

JUDICIAL POWER IN TRANSITIONAL REGIMES: TUNISIA AND EGYPT SINCE THE  
ARAB SPRING

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By

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# JUDICIAL POWER IN TRANSITIONAL REGIMES: TUNISIA AND EGYPT SINCE THE ARAB SPRING

Frederick Harris Setzer, Ph.D.

Cornell University, 2017

The dissertation examines the question of why political authorities assign different powers to courts during political transitions through the cases of Egypt and Tunisia following the 2011 uprisings. In Egypt, the Supreme Council of the Armed Forces allowed the Supreme Constitutional Court (SCC) to continue exercising its power of constitutional review throughout the transition. In Tunisia, the transitional Ben Achour Commission dissolved the Constitutional Council and suspended constitutional review for the duration of the transition. The dissertation argues that the formal powers of courts after 2011 were determined by a two step process that hinges on ideas about the judicial role: first, relations between the courts and the old regime produced a set of ideas about the judicial role; second, these ideas constrained the political authorities that designed the transitional institutions following the 2011 revolutions.

The dissertation considers two alternative explanations. First, the powers of courts may have been determined by the interests of political authorities for or against majority rule. Second, courts may have drawn support from civil society. If courts have allies in civil society, they are more able to claim additional formal powers. The dissertation rejects these explanations based on evidence from interviews with judges, lawyers and political parties, and a study of judicial decisions and transitional documents. Instead, studies of the behavior of the Tunisian Administrative Tribunal, the Egyptian Supreme Constitutional court, and of the incorporation of the shariah into the two countries' legal systems demonstrate the plausibility of the judicial role hypothesis.

The dissertation contributes to a debate about how to conceive of democratic transitions. Against the voluntarist account presented by Philippe Schmitter and Guillermo O'Donnell, the dissertation argues that the institutional legacy of the judiciary provides a real constraint on decision makers during the transition.<sup>1</sup> It also contributes to a debate about what role courts can play in democratization. Scholars of democratization, such as Juan Linz and Alfred Stepan, argue that strong courts aid democratization. Scholars of courts in authoritarianism, such as Nathan Brown, see courts as part of the regime.<sup>2</sup> The dissertation emphasizes the particular characteristics of national legal systems that determine whether courts will act as holdovers from the old regime or as agents of democratization.

## Chapter 1: History and Institutional Choices

The chapter introduces the legal history of Egypt and Tunisia and excludes explanations

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<sup>1</sup> Schmitter and O'Donnell (1978)

<sup>2</sup> Linz and Stepan (1996), Brown (2006)

based on an early divergence of the cases before the reform era of the 1970's. Legal development followed similar trajectories in Tunisia and Egypt. Both countries began legal reforms during the era of pre-colonial state-building. Although Egypt was colonized by Britain and Tunisia by France, both countries retained a civil law system with strong French influences. Both countries were governed by leftist nationalist regimes in the middle of the twentieth century. An important divergence occurred in the reform era. Egyptian president Sadat (1970-1981) established the Supreme Constitutional Court as the centerpiece of his legal reforms and a guarantor of the liberal rights granted by the 1971 Constitution. Tunisia reached the same goal by establishing the Administrative Tribunal. A constitutional court occupied the center of Egypt's legal system. In Tunisia, this role was filled by an administrative court with comparable political influence but no power of constitutional review.

## Chapter 2: Countermajoritarian Interests and Judicial Power

The chapter examines implications of the countermajoritarian hypothesis for the design of the transitional institutions, the stances of political parties on the question of interim constitutional review, and the outcome of elections in both countries. The design of the transitional institutions is not fully countermajoritarian in Egypt or fully majoritarian in Tunisia. Electoral rules in Egypt amplified the vote share of the Muslim Brotherhood's "Freedom and Justice Party". Electoral rules in Tunisia limited the number of seats won by the Islamist party Ennahda. Parties from across the spectrum supported interim constitutional review in Egypt, and opposed it in Tunisia. All of these findings undermine the countermajoritarian hypothesis. They also highlight the constraints on the drafting bodies.

## Chapter 3: Civil Society and Judicial Power

The civil society hypothesis argues that either civil society was weaker in Tunisia, or that it was unable to influence the transitional institutions, or it could not as effectively engage with the courts because of the form of constitutional review exercised by the Tunisian Constitutional Council. Civil society did engage with the courts in Tunisia, but exclusively through administrative review rather than through administrative review and constitutional review as in Egypt. Civil society was able to influence the design of the transitional institutions in Tunisia through representation in the Ben Achour Commission and through popular protest. In Egypt, civil society became increasingly co-opted by political forces over the course of the transition. The finding undermines the civil society hypothesis and sets the stage for the discussion of the Administrative Tribunal in Chapter 4.

## Chapter 4: The Administrative Tribunal and the Judicial Role

The activity of the Tunisian Administrative Tribunal provides an illustration of the impact of ideas about the judicial role. The Administrative Tribunal was willing to rule against the Troika government. It was not willing to decide cases through which it might claim additional powers, including interim constitutional review. The Tribunal declined to decide the question of the Assembly's mandate or to intervene in the summer 2013 crisis, when protesters called for the dissolution of the Assembly. The actions of the Tribunal are explained by ideas

expressed by the judges. Moreover, these ideas reflect the experiences of the Tribunal during the Ben Ali era when the Tribunal maintained its independence by avoiding politicization.

#### Chapter 5: The Incorporation of the Shariah and the Judicial Role in Egypt and Tunisia

The chapter establishes the plausibility of a link between the constitutional status of shariah and the role of courts in transitional politics through a study of judicial politics in these two cases, especially since 2011. The context of the 2011 transitions gave courts in both countries an opportunity to claim greater powers, but the courts responded differently. The SCC's role as an interpreter of Islamic law has increased its legitimacy and allowed it to rule against the government. Tunisia's Personal Status Code reinforced a legal positivist ideology that favored judicial deference to the legislative and executive. Furthermore, the political imperative of protecting the Personal Status Code made secular opposition parties, and even judges, more skeptical of constitutional review. The incorporation of the shariah is an example of the mechanism linking judicial activity before 2011 to ideas about the judicial role to positions on the formal powers of courts after 2011.

#### Chapter 6: Judicial Politics and the Supreme Constitutional Court of Egypt

The chapter traces the process leading from judicial activity to ideas in Egypt. The Supreme Constitutional Court and the ordinary judiciary acted in tandem, even though, like the Tunisian judiciary, the Egyptian judiciary was initially suspicious of constitutional review. The activity of the SCC legitimized constitutional review in the eyes of ordinary judges. Judges on the SCC imported new constitutionalist ideas that modified the strict legal positivism of the Egyptian judiciary. The SCC's rulings benefited the ordinary judiciary. The disputes surrounding the 2005 elections solidified an alliance between the ordinary judiciary and the SCC and legitimized the role of the judiciary as a political arbiter.

#### Chapter 7: Institutional Choices, 2011-2014

The chapter outlines possible alternative designs for the courts and the broader transitional institutions and shows how considerations of the judicial role led to the rejection of these alternatives. The normative component of the judicial role influenced the drafting bodies directly, and the judicial role also acted as a guide for the drafting bodies' expectations about how courts would act during the transition. Extensive judicial powers were never an option in Tunisia because the courts would likely refuse to exercise them. Egyptian courts interpreted the formal powers granted to them by political authorities in a way that was compatible with their previous practices. At each turning point of the transition, considerations of the judicial role trumped considerations of the countermajoritarian impact of greater judicial powers.

#### Conclusion

The dissertation highlights an unusual feature of the judiciary - the durability of ideas about the judicial role - and explains why this feature is especially relevant in transitions. The voluntarist account of transitions proposed by Schmitter and O'Donnell works well for most

actors, such as individuals, political parties, or some state institutions<sup>3</sup>. In contrast, the dissertation shows how the judiciary in both countries was bound by conceptions of its role that were formulated during the previous regime. Features of the judiciary provide a real constraint on the actions of individual judges and on the powers that the drafting bodies could assign to the judiciary.

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<sup>3</sup> Schmitter and O'Donnell (1978)

## BIOGRAPHICAL SKETCH

Harris Setzer received a BA from the University of Chicago in Political Science in 2010. He studied Arabic in Damascus, Syria in 2010-2011. He began his graduate education at the Department of Government at Cornell University in 2011.



For Serena

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## INTRODUCTION

### 1. The Judicial Role in Egypt and Tunisia

On February 5, 2011 at the height of the protests in Cairo, two liberal activists, Hossam Bahgat and Soha Abdelaty, published an op-ed in the *Washington Post* to lay out their vision of a post-Mubarak Egypt<sup>1</sup>,

As Egyptian citizens and human rights defenders, we have been on the streets here, including in Tahrir Square, since Jan. 25 to demand dignity and freedom for all Egyptians. There is nothing we want more than an immediate end to the Mubarak era...But for a real transition to democracy to begin, Mubarak must not resign until he has signed decrees that, under Egypt's constitution, only a president can issue. This is not simply a legal technicality...

This is a remarkable statement for revolutionaries to make in the middle of a revolution. In Egypt, liberal activists clung to a notion of legality that seems to be at odds with the revolution that they had just brought about.

In Tunisia, such an attachment to legal continuity was absent, even among jurists. Habib Koubaa, former Secretary General of the Constitutional Council, argued that “the revolution created a political void....The parties exploited this situation to concentrate power in their own hands [by creating the National Assembly].”<sup>2</sup> Koubaa’s opinions reflect Tunisian judges’ acceptance of an interpretation of the revolution as a period of constitutional hiatus. Koubaa opposes the Assembly on political grounds but accepts the premise that a “political void” existed after January 2011. Koubaa’s stance against legal continuity is especially remarkable because he held an important post in the dissolved Constitutional Council during the Ben Ali era.

These attitudes were accompanied by a sharp contrast between powers granted to the

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<sup>1</sup> Hossam Bahgat and Soha Abdelaty. “What Mubarak must do before he resigns,” *Washington Post*, 5 February 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/04/AR2011020406548.html>

<sup>2</sup> Interview with Habib Koubaa

high courts inherited from the old regime in each country. In Egypt, the Supreme Council of the Armed Forces confirmed the SCC's power of constitutional review in 2011, and granted it additional powers in 2012. The SCC exercised these powers vigorously by dissolving the House of Representatives and the Constituent Assembly<sup>3</sup>. In Tunisia, the Ben Achour Commission suspended the Constitutional Council for the duration of the transition. The Tunisian government did not create an alternative means of constitutional review until the adoption of the 2014 Constitution<sup>4</sup>. The main question addressed by the thesis is why the transitional regimes in Egypt and Tunisia gave such different powers to their constitutional courts.

## The Judicial Role

The dissertation answers this question by proposing a three step process that hinges on ideas about the judicial role: first, different judicial institutions produced different patterns of judicial behavior; second, judicial behavior produced ideas about the judicial role; third, these ideas influenced the drafting bodies' design of the formal powers of courts after 2011. Egypt and Tunisia share a set of legal influences, but their judicial systems diverged after the 1970's, when Egypt created the Supreme Constitutional Court and Tunisian created the Administrative Tribunal. This divergence created a different pattern of judicial activity in each country. In Tunisia, the Administrative Tribunal exercised administrative review of legislation without a

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<sup>3</sup> David Kirkpatrick, "Blow to Transition as Court Dissolves Parliament," *New York Times*, 14 June, 2012. <http://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html?module=ArrowsNav&contentCollection=Middle%20East&action=keypress&region=FixedLeft&pgtype=article>

<sup>4</sup> "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011.

<http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

"Decree--law n° 2011-14 dated 23 March 2011, relating to the provisional organization of the public authorities," *World Intellectual Property Organization*, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=245403](http://www.wipo.int/wipolex/en/text.jsp?file_id=245403)

"Tunisia's Constitution of 2014," *Constitute Project*. 14 January 2014.

[https://www.constituteproject.org/constitution/Tunisia\\_2014.pdf](https://www.constituteproject.org/constitution/Tunisia_2014.pdf)

power of constitutional review. This activity favored an ideology of legal positivism among Tunisian judges, political parties and civil society. In Egypt, the Supreme Constitutional Court exercised constitutional review. This activity favored an ideology of new constitutionalism among Egyptian judges, political parties and civil society. After the 2011 revolutions, the drafting bodies had to consider these ideas when deciding what powers to grant the courts during the transition. Tunisian legal positivism had implications for how actors interpreted the transitional situation. The constitution could be suspended. It also implied that courts would remain outside of the political process of drafting a new constitution. Egyptian new constitutionalism stressed the status of the constitution as a higher law that could not be suspended. It also implied a role for the judiciary as a political arbiter. Hossam Bahgat and Soha Abdelaty's acceptance of legal continuity and Habib Koubaa's acceptance of a "political void" are examples of the force of such ideas.

The conclusion in favor of the judicial role hypothesis has implications for the role that courts might play in democratization. Like the categorization of cases as military, single party or personalist regimes, a categorization based on ideas about the judicial role can give some indication of how the transition process is likely to unfold in a given country, even if it does not determine the success or failure of democratization<sup>5</sup>. The dissertation argues that ideas about the judicial role are not reducible to other factors. This argument counters two alternative ways of characterizing the relationship between the judiciary and broader transitional politics. The first alternative is that the judicial powers can be explained only by political interests of power holders. Contrary to this alternative argument, ideas about the judicial role are not produced by

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<sup>5</sup> Geddes (2003), Bratton and Van de Walle (1994)

transitional politics but instead are relatively fixed<sup>6</sup>. The second alternative is that the judiciary is simply the product of political development. For Linz and Stepan, countries that have a well-developed “legal society” have a better chance at democratization than those that do not<sup>7</sup>. However, Linz and Stepan cannot account for differences between national legal systems other than their extent of legal development. The dissertation shows how one such difference, in conceptions of the judicial role, produced different results in Egypt and Tunisia.

In the first section of the introduction, I look at different theoretical perspectives on judicial politics and transitions. I narrow down the outcome of interest to the formal powers assigned to courts in Tunisia and Egypt after 2011. In the second section, I present three explanations for this outcome, including the judicial role hypothesis described above. In the third section, I describe the methodology that I use to test these explanations.

## **2. Judicial Power in Transitions: Three Perspectives**

Three differences between the Egyptian and Tunisian cases suggest three possible explanations for the divergent outcomes.

First, the transitional documents were drafted by two bodies, the Supreme Council of the Armed Forces (SCAF) in Egypt and the Ben Achour Commission in Tunisia, that had very different political interests. The interests of the SCAF are countermajoritarian and the interests of the Ben Achour Commission are majoritarian. Courts are countermajoritarian institutions because they are rarely elected and enforce a set of largely stable laws. Constitutional review is particularly countermajoritarian because it can block actions by a majority in the legislature. As

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<sup>6</sup> Ginsburg (2003) argues that the composition of drafting bodies can explain the powers granted to constitutional courts in new democracies. The past history of the judiciary and judicial ideology are largely irrelevant.

<sup>7</sup> Linz and Stepan (1996), Schmitter, O’Donnell and Whitehead (1986)



a result, the SCAF would favor strong courts and the Ben Achour Commission would favor weak courts. This explanation assumes that political authorities can assign powers to courts at will, that the interests of the drafting bodies can be described as majoritarian or countermajoritarian and that these interests motivated the drafting bodies design of the courts.

Second, the Egyptian and Tunisian constitutional courts exercised different forms of constitutional review. The Egyptian SCC exercised a posteriori concrete review, while the Tunisian Constitutional Council exercised a priori abstract review. Both forms of review can act as a countermajoritarian veto, but they have very different implications for relations between the courts and litigants. Ordinary litigants could not bring cases to the Tunisian Constitutional Council. On the other hand, the activism of the SCC before 2011 is largely the result of cases brought by ordinary litigants. Moreover, litigants formed what Moustafa calls a ‘judicial support network’ of civil society organizations<sup>8</sup>.

Third, the Egyptian and Tunisian constitutional courts had different levels of activity before 2011. The Egyptian SCC was both more active, in terms of number of cases decided, and more assertive, in terms of the number of decisions issued against the government, than the Tunisian Constitutional Council. This pattern might imply that law and courts are simply less important in Tunisia than in Egypt. However, the activity of the Tunisian Administrative Tribunal both before and after 2011 argues against such a sweeping statement<sup>9</sup>. The activity of the SCC and the inactivity of the Constitutional Council before 2011 might affect the outcome after 2011 by creating expectations of proper judicial behavior. These expectations combine with legal theory to produce a conception of the judicial role that guides the drafting bodies design of the courts’ formal powers.

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<sup>8</sup> Moustafa (2007), Epp (1998)

<sup>9</sup> Tribunal Administratif: Le nombre des affaires a evolue a 2694 contre 1965 en 2010”

<http://www.tunisienumerique.com/tribunal-administratif-le-nombre-des-affaires-a-presque-double-en-2011/57505>

Each of these explanations has different implications for the role of courts in democratic transitions. The countermajoritarian function can be a barrier to democratization or it can aid democratization by allaying the fears of old regime elite<sup>10</sup>. This function is necessary for courts to enforce elite pacts, as the transitions literature suggests. The second explanation is the most optimistic about the role of courts in democratization. It argues that courts can only be effective if they have support from civil society, so courts are natural allies of both liberalization and democratization. If the judicial role explanation is correct, courts either help or hinder democratization depending on how they conceive of their role. In either case, actors must take into consideration ideas about the judicial role when designing the transitional institutions.

Each explanation focuses on a specific actor: the drafting bodies (including the political forces that these bodies represent), civil society or the courts themselves. At the broadest level, any actor could fall into at least one of these categories, and any explanation could fall into these three categories. The dissertation narrows down these explanations, and excludes some variations on these explanations in the process. In section 6, I derive a hypothesis from each of these three perspectives.

### **3. Contributions**

Beyond answering the question of why Tunisian and Egyptian courts had different formal powers, the dissertation looks at two broader issues. First, the Tunisian and Egyptian cases suggest different roles that courts can play in democratization. Second, the Tunisian and Egyptian cases are part of the larger context of constitutional change after the Arab Spring.

Towards a Theory of Judicial Politics and Democratization

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<sup>10</sup> Ginsburg (2003)

The rule of law upheld by an independent judiciary is an essential part of any consolidated democracy. However, the legal institutions that support a consolidated democracy may not be the same as the legal institutions that can democratize an authoritarian regime or consolidate democracy during a period of transition.

Scholars note the connection between the expansion of judicial review and democracy<sup>11</sup>. However, it is not clear whether strong courts cause democratization. Ginsburg argues that governments empower courts to deal with the potential downsides of democracy<sup>12</sup>. In other words, strong courts are a response to democratization. Linz and Stepan suggest that courts aid democratization by brokering and enforcing elite pacts. The South African Constitutional Court provides an example of this process. It reviewed the 1994 draft constitution for compatibility with a set of principle agreed upon by the political parties earlier in the transition<sup>13</sup>.

Strong courts might actually hinder democratic revolution. The global expansion of judicial power has extended to authoritarian regimes, without democratizing these regimes<sup>14</sup>. The suspension of the old legal system is often necessary to deal with crimes committed under the old regime. Transitional justice retroactively punishes acts that were not illegal under the old regime, and as a result poses a dilemma for the rule of law. Transitional justice often occurs through exceptional institutions, which poses a threat to the established court system<sup>15</sup>.

The outcomes of Tunisian and Egyptian cases - democratization and low judicial power in Tunisia, authoritarianism and high judicial power in Egypt - are an exception any theory

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<sup>11</sup> Ackerman (1994), Shapiro (1992), Tate and Vallinder (1995)

<sup>12</sup> Ginsburg (2003)

<sup>13</sup> Linz and Stepan (1996), Gloppen (1997)

<sup>14</sup> The articles collected in Ginsburg and Moustafa (2008) and Ginsburg and Simpser (2012) outline the many ways that courts can buttress authoritarian regimes.

<sup>15</sup> Teitel (2000), Radbruch (2006)

connecting democracy to strong courts. The processes that led to these outcomes provide further opportunities to study the roles that courts might play in democratization. Depending on which hypothesis is correct, it is possible that courts could broker elite pacts or that they could alleviate the elite's fears of democratization. It is also possible that the existing court system could stand in the way of transitional justice or otherwise act to cement the old regime.

### Judicial Power in the Arab Spring

Apart from Tunisia, the prospects for democratization or even liberalization after the Arab Spring are bleak. Yet the prospects for the judicialization of politics, defined by the expanding formal powers and activity of constitutional courts, are looking brighter<sup>16</sup>. The Arab Spring launched a wave of constitutional reform in countries, like Tunisia and Egypt, that experienced uprisings and regime change, as well as those that did not, like Morocco and Jordan. In all of these countries, the new constitutions grant greater powers to the constitutional court<sup>17</sup>. In Tunisia, Morocco and Jordan, it is too early to know whether the courts in these countries will exercise these new powers. However, in Egypt, the Supreme Constitutional Court has used its powers in a series of crucially important judgements on the legitimacy of the parliament and the Constitutional Assembly. Unfortunately this unprecedented exercise of judicial power occurred in the midst of the breakdown of Egyptian democracy. Judging from the constitutions issued by

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<sup>16</sup> Shapiro (1992)

<sup>17</sup> "Constitution of the Arab Republic of Egypt, 2014," *State Information Service*. January 18, 2014.

<http://www.sis.gov.eg/Newvvr/Dustor-en001.pdf>

"Tunisia's Constitution of 2014," *Constitute Project*. 14 January 2014.

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<http://cco.gov.jo/en-us/documentsofthecourt/thelawoftheconstitutionalcourt.aspx>

"Morocco: Draft Text of the Constitution" tr. Jefri Ruchti in Ruchti (2011)

the kings of Morocco and Jordan and the Egyptian military, the rulers of these countries seem set to judicialize their regimes without democratizing them. On the other hand, the suspension of constitutional review during the Tunisian transition was an attempt at democratization in the absence of judicial restraints.

These outcomes are surprising because the assumed connection between democracy and courts, or more generally the rule of law, is cut. These cases raise the question of what role constitutional courts and judicial might play in cementing authoritarian regimes. An answer to the main question posed by the thesis - why Tunisian and Egyptian constitutional courts had different formal powers during the transition - would help answer the question of why the Arab Spring has seen an expansion of judicial power across these cases, even as authoritarian regimes have entrenched themselves in Morocco, Jordan and Egypt.

#### **4. The Tunisian and Egyptian Transitions**

From the beginning of the protests in Tunisia and Egypt, the protesters demanded the adoption of a new constitution. As a result, law was at the center of the revolutions. The cases followed parallel paths from 2011 to 2014. In the first stage, in the spring of 2011, the drafting bodies issued interim constitutional documents outlining the powers of different state institutions, including courts. In the second stage from 2011 to 2012, these institutions redefined their powers. In the third stage in 2013, a political crisis forced the reorganization of the transitional institutions of both countries. In the fourth stage in 2014, both countries adopted new constitutions.

The issue of courts was first addressed by the drafting bodies - the SCAF and the Ben Achour Commission - which were charged with designing the transitional institutions in the spring of 2011. After the fall of Mubarak, the military originally hoped to organize quick

elections that would bring Omar Suleiman, Mubarak's vice president, to power. The protest movement rejected this plan, so the military convened the SCAF to govern the country until elections could be held. The SCAF issued a Constitutional Proclamation calling for the election of a parliament and president and the drafting of a new constitution by a Constituent Assembly. The Proclamation confirmed the powers of the SCC and formed the basis of the SCC's decisions during the transition<sup>18</sup>.

Immediately after the fall of Ben Ali, Tunisia was governed by a transitional government headed by figures from the old regime. The transitional government convened the Ben Achour Commission in response to the Kasbah protest movement. The Commission brought together opposition parties and civil society figures with the sole purpose of designing the transitional institutions. The Commission issued the transitional Decree on March 23, 2011. The Decree called for the election of a National Assembly and dissolved most other state institutions, including the presidency, the parliament and the Constitutional Council<sup>19</sup>.

The framework created by the SCAF and the Ben Achour Commission still allowed courts some opportunities to redefine their own formal powers. The SCC issued decisions dissolving the House of Representatives and the Constituent Assembly on the grounds that their election was illegal. Following the election of Muhammad Mursi in June 2012, the SCAF issued amendments to the Constitutional Proclamation, which gave the SCC control over its own appointments and gave it the power to review the draft constitution for conformity to "any

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<sup>18</sup> "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011. <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>19</sup> "Decree--law n° 2011-14 dated 23 March 2011, relating to the provisional organization of the public authorities," *World Intellectual Property Organization*, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=245403](http://www.wipo.int/wipolex/en/text.jsp?file_id=245403)

principle agreed upon in all of Egypt's past constitutions."<sup>20</sup> Mursi responded by issuing his own decrees annulling the SCAF's amendments and insulating the Constituent Assembly and the president from constitutional review until the adoption of a final constitution. The SCC resisted these measures until a compromise allowed the adoption of the new constitution in December 2012<sup>21</sup>.

In Tunisia, the first phase of the transition, from the election of the Assembly in October 2011 through the spring of 2013, saw the Administrative Tribunal rise to prominence. The Tribunal is the highest public law court in Tunisia charged with reviewing the legality of government acts. The Tribunal ruled against the Troika government on a large number of cases<sup>22</sup>. However, this activity did not lead the Tribunal to claim a formal power of constitutional review.

Both Tunisia and Egypt went through a crisis in the summer of 2013. In spring 2013, the Mursi government considered legislation to reform the judiciary, which the opposition believed would threaten judicial independence. The Tamarod protest movement organized protests to call for Mursi's resignation, culminating in the June 30, 2013 protests<sup>23</sup>. The military removed Mursi from office on July 3, and General Abd al-Fattah al-Sisi seized control of the government. The

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<sup>20</sup> "English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012.

<http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

<sup>21</sup> "English text of President Morsi's new Egypt Constitutional Declaration." *Ahram Online*, 12 August 2012.

<http://english.ahram.org.eg/NewsContent/1/140/50248/Egypt/First--days/English-text-of-President-Morsis-new-Egypt-Constit.aspx>

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<http://english.ahram.org.eg/NewsContent/1/64/58947/Egypt/Politics-/English-text-of-Morsis-Constitutional-Declaration-.aspx>

<sup>22</sup> "Tribunal Administratif: Le nombre des affaires a evolue a 2694 contre 1965 en 2010"

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<http://www.lapresse.tn/18042015/80788/des-decisions-inconstitutionnelles.html> for further information about the number of cases decided by the Tribunal.

<sup>23</sup> Sabry, Bassem. "Eight Questions on 'Purging' Egypt's Judiciary," *Al-Monitor* April 23, 2013. <http://www.al-monitor.com/pulse/originals/2013/04/eight-questions-purging-egyptian-judiciary.html#>

SCC endorsed these moves, and Adly Mansour, the president of the SCC, served as interim president until Sisi was formally elected in June 2014<sup>24</sup>.

The Arrahil protest movement called for the resignation of the Troika government, the dissolution of the Assembly and the drafting of a new constitution by a council of experts. The National Dialogue Quartet - the Union Generale des Travailleurs Tunisiens (UGTT), the Union Generale de la Commerce et de l'Artisanat (UTICA), the Organisation Nationale des Avocats Tunisiens (ONAT), and the Ligue Tunisienne des Droits de l'Homme (LTDH) - formed to mediate these disputes. The parties agreed on a compromise. The Troika resigned and was replaced by the technocratic government of Mehdi Jomaa. The Assembly remained in place and drafted a new constitution.

By 2014, both countries adopted new constitutions, bringing the transitions to a close. In Egypt, Sisi convened a council of experts to draft a new constitution, which was adopted in 2014. The new constitution confirmed the extensive powers of the SCC<sup>25</sup>. In Tunisia, the Assembly adopted the new constitution on January 14, 2014. The 2014 Constitution called for the creation of a new constitutional court exercising a posteriori concrete review. However, the creation of this institution was delayed by disputes over the Supreme Council of the Judiciary. In the interim, the constitution created a special non judicial body - the Instance Provisoire pour le Controle Constitutionnel des Projets de Loi (IPCCPL) - to exercise a priori review of legislation<sup>26</sup>.

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<sup>24</sup> "Profile: Interim Egyptian President Adly Mansour," *BBC*, 4 July, 2013, <http://www.bbc.com/news/world-middle-east-23176293>

<sup>25</sup> Muhammad Mansour, "Members of Constitutional Committee of 50 Announced," *Egypt Independent*, 1 September 2013. <http://www.egyptindependent.com/news/members-constitutional-committee-50-announced>

<sup>26</sup> "Tunisia's Constitution of 2014," *Constitute Project*. 14 January 2014. [https://www.constituteproject.org/constitution/Tunisia\\_2014.pdf](https://www.constituteproject.org/constitution/Tunisia_2014.pdf)



## 5. Theories of Judicial Power in Transitions

The transitions literature suggests that the role of courts in democratization is a unique topic distinct from the study of courts in consolidated democracies. However, the exact role that courts might play in transitions is under theorized in this literature, and the conclusions of this literature may not apply to the Tunisian and Egyptian cases. The judicial politics literature provides several models of judicial behavior, judicial power and relations between courts and political authorities that can be imported to the study of transitions.

### The Judiciary in Transitions

The transitions literature recognizes that different regime types have different odds of successful democratization. These regime types often imply a status for courts. For example, Linz introduces a distinction between totalitarian and post-totalitarian regimes<sup>27</sup>. Totalitarian regimes are defined by the control of the regime over all institutions and all areas of life. Independent courts are impossible in such a situation. Totalitarian regimes are also less likely to democratize successfully. Post-totalitarian regimes are defined by the presence of some institutions that are beyond the control of the regime, perhaps including courts. Neo-patrimonial regimes are defined by an absence of strong institutions, including courts. They are also least likely to democratize. Bratton and Van de Walle contrast these regimes with the corporatist regimes of Latin America and Southern Europe<sup>28</sup>. In these examples, the presence of strong courts is one aspect of the regime types that are most likely to democratize, but there is no reason to believe that courts cause these outcomes. Courts form part of the institutional background of

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<sup>27</sup> Linz (2000)

<sup>28</sup> Bratton and Van de Walle (1994)

some regimes, but their role in the actual transitional period is minimal. On the other hand, O'Donnell emphasizes the rule of law as an aspect of the consolidation of democracy or of the quality of democracy. Ginsburg interprets constitutional courts as a means of guaranteeing minority interests during a transition to democracy. In both of these perspectives, courts become relevant only after the transition to electoral democracy<sup>29</sup>.

Studies of the process of democratization suggest some role for courts in successful democratization. Linz and Stepan argue that democratization depends on the negotiation and maintenance of an elite pact. Courts can broker and enforce elite pacts, although many other actors could do so too<sup>30</sup>. Another means that courts might influence transitional politics is through the process of constitutions drafting, which accompanies many but not all transitions. The authors of national constitutions claim to act in the name of the people, but in practice courts are needed to interpret and elaborate the constitution after it is adopted. In some cases, courts have themselves been involved in drafting constitutions or in supervising constitutional amendments during transitions. The South African Constitutional Court reviewed the 1994 draft constitution. The Conseil d'Etat, the highest public law court in France, was largely responsible for drafting the 1958 constitution<sup>31</sup>.

This pathway raises two questions. Does the process of constitution drafting matter for democratization? Do courts matter for the process of constitution drafting? To answer these questions, it is necessary to develop a theory of the status of courts in the regime and a theory of judicial power. The next two sections deal with these issues in the context of the Tunisian and Egyptian cases.

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<sup>29</sup> O'Donnell (2010), Ginsburg (2003)

<sup>30</sup> Stepan in O'Donnell, Schmitter and Whitehead (1986)

<sup>31</sup> Duverger (1958), Gloppen (1997)

## Constitutional Authoritarianism

Moustafa argues that the Egyptian revolution was “defined by a struggle over constitution and the rule of law....this intense focus on law and legal institutions is a legacy of the prominent role that law plays in maintaining authoritarian rule in Mubarak’s Egypt.”<sup>32</sup> Writing in 2011, Moustafa was cautiously optimistic that this legacy could result in democratization. Events since then confirm Moustafa’s claim that law, courts and the constitution would play a central role in Egypt’s transition, but they also show the challenges of this legacy. I develop a category of constitutional authoritarian regimes that generalizes the characteristics identified by Moustafa in Egypt to a broader range of cases.

Both Egypt and Tunisia are examples of constitutional authoritarian regimes. The category has two defining characteristics: the regime must write the constitution, and a constitutional court must have the power to interpret the constitution. I contrast constitutional authoritarian regimes with two other ideal types: exceptional regimes and non-constitutional regimes. Constitutional authoritarian regimes challenge the assumptions of the transitions about how courts are likely to behave during an era of democratization.

Constitutional authoritarian regimes differ from non-constitutional regimes in that they have written constitutions and constitutional court with the power to interpret the constitution. The constitutional court is not necessarily important or powerful in such regimes. In such regimes, inactive constitutional courts like the Tunisian Constitutional Council are probably more common than active constitutional courts like the SCC. The categorization is more about ideology than institutions. Despite the global consensus in favor of constitutional review, non-constitutional regimes have declined to create even a facade constitutional court. Constitutional

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<sup>32</sup> Moustafa (2011)

authoritarian regimes are open to international models of constitutional review. The act of drafting a constitution and creating a constitutional court is best understood as an attempt to institutionalize the regime for the long term, not a step towards democratization.

Constitutional authoritarian regimes differ from exceptional regimes in that the regime has written the constitution and guided the development of the legal system. The categorization is also more about constitutional history than the text of the constitution. Certain regions - those with little history of democratic rule and relatively recent independence from colonial rule - are more likely to contain regimes that meet these conditions<sup>33</sup>.

The characteristics of constitutional authoritarian regimes pose several problems for the transitions paradigm relating to sequencing, the mode of constitution drafting, and the role of courts in transitional politics. The transitions paradigm envisions a sequence of opening or liberalization, elite pact and constitution drafting<sup>34</sup>. Tunisia and Egypt had been liberalizing for decades without democratizing. The popular uprisings forced the drafting of a new constitution before an elite pact could be negotiated. The transitions literature deemphasizes constitution drafting as a means of democratization. The constitutional framework of these regime may require more reworking than the transitions paradigm envisions. Of course, many of the classic cases of the transitions literature did write new constitutions. What is necessary in constitutional authoritarian regimes is not just a new constitutional text, but an era of extra-constitutional rule, in which the state institutions can be rearranged. The Assembly system or revolutionary rupture fulfills this requirement, but the Convention system or legal continuity does not. In the

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<sup>33</sup> Whether a country has a previous era of democratic constitutional rule can be a difficult question to answer. Egypt is the paradigmatic constitutional authoritarian regime, but even in that case there are some deviations from the type. Egypt did have a brief era of liberal constitution drafting that resulted in the 1921 constitution, although Egypt was never a consolidated democracy. Nineteen years of non-constitutional rule under Nasser marks a break in Egypt's constitutional development. Turkey had periods of democratic rule, but only in the context of the military-drafted constitutions of 1960 and 1982.

<sup>34</sup> Schmitter, O'Donnell and Whitehead (1986)

transitions literature, courts form part of the class of institutions that can broker elite pacts and guarantee their enforcement. In constitutional authoritarian regimes, courts are part of the regime and their willingness to broker such agreements cannot be assumed.

In constitutional authoritarian regimes, the source of judicial power is a key question for democratization. If courts act as agents of the regime, they would oppose democratization. However, the liberalized aspect of such regimes and the possibility of popular contestation through legal means give courts other avenues to act in support of democratization. A closer look at the sources of judicial power is necessary to determine how courts are likely to act in democratizing constitutional authoritarian regime. The next section looks at theories of judicial power that may help answer this question.

## Judicial Power

Past decades have seen a renewed interest in the study of judicial power, founded on the belief that the political role of law and courts has expanded into new policy areas in established democracies and into authoritarian regimes that were previously hostile to law. Tate and Vallinder's *The Global Expansion of Judicial Power* sums up this trend. Scholars have suggested several explanations for this process of judicialization. These theories may focus on relations among state actors, the role of courts in policing bureaucracies, the expansion of civil society legal activism and the legal profession, ideas about the judicial role. I draw on these theories in formulating the hypotheses addressed by the dissertation.

One prominent school of thought attributes the existence of strong judicial institutions to

the fragmentation of political authority<sup>35</sup>. The more divided power is among different political factions or branches of government, the smaller the risk of retaliation by political authorities against judges and the greater the scope for judicial assertiveness. This theory can apply to liberalized authoritarian regimes, transitional regimes and democracies. Ginsburg argues that during the founding of new democracies in Asia, parties that held only a tenuous majority created strong constitutional courts as a way to entrench their preferred policies. Helmke applies this approach to Argentina to explain the assertiveness of the country's courts during times of political instability as the country transitioned from authoritarian rule.

Peerenboom, Landry, and Rosberg compare courts to other means of control available to authoritarian regimes<sup>36</sup>. In the cases of China and Egypt, courts have gained importance as other means of control, such as party organizations or the Chinese system of complaints and petitions have declined. One of the prerequisites of a functioning court is independence from the parties whose disputes it adjudicates. In disputes between private citizens, authoritarian regimes can guarantee this sort of independence as well as democracies. Even in disputes between a private citizen and the state, authoritarian regimes may still provide a fair trial in situations where the actions of a state agent are at odds with the will of the leadership of the regime as expressed by the law. Typically, authoritarian regimes maintain broad emergency powers or, as in the case of Egypt, a parallel system of military courts to limit the scope of judicial independence.

In *The Rights Revolution*, Charles Epp argues that the expansion of the judicial power into new policy areas is closely tied to the rise of rights litigation. Rights litigation depends on a judicial support structure of civil society groups and lawyers who use courts to achieve their goals. The rights revolution required an independent judiciary with the power of constitutional

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<sup>35</sup> Helmke (2005), Ginsburg (2003), Helmke and Rosenbluth (2009), Magaloni (2003)

<sup>36</sup> Peerenboom (2002), Landry in Ginsburg and Moustafa (2008), Rosberg (1995).

review as a prerequisite, but only the growth of the judicial support structure made it possible for individuals to claim their rights in court. The growth of a judicial support structure is a process that takes a long time to unfold because it depends on the institutionalization of civil society groups and the rise of repeat player litigants. Epp's concern is with the expansion of judicial power into new issue areas, such as police procedure, women's rights or workplace safety, not the high politics of the Supreme Court and the President. In the United States, the Supreme Court has always been the final arbiter of constitutional disputes among the branches of government, but it is only after the rights revolution that its power has extended to a wide range of policy areas<sup>37</sup>.

Works on the rule of law in the Middle East, especially Egypt, have emphasized the growth of a professional judiciary as the prerequisite for judicial power. Ziadeh argues that Western legal training and the development of the legal profession as the basis for rule of law in Egypt. The traditionalism of the Islamic shariah and the lack of professional organization for the ulema preventing the rule of law from taking hold in Egypt before the introduction of Western models. The autonomy of professional organizations for judges and lawyers were threatened by Nasser's party state, as was Egypt's orientation towards Western culture. Reid makes a similar argument about other Arab countries. The liberal age of the Arab World in the late nineteenth and early twentieth centuries was a good environment for the development of the legal profession and the judiciary. This development was cut short by the rise of Arab nationalism in the middle of the twentieth century. Nathan Brown's *The Rule of Law in the Arab World* draws on this tradition and updates it to take into account Egypt's liberalization since 1970<sup>38</sup>. For Brown, the Egyptian judiciary owes its existence to the ambitions of the country's

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<sup>37</sup> Epp (1998)

<sup>38</sup> Ziadeh (1968), Reid (1981), Brown (2006)

rulers towards centralization and modernization, but the judiciary has become genuinely independent and can impose at least modest restraints on the regime.

A comparison between American constitutional review and the thought of Hans Kelsen, architect of Europe's first constitutional court, shows how different theories of the judicial role can result in different powers for constitutional courts. Kelsen was concerned with limiting judicial power as they were with subordinating the executive and legislative branches to constitutional review. As Kelsen argues, the design of the Austrian constitutional court must take into consideration the hierarchical nature of the judiciary in civil law countries<sup>39</sup>. A system that, as in the United States, gave the power of constitutional review to all courts, included fundamental rights as a grounds for constitutional review and included the constitutional court as part of the judicial branch would give judges too much power, while at the same time politicizing the judiciary. Kelsen made sure that the Austrian constitutional court was insulated from the ordinary judiciary. These measures were intended to ensure that the Court acted as a neutral mediator among other state institutions, not as a representative of an independent judicial power.

In "Origins of Positive Judicial Independence" and *Judges beyond Politics in Democracy and Dictatorship*, Hilbink argues that ideas about the judicial role as well as the internal organization of the judiciary can account for variation in judicial activism across cases<sup>40</sup>. In the Chilean case, the centralization of power in the hands of senior judges, who controlled decisions regarding the promotion of junior judges, made the Chilean judiciary independent of other branches of government. However, this independence did not translate into judicial activism either during or after the Pinochet period because of the conservative views of senior judges and a judicial ideology that stressed a strict separation of judging from politics. In contrast, the

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<sup>39</sup> Kelsen (1942), Duverger (1958), Stolleis (2004), Sweet (1992)

<sup>40</sup> Hilbink (2007), Hilbink (2012)



diffusion of ideas drawn from the new constitutionalism to the Spanish judiciary made them more likely to challenge the Franco regime.

#### Outcomes: Power and Formal Powers

The description above shows that, in addition to disagreeing about the origins of judicial power, authors can also conceive of the outcome of judicial empowerment in quite different terms. Some authors define it as the formal powers enumerated in constitutions, as the willingness to challenge political authorities, or as the extension of judicial decision making to new policy areas. Of these conceptions, formal powers is the most useful for the Egyptian and Tunisian cases and for the study of the questions raised above.

Dahl's definition of power as the ability of one actor to compel another is difficult to apply to courts<sup>41</sup>. The US Supreme Court claims to have this sort of judicial power; it is the head of an autonomous branch of government with the power to check the actions of the other branches. The subordination of all branches of government to the constitution, as interpreted by the Supreme Court, is at the center of American constitutionalism and the rule of law. The power of Supreme Court to compel other actors should manifest itself most clearly in periods of constitutional crisis such as Watergate, when the Supreme Court asserted its power against the president's claim of executive prerogative in *United States v. Nixon*. Yet this example also shows the weaknesses of this conception of judicial power. Watergate was a highly exceptional situation which may reveal little about the operation of judicial power in other situations. Moreover, the Supreme Court clearly had the backing of Congress, public opinion, and a host of other actors in its confrontation with the president. Empirical studies of constitutional courts

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<sup>41</sup> Dahl (1957)

often find that they challenge power holders only when they have the backing of powerful opposition parties or the support of public opinion<sup>42</sup>.

Given these problems, it makes sense to focus on the formal powers of courts rather than on their power to compel other actors. Formal powers are enumerated in constitutional documents and are easy to observe. The question to be answered by the hypotheses is not why the courts act or not, but why other actors assigned such different formal powers to the constitutional courts in Tunisia and Egypt. The question of constitutional review has come up more than once in each of the countries, although the initial decision to either retain or abolish the constitutional court in 2011 certainly shaped later decisions. In Tunisia, the Ben Achour Commission made the first decision to dissolve the Constitutional Council and establish the Assembly system. Once the Assembly was in session, it could have recreated the Constitutional Council through an organic law. It could also have granted a power of constitutional review to the Administrative Tribunal. Since the adoption of the 2014 constitution, the Assembly has granted a limited power of constitutional review to the IPCCPL. At each of these junctures, political authorities limited the formal powers of Tunisian courts. In Egypt, the SCAF confirmed the powers of the SCC in the Constitutional Proclamation of 2011. It added to these powers through the June 2012 amendments to the Proclamation. The 2012 constitution drafted by the Mursi government confirmed the powers of the SCC. At each of these junctures, political authorities either maintained or increased the formal powers of the SCC.

Each of the hypotheses highlights one important difference between Egypt and Tunisia that might lead the authors of the transitional constitutional documents to grant different formal powers to the constitutional court.

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<sup>42</sup> Vanberg (2005), Helmke (2005), Ramseyer and Rasmusen (2003)

## 6. Hypotheses

### Hypothesis 1: Majoritarian and Counter-majoritarian Interests

The constitutional decree, which governed the Egyptian transition from February 2011 until the adoption of a new constitution in November 2012 was issued by an actor, the military, which feared majority rule. According to this hypothesis, the SCAF wanted to give the SCC extensive powers so that it could check the actions of the elected parliament and president.

The failure of opponents of majority rule to institute similar measures in Tunisia can be attributed to the strength of Tunisian political parties during the transition and to the weakness of the Tunisian military and other institutions of the old regime. The coalition of political parties and civil society groups represented by the Ben Achour Commission, favored the establishment of a National Assembly with both the power to legislate and to draft a constitution. Supporters of the old regime remain a potent force in Tunisia, but they are led by political parties grouped in the Nidaa Tounes coalition, not by the military. Like Egypt, the pre-2011 Tunisian regime was dominated by a ‘repressive apparatus,’ the collection of military, police, secret police, and intelligence agencies charged with regime security. However, Tunisia’s repressive apparatus differed greatly from Egypt’s military<sup>43</sup>. The secret police lacked the popular legitimacy of the Egyptian or Tunisian military, and, as a secret organization, it lacked the corporate identity that allowed the military to intervene in politics as an institution.

### Hypothesis 2: Civil Society and Judicial Support Networks

The constitutional courts of Tunisia and Egypt were based on different models. The SCC resembles the constitutional courts of Germany and Austria, which have several defining

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<sup>43</sup> Bellin (2012)

features: the court can both hear appeals of concrete cases and answer petitions brought by the president or other officials concerning the constitutionality of legislation. The Tunisian Constitutional Council is modelled after the French Constitutional Council. In the French model, the Council exercises only abstract review of legislation. It can review legislation only at the request of government officials, not through appeal of cases from lower courts, and only before the law has been promulgated.

As a result of these institutional differences, the SCC is able to interact with civil society in a way that the Tunisian Constitutional Council could not. During the Mubarak period, the SCC was at the center of what Moustafa calls a ‘judicial support network’ of NGO’s, opposition parties and reformist lawyers who saw constitutional litigation as a means of challenging the regime<sup>44</sup>.

The support that the SCC enjoys from civil society may be crucial for its continued influence during the transition. The decision of the SCAF to include the SCC in the constitutional decree is a concession to a broad group of civil society actors that support constitutional review. Such a concession would gain at least some support for the SCAF and provide a forum, the courts, where civil society could air its grievances with relatively little danger to the core interests of the military.

Tunisia had a strong civil society and a constitutional court during the Ben Ali period. However, its constitutional court was limited to abstract review of legislation, it lacked strong connections with civil society that would produce judicial power. In Tunisia, legal activism had to focus on other avenues, including the Administrative Tribunal, the highest court dealing with disputes between citizens and the state in Tunisia. Administrative courts are intended to check

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<sup>44</sup> Moustafa (2007) draws on Charles Epp’s (1998) concept of the judicial support structure. Epp argues that, far from serving as a check on democratic rule, courts depend on popular mobilization for their power.

abuses of state power, but they do not have the power to overturn laws. As a result, the impact of even a powerful high administrative court is more limited than that of a powerful constitutional court.

### Hypothesis 3: The Judicial Role

The SCC decided more cases than the Tunisian Constitutional Council and it ruled against the government far more frequently. The judicial role hypothesis argues that the formal powers of the courts after 2011 are the result of normative ideas about the judicial role, but these ideas in turn are the result of judicial activity in the decades before 2011. The hypothesis posits a three step process from judicial practices before 2011 to ideas about the judicial role to formal powers after 2011. A purely ideational argument would look at judicial ideology or popular opinion about the judicial role, but not judicial practices.

This hypothesis could be falsified by the total absence of one of the steps, or by a clear contradiction between ideas about the judicial role and the formal powers granted to courts. The absence of such evidence does not exclude other explanations. Each of the links in this three step process produces observable implications for the impact of judicial practice on ideas up until 2011, the content of the transitional documents, and the activity of courts after 2011.

The judicial role hypothesis assumes that courts act according to a logic of appropriateness, rather than a logic of consequentiality<sup>45</sup>. For courts, the bounds of what is appropriate and what is feasible are closely related. Unlike armies, political parties or trade unions, courts have few means of applying pressure<sup>46</sup>. Moreover, judges are professionals who

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<sup>45</sup> March and Olsen (2009)

<sup>46</sup> Judges can persuade other actors to apply such pressure. Egypt saw numerous popular protests in support of the judiciary both before and after 2011 for example. Judges can also go on strike. In Egypt, a strike was a serious threat because the absence of judicial supervision would make the election results invalid. Still, this depends on a

gain their status from holding an office. Their self interest is closely aligned with the standing of the judiciary as a whole. As a result, judges believe that acting according to the judicial role is also in their own self interest. In designing the formal powers of courts, the drafting bodies may act according to a logic of appropriateness or a logic of consequentiality that takes into account the limits that the judicial role imposes on the judiciary's activity.

## **7. Methodology**

The dissertation is a comparative study of qualitative data from within the two cases, Egypt and Tunisia. I chose this approach over several alternatives, including a large-n study of all transitions, a different selection of cases or a most-similar case design. The outcome - the formal powers of high courts - is fairly easy to measure across different cases. However, the independent variables - interests of the drafting bodies, connections between the courts and civil society, and ideas about the judicial role - are harder to measure across different cases. This makes it difficult to design a large-n study to determine which of these variables affects the outcome.

Although there are many examples of transitions, the Arab Spring cases are the best to examine the specific problem of democratization in constitutional authoritarian regimes that I outlined above. The cases are selected from a smaller population of transitions in constitutional authoritarian regimes. A different selection of cases would not take into account the unique characteristics of this population. Despite broad similarities between Egypt and Tunisia, there

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belief that judicial supervision is essential for legitimate elections. A judicial strike could make it difficult to maintain social order and resolve disputes. However, the effects of a judicial strike are not as immediate as those of many other kinds of workers, such as transport workers, garbage collectors or police. In Tunisia, the UGTT's general strike proved more effective than any of the judicial strikes organized by the judicial syndicates, the SMT and AMT. In Egypt, the disappearance of the police during the Mursi presidency made daily more difficult and dangerous in a way that a judicial strike never could. Political authorities often resist implementing judicial decisions even in established democracies. This problem was especially acute in both Tunisia and Egypt both before and after 2011.

are too many differences, such as different colonial legacies and different roles for the military, for a most similar case design<sup>47</sup>. Testing the hypotheses requires gathering data from within each of the cases using interviews and written sources.

In the following sections, I look at different criteria for selecting cases. I then outline the process of data collection from each of the cases.

### Case Selection: Judicial Power in Transitions

Tunisia and Egypt since 2011 belong to a larger set of cases; they are examples of transitional regimes, situations where the basic structures of the regime are in flux. Such periods are usually periods of constitutional politics, in which a new constitution is in the process of being written or an old constitution is being substantially revised. The transition can also be thought of as a movement from one regime type to another or a period when the fundamental character of the regime is in doubt. This intermediate phase can last anywhere from a few months to a few decades. For example, Turkey and Pakistan have oscillated between democratic and authoritarian regimes for much of the last fifty years. Uncertainty remains about the form that these countries' regimes will take. Other countries have had more clearly defined transitions from authoritarianism to democracy. For example, the transitions in most Central European countries lasted only a few years after 1989. By the middle of the 1990's, these countries had finished the process of constitutional reform and had already gone through several competitive elections.

The category of transitional regimes is not the same as hybrid regimes or competitive authoritarianism. What is important is uncertainty about the constitutional structure of the

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<sup>47</sup> Przeworski and Teune (1970)

regime, not its combination of democratic and nondemocratic elements. Many hybrid regimes have shown themselves to be quite stable. For example, Iran has retained its system of an elected president and an unelected Supreme Leader since 1979. For decades before 2011, Egypt had combined relatively free elections for parliament with an essentially unelected executive.

Several authors have produced lists of transitional regimes, usually in the context of a measure of democracy. Using an ordinal scale, such as the Polity score, and coding any country that passes through or near zero, would not be appropriate for this study because such a list would include hybrid and competitive authoritarian regimes as well. It would also exclude transitions from one kind of authoritarianism to another. More suitable would be Gasiorowski's Political Regime Change dataset, which explicitly attempts to limit the universe to countries that have transitioned from one of four regime types, democracy, authoritarianism, semi-democracy (competitive authoritarianism) and transitional democracy or Geddes, Wright and Frantz's Autocratic Regime Data, which includes a coding of all regimes since 1945 as democratic or as one of several varieties of authoritarianism. Like the Political Regime Change dataset, this data has the advantage of identifying authoritarian to authoritarian regime changes. Their data include 340 observations of regime change since 1945<sup>48</sup>.

Judicial power in these transitions can be gauged by looking at a constitutional court's de jure powers. A court's de jure powers, may be reduced, kept the same, or expanded during a transition. A numerical scale could give zero, one or two points for each of these scenarios respectively. The SCC has taken on additional powers since the beginning of the transition. The South African Constitutional Court's power to rule on the validity of the draft constitution is an example of another kind of extraordinary power granted to a constitutional court for a limited

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<sup>48</sup> Gasiorowski (1996) Cheibub, Gandhi and Vreeland (2010), Geddes, Wright and Frantz (2012)  
<http://dictators.la.psu.edu/>



time during a transition. The Tunisian Constitutional Council's powers were completely eliminated. During most transitions, the constitutional court has retained its de jure powers. Most transitions in Latin America have not coincided with the drafting of a new constitution. As a result, the de jure powers of the court, which are defined in the constitution, remained the same.

The literature on transitions attributes an important role to the judiciary in liberalizing authoritarian regimes and consolidating emerging democracies. The transitions literature assumes that an active judiciary will help a transitional regime move towards democracy<sup>49</sup>. In fact, courts have played varying roles in transitions. Some have exercised high levels of judicial power. In South Africa, the constitutional court rejected the first draft of the constitution. In Hungary, the parliament created a new constitutional court in the early stages of the transition, which quickly began overruling legislation. In Pakistan, the Supreme Court and the lawyers movement has been a major force in politics as the country has transitioned from military rule. The Turkish constitutional court has played a prominent role in the serial crises that have accompanied the country's transitions between military and civilian rule. Other transitional regimes have had inactive courts. Hilbink highlights the surprising lack of judicial activism in Chile during and after the Pinochet years. After World War II, the constitutional courts of Germany and Italy rapidly rose to prominence as democracy was consolidated in these countries. In Japan, a constitutional court was established in 1947, but it was notoriously inactive during the first decades of Japanese democracy. In most of the Eastern European transitions occurred in countries that did not have constitutional courts or whose constitutional courts had only been recently established. With the exception of Hungary, courts established in these countries since

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<sup>49</sup> Linz and Stepan (1996)

1989 have been slow to exercise their authority<sup>50</sup>. Tunisia is particularly pronounced case of low judicial power. The situation of Tunisia, where the Constitutional Council was consciously dissolved, is rare. More common are cases where a constitutional court did exist, but was largely inactive during the transition.

These data are sufficient to gain a general understanding of the level of judicial power in the universe of cases. Ginsburg suggests that constitutional courts can have either a high activity or a low activity equilibrium<sup>51</sup>. If Ginsburg is correct then the distribution of judicial power in the universe of cases would be bimodal. Tunisia is an example of the low activity equilibrium. Egypt is an example of the high activity equilibrium. It is likely that the low activity equilibrium is more common. The data overestimate the importance of the low activity equilibrium. Chronically unstable countries produce more transitions and thus more observations. Some countries experienced many transitions within a short period of time, such as Benin in the 1960's or Syria in the 1950's. These separate observations could be considered part of a single era of transition. On the other hand, the literature focuses disproportionately on cases of high activity. Many of the cases in which judicial activism has not been studied would be examples of weak judicial power because courts that played an important role in transitional politics would be more likely to attract scholarly attention. However, there are enough examples of the high equilibrium in the literature to show that this outcome is not simply an outlier. The Egyptian case is representative of this larger phenomenon.

Egypt and Tunisia are extreme cases in that they represent very high and very low levels of judicial power in transitional regimes<sup>52</sup>. The de jure suspension of judicial review in Tunisia makes it a case of very low judicial power. In the scale described above, Tunisia would receive

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<sup>50</sup> Hilbink (2007), Hilbink (2012), Bali (2012), Arato (2000), Ginsburg (2003), Newberg (1995), Gloppen (1997)

<sup>51</sup> Epp (1998), Ginsburg (2003)

<sup>52</sup> Gerring (2008)

zero points because the constitutional court was suspended de jure and thus was unable to exercise any influence on the transition. The prominent role of the Egyptian SCC, culminating in the interim presidency of Adly Mansur, is also unusual. Using the scale described above, Egypt would receive full points because its constitutional court was granted additional powers during the transition and it made extensive use of these powers. Tunisia and Egypt fall in the extremes of the range of judicial power in transitional regimes, but neither case is unique in its level of judicial power

Each case is puzzling on its own, even without the comparison between the two, and a single extreme case can be used to generate hypotheses. A paired comparison of these two cases can be used to generate generalizable hypotheses. A hypothesis generated by a study of these cases could be tested using a broader range of cases, including those discussed above. It can also be tested using additional data from within the Tunisian and Egyptian cases. Each of the hypotheses has implications in a number of areas including the timing of constitutional court decisions, the procedural history of decisions, the activity of lower courts, and the positions of judges, political parties, lawyers and civil society on the question of constitutional review.

#### Case Selection: Transitional Models and Constitutional Authoritarianism

Tunisia and Egypt after 2011 can each be seen as a typical case of two different models for democratization: revolutionary rupture and legal continuity. These models are reflected in the form of constitution drafting adopted by each country. Revolutionary rupture takes the form of constitution drafting by a sovereign legislative-constituent assembly. Legal continuity may take a variety of institutional forms. A special constitutional convention may operate alongside existing institutions. A country may amend its constitution through ordinary procedures rather

than writing a new constitution. These cases are selected as too examples of these models, not as examples of high and low judicial power. Many countries have gone through transitions that correspond to these models.

To qualify as an example of revolutionary rupture, a country must suspend its constitution and draft a new one through a special legislative-constituent assembly. Blount, Elkins and Ginsburg list five constitutional design processes: constituent assembly (what I refer to as the convention model - the constituent assembly has no legislative powers), constituent legislating assembly (what I refer to as the assembly model), constituent legislature, executive, and other. For the purposes of this study, the constituent legislature approximates the assembly model because the parliament wields both legislative and constituent powers. Of the cases listed by Blount, Elkins and Ginsburg, 204 are examples of the assembly model (26 constituent legislating assembly and 178 constituent legislature), 103 are examples of the convention model (constituent assembly), and 104 fall into other categories<sup>53</sup>.

Why study judicial power in the context of each of these two models for the transitional regimes? Both models agree that law and courts are essential to the transition. However, they have different explanations of what courts should do during the transition. The legal continuity models rests on the assumption that a legal system inherited from the old regime can help the democratization process. The revolutionary rupture assumes that the legal order can be suspended without the country falling into anarchy. Both of these assumptions are problematic.

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<sup>53</sup> I assume that a post-authoritarian transitional regime will write a new constitution. This has been a safe assumption for the Arab Spring transitions; new constitutions have been drafted in Tunisia, Egypt and Libya, as well as Morocco, where the regime was never overthrown. Most of the post-1989 transitions were also accompanied by the adoption of new constitutions. However, constitution-writing and democratization do not always accompany each other. The literature on democratic transitions does not make this assumption, in part because many countries in Latin America democratized without writing a new constitution. The pacted transitions in these regions occurred in regimes that had suspended a previous democratic constitution, making constitutional revision less necessary. Arato argues for another means of avoiding the constitution drafting process by using the amendment rules of the old constitution, which was used by a minority of the 1989 transitions. Arato (2000), Blount, Elkins and Ginsburg in Ginsburg (2012)

Each assumption may hold in certain conditions but not in others. As described above, Tunisia and Egypt are examples of a certain set of conditions typical of liberalized authoritarian regimes. Such a study focuses on processes as much as outcomes. Both of the models depend on these processes unfolding in a particular way. In contrast, the first approach assumes that high levels of democracy will go along with high levels of judicial power, without deciding on an explanation for why they are connected. A small-n study of two cases can show whether these processes are taking place.

Why focus on the Arab Spring out of all of these cases? Other waves of democratization in other regions have included examples of each model. For example, Arato divides the Eastern European transitions into examples of legal continuity and revolutionary rupture<sup>54</sup>. Each wave of democratization occurs in a specific time period and region. The Mubarak and Ben Ali regimes are examples of constitutional authoritarianism. Both regimes created constitutional courts and made widespread use of ordinary courts. Such regimes differ from both the post-totalitarian regimes of Eastern Europe, which did not have legal opposition parties or constitutional courts. They also differ from the exceptional military regimes of Latin America, which typically suspended existing civilian institutions and justified themselves only as “transitional powers.”<sup>55</sup> A comparison of Tunisia in 2011 and Hungary in 1989 for example, or a large-n study of all of the transitions listed by Blount, Elkins and Ginsburg could not answer these questions.

### Testing Hypotheses: Interviews and Written Sources

I conducted fieldwork in Tunisia and Egypt in the 2014-2015 academic year with judges,

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<sup>54</sup> Arato (2000)

<sup>55</sup> Schmitter, O'Donnell and Whitehead (1986). Loveman (1993). Some Eastern European Communist regimes, including Hungary and Yugoslavia, did create constitutional courts in the 1980's. Arato (2000)

lawyers and political party representatives. In the interviews with Tunisian political party representatives, I asked about their stances on the dissolution of the Constitutional Council, interim constitutional review by the Administrative Tribunal and the IPCCPL, and the formal powers of the new Constitutional Court described in the 2014 Constitution. Some of the interviews also addressed specific issues such as the removal of sitting judges by the Minister of Justice Nouredine Bhiri in 2012. In the interviews with Tunisian legal professionals, I asked the same questions about interim constitutional review. I also asked about issues such as the Assembly's mandate, interactions between the courts and civil society, and the resolution of electoral disputes by the Administrative Tribunal. The interview with Egyptian lawyer Ahmed Eid focused on the design of the Egyptian legal system and Mr. Eid's perception of different parts of the court system. The interviews are listed in the appendix.

Written sources supplement the interviews. The positions of political parties can also be found in written sources such as platforms, or in op-eds by political figures<sup>56</sup>.

Written sources are also an independent source of data. Constitutions, transitional documents and judicial decisions trace the basic outline of the transitions. The transitional documents include the outcome of interest - the formal powers of courts - but also a variety of other information about the transitional regime. The timing of these documents is often of critical importance. Taken together, these data can be used to build a narrative about the transitions. These documents are usually readily available<sup>57</sup>. These documents are supplemented by the writings of judges and legal professionals. Judges write academic works

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<sup>56</sup> 2011 Ennahda Party Platform. <http://www.ennahdha.tn/>  
Brown, Nathan and Amr Hamzawy. "The Draft Party Platform of the Egyptian Muslim Brotherhood," *Carnegie Endowment* January 2008. [http://carnegieendowment.org/files/cp89\\_muslim\\_brothers\\_final.pdf](http://carnegieendowment.org/files/cp89_muslim_brothers_final.pdf)

<sup>57</sup> The cases of the SCC are all published in the Court's journal, *Al-Mahkamah al-Dusturiyah al-'Ulya*.

and commentary on cases, as well as op-eds in newspapers<sup>58</sup>.

## **8. Plan of the Dissertation**

The book is split into two parts of approximately equal length. The first part falsifies the first two hypotheses. The second part establishes the plausibility of the judicial role hypothesis.

Chapter 1 narrows down the range of possible explanations. It excludes explanations that depend on a divergence between the cases sometime early in their history. The chapter shows that the legal institutions of the two countries developed in parallel from the pre-colonial period until the reform era in the 1970's. In 1971, the new Egyptian constitution created the SCC as a result of the convergence of economic reform and Sadat's reworking of the Nasser regime's constitution and ideology. This contingent event marks a key divergence between the two cases.

Chapter 2 rejects the countermajoritarian hypothesis. The transitional institutions designed by the SCAF are not completely countermajoritarian, and the transitional institutions designed by the Ben Achour Commission are not completely majoritarian. The stances of political parties of the question of interim constitutional review contradict the predictions of the hypothesis. Both government and opposition parties share a broad consensus about the status of courts in each country. In Tunisia, both government and opposition parties support the dissolution of the Constitutional Council and oppose constitutional review by the Administrative Tribunal. In Egypt, both sides supported interim constitutional review by the SCC, except for a brief period after Mursi's November 2012 Constitutional Decree.

Chapter 3 rejects the civil society hypothesis. Egyptian civil society was not able to influence the drafting of the transitional documents, which was controlled by the military. In

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<sup>58</sup> For examples of writing by judges and legal professionals see, Fawzi (1999), Boyle and Sherif (1996), 'Ubayd (1991), Amine Mahfoudh, "Le Tribunal Administratif: Juge Constitutionnel" *La Presse*.  
<http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

contrast, the Tunisian system gave ample opportunity for involvement by civil society. The connections between civil society and the courts that Moustafa and El-Ghobashy identify in Egypt were severely strained by the transition<sup>59</sup>. Tunisian civil society did build connections with the Administrative Tribunal. Yet these connections did not result in expanded powers for the Tribunal.

Chapter 4 looks at the activity of the Tunisian Administrative Tribunal during the transition as an example of the judicial role trumping the political interests of the judges. The judges of the Tribunal opposed the Islamist-led Troika government and supported the secular opposition. The Tribunal enjoyed widespread popularity. The crisis of the Assembly system in 2012-2013 gave the Tribunal an opportunity to intervene in politics. Despite these conditions, the Tribunal rejected political involvement. Interviews with Tunisian judges establish the importance of the judicial role for the Tribunal's activity.

Chapter 5 looks at the incorporation of the shariah into the legal systems in both countries. The different stances taken by these regimes towards the shariah had implications for other questions of legal theory. The shariah forms part of a body of super-constitutional norms in Egypt. The SCC's role in defining these norms made it contradictory to suspend constitutional review in Egypt, even temporarily. Constitutional review poses a danger to the Personal Status Code, which even more than the 1959 Constitution, formed the basis of Tunisia's secular republican ideology.

Chapter 6 looks at politics within the Egyptian judiciary. This chapter addresses the objection that the judicial role is simply the product of the political interests of judges. Initially, ordinary judges were suspicious of the SCC and its model of constitutional review. The activity of the SCC gradually brought the SCC and the ordinary judiciary closer together. The disputed

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<sup>59</sup> Moustafa (2007), El-Ghobashy (2008)



elections of 2005 were particularly important for expanding the political role of the SCC and its connections with the ordinary judiciary. The contingent event identified in Chapter 1, the creation of the SCC, furthered a new conception of the judicial role.

Chapter 7 outlines the different options for the design of the transitional institutions that were proposed in 2011 to 2012. Many of the designs would have similar implications for the interests of the drafting bodies and civil society. In contrast, the judicial role hypothesis can distinguish between different options.

## CHAPTER 1: HISTORY AND INSTITUTIONAL CHOICES

### Introduction

This chapter includes an outline of Tunisian and Egyptian legal history and a description of the countries' legal systems in 2011. The chapter provides background for the later chapters, but it also uses a study of Tunisian and Egyptian legal history to exclude arguments based on an early divergence between the two cases. These explanations focus on the longer development of legal institutions, or the use of different legal models in the two countries during the 2011 transitions. These arguments link these features to greater judicial power, and assume that Egypt exhibits these features to a greater extent than Tunisia. The failure of these explanations justifies the focus on the status of courts as an important part of transitional politics.

These arguments might depend on stateness or ‘degree of government’ or on deeply seated cultural differences that could explain the differing status of courts in Tunisia and Egypt<sup>60</sup>. What unites these different arguments is a focus on factors that must have a long historical development. These arguments imply that the two cases diverged at some point early in their history. The first section examines the history of constitutional development in Egypt and Tunisia during four periods - pre-colonial, colonial, nationalist, and reform eras - and tries to identify a critical juncture at which the two countries diverged. The literature on Egypt has suggested that each of these periods could mark the beginning of Egypt’s distinctive development. However, this literature does not explicitly compare Egypt with Tunisia<sup>61</sup>. I conclude that a substantial divergence occurred only in the last period, the era of liberalization from the 1970’s until 2011, with the establishment of the Supreme Constitutional Court (SCC). Moreover, this divergence was the result of three factors - economic reform, constitution drafting, and the diffusion of the a posteriori model of constitutional review - that overlapped in Egypt during the presidency of Anwar Sadat. The comparison with Tunisia highlights the contingent nature of these factors. Nothing in Egypt’s earlier history determined that it would create a constitutional court exercising a posteriori review. If the factors of economic reform, constitution drafting and diffusion of the a posteriori model had come together in Tunisia at the same time, Tunisia might also have created a similar court.

A further implication of the early divergence explanation is that courts should draw their strength from broad social forces and from a legalized political culture. In other words, it is not just courts that are important, but law in general. The section concludes with an outline the Tunisian and Egyptian legal systems as they existed immediately before the 2011 revolutions,

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<sup>60</sup> Huntington (1968), Anderson (1986), Ayubi (1994), Collier (2011), Mahoney and Rueschemeyer (2003)

<sup>61</sup> Brown (2006) Moustafa (2007) Rosberg (1995).

with special attention to connections between constitutional review, other areas of the judiciary and the legal profession. This outline assesses the importance of law, rather than just courts or constitutional review, in both of the cases. I conclude that the legal system as a whole was not more developed or independent in Egypt than Tunisia. The factors identified by the other hypotheses - the interests of the drafting bodies, connections between civil society and the courts, or conceptions of the judicial role - are needed to explain the outcome.

### **History of Constitutional Development in Egypt and Tunisia**

Much of the literature on law and courts in Egypt treats the country as exceptional among Arab states, authoritarian regimes, or the developing world generally. Rosberg writes that in terms of “the institutionalization of the judiciary, it seems that Egypt is uniquely advanced in the developing world.” Brown emphasizes the diffusion of legal models from Egypt to other Arab countries. Moustafa’s work starts from the assumption that the exercise of constitutional review by the SCC is unusual in the Arab World and authoritarian regimes generally. Moustafa extends this exceptionalism to the 2011 revolution when he writes that “among the protest movements sweeping the region in the Arab awakening of 2011, the Egyptian revolt is the movement that is perhaps most defined by a struggle over the Constitution and the rule of law more generally”. He attributes the prominence of law and legal issues in the 2011 revolution to the prominence of law in the Mubarak regime<sup>62</sup>.

These different authors all suggest that a divergence in Egypt’s historical development can account for unusual aspects of its modern legal and political system, but they disagree about when this divergence occurred. For Brown and Ziadeh, the unusual features of the Egyptian

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<sup>62</sup> Rosberg (1995) pg. 23, Brown (2006), Moustafa (2007), Moustafa (2011) abstract.

system date to the colonial or the period of pre-colonial state building in the nineteenth century. Ziadeh contrasts the modern Egyptian legal system with its Islamic predecessor “there was very little in the course of Egyptian history from the early Islamic period up to the accession of Isma’il Pasha in 1863 that was conducive to the emergence of an independent legal system with a vigorous body of men capable of establishing and maintaining a rule of law”<sup>63</sup>. Writing during the Nasser period, Ziadeh expresses skepticism that these features could survive authoritarian rule. Moustafa focuses on the economic crisis of the 1970’s as the impetus for the creation of the SCC and brackets Egypt’s earlier history. Rosberg argues that the failure of the single party state and bureaucracy of the Nasser regime forced Sadat to adopt legal reforms. The outcome of these reforms in turn depends on a pervasive bureaucracy and a highly institutionalized military, two features which might distinguish Egypt from other Arab states.

In fact, Tunisia closely paralleled Egypt’s development in all four periods. These features distinguish both Tunisia and Egypt from many other Arab states. The parallel development of the two countries undermines arguments based on stateness or the early divergence of the two cases. However, the creation of the SCC in 1979 did mark an important divergence between the two countries.

#### Constitutionalism and State-Building (Tunisia 1860-1881, Egypt 1867-1882)

Both Tunisians and Egyptians often cite geography and a long political history as features that distinguish their countries from other parts of the Arab World<sup>64</sup>. The early development of

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<sup>63</sup> Ziadeh (1968) pg. 1

<sup>64</sup> Ayubi (1994)

H.L. “L’unité tunisienne est un don du ciel,” *La Presse*, 22 October 2014. <http://lapresse.tn/17012015/89573/lunite-tunisienne-est-un-don-du-ciel.html>

modern legal institutions in either of these countries could explain the more expansive power of courts after 2011. If this history can explain the outcomes after 2011, there should be some clear divergence between the two cases that favored the development of legal institutions in Egypt over Tunisia. In fact, the two countries had a similar pattern of state building during this period.

By the nineteenth century, Tunisia and Egypt had a similar relationship with the Ottoman Empire. Both countries were on the periphery of the Ottoman Empire. Although Egypt had once been under direct control by the Ottomans, by the eighteenth century, the Mamluks had asserted their autonomy<sup>65</sup>. In both countries, a local ruler, Muhammad Ali (r. 1805-1848) in Egypt and Hussein bin Ali (r. 1705-1740) in Tunisia, secured the right to pass on their office to their heirs, instead of accepting a replacement appointed by the Ottoman sultan. Both countries were influenced by reforms within the Ottoman Empire, but the local dynasty was able to select reforms from Ottoman and European sources. The dynasties founded by these two rulers formed the basis for the growth of the national state. In Egypt, Muhammad Ali began a program of modernization. The Beys of the Husseinid dynasty, especially Ahmed Bey (r. 1837-1855), initiated a similar program in Tunisia<sup>66</sup>.

The rulers of Tunisia and Egypt adopted some of the earliest constitutional documents in the Arab World. Tunisia adopted the fundamental pact in 1857 and a full constitution in 1861. Brown argues that rulers adopted these documents to strengthen their administrations rather than to limit their own power<sup>67</sup>. As in contemporary Europe, courts were not considered the final interpreters of these documents, and there was no constitutional review by courts<sup>68</sup>. Tunisia had two short periods of constitutional rule, first immediately after the adoption of the Fundamental

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<sup>65</sup> Fahmy (1997)

<sup>66</sup> Brown (2002)

<sup>67</sup> Brown (2002) al-Dhiab (2005), tr. Brown (2005)

<sup>68</sup> Al-Dhiab implies that the legislative-consultative council, rather than a court, would decide if the ruler had violated the Pact.

Pact, and then again under the leadership of Kheireddine Pasha, prime minister from 1873-1877. Despite this mixed record, the Pact remained an important symbol of Tunisian nationalism through the colonial period<sup>69</sup>. In Egypt too, periods of constitutional rule alternated with periods of autocratic rule. The first constitutional document was adopted in 1879 but quickly became irrelevant. As in Tunisia, the constitution lived on as a national symbol.

Both countries began to codify their laws and establish new court systems before the beginning of colonialism. Muhammad Ali commissioned legal codes based on European and Ottoman models, with the first penal code adopted in 1829. This effort coincided with the drafting of the Majalla code in the Ottoman Empire. The Egyptian legal system at the beginning of Muhammad Ali's reign consisted of shariah courts and a variety of secular 'courts' operated by administrative officials rather than strictly judicial personnel. Muhammad Ali and his successors established several varieties of courts, including commercial courts, councils of first instance, and appellate councils, which judicialized this area of administrative dispute resolution. Peters considers the staff of these courts the first modern judicial professionals in Egypt<sup>70</sup>. These new courts complemented the existing shariah courts.

In Tunisia too, legal reform took the form of codification, and Ottoman and European civilian models predominated. At the beginning of the period, Tunisia had parallel Islamic courts and administrative justice exercised by a variety of officials. Both of these systems were reformed and centralized by the Beys. An 1876 decree created a shariah court of appeals in Tunis, formalizing a hierarchy among the religious courts. Before the establishment of the

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<sup>69</sup> Brown, introduction to al-Dhiaf (2005)

<sup>70</sup> Peters (1999 a), Peters (1999 b), Peters (2007)

protectorate, consular courts handled all cases between Tunisians and Europeans. Like the Mixed Courts in Egypt, the consular courts led to the growth of a modern legal profession<sup>71</sup>.

#### Constitutionalism and Colonialism (Tunisia 1881-1956, Egypt 1882-1952)

Increasing foreign influence in Egypt culminated in the British occupation of the country in 1882. The British faced rival claims from France and the Ottoman Empire, as well as a well-entrenched Egyptian elite and monarchy. As a result, they did not annex Egypt as a formal part of their empire, instead declaring a protectorate over the country.

This indirect colonialism had important implications for the content of Egypt's laws. The British imported a few aspects of British law, but for the most part, they left the civilian model in place. The Egyptian civil code adopted in 1871 was influenced by French civilian models, and this code remained in force until the adoption of Sanhuri's code in 1948, which was also heavily influenced by French law. Cromer, the British Consul-General in Egypt from 1883 to 1907, intended to import a common law system similar to those used in other British colonies, such as India or the Sudan. However, he found that French civil law influence was already entrenched in the Egyptian legal system and the Egyptian state generally. Many institutions of the Egyptian state, such as the Mixed Courts and the Caisse de la Dette Publique, were already staffed with French advisors and judges when the British occupied the country. Cromer spent much of his tenure in Egypt struggling against French influence<sup>72</sup>.

Further legal development during the colonial period looked to French models more than British models. Most Egyptians who studied law abroad during the colonial period studied in

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<sup>71</sup> Gobe (2013) pp. 32-38, Liebesny (1975). The establishment of a shariah court of appeal is particularly noteworthy given the hostility of many Islamic legal systems to appeal. Shapiro (1981), Vogel (2000)

<sup>72</sup> Rogan (2004), Peters (1999), Brown (2006)

France rather than Britain. Sanhuri, who completed a doctorate in law at the University of Lyon in 1926, is a prominent example. As a result, Egypt is one of only a handful of British colonies that did not receive a common law legal system. Other examples, such as Quebec and South Africa also had previous development of a civil law system through French or Dutch influence respectively. Even in these cases, the British were able to import more of the common law than in Egypt<sup>73</sup>.

The colonial period was defined by the coexistence of parallel court systems, such as the Consular and Mixed Courts used for cases involving foreigners, and parallel sources of law, including international treaties, uncodified Shariah as well as state legislation. The last years of the monarchy saw the consolidation of the court system through the elimination of the Mixed Courts and the Shariah Courts. These developments were a victory for the ordinary judiciary, which was able to concentrate the jurisdiction for different kinds of cases in its own hands<sup>74</sup>.

Nathan Brown argues that the conditions of indirect colonialism also aided the development of legal institutions and made Egyptian lawyers and judges act more assertively against political authorities<sup>75</sup>. The need to adjudicate cases involving multiple nationalities required the creation of the Mixed Courts. Because the Mixed Courts were the result of international agreements and treaties, their independence could not be easily compromised by either the Egyptian government or the British colonial authorities. As a result, they formed an island of judicial independence, which individuals could use to challenge state authority in certain cases.

The ambiguous relationship of Egypt to both the British Empire and the Ottoman Empire gave nationalist lawyers a means of couching issues surrounding Egypt's sovereignty in

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<sup>73</sup> Brown (2006) Bechor (2007)

<sup>74</sup> Brown (1993), Cannon (1988) on the Mixed Courts

<sup>75</sup> Brown (2006) pp. 23-60



international legal terms.<sup>76</sup> Unlike Tunisia, Egypt does not have a clear independence day. Instead, British influence gradually receded from the 1919 revolution until Nasser expelled the last British troops from Suez canal zone in 1956. This twilight period of colonialism provided additional opportunities for nationalist lawyers to challenge the colonial state. The 1919 revolution focused on the issue of a new constitution. Nationalists often couched their grievances in constitutional terms during this period. The 1923 constitution also gave rise to a few instances of constitutional review by ordinary courts in Egypt in the 1920's and 30's, although this power was not widely recognized<sup>77</sup>.

This depiction contrasts Egypt with countries that were not colonized or were only briefly colonized, such as Syria, Saudi Arabia and Yemen, and countries that were colonized directly, such as Algeria. Tunisia could fall into the category of direct colonization, like its neighbor Algeria. Like Algeria, Tunisia had a large European settler population. However, in terms of its domestic and international legal status, Tunisia more closely resembled indirect colonization along the same lines as Egypt. The French incorporated Tunisia into their empire much later than Algeria. The French army invaded Tunisia in 1881 and forced the Bey to accept a protectorate, while the French colonization of Algeria began in 1830 with the occupation of Algiers. Moreover, the process of colonization was far more violent in Algeria, with numerous rebellions followed by repression and the mass confiscation of Algerian land. Partly this is due to the different forms of political organization that the French found in the two countries. In Algeria, the French faced numerous independent rulers and tribes, whereas Tunisia had already established a relatively strong centralized state under the Beys<sup>78</sup>.

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<sup>76</sup> Lewis (2013) Brown (2006) Shalakany (2013)

<sup>77</sup> Bernard-Maugiron (2003)

<sup>78</sup> Sessions (2011), Ruedy (1967), Brown (1974)

In legal terms, Tunisia more closely resembled the indirect colonialism of Egypt than the direct colonialism of Algeria. Despite the presence of the settler population, Tunisia was never annexed to France. The protectorate system allowed the continued operation of the Bey's administration<sup>79</sup>. Like the British in Egypt, the French initially faced rival claimants to sovereignty over Tunisia, including the Ottoman Empire, Italy and Britain. The European powers agreed that the European population in Tunisia would be represented by the French government, with the exception of the Italians, who would have their own litigation. The Italians were the largest single foreign nationality in Tunisia<sup>80</sup>. As in Egypt, the colonial period in Tunisia was defined by parallel legal institutions. The consular courts established to deal with cases involving foreigners were analogous to the Mixed Courts in Egypt<sup>81</sup>.

Although Tunisia did not have a revolutionary uprising comparable to the events of 1919 in Egypt, constitutional issues were at the center of nationalist concerns during the colonial period. The Destour, or constitution party, was founded on the twin principles of restoring constitutional government and abolishing the French protectorate over Tunisia<sup>82</sup>.

#### Constitutionalism and Nationalism (Tunisia 1956-1987, Egypt 1952-1970)

In both countries, colonialism produced a nationalist response that extended to the legal realm, and the rise of the Nasser and Bourguiba regimes set the stage for legal reforms. This era of legal change was threatening to the established judiciary. Especially in Egypt, this era is remembered for conflicts between the regime and the judiciary and for the erosion of judicial

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<sup>79</sup> Anderson (1986), Brown (1974)

<sup>80</sup> Lewis (2013)

<sup>81</sup> Gobe (2013)

<sup>82</sup> Gobe (2013), Lewis (2013)

independence. Rosberg identifies the problems of the Nasser era as the impetus for the rise of the Egyptian judiciary during the subsequent reform era.

The Nasser regime's treatment of Abd al-Razzaq Sanhuri, the most famous modern Arab jurist, is emblematic of its attitude toward law. Soon after the Free Officers' Coup, the Nasser regime suppressed Sanhuri's plan to establish constitutional review in Egypt by the Majlis al-Dawlah and eventually exiled Sanhuri from Egypt. The Nasser regime also clashed with the ordinary legal professionals represented by the Judges' Club and the Lawyers' Club. This conflict culminated in the "massacre of the judiciary" in 1969, in which Nasser removed hundreds of judges from their position. The Nasser regime also created a series of exceptional measures through which the government could intervene in the legal order. These include the socialist prosecutor, the revolutionary courts, the military courts, and the constitutional state of emergency<sup>83</sup>. The Nasser regime did not shy away from asserting a norm superior to positive legislation, which they described as national security or the aims of the revolution, but it gave judges no role in defining this norm.

Nationalism and independence raised the question of the role of Islam in the Egyptian and Tunisian nation states. Sanhuri grappled with this question throughout his career from the 1920's to the 1950's. Sanhuri produced a code that he believed to be 'one-hundred percent Islamic,' although it also borrowed heavily from Western civil law. The influence of Islamic law in Sanhuri's code was most noticeable in personal status. Sanhuri laid the foundation for the view that the shariah could provide an inspiration or 'source' for legislation. Sanhuri also pioneered constitutional review in Egypt. In his academic work, he argued that the caliphate could be revived as a sort of international Islamic legal body. Egypt adopted Sanhuri's code in

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<sup>83</sup> Brown (2006) pp. 76-84 notes the continuity between the state of emergency and the practices of the British occupation government, especially during war time. The 1923 Constitution also had a provision for emergency rule. Shalakany (2013)

1948 and remained in effect even after Sanhuri himself had fallen out of favor with the Nasser regime<sup>84</sup>.

In Tunisia, the adoption of new legal codes coincides with independence. Bourguiba associated himself closely with the personal status code, which he used to establish an image of himself as a lawgiver, even claiming the title of mujtahid. Positive legislation is venerated over constitutional norms, and the president, rather than judges, defines the law<sup>85</sup>.

The exceptional institutions of the Bourguiba regime did not extend as far as their Egyptian equivalents. Although Article 46 of the 1959 constitution contained provisions for declaring a state of emergency, Tunisia did not experience extended periods of emergency rule. The Bourguiba and Ben Ali regimes used exceptional courts or military courts for some cases. However, Tunisia never developed a vast network of exceptional courts comparable to Egypt's. The Tunisian government continues to face these issues in the recent debate over counter-terrorism and national security laws<sup>86</sup>.

#### Constitutionalism and Liberalization (Tunisia 1987-2011, Egypt 1970-2011)

This era is of critical importance for the theories of Brown, Rosberg and Moustafa. All of these authors wrote during the 'golden age' of the SCC, although Moustafa notes signs of authoritarian retrenchment after 2005. Judges of the SCC themselves played a major role in defining scholarship on the Egyptian judiciary during this period, both as informants to academic researchers and as the authors of academic works in Arabic and English. On the other hand,

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<sup>84</sup> Sanhuri (1926), Hill (1987), Shalakany (2001), Shalakany (2013)

<sup>85</sup> Charrad (2001), Borrmans (1977) See chapter 5 of the dissertation.

<sup>86</sup> Human Rights Watch. "Tunisia: Flaws in Revised Counterterrorism Bill," July 7, 2015. <https://www.hrw.org/news/2015/07/07/tunisia-flaws-revised-counterterrorism-bill>. Tunisia has been in a state of emergency since the Sousse terrorist attacks in 2015.

Bernard-Maugiron, and especially Shalakany, present a skeptical view of the Egyptian judiciary in this period. For Shalakany, the Egyptian judiciary and legal profession never really recovered from the 1952 coup<sup>87</sup>.

In light of the comparison with Tunisia, I conclude that three factors contributed to the establishment of the SCC and the divergence with Tunisia: economic reform, the drafting of a new constitution in 1971, and the diffusion of the model of a posteriori review exemplified by the German Constitutional Court. Broad political and economic conditions were similar in both cases. Tunisia certainly went through economic reform in this period, and it was influenced by global trends toward the new constitutionalism. However, these trends did not coincide with the adoption of a new constitution or the creation of a new constitutional court in Tunisia.

Sadat used legal reforms and the adoption of a new constitution to mark a break with the Nasser period. The 1971 constitution is a much more liberal document than the constitutions of the Nasser period. The preamble asserts the democratic and republican nature of the regime. The constitution created the SCC, the first court charged with constitutional review in Egypt's history. It contains a set of fundamental rights that have formed the basis for much of the SCC's activity. On the other hand, the constitution also concentrates power in the hands of the president and justifies emergency rule<sup>88</sup>.

The SCC model of a specialized constitutional court exercising a posteriori review won out over several alternative possibilities for constitutional review. Sadat could have chosen a priori constitutional review like France after 1958 or Tunisia after 1989. He could have chosen decentralized review by all courts, as in the United States. This model is rare internationally, but

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<sup>87</sup> Brown (2006), Moustafa (2007), Rosberg (1995), Boyle and Sherif (1995). Adel Omar Sherif, co-editor of the volume, was a judge of the SCC during the 1990's and 2000's. The volume collects essays by other members of the court as well. Shalakany (2013), Bernard-Maugiron (2003)

<sup>88</sup> Brown (2006)

does have a precedent in the activity of Egyptian courts under the 1923 constitution<sup>89</sup>. Sadat could have granted a power of constitutional review to the Majlis al-Dawlah, the highest administrative court. Sanhuri tried to claim such a power for the Majlis al-Dawlah in the early 1950's. Either of the last two choices would have empowered the judiciary as a whole more than review by a specialized constitutional court like the SCC.

The SCC played an important role in Egypt's economic liberalization. Moustafa argues that it guaranteed private property and investment against the sort of appropriations that had often occurred in the Nasser period. The SCC's power of a posteriori review was also essential for repealing laws from the Nasser period that were at odds with economic liberalization. Moreover, popular opposition to liberalization made it politically difficult for the regime to address these issues through legislation<sup>90</sup>.

The beginning of Tunisia's reform era is harder to pinpoint. Bourguiba began economic reforms in the early 1970's, which backed away from the efforts at centralized planning and land reform in the 1960's. The 1970's saw the repeal of Tunisia's socialist economic laws by legislation. Economic liberalization also had the support of many of the opposition parties. For example, According to Mohamed Bennour, the Ettakatol Party "began as the economically liberal opposition to Bourguiba's nationalization programs in the 1960's and 70's."<sup>91</sup> As a result, there was no need for a posteriori constitutional review to remove these laws. In 1972, Bourguiba established the Administrative Tribunal, which quickly became the centerpiece of the Tunisian court system, with a reputation for independence unequalled by any other Tunisian court. Like the SCC, the Administrative Tribunal was established in the midst of economic

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<sup>89</sup> Bernard-Maugiron (2003)

<sup>90</sup> Moustafa (2007)

<sup>91</sup> Interview with Mohamed Bennour. King (2003) for general information on Tunisia's economic reforms.

liberalization. Its power to review the acts of government officials, although not legislation, could play a similar role in protecting private property and investment.

Ben Ali's coup d'état in 1987 initially raised hopes of further reforms. At first, Ben Ali did move against the one-party state of the neo-Destour party. In the first post-coup election, opposition parties were allowed to participate. By the 1990's, restrictions made it nearly impossible for opposition parties to compete in Tunisian elections. As a result, Tunisia from the 1990's to 2011 qualified as an electoral autocracy, but just barely. Despite liberalization in other areas, Tunisia remained close to the model of the single party state. Its elections and political parties were more restricted than Egypt's during the same period<sup>92</sup>.

Ben Ali's reforms also had legal and constitutional aspects. The creation of the Constitutional Council in 1987 was one of his first reforms. He sponsored amendments of the 1959 constitution but did not introduce a new constitution. However, as with the reforms of the electoral arena, the results were disappointing, and the Constitutional Council remained a hollow institution

The reforms in Tunisia and Egypt had similar causes, the failure of the nationalist economic model and single party state, and a similar goal, the consolidation of a liberalized authoritarian regime. However, these reforms had different results for the legal system and judicial politics in the two countries, which are described in the following section.

## Table of Legal History

The previous four sections on legal history are summarized in the table below.

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<sup>92</sup> In 2010, Freedom House coded Tunisia as 5 for civil liberties, 7 for political rights, and Egypt as 5 for civil liberties and 6 for political rights on a scale from 1 (free) to 7 (unfree). *Freedom in the World 2010*. <https://freedomhouse.org/report/freedom-world/freedom-world-2010>

Table 1: Legal history of Tunisia and Egypt

	Egypt	Tunisia
<b>Pre-Colonial Era: Politics</b>	1805-1848 Muhammad Ali	1837-1855 Ahmed Bey
Constitutions and Legislation	1829 First Penal Code 187 Constitution 187 Civil Code	1857 Fundamental Pact 1861 Constitution
Judiciary	Judicial Councils 1875 Mixed Courts	1876 Shariah Court of Appeals
<b>Colonial Era: Politics</b>	1882 British occupation 1919 Revolution 1922 Nominal Independence	1881 French protectorate 1946 Establishment of UGTT
Constitutions and Legislation	1923 Constitution 1948 Sanhuri Code	1883 Marsa Accords
Judiciary	1946 Sanhuri heads Council of State	1884 French Tribunals replace Consular courts
<b>Nationalist Era: Politics</b>	1952 Free Officers' Coup	1956 Independence
Constitutions and Legislation	1956, 1964 Constitutions	1959 Constitution 1956 Personal Status Code
Judiciary	1937 Abolition of Mixed Courts 1952 Abolition of Shariah Courts	1957 Abolition of Shariah Courts
<b>Reform Era: Politics</b>	1970 Nasser-Sadat transition	1969 End of Land Reform 1987 Ben Ali's coup
Constitutions and Legislation	1971 Constitution	1989 Constitutional Amendments
Judiciary	1979 Establishment of SCC	1972 Establishment of TA 1987 Establishment of CC

### The Legal System on the Eve of the 2011 Revolutions



The design of the Tunisian and Egyptian legal systems in 2011 provides an opportunity to test two implications of explanations based on an early divergence between the cases. First, an implication of stateness arguments is that all aspects of the legal system - including lawyers, law schools and professional organizations, as well as courts - should be less important in Tunisia than in Egypt. The section focuses on three areas typically considered to be outside the core of the judiciary - the administrative courts, exceptional courts, and lawyers and professional organizations. Each of these areas contradicts the view that law is less important in Tunisia. The Egyptian administrative courts, and especially exceptional courts, show the deep influence of the regime over the judiciary, even if the SCC and the ordinary judiciary retained a certain degree of independence and professionalism. There is an important difference between the status of judges and the status of lawyers in each country. In Egypt, the social status of lawyers declined since the beginning of the Nasser period, even after the establishment of the SCC in 1979. Since 2011, Tunisian lawyers and the the Tunisian lawyers' syndicate, which was part of the National Dialogue Quartet, have played an important role in transitional politics, even as courts remained marginal.

#### Ordinary Courts and Administrative Courts

Like many civil law systems, both Tunisia and Egypt have separate ordinary and administrative courts. Apart from Rosberg, most scholars of the Egyptian judiciary have focused on either the ordinary courts or the SCC rather than the administrative courts<sup>93</sup>. The role played by these different jurisdictions is different in the two countries. The Tunisian Administrative Tribunal resembles the SCC in its reputation for independence and in its design - it is a unique

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<sup>93</sup> Rosberg (1995)

jurisdiction without any lower courts. These differences reflect the influence of the SCC and the Administrative Tribunal on the rest of their legal systems.

Egypt has three tiers of ordinary courts, headed by the Court of Cassation<sup>94</sup>. Egypt also has three tiers of administrative courts. At the top of the hierarchy is the High Administrative Court in Cairo. The Egyptian administrative court system traces its origins to Sanhuri's Majlis al-Dawlah, which was founded in 1946, and to earlier administrative courts established after the adoption of French style civil code in 1883. Rosberg argues that the renewed prominence of the administrative courts dates to Sadat's presidency<sup>95</sup>.

The political implications of the split jurisdiction are a matter of debate in Egypt. Judges of the Egyptian ordinary courts often consider the administrative courts to be close to the regime<sup>96</sup>. Several features of the administrative courts make this claim plausible, even if it is hard to verify. The split jurisdiction could be an example of the parallel surveillance structures described by Rosberg. It could also be useful to the regime because the regime could shift important cases to a more favorable venue. These attitudes echo criticism of the split jurisdiction in other countries<sup>97</sup>. In contrast, Ahmed Eid, an Egyptian lawyer with opposition political views, stated that before the 2011 revolution, the administrative courts were known for their relative independence and that they "would often issue decisions releasing prisoners who were held illegally"<sup>98</sup>.

In Tunisia, the administrative jurisdiction does not parallel the ordinary jurisdiction because the Administrative Tribunal is the only administrative court in the country. The

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<sup>94</sup> Brown (2006), Hill (1975) for a description of the organization of the ordinary courts and administrative courts.

<sup>95</sup> Rosberg (1995)

<sup>96</sup> Moustafa (2007) discusses disputes between the ordinary and administrative judges over appointments to the SCC. The ordinary judges argued that appointing administrative judges to the SCC would compromise its independence. Rosberg (1995).

<sup>97</sup> Rosberg (1995), Dicey (1982) [1915] presents the classic common law argument against the split jurisdiction.

<sup>98</sup> Interview with Ahmed Eid

Tribunal has a reputation for independence while the ordinary courts were considered corrupt, unprofessional and close to the regime. Samir Annabi, head of the Tunisian anti-corruption agency, estimated that “a majority of cases” in the ordinary judiciary were subject to interference from the regime or other interests. Annabi estimated that “90% of [ordinary] judges do not have adequate training.” In contrast, he stated that the Administrative Tribunal “recruited judges and civil servants of the highest professional quality”<sup>99</sup>. Still, the absence of local administrative courts limited the role that Tribunal could play. The Tribunal was an elite institution in the sense that its judges formed an elite class within the judiciary and in the sense that it handled elite cases dealing with state administration. Hichem Hammi, a judge of Tribunal, stated that the Tribunal “remained alone” since its establishment and that the administrative judicial system is “extremely centralized”<sup>100</sup>. Tunisian administrative judges also lacked any form of professional organization analogous to the SMT before the establishment of the Union des Magistrats Administratifs (UMA) in 2011.

There were important differences between the Tunisian and Egyptian court systems in 2011, but these differences cannot be described as the absence of a developed court system in Tunisia. Tunisia has at least one area of the judiciary that is known for its independence and capacity to rule against the regime - Administrative Tribunal. The split jurisdiction that has been criticized in Egypt and other countries as a threat to judicial independence allowed the Administrative Tribunal to carve out a limited sphere of autonomy<sup>101</sup>. The view that Egypt’s judiciary as a whole is more independent than Tunisia’s is complicated further by the exceptional courts, which are described below.

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<sup>99</sup> Interview with Samir Annabi

<sup>100</sup> Interview with Hichem Hammi

<sup>101</sup> Dicey (1982) [1915]

## Ordinary Courts and Exceptional Courts

The importance of exceptional courts in Egypt is recognized throughout the literature. Brown, Moustafa, and Bernard-Maugiron all have some description of the exceptional courts. However, given the sensitive nature of the subject there is relatively little scholarship focusing on the exceptional courts<sup>102</sup>. The exceptional courts include military courts, which try both military officers and civilians in cases relating to national security, as well as State Security courts, which in turn are divided into “regular” and “emergency” sections<sup>103</sup>. What cases qualify for the exceptional courts has varied over time. Indeed, the lack of a clear rule governing which cases should be tried in which court is essential to the exceptional system. The regime can decide to redefine a case as a national security or military issue as it sees fit. Such redefinitions can occur on a case by case basis or through legislation. In 2014, the Sisi regime issued a decree defining all cases dealing with public infrastructure as cases falling under the jurisdiction of the military courts, making nearly any crime committed on a public street or in public institutions such as universities a matter of national security<sup>104</sup>.

The Egyptian ordinary courts’ reputation for independence obscures the role played by exceptional courts. The regime can allow the ordinary courts and the SCC to operate independently because the truly sensitive cases could be removed from their jurisdiction. The ordinary courts would only hear a case if the regime had decided that the case did not fall into any of the exceptional categories, and therefore was not of direct interest to the regime. During the Mubarak period, the Judges’ Club would sometimes issue statements against the emergency

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<sup>102</sup> Brown (2006), Bernard-Maugiron (2003) Moustafa (2007). Agrama (2012), which has a chapter on the emergency state, is a partial exception.

<sup>103</sup> Brown (2006), pg. 112

<sup>104</sup> Patrick Kingsley. “Egypt places civilian infrastructure under army jurisdiction,” *The Guardian*, 28 October 2014. <http://www.theguardian.com/world/2014/oct/28/egypt-civilian-infrastructure-army-jurisdiction-military-court>

law and in favor of restoring ‘right to the natural judge,’ that is the right to try cases in their original jurisdiction rather than in the emergency courts. These moves had little effect either before or after 2011. In fact, the months immediately after the 2011 revolution saw a rapid increase in the number of cases tried by the emergency courts. The SCC did not make even limited criticism of the the emergency system in its decisions. It has upheld the validity of the exceptional courts, the emergency law, and a broad scope for executive action or “acts of sovereignty”<sup>105</sup>.

Some aspects of the Egyptian emergency regime also undermine the professionalism of the judiciary, rather than just limiting the scope of its jurisdiction. The judiciary jealously guards access to judicial appointments to both the SCC and the ordinary courts. The emergency system allows military officers to take on judicial functions, effectively undermining the procedures for selecting judges. Police officers are allowed to become judges, blurring the distinction between judicial and law enforcement functions<sup>106</sup>.

## Lawyers and Judges

Both countries follow the civilian practice of sharply dividing lawyers and judges into two career paths. Judges are state employees, but lawyers are paid by private clients. In this system, lawyers and judges can end up with very different relations with regime, political importance, and social status. In Egypt, the rise of courts and judges after 1970 did not also

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<sup>105</sup> Brown (2006) pg. 117 on the Judges’ Club statements against the exceptional courts, pg. 121 on acts of sovereignty, Bernard-Maugiron (2003) and Moustafa (2007) all note these limits on the SCC’s activity. See Brown (2006) for criticism of the emergency laws by the Judges’ Club. In the year after the fall of Mubarak, more than twelve thousand Egyptian civilians have been tried by military courts, more than were tried during the thirty years of Mubarak’s rule. Human Rights Watch. *World Report 2012, Egypt*. <http://www.hrw.org/world-report-2012/world-report-2012-egypt>

<sup>106</sup> Interview with Ahmed Eid

mean the rise of lawyers. In Tunisia, the marginalization of courts and judges after 2011 did not mean the marginalization of lawyers.

Ziadeh's 1968 description of the "total eclipse" of law in Egyptian politics after the 1952 coup seems premature if we focus on courts and judges as representatives of the law<sup>107</sup>. The 1971 constitution would grant courts a power of constitutional review that they had never enjoyed before. The Judges' Club, the most powerful professional organization representing the Egyptian judiciary, continued to operate throughout the Nasser era. On the other hand, Ziadeh's pessimism about the future of Egyptian lawyers seems justified. Brown notes a rapid increase in the number of lawyers as the barriers to entering the profession were lowered during Sadat's presidency. From being a cosmopolitan elite before the Free Officers' coup, lawyers became one of the least prestigious professions. Law schools had among the lowest admission standards of any academic department. The political complexion of the profession changed as middle class Islamists joined the profession. By the 1990's, the Lawyers' Syndicate was known for its pro-Brotherhood sympathies<sup>108</sup>.

Tunisian lawyers saw a similar decline in status. Ben Ali's reforms lowered the barriers to entry to the legal profession by requiring only an undergraduate degree to practice law and founding a new school of law separate from existing universities. In an interview, Samir Annabi argued that these changes "flooded [the profession] with 3,000 new lawyers"<sup>109</sup>. As a result, the number of lawyers increased, and the average standard of living of lawyers decreased. In contrast, the salaries of judges increased during the same period, making them among the highest paid officials. On the other hand, lawyers retained greater autonomy from the regime than judges. The leaders of the lawyers' professional organization, the *Ordre Nationale des Avocats*

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<sup>107</sup> Ziadeh (1968), pg. 1

<sup>108</sup> Shalakany (2013), Brown (2006)

<sup>109</sup> Interview with Samir Annabi

Tunisiens (ONAT), were elected by members of the organization throughout the Ben Ali period, despite occasional interference by the regime. According to Annabi, these elections made the ONAT “an outpost of democratic practices”<sup>110</sup>. As a result their professional organization retained greater credibility than the judicial syndicate. The Tunisian professional organizations for the ordinary judiciary - the Syndicat des Magistrats Tunisiens (SMT) and the Association des Magistrats Tunisiens (AMT) - lack the long institutional history and political influence of the Egyptian Judges’ Club. Even after the 2011 revolution, the influence of the judicial syndicates has been limited. The SMT and AMT did organize judicial strikes to pressure the transitional government, but they never won an official role comparable to the ONAT’s membership in Quartet.<sup>111</sup>

The role of lawyers and the ONAT following the 2011 revolution reveal the enduring importance of law and lawyers in Tunisian politics, despite years of cooptation by the regime. The ONAT formed one of the four members of the National Dialogue Quartet, which brokered the deal leading to the resignation of the Troika government and the adoption of the 2014 constitution. The leadership of the Ligue Tunisienne des Droits de l’Homme (LTDH), another member of the Quartet, also includes many lawyers<sup>112</sup>. Even as courts and judges were sidelined during the transition, lawyers and their professional organizations became more prominent. This pattern contradicts the claim that law was not important in the Tunisian transition and that Tunisia lacked a legalized political culture.

## Conclusion

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<sup>110</sup> Interview with Samir Annabi, Gobe (2013)

<sup>111</sup> “Tunisie: Les représentants des magistrats appellent à une grève le jeudi 7 novembre.” *Huffpost Maghreb*, 6 November 2013. [http://www.huffpostmaghreb.com/2013/11/06/tunisie-magistrats-greve\\_n\\_4226430.html](http://www.huffpostmaghreb.com/2013/11/06/tunisie-magistrats-greve_n_4226430.html)

<sup>112</sup> “La Ligue Tunisienne des Droits de l’Homme,” <http://www.ltdh.tn/>

This chapter has rejected several categories of explanations that rely on a divergence between Tunisia and Egypt early in their histories, some time between the beginning of modern state building in the nineteenth century and the beginning of the reform era in the 1970's and 80's. Such explanations might include a focus on early state development, indirect colonialism, or the nature of the post-independence regime to explain the different status of courts in the two countries after 2011. An important implication of these explanations is that law in general would be more important in Egypt than in Tunisia in the decades before 2011. An examination of the legal professions in both countries shows that this is not the case.

How then are the different aspects of the Tunisian and Egyptian transitional regimes connected? Each of the other hypotheses offers a different answer to this question, but they agree that the divergence is located in recent history. Each of the other three hypotheses implies a divergence between Tunisia and Egypt sometime after the beginning of reforms in the 1970's. The countermajoritarian hypotheses focuses on politics during and after the 2011 revolutions, but it also builds on an interpretation of the SCC as a countermajoritarian institution during the Sadat and Mubarak regimes. The civil society hypothesis looks at the forms of legal activism that resulted from the establishment of the SCC in Egypt as opposed to the Tunisian system that lacked constitutional review. The judicial role hypothesis also considers the establishment of the SCC (and the Tunisian Administrative Tribunal) to be a turning point. These institutions defined relations between the judiciary and the regime and ultimately the judges' conception of the judicial role as well. The following chapters examine each of these explanations in turn.



## CHAPTER 2: COUNTERMAJORITARIANISM AND JUDICIAL POWER

### Introduction: Majoritarian and Counter-majoritarian Interests

When I asked Habib Koubaa, former Secretary General of the Constitutional Council, why the Ben Achour Commission created the Assembly and dissolved the Constitutional Council, he said, “the revolution created a political void...the parties took advantage of this situation to concentrate power in their own hands”<sup>113</sup>. Behind this polemic is a majoritarian explanation of the creation of the Assembly and the dissolution of the Constitutional Council. The groups that dominated the Commission knew that they would dominate the Assembly as well, so they gave the Assembly as much power as possible and dissolved other institutions, such as the Constitutional Council and the elected presidency that might have checked the Assembly. For the Egyptian opposition, the judiciary and the military represent two sides of a single deep state, especially after the SCC’s endorsement of the Sisi regime. As Ahmed Eid, an Egyptian lawyer with anti-military views, put it, “Egyptian courts can only be understood as agents of the regime.”<sup>114</sup> According to this argument, the Egyptian courts have extensive powers because the military empowered them. The military empowered the courts because the courts can be counted on to rule against the opposition.

These explanations presented by Koubaa and Eid are examples of the counter-majoritarian hypothesis, which states that the formal powers of the high courts of Tunisia and Egypt are the

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<sup>113</sup> Interview with Habib Koubaa, November 12, 2014.

<sup>114</sup> Interview with Ahmed Eid

result of the political interests of the SCAF and the Ben Achour Commission, the bodies charged with drafting the transitional documents in 2011, for or against majority rule. Subsequent amendments to the formal powers of the courts by the Assembly in Tunisia, or the SCAF and the Mursi government in Egypt are also the result of these actors' majoritarian or counter-majoritarian interests<sup>115</sup>.

This explanation has two implications. First, if the empowerment of courts is the result of the counter-majoritarian interests of the drafters of the transitional documents, the other state institutions described in these documents should also be designed to restrain the majority. I assess this implication through an examination of the provisions of the transitional documents in both countries and their operation from 2011 to 2014. Second, parties that are part of a majority coalition should oppose constitutional review and minority parties should support it. I assess this implication based on the actions taken by Tunisian and Egyptian political parties on issues related to judicial power during the course of the transition and by interviews with Tunisian political parties and judges.

I conclude that the interests of the drafting bodies did play a major role in the design of the transitional institutions, but their interests are not simply majoritarian or counter-majoritarian. Rather the interests of the drafting bodies are defined by their ability to intervene in later politics, which is limited by the drafting bodies' sources of legitimacy and the status of the judiciary in Tunisia and Egypt. This reflected in the design of the transitional institutions, which contain majoritarian and counter majoritarian elements in each country. The options open to the drafting

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<sup>115</sup> This explanation draws on a large body of literature that sees constitutional review as primarily a means of limiting a majority rule. Ginsburg describes constitutional review as an insurance policy that parties use to protect themselves from future periods of rule by a rival party. Ginsburg argues that parties that expect to lose power in the future will empower constitutional courts. Hirschl argues that a broader social and economic elite empowers courts to enforce fundamental rights, especially property rights, against the majority. This literature is informed by the earlier histories of American and European democracies. Federalist No. 78 argues that the inclusion of a judicial branch charged with constitutional review in the US Constitution restrains the excesses of majority rule. Ginsburg (2003), Bickel (1959), Elster in Smith (1995), Hirschl (2004), Ackerman (1994), Rossiter (1961).

bodies and political parties charged with granting formal powers to the courts were limited by characteristics of the judiciary and the judicial role in each country. This is reflected in the consensus among different political parties within each country about the proper role of courts.

#### Implication 1: The Transitional Documents

If the empowerment of courts is the result of the countermajoritarian interests of the drafters of the transitional documents, the other state institutions described in these documents should also be designed to restrain the majority. As Ginsburg notes, there are many mechanisms other than constitutional review by courts that can limit the power of an electoral majority<sup>116</sup>. Ginsburg lists bicameralism, proportional representation, and strict requirements for constitutional amendment. Separate legislative and executive branches and government accountability to the legislature could be added to this list. Constitutional amendment is not applicable in the transitional context, but the relationship between the constituent power and the other branches is of critical importance. If the designers of a transitional regime are primarily concerned with limiting the power of the majority, there is no reason that they would not adopt these other strategies as well. More generally, the transitional institutions as a system, and not simply the courts, should be designed to constrain the majority.

I examine the provisions of the Tunisian and Egyptian transitional documents in the categories of state institutions, electoral rules and the role of courts to see if these different areas reflect a logic of majoritarianism and counter-majoritarianism respectively<sup>117</sup>. I conclude that

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<sup>116</sup> Ginsburg (2003) pg. 25

<sup>117</sup> These documents include first and foremost the SCAF's February 13, 2011 Constitutional Proclamation and the Ben Achour Commission's March 23, 2011 Decree on the Provisional Organization of Public Powers, which created the basic outline of both countries' transitional institutions. The SCAF also proposed amendments to the 1971 Constitution, which formed the basis of the March 30, 2011 Constitutional Declaration. On June 18, 2012, the SCAF issued amendments to the Constitutional Proclamation. At nearly the same time the SCAF also reformed the internal procedures of the SCC through a decree law in the summer of 2012. The Ben Achour Commission

the transitional documents in both cases contain a mixture of majoritarian and counter-majoritarian elements. I then examine the activity of the transitional institutions after they were created. I conclude that the design of the transitional institutions is better explained by certain characteristics of the bodies charged with drafting these documents, the Ben Achour Commission in Tunisia and the SCAF in Egypt, and by certain characteristics of the judiciary in each country. The SCAF designed the transitional institutions to allow future interventions by the military and the judiciary. The Ben Achour Commission recognised that it could not intervene in future politics, with or without the assistance of the judiciary, and so designed a system that concentrated power in an elected Assembly but also ensured that no single party could dominate the Assembly. The results are summarized in this table:

Table 2: Design of the Transitional Institutions

	Egypt	Tunisia
State Institutions	separate branches	Constituent Assembly (majoritarian)
Electoral Rules	complicated - first past the post, presidential appointments, staggered elections (results are majoritarian)	PR (countermajoritarian)
Role of Courts	constitutional review (countermajoritarian)	no constitutional review (majoritarian)

The SCAF represented the Egyptian military, which had long played a central role in Egyptian politics. The members of the SCAF knew that the military would still be able to intervene in the political arena in the future, even if the SCAF or its individual members were

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dissolved itself soon after issuing the March 2011 Decree. Interim constitutional issues were again addressed by the National Assembly in the December 2011 Provisional Organic Law, which confirmed the basic features of the Commission's Decree, including the abolition of the Constitutional Council.

"Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011.

<http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

"Decree--law n° 2011-14 dated 23 March 2011, relating to the provisional organization of the public authorities," *World Intellectual Property Organization*, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=245403](http://www.wipo.int/wipolex/en/text.jsp?file_id=245403)

removed. The existence of the SCC, its high degree of popular legitimacy, and Egypt's long tradition of an activist judiciary gave the SCAF a means of intervening in politics without launching a coup or governing the country directly. The Ben Achour Commission in contrast was a temporary gathering of political and civil society figures that drew its legitimacy from Tunisia's constitutional crisis following the 2011 revolution. Although many members of the Commission have continued to influence Tunisia politics, the Commission itself could not last beyond the immediate post-revolution period. In theory, the judiciary could provide a means of entrenching the Commission's decisions even after it had disbanded. However, the Tunisian judiciary was unsuited to such an active role in politics. As a result, the Commission had no means to entrench its decisions against future actions by the Assembly, even if it had wanted to do so.

This conclusion has important implications for the larger study because it suggests that the formal powers of courts were not determined by the majoritarian or counter-majoritarian interests of the drafting bodies. Rather, the SCAF and the Ben Achour Commission each inherited a judicial system that lent itself to a different role in transitional politics. The drafting bodies were limited in the powers that they could assign to the courts.

### Checks and Balances among State Institutions

State institutions are bodies that derive their authority directly from a constitution. They are analogous to the branches of government in the US Constitution. The main decision is whether to concentrate power in a single state institution, like the British parliament, or disperse it among several, like the three branches of US Constitution.

The SCAF's February 2011 Constitutional Proclamation created an elected presidency, a bicameral legislature consisting of the Shura Council and the House of Representatives, and a

Constitutional Assembly to be elected by the House of Representatives and charged solely with drafting a new constitution<sup>118</sup>. The Decree also allowed the Supreme Constitutional Court to continue exercising constitutional review during the transition. The existence of these separate branches of government created multiple checks and balances. Moreover, each branch was elected according to a different procedure. As a result, the odds of a single party winning a majority through each of these procedures were reduced.

The SCAF also granted itself extensive powers in the transitional Decree and subsequent amendments, effectively making itself another constitutional institution. According to the Decree, the SCAF would exercise full legislative and executive powers until the parliament and president could be elected. Even after the elections, the SCAF would still have important powers related to military affairs. The June 2012 amendments to the Constitutional Declaration extended the SCAF's legislative powers after the elections<sup>119</sup>.

The design of Egypt's transitional state institutions is clearly countermajoritarian, but the major role of the SCAF raises questions about how this system would operate. If the SCAF could veto actions itself, why create other countermajoritarian features? The SCAF may have thought of these powers as a last resort to be used only in extraordinary circumstances. The SCAF may have considered the use of its powers to be politically costly, so it would be preferable to create a system in which its veto would be used only rarely.

In terms of state institutions, the design of the Tunisian Assembly is highly centralized, or centripetal, to use Gerring and Thacker's phrase<sup>120</sup>. Gerring and Thacker list numerous

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<sup>118</sup> "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011.  
<http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>119</sup> "English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012.  
<http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

<sup>120</sup> Gerring and Thacker (2008). Gerring, Thacker and Moreno (2005).

characteristics of centripetal government, some of which fall into the category of institutional choice open to decision by the Ben Achour Commission, such as electoral system, and others into secondary effects of these choices, such as party system. Of the issues that were open to decision, the Ben Achour Commission always selected the centripetal option. It chose a unicameral legislature, an executive accountable to the legislature, party list PR electoral system, an ambiguous constitutional framework, few elective offices, congruent election cycles, no referenda, and a restrained judiciary. With the exception of the party list PR electoral system, these features defined by Gerring and Thacker as centripetal overlap with the features defined by Ginsburg and Elster as majoritarian<sup>121</sup>. A majority in the Assembly could pass laws, appoint the president, and draft the constitution without any formal check. It could alter its own procedures and the procedures for ratifying the new constitution. It could extend its own mandate without new elections, as it did on October 23, 2012.

The Ben Achour Commission did create an independent elections committee, the ISIE, and it gave responsibility for resolving electoral disputes to the Administrative Tribunal. However, once the Assembly was elected, it could change the organic laws governing the ISIE and the Administrative Tribunal. As Stepan writes the Commission made only “decisions that were *indispensable* (emphasis in original) to the creation of a democratic government”<sup>122</sup>. The ISIE and the Administrative Tribunal’s power to decide electoral disputes were intended to allow an orderly election of the Assembly, not to limit its power once it had been elected. The Ben Achour Commission’s decree expired after the election of the Assembly, which was free to change the provisions governing the ISIE and the Administrative Tribunal.

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<sup>121</sup> Ginsburg (2003), Elster in Smith (1995)

<sup>122</sup> Stepan (2012)

## Electoral Rules

The most well-known types of electoral rules are first-past-the-post, which has majoritarian implications, and proportional representation (PR), which has countermajoritarian implications. Staggered elections and different electoral rules for different offices can have countermajoritarian effects.

The rules for the election of Egypt's House of Representatives and Shura Council included a mixture of PR seats and single member districts, as well as additional rules and requirements for some seats. Egypt's use of different electoral rules for the two houses of parliament, the Constituent Assembly and the presidency can be seen as a part of a countermajoritarian strategy because these different rules could cause the different branches to be controlled by different parties. Unusual aspects of Egypt's electoral laws, such as the rules reserving seats in the parliament for independents or for workers and peasants, could also be seen as limitations on the ability of any one party to win a majority. However, the actual effect of these rules in the 2011-2012 elections proved to be highly countermajoritarian.

The House of Representatives was elected in three phases from November 2011 to January 2012. Two-thirds of the seats were elected by proportional representation by party lists and one third by plurality voting in single member districts. Initially, only independents were allowed to run for the single member district seats. However, the SCAF abolished this rule. In the House of Representatives, the FJP-led Democratic Alliance for Egypt received 37.5% of the votes, but 235 out of 498 elected seats (47.2%). The Democratic Alliance won 108 out 166 (65%) of the single member district seats. The Democratic Alliance and FJP benefited



enormously from the existence of the single member districts and from the SCAF's abolition of the independents-only rule<sup>123</sup>.

The Shura Council was elected in two phases in March 2012, according to a complicated set of rules that assigned 120 seats to proportional representation, 60 to majority voting in single member districts, and 90 additional seats to presidential appointment. In the Shura Council, the FJP received 45.04% of the votes, but 105 out of 180 elected seats (58.33%). Furthermore, 90 additional seats were to be appointed by the president. Given Mursi's election earlier that year, FJP control of the Shura Council was nearly inevitable<sup>124</sup>.

The electoral rules designed by the SCAF also allowed Mursi to win the presidency. Mursi won 25% of the vote in the first round, the highest share of any candidate, and 51% in the run-off against Shafik. A different method of electing the president, such as a national first past the post election without a run-off, may not have led to a different result, but Mursi's victory reveals the majoritarian side of presidential systems. As Linz points out, presidential systems can be particularly damaging to minorities. The presidency cannot be divided, so even a small majority wins total control of the executive<sup>125</sup>. Aspects of the Egyptian system of presidentialism, such as the president's role in appointing members of the Shura Council, magnified these problems. The presidential system meant that Mursi could concentrate power in his hands and that he could not be removed by the legislature. Under Mubarak, Egypt did not have a strong legislative branch or strong political parties. Even if the presidency and the legislature were controlled by different parties, Egypt's history suggests that the legislature would not be able to provide a meaningful check on the president.

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<sup>123</sup> "Egyptian Elections: Preliminary Results," [www.jadaliyya.com](http://www.jadaliyya.com)  
[http://www.jadaliyya.com/pages/index/3331/egyptian-elections\\_preliminary-results\\_updated-](http://www.jadaliyya.com/pages/index/3331/egyptian-elections_preliminary-results_updated-)

<sup>124</sup> Supreme Committee for Elections, <https://www.elections.eg/>  
[http://en.wikipedia.org/wiki/Egyptian\\_Shura\\_Council\\_election,\\_2012#cite\\_note-official-election-website-1](http://en.wikipedia.org/wiki/Egyptian_Shura_Council_election,_2012#cite_note-official-election-website-1)

<sup>125</sup> Linz (1990)

The operation of Egypt's electoral rules in 2011-2012 poses a problem for the countermajoritarian explanation. At least in hindsight, it is clear that the Egyptian electoral rules can only restrain a majority in the legislature if the president is not also of the same party. Many of these rules were inherited from the Mubarak period when there were semi-free elections for the legislature but no real elections for the presidency. It is possible that the SCAF simply neglected to adjust these rules to a system of free presidential elections. It is also possible that they accepted the Muslim Brotherhood's promise not to field a presidential candidate and assumed that the new president would be pro-military. However, neither of these explanations is very compelling. The electoral rules were subject to intense debate in 2011. The SCAF had unchecked legislative power to change these rules. The SCAF did make some changes to the electoral laws, such as removing the independents only rule for one third of the seats in the House of Representatives, which was a major demand of the Muslim Brotherhood. At the very least, the electoral rules suggest that the transitional institutions are not solely the result of a master plan devised by the SCAF.

In Tunisia, the electoral rules complicate the picture of the majoritarian Assembly system. Stepan writes that the electoral rules adopted by the Ben Achour Commission were "correctly understood to have crucial antimajoritarian, democracy-facilitating, and coalition-encouraging implications. Had a Westminster-style 'first-past-the-post' system of plurality elections in single member districts been chosen, Ennahda would have won almost nine out of every ten seats, instead of the slightly more than four in ten it was able to win under PR"<sup>126</sup>. The Ben Achour created a system in which a majority in the Assembly held nearly unlimited powers, but it also made it as hard as possible for any one party to gain such a majority. Establishing

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<sup>126</sup> Stepan (2012)

these electoral rules was one of the main decisions of the Commission. These rules mark a break from the electoral system of the Ben Ali era.

The contradiction between majoritarian state institutions and countermajoritarian electoral rules can be explained by a more nuanced understanding of the interests of the members of the Commission. Between revolutionaries and remnants, the Commission would side with the revolutionaries. Among revolutionaries, the Commission would side with the small secular parties against Ennahda. However, any electoral system that empowered these small secular revolutionary parties would also open the door to the numerous parties representing former members of Ben Ali's RCD party that appeared from 2011 to 2013.

Once one accepts a disconnect between the interests of the Commission and the interests of the main parties in the Assembly, the lack of restraints on the Assembly is puzzling. If the Commission's goal was to ensure that Ennahda could not govern alone, why did it not add restraints on the Assembly? After all, Ennahda was able to form a coalition government that gave it a degree of control over the government and the constitution drafting process. Moreover, the outcome of founding elections is often very uncertain. In the Tunisian case, the secular parties and former RCD supporters were known to be in disarray after the revolution. The Commission had no way of knowing that Ennahda could not attain a simple majority in the Assembly. This situation would seem to necessitate additional rules, such as requiring a two thirds majority for approval of the constitution, or creating a bicameral legislature, that might contain a majority in the Assembly. At the very least, a narrow set of procedural rules for the Assembly enforced by the Administrative Tribunal should have seemed attractive to the Commission, and might have made the Assembly system less alarming to its opponents.

The Role of Courts

The main theoretical issue facing the transitional regimes was whether a constitutional document, either an old constitution or a provisional constitutional document, would remain in force during the transition. The following question was whether a court could use such a document to review actions by other state institutions. However, the scope of options open to both the Ben Achour Commission and the SCAF was much broader than the choice of maintaining or abolishing judicial review. If a court is to be an effective countermajoritarian institution it must be able to act independently of the other branches. The terms of its members must be long, and the procedures of the court must be protected from interference. Especially in a system of concrete constitutional review like Egypt's, the constitutional court can only be effective if the lower courts are able to refer cases to it without interference. The Ben Achour Commission and the Assembly made few changes on these points. The SCAF's March Decree simply confirmed the organization of the SCC, but a later Decree greatly increased the SCC's autonomy from the presidency.

A focus on the formal powers of high courts, especially constitutional review, suggests a highly majoritarian impulse behind the Commission's Decree. Even if the dissolution of the Constitutional Council could be explained by other factors, the Commission did not try to replace the Council with some other means of judicial review. Several options for judicial review of the Assembly remained open. That the Ben Achour Commission did not pursue any of these options supports the majoritarian explanation. The inclusion of the Administrative Tribunal in the Commission's Decree, like the creation of the ISIE, can be seen as indispensable for the operation of the election of the Assembly.

Despite the absence of any form of constitutional review, Tunisian courts, especially the Tribunal, were still able to check actions of the government in some cases. The Tribunal can,

and did, rule that actions taken by the government were contrary to the law. As of 2015, internal reform of the Tribunal and the ordinary courts has still not been carried out<sup>127</sup>. They still operate with the personnel and regulations of the Ben Ali period. If the Commission had truly wanted to remove every restraint from the Assembly, it could have pushed through reforms of the Tribunal and the ordinary courts. In this light, the Tunisian courts still had a countermajoritarian role even though they could not overturn legislation. The Commission did not seek to empower the Assembly and disempower the courts across the board, rather it marked a limit for judicial activity by placing constitutional questions beyond the jurisdiction of the courts.

The SCAF's Proclamation gave the SCC the same powers it had before the revolution, as well as an additional power of a priori review of electoral laws. Even this confirmation of the SCC's powers had important countermajoritarian implications. As Ginsburg argues, constitutional review by a court is among the most effective countermajoritarian strategies. Judges are usually not elected, so they are insulated from popular opinion. Judges serve long terms, so they are an effective means of entrenchment. The empowerment of the SCC in the SCAF's decree could be seen as a desire for continuity with the pre-revolutionary system, the need to decide possible disputes between the separate legislative, executive and constituent institutions, or as a check on legislative and executive actions. All of these interpretations are compatible with the countermajoritarian explanation, although the last interpretation is the most direct.

In summer 2011, the SCAF issued a decree law giving the SCC the power to appoint its own justices<sup>128</sup>. Brown notes that total autonomy of judges to choose their own replacements is

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<sup>127</sup> Mersch, Sara. "Judicial Reforms in Tunisia," Carnegie Endowment for International Peace, April 10, 2015. <http://carnegieendowment.org/sada/2015/04/10/judicial-reforms-in-tunisia/i690>

<sup>128</sup> Brown, Nathan J. "Egypt: A Constitutional Court in an un-Constitutional Setting," 23 October 2013. [http://www.constitutionnet.org/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting\\_0.pdf](http://www.constitutionnet.org/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting_0.pdf)

nearly unique among high courts anywhere in the world. At least in theory, these reforms insulated the SCC from any changes to its composition by future governments. These measures ended presidential control over SCC appointments, perhaps in anticipation of the election of an Islamist president.

The SCAF's next amendment to the SCC's formal powers came in June 2012, immediately before the election of Mursi to the presidency. The SCAF's June 18 amendment to the Constitutional Declaration granted itself continued legislative powers even after the election of a president and asserted the autonomy of the military. The amendment also added a procedure for the SCC to veto provisions of the draft constitution found to be in contradiction to the 'goals of the revolution' or 'any principle agreed upon in all of Egypt's previous constitutions'.<sup>129</sup> The SCAF added these powers when it became clear that the Muslim Brotherhood would be able to dominate the constitution drafting process.

The SCAF's reform of the SCC's formal powers can be seen as a direct response to the threat of Muslim Brotherhood control of executive, legislative and constituent bodies. Such an interpretation would be consistent with the countermajoritarian hypothesis. The SCAF ensured that the SCC would be able to block legislative and executive actions, that it would be able to retain its institutional autonomy against the Mursi presidency, and finally that it could veto provisions of the draft constitution.

This interpretation makes sense based on the content of the transitional documents, but it has difficulty accounting for the activity of the SCC during the transition, which has largely been based on the supervision of elections, not constitutional review of legislation or executive acts.

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<sup>129</sup> Brown (2013)  
"English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012.  
<http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

The ability to decide on the legitimacy of elections, whether through a priori review of electoral laws or adjudication of electoral disputes, gave the SCC much more than simply a power to check actions by the other branches. When the transitional institutions went into action, the full potential of this power became apparent.

### The SCC in the Transition

The examination of the transitional documents leaves some unresolved questions. Why did both the SCAF and the Ben Achour Commission create electoral rules that are at odds with their supposed countermajoritarian or majoritarian interests? The countermajoritarian explanation implies that these institutions would act to counter the largest party. In Egypt, seemingly countermajoritarian institutions such as the bicameral legislature and the separate Constitutional Assembly failed to provide any check on the presidency. The courts at least did act against the Muslim Brotherhood, but how they did so is not consistent with the countermajoritarian explanation.

In both cases, the transitional institutions are a mixture of majoritarian and counter-majoritarian elements. In Egypt, the elaborate checks and balances provided by the separate legislative, constituent and executive branches quickly crumbled. Partly this is due to the majority commanded by the Muslim Brotherhood in every other branch of government. Over the course of 2012, Mursi's plurality in the first round of the presidential elections turned into a near monopoly of state power. The judicial decisions dissolving the House of Representatives and the Constituent Assembly provide further evidence of the weakness of these institutions<sup>130</sup>.

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<sup>130</sup> David Kirkpatrick, "Blow to Transition as Court Dissolves Parliament," *New York Times*, 14 June, 2012. <http://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html?module=ArrowsNav&contentCollection=Middle%20East&action=keypress&region=FixedLeft&pgtype=article>

Neither institution was able to defend itself against dissolution. However, these bodies were not the focus of opposition to the judiciary and the military. Of the elected branches, only the presidency commanded any real power or popular support by the end of 2012. In hindsight, the weakness of these institutions is apparent even in the provisions of the SCAF's decree. The decree did little to address the concentration of power in the executive that had long characterized Egyptian politics. If the SCAF had genuinely intended the parliament and the Constituent Assembly to check the presidency, it would have granted them additional powers.

The operation of Egypt's transitional institutions from 2011 to 2013 also reveals the central role played by the courts. Partly this is because the FJP's electoral success allowed Islamists to control every branch of government apart from the judiciary. However, the role played by the courts in Egypt is not quite in line with the predictions of the countermajoritarian explanation. According to this explanation, the SCAF empowered the judiciary to deal with precisely the situation that Egypt faced after the elections, that is a legislative and executive controlled by the Muslim Brotherhood. Yet the most important actions by the SCC during this period were not vetoes of legislation or executive actions. Instead, decisions by the SCC and the administrative courts reorganized the structure of the transitional institutions. With the dissolution of the House of Representatives, the contest between Mursi and the courts took on an extra-constitutional character. At first, the SCC's powers did not extend to a veto over the content of the new constitution, as was the case in the South African transition or in India's basic structure doctrine<sup>131</sup>. The SCAF added this power through an additional constitutional decree, after it became clear that the Muslim Brotherhood would be able to dominate the constitution

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<sup>131</sup> Mohamed Abdelal, "Constitutionality of Constitutional Acts in Egypt," 9 October 2014. <http://jurist.org/forum/2014/10/mohamed-abdelaal-egyptian-court.php>



drafting process<sup>132</sup>. Another area of the SCC's activity centered around the status of the SCAF in Egypt's constitutional framework<sup>133</sup>.

The SCC was involved in deciding Egypt's constitution both formally through its power of review over the draft constitution and informally through its decisions dissolving state institutions or dramatically changing their powers. This constituent role of the SCC can help explain some of the puzzling features of the Egyptian transitional regime. The SCC's activity is the result of an attempt to find a workable balance between the different state institutions. The goal was not simply to limit the power of the Muslim Brotherhood. The SCC's reworking of the transitional institutions must play out over several years. It must test different institutional arrangements. The Tunisian model of a unicameral parliament would probably have restrained the Muslim Brotherhood more effectively than Egypt's complicated electoral rules and presidential system. During the first phase of the transition before the election of Mursi to the presidency, it seems that the military tried to use elections to recreate the basic features of the pre-2011 system, including a weak parliament, and a strong, pro-military presidency. Direct rule by the SCAF during a quick transition also created problems because popular mobilization was likely to continue for sometime after the 2011 revolution. The SCAF knew that it could not conclude the revolution itself by simply drafting a new constitution.

### **The Transitional Constituent Power and the Political Role of the Judiciary**

The examination of the SCAF's Decree and the Ben Achour Commission's March 23 Decree undermines the argument that the drafting bodies were motivated primarily by

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<sup>132</sup> Brown (2013)

"English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012.  
<http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

<sup>133</sup> Brown (2013)

majoritarian or counter-majoritarian interests. The actual operation of the transitional institutions from 2011 to 2013 casts further doubt on this argument. Still, there is clearly a different, even opposing, logic behind the transitional institutions of the two countries. The SCAF designed the transitional institutions to allow future interventions by the military and the judiciary. The Ben Achour Commission recognised that it could not intervene in future politics, with or without the assistance of the judiciary, and so designed a system that made the Assembly resistant to interference by other actors. Despite the ideological differences between the Commission and the Assembly, the members of the Commission saw the Assembly as the only means of implementing their vision for the transition.

The design of the transitional institutions is still the result of the interests of the drafting bodies, but their interests cannot be described as simply majoritarian or countermajoritarian. The design of the transitional institutions is better explained by the perceived level of durability of the bodies charged with drafting these documents, the Ben Achour Commission in Tunisia and the SCAF in Egypt, and by the ability of the judiciary in each country to enforce the transitional documents on elected institutions. A body that is perceived to be durable or institutionalized, such as the SCAF, is expected to survive long enough to intervene in future political decisions.

The SCAF represented the Egyptian military, which had long played a central role in Egyptian politics. The members of the SCAF knew that the military would still be able to intervene in the political arena in the future, even if the SCAF or its individual members were removed. The existence of the SCC, its high degree of popular legitimacy, and Egypt's long tradition of an activist judiciary gave the SCAF a means of intervening in politics without launching a coup or governing the country directly.

The Ben Achour Commission in contrast was a temporary gathering of political and civil society figures that drew its legitimacy from Tunisia's constitutional crisis following the 2011 revolution. Although many members of the Commission have continued to influence Tunisian politics, the Commission itself could not last beyond the immediate post-revolution period. In theory, the judiciary could provide a means of entrenching the Commission's decisions even after it had disbanded. However, by rejecting constitutional review, the Commission also rejected such a role for the judiciary. Tunisian judiciary was unsuited to such an active role in politics. As a result, the Commission had no means to entrench its decisions against future actions by the Assembly, even if it had wanted to do so. In order for the Commission's strategy of fortifying the Assembly to be effective, the Commission must assume that courts are not an attractive means of entrenching its wishes. In order for the SCAF's strategy of intervening in the transition to be effective, the SCAF must assume that the courts can enforce decisions on other actors without direct intervention by the military. Why so many actors have such different perceptions of the ability of courts in the two countries is not clear. Yet this perception is as essential to events as the different interests of the SCAF and the Commission. The actions of the SCAF and the Ben Achour Commission do not make sense otherwise. The SCAF would have had no choice but to rule directly after 2011, and especially after the election of Mursi in 2012. The Ben Achour Commission could have continued to influence the transition through the courts, perhaps making the Assembly system unnecessary.

#### The SCAF and the Political Use of the Judiciary

It is clear that the Egyptian military is highly institutionalized, and that the members of the SCAF acted primarily as representatives of the military establishment. It is harder to say whether the SCAF designed the transitional institutions to facilitate military intervention in

politics, or whether they hoped that the countermajoritarian features of the transitional documents would make military intervention unnecessary.

To answer this question, it is necessary to define the military's role in Egyptian politics more precisely. There are many kinds of military regimes and many patterns of civil-military relations. I outline three ideal types based on the examples of Chile (1990-present), Turkey (1960-2002) and Egypt (1952-2011). The SCAF could have envisioned a situation like the transition engineered by Pinochet, where the military gave up power without any expectation of a future coup, but also left a constitutional legacy that maintained the autonomy of the military and weakened the left-wing opposition. In Turkey, the military both rewrote the constitution and intervened regularly in later politics. Yet the military establishment also coexisted with both pro-military and anti-military elected governments. In Egypt before 2011, the president was always a former military officer and was never subject to any real electoral challenge. The military was capable of direct intervention in politics, but it never did so between the Free Officers' Coup and 2011 because the government was always pro-military<sup>134</sup>.

Each of these types implies a different role for a constitutional court. In the Chilean scenario, the constitutional court becomes a truly independent actor in the democratic system that enforces a constitution created by the military. The military cannot influence the actions of the court except through the constitution that it drafted before the transition to democracy. Rulings by the court on matters of interest to the military carry no more weight than rulings on other areas, and are not more likely to be obeyed by other actors. The countermajoritarian explanation of the transitional documents implies that the SCAF expected a Chilean-style transition, that is a

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<sup>134</sup> Barros (2002), Hilbink (2007) on Chile, Cook (2007) on Turkey and Egypt, Loveman (1993) on Latin America, including Chile. Thailand and Pakistan are also prominent examples of this second type. Newberg (1995)

situation in which the military uses law to influence politics even after its capacity to launch a coup has waned.

In the Turkish scenario, the constitutional court coexists with a politicized military, which may institutionalize its role in politics through bodies like the Turkish National Security Council or the Egyptian SCAF. The court may enforce a constitution drafted by the military, but it can also cooperate with the military in response to political developments. The military may issue amendments to the constitution or other decrees that give a basis to court decisions. The court's rulings in areas of interest to the military are more likely to be respected than rulings in other areas because the court's decision represents an implicit threat of military intervention.

Instead of believing that it had actually given up power to civilians, the SCAF envisioned the Turkish scenario of civilian rule with the possibility of military intervention. The continuing role of the SCAF in the transitional documents and the 2012 Constitution make this clear. The 2013 coup shows that military intervention remained a possibility in Egypt. Such intervention was the real veto on the elected government. At some point, the military decided that cohabitation with Mursi was impossible and that only a return to the pre-2011 system of a pro-military presidency was acceptable. The SCAF might have been able to tolerate a non-military president during ordinary times, but the context of popular revolution and constitutional hiatus made such cohabitation difficult. Over the long term, that is after the adoption of a permanent constitution, they may have expected the courts to play a more prominent role as the military withdrew from politics. In this scenario, the constitutional court should aid the military by defining the limits of acceptable behavior by the civilian leadership. It can block legislation that the military opposes. It can legitimate the military's involvement in politics.

The debate over the sequencing of elections is better interpreted in light of the SCAF's continued involvement in politics. The Muslim Brotherhood favored holding legislative and presidential elections before drafting a new constitution, presumably because the newly elected executive and legislative branches would be able to influence the constitution drafting process. The SCAF conceded this point to the Brotherhood in the 2011 Constitutional Declaration<sup>135</sup>. The staggered elections during the long transition designed by the SCAF did not produce noticeable countermajoritarian effects; the FJP won all of the elections held in 2011 and 2012. However, by drawing out the transitional process, the SCAF gave itself time to react to developments.

The empowerment of the SCC is a result of the long transition. The strengthened SCC allowed the SCAF to rework the transitional institutions after the promulgation of the original transitional Decree in 2011. The SCAF responded to Mursi's victory in the presidential election by limiting the power of the presidency and increasing the independence of the SCC. It responded to the Muslim Brotherhood's control of the Constituent Assembly by giving the SCC a veto over the draft constitution<sup>136</sup>. The SCAF's first choice was the election of a pro-military president. Once the SCAF knew that this was impossible, it shifted greater power to the SCC. Its second choice was the Turkish scenario of a civilian president limited by a constitutional court and the implicit threat of military intervention. Only when this second choice became unworkable did the military shift to its third choice, direct military rule. At each of these junctures the SCAF worked with the SCC to change the institutional rules governing the transition. The military seems to have underestimated the popularity of the FJP, and

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<sup>135</sup> "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011.  
<http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>136</sup> "English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012.  
<http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

overestimated its ability to constrain Mursi. Yet it is now obvious the military always retained its ultimate power to intervene in politics. Allowing the transition to proceed was relatively costless for the military.

The military could not have predicted that events would compel it to govern directly, the option that it had sought to avoid for decades. Moreover, a short transition under direct military rule would create difficulties for the SCAF. As in Tunisia, the immediate post-revolutionary period mobilized the population, creating opportunities for new actors and dangers for established institutions. The Ben Achour Commission benefited from this mobilization, but it threatened established institutions like the SCAF. The demonstrators could not be easily demobilized in 2011. The military needed the Tamarod movement to get the population on its side<sup>137</sup>. For these reasons, the SCAF preferred a system that would prolong the transition and allow the SCAF to intervene in politics rather than governing directly.

#### The Ben Achour Commission and the Decision to Delay the Decision

For critics like Habib Koubaa, the Commission and the Assembly represent the same group of revolutionary parties. Contrary to this position, I argue that by creating the Assembly, the Commission actually gave up a great deal of power to its ideological adversaries. The Ben Achour Commission was certainly a revolutionary body, but it also contained relatively few Islamists<sup>138</sup>. Indeed many members of the Commission, including Ben Achour himself, who had

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<sup>137</sup> "Profile: Egypt's Tamarod protest movement," *BBC*, 1 July 2013. <http://www.bbc.com/news/world-middle-east-23131953>

Basil El-Dabh, "June 30: Tamarod and its opponents," *MEI*, 26 June 2013. <http://www.mei.edu/content/june-30-tamarod-and-its-opponents>

<sup>138</sup> The Commission consisted of 155 members. Thirty-six of these were drawn from political parties, 33 from civil society, 12 from the provinces, and 74 from other categories. Ennahda had only three representatives in the Commission, the same number as the other twelve parties. Many of the representatives may have harbored pro-

resigned from the Constitutional Council in 1992, had held high positions under the Ben Ali regime. Ben Achour himself had a difficult relationship with Ennahda. Ennahda spokesman Ziad al-Doulatli stated that Ben Achour is “known for his Francophone and secular leanings and his hostility toward religion”<sup>139</sup>.

The Commission worked hand in hand with a provisional government headed by two figures from the old regime, Mohamed Ghannouchi and Beji Caid Essebsi. The provisional government faced the Kasbah protesters who occupied the Place du Gouvernement demanding the establishment of a National Constituent Assembly and the drafting of a new constitution<sup>140</sup>. The provisional government’s original plan of quickly holding presidential elections under the 1959 constitution proved untenable in the face of the demonstrations. The Ben Achour Commission was convened to find a way out of this impasse. It is possible that the adoption of the Assembly system was unavoidable given the pressure from the Kasbah demonstrators. For anyone who had suspicions of Ennahda and recognized the impossibility of maintaining the old regime, the creation of judicial review would seem to be an obvious strategy.

In fact, both the nature of the transitional constituent power and the status of the country’s courts limited the options open to the Ben Achour Commission. The Commission was appointed by the provisional government, and its decisions could only become effective through decrees issued by the government. It gained its legitimacy by representing a broad spectrum of political parties and civil society. Most importantly it operated in a brief window immediately

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Ennahda sympathies, but the heavy representation from civil society and labor would seem to limit the influence of Islamists in the Commission. In any case, the March 23 Decree was approved by a nearly unanimous vote. See “Liste des membres du Conseil de la Haute instance pour la réalisation des objectifs de la révolution.”

[http://www.tunisie.gov.tn/index.php?option=com\\_content&task=view&id=1488&Itemid=518&lang=french](http://www.tunisie.gov.tn/index.php?option=com_content&task=view&id=1488&Itemid=518&lang=french)

<sup>139</sup> “Rached Ghannouchi, Leader of Ennahda returns to Tunis after Twenty Years of Exile,” *Asharq al-Awsat* 30/01/2011,

<http://archive.aawsat.com/details.asp?section=4&issueno=11751&article=606016&feature=#.VSk3O11W-iw>

<sup>140</sup> Lauranne Provenzano, “Grande manifestation contre le gouvernement place de la Kasbah a Tunis,” *Jeune Afrique*, 25 February 2011. <http://www.jeuneafrique.com/182221/politique/grande-manifestation-contre-le-gouvernement-place-de-la-kasbah-tunis/>



after the 2011 revolution and before the entrenchment of a new government. Some members of the secular opposition hoped that the Commission might continue to sit in some capacity even after it had promulgated the Decree to provide a check on Ennahda. In fact, the Commission quickly lost relevance after March 2011, and voted to disband itself in May 2011<sup>141</sup>.

The Commission could not institutionalize itself and thus could not intervene in subsequent politics. The only way that the Commission could ensure that its wishes were carried out was by empowering some other body, most likely a court, to enforce the content of its Decree on the Assembly. That the Commission passed up this opportunity to extend its influence is puzzling. However, several factors made the Tunisian courts unsuitable for such a role. The Constitutional Council lacked popular legitimacy. It could have acted as a secular roadblock against Ennahda's ambitions. The Council was at odds with the Commission on other issues.

These factors left the Commission with few options for influencing the transition. The best option was to ensure that the Commission's creation, the Assembly would be able to survive. The fall of the Assembly would mean the end of the Commission's project. Any replacement for the Assembly would likely overturn the balance between the political factions created by the Commission's choice of electoral rules. For these reasons, the Commission favored the success of the Assembly over an alternative imposed by other actors. Statements by Ben Achour as well as the operation of the Assembly from 2011 to 2014 support this logic.

In an interview to *La Presse*, Ben Achour discussed the possibility of a referendum on the draft constitution.

this idea of using a referendum was discussed. But we immediately discarded it because of this danger. I remember saying to my colleagues, "We'll treat the Constituents like the pope. We'll

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<sup>141</sup> Khemais Frini. "Vers la dictature de l'Assemblée" *La Presse*, 5 August 2013. <http://lapresse.tn/10122014/70903/vers-la-dictature-dassemblee.html>

lock them up in the Bardo palace until they reach agreement on a draft by a two-thirds majority. At that point, they'll send out white smoke." They just have to manage to arrive at that two-thirds consensus. This condition is a guarantee the consensus will be achieved. And we did not include resort to a referendum in our provisional draft constitution. Otherwise, we run the risk of a total vacuum at the level of State institutions. Neither the National Constituent Assembly, nor the government nor the President of the Republic will have legitimacy any longer, this time either legal or political. This vacuum can be fatal. It can lead to the development of anarchy. And faced with a vacuum or anarchy, no legal armed force can remain indifferent. I'm saying this frankly: not only may it intervene, but in this hypothesis of national disaster, out of duty to the entire homeland, it is obliged to intervene in order to put an end to chaos.<sup>142</sup>

This statement reveals several key aspects of Ben Achour's thinking about the Assembly. He emphasizes the impossibility of any institutional check on the Assembly. Ben Achour was clearly alarmed by the possibility that the Assembly would ignore the two thirds rule and instead approve the draft constitution by referendum, but he also recognized that no provision of the transitional documents prevented it from doing so.

This understanding of the dangers facing the Tunisian transition led Ben Achour to favor the institutional design that would "treat the Constituents like the pope," or like cardinals to be precise. The failure of the Assembly or rejection of its constitution would create "a total vacuum at the level of State institutions." Of course, some state institutions, including the ordinary courts, would continue to operate in such a scenario. Ben Achour does not consider the courts capable of filling the vacuum. The military could fill the vacuum, and Ben Achour seems to welcome military intervention in case of the failure of the Assembly, but he also considers such intervention to be outside the bounds of any political structure. A military coup in Tunisia would have ended the transition set in motion by the Commission.

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<sup>142</sup> [https://islamwest.org/resources/Islam\\_and\\_the\\_West/Yadh-Ben-Achour-interview.pdf](https://islamwest.org/resources/Islam_and_the_West/Yadh-Ben-Achour-interview.pdf), "Nous risquons une dictature pire que celle de Ben Ali." 31 August 2012. <http://lapresse.tn/20012015/54651/nous-risquons-une-dictature-pire-que-celle-de-ben-ali.html>

In the same interview, Ben Achour applied a similar logic to the Assembly's one year mandate, saying, "I've already answered this question many times. 23 October is indeed a deadline. But we don't agree on the consequences to be drawn from that. Personally I think that after that date, the Constituent Assembly will to a great extent lose its credibility and its moral and political legitimacy. I don't really believe the debate can be situated in the legal field to draw concrete consequences at that level and conclude that the Constituent Assembly is somehow legally invalid after 23 October."

The debate over the expiration of the Assembly's one year mandate that played out from October 2012 until the resignation of the Troika II government in January 2014 reveals the utility of this system. By 2012, the Assembly had become quite unpopular. The opposition called for the dissolution of the Assembly and the appointment of a committee of experts to draft the constitution. However in the absence of any legal means of dissolving, the opposition could reach this goal only by plunging the country into the 'void' described by Ben Achour. Given this choice, compromise within the Assembly system proved more attractive to the secular opposition.

Conclusion: From Countermajoritarianism to Interventionism

The Tunisian transitional institutions are not fully majoritarian, and the Egyptian transitional institutions are not fully countermajoritarian. The interests of the Ben Achour Commission and the SCAF cannot simply be described as majoritarian or countermajoritarian. Certainly, the SCAF feared rule by the Muslim Brotherhood, but its overarching goal was to protect the core interests of the military. The Commission also tried to prevent the Islamists from gaining a majority in the Assembly. The Ben Achour Commission needed an undissolvable Assembly to complete the tasks - writing a constitution and governing the country during the transition, that the Commission itself could not do. This reinterpretation of the design of the transitional institutions and of the interests of the drafting bodies undermines the countermajoritarian hypothesis, but it does not answer the original question of why the formal powers of the SCC were so much greater than those given to any Tunisian court. Constitutional review by a court would seem to be a good way for the Commission to ensure that its wishes were carried out. The characteristics of the SCAF make it capable of intervening in politics, but

it is not clear why a partnership with the SCC was most attractive means for such intervention. The formal powers of the Tunisian court are limited even when the Commission, the body charged with granting these powers, seems to have an interest in strong constitutional review. The formal powers of the Egyptian court are strong even when the SCAF does not seem to need the courts.

In the next section, the positions of political parties and legal professionals reveal a surprising consensus in each country about the role of courts. Majority parties do favor somewhat weaker courts, and minority parties do favor somewhat stronger courts, but the range of positions is limited by underlying notions about the proper role of courts.

### **Implication 2: Views of Political Parties on the Role of Courts**

A second implication of the countermajoritarian explanation is that minority political parties will support constitutional review, while majority political parties will oppose it. I assess this implication based on interviews with Tunisian political parties and the actions taken by Tunisian and Egyptian political parties on issues related to judicial power during the course of the transition. Interviews with legal professionals help put the positions of the political parties in context. There is important variation in the positions of political parties on this question in both countries. However, interviews, public statements, and provisions of draft constitutions show that the positions of political parties are constrained by conceptions of the judicial role.

#### Tunisia

In Tunisia, political parties addressed the question of constitutional review several times during the transition - during the drafting of the transitional documents in spring 2011, the debate

over the role of the Administrative Tribunal in 2012 to 2013, the drafting of the transitional provisions of the 2014 constitution, and the design of the new Constitutional Court to be created by 2016. On all of these issues, parties show a greater degree of consensus than the majoritarian explanation implies.

#### Dissolving the Constitutional Council: 2011

There is a consensus in favor of abolishing the Constitutional Council among Tunisian political parties. All of the interviewees - Samir Taieb of al-Massar, Mohamed Bennour of Ettakatol, Fatma Bouraoui of Nidaa Tounes, and Walid ben Omrane of CPR - agree that the Constitutional Council was too close to the old regime and to Ben Ali personally and had to be dissolved after the revolution. Even parties that were opposed to the Troika (Al-Massar and Nidaa Tounes) or that included members of the dissolved RCD (Nidaa Tounes) supported the dissolution of the Council.

Only legal professionals who had previously been affiliated with the Council were willing to defend it. Hichem Hammi defended the “excellent jurisprudence” of the Council while still recognizing that the Council’s close ties to Ben Ali made its dissolution necessary after the revolution. Zouheir M’dhaffar favored a quick transition under the 1959 Constitution that would have allowed the continued operation of the Council. In the interview, Habib Koubaa proposed the review of the Assembly’s legislative and executive functions, but not its constituent function<sup>143</sup>. A somewhat different consensus exists among legal professionals. They may not condemn the Council, but they also recognize that it is incompatible with the transitional system. Constitutional review, whether by the Council, the Tribunal, or any other body, requires a basis

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<sup>143</sup> Interviews with Zouheir M’dhaffar and Habib Koubaa

in the transitional documents. All of the legal professionals insisted that courts cannot and should not claim more powers for themselves.

Provisional Review: The Tribunal and the Instance Provisoire pour le Contrôle Constitutionnel des Projets de Loi (IPCCPL)

There is also a consensus among political parties in favor of the continued operation of the Administrative Tribunal with its Ben Ali-era personnel, but some disagreement about the possibility of provisional constitutional review by the Tribunal. The Tribunal clearly has broad political legitimacy that the Council lacked. As a result, it was a more promising site for constitutional review during the transition than the Council. The party representatives and legal professionals agreed that review by the Tribunal would be more of a check on the Assembly than review by the IPCCPL. The IPCCPL consists of three members drawn from the court and legal academia and three members appointed by government officials. Koubaa argues that the IPCCPL is designed to not provide a real restraint on the Assembly. Many of its members are political appointees and non-judges, and it lacks the long institutional history of the Administrative Tribunal<sup>144</sup>. The legal professionals were opposed to the IPCCPL and critical of its activity, but they were also suspicious of constitutional review by the Tribunal. Samir Taieb attributed the failure of al-Massar's plans for constitutional review by the Tribunal to opposition by the Troika parties. However, opposition to this plan was more widespread than Taieb's argument implies. Fatma Bouraoui of Nidaa Tounes expressed support for the IPCCPL, saying that it successfully combined constitutional review with the Assembly system. The 2014

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<sup>144</sup> Interview with Habib Koubaa

Constitution, including the provisions concerning the IPCCPL, was adopted by a nearly unanimous vote in the Assembly<sup>145</sup>.

All five legal professionals expressed skepticism of constitutional review by the Tribunal. Habib Koubaa considered provisional review by the Tribunal to be marginally preferable to the IPCCPL, but also theoretically problematic because the Tribunal is designed only to review the legality of administrative acts, not the constitutionality of laws. As Koubaa puts it “every level of legality should have its own guardian”<sup>146</sup>. The Tribunal does not have the technical expertise necessary to review the constitutionality of laws. The concentration of both constitutional review and administrative law functions in the Tribunal would pose a problem to the balance of powers. Hichem Hammi, currently a magistrate of the Tribunal, also rejected constitutional review by the Tribunal, also citing the hierarchy of legality mentioned by Koubaa. After the adoption of the 2014 constitution, the Tribunal could use the constitution as a source of law in its decisions, even though it could not void a statute. During the constitutional hiatus, the Tribunal would have no basis for review of the Assembly. These concerns override the sympathy that legal professionals have for the Tribunal and their partisan affiliation with the secular opposition.

## Egypt

As in Tunisia, actors addressed the question of constitutional review several times during the transition. First, the SCAF decided to continue constitutional review under its February 2011 Proclamation. Political parties did not have a direct role in making this decision, but they could still take positions on it. The 2011-2012 elections brought the FJP to power and pushed

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<sup>145</sup> “La Nouvelle constitution tunisienne adoptée,” *Libération*, 27 January 2014.

[http://www.liberation.fr/planete/2014/01/27/la-nouvelle-constitution-tunisienne-adoptee\\_975731](http://www.liberation.fr/planete/2014/01/27/la-nouvelle-constitution-tunisienne-adoptee_975731)

Interview with Fatma Bouraoui

<sup>146</sup> Interview with Habib Koubaa. A similar objection came out in the interview with Fatma Bouraoui. Bouraoui is a professor of public law at the University of Tunis and a legal advisor to Nidaa Tounes, but she still claimed to have no expertise in constitutional questions and suggested that I ask a constitutional law scholar instead.

non-Islamists into the opposition. Once it became clear that Mursi would win the presidency, the debate over constitutional review became a contest between the Muslim Brotherhood and the SCC and SCAF. Restraints on the positions of both sides fell away over the course of 2012-2013. Both sides attempted to change the status of the courts for their own interest. Mursi's government addressed this issue on two occasions - during the drafting of the 2012 Constitution and the crisis surrounding Mursi's constitutional Decree in November and December 2012<sup>147</sup>. Mursi also removed a number of sitting judges from the ordinary courts, and the opposition often accused him of planning a judicial purge. Mursi's Constitutional Decree was the only time that the principle of constitutional review by the SCC was directly challenged. At other times, debate focused on reform of the appointment and internal procedures of the SCC and the ordinary judiciary<sup>148</sup>.

In contrast to Tunisia, constitutional review and the status of the SCC became bitterly divisive issues in Egypt. Yet the conflicts surrounding these issues mask a consensus on the role of courts that is quite different from the consensus in Tunisia. The Mursi government never sought to suspend constitutional review for any length of time comparable to Tunisia's three year constitutional hiatus. Judging from both its actions and its statements, the Muslim Brotherhood accepted the principle of constitutional review, even as it sought to make constitutional review more amenable to its political goals.

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<sup>147</sup> "English text of President Morsi's new Egypt Constitutional Declaration." *Ahram Online*, 12 August 2012. <http://english.ahram.org.eg/NewsContent/1/140/50248/Egypt/First--days/English-text-of-President-Morsis-new-Egypt-Constit.aspx>

"English Text of Morsi's Constitutional Declaration." *Ahram Online*, 22 November 2012.

<http://english.ahram.org.eg/NewsContent/1/64/58947/Egypt/Politics-/English-text-of-Morsis-Constitutional-Declaration-.aspx>

Nariman Youssef, "Egypt's Draft Constitution Translated," *Egypt Independent*, 2 December 2012.

<http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>

<sup>148</sup> Sabry, Bassem. "Eight Questions on 'Purging' Egypt's Judiciary," *Al-Monitor* April 23, 2013. <http://www.al-monitor.com/pulse/originals/2013/04/eight-questions-purging-egyptian-judiciary.html#>



## Direct Rule by the SCAF: February 2011 - June 2012

The provisions of the SCAF's Constitutional Proclamation are discussed above; here the focus is on the opposition parties' responses to the Proclamation. The Muslim Brotherhood and other opposition groups objected to many aspects of the Proclamation and the SCAF's rule, but they accepted constitutional review by the SCC. The key issues of this early phase of the transition include the drafting a new constitution and amending the 1971 Constitution, the sequencing of constitution drafting and elections, and electoral law issues. The SCAF made many concessions to the opposition on these issues. For example, it agreed to the drafting of a new constitution after elections, which was a key demand of the opposition. It rejected direct military rule during the constitution drafting process. It allowed candidates affiliated with parties to stand for the independent seats in the parliament<sup>149</sup>. It could be that the SCAF saw constitutional review as the one area on which they could not compromise. In fact, there was consensus between the SCAF and the opposition on the role of the SCC. In this early phase, the opposition was more likely to see the SCC as a check on the SCAF than as a barrier to majority rule. Direct rule by the SCAF during a constitutional hiatus, the most pro-military position, would be at odds with constitutional review by the SCC. The inclusion of the SCC in the Constitutional Proclamation can be seen as part of an overall compromise by the SCAF that allowed an elected government to guide the constitution drafting process<sup>150</sup>.

The understanding between the Muslim Brotherhood and the judiciary during the Mubarak period and the early months of the revolution seems tenuous and half-hearted in hindsight. It could be that the independence of the judiciary and the principle of constitutional

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<sup>149</sup> Moustafa (2011), "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011. <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>150</sup> Moustafa (2011)

review were red lines that the military would not allow the Mursi government to cross. The Brotherhood may have limited its actions and statements from the 2007 platform until the November 2012 Constitutional Decree to respect this red line. Certainly, these statements by the Brotherhood mask a deep suspicion of the sitting judges, all of whom were in some way products of the Mubarak regime. The calls for judicial reform by the FJP-dominated House of Representatives and Muslim Brotherhood protests against judicial corruption reflect this suspicion. However, certain aspects of the Muslim Brotherhood program, such as pushing back the power of the executive and even the gradual Islamicization of Egyptian law, are not necessarily at odds with the judiciary. Moustafa notes that the opposition, including the Muslim Brotherhood, considered the drafting of a new constitution the centerpiece of the revolution and favored the involvement of courts in the transition. Rutherford suggests a genuine adherence of the leadership of the Brotherhood to an ideology of Islamic constitutionalism<sup>151</sup>. Specifically, the Brotherhood was invested in the principle of Article 2 of the 1971 constitution, that shariah is a source of legislation, and that compatibility of laws with the shariah can be assessed by a court. The 2007 Muslim Brotherhood platform - often considered a hardline document - still calls for protecting the jurisdiction of the 'natural judge' against the exceptional military and security courts<sup>152</sup>. The ordinary and administrative judiciary would also support these protections. The platform appeared immediately after the struggle over judicial supervision of elections in 2005, when the judges and opposition groups, including the Muslim Brotherhood, were on the same side against the Mubarak regime.

Events culminating in Mursi's election in June 2012 changed the stakes of constitutional review. First, over the course of 2011-2012, the SCC took actions that convinced the

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<sup>151</sup> Moustafa (2011), Rutherford (2008)

<sup>152</sup> Brown, Nathan and Amr Hamzawy. "The Draft Party Platform of the Egyptian Muslim Brotherhood," January 2008 [http://carnegieendowment.org/files/cp89\\_muslim\\_brothers\\_final.pdf](http://carnegieendowment.org/files/cp89_muslim_brothers_final.pdf)

Brotherhood that it was an ally of the SCAF. The SCC upheld the dissolution of the Constitutional Assembly. SCC judges played a direct role in the drafting of the SCAF's constitutional amendments<sup>153</sup>. Second, with the election of a civilian government, the SCC's power of constitutional review could be used against the FJP rather than the SCAF, and the judiciary increasingly became a target of protests by the Muslim Brotherhood.

Mursi's Presidency: June 2012 - June 2013

The FJP government attempted to weaken the judiciary through several means short of abolishing constitutional review, both during the transition and to a lesser extent in the 2012 Constitution. Before its dissolution by court order, the FJP-controlled parliament considered legislation reforming the appointment of SCC judges<sup>154</sup>. In the spring of 2013, the Shura Council again considered legislation reforming the judiciary. These indirect approaches arguably posed a greater threat than the temporary suspension of constitutional review because they were directed at the institutional autonomy of the judiciary, yet Mursi's Constitutional Decree became the turning point in relations between the Muslim Brotherhood and the judiciary.

Mursi's Constitutional Decree explicitly excluded executive actions and the work of the Constitutional Assembly from judicial review, yet in many respects the aims of this Decree were limited. The Decree stated that it would apply only until the adoption of a new constitution. In practice, it applied for a very limited time frame of several weeks in November and December 2012, when Mursi suspended the Decree. In any case, the new constitution was adopted by the end of the year. Mursi's Decree was clearly an attempt to reverse the SCAF's June 18 amendment to the Constitutional Proclamation, which had given the SCC the power to review

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<sup>153</sup> Brown (2013)

<sup>154</sup> Brown (2013)

the draft constitution. Such a power had not been included in the original Constitutional Proclamation and had no precedents in earlier practices of the SCC. Despite these limitations, the Decree's suspension of constitutional review proved to be an extremely divisive issue. The Judges' Club, the main professional organization representing Egypt's judges, organized protests and threatened to withhold judicial supervision of the constitutional referendum<sup>155</sup>.

The 2012 Constitution was drafted by the FJP-dominated Constitutional Assembly, but it also included concessions to the military. The president cannot declare war without the permission of the military. Some guarantees of the military's autonomy were written into the Constitution. It was criticized for being too similar to the 1971 Constitution. The 2012 Constitution retained broad powers for the presidency, which would empower Mursi. The 2012 Constitution did not make substantial changes to the judiciary or the SCC. It did call for the creation of an Islamic law council practicing a priori review of legislation, which could have undermined the SCC's jurisdiction in this area. It also left many of the details of the SCC's appointment and operation to subsequent legislation, which the opposition worried would open the door to attacks on the court's independence. Nevertheless, the SCC accepted it as a valid constitution in its decision between December 2012 and June 2013.

In spring 2013, rumors circulated that the FJP government intended to remove up to 3,500 sitting judges<sup>156</sup>. By this time, the SCC and the judiciary in general had become targets of protests by Muslim Brotherhood supporters. The judiciary and the secular opposition in general held up Mursi's constitutional Decree as evidence of the lawlessness of his government. Despite

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<sup>155</sup> "Egypt Judges Refuse to Oversee Morsi Referendum," *BBC*, 3 December 2012. <http://www.bbc.com/news/world-middle-east-20575547>

<sup>156</sup> Sabry, Bassem. "Eight Questions on 'Purging' Egypt's Judiciary," *Al-Monitor* April 23, 2013. <http://www.al-monitor.com/pulse/originals/2013/04/eight-questions-purging-egyptian-judiciary.html#>

the adoption of the 2012 constitution, the rift between the judiciary and the government never healed.

### The Changing Politics of Constitutional Review

This narrative leads to several conclusions. Initially, both sides accepted the legitimacy of constitutional review and of judicial supervision of elections. In the midst of disagreements about the timing of elections and the means of drafting a new constitution, there was a consensus on the role of courts. This consensus broke down over the course of 2011 and 2012. The SCAF further increased the formal powers and institutional autonomy in response to the Muslim Brotherhood's electoral successes. The Mursi government responded with the Constitutional Decree that suspended constitutional review temporarily.

Yet this strategic use of the judiciary had its limits. In Egypt, constitutional review is not a politically neutral instrument that can be used by any party. During the period of direct rule by the SCAF 2011-2012, the FJP concluded that it could not trust the judiciary to safeguard its interests. Barring a dramatic purge of the judiciary, the FJP would have to be in power for many years or even decades to sufficiently reshape the composition of the judiciary. Even drafting a new constitution might not be enough if the SCC retained the power to interpret it. Suspending or abolishing constitutional review would seem to be a particularly attractive strategy in such circumstances. Still, the FJP did not attempt to remove constitutional review, or even suspend it for an extended period of time. The Tunisian scenario of an open-ended constitutional hiatus without constitutional review was unthinkable in Egypt, even for the party that might benefit from such a system. The FJP's attempts to change the composition of the judiciary and to establish a priori review of legislation based on Islamic law suggest that the party was interested

in creating judicial review that would be more favorable, rather than eliminating judicial review altogether.

It could be that the courts represented a redline for the military and that the Mursi government backed off from attempts to limit their power out of fear of a military intervention. However, the Mursi government did continue attempts to reform the composition of the judiciary, which were denounced by the judiciary and the military. In attempting to use the judiciary to their advantage, actors in both Tunisia and Egypt were limited by certain characteristics of the judicial system they inherited from the pre-revolutionary regime. Even if a majoritarian party in Egypt had total control over the design of the transitional documents it seems unlikely that they would have chosen the Assembly system. Instead, they most likely would have created a form of constitutional review that would have been favorable to their interests, just as Sadat created the SCC to further his interests.

## **Conclusion**

The evidence undermines the countermajoritarian hypothesis. At first glance, the different interests of political authorities in the two countries offer a compelling explanation. It also changes the picture of the relationship between courts and political authorities, including the SCAF, Ben Achour Commission, the Mursi government and the Assembly. The formal powers are not simply delegated by these political authorities to courts.

Several questions remain. It is clear that the SCAF knew that it would continue to be a factor in Egyptian politics, while the Ben Achour Commission knew that it gained its authority only from the immediate post-revolutionary context. This difference is more important than the supposed majoritarianism of the Commission and countermajoritarianism of the SCAF. It is not clear why these characteristics would lead to a different relationship with the courts. Why did

the Ben Achour Commission not try to use constitutional review to entrench its position against the Assembly? After all, if the Commission knew that it could not institutionalize itself, then constitutional review would be its only chance to influence later politics. It is also clear that a range of actors, including both political parties and legal professionals, had little confidence in constitutional review of the Tunisian Assembly by any court. Where does this perception come from? The SCAF could intervene without legal cover, but the SCAF preferred to create several transitional institutions and to empower the SCC to supervise them, rather than exercising power itself.

The views of political parties on the courts present a similar puzzle. They display a remarkable level of consensus about issues that the countermajoritarian hypotheses states should be divisive. In Egypt, this consensus broke down following Mursi's Constitutional Decree. This most radical phase of Mursi's presidency still did not come close to replicating the Tunisian system. The gap between the two cases remains, even after examining the full spectrum of positions adopted by political parties. In both cases, parties do not adopt the positions that would be most favorable to them. The question for the next two chapters is how this constraint developed.

## CHAPTER 3: CIVIL SOCIETY AND JUDICIAL POWER

### **Introduction**

Chapter 2 left unanswered the question of why the Supreme Council of the Armed Forces (SCAF) chose the courts as the main countermajoritarian feature of the transitional institutions, rather than exercising a veto itself or holding elections after the adoption of a new constitution. One answer to this question is that the exercise of a veto by a court is more legitimate than the exercise of a veto by the military or an extended period of military rule. Provided that the courts would reliably check an elected government, the SCAF may have preferred the more popular approach of interim constitutional review by the SCC. This answer points to the resources that courts might have in society at large, beyond formal state institutions.

This answer fits well with the civil society hypothesis, which argues that the Supreme Constitutional Court (SCC) enjoyed greater support from civil society than the Tunisian courts did, and that this support led the SCAF to grant additional powers to the SCC. This hypothesis builds on work by Epp, Rosberg, Brown, El-Ghobashy, and especially Moustafa. Moustafa and El-Ghobashy focus on the connection between the courts and civil society as an explanation for the high level of activity of Egyptian courts. Brown emphasizes conceptions of liberal legality as a factor allowing the expanded role of the SCC. All of these authors look to civil society to explain the expansion of the SCC's activity into new areas or its willingness to rule against the government. They do not argue that civil society activism explains why Sadat created the SCC or gave it its powers. Moustafa instead explains the creation of the SCC as part of the government's plan to attract foreign investment. Rosberg explicitly rejects the 'English hypothesis' - that groups outside of the state may be strong enough to compel the state to accept courts as mediators - as an explanation for the increased independence that the government granted to the administrative courts<sup>157</sup>. Still, the 2011 revolution could have given civil society an opening to influence the formal powers of courts. Popular protests proved capable of

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<sup>157</sup> Moustafa (2007), El-Ghobashy (2008), Rosberg (1995), Brown (2006), Epp (1994)



changing the behavior of regimes, and the process of constitution drafting made a redesign of the courts plausible. In Egypt, conflict between liberal civil society and the newly-elected Islamist government created a new alliance among the civil society, the courts and the SCAF.

The civil society hypothesis has three steps, each of which has observable implications. First, civil society support for the courts must increase before 2011. Civil society supports the SCC because of the history of activist litigation since the establishment of the SCC. Such a history is lacking in Tunisia because the Constitutional Council could not exercise a posteriori review. Second, the alliance between civil society and the courts must continue through the transition. Third, the drafting bodies must act according to this pressure from civil society, either because civil society has direct control over the drafting process or because the drafting body decides to make a concession to civil society.

I address each of the three steps described above in both Tunisia and Egypt. Before 2011, Egyptian courts did have stronger connections to civil society than their Tunisian counterparts. This is especially true for the constitutional courts. After 2011, however, Tunisian civil society developed rapidly and launched a wave of rights litigation at the Administrative Tribunal. In contrast, Egyptian civil society faced a more difficult environment after 2011 with conflicts between liberals and Islamists and repression by both the Mursi government and the military. The SCAF was closed to influence from civil society. The SCAF may have considered public opinion in designing the transitional institutions, but civil society organizations had few ways to influence the SCAF. The Ben Achour Commission was explicitly composed of representatives from civil society organizations. I conclude that the civil society hypothesis fails to explain both the presence of judicial power in Egypt and its absence in Tunisia.

Defining Civil Society

In examining this hypothesis, it is important to define civil society and distinguish it from other concepts, such as public opinion, social movements or protest movements. In general civil society is defined as organizations independent of the state with non-profit goals. Diamond distinguishes civil society from the ‘political society’ of parties and elections in that its goal is not to gain control over the government<sup>158</sup>. Civil society is distinguished from social movements and protest movements by its level of organization and institutionalization, although civil society organizations can also be involved in protests. As a practical matter, is not always clear whether an organization falls into the category of civil society. Beinin notes that the Polish Solidarity movement, an archetypal example from the Eastern European civil society revolutions, quickly transformed itself into a political party<sup>159</sup>. The labor movement and Islamist organizations fit the definition of civil society, but these organizations are often examined separately from the rest of civil society. Moreover, in the context of Tunisia and Egypt, Islamist and labor movements often pursue goals that are at odds with liberal civil society<sup>160</sup>.

The literature considers the various roles that civil society might play in politics. At one extreme, Gellner argues that the regime type of the modern West is better described as ‘civil society’ rather than ‘democracy.’ For Dahl, “the freedom to form and join organizations” is an essential component of democracy because it helps individuals form their political preferences, which can then be expressed through political parties and elections. This argument assumes that civil society is both genuinely independent of the state and has access to the true opinions of the public. The Eastern European experience led scholars to a renewed interest in civil society and

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<sup>158</sup> Diamond (1999), Dahl (1971) pg. 3, Gellner (1994)

<sup>159</sup> Beinin (2015)

<sup>160</sup> Moustafa (2007) for example discusses both liberal and Islamist legal activism, but he treats these two groups separately. Moustafa (2010) focuses exclusively on Islamist activism. Beinin (2015) contrasts the UGTT, Tunisia’s largest trade union, with the rest of civil society.

its role in democratization. Arato describes the 1989 transitions as ‘civil society revolutions.’ These authors assume that there is a natural connection between civil society and democracy and that the political goals of civil society are compatible with liberal democracy. Against this view, Sheri Berman argues that the strong civil society of Weimar Germany paved the way for the rise of Nazism. Literature on the Middle East has also examined how authoritarian regimes can co-opt civil society. Bellin argues that the Tunisian labor movement cooperated in the consolidation of authoritarianism under Ben Ali. In the case of Egypt, Bein is skeptical that civil society, or rather civil society apart from the labor movement, could play a major role in the 2011 revolution. Bein argues that the focus on the broad category of civil society in explaining the success of the Tunisian transition obscures the central role played by the labor movement<sup>161</sup>.

The hypothesis requires that civil society act as a ‘judicial support network,’ a term used by Epp and Moustafa<sup>162</sup>. A judicial support structure consists of civil society organizations that engage in activist litigation to further their ends, and that support the independence of courts. This is a much narrower category than civil society in general. Not all civil society groups are capable of legal activism, and not all of the goals pursued by civil society can be reached through litigation. The regime can intervene in civil society directly by banning particular groups or regulating their membership and activities. It can also make the legal system more or less hospitable to civil society litigation. In the context of Egypt and Tunisia, activist litigation is often the preserve of a particularly elite variety of civil society.

The hypothesis conceives of the presence of a judicial support network as a binary. A state that has such a network will also have courts with strong formal powers. The cases show the many forms that civil society and its interaction with the courts can take. At times, civil

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<sup>161</sup> Dahl (1971), Arato (2000), Gellner (1994), Bellin (2002), Berman (1997), Bein (2015), Bein (2014) on the problems of applying the concept of civil society to Egypt’s revolution.

<sup>162</sup> Epp (1998), Moustafa (2007),

society in both countries has interacted with the courts in the way suggested by the hypothesis, but I conclude that these interactions cannot explain the formal powers of courts in either case.

## **Civil Society and the Courts before 2011**

### Egypt

From the 1980's to the 2000's, a tentative alliance among liberal activists, Islamists and the courts developed. In part, this alliance reflects a shared understanding of the judicial role among liberals and Islamists. Chapter 4 discusses Islamist attitudes toward the SCC and constitutional review in greater detail. It also reflects a shared interest in challenging the overwhelming power of the regime, and a shared strategy of litigation. Liberals and Islamists cooperated through the 2011 protests and the early phase of the transition, but came into conflict especially after the election of Muhammad Mursi in 2012.

The hypothesis is plausible in the Egyptian context because of the strong links that developed between civil society and the courts during the Mubarak era. Moustafa suggests that the protest movement would build on the links between the judiciary and civil society by putting legal and constitutional issues at the center of the revolution<sup>163</sup>. The divide between liberal and Islamist civil society is not necessarily a problem for the hypothesis. It is possible that liberal civil society would support the courts as a check on the Mursi government because of the conflict between liberal and Islamist civil society. Unlike the SCAF, liberal civil society had no other means of restraining the Mursi government other than the courts.

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<sup>163</sup> Moustafa (2011)

## Liberal Activism

The goals of liberal litigation include limiting the power of the regime, creating a space for the development of civil society, guaranteeing free electoral competition, as well as securing property rights. Liberal litigation includes both work by NGO's of a secular democratic orientation, as well as economically liberal litigation on issues such as property rights by actors with an interest in liberal economic reforms. Moustafa lists the main civil society groups involved in litigation before the SCC in the 2000's as the Hisham Mubarak Center for Legal Aid, the Land Center for Human Rights, the Center for Human Rights Legal Aid, and the Center for Women's Legal Assistance. Major cases brought by these groups include a challenge to repudiation divorce (khul'), a challenge to a law discriminating between men and women in adultery cases, numerous challenges to aspects of the emergency laws<sup>164</sup>.

Moustafa also recognizes the limits imposed on these organizations by the regime. Only licensed organizations could participate in litigation. In the 1990's and 2000's, the government passed a series of NGO laws to restrict civil society organizations. When the SCC proved too willing to challenge the regime during the 2005 elections, Mubarak asserted his power as president to name judges to the court<sup>165</sup>.

Liberal civil society also faced a challenge in working with two other components of civil society, Islamists and the labor movement, that often had different goals. Islamist groups are absent from Moustafa's list, although he describes how Islamists used litigation and legal

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<sup>164</sup> Other recently established organizations involved in activist litigation include the Egyptian Initiative for Personal Rights, Egyptian Center for Human Rights, South Center for Human Rights, Egyptian Association for Developing Legal Awareness, Egyptian Center for Housing Rights, Ma'at Center for Juridical and Constitutional Studies. Moustafa (2007) pp. 206-208

<sup>165</sup> Moustafa (2007)

education to reach their goals<sup>166</sup>. The Egyptian labor movement was at the margins of the new civil society of the Mubarak era, and Moustafa does not mention it as part of the judicial support structure. Egyptian workers lacked a strong independent organization comparable to the Union Generale des Travailleurs Tunisiens (UGTT) in Tunisia. Egyptian labor unions were either co-opted by the regime or banned before 2011. From the Nasser period on, the Egyptian regime suppressed independent labor unions. Under Mubarak, workers could join only officially recognized unions, and the internal governance of these unions was tightly controlled by the Ministry of Labor<sup>167</sup>.

The co-opted labor movement did not make extensive use of the courts. The SCC and the administrative courts did issue some rulings favorable to labor organizations based on the 1971 Constitution's guarantee of freedom of association. Labor groups worked with NGO's such as the Hisham Mubarak Center to bring these cases to the courts<sup>168</sup>. However these rulings did little to protect the labor movement from regime manipulation. Indeed, the liberal economic decisions of the SCC, such as the abolition of rent control, often favored property owners over workers and renters<sup>169</sup>. Beinin notes that the number of wildcat strikes and worker protests increased during the years leading up to 2011, as workers turned to forms of activism outside of established organizations. Furthermore, workers, but not unions, were central to the 2011 protests in Egypt<sup>170</sup>.

## Islamist Activism

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<sup>166</sup> Moustafa (2010), Moustafa (2007). Islamist legal activism is described in chapter 5 of the dissertation.

<sup>167</sup> Al-Sayed in Bernard-Maugiron (2008), Beinin (2015)

<sup>168</sup> Al-Sayed in Bernard-Maugiron (2008)

<sup>169</sup> Moustafa (2007).

<sup>170</sup> Beinin (2015)

Islamist organizations, including those affiliated with the Muslim Brotherhood, enjoyed a huge membership during the Mubarak era. In addition to religious and social welfare activities, Islamists also engaged in activist litigation, often making use of the shariah provision of the Egyptian constitution<sup>171</sup>.

On some issues, the aims of liberal litigation and Islamist litigation overlapped. Both liberals and Islamists sought to limit the power of the regime and to protect their own right to organize freely. Both groups found the courts sympathetic to these goals. Islamists sought the right to organize and to participate in elections. These issues came to a head during the 2005 parliamentary elections, in which independent candidates affiliated with the Brotherhood won a substantial number of seats for the first time. The Brotherhood supported the judiciary's claim of a power to certify the results of elections, and independent candidates associated with the Brotherhood were among the main beneficiaries of the new electoral rules implemented in the 2005 legislative elections<sup>172</sup>. Limiting police abuses was a major goal of both liberal and Islamist civil society. The years leading up to 2011 saw numerous high profile cases of police abuse, such as the death by beating of Khaled Mohamed Saeed in 2010, that united different strands of Egyptian civil society<sup>173</sup>. Islamists in particular were likely to face imprisonment and abuse, and Islamist activists focused on helping detainees<sup>174</sup>.

Both liberals and Islamists opposed the socialist state of the Nasser era. The leadership of the Muslim Brotherhood drew from a class of small businessmen that was likely to benefit from economic liberalization. The Brotherhood adopted an interpretation of Islamic law that protected private property and business. The courts proved sympathetic to the economic

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<sup>171</sup> Moustafa (2010), Moustafa (2007)

<sup>172</sup> Moustafa (2007).

<sup>173</sup> Matt Bradley, "Anger on the Streets of Cairo," *The National*, 14 June 2010, <http://www.thenational.ae/news/world/middle-east/anger-on-the-streets-of-cairo>

<sup>174</sup> Agrama (2012)

programs of both liberals and Islamists. Moustafa cites the SCC's decisions overturning the Nasser-era rent control laws as an example of the SCC's liberal economic program. In the 1993 case dealing with this issue, the SCC cited both the 1971 Constitution's right to property and the shariah's protection of private property as justification for overturning the law<sup>175</sup>.

#### Liberals, Islamists and the Regime]

Islamists and liberals had some overlapping goals, including limiting the arbitrary power of the regime and ensuring their own right to organize, and some overlapping strategies, including litigation. However, the Mubarak's regime different treatment of the two groups prevented them from forming strong organizational ties across the liberal-Islamist divide. As Lust-Okar notes, regimes have many tools to impose structure on the opposition, including civil society<sup>176</sup>. In general, the Mubarak regime repressed Islamist groups more severely than liberal groups. The regime at times brought the Muslim Brotherhood in as part of the tolerated opposition, only to violently suppress it a few years later. Sadat's initial opening to the Islamists as followed by a crackdown in the late 1970's<sup>177</sup>.

The Muslim Brotherhood occupied a dominant position among Islamist civil society groups. The Muslim Brotherhood maintained a tight, centralized organization, in part because of its experience with regime repression. Although members of the Brotherhood debated what stances the organization should take, its centralized structure marginalized dissenters<sup>178</sup>. The transformation of the Muslim Brotherhood into the Freedom and Justice Party (FJP) after 2011

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<sup>175</sup> Lombardi (2006). Case 7, Judicial Year 8. (15 May 1993) SCC Volume V, Part 2.

<sup>176</sup> Lust-Okar (2005)

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<sup>178</sup> El-Ghobashy (2005) on debates within the Muslim Brotherhood.



further complicated relations between liberal and Islamist civil society. The election of Muhammad Mursi both split liberal and Islamist civil society and made the largest Islamist civil society group, the Muslim Brotherhood, into an extension of the new regime. The basic mechanism of the hypothesis - civil society support for the courts as a check on the government - could still continue in these circumstances. The question remains whether civil society could influence the SCAF's redesign of the transitional institutions after the 2012 presidential elections.

### Tunisia

With the economic and political liberalization of the 1970's, Tunisia saw the growth of human rights NGO's comparable to those in Egypt. Among these was the Ligue Tunisienne des Droits de l'Homme (LTDH). The LTDH was founded in 1977 by dissidents from the ruling neo-Destour party, including Ahmed Mestiri, Beji Caid Essebsi, Saadedine Zmerli, and Hassib ben Ammar. Relations between the Ligue and the Bourguiba regime remained cordial. Several figures of the Ligue, including Essebsi and Zmerli, served in the government in the 1980's and 90's. It had bureaus throughout Tunisia and 3,000 members in 1985<sup>179</sup>. The LTDH had a strong legal orientation. Many of its founding members were lawyers. It brought cases to the Administrative Tribunal during the Ben Ali era, but the effect of these cases was limited by the regime's refusal to enforce some decisions of the Tribunal - problem noted by the interviewees, Mohamed Bennour, Hichem Hammi and Habib Koubaa<sup>180</sup>. The Ben Ali era proved difficult for the LTDH. The RCD attempted to infiltrate the LTDH. The activities of the LTDH were

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<sup>179</sup> Waltz (1995), pg. 134

<sup>180</sup> Interviews with Mohamed Bennour, Hichem Hammi and Habib Koubaa. Baccouche in Gaboriau et al. (2003) on relations between the Tribunal and the LTDH.

suspended briefly by a judicial decision in 1992. In 2000, the government banned all activities of the LTDH. This ban was subject to numerous challenges, but the LTDH was never able to hold a conference again before the 2011 revolution<sup>181</sup>. Islamist organizations were suppressed more severely. The social wing of the Ennhada movement was banned along with the political party after 1989. Private mosques and religious schools were not allowed. As a result, the sort of Islamist legal activism described by Moustafa, El-Ghobashy and Lombardi had no parallel in Tunisia<sup>182</sup>.

Perhaps the strongest civil society organization in Tunisia from independence through the 2011 revolution was the Union Generale des Travailleurs Tunisiens (UGTT). The UGTT had a symbiotic relationship with the ruling party from early years of the independence movement. It formed part of the governing coalition during the first fifteen years of Bourguiba's presidency. Economic liberalization from the 1970's on brought the UGTT into conflict with the regime. The UGTT called for general strikes in 1978 and 1984. Both were suppressed. The regime interfered in the activities of the UGTT, especially during the Ben Ali era. The economic liberalization of the Ben Ali era further weakened the membership base of the UGTT. As a result, the UGTT became somewhat weaker in the years leading up to the 2011 revolution. However, the regime never attempted to ban the UGTT, which still enjoyed a broad membership and a high level of popular support on the eve of the 2011 revolution<sup>183</sup>.

In general, Tunisia's civil society was more constrained under Ben Ali than Egypt's civil society was under Mubarak. However, this difference is only a matter of degree. Tunisian civil

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<sup>181</sup> Ligue Tunisienne pour la defense des Droits de l'Homme Website, 5 September 2014.  
<http://www.ltdh.tn/?q=fr/article/historique>

<sup>182</sup> Moustafa (2010), El-Ghobashy (2008), Lombardi (2006)

<sup>183</sup> On the early history of the UGTT, see Ben Hamida (1989)

On its relations with the Ben Ali regime: Rasha Moumneh, "The Price of Independence: Silencing Labor and Student Unions in Tunisia," *Human Rights Watch*, 2010.

society engaged in only modest legal activism before 2011, in contrast to the growth of the judicial support network in Egypt. In Tunisia, the UGTT was tolerated by the regime, while human rights groups like the LTDH were banned. In Egypt, the labor movement was banned, but groups comparable to the LTDH, were tolerated. This had important implications for the strategy of Tunisian civil society. The centerpiece of Tunisian civil society was the UGTT, and its favored methods were strikes or negotiations directly with the government, not litigation<sup>184</sup>.

### **Civil Society and the Courts in the Transition, 2011-2014**

#### Egypt

The 2011 protests were a surprising victory for Egyptian civil society, although NGO's made up only part of the movement. Liberal NGO's, the Muslim Brotherhood, Salafists, the labor movement, and non-political groups such as soccer clubs all took part in the protests in late January and early February 2011. The success of the protests in forcing Mubarak from office reflects their broad base of support and especially an alliance between Islamist and liberal activists. However, the transitional period soon proved dangerous for Egyptian civil society. The consensus among liberal and Islamist activists collapsed. Both the military and the Mursi government stepped up repressive measures against civil society. These factors made civil society weaker and less able to influence the course of the transition, including decisions relating to the status of courts. The transition also damaged the connection between civil society and the courts that Moustafa describes as a defining feature of judicial politics in the Mubarak era. Civil society won few victories in court comparable to those before 2011. The important

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<sup>184</sup> Bellin (2002)

court decisions of the transition - the decision of the High Administrative Court to dissolve the House of Representatives and the Constitutional Assembly - were not the result of civil society litigation and often served interests opposed to those of civil society.

### Liberal-Islamist Tensions

Many of the issues that might divide liberals and Islamists - changes to the role of Islam in the constitution, whether Egypt would have an Islamist president - were not on the table during the Mubarak era. The transition, the constitution drafting process, and the Mursi presidency revealed the differences between liberals and Islamists. Both liberals and Islamists participated in the early protests at Tahrir Square, although they did not necessarily do so in a coordinated manner. The protests on the first days January 2011 were dominated by non-Islamists. The Brotherhood ordered its supporters to stay away from the protests until January 28, 2011, when its supporters filled Tahrir Square after Friday prayers<sup>185</sup>. The participation of the Brotherhood supporters and other Islamists was essential in the success of the protest movement, but liberals feared that they would lose control of the movement to the larger and more organized Brotherhood.

The election of the House of Representatives in 2011 paved the way for the appointment of the Constitutional Assembly and the constitution drafting process. This phase of the transition revealed further conflicts between liberals and Islamists. The victory of the FJP and the strong showing of the Salafist Nour Party in the parliamentary elections allowed Islamists to dominate the constitution drafting process. Liberals feared that the Islamists would use the new

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<sup>185</sup> Souad Mekhennet and Nicholas Kulish, "With Muslim Brotherhood set to join Egypt protests, religion's role may grow," *New York Times* 28 January 2011.  
[http://www.nytimes.com/2011/01/28/world/middleeast/28alexandria.html?\\_r=0](http://www.nytimes.com/2011/01/28/world/middleeast/28alexandria.html?_r=0)

constitution to expand the role of shariah in the constitution. Coptic Christians feared that the new constitution would exclude them from many aspects of Egyptian citizenship, such as the right to serve in the military or to stand for the presidency<sup>186</sup>. In this context, liberal and Islamist civil society groups began pursuing contradictory goals. Women's rights remained an area of disagreement. For example, Article 36 of the 2012 draft constitution produced by the Brotherhood supporters in the Constitutional Assembly guarantees equality between men and women, except when it is contradicted by the shariah. Salafists rejected a prohibition on the trafficking of women and children because they believed that it would be used to ban early marriages<sup>187</sup>.

The presidential elections of 2012 and Mursi's presidency from 2012 to July 2013 brought the conflict between liberals and Islamists to a head. With an Islamist occupying the highest office of the state, liberal civil society began working to protect itself from a new regime that many feared would be more oppressive than that of Mubarak. This stance pushed liberal civil society into an alliance with the military. It also changed the nature of the connection between civil society and the courts. Before 2011, civil society had used the courts to achieve particular policy changes in areas such as property rights, freedom of speech, and freedom of association. Civil society founded these cases on the fundamental rights included in the Egyptian constitution and international treaties. During the Mursi era, liberal civil society hoped that a decision of the courts, especially the SCC, could completely overturn the new regime, or at least shift the balance of power away from the presidency. This more ambitious goal did not

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<sup>186</sup> The Brotherhood's 2007 platform contained similar provisions. Brown, Nathan and Amr Hamzawy. "The Draft Party Platform of the Egyptian Muslim Brotherhood," *Carnegie Endowment* January 2008. [http://carnegieendowment.org/files/cp89\\_muslim\\_brothers\\_final.pdf](http://carnegieendowment.org/files/cp89_muslim_brothers_final.pdf)

<sup>187</sup> "Egypt: Fix draft constitution to protect key rights," *Human Rights Watch*, 8 October 2012. <https://www.hrw.org/news/2012/10/08/egypt-fix-draft-constitution-protect-key-rights>

require the same sort of organizing as the numerous small cases brought by civil society before 2011.

The politics of the transition split civil society into liberal and Islamist factions. It also shifted the focus of civil society from rights litigation toward structural constitutional questions that civil society could do little to decide.

### State Repression

Even as the Egyptian regime became more democratic following the 2011 revolution and the 2012 elections, the level of repression increased. This was true even in the most hopeful phase of the transition immediately after the departure of Mubarak. Courts in particular were a means of repression. Ahmed Eid, an Egyptian lawyer and activist, stated that the administrative courts have been “turned against the opposition” since the 2011 revolution. The military courts tried more civilians in the months after 2011 than they had in the previous decades<sup>188</sup>.

Demonstrators were more willing to challenge the regime during this period, but they often met with a level of violence that would have been unusual in the Mubarak era.

The election of Mursi to the presidency in 2012 did not end this trend. Indeed, the new Islamist government began its own programs of repression in parallel to actions by the military, police and emergency courts. In 2013, the Shura Council considered a new NGO law that would require organizations to seek government approval for any project receiving foreign funding<sup>189</sup>.

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<sup>188</sup> In the year after the fall of Mubarak, more than twelve thousand Egyptian civilians were tried by military courts, more than were tried during the thirty years of Mubarak’s rule. Human Rights Watch. *World Report 2012, Egypt*. <http://www.hrw.org/world-report-2012/world-report-2012-egypt>  
Interview with Ahmed Eid.

<sup>189</sup> Peter Kingsley, “Human Rights Groups Fear Impact of Draft Egypt Law Restricting their Work,” *The Guardian*, 5 April 2013. <http://www.theguardian.com/world/2013/apr/05/egypt-draft-law-ngos-development>

The 2013 coup brought an unprecedented level of repression. The massacre of Muslim Brotherhood supporters at Raba'ah al-Adawiyah square is the most dramatic example. Courts played a central role in the Sisi regime's crackdown on the Muslim Brotherhood. Mursi himself was put on trial and found guilty of espionage and inciting deadly violence. Judges issued mass death sentences to Muslim Brotherhood supporters, although few of these sentences were ever carried out<sup>190</sup>.

The violence of the coup was followed by a series of legal restrictions on civil society. The 2014 NGO law required all civil society groups to register with the government. The anti-protest law was used not only to prevent nearly all public demonstrations after the coup, but also to prosecute leaders of Egyptian civil society, including the leaders of the April 6 movement<sup>191</sup>.

#### Court Activity, 2011-2013

Given the problems outlined above, it is not surprising that civil society failed to win major victories in the courts during the transition. The SCC and its judges were involved in the transition from the beginning. The SCAF worked with experts from the SCC to draft the Constitutional Decrees. The SCAF issued a decree law in June 2011 allowing the SCC to select its own president, perhaps in anticipation of a greater role for the SCC. However, the SCC did not issue a major decision until June 14, 2012. Despite the persistence of oppressive laws from the Mubarak period, the first year after the revolution did not see a wave of litigation at the SCC to overturn these laws.

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<sup>190</sup> Patrick Kingsley, "Egyptian Judge Sentences 720 Men to Death," *The Guardian*, 28 April 2014. <http://www.theguardian.com/world/2014/apr/28/egyptian-judge-sentences-720-men-death>

<sup>191</sup> Ahmed Naje. "Egypt's NGO Laws Continue to Threaten Civil Society," *Tahrir Institute*, 17 October 2014. <http://timep.org/commentary/egypts-ngo-laws-continue-threaten-civil-society/>

The major decisions that the SCC issued from June 2012 to June 2013 did not result from civil society litigation and often favored interests opposed to civil society. Some of these decisions made use of the procedure of a priori review that had been granted to the SCC by the Constitutional Decree of 2011<sup>192</sup>. According to this provision, the SCC was required to review all electoral legislation within fifteen days before it was adopted. There was no procedure through which civil society could not bring these cases to the SCC. The 2012 Constitution also included this power and extended it to laws governing legislative elections.<sup>193</sup>

The High Administrative Court suspended the Constitutional Assembly on April 10, 2012. The case was filed by. The court argued that the House of Representatives violated the Constitutional Decree by appointing some of its own members to the Constitutional Assembly and that the membership of the Assembly was unrepresentative of Egyptian society. A compromise between Islamists and the secular opposition resulted in a new Constituent Assembly that included more members of the opposition. The second Assembly also faced legal challenges, although it continued to meet and ultimately drafted the constitution that was adopted by referendum in December 2012.

The SCC issued a decision dissolving the House of Representatives on June 14, 2012<sup>194</sup>. The decision did use the language of fundamental rights. The court argued that the electoral law was invalid because the party list system discriminated against candidates who did not have a

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<sup>192</sup> The SCC's website includes the full text of its a priori review decisions from 2011-2013. The Constitutional Decree requires all electoral laws to be reviewed by the SCC before they are adopted. The President of the SCAF the power to forward electoral legislation to the SCC for a priori review. Of the a priori cases reviewed by the SCC from 2011 to 2013, were forwarded by the President. <http://hccourt.gov.eg/Pages/Rollcourt/controlback.aspx>

<sup>193</sup> Nariman Youssef, "Egypt's Draft Constitution Translated," *Egypt Independent*, 2 December 2012. <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>

<sup>194</sup> David Kirkpatrick, "Blow to Transition as Court Dissolves Parliament," *New York Times*, 14 June, 2012. <http://www.nytimes.com/2012/06/15/world/middleeast/new-political-showdown-in-egypt-as-court-invalidates-parliament.html?module=ArrowsNav&contentCollection=Middle%20East&action=keypress&region=FixedLeft&gtype=article>

Brown, Nathan J. "Egypt: A Constitutional Court in an un-Constitutional Setting," 23 October 2013. [http://www.constitutionnet.org/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting\\_0.pdf](http://www.constitutionnet.org/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting_0.pdf)



party affiliation. However, the implications of the case were clearly more important for the balance of powers among state institutions than for the rights of individuals. Civil society of the kind described as the judicial support structure by Moustafa was not involved in bringing this case to the SCC.

## Tunisia

### Civil Society

Civil society developed rapidly after the 2011 revolution. A huge number of new organizations were founded immediately after the fall of Ben Ali, including groups, such as the Syndicat des Magistrats Tunisiens (SMT), Union des Magistrats Administratifs (UMA), with a specific focus on law and courts<sup>195</sup>. In some cases, it is more correct to say that existing organizations broke free from the restrictions imposed by the Ben Ali regime. The LTDH is a major example. The Administrative Tribunal lifted the ban on the LTDH's activities that had been imposed by Ben Ali. The UGTT also emerged from the restrictions of the Ben Ali era and became more active than it had been in decades. Strikes organized by the UGTT became a common feature of the transition. Many of these strikes, such as the general strike following the assassination of Mohamed Brahmi on July 25, 2013, were intended to pressure the Troika government<sup>196</sup>.

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<sup>195</sup> "La Societe Civile dans une Tunisie en Mutation," *United Nations Program for Development*, <http://touensa.org/wp-content/uploads/2014/07/La-soci%C3%A9t%C3%A9-civile-dans-une-Tunisie-en-mutation.pdf>

<sup>196</sup> Beinin (2015). The UGTT's general strike on July 25, 2013 was one of the first steps of the movement calling for the resignation of the Troika.

Islamist organizations developed rapidly too. Groups like Ansar al-Shariah pressured the Assembly for the inclusion of shariah law in the new constitution. The courts, including the Administrative Tribunal, usually proved hostile to the aims of Islamist litigants. Many Islamist groups, including Hizb al-Tahrir and Ansar al-Shariah, sought to legalize their organizations in the years after 2011. The court refused to legalize Hizb al-Tahrir and declared Ansar al-Shariah to be a terrorist organization. Islamist groups did try to use the courts to enforce their view of acceptable speech using laws prohibiting libel of religion<sup>197</sup>.

Some challenges remained for civil society during the transition. Restrictive laws governing political parties, non-governmental organizations and the press remained in effect even after the fall of Ben Ali<sup>198</sup>. Civil society feared that the Troika would use its control of the Assembly to pass repressive legislation and write a constitution with weak rights protections. The UGTT was threatened by violence from Islamists militias such as the LPR<sup>199</sup>. Nevertheless, the years after 2011 mark a dramatic turnaround for Tunisian civil society.

### The Administrative Tribunal

The legalization of the LTDH by the Tribunal points to the close connection that would develop between civil society and the courts immediately after the 2011 revolution. The most important decisions of the Tribunal during the transition were the result of cases brought by civil

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<sup>197</sup> Lilia Weslaty, "Tunisie: Fallait-il reconnaitre legalement le parti islamiste hizb ut tahrir?" *Nawaat*, 30 August 2012. <http://nawaat.org/portail/2012/08/30/tunisie-fallait-il-reconnaitre-legalement-le-parti-islamiste-hizb-ut-tahrir/> "Tunisia: 'Persepolis' Trial a Setback for Free Expression," *Human Rights Watch*, 25 January 2012. <https://www.hrw.org/news/2012/01/25/tunisia-persepolis-trial-setback-free-expression>

<sup>198</sup> "Tunisia's Repressive Laws: The Reform Agenda," *Human Rights Watch*, 16 December 2011. <https://www.hrw.org/report/2011/12/16/tunisi-as-repressive-laws/reform-agenda>

<sup>199</sup> "Tunisie: Abassi attaque, l'UGTT accuse les LPR," *Gnet* 14 November 2014. <http://www.gnet.tn/actualites-nationales/tunisie-abassi-attaque-l-ugtt-accuse-les-lpr/id-menu-958.html>

society<sup>200</sup>. These include the the 2013 decisions concerning the appointment of members of the IVD and ISIE.

The strong connection between the Tribunal and civil society did not result in a power of interim constitutional review for the Tribunal. Civil society did support the Tribunal on other issues. Civil society groups, including Human Rights Watch, the Association des Magistrats Tunisiens (AMT), the LTDH, and others pressured the government to enforce the Tribunal's decision reinstating the judges removed by the Troika's justice minister Nouredine Bhiri. Civil society agreed with the Tribunal's stance on the design of the Conseil Supérieur de la Magistrature, which was intended to guarantee to judicial independence<sup>201</sup>. More generally, civil society recognized that a strong judiciary was necessary to preserve the autonomy of civil society. This support for a strong judiciary did not lead to support for transitional constitutional review.

### **Civil Society and the Drafting Bodies, 2011-2014**

If the hypothesis can explain the formal powers of courts, then civil society must be able to influence the design of the transitional institutions, which was first decided by the drafting bodies: the SCAF in Egypt and the Ben Achour Commission in Tunisia. The SCAF was less open than the Ben Achour Commission to influence from civil society. Moreover, transitional politics eroded civil society organizations in Egypt and strengthened them in Tunisia. Both

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<sup>200</sup> Interview with Hichem Hammi, Benjamin Roger. "En Tunisie, des citoyens veulent envoyer l'Assemblée constituante au Tribunal." *Jeune Afrique*. 31 August 2012. 31/08/2012. <http://www.jeuneafrique.com/Article/ARTJAWEB20120831122039/>

<sup>201</sup> "Letter to the Ministry of Justice Regarding the Dismissal of Judges," *Human Rights Watch*, 20 December 2012. <https://www.hrw.org/news/2012/12/20/letter-ministry-justice-regarding-dismissal-judges>  
"Tunisia: Revise Judiciary Bill," *Human Rights Watch* 6 August 2012. <https://www.hrw.org/news/2012/08/06/tunisia-revise-judiciary-bill>

countries saw the rise of new protest movements in 2013 - the Arrahil movement in Tunisia and the Tamarod movement in Egypt - that threatened established civil society organizations. In Egypt, the Tamarod movement supplanted older civil society organizations, while in Tunisia, the Arrahil movement strengthened them through the formation of the National Dialogue.

## Egypt

The military showed itself to be very conscious of public opinion and of the need for public support. However, it also undermined the organizations that could turn the public into civil society and broke the connections between civil society and the courts.

### The SCAF

The period of interim government SCAF was a concession by the military in response to the protests of January and February 2011. The military originally wanted Omar Suleiman, a former army general and high-ranking intelligence official, to replace Mubarak. Suleiman was appointed vice president on January 29, 2011, in the midst of the protests. Mubarak's resignation would pave the way for Suleiman to assume the presidency until new elections could be held. This plan to have a Mubarak appointee step into the presidency was unpopular with all parts of the protest movement. In the end, Suleiman resigned with Mubarak on February 11, 2011. The SCAF responded by issuing the Constitutional Decree of February 13, 2011, declaring itself the provisional government of the country<sup>202</sup>.

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<sup>202</sup> Michael Slackman. "Choice Likely to Please the Military, not the Crowds," *New York Times*, 30 January 2011. <http://www.nytimes.com/2011/01/30/world/middleeast/30suleiman.html?hp>  
"Constitutional Proclamation," 13 February 2011. <http://www.righttononviolence.org/mecf/countries/egypt/>

These events show the power that the protest movement could have, even over the military. However, this does not mean that civil society was able to influence specific decisions by the SCAF. As the transition continued, the protest movement became less effective in pressuring the military. Furthermore, the protest movement is not equivalent to the civil society organizations described by Moustafa. The military exploited the difference between civil society and the protest movement to create a variety of popular politics - the Tamarod movement - that was more suited to its own interests.

### The Military's Policy towards Civil Society

The hypothesis assumes that civil society will be able to influence power-holders, such as the Egyptian military. In fact, the military was more able to manipulate civil society than civil society was able to manipulate the military. The military, as well as other actors such as the Mursi government, the courts and the Ministry of the Interior, attempted to shape Egyptian civil society. The military's policy towards civil society resulted in the Tamarod movement. The extent to which the Tamarod movement was a genuine grassroots uprising as opposed to a plan hatched by the military and the Ministry of the Interior is one of the basic disagreements between supporters and opponents of the Sisi regime. The movement grew out of dissatisfaction with the Mursi presidency in spring 2013. It did build on existing civil society organizations and political parties. On the other hand, critics of the Sisi regime argue that the military or the Ministry of the Interior played a major role in organizing the original leadership of the Tamarod movement<sup>203</sup>. In any case, the movement had little importance until the military called on Egyptians to

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<sup>203</sup> Asma Alsharif and Yasmine Saleh, "The real force behind Egypt's 'revolution of the state'" *Reuters*, 10 October 2013. <http://uk.reuters.com/article/uk-egypt-interior-special-report-idUKBRE99908720131010>

‘descend’ on the streets on June 30. The prospect of support from the military was the only factor that made the movement’s goal, removal of Mursi from the presidency, plausible.

From the perspective of the military, the Tamarod movement had several advantages over other forms of civil society. Tamarod lacked a permanent organization and leadership. It developed quickly in the spring of 2013 and declined after the June 30, 2013 coup. It was oriented towards only one goal: the removal of Mursi from the presidency. These factors made the movement less likely to interact with the courts than the older civil society organizations. The Tamarod movement could help the military bring out large numbers of protestors, but it would not organize activist litigation. After Mursi was removed, Tamarod would not shift to other goals that might challenge the military.

The Tamarod movement not only helped bring about the 2013, it also changed Egyptian civil society even before the coup. Many previously independent organizations attached themselves to the overarching goal of removing Mursi. Some leaders of the Tamarod movement had previously been involved in the Kefaya movement against Mubarak during the 2000’s. Other organizations such as the April 6 Youth movement and the Popular Current cooperated in gathering signatures for Tamarod’s petition<sup>204</sup>. The participation of other civil society organizations in the Tamarod movement compromised their independence from the emerging military regime. It also shifted their activity away from litigating rights issues towards protests. Groups that refused to support the Tamarod movement were marked for repression by the new military regime<sup>205</sup>.

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<sup>204</sup> “Profile: Egypt’s Tamarod protest movement,” *BBC*, 1 July 2013. <http://www.bbc.com/news/world-middle-east-23131953>

Basil El-Dabh, “June 30: Tamarod and its opponents,” *MEI*, 26 June 2013. <http://www.mei.edu/content/june-30-tamarod-and-its-opponents>

<sup>205</sup> The Sisi regime also imprisoned the leaders of the April 6 movement, despite their cooperation with Tamarod.

The Tamarod movement has not had a major impact on Egyptian politics after the 2013 coup. Partly this is due to the movement's lack of organization. It is also due to the nature of the goals pursued by the movement. After Mursi was removed from power, the movement struggled to find a new cause. In any case, the Tamarod movement failed to build connections with the judiciary. Tellingly, the causes that it took up after the coup - the reversal of Egypt's peace treaty with Israel and opposition to international military intervention in Syria - did not touch on domestic Egyptian politics and could not be achieved through litigation. The movement considered establishing a political party, but its application to do so was rejected by the Supreme Electoral Commission in 2014<sup>206</sup>.

## Tunisia

The Tunisian system not only responded to the demands of protesters, but also gave civil society organizations a central role in the three main transitional institutions: the Ben Achour Commission, the Assembly, and the National Dialogue. Civil society had ample opportunity to grant additional powers to courts, but chose not to do so.

### The Ben Achour Commission

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<sup>206</sup> "Egypt's Rebel Campaign launches petition to cancel US aid, Israel peace treaty," *Reuters*, 18 August 2013. <http://english.ahram.org.eg/NewsContent/1/64/79334/Egypt/Politics-/Egypst-Rebel-Campaign-launches-petition-to-cancel-.aspx>

"Tamarod wants Syria-bound ships blocked from Suez," *Egypt Independent*, 28 August 2013, <http://www.egyptindependent.com/news/tamarod-wants-syria-bound-ships-blocked-suez>

"Tamarod, Sami Anan Political Parties Rejected," *The Atlantic Council* 4 December 2014. <http://www.atlanticcouncil.org/blogs/egyptsource/top-news-tamarod-sami-anan-political-parties-rejected>

The creation of the Ben Achour Commission was clearly the result of street protests. The Kasbah demonstrators camped outside of the headquarters of the transitional government of Mohamed Ghannouchi demanding the election of a National Assembly and the drafting of a new constitution. In response, the government formed the Commission to guide the first step of the transition. As in Egypt, the government initially favored a quick transition to a new presidency, but popular protests made this plan untenable. In its origins the Commission resembles the SCAF's assumption of power in the midst of the protests. However, the design of the Commission made it much more open to influence by civil society organizations. Many of the members of the Commission were chosen specifically as representatives of different civil society organizations, including the UGTT, the LTDH, the ONAT and fifteen other organizations<sup>207</sup>. The Commission was independent of the Ghannouchi government in a way that the SCAF could never be independent of the military.

The Commission had a great deal of leeway in designing the transitional institutions. The government was checked by popular opinion. The Kasbah protest movement insisted on the creation of the National Assembly, but this choice did not preclude some form of interim judicial review<sup>208</sup>. If civil society wanted to empower the courts by giving them a power of constitutional review, it had an opportunity to do so through the Ben Achour Commission.

## The Assembly

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<sup>207</sup> "Liste des membres du Conseil," 7 April 2011.

[http://www.tunisie.gov.tn/index.php?option=com\\_content&task=view&id=1488&Itemid=518&lang=french](http://www.tunisie.gov.tn/index.php?option=com_content&task=view&id=1488&Itemid=518&lang=french)

<sup>208</sup> Such proposals are outlined in chapter 1 of the dissertation.

Lauranne Provenzano, "Grande manifestation contre le gouvernement place de la Kasbah a Tunis," *Jeune Afrique*, 25 February 2011. <http://www.jeuneafrique.com/182221/politique/grande-manifestation-contre-le-gouvernement-place-de-la-kasbah-tunis/>



Of the three transitional institutions, the Assembly was perhaps the most resistant to civil society influence. Although there is a lot of overlap between political parties and civil society organizations in Tunisia, the governing parties had no need to consult such organizations after being elected. Some leading figures of the Troika, most notably President Moncef Marzouki, had risen to prominence through civil society and human rights activism rather than party politics. However, Marzouki became closely associated with his own party, the *Congres pour la Republique* (CPR), and the Troika generally. Observers describe civil society as a check on the Assembly rather than a participant in it<sup>209</sup>. Nevertheless, civil society groups were able to influence the activity of the Assembly with help from the Administrative Tribunal. The Tribunal blocked the appointment of members of several organs created by the Assembly, including the Instance Verite et Dignite (IVD, the body charged with transitional justice) and the Instance Superieure Independante pour les Elections (ISIE). In an interview, Hichem Hammi, a judge of the Administrative Tribunal emphasized the role of civil society in bringing such cases to the Tribunal, stating that “the development of civil society [since 2011] led to the higher number of cases as more independent organisations appeal their disputes with the state to the TA [Administrative Tribunal]”<sup>210</sup>.

Popular protest provided another means for civil society to pressure the Assembly. Bardo Square directly outside the Assembly building was regularly filled with protests of either liberal or Islamist organizations from the election of the Assembly through the end of the transition. Civil society challenged the Assembly most dramatically through the Arrahil movement, which occupied the square in front of the Assembly starting in July of 2013. The Arrahil movement has

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<sup>209</sup> Interview with Habib Koubaa

<sup>210</sup> These cases are discussed in Chapter 4 of the dissertation.

Benjamin Roger. “En Tunisie, des citoyens veulent envoyer l’Assemblée constituante au Tribunal.” *Jeune Afrique*. 31 August 2012. 31/08/2012. <http://www.jeuneafrique.com/Article/ARTJAWEB20120831122039/>

some things in common with the Tamarod movement in Egypt. It called for the removal of a democratically elected Islamist government and the drafting of a new constitution by experts. It was organized around this goal in 2013 and did not have a long institutional history. It enjoyed the support of many older civil society organizations, but was distinct from them. In both cases, the old civil society was more likely than the Arrahil and Tamarod movements to see courts as allies and to favor additional powers for them. However, the Arrahil movement did not make constitutional review part of its demands. Indeed, the idea of a constitution written by experts might empower legal experts, but it also made provisional constitutional review implausible. Also, a committee of experts would not be subject to review by the Administrative Tribunal the way that the Assembly was.

Of course, the results of the 2013 protests were very different in the two countries. In Tunisia, the old civil society represented by the National Dialogue was able to lead the Arrahil movement. In Egypt, the Tamarod movement led to military intervention and erosion of older civil society organizations. By forcing the the Troika to make concessions on the composition of the interim government and the new constitution, the National Dialogue was able to achieve the goal of the Arrahil movement without abolishing the Assembly. However, the National Dialogue that resulted from the Arrahil protests also did not expand the power of courts.

### The National Dialogue

The National Dialogue first met in October 2013 after months of protests against the Assembly and the Troika government, with the aim of negotiating an end to the crisis between the government and the opposition. The formation of the National Dialogue provided another opportunity for civil society to redesign the transitional institutions. The National Dialogue

Quartet formed to mediate between the Troika government and the opposition. The National Dialogue consisted of four civil society organizations: the UGTT, the Ordre Nationale des Avocats Tunisiens (ONAT), the Tunisian Union of Industry, Trade and Handicrafts (UTICA, the national business association) and the LTDH. Observers consider the National Dialogue to be representative of civil society generally, which was a major source of its legitimacy and effectiveness in checking the Assembly. For example, in reference to the 2013 crisis, Habib Koubaa argued that “if it were not for the pressure from civil society, the Assembly would have stayed in power for five years.”<sup>211</sup> As a result, it was a means for civil society to intervene directly in transitional politics.

The National Dialogue forced a series of compromises on the Troika. The National Dialogue negotiated the resignation of the Troika government and its replacement by an interim technocratic government, as well as substantial changes to the draft constitution that was finally adopted in January 2014. It did not force the Troika to accept judicial review of the Assembly before the adoption of a new constitution, although proposals for review by the Tribunal circulated throughout the transition<sup>212</sup>. It also left the government free to design a weak, non-judicial form of constitutional review - the Instance Provisoire pour le Controle Constitutionnel des Projets de Loi (IPCCPL) - after the adoption of the 2014 constitution. In short, civil society had the opportunity to strengthen the courts through the National Dialogue, but chose not to do so. Indeed, the prominence of civil society in mediating political disputes could prevent courts from playing this role. The National Dialogue itself acted as a sort of constitutional court reviewing the actions of the Assembly and interpreting the unwritten norms governing the transition. The National Dialogue’s resolution of the crisis may have prevented an intervention

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<sup>211</sup> Interview with Habib Koubaa

<sup>212</sup> These proposals are discussed in chapter of the dissertation.

by the Administrative Tribunal, which would have propelled courts to the center of transitional politics<sup>213</sup>.

## **Conclusion**

Like the countermajoritarian hypothesis, the civil society hypothesis focuses on the interests of a particular actor in transitional politics. The failure of these hypotheses points to the need to consider how actors conceive of their own interests. The next section looks at how the practices of the legal system created different conceptions of the judicial role in Egypt and Tunisia, drawing examples from the Tunisian Administrative Tribunal, the incorporation of shariah in Tunisia and Egypt, and the SCC's relations with the ordinary judiciary in Egypt.

## INTRODUCTION TO SECTION II: THE JUDICIAL ROLE

### Introduction: Ideas and Interests

The first two hypotheses - the countermajoritarian hypothesis and the civil society hypothesis - are based on the interests of political actors. The failure of these hypotheses suggests a turn to explanations based on ideas held by these actors. A purely ideational

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<sup>213</sup> “Le Dialogue national ne me represente pas, seule la constitution me protege,” *Webdo*, 3 December 2014. <http://www.webdo.tn/2014/12/03/tunisie-le-dialogue-national-ne-me-represente-pas-seule-la-constitution-me-protege/>

explanation would have difficulty accounting for the different outcomes in Egypt and Tunisia because their overall legal cultures are similar, as described in chapter 1. Moreover, any difference between these legal cultures might be the result of the political factors addressed by the first two hypotheses - the interests of the drafting bodies or the interests of civil society - or by other political factors. Such explanations would be difficult to test because it is impossible to observe whether the drafting bodies were motivated by a particular set of ideas.

The judicial role hypothesis combines elements of ideational and political explanations. It argues that the formal powers of the courts after 2011 are the result of normative ideas about the judicial role, but these ideas in turn are the result of judicial practices in the decades before 2011. It posits a three step process from judicial practices before 2011 to ideas about the judicial role to formal powers after 2011. A purely ideational argument would look at judicial ideology or popular opinion about the judicial role, but not judicial practices.

This hypothesis could be falsified by the total absence of one of the steps, or by a clear contradiction between ideas about the judicial role and the formal powers granted to courts. The absence of such evidence does not exclude other explanations. Each of the links in this three step process produces observable implications. The impact of judicial practice on ideas up until 2011. The impact of these ideas on the transitional documents, and on the activity of courts after 2011.

The first section of this introduction outlines the judicial role hypothesis and its mechanism connecting judicial activity to ideas about the judicial role to the formal powers of courts after 2011. The second section lists the observable implications of the hypothesis in the areas of history, judicial activity, and statements from the interviews and writings by judges and

political parties. The conclusion outlines how the following chapters will examine the hypothesis.

## **The Judicial Role Hypothesis**

### The Judicial Role and Formal Powers of Courts

The judicial role hypothesis draws on two bodies of literature. The first literature deals with formalist and sociological approaches to law. Formalism can be both a normative stance and a theory of how courts do in fact operate<sup>214</sup>. The descriptive definition of formalism states that courts base their activity on the direct application of formal rules contained in laws and constitutions. The countermajoritarian and civil society hypotheses adopts this view by assuming that courts will behave according to their formal powers. The drafting bodies could assign any level of power to the courts to suit their political aims. If the courts used limited powers to defend civil society, they would also use expanded powers in the same way. The judicial role hypothesis argues that the drafting bodies must take into consideration non-formal factors, such as the courts' interpretation of the judicial role.

The second literature addresses the logic of action behind judicial activity. March and Olsen describe the logic of appropriateness as “action as driven by rules of appropriate or exemplary behavior, organized into institutions. Rules are followed because they are seen as natural, rightful, expected, and legitimate” and the logic of consequentiality based on the self

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<sup>214</sup> Schauer (1988), Weber (1978) argues that modern law tends toward formalism or rationalization. Kennedy describes formalism as an “epithet” for modern legal scholars. On the other hand, social scientists often use formalist indicators, such as the formal powers of courts in the constitution, as independent or dependent variables. Ginsburg (2003)

interest of the actor<sup>215</sup>. The first two hypotheses assume a logic of consequentiality for the drafting bodies, the courts, and other actors such as civil society and political parties.

The judicial role hypothesis does not reject the logic of consequences, but does show how the logic of appropriateness can shape the design of the transitional institutions. The judicial role hypothesis assumes that courts act according to a logic of appropriateness, rather than a logic of consequentiality. For courts, the bounds of what is appropriate and what is feasible are closely related. Unlike armies, political parties or trade unions, courts have few means of applying pressure<sup>216</sup>. Moreover, judges are professionals who gain their status from holding an office. Their self interest is closely aligned with the standing of the judiciary as a whole. As a result, judges believe that acting according to the judicial role is also in their own self interest. The drafting bodies may act according to a logic of appropriateness or a logic of consequentiality that takes into account the limits that the judicial role imposes on the judiciary's activity.

### Components of the Judicial Role

Shapiro describes a general “judicial paradigm” of triadic dispute resolution<sup>217</sup>. In this paradigm, a dispute between two parties is mediated by a judge. The court does not make policy or decide any issue beyond the case that is put in front of it. Shapiro describes the judicial

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<sup>215</sup> March and Olsen (2009)

<sup>216</sup> Judges can persuade other actors to apply such pressure. Egypt saw numerous popular protests in support of the judiciary both before and after 2011 for example. Judges can also go on strike. In Egypt, a strike was a serious threat because the absence of judicial supervision would make the election results invalid. Still, this depends on a belief that judicial supervision is essential for legitimate elections. A judicial strike could make it difficult to maintain social order and resolve disputes. However, the effects of a judicial strike are not as immediate as those of many other kinds of workers, such as transport workers, garbage collectors or police. In Tunisia, the UGTT's general strike proved more effective than any of the judicial strikes organized by the judicial syndicates, the SMT and AMT. In Egypt, the disappearance of the police during the Mursi presidency made daily more difficult and dangerous in a way that a judicial strike never could. Political authorities often resist implementing judicial decisions even in established democracies. This problem was especially acute in both Tunisia and Egypt both before and after 2011.

<sup>217</sup> Shapiro (1981)

paradigm as an ideal type from which actual courts may diverge substantially. For this project, variations in these ideas between the two countries are of central importance, but Shapiro’s judicial paradigm provides a landmark for these variations.

Alec Stone Sweet categorizes different high courts based on how closely they correspond to Shapiro’s “judicial paradigm” of dispute resolution as opposed to policy-making roles. His “Continuum for Comparing Types of Courts against the ‘Judicial Paradigm’” is partly reproduced below<sup>218</sup>.

Table 3: Varieties of the Judicial Role

Most Judicial				Least Judicial
<b><u>Ordinary Courts</u></b>	<b><u>Courts of Cassation</u></b>	<u>High Administrative Courts</u>	Concrete Const. Review	Abstract Const. Review
<b><u>Dispute Resolution</u></b>	<b><u>Appeals</u></b>	<u>Public Law Appeals</u>	Const. Cases	Review of Draft Legislation

Ideas about the judicial role can be described as a statement about which of these roles are appropriate for courts. In the French system, the judicial role is defined narrowly. Ordinary judicial courts are separated from overly political activities by by two barriers: the split jurisdiction of the administrative courts and the separation between the Constitutional Council and the judiciary. The core of any concept of the judicial role is a definition of judicial activity as either technical (judicial dispute mediation) or political (policy-making), or an idea of the limits of proper judicial activity (which of the activities listed in the chart are suitable for the judiciary). The judicial role is connected to ideas about the sources of judicial independence, the

<sup>218</sup> Sweet (1992) pg. 248. I have added a description of the activity by each court in the last row. Activities of the ordinary judiciary are in bold and underlined. Activities of the administrative judiciary are underlined. Activities of non-judicial institutions are plain.



role of other state institutions, the sources of law, and the nature of the constitution. To illustrate how these connections might play out, I sketch two ideal types of the judicial role based on non-political and political activity.

If the judicial role emphasizes the non-involvement of courts in political decisions, the legislative and executive must have a broader scope of activity. The judiciary must derive its independence from its internal organization, not from an ability to block actions by the political branches. Respecting the broad scope of legislative action implies a positivist, literal interpretation of statutes, and the exclusion of non-legislative sources of law. Deference to the legislative power implies deference to the constituent power.

If the judicial role emphasizes the power of courts to balance the other branches, then the powers of the other branches are necessarily constrained. If the judiciary is able to block actions by the other branches, then this power could be a guarantee of judicial independence. If the judiciary is able to overturn actions by the other branches, it must be able to call on some higher source of law, such as a constitution, fundamental rights, or natural law. At least it must have broad powers to interpret legislation. If the judiciary uses fundamental rights or natural law, or if it conceives of the constitution as an embodiment of these higher sources of law, then judicial review should continue even in the absence of a formal constitution.

#### The Mechanism: From Judicial Role to Formal Powers in Tunisia and Egypt

The judicial role and its implications may be contested by different actors, even within the judiciary itself. Indeed, this contestation is essential to the mechanism of the hypothesis. The hypothesis posits a pathway from judicial activity before 2011 to ideas about judicial role to formal powers after 2011. The first step is the production of ideas about the judicial role through

the activity of courts. Decisions of constitutional courts, including the SCC and the Tunisian Constitutional Council, enjoy a wide readership among legal professionals in their respective countries. Constitutional courts can act as conduits for the importation of legal ideas from other countries. The activity of the constitutional court may carve out a new role for the judiciary. For example, by consistently ruling against political authorities the constitutional court may claim a more political role.

The second step is the influence of these ideas on the design of the transitional institutions in 2011. The drafting bodies may have been motivated by a normative commitment to the judicial role that was prominent in their countries. Many members of the Ben Achour Commission were lawyers, and the SCAF worked closely with judges from the SCC. The decisions of the drafting bodies could reflect a belief about what activities the judiciary was capable of. The SCC may have been an attractive countermajoritarian mechanism for the SCAF because of its past jurisprudence during the Mubarak era. The reluctance of the Tunisian judges to engage in political activity could make constitutional review implausible to the Ben Achour Commission as a means of restraining the Assembly. Some group outside of the drafting bodies, such as political parties, civil society or the judges themselves may have been committed to a particular version of the judicial role and pressured the drafting bodies to incorporate their views into the transitional documents. In any of these three scenarios, ideas are crucial for connecting the activity of courts before 2011 to the formal powers given to the courts after 2011.

## **Implications**

Interviews and Writings by Judges

Judges, lawyers and political party representatives should share some common normative views about the judicial role. The civil society and countermajoritarian hypotheses imply disagreements among these actors about the powers that should be assigned to courts and the appropriateness of judicial activity. The judicial role hypothesis implies that there should be a broad consensus among these different actors in each country, but a difference between the two countries.

In Tunisia, judges should support an apolitical role for the judiciary, as well as the implications of this role for the sources of law and the nature of the constitution outlined above. Judges should accept the Assembly system, even if they are opposed to the Troika government.

In Egypt, judges should support an activist role for the judiciary, as well as the implications of this role for the sources of law and the nature of the constitution outlined above. Judges should support interim constitutional review, but the more important implication is that Islamists should also support interim constitutional review because this implication is at odds with the other two hypotheses.

#### Judicial Activity, 2011-2014

Judicial activity during the transition should be motivated by the same ideas that existed before the transition. The conception of the judicial role includes limits on judicial activity toward the other branches. Court decisions after 2011 should not transgress these boundaries either, even if the changing political circumstances of the transition might make such actions attractive to courts. Cases in which the judicial role and the political pressure on the court dictate opposite actions are a particularly important test of the hypothesis. The two other hypotheses

provide predictions for judicial activity, which can be compared with the predictions of the judicial role hypothesis.

In Tunisia, courts should limit their activity even within the bounds imposed by the absence of constitutional review. They should not seek to claim additional formal powers, because the formal powers included in the transitional documents already reflect the judicial role.

In Egypt, courts should be willing to confront political authorities, but only on issues where courts had established a record of activism before 2011.

## History

Each of the steps from judicial activity to ideas to formal powers should be present in each of the cases. Sources for the first step include judicial decisions and judicial politics in the era before 2011. The text of court decisions may include descriptions of the judicial role. Particular decisions may establish a precedent for judicial activity in a new area. Sources for the second step include the content of the transitional documents and statements by judges and political party figures.

Putting these events in chronological order can also distinguish between different hypotheses. To distinguish role explanations from purely normative or political explanations, it is necessary to look at how the role was constructed historically. It could be that judicial activity and the judicial role advocated by judges is simply a response to changing political circumstances.

## **Conclusion: Plan of the Section**

The following chapters use several strategies to test this hypothesis. To show the plausibility of this hypothesis, the chapters trace the three step process in each of the cases. They also highlight examples where the predictions of the first two hypotheses would be flatly contradicted by the judicial role hypothesis. These include the refusal of the Tunisian Administrative Tribunal to claim additional powers and the support of the Egyptian Muslim Brotherhood for constitutional review.

This section includes four chapters. Chapter 4 looks at the activity of the Tunisian Administrative Tribunal. The Administrative Tribunal declined to claim additional formal powers during the transition, despite support from civil society and the opposition parties. Chapter 5 looks at the incorporation of shariah into the legal systems of Tunisia and Egypt. The Muslim Brotherhood supported interim constitutional review even though it would act as a counter-majoritarian mechanism. Chapter 6 looks at relations between the Supreme Constitutional Court of Egypt and the ordinary judiciary. Each of these chapters provides examples of the three step mechanism suggested by the judicial role hypothesis. Chapter 7 looks at the range of options for the transitional institutions and how the judicial role hypothesis can explain the choices of the drafting bodies.

## CHAPTER 4: THE ADMINISTRATIVE TRIBUNAL AND THE JUDICIAL ROLE

### **Introduction**

The chapter outlines the activity of the Tunisian Administrative Tribunal from 2011 to 2014. This outline provides a test of the countermajoritarian and civil society hypotheses, both of which imply that the Tribunal should rule assertively against the Assembly and the Troika government. The Tribunal did rule against the Assembly on a number of issues, but it also passed up two opportunities to check the Assembly. First, it declined to issue a decision on the validity of the Assembly's mandate. Second, it declined to use the 1959 Constitution as a source of law, which would have allowed the Tribunal to overturn legislation passed by the Assembly. In general, the Tribunal expanded its activity during the transition but declined to claim additional formal powers against the Assembly. This anomaly can be explained by the judges' conception of their role. The second section outlines the judicial role through a history of relations between the Tribunal and political authorities both before and after 2011 and through interviews with legal professionals. The third section shows how these conceptions limited the activity of the Tribunal on the issues of the Assembly's mandate and 1959 Constitution.

Chapter 2 concluded with the question of why the Ben Achour Commission did not attempt to use judicial review to entrench its program against the Assembly. In the absence of a constitutional court, the Administrative Tribunal was the most plausible option for provisional constitutional review, so understanding the Tribunal is an important step to answering the question of why the Tunisian transitional regime rejected constitutional review. The Ben Achour Commission's Decree was not the only opportunity to grant additional formal powers to the Tribunal. The Troika and the opposition renegotiated many aspects of transitional institutions in late 2013. The Tribunal acted as an ally of the secular opposition against the Troika, but when the opposition forced the Troika government to make a series of compromises in late 2013, it did not include greater powers for the Tribunal in these demands. By January 2014, the opposition

was able to engineer the resignation of the Troika and its replacement with a technocratic government, so it seems plausible that the Troika could have accepted judicial review if the opposition had demanded it.

Even in the absence of an expansion of the Tribunal's formal powers by the Assembly or another political authority, it could have claimed additional powers through its activity. Many courts claimed powers that were not formally enumerated in any constitution. The US Supreme Court's claim of a power of constitutional review in *Marbury v. Madison* is an example. In any case, the high court must interpret its formal powers through activity. The Tribunal had two major opportunities to claim a power of constitutional review during the transition: the dispute over the expiration of the Assembly's mandate in 2012 and the November 7, 2013 case concerning the appointment of members of the transitional justice body, in which the president of the Tribunal suggested that the 1959 Constitution might still be valid<sup>219</sup>. The Tribunal declined to rule on the Assembly's mandate and quickly retreated from the claim that the 1959 Constitution was still valid. Even given favorable circumstances in 2012 and 2013, the Tribunal did not expand its formal powers, or even promote an expansive interpretation of its powers, and it was not granted any additional formal powers by the political authorities.

## **I. The Countermajoritarian Hypothesis and the Civil Society Hypothesis as Explanations for the Behavior of the Tribunal**

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<sup>219</sup> On the issue of the Assembly's mandate, [https://islamwest.org/resources\\_Islam\\_and\\_the\\_West/Yadh-Ben-Achour-interview.pdf](https://islamwest.org/resources_Islam_and_the_West/Yadh-Ben-Achour-interview.pdf), "Nous risquons une dictature pire que celle de Ben Ali." 31 August 2012. <http://lapresse.tn/20012015/54651/nous-ri-squons-une-dictature-pire-que-celle-de-ben-ali.htm>  
On the November 7, 2013 case: Amine Mahfoudh, "Le Tribunal Administratif: Juge Constitutionnel" *La Presse*. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

## The Countermajoritarian Hypothesis

The countermajoritarian hypothesis implies that the activity of courts will serve the interests of the actors that empowered them, and that courts will be willing and able to rule against governments. The hypothesis assumes that courts can play a countermajoritarian role because of certain aspects of their institutional design: their appointments are insulated from political authority, the internal structure of the court cannot be easily changed by the government, and they are empowered to review the acts of the legislative and executive.

A countermajoritarian role is particularly plausible for the Tunisian Administrative Tribunal because of its political environment. The Tribunal did not gain additional formal powers after 2011, but the fluid political situation of the transition gave it many opportunities to act assertively. Moreover, there is evidence that the opposition intended to use the Tribunal as a countermajoritarian mechanism against the Troika government. By the summer of 2011, the provisional government headed by Beji Caid Essebsi had ceded control of constitutional questions to the Ben Achour Commission, which in turn called for the election of an Assembly to draft the new constitution. The provisional government lacked the legitimacy and the legal authority to alter formal powers of the Tribunal or to issue a document that could form the basis for constitutional review. It did still have broad authority to appoint judges. As one of the last acts of its tenure, the provisional government appointed a new president of the Administrative Tribunal, Raoudha Mechichi. Mechichi was known as a staunch secularist. Although she had worked in the Tribunal since 1984, she was still considered to be close to the Essebsi



government<sup>220</sup>. Through this choice, the provisional government intended the Tribunal to act as a check on the Assembly and the future Ennahda-led government<sup>221</sup>.

The Tribunal was suitable for such a countermajoritarian role because of its institutional history and the assumed political views of its judges. According to the organic law governing the Tribunal, the head of government (the President of the Republic before 2011 or the Prime Minister after 2011) had the power to appoint the president of the Tribunal<sup>222</sup>. In theory, the Troika government could have removed Mechichi and appointed a pro-government president. Certainly, such a move would have been condemned by the secular opposition. It would likely be ineffective as well because most of the lower ranking judges were also opposed to the Troika government. Like most judges in Tunisia, the judges of the Tribunal are assumed to support secular parties and to oppose Ennahda. Their ties to the Ben Ali regime, their social and economic status, and their professional background all suggest a secular political stance. An Islamist government would have to remove a large number of sitting judges and replace them with partisan appointees to change the basic political composition of the Tribunal.

### The Civil Society Hypothesis

The civil society hypothesis argues that the greater activity of the Tribunal - especially in fundamental rights and other areas litigated by civil society - should lead to greater formal powers for the Tribunal, either because the drafting bodies give the Tribunal greater formal powers as a concession to civil society or because the Tribunal claims these powers for itself.

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<sup>220</sup> “Raoudha Mechichi,” *Leaders*, 26 September 2011. <http://www.leaders.com.tn/article/6429-raoudha-mechichi>

<sup>221</sup> “Justice: Nomination de premier president du Tribunal Administratif,” *La Presse*, 7 September 2011. <http://www.lapresse.tn/07092011/36336/justice-nomination-de-premier-president-au-tribunal-administratif.html>

<sup>222</sup> Law 72-40, June 1, 1972, <http://www.legislation-securite.tn/fr/node/28167>

Civil society is a broad category, but most of the Tribunal's civil society allies were on the secular side of the political spectrum. Many of the civil society groups that formed part of the Tribunal's support network were also part of the Arrahil movement that called for the dissolution of the Assembly and the resignation of the Troika government<sup>223</sup>. As a result, both the civil society hypothesis and the countermajoritarian hypothesis predict that the Tribunal should act against the Assembly.

The Tribunal did not claim additional powers and none of the transitional authorities granted it additional powers, but both of these outcomes were plausible. At the time of the revolution, the Tribunal already enjoyed the support of a broad range of political parties and civil society groups. As outlined in Chapter 3, the Administrative Tribunal developed an extensive judicial support network immediately after 2011. The activity of the Tribunal as measured by the total number of cases has increased dramatically since 2011. Hichem Hammi confirms that this increase is the result greater activity of civil society in bringing cases to the Tribunal<sup>224</sup>. This increasing influence could have given the Tribunal greater leverage in the redesign of the transitional institutions that occurred during the 2013 crisis and in the 2014 constitution

Civil society litigation suggested an alternative means for the Tribunal to overturn legislation by the Assembly by using the fundamental rights enumerated in international treaties. This approach could have allowed the Tribunal to side-step highly controversial issues like the Assembly's mandate and the validity of the 1959 Constitution while still claiming a power to review the Assembly's legislation. Fundamental rights, whether drawn from constitutions,

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<sup>223</sup> Anouar Boukhars et al. "The Egypt Effect: Sharpened Tensions, Reshuffled Alliances," *Carnegie Endowment*, 13 February 2014. <http://carnegieendowment.org/2014/02/13/egypt-effect-sharpened-tensions-reshuffled-alliances/h5ps#sthash.e7dBL1LZ.dpuf>

<sup>224</sup> "Tribunal Administratif: Le nombre des affaires a evolue a 2694 contre 1965 en 2010" <http://www.tunisienumerique.com/tribunal-administratif-le-nombre-des-affaires-a-presque-double-en-2011/57505> Interviews with Hichem Hammi, Mohamed Bennour, Samir Taieb, Fatma Bouraoui and Walid ben Omrane. <http://www.lapresse.tn/18042015/80788/des-decisions-inconstitutionnelles.html> for further information about the number of cases decided by the Tribunal.

international treaties or other sources, usually have a prominent role in civil society litigation and ‘rights revolutions.’<sup>225</sup> In Tunisia from 2011 to 2014, human rights were at the center of revolutionary discourse. A claim by the Tribunal to act as a guardian of human rights could be particularly potent in this environment. Furthermore, Tunisia was party to several international treaties containing rights provisions, such as the UN Convention on Human Rights. The Tribunal’s doctrine considers treaties to be superior to legislation, so if there is a conflict between a law and the treaty, the Tribunal would refuse to apply the law<sup>226</sup>.

### **The Tribunal and the Assembly, 2011-2014**

This section surveys interaction between the Tribunal and the Assembly from 2011 to 2014 focusing on four key incidents: the design of the transitional institutions in the months after the January 2011 revolution, the debate over the Assembly’s mandate from October 2012 to the summer of 2013, the Tribunal’s November 2013 decisions dealing with the 1959 constitution, and the adoption of the final constitution in January 2014. Each of these periods poses problems for the the countermajoritarian and civil society hypotheses. The Tribunal expanded its activity rapidly in 2011 but it was not granted additional powers. The Assembly’s mandate and the November 2013 decisions were opportunities to for the Tribunal to claim additional powers and to check the Assembly, but the Tribunal did not take advantage of the these opportunities. In late 2013, the opposition forced the Troika to resign and to make major concessions on the content of the new constitution, but at the same time, the opposition also limited the Tribunal’s power by

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<sup>225</sup> Epp (1998), Lasser (2009)

<sup>226</sup> Interview with Hammi. The 2014 Constitution makes the superiority of treaties to legislation explicit. “Constitution of Tunisia, 2014,” *Constitute Project*. [https://www.constituteproject.org/constitution/Tunisia\\_2014.pdf](https://www.constituteproject.org/constitution/Tunisia_2014.pdf)

creating the Instance Provisoire pour le Controle Constitutionnel des Projets de Loi (IPCCPL) and removing Raoudha Mechichi from the presidency of the Tribunal.

#### The Ben Achour Commission and the Decree - January 2011 - October 2012

The March 23 Decree left the Tribunal as the sole representative of legal continuity with the pre-2011 regime. The first year after the fall of Ben Ali saw a flood of rights litigation at the Tribunal. The Tribunal quickly became involved in deciding procedural issues arising from the new National Assembly.

In the months after the 2011 revolution, the Tribunal issued decisions overturning repressive regulations left over from the Ben Ali regime. Immediately after the revolution in 2011, the Tribunal overturned the ban on Council for Human Rights, which had been dissolved by the Ben Ali regime. It dissolved the Conseil Superieur des Magistrats, which was a relic of the Ben Ali regime<sup>227</sup>. The Tribunal also decided disputes relating to the elections for the Assembly in October 2011.

These decisions increased the prominence of the Tribunal and paved the way for actions against the Assembly and the Troika government. The Tribunal ruled in favor of civil society on cases dealing with the internal procedures of the Assembly, the operation of the ISIE, and the Instance Verite et Dignite. A group of civil society organizations, including Bawsala, demanded that the Assembly reveal information about the internal activities of the Tribunal, such as the

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<sup>227</sup> Lilia Weslaty. *Nawaat*, 9 October 2012. "Selon le Tribunal Administratif le Conseil Superieur des Magistrats est illegal." <http://nawaat.org/portail/2012/10/09/tunisie-selon-le-tribunal-administratif-le-conseil-superieur-des-magistrats-est-illegal/>

attendance of particular delegates at meetings. The Tribunal forced the Assembly to accept greater transparency<sup>228</sup>.

This activity supports both of the hypotheses. The Tribunal did act as a counterweight to the Assembly several times during the transition. The Tribunal ruled against the Assembly on the internal procedures of the Assembly, the reinstatement of the dismissed judges, the operation of the ISIE, the body charged with overseeing elections, and the nomination of members of the Instance Verite et Dignite (IVD), the transitional justice body. All of these decisions resulted from cases brought by civil society. Such a large number of rulings against the government was unprecedented in the Tribunal's history<sup>229</sup>.

Although many of the cases brought by civil society deal with human rights directly or indirectly, the Tribunal has not used the UN Convention of Human Rights or other international human rights treaties in its decisions. Instead, it used arguments founded on the statutes themselves and avoided overturning any legislation as incompatible with international treaties<sup>230</sup>.

### The Assembly's Mandate - October 2012 - August 2013

The debate about the Assembly's mandate grew out of the ambiguities of the transitional documents that created the Assembly. The Ben Achour Commission's interim decree of March 23, 2011 called for the creation of a National Assembly with full legislative and constituent

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<sup>228</sup> Benjamin Roger. "En Tunisie, des citoyens veulent envoyer l'Assemblée constituante au Tribunal." *Jeune Afrique*. 31 August 2012. 31/08/2012. <http://www.jeuneafrique.com/Article/ARTJAWEB20120831122039/>

<sup>229</sup> "Tribunal Administratif: Le nombre des affaires a evolue a 2694 contre 1965 en 2010" <http://www.tunisienumerique.com/tribunal-administratif-le-nombre-des-affaires-a-presque-double-en-2011/57505> <http://www.lapresse.tn/18042015/80788/des-decisions-inconstitutionnelles.html> for further information about the number of cases decided by the Tribunal.

Interview with Hammi.

<sup>230</sup> Mahfoudh notes that other Tunisian courts have accepted the principle of the superiority of treaties over legislation. Amine Mahfoudh, "Le Tribunal Administratif: Juge Constitutionnel" *La Presse*, 19 November 2013. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

powers. However, the decree contained few rules for the operation of the Assembly or any clear description of its powers. In any case, the decree also included a clause voiding application of the decree after the election of the Assembly<sup>231</sup>. In May 2011, the major political parties formally agreed to limit the mandate of the Assembly to one year after its election on October 23, 2011. Even earlier, there had been a consensus that the Assembly should draft a new constitution and call new elections as quickly as possible, probably within a year or less<sup>232</sup>. The secular parties argued that the Assembly must not ‘turn itself into a parliament,’ that is try to govern the country for the long term or implement major legislation<sup>233</sup>.

By the summer of 2012, it was clear that the Assembly would not finish drafting the constitution within one year. The expiration of the one year mandate, and its indefinite renewal by the Assembly itself, created a crisis of legitimacy for the Assembly. The Assembly’s legitimacy crisis coincided with growing discontent against to the Troika government. The assassinations of Chokri Belaid and Mohamed Brahmi led to widespread protests. In the Assembly, parliamentarians began abandoning Ennahda’s coalition partners, Ettakatol and CPR. Starting in July 2013 after the assassination of Brahmi, opposition protesters occupied the square outside the National Assembly building demanding the resignation of the Troika and the dissolution of the Assembly<sup>234</sup>.

The question of whether the expiration of the mandate made the Assembly was illegal remained open. For both political and legal reasons, many opposition figures tried to shift the discussion of the Assembly’s mandate from politics to law. A decision from the Tribunal on this

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<sup>231</sup> The Assembly replaced the decree with an organic law on December 17, 2011, which reproduced most of the features of the decree.

<sup>232</sup> Stepan (2012)

<sup>233</sup> Khemais Frini. “Vers la dictature de l’Assemblée” *La Presse*, 5 August 2013.  
<http://lapresse.tn/10122014/70903/vers-la-dictature-dassemblee.html>.

<sup>234</sup> “Le sit-in Arrahil se poursuivra jusqu’au depart du gouvernement” *La Presse*, 23 August 2013.  
<http://lapresse.tn/13012015/71498/le-sit-in-arrahil-se-poursuivra-jusquau-depart-du-gouvernement.html>

issue could force the dissolution of the Assembly and provide a legal basis for the accession of a new transitional government. Opposition figures, including Beji Caid Essebsi, leader of the emerging secular party Nidaa Tounes, argued that the Tribunal became illegal on October 23, 2012. Opposition legal scholars provided the groundwork for this argument<sup>235</sup>.

Both the political sympathies of most of the Tribunal judges and the political atmosphere during the summer of 2013 favored the dissolution of the Assembly. Despite numerous threats to bring a case to the Tribunal, the opposition never did so. Still, the Tribunal could have found a way to rule on this question in the context of another case. Any action taken by the Assembly could be deemed illegal if the Assembly itself were illegal. The absence of a decision by the Tribunal on this issue is not easily explained.

The 1959 Constitution: September 2013 - December 2013

The National Dialogue agreed that the Assembly system should remain in place. Negotiations about the final constitution and the caretaker government began in earnest.

On November 7, 2013, the Tribunal issued a major decision overturning the appointment of members of the Instance Verite et Dignite. This decision had the potential to derail the government's plans for transitional justice, which is an issue that pits figures of the old regime against the new democratic government. It also followed several decisions blocking the appointment of members of the Instance Superieure Independante pour les Elections (ISIE), which caused further friction between the Assembly and the Tribunal. A statement issued by the Judicial Council of the Tribunal alongside this decision also asserted the Tribunal's power to

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<sup>235</sup> Jean-Christophe Ploquin. "En Tunisie, un veteran de l'indépendance face aux islamistes" *La Croix*, 11 November 2013. <http://paris-international.blogs.la-croix.com/en-tunisie-un-veteran-de-lindependance-face-aux-islamistes/2013/11/11/>

review legislation based on conformity to the 1959 constitution<sup>236</sup>. The statement asserted that in the absence of a constitutional court the Tribunal must decide whether legislation is in conflict with the constitution. This claim was controversial because the Tribunal had never before exercised a power of constitutional review of legislation and because the 1959 constitution had been suspended immediately after the 2011 revolution<sup>237</sup>.

Political parties and civil society were divided by the issue of transitional justice covered by the decision as well as validity of the Tribunal's statement claiming a power of constitutional review. Supporters of the secular opposition welcomed the Tribunal's decision on transitional justice. The secular opposition was suspicious of the Instance Verite et Dignite as a possible means of prosecuting opponents of the Troika who had ties to the Ben Ali regime. Civil society groups that advocated for transitional justice opposed the decision. Islamists and supporters of the Ennahda government saw the decision and the statement as an attack on the transition as a whole<sup>238</sup>. Some opposition figures welcomed the statement and argued in favor of provisional review by the Tribunal.

The Tribunal's decision did force the government to reform the procedures for selecting members of the Instance, even though the Tribunal backed down on the questions of the validity of the 1959 Constitution and of the Tribunal's power to review legislation. Ultimately, the Tribunal did not exercise the powers outlined in the statement. It never declared a piece of legislation to be unconstitutional, and it did not refer to the 1959 Constitution in its later

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<sup>236</sup> Arret 7 Novembre 2013, 134866 – 134855 – 134854

For an overview of disputes surrounding the ISIE, see Rafea ben Achour, "Les enjeux du proces electoral" colloquium organized 3 December 2013 in Tunis. [http://www.kas.de/wf/doc/kas\\_38488-1522-1-30.pdf?140804145710](http://www.kas.de/wf/doc/kas_38488-1522-1-30.pdf?140804145710)

<sup>237</sup> 'Amr al-Safrawi, "Ra'i qanuni: Ra'is al-Mahkamah al-Idariyah yuzakki kharaq al-dustur wa yujayiz tujawuz al-sultah wa yaqbur manzumat al-'adalah al-intiqaliyah." (Judicial Opinion: The President of the Administrative Tribunal stokes the fire burning the constitution, allows the excess of power, and buries the system of transitional justice), *Assabah* <http://www.assabah.com.tn/>

<sup>238</sup> 'Amr al-Safrawi, "Ra'i qanuni: Ra'is al-Mahkamah al-Idariyah yuzakki kharaq al-dustur wa yujayiz tujawuz al-sultah wa yaqbur manzumat al-'adalah al-intiqaliyah."



decisions. This outcome may represent a decision by the Tribunal to backtrack or it may be the result of changing political circumstances that made the Tribunal's countermajoritarian role less appealing to the secular parties. As secularists gained control of the government, first in the Jomaa caretaker government, and then more decisively after the 2014 elections, the potential for confrontation between the Tribunal and government decreased. The Tribunal had only a short window to apply this doctrine because the new Constitution would be adopted in January 2014, three months after the Tribunal raised the possibility of citing the 1959 Constitution. The 2014 constitution also created a specialized body for provisional constitutional review, the IPCCPL, rather than giving this power to the Tribunal. Nidaa Tounes, the main secularist party, supported this provision as much as the Troika parties<sup>239</sup>.

#### The 2014 Constitution and the Resignation of the Troika - January 2014 - March 2014

Negotiations between the Troika and the opposition starting from the summer of 2013 resulted in a comprehensive plan. First, the Troika government would resign to be replaced a technocratic caretaker government headed by Mehdi Jomaa. Second, a permanent constitution would be adopted in January 2014. The transitional provisions of the 2014 constitution seem designed to limit the power of the Tribunal. The 2014 constitution created the IPCCPL as an alternative to provisional constitutional review by the Tribunal. Supporters of the Tribunal opposed the creation of the IPCCPL for this reason. The Jomaa government also removed Mechichi as president of the Tribunal, replacing her with Mohamed Faouzi Ben Hamed. In short, the opposition forced the Troika to resign and imposed major concessions with regard to the constitution, but it also agreed to limitations on the Tribunal.

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<sup>239</sup> Interviews with Fatma Bouraoui (Nidaa Tounes), Walid ben Omrane (CPR) and Mohamed Bennour (Ettakatol)

The Tribunal's activity from 2011 to 2014 reveals a mixture of assertiveness and deference to political authorities that cannot be explained by either of the alternative hypotheses. Under the leadership of president Mechichi, the Tribunal acted as a counterweight to the Assembly. With the support of civil society, the Tribunal ruled against the Assembly. These conditions presented the Tribunal with an opportunity to claim additional powers, but it did not do so.

## **II. The Judicial Role**

### The Judicial Role Hypothesis

As described in the Introduction to Section II, the judicial role hypothesis states that beliefs about the judicial role will affect formal powers of courts. The drafting bodies may believe that certain roles are appropriate or inappropriate for courts, or they may believe that courts will behave in a certain way and design the transitional institutions accordingly. The judicial role consists of both normative and practical elements. It includes a concept of law and a theory of the sources of judicial independence.

The judicial role develops historically. First, judges adopt a set of practices and beliefs that allow them to secure their interests in the old regime. Second, these ideas persist during the transition and continue to guide judicial behavior in a highly uncertain environment. Finally, these ideas shape the formal powers that courts demand and the formal powers that political authorities are willing to grant them. A different collection of political forces or a different arrangement of the transitional institutions would not have made the Tribunal any less reluctant to perform these roles.

This hypothesis can explain the behavior of the Tribunal, including its combination of deference on some issues with assertiveness on others. It argues that the Tribunal's deference to the Assembly is the result of a choice by the Tribunal to remove itself from politics. Such a choice could result from a principled objection to court interference in politics or a fear of the consequences of political activity for the court. These two reasons could be intertwined. Like many courts, the Tribunal bases its legitimacy on a claim of apolitical expertise. Aspects of Tunisian legal culture, the Tribunal's internal structure and its relations with political authorities before and after 2011 make this claim especially important for the Tribunal. The Tribunal maintained a reputation for independence unequalled by any of the other institutions inherited from the Ben Ali regime. This independence rested on a shared view of the Tribunal's role as an apolitical expert actor. The procedures of the Tribunal were designed to protect this role. The judges were promoted according to meritocratic criteria from within the Tribunal. The Tribunal presented an image of consensus; judges do not sign their decisions and public disagreements are rare. Finally, the Ben Ali regime maintained a norm of non-intervention in the internal structure of the Tribunal.

There are two possible objections to this explanation. First, the ideas espoused by the Tribunal could simply be a product of strategic considerations. Second, the Tribunal might show deference to Assembly on some issues of key importance to the Assembly because it is afraid of retaliation by the Assembly. I address the first objection by looking at the history of the Tribunal. A connection between ideas and the practices of the court during the old regime can address this objection. The ideas held by the Tribunal judges are not simply the result of shifting interests, but are rather rooted in experiences of the Ben Ali period. I address the second explanation by showing that retaliation against the Tribunal was rare and that the Assembly had

few means to retaliate. The Tribunal is more concerned with divisions among its own judges than retaliation from the government.

It has implications for the activity of courts before and after 2011. Tunisian courts should pass up opportunities to claim additional powers if these powers are at odds with their conception of the judicial role. Such situations are the crucial test of the hypothesis because the predictions of the hypothesis diverge from the predictions of the other two hypotheses. Any time that the Tribunal did not rule against the Assembly could be such an opportunity, but this raises two objections.

In the following section, I outline the views of judges on the judicial role as presented in the interviews. I then address two objections to this explanation. I then outline how ideas about the judicial role explain the Tribunal's pattern of assertiveness and deference during the debate about the Assembly's mandate from October 2012 to August 2013 and the Tribunal's November 7 decision claiming a power of constitutional review.

## **Applying the Judicial Role Hypothesis to the Tribunal**

### The Judicial Role and the Tribunal According to Legal Professionals

The interviews reveal that beliefs of Tunisian legal professionals favor a technocratic view of judicial activity and a legal positivist view of the sources of law. Each of these positions is justified not just by legal theory but also by a concern for judicial independence. The danger to judicial independence is politicization of the judges themselves more than cooptation or retaliation by political authorities. The interviewees' conception of the judicial role consists of three principles.

First, law is technical or scientific field that is antithetical to politics. Courts should defer to the government on political questions. The conception of political questions held by Tunisia legal professionals is quite broad. Constitutional review is perceived as a political activity. As a result, legal professionals voiced objections to constitutional review by the Tribunal. Koubaa said that review by the Tribunal would be preferable to review by the IPCCPL because he considers the IPCCPL to be too weak to stand up to political authority. The involvement of the Tribunal in constitutional questions would make it a target for interference from the political authorities.

Second, judicial activity requires specialized knowledge and training. Moreover, different legal tasks require different kinds of expertise. For example, Koubaa and M'dhaffar state, the judges of the Tribunal do not have the appropriate training for constitutional review, even though both interviewees are sympathetic to the Tribunal. They consider the process of deciding public law issues to be substantially different from constitutional issues. M'dhaffar described the activity of the Constitutional Council as 'both political and legal,' and thus fundamentally different from the activity of other courts, including the Tribunal. Not only should the Tribunal not meddle in politics, it should also avoid the political questions involved in constitutional review.

Third, courts should base their decisions only on positive law or legislation, rather than constitutional norms, natural law or precedents. They should not claim power that are not clearly granted to them by the constitution and organic laws. For example, Koubaa argued that the Tribunal could exercise review based on the 1959 constitution or the March 23 Decree, but because such a power was not granted by any valid legal text, it is impossible for the the Tribunal to claim such a power. M'dhaffar rejected any form of a posteriori constitutional

review because it could destabilize the legal order in both practical areas, such as social security, and highly symbolic areas, such as the personal status code. The first task of courts is to ensure the uniformity and stability of law, not to correct imperfections in the law.

The interviewees' understanding of judicial independence is quite different from how judicial independence is understood in the United States, or in Egypt for that matter. The Tunisian conception of judicial independence rests on institutional organization, not on constitutional provisions or constitutional review. In the United States, constitutional review is an essential activity of the judiciary. It is opposed to political activities. Judicial independence is founded in the constitutional separation of powers, which makes the judiciary a branch of government equal to the executive and the legislative. In Egypt too, constitutional review is an essential activity of the SCC. Although lower courts cannot exercise constitutional review, the SCC's power of constitutional review is still important to them because it can be used to guarantee judicial independence against government interference. For this reason, the suspension of the constitution would be a greater threat to judicial independence in Egypt than Tunisia. The unusual aspects of the Tunisian conception of judicial independence suggests that these ideas about the sources of judicial independence are not simply the result of theory, but also of the Tribunal's experience during the Ben Ali period.

The legal professionals' understanding of the judicial role is not simply a normative ideal but also a set of causal beliefs about what sorts of activity by the Tribunal will be beneficial or harmful to its independence<sup>240</sup>. The judges applied these concepts to the cases of the Assembly's mandate and the November 7, 2013 decision.

#### Relations between the Tribunal and the Ben Ali Regime

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<sup>240</sup> Keohane and Goldstein contrast norms with causal beliefs. Goldstein and Keohane (1993)

If the judges' conception of the judicial role can account for the activity of the Tribunal after 2011, it should have its roots in the pre-revolutionary period. Otherwise, this conception could simply be a response to the constraints imposed on courts by the Assembly system. The pattern of non-interference in the Tribunal coupled with non-enforcement of some decisions dates back to the Ben Ali and Bourguiba regimes. It is evidenced in the Tribunal's decisions against the Ben Ali regime, the method of appointing members of the Tribunal during the Ben Ali regime and the interviewees' attitude toward the Tribunal. Moreover, it is implausible that the Assembly could impose an ideology of judicial deference on the Tribunal during the relatively short transitional period.

The Tribunal was less active under the Ben Ali regime than it was after 2011. It decided fewer cases per year. Civil society was less able to bring cases to the Tribunal before 2011. Hammi went so far as to say that Tunisia had 'no real civil society' before 2011. It also had little political role to play in a regime where power was concentrated in the hands of the president. Still this period was of great importance to the activity of the Tribunal after 2011. As the interviews make clear, the Tribunal did sometimes rule against the Ben Ali regime without provoking the regime to undermine its independence. The 2004 decision allowing a teacher to wear a hijab and decisions regarding the Tunisian League for Human Rights in the 1990's are among the most well-known<sup>241</sup>. The regime did choose not to enforce decisions that it opposed. As Mohamed Bennour, spokesman of Ettakatol, put it 'the problem that the TA faced in the Ben Ali period was the non-execution of its judgements by the executive.'

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<sup>241</sup> Comité des droits de l'homme Nations Unies. "La situation des droits de l'homme en Tunisie" March 2008. [http://www.univie.ac.at/bimtor/dateien/tunisia\\_omct\\_2008\\_human\\_rights\\_report.pdf](http://www.univie.ac.at/bimtor/dateien/tunisia_omct_2008_human_rights_report.pdf). Ahmed Souab was involved in a 2004 case in which the Tribunal ruled against the ruling RCD party on charges of corruption. Mahfoudh cites the Tunisian League for Human Rights decisions as a rare example of the Tribunal's use of international treaties. Amine Mahfoudh, "Le Tribunal Administratif: Juge Constitutionnel" *La Presse*. 19 November 2013. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

These informal institutions persisted because Ben Ali allowed them to persist. The Tribunal could easily have ended up like the ‘empty shell institutions’ of the Ben Ali regime, such as the Constitutional Council and the parliament<sup>242</sup>. The president of the republic had the power to appoint a president of the Tribunal<sup>243</sup>. However, this power did not translate into direct control over the Tribunal or the stacking of the Tribunal with Ben Ali’s associates, as was the case with the Constitutional Council. There was a strong norm that the president should choose a president from the Tribunal’s judges and this procedure should not be used to pressure the court. That it did not suggests that the independence of the Tribunal was beneficial to the regime. Over the four decades since its creation in 1972, political authorities had learned how to deal with the Tribunal without destroying its independence. By respecting the independence of the Tribunal, the regime maintained a valuable source of unbiased legal expertise. Like the early French Conseil d’Etat, the Tribunal under Ben Ali was a consultative more rather than a judging institution. Like administrative courts in other authoritarian regimes, the Tribunal helped the Ben Ali regime monitor the bureaucracy for corruption<sup>244</sup>. The regime’s non-enforcement of some of the Tribunal’s decisions gave the regime a veto over the Tribunal’s activities without fundamentally compromising the institution. For its part, the Tribunal had developed a set of norms for its internal governance that improved on the legal guarantees of its independence.

The interviewees state that the Tribunal was also remarkably free from interference during the Ben Ali period. Even interviewees, such as Mohamed Bennour of Ettakatol, who were bitterly opposed to the Ben Ali regime, agree on this point. Samir Annabi traces the greater independence of the Tribunal to its founding, which grouped together leading jurists, to the actions of its first president, Mr. Kanani, who used his political influence to ensure the

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<sup>242</sup> Interview with Walid ben Omrane

<sup>243</sup> Law 72-40, June 1, 1972 <http://www.legislation-securite.tn/fr/node/28167>

<sup>244</sup> Rosberg (1995)



independence of the Tribunal, and to the practice of appointing judges based on expertise rather than political connections<sup>245</sup>. By 2011, the Tribunal had already established a reputation for independence that was respected by all of the major political parties and by legal professionals.

The Troika government used much the same approach in dealing with the Tribunal. Certainly the impunity of the Troika in choosing which decisions to enforce is not as great as during the Ben Ali period. Some of the most effective decisions of the Tribunal during the transition were in the internal procedures of the Assembly and in the implementation of organic laws drafted by the Assembly, such as those creating the ISIE and the Instance Verite et Dignite. In these cases, the Tribunal's decisions changed the behavior of the government on important issues. In contrast, the operation of ministries remained an area of relative impunity for the government. The Ministry of Justice refused to reinstate the judges that had been removed for corruption, in defiance of a decision by the Tribunal. As of 2015, these judges have still not been reinstated. This is not surprising because the Troika inherited much of its administrative personnel from the Ben Ali period.

It is implausible that the Assembly system could create a new judicial ideology that could replace the Tribunal's experience during the Ben Ali regime. As discussed above, the Assembly did not retaliate against the Tribunal, it did not attempt to remove judges from the Tribunal, and it did not issue new laws reorganizing the judiciary.

Despite the many changes brought by the revolution, the certain patterns of relations between the Tribunal and political authorities remained the same. These include non-enforcement rather than interference by political authorities and deference by the Tribunal on political questions. The ideology of the Tribunal is not simply a response to transitional politics.

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<sup>245</sup> Interviews with Samir Annabi and Mohamed Bennour

The methods used by the Tribunal to ensure its independence during the Ben Ali regime continued to be useful during the transition.

### The Assembly's Limited Means of Retaliation

The activity of the Tribunal combines assertiveness and deference to the Assembly on different issues. An alternative explanation for the Tribunal's deference on some issues is that it faced a threat of retaliation from the Assembly if it issued rulings that threatened the Assembly's core interests. It could be that the Assembly is more able to retaliate if these core interests are threatened. If this is the case, the inactivity of the Tribunal on the issues of the Assembly's mandate and provisional constitutional review would not be evidence of the ideational explanation. Retaliation might take the form of interference in the internal governance of the Tribunal or the removal of judges from the Tribunal. It is possible that the government could communicate its demands to the Tribunal so effectively that the Tribunal would never make the mistake of crossing one of the government's redlines. In practice, there should be some evidence of the Assembly threatening retaliation. At least there should be clear means through which the Assembly could retaliate against the Tribunal, such as interference in the organization of the Tribunal, removal of sitting judges or changes to the laws and constitutional provisions governing the Tribunal.

The Tunisian transitional institutions were designed to concentrate power in the Assembly. This concentration of power could discourage activity by the Tribunal on issues of critical importance to the Assembly. Whatever the balance of power between different parties, a majority in the Assembly has nearly unchecked power to pass legislation and draft the constitution. Even if the majority party were voted out after the end of the transition, as

happened with Ennahda, it still had major influence over the constitution, and thus the future status of the Tribunal. This argument implies that the Tribunal would rarely challenge the interests of the majority in the Assembly. If the Tribunal did challenge the Assembly, the Assembly would respond by altering the statutes that formed the basis of the Tribunal's decision or by interfering in the internal governance of the Tribunal.

In fact, the Tribunal did not face retaliation for its decisions by any of the transitional governments. In general, governments have several means of retaliating against courts, including altering the constitution, legislation governing the courts, or removing sitting judges. The Troika had limited control over all of these means of retaliating against the Tribunal.

The public positions of the political parties on the provisions of the draft constitutions undermine the argument that the Assembly's constituent power gave it a means to retaliate against the Tribunal. No party argued that the Tribunal should be removed from the new constitution or that its independence or formal powers should be reduced. None of the draft constitutions, including Ennahda's controversial draft of June 1, 2013, attempted to restrict the formal powers to the Tribunal.

The draft constitution proved to be one of the issues where the Troika faced the most opposition and had to make the most concessions. The ratification of the new constitution was subject to a two-thirds majority requirement. Like the one year mandate, this requirement could not be enforced on the Assembly by any other body, but it would still be costly politically for the Troika to ignore this requirement. In practice, the final draft constitution was approved by over ninety percent of the members of the Assembly<sup>246</sup>. The first draft constitution produced by the Troika government on June 1, 2013 proved highly controversial and contributed to the crisis

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<sup>246</sup> Bawsala, <http://www.tunisia-live.net/2014/01/26/new-tunisian-constitution-adopted/>

during the summer of 2013<sup>247</sup>. In short, the Assembly's constituent power was not a more effective means to retaliate against the Tribunal or other courts.

The Troika also found it difficult to pass legislation, despite commanding a majority in the Assembly. The Troika parties may have been committed to the Assembly system, but the unity of the Troika government was always in doubt. Many individual delegates defected from Ennahda's coalition partners in 2012 and 2013. As a result, the Troika's majority dwindled from 138 to 117 out of 217. As many as sixty opposition delegates suspended their participation in the Assembly during the summer of 2013<sup>248</sup>. It could be that the Troika parties were only able to unite when the Assembly system itself was threatened. This explanation is plausible because the Assembly system was the basis of the Troika parties' power. However, the parties often failed to agree even on the desirability of maintaining the Assembly system. Although the Assembly ultimately survived, its viability was in doubt for much of the transition. The opposition openly called for the dissolution of the Assembly and the creation of very different transitional institutions. In the summer of 2013, it looked like they might succeed in forcing the dissolution of the Assembly. Ettakatol and CPR may have been too deeply invested in the Assembly system to contemplate an alternative. However, association with the Troika also eroded support for these parties. Ettakatol failed to win a single seat in the 2014 elections. Many figures from these parties have continued to be involved in politics, but in different capacities or with different party affiliations<sup>249</sup>. By 2013, individual delegates from CPR and Ettakatol may have seen better political prospects in opposing the Assembly and trying to secure their own position in a post-

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<sup>247</sup> Interview with Fatma Bouraoui

<sup>248</sup> Anna Antonakis-Nashif, "Tunisia's Legitimacy and Constitutional Crisis: The Troika has Failed" *SWP Comments*, August 2013. [http://www.swp-berlin.org/fileadmin/contents/products/comments/2013C26\\_atk.pdf](http://www.swp-berlin.org/fileadmin/contents/products/comments/2013C26_atk.pdf)

<sup>249</sup> Aymen Gharbi "Le Tribunal Administratif confirme: Pas de siege pour Ettakatol a Kasserine" *Huffpost Tunisie*, 18 November 2014. [http://www.huffpostmaghreb.com/2014/11/18/tribunal-isie-kasserine\\_n\\_6177370.html](http://www.huffpostmaghreb.com/2014/11/18/tribunal-isie-kasserine_n_6177370.html)

Assembly system. The unpopularity of the Assembly gave the Tribunal an opening to challenge the basic principle of the supremacy of the Assembly.

In contrast to the legislative and constituent functions, executive and ministerial actions gave more leeway to the Troika. However, the ability of the government to use its power to appoint judges as a means of retaliation against the Tribunal is more limited than it might seem. The government always had the power to appoint the president of the Tribunal, but the Troika declined to use this power against Mechichi. Mechichi was removed by the Jomaa government, not by the Troika government, which resigned before the removal of Mechichi<sup>250</sup>. The government did remove a number of ordinary judges in 2012, and failed to reinstate despite a ruling from the Tribunal<sup>251</sup>. Although the government never reinstated the judges, it did face criticism from civil society, the judiciary and the opposition parties on this issues, and its removal of the judges did not expand into a broader campaign to reshape the ordinary judiciary. In any case, a similar strategy would not work against the Tribunal. The Tribunal, as an administrative rather than a judicial body, is not under the authority of the Ministry of Justice. According to the organic law governing the Tribunal, lower ranking judges in the Tribunal are appointed by senior judges, not the government. The government would need to first change the organic law governing the Tribunal or use some extraordinary measure, such as transitional justice, to remove Tribunal judges on grounds of corruption or other offences. The Assembly also shelved plans to reform the judiciary until after the adoption of a new constitution and the election of a permanent legislature<sup>252</sup>.

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<sup>250</sup> Insaf Boughdiri, "Des Decisions Inconstitutionnelles," *La Presse*, 26 March 2014  
<http://www.lapresse.tn/18042015/80788/des-decisions-inconstitutionnelles.html>

<sup>251</sup> "Reinstate Judges Fired Arbitrarily," Human Rights Watch, 8 July 2014.  
<https://www.hrw.org/news/2014/07/08/tunisia-reinstate-judges-fired-arbitrarily>

<sup>252</sup> Sarah Mersch. "Judicial Reforms in Tunisia" *Carnegie Endowment for International Peace*, 10 April 2015  
<http://carnegieendowment.org/sada/?fa=59746>

## Retaliation and non-Enforcement

Many actors, including the opposition parties and the judicial syndicates, the SMT and the AMT, accused the Troika government of undermining the independence of the Tribunal and retaliating against its decisions. However, it is difficult to find a clear example of any post-2011 government retaliating against the Tribunal. It is possible that relations between the Tribunal and the government are still defined by an implicit threat of retaliation. In fact, non-enforcement provided a means for the government to deal with the Tribunal that was more attractive than retaliation.

The removal of Mechichi sparked protests by the AMT, which claimed that the government was undermining the independence of the Tribunal. There are several reasons to be skeptical of this claim. First, the head of government had the legal authority to remove the president of the Tribunal. The law governing the Tribunal had remained the same since the Ben Ali period. Second, the party most opposed to Mechichi, Ennahda, never tried to use this power to undermine the Tribunal, even during the confrontation over the Assembly's mandate. Third, many of the judges of the Tribunal, at least those represented by the UMA, were suspicious of Mechichi and her political program. In this light, the Jomaa government's decision to remove Mechichi was not an attempt to undermine the independence of the Tribunal or punish it for its numerous rulings against the government from 2011 to 2014. Instead, this decision resolved a tension between two visions of the Tribunal's role. Mechichi, along with secular political parties and civil society groups, had sought to make the Tribunal into a counterweight against the Assembly. The other view is presented by the legal professionals that I interviewed - Hammi, Annabi and Koubaa. The Tribunal should confine itself to a relatively narrow technical realm in

which it had unquestioned expertise. It should avoid political conflicts in order to avoid conflicts with the government and divisions within the Tribunal. This role was more in keeping with the traditions of the Tribunal and with the legal theory espoused by most Tunisian legal professionals. This second view triumphed because of support from a large number of legal professionals, including judges of the Tribunal, and from the Jomaa government.

The government was able to impose its will on the Tribunal in the area of appointments to the ordinary judiciary. In the interviews, Koubaa and Annabi note that the Troika did refuse to enforce some of the Tribunal's decisions, as during the Ben Ali period. The most well-known example is the case of the judges removed for corruption by the Troika's minister of justice, Nouredine Bhiri in 2012. The Tribunal ruled that these judges had been removed illegally and must be reinstated. As of 2015, these judges have still not been reinstated despite criticism from Tunisian and international NGO's<sup>253</sup>. The Troika government did not have the monopoly on power that the Ben Ali regime had, but in this case the Ministry of Justice was still able to dominate the ordinary judges in much the way that it had under Ben Ali.

In the cases where the Tribunal challenged the Assembly most directly and where the Assembly could retaliate through its legislative rather than its constituent power, the government responded by non-enforcement of the Tribunal's decisions, rather than retaliation. This continues a pattern from the old regime. This pattern has implications for the behavior of Tribunal. The Tribunal does not need to be as careful about overstepping the bounds of what the Assembly will allow if the result is only non-enforcement of the decision rather than retaliation against the court.

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<sup>253</sup> "Reinstate Judges Fired Arbitrarily," Human Rights Watch, 8 July 2014. <https://www.hrw.org/news/2014/07/08/tunisia-reinstate-judges-fired-arbitrarily>. As a representative of a member party of the Troika, Ettakatol, Bennour defended the government's record in enforcing decisions of the Tribunal, and argued that the removal of judges by Bhiri was necessary.

## **The Judicial Role and the Activity of the Tribunal, 2011-2014**

The statements of judges show that a certain conception of the judicial role was widespread in Tunisia. The history of the Tribunal under Ben Ali show that these ideas have deep roots in the past. Relations between the Tribunal and the Assembly show that the Tribunal's behavior was not limited by the threat of retaliation. All of this evidence shows that the judicial role hypothesis can be applied to the Tribunal.

Both the issue of the Assembly's mandate and the November 7, 2013 case can be interpreted as opportunities for the Tribunal to limit the power of the elected government. Moreover, they were opportunities for the Tribunal to claim additional formal powers. However, in both of these cases the Tribunal ultimately declined to claim additional powers over the Assembly.

### **The Mandate of the Assembly: Political and Legal Considerations**

The Tribunal's refusal to issue a decision on the Assembly's mandate is puzzling from the perspective of either the countermajoritarian or civil society hypotheses. However, interviews with legal professionals reveal the importance of ideas about the judicial role, and especially about legal methodology and the sources of law, in the Tribunal's approach to this issue. Legal professionals oppose the Assembly system in practice, but they accept the theory underlying it.

Legal professionals expressed disapproval of the Assembly and its decision to unilaterally extend its mandate. Often their arguments were nearly identical to those used by



secular opposition politicians, such as Essebsi. This is not surprising giving the partisan affiliation of most judges. Koubaa and M'dhaffar, two former judges who had since moved to private practice were particularly critical of the Assembly. When I asked why the Assembly extended its mandate, Koubaa replied that “they simply wanted power.” M'dhaffar considered the era of the Assembly from 2011 to 2014 to be “a big stupidity” in which “the country lost three years.”<sup>254</sup>

However, this hostility to the Assembly does not translate into support for action by courts against the Assembly system. Despite their political stance against the Assembly, legal professionals reject the argument that the Assembly is illegal because of the expiration of its mandate and oppose the involvement of the Tribunal in this issue. Koubaa places responsibility for checking the Assembly on civil society rather than any court. He argues that “if it were not for civil society, the Assembly would have stayed in power for five years.” Hammi rejected a Tribunal decision on the legitimacy of the Assembly because the issue was “completely political.” The one year mandate was simply a political agreement among the parties, not a valid legal rule that the Assembly could use in its decisions.

Such a decision would not be constitutional review because it would not be based on any constitutional text. Instead, it would ask the Tribunal to take on an amorphous role as the ‘guardian of the transition.’ As Koubaa argued, the March 23 Decree, or the Assembly’s own organic law of December 17 could form the basis of judicial review of the Assembly. Yet these documents did not give a power of review to the Tribunal or any other court, and they did not include the one year limit. Given the positivist doctrine of the Tribunal, the legal case for dissolving the Assembly was weak.

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<sup>254</sup> Interviews with Koubaa and M'dhaffar

From these interviews, it is clear that legal positivism is the official legal methodology of the Tribunal and the Tunisian legal system generally. It is the only methodology that legal professionals endorse in the interviews, regardless of what other considerations these statements might mask. However, it is not clear why the judges are so attached to this methodology. The disputes following the Tribunal's November 7, 2013 decision reveals some of the political considerations that help explain the judges' commitment to legal positivism.

#### The Judicial Role and 1959 Constitution: Politics inside the Tribunal

The decision to block appointments to the IVD was politically sensitive, but not more so than the Tribunal's other decisions. From a positivist legal perspective, the Tribunal was on firmer ground with the November 7, 2013 case than with the issue of the Assembly's mandate. The November 7 decision was the result of a case brought against the Assembly over the appointment of members of the Instance Verite et Dignite. In contrast, the issue of the Assembly's mandate was never addressed in an actual case. Moreover, the Tribunal could draw on several sources of law to justify the decision, including the 1959 Constitution and international treaties, whereas a time limit on the Assembly's mandate is not mentioned in any legal text. However, the Tribunal's use of the 1959 Constitution entangled it in the question of the ultimate authority governing the transitional regime. This question split legal experts and the judges of the Tribunal. The Tribunal's refusal to press these claims is the result of politics within the Tribunal and of concerns about the Tribunal's independence.

Legal experts were uncertain about what power the Tribunal was claiming in the statement. One interpretation of the statement was that the Tribunal was claiming a far-reaching power to overturn legislation on the basis of the 1959 constitution. Amine Mahfoudh claimed

that is this act made the Tribunal the “Marshall of Tunisia.”<sup>255</sup> Mahfoudh argues that the 1959 Constitution could still be used as a source of law. This claim goes a bit farther than the constitutional review exercised by the US Supreme Court because the Tribunal seems to claim a right to decide what counts as a valid constitution. At least it is a bold political statement that the suspension of the 1959 Constitution after the revolution was illegitimate. The Tribunal might be able to dodge the question of the 1959 Constitution entirely; Mahfoudh also points out that the fundamental rights included in the UN Convention of Human Rights could be used to overturn statutes because treaties form a higher law than legislation and the Tribunal has always had the power to review the application of treaties.

A second interpretation was that the statement was simply an assertion of the power of constitutional review by exception, which the Tribunal had always exercised. Samir Taieb, Secretary General of the Al-Massar party, contended that the Tribunal actually had been exercising constitutional review since the dissolution of the Constitutional Council<sup>256</sup>. His party’s proposal to grant the Tribunal a power provisional constitutional review would simply recognize and expand this practice. Hammi emphasized that the Tribunal always had the power apply the constitution to void the application of statutes in particular cases through the procedure known as review by exception. However, such a decision does not overturn the statute in general or produce a binding precedent other courts or on later decisions by the Tribunal<sup>257</sup>.

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<sup>255</sup> Amine Mahfoudh, “Le Tribunal Administratif: Juge Constitutionnel” *La Presse*. 19 November 2013. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

<sup>256</sup> Taieb’s second claim, that the Tribunal’s exercise of review by exception is equivalent to constitutional review of statutes, or at least a good preparation for constitutional review of statutes, is rejected by all of the legal professionals that I interviewed.

<sup>257</sup> On the other hand, the Tribunal is the only public court in Tunisia, so it can decide how to interpret any law in all public law cases. The Tribunal includes a lower court, a court of appeals and a high court, so cases can go through two appeals. It seems likely that the views of the high court would influence decisions by the lower courts, which are housed in the same building. The 2014 Constitution envisions a network of administrative courts throughout the country.

The decision also divided the judges of the Tribunal. The Union des Magistrats Administratifs (UMA), led by Ahmed Soueb, the president of the Tribunal's Chamber of Cassation publicly opposed Mechichi's position. Such a public disagreement among judges of the Tribunal is extremely rare. *La Presse*, Tunisia's leading francophone newspaper and a bastion of secular opinion, characterized Soueb's campaign against Mechichi as "defamatory"<sup>258</sup>.

The interviews shed light on the reasoning that would make the judges of the Tribunal oppose the November 7, 2013 statement. In the interviews, all of the judges and legal professionals expressed concerns about the implications of constitutional review by the Tribunal for the Tribunal itself and for the broader legal system. When asked about the issue of provisional constitutional review, Koubaa contrasted the strengths of the Tribunal with the weaknesses of the IPCCPL. If the statement were put into practice, the Tribunal would start to resemble the IPCCPL in exactly the ways that Koubaa finds most problematic. The Tribunal would publicly endorse one political faction, inviting both control by that faction and retaliation by the rival faction. Of course the actual number of Tribunal judges would not decrease, but as judges became public figures, they would be more vulnerable to pressure from political authorities. Mechichi was exactly this sort of public figure judge, and Soueb became one in the course of the conflict over the November 7, 2013 statement.

The November 7, 2013 decision marked the last major act of the Mechichi presidency. In March 2014, the Jomaa government replaced Mechichi with Mohamed Faouzi Ben Hamed, who

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<sup>258</sup> Ahmed Soueb (or Sweb), founder of the union des magistrats administratifs opposes Mechichi <http://www.leconomistemaghrebin.com/2013/11/30/ahmed-soueb-je-naurai-jamais-peur-et-je-ne-me-tairai-jamais/> Opposition of syndicate of administrative judges to decision claiming constitutional review <http://www.carthagefm.net/ar/articles/218909> Insaf Boughdiri, "Des Decisions Inconstitutionnelles," *La Presse* 26 March 2014 <http://www.lapresse.tn/18042015/80788/des-decisions-inconstitutionnelles.html>

was known as an insider at the Tribunal<sup>259</sup>. In subsequent decisions, the Tribunal has not exercised the powers that it claimed in the November 7, 2013 statement. The “war of clans” fought between the UMA and Mechichi was a major concern for the Tribunal<sup>260</sup>. It embarrassed the Tribunal and threatened the consensus that legitimated its decisions. It is quite possible that opposition from political authorities would have blocked the Tribunal’s claims even without opposition from the judges of the UMA. The parties quickly agreed to create the IPCCPL rather than having the Tribunal exercise provisional constitutional review. Still, it is difficult to imagine a situation where the claims could have succeeded because even if the political environment favored expanded powers for the Tribunal, the judges themselves would have rejected constitutional review.

### **Conclusion: The Administrative Tribunal and the Ben Achour Commission**

This chapter addressed neither the Constitutional Council nor formal powers. Instead, it dealt with the activity of the Tribunal and the informal powers that it might claim for itself rather than the formal powers assigned to it in the transitional documents. Yet, the activity of the Tribunal helps explain why the Ben Achour Commission dissolved the Constitutional Council rather than granting it greater powers. The activity of the Tribunal from 2011 to 2014 ultimately

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<sup>259</sup> “Biographie de Faouzi Ben Hamed, nouveau premier president du tribunal administratif” *Business News*, 18 March 2014, <http://www.businessnews.com.tn/biographie-de-mohamed-faouzi-ben-hamed-nouveau-premier-president-du-tribunal-administratif.525.45016.3>

Rifka Mbaraki, a judge of the Tribunal argued that Mechichi was removed because of “the mistakes that she had made,” and that Ben Hamed’s “impartiality could not be doubted.”

Khola Al-Zataiqi “In a conference organized by the coordinaters of transitional justice: accusations against the presidency of the Administrative Tribunal” *Ettounisi* <http://www.carthagefm.net/ar/articles/218909>  
Mbaraki was later elected secretary general of the UMA.

“Tunisie - Composition du nouveau bureau executif de l’union des magistrats administratifs” 12 May 2014.

*Business News*, 18 March 2014,

<http://www.businessnews.com.tn/tunisie--composition-du-nouveau-bureau-executif-de-lunion-de-magistrats-administratifs.520.46322.3>

<sup>260</sup> “Guerre des clans au Tribunal Administratif” *Le Courrier de l’Atlas*, [lecourrierdelatlas.com](http://lecourrierdelatlas.com)

confirms the Commission's skepticism of constitutional review as a means of limiting the Assembly. Even given support from major political parties and civil society, the Tribunal still resisted calls to rule on the Assembly's mandate or to claim a more general power of constitutional review.

In a broader sense, the case of the Tribunal shows how the activity of courts before 2011 might translate into different formal powers after 2011. The activity of the Tribunal and other courts during the Ben Ali period would shape the Ben Achour Commission's perception of the Tunisian judiciary's ability to restrain political authorities. In light of this experience, if the Commission had given a power of constitutional review to the Tribunal, it seems likely that the judges of the Tribunal would have been wary of the implications of this power for their own independence and would have used it only rarely. As a result, constitutional review by the Tribunal could not provide a real check on the Assembly.

The next section examines a connection between pre-2011 activity and formal powers in the very different context of the shariah and personal status law in both Tunisia and Egypt.

## CHAPTER 5: INCORPORATION OF THE SHARIAH AND THE JUDICIAL ROLE

### **Introduction: Shariah and Judicial Power**

After the 2011 revolutions, Tunisia and Egypt created very different transitional institutions. In Egypt, the Supreme Council of the Armed Forces (SCAF)'s Constitutional Proclamation created separate legislative, executive, judicial and constitutional drafting bodies<sup>261</sup>. In Tunisia, the Ben Achour Commission called for the election of a National Assembly with legislative, executive and constitution drafting powers<sup>262</sup>. These two systems gave different powers to courts. In Egypt, the Supreme Constitutional Court continued to exercise constitutional review throughout the transition. In Tunisia, the Constitutional Council was dissolved and no alternative means of constitutional review developed until the adoption of a new constitution in January 2014. Previous chapters of the dissertation examine the countermajoritarian hypothesis, which argues that opposition and minority parties support constitutional review and governing parties oppose it.

Anomalies undermine this hypothesis in both of the cases. In Egypt, many actors, including the Muslim Brotherhood and other Islamists, support constitutional review even though it seems to be against their interests as defined by the countermajoritarian hypothesis. In Tunisia, actors that should benefit from constitutional review, including judges and the secular opposition parties, still reject it. The judicial role hypothesis offers an explanation for these anomalies. It argues that judicial activity under the old regime creates a set of idea about the judicial role that then influences the formal powers of court after the 2011 revolutions. Ideas about the judicial role can cause actors to adopt positions for or against constitutional review that contradict their self interest. This chapter will investigate the mechanism posited by the judicial

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<sup>261</sup> "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011. <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>262</sup> "Decree--law n° 2011-14 dated 23 March 2011, relating to the provisional organization of the public authorities," *World Intellectual Property Organization*, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=245403](http://www.wipo.int/wipolex/en/text.jsp?file_id=245403)

role hypothesis - that the practices of the legal system under the old regime create a set of ideas that then influence the status of courts during the transition - using the issue of Islamic law as an example.

The attitudes of the Muslim Brotherhood toward constitutional review and the proper role of the shariah in Egyptian law are an example of the main mechanism of this hypothesis - how the activity of a constitutional court might promote certain ideas. Rutherford compares three varieties of constitutional thought in Egypt: liberal, statist and Islamic<sup>263</sup>. In light of a comparison with Tunisia, the similarities among these three are more prominent than the differences. All of them accept constitutional review of legislation. They also share several conceptions that make provisional constitutional review more plausible. The Muslim Brotherhood has not indicated that it is opposed to constitutional review in principle. In fact, their commitment to Islamicizing Egyptian law entails some form of constitutional review<sup>264</sup>. The activity of the SCC played a critical role in the development of this consensus. Before the establishment of the SCC, the main features of the consensus had not yet developed, although certain elements can be found in the thought of the Muslim Brotherhood, Sanhuri's Code, and Sadat's efforts at Islamicization. How the Muslim Brotherhood thinks about implementing shariah owes a lot to the practices of the SCC. Similar examples could be drawn from the ordinary judiciary, which originally saw the SCC and a posteriori constitutional review as a threat but eventually came to see it as a guarantor of judicial independence<sup>265</sup>.

In Tunisia, the shariah was never incorporated into the constitution, and courts never played a major role in interpreting the shariah. The Personal Status Code promulgated by

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<sup>263</sup> Rutherford (2008)

<sup>264</sup> Moustafa (2010) Lombardi (2006)

<sup>265</sup> See Brown (2006) pp. on early resistance to the SCC by ordinary judges. This topic is addressed in chapter 4, section 3 of the dissertation.



Bourguiba came to symbolize the country's secular identity, and at the same time cemented a legal ideology that gave great weight to positive legislation. Tunisia's rejection of the shariah also explains some of the skepticism that Tunisian judges show to constitutional review, especially a posteriori review. Even though the shariah is not a source of law in Tunisia, the possibility that it might be has provoked a reaction from the country's leadership. Soon after independence, Bourguiba had a new code of personal status drafted. This code contained many provisions that separated Tunisia from the shariah and from the practices of other Arab countries. Polygamy and unilateral divorce by the husband were banned, adoption was allowed, and the rules governing inheritance were made more equitable for women. It also assured that issues of personal status, which were the areas most subject to influence from the shariah before independence, would be decided by positive legislation. For this reason, seemingly non-political issues surrounding marriage, adoption and inheritance became a central part of Tunisian identity. For many secular Tunisians, the personal status code is of greater symbolic importance than the 1959 constitution, which was subverted by dictatorship anyway. This veneration of the Code has important implications for the powers of courts. Zouheir M'dhaffar, former Minister of Public Property and former Judge of the Constitutional Council, stated that he opposed a posteriori constitutional review because a judge might "declare the code of personal status unconstitutional because it permits adoption, which is forbidden by the shariah."<sup>266</sup> A stance against constitutional review might seem strange for a judge and for a figure of the old regime, but as the chapter will make, M'dhaffar is simply taking the veneration of the Personal Status Code to its natural conclusion. Furthermore, M'dhaffar's argument is an example of the pathway suggested by the judicial role hypothesis from the practices of the pre-2011 legal system to ideas about the nature of law to a stance on the formal powers of courts after 2011.

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<sup>266</sup> Interview with Zouheir M'dhaffar

The first section outlines how the Egyptian and Tunisian legal systems have incorporated shariah. The second section looks at the attitude of Egyptian Islamists, including the Muslim Brotherhood, towards law. The conception of shariah moved from a set of rules and institutions outside of the state legal system to a higher law or constitutional norm within the legal system. By 2011, Islamists supported some variation of constitutional review as a means of Islamicizing Egyptian law. The third section looks at the role of shariah in debates about the constitution and constitutional review in Tunisia after 2011, including the positions of legal professionals and Islamist and secular political parties. From independence onwards, Tunisian secular republicanism was closely associated with positive legislation. Legal positivism also manifested itself in suspicion of constitutional review during debates about the new constitution and constitutional court, even after a shariah provision in the constitution had been definitively rejected.

### **Overview of Incorporation: The 1971 Constitution and Decisions of the SCC**

#### The 1971 Constitution and Article 2

The SCC and the Islamicization of Egyptian law through constitutional review have their roots in Sadat's presidency and the 1971 Constitution. However, the SCC emerged as the main interpreter of the shariah only after Sadat's presidency, with its first decision interpreting Article 2 in 1985.

Soon after rising to the presidency, Sadat set out to reform three pillars of the Nasser regime - revolutionary leftist ideology, the centrally-planned economy, and the single party state

of the Arab Socialist Union<sup>267</sup>. The 1971 Constitution was the centerpiece of these reforms. The Constitution scaled back the revolutionary socialist rhetoric of the Nasser era constitutions. It also guaranteed a right to private property. The Constitution called for a multi-party system. It called for the creation of the Supreme Constitutional Court. Most importantly for this chapter, the Constitution emphasized Egypt's Islamic identity and introduced shariah as "a source of legislation."

From the text of the 1971 Constitution, it is not clear that the SCC has the power to overturn legislation that is contrary to the shariah. Article 2 states "Islam is the religion of the State and Arabic its official language. Shariah is the principle source of legislation." Previous Egyptian constitutions had mentioned Islam, but not the shariah. Separately, Chapter 5, describes the SCC and its power of constitutional review. The phrase "the source of legislation" seems to imply that the legislature should examine the principles of the shariah in creating legislation. Several other countries - Iran, Afghanistan, Syria, and Pakistan - had incorporated the shariah as a source of legislation in their constitutions before 1971<sup>268</sup>. By 1971, none of these countries had a practice of constitutional review by courts on the basis of these provisions. The SCC first claimed this power through a case decided on May 4, 1985. In this case, the SCC specifically considered the argument that Article 2 was not meant to be justiciable. It rejected this argument, but it did decide that Article 2 did not apply retroactively to laws passed before 1980, when Article 2 was amended to make shariah "the source of legislation," rather than "a

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<sup>267</sup> Waterbury (1983) for an overview of the Sadat and Nasser regimes.

<sup>268</sup> Ahmed and Ginsburg (2014). In 1973, the Pakistani constitution was amended to allow courts to apply the shariah principle. Since then Pakistani courts have developed a record of activity in this area comparable to the SCC. Lau (2006)

source”<sup>269</sup>. It took fourteen years after the adoption of the 1971 constitution for the SCC to emerge as an agent of the Islamicization of Egyptian law.

## Alternatives to Article 2

Both of the alternatives to Islamic judicial review - Islamic legislation, and direct involvement of the ulema in applying the shariah - remained viable options during the Sadat period. Sadat considered drafting a new code that would be more Islamic than the Sanhuri code. To this end, he assembled a group of experts with support from al-Azhar. By 1980, al-Azhar had approved drafts of Islamic civil and criminal codes. Like many codification efforts, Sadat’s Islamic Code floundered as a result of the enormous challenges of drafting an entirely new body of legislation and the political controversies created by an attempt at dramatic legal change. Islamists, including the Muslim Brotherhood, opposed the codes. They objected to the claim by Sadat and al-Azhar to a monopoly on interpretation of the shariah. They also objected to the liberalization of family law known as Jihan’s law that Sadat passed by decree at around the same time. Secularists rejected the idea of Islamicizing Egyptian law in the first place, leaving Sadat with few supporters<sup>270</sup>.

The role of al-Azhar in drafting the Islamic codes showed the continuing importance of the ulema as a means of Islamicization. Sadat never proposed the reestablishment of the shariah courts or of any other parallel Islamic jurisdiction. Still, his presidency saw important developments in the state religious hierarchy. In place of the old shariah courts, the Fatwa Council of al-Azhar developed to advise Egyptian Muslims on matters related to the shariah.

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<sup>269</sup> Lombardi (2006), Moustafa (2010), Case 20, Judicial Year 1. For the text of Egyptian constitutions, <http://www.righttononviolence.org/mecf/countries/egypt/>

<sup>270</sup> Moustafa (2007)

The rise of this institution reflects a desire to Islamicize Egyptian society, although not through law. The Fatwa Councils came to be seen as an alternative or supplement to law and legal proceedings, not as a parallel jurisdiction of courts, and they have no means of enforcing their decisions. This development removed another competitor to the courts in defining Islamic law<sup>271</sup>.

#### Article 2 Doctrine of the SCC

The SCC decisions have shaped the shariah into a constitutional norm, rather than an all-encompassing set of legal rules<sup>272</sup>. This process justified the SCC's review and removed the intellectual bases of the alternative methods of Islamicization. The decisions of the SCC also balanced the interests of Islamists with those of secularists and the government. As a result, the SCC gained a level of support from both groups.

The first Article 2 case decided by the SCC involved a challenge by the shaykh of Al-Azhar against a provision of the Egyptian civil code that required debtors to pay interest on overdue loans. The SCC upheld the interest payment law, but it did so on the grounds that it not apply Article 2 to any laws that existed before the adoption of the 1980 amendment of Article 2. This decision has greatly limited the impact of Article 2, but still gave Islamists a means to challenge laws they considered un-Islamic<sup>273</sup>.

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<sup>271</sup> Agrama (2012) pp. 111-122, Hill (1975)

<sup>272</sup> Lombardi (2006) provides an overview of the SCC's Article 2 decisions.

<sup>273</sup> Moustafa (2010), Case 20, Judicial Year 1.

The SCC's use of Article 2 remained limited until 1993, when the court issued a decision describing its method of interpreting the shariah.<sup>274</sup> According to this decision, the SCC bases its Article 2 decisions on the 'certain rulings of the shariah,' (*al-ahkam al-shar'iyah al-qut'iyah*), and the 'aims of the shariah,' or *maqasid*. The certain rulings of the shariah refer to rules clearly stated in the Quran or Hadith, such as the rules governing inheritance or the prohibition of adoption. The certain rulings can only have an effect on relatively narrow areas of law. In the system cited by the SCC, the *maqasid* consists of five general values: religion, life, lineage, intellect, and property<sup>275</sup>. The SCC's *maqasid* jurisprudence contrasts with a view of the shariah as a complete body of law and doctrine embodied in historical schools of thought. Egyptian salafists sought to add greater detail to the constitution's shariah provision, which might force the SCC to adopt the latter view. The draft constitution added Article 219, which stated "The principles of Islamic law (*sharia*) include general evidence, the foundational principles of Islamic jurisprudence (*usul al-fiqh*), the reliable sources from among the Sunni schools of thought (*madhahib*)"<sup>276</sup>. Treating the shariah as a set of higher principles rather than a complete set of laws makes it easier to combine with constitutional review. It also limits the scope of Islamicization. According to this interpretation, the SCC need only intervene in rare cases when the legislature makes a law that contradicts the shariah. The SCC do not need to derive a complete set of rules from the shariah. Such a task would be more difficult and more suited to a legislature rather than a court.

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<sup>274</sup> Lombardi (2006). Case 7, Judicial Year 8. (15 May 1993) SCC Volume V, Part 2. The SCC decided several property related cases before 1993 in which it overturned laws that contradicted the 1971 constitution's right to private property. The SCC also mentioned that these laws were contrary to the shariah's protection of private property.

<sup>275</sup> Lombardi (2006). Numerous alternative interpretations of the concept of the *maqasid* exist.

<sup>276</sup> Nivien Saleh, tr. Constitution of Egypt, 2012. <http://niviensaleh.info/constitution-egypt-2012-translation/>

The SCC's interpretation of the shariah also minimized the role of religious scholars. In contrast to the language of the 2012 draft constitution, the SCC can choose to ignore the opinions of classical jurisprudence (*usul al-fiqh*) and the schools of law (*madhahib*). The SCC also does not base its Article 2 decisions on the opinions of contemporary ulema of Al-Azhar. The SCC itself claims to be able to exercise *ijtihad*, original interpretation of Islamic law<sup>277</sup>. The SCC application of Article 2 extended beyond personal status cases. The use of shariah in cases outside the area of personal status marks a departure from the practices of the shariah courts of the colonial period, when the shariah was treated as a sort of customary law<sup>278</sup>. The shariah is a principle that can appear in any kind of case, but is only rarely the primary source of law for any particular decision. By erasing the distinction between personal status and other areas of law, the SCC removed the basis for a parallel shariah jurisdiction.

The effect of the SCC's Article 2 decisions on the content of Egypt's laws was ultimately limited. Lombardi and Brown argue that the SCC's interpretation of Article 2 actually restrained the Islamicization of Egyptian law and society. Certainly, Sadat's original plan to draft a completely new Islamic code would have had a much more dramatic impact on Egyptian law. However, the SCC also avoided alienating Islamists. It gave Islamists victories in cases dealing with Jihan's law and the right to wear the veil. Lombardi argues that the SCC intervened during periods of particularly high tension between the regime and Islamists, such as the early 1990's, in order to provide some concessions to Islamists. Perhaps most importantly, the SCC's Article 2 cases showed Islamists that the Islamicization of Egyptian law through constitutional review

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<sup>277</sup> Vogel (1999) argues that the SCC radically reinterprets the concept of *ijtihad* in order to justify its rulings.

<sup>278</sup> Egyptian law still recognizes the concept of personal status. The 1971 and 2014 constitutions state that Christian and Jewish law is "the main source of legislation for the personal status of these groups." As a practical matter, personal status was the area of Sanhuri's code and subsequent Egyptian legislation that was most clearly influenced by the shariah. As in many other systems, specialized courts deal with family law cases in Egypt. Agrama (2012).

was possible<sup>279</sup>. The next section examines the impact of the SCC on the ideology and political activity of Egyptian Islamists. It outlines how the Muslim Brotherhood accommodated itself to the interpretation of the shariah developed by the SCC and how Egyptian Islamists organized to use Article 2 litigation to achieve their goals.

## **Egyptian Islamists' Attitudes towards Law**

### The Early Brotherhood, 1928-1970

Writings by the founder of the Brotherhood, Hassan al-Banna (1928-1949), address the question of the shariah and its place in the modern Egyptian legal system during the period before Sadat's reforms and the establishment of the SCC. The activities of the Brotherhood during the constitutional crisis following the fall of the monarchy in 1952 also provide insight into their thinking on legal questions<sup>280</sup>.

Law and the shariah are central concepts in the thought of the Brotherhood. Starting with the writings of Hassan al-Banna, the Brotherhood often claimed that the Egyptian government was illegitimate because it did not apply the shariah. Moreover, a specific legal theory underlines this claim. The complaint that modern Muslim governments have failed to apply the shariah is widespread among many different Islamist currents. Some of these, such as Salafism and Khomeini's state of the jurist (*wilayat al-faqih*), reject all forms of positive law. In contrast, Al-Banna rejected the view that positive law or legislation were inherently incompatible with

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<sup>279</sup> Moustafa (2010), Lombardi and Brown (2005) Lombardi (2006)

<sup>280</sup> Mitchell (1993) provides an overview of the early Brotherhood. Al-Banna, Wendell tr. (1978)



Islam<sup>281</sup>. From this early period, the Brotherhood accepted the idea that the shariah was a higher law that could be embodied in positive legislation. However, the question of how to go about creating shariah legislation remained.

The leadership of the Brotherhood advocated at least three approaches to applying the shariah: through legislation, special shariah courts, and the inclusion of shariah in the constitution. First, a Brotherhood committee began work to draft an Islamic code that would improve on the Sanhuri code. Second, the Brotherhood opposed the abolition of the parallel shariah courts. Judges with special training in shariah law ran these courts. As such they represent an example of enforcing the shariah through the ulema or other experts in the traditional religious sciences. The Egyptian monarchy replaced these courts with a single jurisdiction of courts enforcing the Sanhuri code.

Third, the Brotherhood favored a constitution that would enshrine the principles of the shariah as a law higher than ordinary legislation. This third option contains the foundation for the SCC's shariah constitutional review. The Brotherhood described the Quran as a 'constitution' for Muslims. However, this did not mean that they rejected the idea of a written constitution. The Brotherhood pressed for the adoption of a new constitution immediately after the 1952 Free Officers' coup. Hassan al-Banna argued that certain laws should be suppressed because they contradicted Islam. Together, these ideas form the basis for constitutional review based on the shariah, although Al-Banna and the other early leaders of the Brotherhood did little to develop this idea further<sup>282</sup>.

The legal theory of the Brotherhood sets it apart from more radical method of directly applying the shariah represented by Saudi Arabia, which rejects the notion of a written

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<sup>281</sup> Khomeini (1979), Hallaq (2013), Vogel (2000)

<sup>282</sup> Brown (1997), Mitchell (1993) pg. 260 on the Brotherhood's Islamic Code, Brown (2006) ch. 3 on Brotherhood opposition to the abolition of the shariah courts

constitution, positive legislation, appeal and precedent. The Brotherhood's legal theory also does not require Islamicization through legislation, as in the Sudan<sup>283</sup>. Laws should be compatible with the shariah but not necessarily the result of codification of shariah rules.

Sadat's reforms represent a concession to Islamists and attempt to ease tensions with the Brotherhood. The incorporation of shariah as a constitutional principle also reflects trends in Islamist thought going back to Hassan al-Banna. However, Sadat did not answer the question of how to turn the shariah into legislation. Of the options outlined above, both the legislative and judicial options remained opened. Sadat also envisioned some role for Islamic scholars and al-Azhar in the drafting of a future Islamic code, so the conception of the shariah as a jurists' law implemented by the ulema remained alive as well. Only with the establishment of the SCC in 1979 and its decision did the courts take the lead in Islamicizing Egyptian law.

#### Islamist Legal Activism, 1985-2011

Sadat's attempt at rapprochement with the Islamists unraveled in the second half of the 1970's. After his assassination, the Mubarak regime began a renewed crackdown of the Brotherhood. Surprisingly, Egyptian Islamists found an ally in the SCC and the judiciary during this period. The particular cases are outlined above in section 1. These cases are important not only for their impact on Egyptian law and the doctrine of the SCC, but also for their impact on the opinions and organizing strategies of Egyptian Islamists<sup>284</sup>.

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<sup>283</sup> Vogel (2000) Wael Hallaq presents a similar theoretical argument, that shariah cannot be applied through institutions adopted from modern Western legal systems. Hallaq (2013) Goldenziel (2013) Lau (2006) Nelson (2011) Layish (2002) Massoud (2013)

<sup>284</sup> Agrama (2012), El-Ghobashy (2008)

The deterioration of relations between the government and the Brotherhood and the closure of the electoral arena to any real opposition party left the legal system as the most attractive means for Islamists to change state policy. At the same time, the opening of Egyptian law schools to large numbers of students in the 1970's created a new class of Islamist lawyers. Muslim Brotherhood candidates won a majority of seats in the Lawyers' Syndicate election of 1992. The Lawyers' Syndicate organized shariah training groups throughout Egypt starting in the 1980's<sup>285</sup>. This era coincided with the SCC's 'golden age' when it was most willing to rule against the regime. The administrative courts were also gaining greater independence from the regime, as described by Rosberg. Ahmed Eid stated that during this era "the administrative courts were known as protectors of human rights."<sup>286</sup> From the 1980's to the 2000's, Islamist networks grew alongside a more independent and reformist judiciary.

A huge number of cases claiming violations of Article 2 were filed with the SCC from the 1980's onward. The SCC chose to hear only a small percentage of these cases. Some of the SCC's Article 2 decisions are undoubtedly the result of Islamist legal activism. The first Article 2 decision by the SCC was the result of a case brought by the leadership of Al-Azhar. The case overturning Jihan's law. Moustafa argues that most of these litigants were not Islamist activists and that they used Article 2 instrumentally<sup>287</sup>. This experience of Islamist legal activism from the 1980's to the 2000's shaped the attitude of Brotherhood leaders towards law as Egypt approached the 2011 revolution. It propagated ideas about the nature of the shariah and the relationship between shariah and the constitution that would be influential in the Brotherhood's political thought. It demonstrated the practicality of shariah constitutional review as a means of legal change. It made the courts a more sympathetic part of the state apparatus than the police or

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<sup>285</sup> Moustafa (2010)

<sup>286</sup> Rosberg (1995), El-Ghobashy (2008), interview with Ahmed Eid

<sup>287</sup> Moustafa (2010), Lombardi (2006)

military in the eyes of Islamists<sup>288</sup>. The next section outlines how each of these mechanisms made the Brotherhood more willing to accept constitutional review by the SCC during the 2011 transition.

#### The Brotherhood Enters Politics, 2007-2012

Despite the growth of Islamist activism in the legal system, the Brotherhood continued to be barred from forming a political party and participating in elections. During the 2005 elections, many independent candidates with ties to the Brotherhood were elected to parliament. The regime soon took measures to restrain the Muslim Brothers' involvement in electoral politics. However, this experience led the Brotherhood to circulate a platform for a possible future Islamist political party. Such a political party became a reality after the 2011 revolution, with the establishment of the Freedom and Justice Party (FJP). The Mursi government implemented some of the goals set out in the platform, especially in the 2012 constitution.

The 2007 platform and the 2012 constitution give a clear picture of the Brotherhood's program for applying the shariah. In contrast to the thought of the early Brotherhood as represented by al-Banna. The 2007 platform and the 2012 constitution implicitly reject alternative models for incorporating the shariah, including an Islamic Code and parallel Islamic courts. Such models could be drawn from other countries or from Egypt's own history. Saudi Arabia's legal system and the pre-1952 system of shariah courts in Egypt are examples of direct application of the shariah by the ulema through Islamic courts. The Sudan, where President Numayri implemented a codification of the shariah covering all areas of law and Sadat's attempt

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<sup>288</sup> Agrama (2012)

at drafting an Islamic Code are examples of Islamicization through legislation<sup>289</sup>. The Muslim Brotherhood could have drawn on any of these models to propose a method of Islamicization that would not rely on constitutional review by courts.

This shift reflects the triumph of the SCC's model of shariah incorporation. The Brotherhood did attempt to change the institutions that would carry out shariah constitutional review. The 2012 Constitution altered the composition of the SCC by reducing the number of judges to ten. Both the 2007 platform and the 2012 Constitution called for the creation of an Islamic law council composed of experts from Al-Azhar to certify that legislation is compatible with the shariah. Such a council would seem to be an example of a priori review. As discussed above, the 2012 Constitution also added greater detail to the shariah provision by stating that "usul al-fiqh" would be the basis for review. The Brotherhood's ideology reflected the experience of thirty years of Islamicization through the SCC. As a result, the Brotherhood remained attached to the principle of constitutional review, even as it came into conflict with the judiciary. This process is an example of the mechanism of the judicial role hypothesis.

## **Overview of Incorporation: The Tunisian Personal Status Code**

### Islam in the 1959 Constitution

The 1959 Constitution establishes Islam as the official religion of Tunisia, but it does not mention the shariah or imply that laws are derived from Islam. The preamble states that it is the

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<sup>289</sup> Vogel (2000), Layish (2002), Massoud (2013) Brown, Nathan and Amr Hamzawy. "The Draft Party Platform of the Egyptian Muslim Brotherhood," *Carnegie Endowment* January 2008. [http://carnegieendowment.org/files/cp89\\_muslim\\_brothers\\_final.pdf](http://carnegieendowment.org/files/cp89_muslim_brothers_final.pdf) Constitutions of 1959 and 2014, draft constitutions of 2012 and 2013. <http://www.righttononviolence.org/mecf/tunisia/#events>

“will of this people...to remain faithful to the teachings of Islam.” Article 1 of the 1959 Constitution states that “Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic and its type of government is the Republic.” The draft constitutions of December 2012 and June 2013 as well as the 2014 Constitution repeat these statements exactly<sup>290</sup>.

The absence of the “source of legislation” provision in the Tunisian constitution is not an insurmountable barrier to judicial review of legislation according to the shariah. The establishment of Islam as the official religion could play the same role. Judges might use strategies short of constitutional review to import the shariah into Tunisian law. They could use the teachings of the shariah as an aid to the interpretation of statutes, on the assumption that the legislature could not intend to draft laws contrary to the official religion. Judges might interpret shariah as a widespread customary law that explains the intentions of litigants in legal documents such as contracts, wills, or marriage agreements. Judges might be influenced by shariah without actually citing it as a source of law. In general, the greater leeway is given to judges, the more opportunity they have to import the shariah.

If the goal of the legislator is to prevent the Islamicization of Tunisian law or to enforce a particular interpretation of the shariah, it is necessary to put further constraints on judges. The Personal Status Code offers a clear statement of the law in the area that is most susceptible to influence from the shariah, personal status and family law.

### Promulgation of the Code

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<sup>290</sup> Constitutions of 1959 and 2014, draft constitutions of 2012 and 2013.  
<http://www.righttononviolence.org/mecf/tunisia/#events>

The Personal Status Code was drafted in the context of the codification of family law in Morocco, Algeria, Egypt and other newly independent countries. The immediate independence period provided an opportunity for extensive legal reform. Colonial authorities in these countries used parallel religious courts to enforce uncodified shariah, especially in personal status cases. The post-independence regimes sought to abolish these parallel courts and create a single hierarchy of courts. The codification of personal status law, whether derived from the shariah or not, allowed ordinary courts to take over the jurisdiction of the shariah courts. Tunisia is exceptional compared to these other North African countries in the extent to which the codification of personal status law was used to implement liberalizing reforms, and the extent to which some provisions of the Code broke with the consensus of the classical Islamic schools of law (*madhahib*)<sup>291</sup>.

In Tunisia, the codification of personal status law quickly became a personal project of Bourguiba. Bourguiba was involved in drafting the Code in his capacity as leader of the neo-Destour party, Prime Minister, and President. The Code was adopted on August 13, 1956, several months after independence and about a year before Bourguiba removed the Bey from power and established a republic. The original 1956 Code banned polygamy and created a set of rules for intestate succession, civil marriage and the guardianship of children, although not adoption. In 1957 further laws abolished *habous* or pious endowments and required all Tunisians to take a patronymic last name. As Bourguiba consolidated power, he implemented additions to the Code that created more obvious contradictions between the provisions of the Code and the shariah. The 1964 amendment legalized adoption, which Borrmans describes as “a

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<sup>291</sup> The French authorities never adopted a code of Islamic law, although Marcel Morand, a French-Algerian jurist, drafted such a code. Christelow (1985), Charrad (2002). The Sanhuri Code, adopted in Egypt in 1948, provides a similar codification of personal status law. Bechor (2007)

revolution in mentalities and mores.”<sup>292</sup> The Quran clearly forbids adoption. The original code made polygamy a crime punishable by a fine, but it did not state that a polygamous marriage was invalid. Two decrees of 20 February 1964 added the rule that any second marriage would be null. A 1968 law equalized the punishments for men and women who commit adultery<sup>293</sup>.

### The Code, Legal Positivism and Islam

The Code divided Tunisian religious and legal experts. In 1957, a group of judges from the shariah courts issued a fatwa condemning the provisions of the Code outlawing polygamy as contrary to Islam<sup>294</sup>. Bourguiba and his supporters insisted that the Code was compatible with Islam and that it was not an attempt at secularization or westernization. Moreover, they used arguments derived from Islamic jurisprudence to support this claim. Two of the most prominent defenders of the Code were Ahmed Mestiri, Bourguiba’s Minister of Justice from 1956 to 1958, and Mohamed Fadhel ben Achour, a scholar of Islamic law and Mufti of the Republic from 1962 to 1970<sup>295</sup>. Mestiri, who studied law in France and had no training in shariah, justified the Code in Islamic terms in his 1966 “Letter of an Ambassador”. Mestiri wrote that the Code avoided “the errors of Mustafa Kemal.” Mestiri argued that in drafting the Code, they turned to the consensus (ijma’) of the Muslim community, and followed the practice of the Caliph Umar, who suspended rules derived from the Quran in cases of necessity<sup>296</sup>.

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<sup>292</sup> Borrmans (1977) pg. 353

<sup>293</sup> Borrmans (1977) pp. 339-340

<sup>294</sup> Borrmans (1977) Ben Achour (1992). The Code replaced the jurisdiction of the shariah courts, so the objections of these judges were probably also founded in self-interest.

<sup>295</sup> Ben Achour (1992). Mohamed Fadhel ben Achour is also the father of Yadh Ben Achour, founder of the Ben Achour Commission in 2011.

<sup>296</sup> Borrmans (1977). Mestiri was ambassador to Algeria at the time. His letter is intended to justify the Code to a Muslim Algerian audience.



Ben Achour presented a fuller justification of the Code and the practice of presidential legislation from the perspective of Islamic law. Notions such as *ijtihad* and necessity. Emphasis on the conditions of a particular time period and nation. The selection of the rule from the historical schools of law that is most compatible with modern life. Emphasizing the aims of *shariah* (*maqasid*) over the content of *shariah* jurisprudence (*fiqh*) and the rulings of the schools of law (*madhahib*). Ben Achour argues that the process of creating the Code through legislation is legitimate and compatible with Islam. Both the form and content of the Code is compatible with Islam.<sup>297</sup>

The ideological basis used by the defenders of the Code is not secularism or westernization. Instead, the ideological basis of the Code is legal positivism, coupled with nationalism. Ahmed Mestiri justified this position in 1966 “Letter of an Ambassador,” by arguing that “every Muslim collectivity constitutes a particular case with its own mental and sociological structures, and that the legislator is the sole judge of the wisdom of this or that reform.”<sup>298</sup> Mestiri does not hesitate to describe Tunisia as a “Muslim collectivity,” rather than a secular or multi-religious nation. However, this “Muslim collectivity” is distinct from the global Islamic community. It is the unique features of each nation that require its legislator to create a national code of law. The state should decide legal questions by issuing legislation.

For critics of the Code, the claim that Bourguiba’s legislation represents *ijtihad* or reform within Islam rings hollow. Western and Muslim scholars of the *shariah* often argue that legal positivism, and its associated institutions of legislation, codification and judicial hierarchy, is in tension with the Islamic legal tradition. Recent work has questioned this generalization. There are relatively few examples of codification of Islamic law before the modern period or of the

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<sup>297</sup> Ben Achour (1992)

<sup>298</sup> Borrmans (1977) pg. 360

eneration of man-made law. Still, Tunisian legal positivism builds on several aspects of the country's Islamic political heritage. The Ottoman Empire produced an enormous body of positive law that existed alongside uncodified shariah. The Ottoman Sultans also created a partnership with the ulema, consensus, which worked to create an official interpretation of Islam<sup>299</sup>. The Beys established a shariah court of appeals before the beginning of colonialism, which asserted the state's power to define the correct interpretation of Islamic law<sup>300</sup>.

Legal positivism had practical implications for the politics surrounding the Code. In principle, the legislator could roll back the reforms, as Ben Ali considered doing in 1988-89. This system created means for opponents to contest the Code, but only through proposing reforms to the legislation, not by invoking a higher source of law that could be used to annul the legislation. Judges and courts would have no role in such a process.

#### Politics of the Personal Status Code, 1959-2011

The debates about the Code described in the previous section reveal the importance of legal positivism for defenders of the Code. The prominence of legal positivism as a justification for the Code is matched by the importance of legislation as the means of legal change in Tunisia. The Code and subsequent reforms were the result of legislation directed by the president. As a result, Islamist opposition to the Code focused on legislation as the most effective means of achieving its goals.

The text of the Code was largely complete by the late 1960's. The only later change to the text of the Code occurred in July 1993, when Ben Ali introduced reforms that allowed

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<sup>299</sup> Gerber (1994) Gerber (1999)

<sup>300</sup> Gobe (2013) pp. 32-38

women to transmit Tunisian nationality to their children<sup>301</sup>. However, both Islamists and secularists pressed for changes to the Code from the 1960's through 2011. Islamists sought to roll back the Code, while secularists hoped to extend legislation to equalize the rights of men and women in areas such as inheritance, divorce and marriage. Soon after Ben Ali's rise to power, the government considered legislation to abolish adoption, which Islamists considered one of the most problematic provisions of the Code<sup>302</sup>. Secularists responded with a campaign in favor of the Code. In any case, legal reform depended on the president's political objectives and his relations with Islamists. Ben Ali originally planned to co-opt the Islamists as a loyal opposition, and his proposed reforms to the Code were part of a compromise with Islamists. After 1989, he reinstated restrictions on opposition parties, especially Islamist parties, and cancelled the proposed changes to the Code. Whether Islamist or secular, reform efforts remained focused on the legislation, and legislation remained focused on the president.

Opposition to the Code might make use of the argument that particular provisions of the Code were contrary to Islam. Bourguiba himself accepted the view that the Code should be compatible with the shariah. Bourguiba rejected some reforms as un-Islamic, such as proposals to equalize the shares of sons and daughters in cases of intestate succession<sup>303</sup>. However, Bourguiba, as both president and legislator, did not delegate the power to make such decisions to either the ulema or the courts. Under the Bourguiba and Ben Ali regimes, provisions of the Code could be criticized, but these criticisms called for further legislative changes.

The Tunisian courts proved to be an inhospitable environment for the sort of Islamist legal activism that occurred in Egypt. In part this is because the Tunisian courts, especially the ordinary courts were less willing to side with Islamists against the regime. The Administrative

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<sup>301</sup> Khiari (2003)

<sup>302</sup> Khiari (2003), pg. 29

<sup>303</sup> Ferjani (1992)

Tribunal did rule in favor of Islamist interests and against the Ben Ali regime in a 2004 case concerning the suspension of a teacher for wearing a hijab<sup>304</sup>. The Tribunal ruled that the circular 102 (an administrative decree, not a law) published in 1988, a decree that banned the wearing of the hijab by public employees, contradicted the freedom of religion provisions of the 1959 Constitution. The SCC decided a similar case in which a student wanted to wear a hijab, but it did so on the basis of Article 2, not on the basis of the 1971 constitution's freedom of religion provisions. It also overturned a law in this case, giving Islamist litigants a much greater victory than in the Tunisian case<sup>305</sup>. The courts could be an ally of Islamists against the Ben Ali regime. However, in the absence of any doctrine requiring that legislation be compatible with the shariah, Islamists could not have seen the courts as a means of Islamicizing Tunisian law.

### **Constitutional Politics and the Shariah in the Tunisian Transition**

The positions of Ennahda, the secular opposition, and judges on constitutional questions were influenced by the experience of the Personal Status Code and the relationship between the state and the shariah that the Code represented. Moreover, this influence led to two counterintuitive outcomes, both which have implications for the status of courts after 2011. First, Ennahda gave up on incorporating shariah into the Tunisian constitution. In Egypt, the SCC depended on at least a measure of support from Islamists. In Tunisia, Islamists had no reason to support constitutional review without a shariah provision. Second, judges supported limitations on judicial review. This position reflects both an ideological commitment to legal

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<sup>304</sup> Comité des droits de l'homme Nations Unies. "La situation des droits de l'homme en Tunisie" March 2008. [http://www.univie.ac.at/bimtor/dateien/tunisia\\_omct\\_2008\\_human\\_rights\\_report.pdf](http://www.univie.ac.at/bimtor/dateien/tunisia_omct_2008_human_rights_report.pdf).

<sup>305</sup> Lombardi (2006).

positivism and a political calculation that judicial review could undermine a central policy goal of Tunisian secularists: the maintenance of the Personal Status Code.

#### Ennahda on Law, 1981-2011

The thought of Ennahda on law and the shariah is similar to that of Egyptian the Muslim Brotherhood. This ideology did not translate into the inclusion of shariah in the post-2011 Tunisian constitution. Rather than simply reflecting moderation, these positions reflect the influence of Tunisia's unique method of approaching the shariah. Given the absence of a tradition of shariah review and the judiciary's hostility to the idea, a shariah provision would not be an effective means of Islamicizing Tunisian law. Ennahda had no reason to support constitutional review after 2011, when it was the governing party.

Ennahda emerged out of the Islamist Tendency movement during the 1980's. Soon thereafter, Ben Ali brutally suppressed the party and imprisoned or exiled its leaders. From the 1980's until 1991, when Rached Ghannouchi was appointed president, Ennahda saw numerous changes in leadership. Ennahda lacks the long history, coherent leadership, and clearly developed ideology of the Egyptian Muslim Brotherhood, so it is difficult to generalize about the party's positions on law during this period. Ghannouchi's numerous writings from the 1990's and 2000's provide the basis for Ennahda's views. Ghannouchi spent time in Egypt, Syria, Algeria, the Sudan, France and Britain, where he was influenced by Nasserism, Salafism, and the Brotherhood at different points in his career.<sup>306</sup>

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<sup>306</sup> Tamimi (2002). Ghannouchi produced books or articles on the philosophy of Ibn Taymiyah, the rights of women, the status of non-Muslims in an Islamic state, civil society and secularism. His most substantial work on political legal theory is the 1993 *Al-Hurriyat al-'Amah fi al-Dawlah al-Islamiyah*, translated in French as *Les libertés publiques dans l'État islamique*.

Ghannouchi's positions became more moderate during his exile in the West. According to his own statements, Ghannouchi distanced himself from the Muslim Brotherhood and instead sought to emulate the Turkish AKP. Both before and after the 2011 revolution, Rached Ghannouchi often stated that Tunisia should remain a 'civil state' rather than a religious state<sup>307</sup>. Stepan interprets such statements as evidence of the greater moderation of Ennahda compared to the Muslim Brotherhood. The Egyptian Muslim Brotherhood also uses the language of the 'civil state' as opposed to a fully secular or fully religious state. Tamimi argues that Ghannouchi's writings during this period are intended to justify a form of Islamic democracy<sup>308</sup>. Critics argue that Ghannouchi's thought is in fact a blueprint for undemocratic Islamist rule. In either case, the concept of the shariah developed by Ghannouchi is compatible with shariah constitutional review, but not with other means of Islamicization.

Ghannouchi's conception of the shariah in his writings from the 1990's leave open the possibility of shariah constitutional review<sup>309</sup>. In *Les libertés publiques dans l'État islamique*, Ghannouchi conceives of human government as a 'viceregency,' to which God has delegated some of his authority through revelation. Human government cannot exceed the powers granted by the Quran and Sunnah. Shariah is the source of all legislation, at least in the sense that human government derives its authority from revelation.

Ghannouchi rejects the underpinnings of the other methods of Islamicization: direct application of the shariah by religious experts or the adoption of a shariah code through legislation. Ghannouchi's finds that the territorial state is compatible with Islam, rejecting non-state institutions, such as a transnational Caliphate.<sup>310</sup> After 2011, Ghannouchi contrasted

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<sup>307</sup> Stepan (2012)

<sup>308</sup> Tamimi (2002) Ghannouchi (1993)

<sup>309</sup> Tamimi (2002) Ghannouchi (1993)

<sup>310</sup> Ghannouchi (1993)

Ennahda with other Islamist movements, such as Hizb al Tahrir, that called for the establishment of a caliphate<sup>311</sup>. Both of these positions would be more extreme than shariah constitutional review in the context of Tunisia. Ghannouchi's moderation in the 1990's and 2000's led him away from the other methods of Islamicization, but it did not preclude shariah constitutional review.

Ideological differences between Ennahda and the Muslim Brotherhood cannot account for the different outcomes in Tunisia and Egypt. The early phase of the transition in 2011 gives a clear example of how pressure from other parties forced Ennahda to compromise on the shariah. To distinguish itself from fringe Islamist movements, Ennahda had to give up on including shariah in the constitution. In the absence of such a provision, Ennahda had no reason to support continued constitutional review. Moreover, the legal activism that familiarized Egyptian Islamists with shariah constitutional review had no parallel in Tunisia.

#### Islamist Politics, 2011-2013

It is debatable whether the Tunisian uprising constitutes a revolution. However, like the great social revolutions in France, Russia or Iran, the Tunisian uprising led to a reassessment of the role of religion in politics<sup>312</sup>. Every state in the Arab World regulates Islam through ministries of religious affairs, official mosques and official religious schools. Despite its secular image, Tunisia under Ben Ali was no exception. Tunisia had long had one of the most highly regulated religious establishments in the Arab World. The Ben Ali regime allowed no

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<sup>311</sup> "Ghannouchi a Hizb Ettahrir: Si le khilafah est dans votre poche, sortez-le," *Mosaique FM*, 17 June 2015. <http://www.mosaiquefm.net/fr/index/a/ActuDetail/Element/53684-ghannouchi-a-hizb-ettahrir-si-le-khilafah-est-dans-votre-pochesortez-le>

<sup>312</sup> Skocpol (1994), Zeghal (2013)

unlicensed mosques to operate. Under Bourguiba, the state closed the ancient university-mosque of Zitouna - the Tunisian equivalent of Al-Azhar - and incorporated its faculty into a department of religious studies at the University of Tunis. Ben Ali reopened Zitouna, but kept it under strict state supervision. Preachers were trained by the Ministry of Religious Affairs and appointed by the government. The Friday sermon was standardized throughout the country. Other regimes have taken similar measures, but there is consensus that the Tunisian state's control of Islam was unusually extensive and effective. In Egypt for example, unlicensed mosques were common under Mubarak, even if they were not officially allowed. Al-Azhar retained greater autonomy than Zitouna<sup>313</sup>.

The post-revolutionary government officially removed some of these restrictions, such as the bans on Salafi organizations, or stopped enforcing others, such as the requirement that preachers be licensed by the Ministry of Religious Affairs. As a result, the highly restricted religious field was suddenly opened to new organizations and ideologies. Soon after the revolution, several groups organized around the goal of implementing the shariah. Mokhtar Jebali, a Zitouna scholar, organized the Front Tunisien des Associations Islamiques (FTAI), which united over a hundred Islamist groups around the goal of including a shariah provision in the new constitution. In the spring of 2012, the FTAI organized demonstrations in front of the Assembly to press for this goal. However, many of the protesters went further, and chanted the slogan "the people want a Caliph"<sup>314</sup>.

Salafist groups rejected the Tunisian state and participation in politics. The most prominent of these was Ansar al-Shariah, but there were numerous smaller Salafist groups with a

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<sup>313</sup> Zeghal (1998) contrasts state regulation of Islam in Tunisia with Morocco and Egypt.

<sup>314</sup> "Devant la Constituante: Des Milliers manifestant pour 'l'application de la Charia.'" *TAP*, 16 March 2012. <http://www.turess.com/fr/tapfr/121442>



range of political and religious positions<sup>315</sup>. These groups went beyond calling for the inclusion of the shariah in the constitution. In contrast to Egypt, where the Salafist Nour Party won the second largest number of seats in the 2012 elections, Tunisian Salafists did not form a political party and did not participate in elections, reflecting their rejection of mainstream politics and the Tunisian republic. They also used terms such as Islamic state, Islamic emirate, or Caliphate. Their terminology and symbolism links them to earlier political Salafist movements and to the presages the Islamic State in Iraq and Syria (ISIS) that would appear in early 2014<sup>316</sup>. In addition to the Salafist groups, the immediate post-revolution period saw the rise of the League for the Protection of the Revolution (LPR), an Islamist militia, which was more closely aligned with Ennahda than the Salafist groups<sup>317</sup>.

All of these groups posed a problem not only for the Tunisian state, but also for Ennahda, which sought to represent different strands of Islamism. Ennahda alternated between trying to accommodate Salafist demands and aligning itself with other mainstream parties against the fringe represented by groups like Ansar al-Shariah. Immediately after the 2011 revolution, Ennahda favored legalizing previously banned Salafist groups<sup>318</sup>. Ennahda's attitude toward these groups quickly soured. In 2012, Rached Ghannouchi stated that "if Salafism means return to the noble values of Islam...yes, I am a Salafist," while also characterizing the Salafist political project as "terrorist."<sup>319</sup> Ultimately, Ennahda found that it could not placate the Salafists. In

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<sup>315</sup> The case of the Bizerte 'justice kiosk' captures the ad-hoc nature of much of the Tunisian Salafist movement from 2011 to 2013. Tim Whewell. "Justice Kiosk: Tunisia's alternative law enforcers," *BBC*, 30 July 2013. <http://www.bbc.com/news/magazine-23469218>

<sup>316</sup> "Ansar al-Shariah," National Center for Counter-Terrorism, [http://www.nctc.gov/site/groups/ansar\\_al\\_sharia.html](http://www.nctc.gov/site/groups/ansar_al_sharia.html)

<sup>317</sup> "Tunisie: Vers la dissolution des Ligues pour la protection de la revolution," *RFI*, 27 May 2014, <http://www.rfi.fr/afrique/20140527-tunisie-vers-dissolution-ligues-protection-revolution>

<sup>318</sup> Erik Churchill and Aaron Zelin. "A Balancing Act: Ennahda's Struggle with Salafis," *Carnegie Endowment*, 19 April 2012, <http://carnegieendowment.org/sada/?fa=47897>

<sup>319</sup> M. Kh. "Tunisie: l'actuel project salafiste est terroriste, affirme Ghannouchi" *Investir en Tunisie* 28 March 2012. <http://www.turess.com/fr/investir/14070>

Egypt, the Salafist parties formed part of the coalition government from 2012 to 2013. They sought to increase the role of Islam in the Egyptian constitution, but they could still be included in the overall project of Islamic constitutionalism directed by the Brotherhood. Even the Sisi regime has been able to coopt the Salafist Nour party. In Tunisia, no major political party argued for shariah constitutional review, leaving Ennahda's "civil state" and the Salafist caliphate as the only options.

A series of events in 2012 and 2013 led to a crackdown on the Tunisian Salafist groups, bringing this brief period of religious ferment to a close. In 2012, a group of Salafists protesting the film marched from downtown Tunis to the upscale Berges du Lac neighborhood, where they tried to storm the US embassy. The assassinations of Chokri Belaid and Mohamed Brahmi in February 2013 and July 2013 respectively were blamed on Salafist extremists. The beginning of a low level insurgency in the Chaambi region in 2013 further raised fears of radical Islamism<sup>320</sup>. All of these events contributed to the Arrahil protest movement against the Troika.

The government responded with a series of security measures. The government declared Ansar al-Shariah to be a terrorist organization in August 2012. A court decision dissolved the LPR and seized its assets. The government also reinstated many of the methods used by the Ben Ali regime to regulate the religious sphere. By July 2015, the Minister of religious affairs, Othmen Batikh, could state that "more than half of the out of control mosques have been closed."<sup>321</sup> The government did not require Friday sermons to be standardized, although this measure was considered in 2014. These efforts had the support of all major political parties, including Ennahda. Indeed, many of these policies were first implemented by the Troika I

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<sup>320</sup> "Tunisie: Les monts Chaambi, Sammama, Salloum et Meghila declares zones militaires fermees," *Huffpost Maghreb* 16 April 2014. [http://www.huffpostmaghreb.com/2014/04/16/tunisie-zones-militaires-\\_n\\_5160293.html](http://www.huffpostmaghreb.com/2014/04/16/tunisie-zones-militaires-_n_5160293.html)

<sup>321</sup> "Plus de la moitie des mosques anarchiques fermees," *Nessma* 14 July 2015, <http://www.nessma.tv/new/nationale/plus-de-la-moitie-des-mosques-anarchiques-fermees-8015>

government, which was heavily dominated by Ennahda, and its conservative minister of religious affairs, Nouredine Al-Khademi<sup>322</sup>. These measures and a popular backlash against Islamism removed groups like the FTAI, the LPR and Ansar al-Shariah from the political scene. However, the Salafist fringe returned as terrorist groups in 2014 and 2015, leading to Tunisia's current security crisis.

## The Draft Constitutions

Whether Ennahda would push for the inclusion of shariah in the new constitution was one of the most important questions hanging over the early phase of the transition. The party's platform released before the October 23, 2011 National Assembly elections did not mention the shariah, and Ghannouchi stated that the party would not push for the inclusion of shariah in the new constitution. However, the movement's earlier history and stances as described above were compatible with incorporating the shariah into the constitution, and its opponents feared that it would do so. Soon after the October 23, 2011 elections, Ennahda MP's proposed adding a provision describing shariah as "a source among sources of legislation" to the constitution. The CPR and Ettakatol threatened to leave the Troika coalition if this provision were enacted<sup>323</sup>. The debate over the shariah also revealed a split within Ennahda between an elite of moderate former exiles, including Ghannouchi, and a rank of file who had stayed in Tunisia throughout the Ben

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<sup>322</sup> "Nouredine al-Khademi: Les mosques sont une ligne rouge qu'il est interdit de transgresser," *TAP* 14 June 2012. <http://directinfo.webmanagercenter.com/2012/06/14/nouredine-al-khademi-les-mosques-sont-une-ligne-rouge-quil-est-interdit-de-transgresser/>

<sup>323</sup> Sarah J. Feuer, "Islam and Democracy in Practice: Tunisia's Ennahda Nine Months in," *Brandeis Middle East Brief*, No. 66, September 2012.

Alexis Arieff and Carla E. Humud, "Political Transition in Tunisia," *Congressional Research Service Report*, 10 February 2015.

2011 Ennahda Party Platform. <http://www.ennahdha.tn/>

Ali period<sup>324</sup>. Ennahda's rejection of a shariah provision pushed the issue out of formal politics and towards the Islamist fringe represented by the FTAI and the Salafists. Following demonstrations by the FTAI in March 2012, Ennahda reaffirmed that it would not support the inclusion of shariah as a source of legislation in the draft constitution<sup>325</sup>.

The Troika produced draft constitutions on August 8, 2012, December 2012, April 22, 2013, and June 1, 2013. None of these drafts included the shariah as a source of law. However, all of them contained provisions that were objectionable to the secular opposition, including provisions that expanded the role of Islam in the Tunisian state. The secular opposition often interpreted constitutional reforms proposed by the Troika, even those that did not mention Islam explicitly, as stealth attempts to introduce shariah and undermine the secular state.

With each revision of the draft constitution, the Troika stepped back from the most controversial provisions. Concerns in the August 8, 2012 draft include provisions annulling international treaties that contradict the constitution, complementarity rather than equality of men and women, criminalization of "attacks on the sacred," criminalization of "any normalization with Zionism or the Zionist state," and limiting the presidency to Muslims<sup>326</sup>. The Troika removed all of these provisions, except the superiority of the constitution to international treaties, by the fourth draft published on June 1, 2013<sup>327</sup>.

Even after these concessions, the June 1, 2013 constitution still raised fears about the Islamicization of the Tunisian state. Fatma Bouraoui of Nidaa Tounes described these concerns as a fear of "erosion of fundamental rights and the rights of women." Bouraoui argued that this

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<sup>324</sup> Alysha Bedig, "Ennahda's Split Personality: Identity Crises in Tunisian Politics," *Fletcher Forum*, 8 April 2012. <http://www.fletcherforum.org/2012/04/08/ennahdas-split-personality/>

<sup>325</sup> "Tunisia's Ennahda to oppose shariah in constitution," *Reuters*, March 26, 2012.

<sup>326</sup> "Tunisia: Fix Serious Flaws in the Draft Constitution," *Human Rights Watch*, 13 September 2012

<sup>327</sup> George Sadek, "The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring," *Library of Congress Legal Reports*. May 2013. <http://www.loc.gov/law/help/tunisia.php#Islamic>

fear drove the Arrahil movement that pressured the Troika government to step down in late 2013. It also spurred the growth of Nidaa Tounes as secular Bourguibist rival to Ennahda. Human Rights Watch found the provisions for equality between men and women to be inadequate. The direct incorporation of international human rights agreements and norms into the constitution was a key demand<sup>328</sup>.

None of these issues deals with the shariah, but these issues clearly stand in the background of fears about the erosion of women's rights. The shariah and the experience of Bourguiba's promulgation of the Personal Status Code stand behind these criticisms. A discourse of fundamental rights, constitutional rights and women's' rights sits side by side with the legal positivism of the Personal Status Code. Fundamental rights are usually understood as norms that the constitution must protect against ordinary legislation. In the Tunisian transition, it is also necessary to protect legislation from the constitution.

#### Judges' Views of Islam and Constitutional Review in the Tunisian Legal System

The adoption of the Personal Status Code spread a legal positivist ideology among Tunisians, just as the SCC spread a view of the shariah as a higher norm among Egyptians. Adherence to this ideology leads some Tunisian judges to adopt positions that seem to contradict their own professional interests. The impact of judicial positivism on the activity of the Administrative Tribunal is described in chapter 4. The Personal Status Code also plays a more immediate role in the political calculations of Tunisian judges. Like the secular opposition in general, Tunisian judges consider personal status to be of fundamental importance to the Tunisian state. Like the secular opposition, Tunisian judges believe that overturning of the Code

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<sup>328</sup> "Tunisia: Strengthen New Constitution's Rights Protections," *Human Rights Watch*, 24 July 2013.

and its replacing it with some more shariah-inspired alternative would have implications for much more than the topics covered in the Code. The political imperative to defend the Personal Status Code reinforces the legal positivist ideology of Tunisian judges. As in the case of the Administrative Tribunal, judges defined their interests through legal positivist ideology. Legal positivism manifests itself in attitudes towards interbranch relations, the nature of the constitution, and the formal powers that should be assigned to courts.

The January 2014 Constitution marks a further round of concessions by Islamists. Indeed, the National Dialogue largely took control of the constitution drafting process away from the Troika government. Still, some judges of a secular or pro-RCD outlook have criticized the 2014 Constitution as a step back from the gains of the 1959 Constitution. These criticisms link issues including the Personal Status Code, modernization, Islam, and presidential power, which are connected only in light of the Personal Status Code and the practice of presidential legislation. Zouheir M'dhaffar considered the rights provisions of the 1959 constitution to be superior to the those of the 2014 constitution. Habib Koubaa objected to the large number of constitutional entities in the new constitution, including the ISIE, an anti-corruption agency, and IVD, in addition to the usual executive, legislative and judicial branches. This division of powers could weaken the state. He also objected to the weak executive implied by the semi-presidential system. He stated that “the country is in the process of developing and it needs a constitution that reflects this reality.” A strong president would be an agent of modernization.

Legal professionals' support for a strong executive is linked to a suspicion of a strong judicial branch. In general, the ideology of legal positivism implies that courts should have fewer formal powers and that they should defer to the political branches in their decisions. When asked about the possibility of provisional constitutional review by the Administrative

Tribunal, M'dhaffar stated that he opposed such review because judges might lack the proper understanding of the Tunisian constitution. He then gave the issue of the Personal Status Code as an example. The interview notes state,

If a public law judge read the new constitution, which declares that Islam is the national religion, he would conclude that laws that contradict the shariah are unconstitutional. Therefore he would declare the code of personal status unconstitutional because it permits adoption, which is forbidden by the shariah. However, a constitutional judge who understands the principles and history of the Tunisian constitution would know that this literal interpretation was not intended by the framers of the constitution<sup>329</sup>.

Zouheir M'dhaffar worried that the provision declaring Islam the official religion would allow a court to overturn Tunisia's Personal Status Code. He opposes such an outcome on both political and legal grounds. M'dhaffar's stance gives the Personal Status Code a semi-constitutional status, rooted in "the principles and history of the Tunisian constitution." For M'dhaffar, the Tunisian constitutions of 1959 and 2014 were superior to legislation in a purely legal sense, but both of them lack the sort of prestige that constitutions have in many other countries. In legal positivism, a constitution is simply super legislation passed by a super legislature, not the embodiment of universal norms. Both the Code and the 1959 Constitution were the work of the same super legislator - Bourguiba, the 1957-59 National Assembly and founding generation of nationalist leaders. Both are foundational documents of the Tunisian Republic. The Code could not possibly be at odds with the 1959 Constitution.

Even without a shariah provision, a posteriori constitutional review could still endanger the code. M'dhaffar added that he found the Austrian model to be "problematic" and even "dangerous." He explains that "a posteriori review requires a political and legal system that is

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<sup>329</sup> Interview with Zouheir M'dhaffar, former president of the Constitutional Council and Minister of Public Property.

extremely developed, as well as a Court that is truly independent and above politics.” M’dhaffar shifts the focus from the status of the shariah in the constitution to the formal powers of courts and the form of constitutional review that they might exercise. This step is important evidence of the link between legal ideas and positions on formal powers of courts after 2011.

None of the other interviewees echoed M’dhaffar total rejection of a posteriori review. M’dhaffar admits that his position is the result of “nostalgia for the old Constitutional Council”<sup>330</sup>. Other legal professionals supported the creation of a constitutional court exercising a posteriori review in the 2014 constitution, even as they objected to proposals for provisional constitutional review by the Administrative Tribunal or the IPCCPL. Elements of the new constitutionalism provide an alternative means of securing the goals of secular judges. The inclusion of international treaties as a source of law coequal with the constitution was one of the key demands of the secular opposition<sup>331</sup>.

Still, judges do take the concerns raised by M’dhaffar seriously, as evidenced by proposals to insulate the future constitutional court from shariah review. Like many other constitutional courts, the Tunisian Constitutional Council, the proposed Constitutional Court in the 2012 and 2013 draft constitutions, and the IPCCPL did not require all members of the court to be professional judges. Muhammad al-Ju’aidi, a Tunisian judge and frequent commentator on legal issues, criticized this provision in the 2013 draft constitution because the appointment of non-judges to the constitutional court because it “opens membership to ulema of the shariah.”<sup>332</sup> The 2014 Constitution still allows one third of the members of the new Constitutional Court to

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<sup>330</sup> Interview with Zouheir M’dhaffar

<sup>331</sup> “Tunisie: La constitution doit marquer le debut d’une nouvelle ere pour les droits humains,” *Al-Bawsala*, 1 February 2014. <http://www.albawsala.com/pub/52ecff9d12bdaa0a91b722da>

<sup>332</sup> Muhammad Al-Afif Al-Ju’aidi. “Ay Mahkamah Dusturiyah fi Tunis? Bab lil-Shari’ah wa Veto lil-’Aqaliyah” (Which Constitutional Court in Tunis? A Door to the Shariah and a Veto for the Minority,” *Legal Agenda*, 18 June 2013. <http://www.legal-agenda.com/article.php?id=427&folder=articles&lang=ar>



be non-legal specialists, but this proportion was reduced as part of the concessions under pressure from the secular opposition and the judiciary<sup>333</sup>.

## **Conclusion**

The issue of the incorporation of Islamic law further undermines the countermajoritarian hypothesis. The Brotherhood supported constitutional review while Tunisian judges opposed it. Another version of hypothesis 2 would be that the Islamist parties would oppose constitutional review not because they are majoritarian but rather because they are opposed to constitutional review in principle. They may seek to replace it with some more Islamic alternative such as the Al-Azhar council described in the 2012 draft constitution, or some more radical reworking of the legal system. A comparison between the two cases shows that there is no one Islamist answer to the question of constitutional review. Instead, the outcome is shaped by each country's history and by the institutions put in place by the authoritarian regime.

The SCC's cooptation of Islamic law is not the main source of its legitimacy - it certainly did not make Islamists unqualified supporters of the court - but it is an excellent example of how the SCC built its legitimacy over the past three decades. It is also an example of the mechanism posited by the judicial role hypothesis: the activity of the SCC before 2011 promoted a set of ideas that made the Brotherhood more sympathetic to constitutional review. In Tunisia, the judiciary has been a secular bastion, as in Egypt. However, secularists are wary of one of the theoretical underpinnings of a posteriori review - the notion that statutes can be invalidated by their contradiction to a higher law embodied in the constitution - because such review could endanger the Personal Status Code and has been a method of Islamicization of law in other

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<sup>333</sup> 2014 Constitution, Article 118, Chapter V

countries, including Egypt. It is another example of the mechanism of the judicial role hypothesis: the prominence of positive legislation in the pre-2011 legal system produced a legal positivist ideology that made judges suspicious of constitutional review after 2011.

## CHAPTER 6: JUDICIAL POLITICS AND THE SUPREME CONSTITUTIONAL COURT OF EGYPT

### **Introduction**

A remarkable feature of the Egyptian transition was the extent to which the judiciary, including the Supreme Constitutional Court (SCC), the ordinary courts, the administrative courts and the Judges Club worked together to achieve common political goals<sup>334</sup>. Americans are used to thinking of all courts as part of a single judicial power, but in Egypt there are important differences among different kinds of courts, including their internal organization, their relationship with the regime and, most importantly, their political interests. The SCC in particular stands apart from any other court because of its close connection with the presidency, which appoints its judges. Despite these differences, the different parts of the judiciary worked together on the cases dissolving the House of Representatives and the Constituent Assembly and on the disputes surrounding the 2012 constitutional referendum. The judicial role hypothesis

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<sup>334</sup> The ordinary judiciary or judicial judiciary refers to the hierarchy of courts headed by the Court of Cassation charged with deciding private law cases. The administrative judiciary, the SCC and the exceptional courts are separate from the ordinary judiciary in their constitutional status, administrative hierarchy and method of appointment. For a general description of the Egyptian judiciary, see Hill (1975), Brown (2006).

explains this through a chain of events from judicial activity before 2011 to ideas about the judicial role to the formal powers of courts after 2011. The SCC's activism before 2011 cemented a conception of the judicial role that would support an alliance among the different parts of the judiciary and a greater involvement of the judiciary in politics after 2011.

The previous chapter described how the activity of the Supreme Constitutional Court (SCC) as an interpreter of the shariah built support for constitutional review among Islamists. This chapter looks at how the SCC used constitutional review to build its legitimacy among other parts of the judiciary, especially the ordinary judges represented by the Judges' Club. As described in chapter 1 of the dissertation, Egypt and Tunisia share a set of legal influences from European civil law and domestic state building that should favor a non-political, technical view of the judicial role. These views made Egyptian judges suspicious of the SCC during its first two decades. These ideas persisted in Egypt even after the creation of the SCC in 1979, and can still be found among Egyptian judges<sup>335</sup>. However, the exercise of constitutional review by the SCC introduced a new conception of the judicial role - as an active participant in politics - and a new strategy for the judiciary to secure its position - balancing against the political branches. By the 2000's, ordinary judges found ideological and practical reasons to support the SCC. These trends coalesced during the disputes surrounding the 2005 elections, when the SCC established the principle of judicial supervision of elections and the ordinary judiciary organized to defend this principle<sup>336</sup>.

The SCC's activity both before and during the transition reveals three key components of its conception of the judicial role. First, the SCC use of fundamental rights and the shariah as constitutional principles in the decades before 2011 made the suspension of constitutional review

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<sup>335</sup> Brown (2006). See the introduction to Section II of the dissertation for a description of technical and political conceptions of the judicial role.

<sup>336</sup> Bernard-Maugiron (2008), Moustafa (2007)

during the transition illegitimate in the eyes of both liberals and Islamists. Second, the SCC continued to act as a political arbiter through the judiciary's power to supervise elections. Third, the SCC's references to Egypt's constitutional tradition implied a role for the SCC in defining the new constitution, even to the extent of claiming a power to review the constitutionality of the draft constitution. The SCC's activity shows how transitional constitutional review could be useful to the political authorities, especially the Supreme Council of the Armed Forces (SCAF), which drafted the transitional documents in 2011.

The first section outlines the mechanism leading from judicial activity to ideas about the judicial role in the Egyptian context. The second section describes the history of the SCC's relations with the ordinary judiciary and how the SCC's activity promoted new ideas about the judicial role. The third section shows how this history influenced the activity of the SCC after 2011. I conclude that the mechanism posited by the hypothesis was at work in this case and that changing views of the judicial role set the stage for the SCAF's inclusion of the SCC in the transitional regime.

#### From Judicial Activity to the Judicial Role

The mechanism of the hypothesis requires the activity of the constitutional court to influence conceptions of the judicial role. This can be a difficult mechanism to observe. It is difficult to gauge whether particular ideas about the judicial role are widespread. It is possible that changes in ideas about the judicial role are the result of other factors, such as changing political pressures. The case of the Egyptian ordinary judiciary provides a means of addressing both of these problems. Unlike other segments of society, judges produce an elaborate discourse about their legal theory. Moreover, the SCC's model of the judicial role is in tension with the

ordinary judiciary's model of the judicial role and the ordinary judiciary's conception of its self interest. This case shows how the activity of the SCC promoted a conception of the judicial role that had been absent in Egypt and that was at odds with how the ordinary judges defined their interests.

In the United States, scholars often treat the ordinary judges and the constitutional court as part of a single judicial power, a stance that reflects the design of the US Supreme Court. The Constitution describes the Supreme Court as part of the “judicial power,” in contrast to non-judicial European high courts such as the Conseil Constitutionnel and the Conseil d’Etat. Because constitutional review is carried out by courts at all levels, not just the Supreme Court, there is not a major divide between constitutional review cases and other cases or between the activity of the Supreme Court and the lower courts<sup>337</sup>.

Conflating the constitutional court with the judiciary in general is misleading in Egypt. In general, the SCC follows the Austrian model of constitutional review. The SCC is separate both nominally and practically from the ordinary judiciary. The 1971 Constitution describes the SCC as an “independent judicial body,” but not as part of either the ordinary judiciary or the administrative judiciary<sup>338</sup>. The SCC was superimposed on much older ordinary and administrative judicial hierarchies.

The creation of the SCC did not automatically result in expanded powers or greater independence for the judiciary as a whole. The design of the SCC presented both dangers and opportunities to the ordinary judiciary. The SCC would be staffed by judges, so it opened the door to greater judicial influence. However it would be formally distinct from the ordinary

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<sup>337</sup> US Constitution, Article 3. Kelsen (1942) highlights the unusual features of American constitutional review from a European perspective.

<sup>338</sup> Sweet (1992)

“Egypt Constitution 2005,” *ACE Project*, <http://aceproject.org/en/regions/mideast/EG/Egyptian%20Constitution%20-%20english.pdf/view>

judiciary and would have its own procedures for appointments. These procedures gave the president direct influence over the SCC, perhaps making the court a tool for controlling the judiciary as a whole. It would exercise a posteriori review, which allow the judiciary to overrule any law and would make the lower courts partners in the process of constitutional review. However, the SCC could also overrule the lower courts, even the supreme courts, the Court of Cassation and the Council of State, which saw themselves as the leaders of the Egyptian judiciary. The inclusion of fundamental rights in the SCC's power of review gave it additional powers, but might also involve the SCC, and the judiciary generally, in controversial political questions.

Egyptian judges adopted most of these stances toward the SCC at one time or another. The SCC's activity pushed judges to adopt a more favorable view of the SCC. Support for the SCC entailed support for its model of constitutional review. The SCC can promote ideas both through argument and by demonstrating the advantages of these ideas. The decisions of the SCC are long and detailed, resembling the decisions of the US Supreme Court or the German Constitutional Court more than the legal syllogism of the French and Tunisian courts<sup>339</sup>. As a result, they provide ample opportunities to present the courts' views. The decisions are widely read by ordinary judges because they represent the authoritative interpretation of the constitution and laws. Some judges of the SCC are also prominent academics, and their writings present a comprehensive theory of the SCC's activity and the broader judicial role<sup>340</sup>.

The decisions of the SCC have also shown that a court can challenge the actions of the Egyptian government. This phenomenon led to interest in the SCC among Western political

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<sup>339</sup> Lasser (2009), Kommers (2012) on the decisions of French courts and the German Constitutional Court.

<sup>340</sup> Sherif (1988), Sherif in Boyle and Sherif (1996), Sherif in Abdel Haleem, Sherif and Daniels (2003), Sherif in Cotran and Sherif (1999), Al-Murr in Mallat (1993), Al-Murr in Boyle and Sherif (1996), Al-Murr (2003).

scientists. It also changed how Egyptians, especially Egyptian judges, thought about the possible scope of judicial activity and relations between the political branches and the judiciary<sup>341</sup>.

For the opposition, the judiciary's pro-military counter-revolutionary program came as a shock because some parts of the judiciary had been centers of reformist activity in the Mubarak era. The SCC enjoyed a 'golden age' of activism in the 1990's. The administrative courts had long been known for their independence from the regime<sup>342</sup>. In an interview, Ahmed Eid stated that, "For many years the administrative courts were known as protectors of human rights. They would often issue decisions releasing prisoners who were held illegally (even if they police might still re-arrest the prisoner after releasing him)...Since the revolution, the administrative courts have been turned against the opposition too."<sup>343</sup> The question of how the different parts of the judiciary accepted a new conception of the judicial role is closely tied to the question of how they abandoned older reformist political stances.

### **History of Egyptian Judicial Politics**

The Egyptian judiciary was initially hostile to the sort of judicial activity represented by the SCC on both ideological and political grounds. Like its Tunisian counterpart, the Egyptian judiciary built its independence on professionalism and an apolitical technical view of judicial practice. As a practical matter, a constitutional court could be a means for the regime to control the judiciary. The SCC used its activity to allay these concerns and to establish itself as a guarantor of the independence of the judiciary as a whole. By the 2000's, the SCC was able to

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<sup>341</sup> Moustafa (2007), Brown (2006), Bernard-Maugiron (2003)

<sup>342</sup> Brown (2006), Moustafa (2007), Rosberg (1995)

<sup>343</sup> Interview with Ahmed Eid

work with the ordinary judiciary to intervene in the politics surrounding Egypt's first multi-candidate presidential elections in 2005.

### The Judiciary under Siege, 1952-1970

Judges and lawyers enjoyed high status under the Egyptian monarchy. A balance of power among the monarchy, the British occupiers and the parliament created a relatively free environment for judicial activity. International trade led to the rise of a class of prosperous lawyers<sup>344</sup>. French legal positivism was the main influence on the Egyptian judiciary. The independence of the judiciary was founded in meritocratic appointments, educational institutions, and an apolitical technical application of the law, not in a power of constitutional review exercised by a high court. However, courts did occasionally use the 1923 Constitution as the basis for constitutional review. Abd al-Razzaq Sanhuri introduced plans for constitutional review by the Council of State, suggesting a variety of views about the judicial role during this period<sup>345</sup>.

The 1952 Free Officers' coup proved to be a grave threat to both judges and lawyers. The revolutionary ideology of the officers threatened all established institutions, including courts. The new regime introduced an ideology of 'socialist legality' that was at odds with the liberal views of Egypt's judiciary. The regime created new institutions, such as the military courts and the socialist prosecutor, that competed with the jurisdiction of the ordinary and

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<sup>344</sup> Shalakany (2013), Brown (2006). This era is described more fully in chapter 1 of the dissertation.

<sup>345</sup> Sherif in Bernarnd-Maugiron (2008) on French influence of the Egyptian judiciary.



administrative courts. Furthermore, the new regime began the nationalization of many areas of the Egyptian economy, eroding the economic basis for the prosperity of lawyers<sup>346</sup>.

The revolutionary environment following the Free Officers' coup also cut off the constitution as a source of judicial independence. The constitution was in flux during this period. Egypt adopted a new constitution in 1956 and again in 1964<sup>347</sup>. Moreover, the constitution drafting process was under the direct control of the Nasser regime. The constitutions contained some provisions that threatened the judiciary. Both constitutions concentrated power in the hands of the president and opened the door to long-term emergency rule, which began in 1958. Neither constitution contained any provision for judicial review. The regime suppressed the attempt by the Council of State to claim a power of constitutional review, and exiled the Council's president, Abd al-Razzaq Sanhuri in 1954. In short, the new constitutions were more likely to be a threat to the judiciary than a guarantor of judicial independence<sup>348</sup>. In this environment, the traditional positivist sources of the judiciary's independence - professionalism and apolitical expertise - became even more important.

Judges and lawyers strengthened their professional organizations in response to the Nasser regime. The Judges' Club and the Lawyers' Syndicate continued to operate throughout the Nasser era. They maintained control over their internal organization and avoided incorporation into Nasser's party, the Arab Socialist Union. Both organizations became centers of opposition to the Nasser regime<sup>349</sup>.

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<sup>346</sup> Brown (2006), Shalakany (2013)

<sup>347</sup> Egypt's constitutional history is further complicated in this period by the de jure union between Egypt and Syria in the United Arab Republic. For an overview of Egyptian constitutions see, "Middle East Constitutional Forum: Egypt," <http://www.righttononviolence.org/mecf/countries/egypt/>

<sup>348</sup> Brown (2006), Shalakany (2013)

<sup>349</sup> Moustafa (2007), Brown (2006) on the Judges' Club during the Nasser era

Judges emphasized the special training and attitudes that they believed were necessary for true judicial independence. The Nasser government lowered standards for admissions to law schools as part of its policy of providing universal higher education. From the 1960's to the 1980's, the number of law students and lawyers increased dramatically, resulting in lower prestige for the profession<sup>350</sup>. In contrast, judges were able to retain some control over the training and recruitment of new judges through institutions such as the High Council of the Ordinary Judiciary, which is headed by the president of the Court of Cassation<sup>351</sup>. Promotion by seniority or by meritocratic criteria remained central features of the judicial hierarchy. The goal of these measures was not only to ensure the quality of members of the judiciary, but also to exclude new members who might have a political orientation (either Islamist or pro-regime) that was at odds with the judiciary. To this end, the admissions exam to the judicial academy gave extra points to the sons of judges<sup>352</sup>. All of these mechanisms insulated the judiciary from attempts by the regime to change its composition.

The authoritarian environment during the Nasser era influenced the judges' thinking about their role. During this period, judges articulated an interpretation of their role that would justify their opposition to the Nasser regime and protect their independence. Muhammad 'Asfur was an Egyptian judge. His book *Istiqlal al-Sultah al-Qada'iyah* (Independence of the Judicial Power), which was published in 1969 in the midst of the conflict between Nasser and the judges, sets out a vision of the judicial role<sup>353</sup>. 'Asfur's main contention is that the judiciary is "a power, not an office". Judges cannot be treated like ordinary state employees. Much of the work is taken up by a comparison between Egypt and the systems of France, Britain, Germany and the

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<sup>350</sup> Moustafa (2007), Shalakany (2013)

<sup>351</sup> Brown (2006), Sherif in Boyle and Sherif (1996) pp. 13-37

<sup>352</sup> Rutherford (2008)

<sup>353</sup> 'Asfur (1969)

United States. ‘Asfur cites the American example of judicial review approvingly, but he does not suggest that such a model is necessary for the Egyptian judiciary. Even if it might be desirable, an independent constitutional court exercising judicial review of government actions was implausible in Egypt in 1969, given the absence of a stable constitution and the regime’s monopoly on power. ‘Asfur’s conception of judicial independence depends on the autonomy of all judges, not on the status of the highest court. ‘Asfur’s concrete proposals for the Egyptian judiciary focus on guarantees of tenure for sitting judges, exclusion of non-judges from judicial activities, and the autonomy of the judiciary from political parties. These demands counter the Nasser regime’s strategies for controlling the judiciary.

The conflict between Nasser and the judges peaked in 1969 with the massacre of the judiciary, in which Nasser removed a large number of sitting judges and began the incorporation of the judiciary into the Arab Socialist Union. By 1969, Egyptian judges feared that the old guarantees of their independence were gone for good, and that there would be nothing to replace them. Ziadeh shares these fears. Ziadeh argued that judicial independence and the rule of law in Egypt were founded on a “body of men,” including both lawyers and judges, that had absorbed modern legal education and liberal ideas under the monarchy. The autonomy of this elite from the government was built from the bottom up. Education, legal culture and a vibrant private sector were all necessary for the survival of this elite. According to this argument, even if the Nasser regime had wanted to create independent courts, it could not do so without these ingredients<sup>354</sup>.

Establishment of the SCC, 1970-2000

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<sup>354</sup> Ziadeh (1969)

Soon after assuming power in 1970, Sadat set out to improve relations with the judiciary. The new constitution adopted in 1971 included liberal principles, fundamental rights, and guarantees of judicial independence. It also called for the creation of the SCC, although it left many of the details of this institution to legislation. In 1973, he reinstated the judges that had been fired during the massacre of the judiciary<sup>355</sup>.

Still, judges were suspicious of the president's plans and did not find his guarantees of judicial independence credible. Said argues that the Judges' Club had two major demands in reforming its status: amendment of the judicial authority law to ensure autonomy of judiciary's budget and appointments, and enforcement of the requirement that judges supervise elections<sup>356</sup>. The judiciary opposed the short-lived Supreme Court, which was created in 1969 and replaced by the SCC in 1979. The greater independence of the SCC went some way toward allaying the fears of ordinary judges about constitutional review, but criticism of the SCC continued. The Judges' Club held a conference on the theme of judicial independence in 1985. Brown argues that this conference revealed the disagreements between the ordinary judiciary and the SCC about the definition of judicial independence. The statement by the Judges' Club argued that the SCC should be abolished. Some judges argued for constitutional review by the Council of State or the Court of Cassation. The SCC countered these arguments with its own statement emphasizing the role of the judiciary in defending the constitution and monitoring the other branches of government<sup>357</sup>.

In the 1980's the SCC began issuing its first major decisions. This era produced most of the SCC's well-known decisions on Islamic law, property law and NGO law. The SCC also acted to defend the interests of the judiciary. The SCC issued a decision on the case of the

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<sup>355</sup> in Bernard-Maugiron (2008)

<sup>356</sup> Said in Bernard-Maugiron (2008)

<sup>357</sup> Brown (2006), in Bernard-Maugiron (2008)

Lawyer's Syndicate. judicial independence. These decisions raised the profile of the SCC and increased its popularity among the civil society organizations and lawyers that make up the judicial support network. It also attracted the attention of scholars. Much of the political science literature on Egyptian courts is the product of this golden age<sup>358</sup>.

Judges of the SCC participated in the creation of this literature, as both authors and informants to academic researchers. The most prominent of these academic judges are Adel Omar Sherif and 'Awad al-Murr. Adel Omar Sherif has served on the SCC since 2002. He published a book in Arabic on constitutional review in Egypt in 1988. He has published several articles in English on the SCC, human rights, the Egyptian judiciary and Islamic law. Sherif studied in Britain and has held visiting appointments at law schools in the United States and Canada. Al-Murr was chief justice of the SCC from 1991 to 1998 during its most activist era<sup>359</sup>.

Sherif describes the SCC as a protector of judicial independence and a check on the power of the government. In "Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences," Sherif emphasizes the role of the SCC's decisions in defining and protecting the independence of Egyptian judges. He cites two decisions by the SCC that deal with judicial independence. The SCC used a case about bankruptcy judges to present a general statement of the requirements for judicial independence<sup>360</sup>. The prerequisites for judicial independence mentioned in the decision, such as security of judicial appointments and self government of judges' professional organizations, are similar to demands made by the Judges' Club for decades. What is new is that the SCC has asserted itself as the protector of the ordinary judiciary. In another case, the SCC overturned

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<sup>358</sup> Moustafa (2007), Brown (2006), Bernard-Maugiron (2003),

<sup>359</sup> Sherif (1988), Sherif in Boyle and Sherif (1996), Sherif in Abdel Haleem, Sherif and Daniels (2003), Sherif in Cotran and Sherif (1999). Moustafa (2007) and Brown (2006) cite interviews with Adel Omar Sherif. Al-Murr in Mallat (1993), Al-Murr in Boyle and Sherif (1996), Al-Murr (2003).

<sup>360</sup> Sherif in Boyle and Sherif (1996), Case no. 34 of Judicial Year 16, Official Gazette no. 25, June 27, 1996.

some mandatory sentences required by legislation, on the grounds that determining sentences is a specifically judicial power<sup>361</sup>. The separation of powers at the constitutional level protects judicial independence at all levels.

Al-Murr was the chief justice of the SCC during its most active period. The SCC was more willing to rule against the government during this period than it had before. Al-Murr also introduced new sources of law to the SCC, especially international human rights norms<sup>362</sup>. The view of the SCC's role that these authors supported emphasized international human rights norms as the basis for the SCC's activity. Al-Murr defended the new rights jurisprudence of the SCC in his academic writings. In "The Supreme Constitutional Court of Egypt and the Protection of Human and Political Rights," "Human Rights in the Constitutional Systems of Egypt and other Islamic Countries: International and Comparative Standards," Al-Murr argued that international human rights norms and the shariah provide a complementary set of rights protections<sup>363</sup>. These two sources of higher law form the basis of the SCC's activity. Al-Murr also emphasized the SCC's decisions protecting the right to litigation<sup>364</sup>. Here too, the SCC used constitutional review to strengthen the independence of the ordinary judiciary.

Sherif and al-Murr introduced a new set of justifications for the activity of the SCC. It is not clear that their views were representative of the SCC as a whole, let alone the broader judiciary. Sherif and al-Murr are unusual in their liberal views and their close connections to Western Anglophone academia. Some judges of the SCC presented a view of the SCC's activity

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<sup>361</sup> Sherif in Boyle and Sherif (1996), Case no. 37 of Judicial Year 15, Official Gazette no. 32, August 15, 1996

<sup>362</sup> Moustafa (2007). in Bernard-Maugiron (2008) in Boyle and Sherif (1996)..

<sup>363</sup> Al-Murr in Boyle and Sherif (1996)

<sup>364</sup> Al-Murr in Cotran and Sherif (1999)

that is more statist in Rutherford's terms<sup>365</sup>. Naturally, Sherif and al-Murr also present a positive view of the SCC's activity and its impact on human rights and the independence of the ordinary judiciary.

In fact, ordinary judges also accepted many of the arguments in favor of the SCC presented by Sherif and al-Murr. This era also marks a transition in ordinary judges' attitudes towards the SCC and their conception of the sources of judicial independence. Muhammad Kamil 'Ubayd published *Istiqlal al-Qada': Dirasah Muqaranah* (Independence of the Judiciary: A Comparative Study) in 1991. 'Ubayd's work presents a traditional view of judicial independence. Although 'Ubayd was not a judge, the Judges Club implicitly endorsed his views. The book was published by the Judges' Club press with an introduction by Yahya al-Rifa'i, president of the Judges' Club. Like 'Asfur's *Istiqlal al-Sultah al-Qada'iyah*, the book again compares Egypt with the main legal models: France, Britain, Germany and the United States. To these, he adds Islamic law as an additional model for the Egyptian judiciary. 'Ubayd repeats the basic demands for judicial independence: control over appointments, freedom from political interference, no appointment of non-specialists to judicial positions, and self-government for judicial professional organizations. The SCC and constitutional review remain marginal in 'Ubayd's work. The ordinary judiciary is embedded in a state structure that includes the executive and legislative branches, as well as the administrative judiciary and the SCC. 'Ubayd does not suggest that the ordinary judiciary's relationship with the SCC is more important than its relations with these other institutions. The independence of the judiciary is guaranteed by procedures of appointment and professional self-governance, not by the SCC or even by the constitution.

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<sup>365</sup> Rutherford (2008). Moustafa (2007) argues that the replacement of al-Murr by Muhammad Galal as chief justice in 1998 signalled a move by the regime to reign in the SCC. During the transition, Tahani al-Gebali, the first female judge of the SCC, was known for her pro-military opinions.

Hisham Muhammad Fawzi's *Raqabat Dusturiyat al-Qawanin: Dirasah Muqaranah bayn Amrika wa Misr* (Constitutional Review of Laws: A Comparative Study of America and Egypt) presents a new view of the SCC and the broader judiciary<sup>366</sup>. The book was published by the Egyptian Organization for Human Rights, not the Judges' Club. Like 'Asfur and 'Ubayd, Fawzi compares the Egyptian judiciary with international models. Unlike 'Asfur, Fawzi argues for the importation of the practices of the US Supreme Court to Egypt. Constitutional review by the SCC should be a protection of fundamental rights, just at like constitutional review by the US Supreme Court. Fawzi lists "attempts to limit the role of the American Supreme Court," including the creation of extraordinary tribunals during the Civil War, refusal of the executive and legislative branches to follow the Supreme Court's rulings, and attempts to increase the number of judges<sup>367</sup>.

He draws lessons for the SCC from these incidents of American judicial history. The SCC faces similar "limitations," from extraordinary courts, constitutional interpretation by the president, and government interference in its internal organization. The parliament proposed a reform of the law governing the SCC that would replace a posteriori review with a priori review. Fawzi argues that the reform of the SCC by legislation, rather than constitutional amendment is interference in the independence of the SCC. A priori review is undesirable because it would limit the effect of the SCC's decision and make the SCC's review part of a legislative, rather than judicial process. Fawzi's comparison between the US Supreme Court and the SCC leads to a program for reforming the Egyptian judiciary and its role in the broader constitutional system. Fawzi proposes that the SCC adopt "the Anglo-Saxon style" of judicial decisions, that is signed

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<sup>366</sup> Fawzi (1999). SCC president 'Awad al-Murr served on Fawzi's dissertation committee, indicating the close connection between the SCC and legal academia.

<sup>367</sup> Fawzi (1999) pp. 301-340



opinions by individual judges, including dissents<sup>368</sup>. Fawzi argues that this proposal would increase the status of the judges as public figures. The influence of the American model of judicial review and global human rights discourse is evident in this work. However, without the SCC these examples would not be plausible in Egypt. The SCC provided a tool to strengthen the judiciary and check the regime. The model of strong constitutional review exercised by the US Supreme Court provided a justification for the SCC's activity.

The SCC became a possible guarantor of judicial independence during the 1980's and 1990's, although judges and legal academics debated whether this role was suitable for the SCC. Starting in 2000, disputes about the supervision of elections by judges provided an opportunity for an alliance between the SCC and the ordinary judiciary.

#### Elections and the Judicial Revolt, 2000-2011

In the period between 2000 and 2005, the ordinary judiciary and the SCC became involved in electoral politics. The 1971 Constitution requires the judiciary to supervise elections. Until 2000, this requirement was interpreted narrowly. A small number of judges were assigned to election boards that usually had no direct involvement in supervising voting. In 2000, the SCC ruled that the 1956 law on the Exercise of Political Rights was unconstitutional because it allowed the heads of the electoral committees to be non-judges<sup>369</sup>. The decision called for a greatly increased involvement of the judiciary in elections.

This decision coincided with a brief opening of the electoral field to opposition candidates. The 2000 elections resulted in victories for Mubarak and the ruling party, but also

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<sup>368</sup> Sherif also discusses the possibility of reforming the structure of the SCC's decisions. Sherif in Boyle and Sherif (1996)

<sup>369</sup> Younes in Bernard-Maugiron (2008)

criticism of the electoral rules that produced these lopsided results. In the 2005 elections, large numbers of independent candidates affiliated with the Muslim Brotherhood were allowed to run for the first time. A 2005 amendment to the constitution allowed multi-candidate presidential elections for the first time. Previously, the president had been chosen by the parliament and then approved by a popular referendum, ensuring that Mubarak was reelected without any real opposition<sup>370</sup>. Article 76 of the Constitution as amended in 2005 states,

Candidature applications shall be submitted to an independent committee, named the Presidential Elections Committee. The committee shall be composed of the head of the Supreme Constitutional Court as a chairman and the head of the Cairo Court of Appeal, the most senior deputy of the head of the Supreme Constitutional Court, the most senior deputy of the head of the Court of Cassation, the most senior deputy of the State Council and five public figures, recognized for impartiality....

The committee shall establish main committees to be composed of members of the judiciary to supervise the process in accordance with such rules and regulations as may be decided by the committee.

The wording of the amended constitution does not fully reflect the enormous efforts of the judiciary in supervising the 2005 elections. The committees described in this provision decided to place judges in every polling place in Egypt to ensure that the voting proceeded without fraud. The effort involved thousands of judges<sup>371</sup>.

The involvement of judges in the electoral process made the judges political arbiters. If the regime interfered in the referendum on the constitutional amendment, the Judges' Club threatened to boycott the presidential elections<sup>372</sup>. Without judicial supervision, the elections could not be valid, according to the SCC's interpretation of the 1971 Constitution. The results of the 2005 elections brought the judiciary into conflict with the regime. The Judges' Club

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<sup>370</sup> Moustafa (2007) Bernard-Maugiron in Bernard-Maugiron (2008)

<sup>371</sup> Moustafa (2007)

<sup>372</sup> Bernard-Maugiron in Bernard-Maugiron (2008)

published a report accusing the government of widespread electoral fraud<sup>373</sup>. Judges participated in public protests. Mohamed Sayed Said describes these events as a ‘judges’ revolt’. The regime responded by disciplining judges through the provisions of the 1972 judiciary law. In 2006, the police surrounded the Judges’ Club, the Court of Cassation and the Lawyers’ Syndicate buildings to forestall possible protests in support of the judges<sup>374</sup>.

The SCC had an ambiguous role in this process. The SCC’s 2000 decision started the chain of events. Its judges were involved in the elections committees. The events of 2005 indicate the involvement of the SCC in politics and cooperation between the SCC and the ordinary judiciary. The SCC’s ruling was supported by protests from civil society and a strike by ordinary judges. The SCC certified the results of the 2005 elections, despite the allegations of fraud. Some parts of the opposition saw the SCC’s decision as a betrayal. Moustafa describes the SCC as a rubber stamp for approving election results favorable to the regime. As Moustafa notes, the composition of the SCC had changed substantially between 2000 and 2005, as Mubarak had appointed numerous pro-regime judges to curb the activism of the SCC<sup>375</sup>. Despite these controversies, the opposition and the ordinary judiciary still supported the broader principle of judicial supervision of elections.

Moustafa describes the years after 2005 as an era of decline for the SCC and the judiciary generally. Samir Annabi, President of the Tunisian anti-Corruption Agency, echoed the view that the period after 2005 marked a decline in the independence and professionalism of the Egyptian judiciary<sup>376</sup>. However, this period did have important implications for ideas about the

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<sup>373</sup> Thanassis Cambanis, “Egypt’s Mubarak is Reelected President,” *Boston Globe*, 10 September 2005. [http://www.boston.com/news/world/middleeast/articles/2005/09/10/egypts\\_mubarak\\_is\\_reelected\\_president/](http://www.boston.com/news/world/middleeast/articles/2005/09/10/egypts_mubarak_is_reelected_president/)

Said in Bernard-Maugiron (2008)

<sup>374</sup> Said in Bernard-Maugiron (2008)

<sup>375</sup> Moustafa (2007)

<sup>376</sup> Moustafa (2007), Interview with Samir Annabi

judicial role and the later activities of the judiciary. Despite initial resistance by the Mubarak regime, the judiciary's role in observing elections became institutionalized. The judiciary also supervised the 2010 elections. The SCAF included this power in the Constitutional Decree with little controversy. The decisions of the SCC and the administrative courts dissolving the House of Representative and the Constituent Assembly builds on this tradition<sup>377</sup>. In these decisions, the SCC and the administrative courts used the principle that elections could only be valid if they were supervised by the judiciary. They also relied on the activism of the ordinary judiciary, especially the Judges' Club, to make these rulings effective. As in 2005, the Judge' Club threatened a boycott of the 2012 constitutional referendum.

The events of 2005 had a broader impact on conceptions of the judicial role and the ordinary judiciary's attitude toward the SCC. Younes describes a 'politicization of the judges' discourse,' in which judges framed their demand for judicial independence as part of a larger struggle against the arbitrary power of the Mubarak regime<sup>378</sup>. Whether the judges intended to confront the regime or not, the principle of judicial supervision of elections pushed the activity of both the SCC and the ordinary judiciary far to the political end of the chart from the Introduction to Section II. The events of 2005 show that the ordinary judges were clearly committed to this activity and to the expanded judicial role that it implied.

During the 2005 elections, the ordinary judges seemed able to influence electoral politics for the first time. To do so, they needed the help of the SCC to protect the constitutional principle of judicial supervision of elections, just as the SCC needed the ordinary judges to carry out electoral supervision. At least in the realm of electoral politics, the distinction between the purely technical activity of the ordinary judiciary and the more political activity of constitutional

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<sup>377</sup> Brown (2013)

<sup>378</sup> Younes in Bernard-Maugiron (2008)

review that is central to the French and Austrian models started to break down<sup>379</sup>. If the Mubarak regime had continued to prevent real electoral competition, these changes might have had little impact on broader politics. However, the 2011 revolution brought electoral politics to the fore, and with it the principle of judicial supervision of elections and the political conception of the judicial role that it implied. Ironically, the period of conflict between the judiciary and the Mubarak regime paved the way for the SCC's pro-military decisions during the transition.

### **Judicial Activity in the Transition**

The SCC exercised three main forms of activity during the transition: supervision of elections and electoral law, fundamental rights review, and intervention in the constitution drafting process. Each of these activities builds on precedents from before 2011. Expansions of the SCC's powers may have been controversial. Through each of these methods, the SCC showed how it could be an effective player in transitional politics, and how it could be useful for the SCAF. Excluding the SCC from the transitional regime would have considerable costs: alienating the ordinary judiciary, which would complicate any effort to supervise elections and lead to a repeat of the 2005 disputes. Including it would have considerable benefits: legitimating constraints on the political branches (even if the SCAF could exercise such constraints without the courts).

### Judicial Supervision of Elections

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<sup>379</sup> See the chart in the Introduction to Section II of the dissertation.

The Constitutional Decree also included the principle that judges must supervise the elections. The language of the Constitutional Decree on electoral supervision is similar to the 1971 Constitution and would be interpreted the same way by the SCC<sup>380</sup>. This choice fits with Egypt's earlier history as described above, but it is very different from the international model for supervising elections, which emphasizes foreign observers and the creation of an independent elections committee. The Ben Achour Commission chose this model for Tunisia in 2011<sup>381</sup>.

The Constitutional Decree introduced a new power to the SCC: a priori review of electoral laws. Article 28 of the Constitutional Decree describes this power, Draft legislation for presidential elections will be shown to the Supreme Constitutional Court before being issued to determine the extent of compliance with the constitution. The Supreme Constitutional Court will issue its decision on this matter within 15 days of receiving the draft legislation. If it decides that the text is unconstitutional, more work must be done before the law can be issued. In all cases, the decision of the Court will be obligatory for all authorities of the state, and will be published in the official gazette within three days of being released<sup>382</sup>.

The 2012 Constitution included this provision and extended the SCC's a priori review to legislative elections as well, presumably because the Muslim Brotherhood wanted to ensure that the parliament would not be dissolved by the SCC on the grounds that it had been elected through an unconstitutional electoral law<sup>383</sup>.

The SCC had never exercised any form of a priori review before 2011. Indeed, the SCC had campaigned against the addition of such review in the past because it would insulate laws from later constitutional review<sup>384</sup>. A priori review also put the SCC in a closer relationship with

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<sup>380</sup> Article 39, "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011.

<http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>381</sup> Global Network of Domestic Election Monitors, "Declaration of Global Principles for non-Partisan Election Monitoring," 3 April 2012 <http://www.gndem.org/declaration-of-global-principles> for a description of the international consensus for elections monitoring.

<sup>382</sup> "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011.

<http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>383</sup> Brown (2013)

<sup>384</sup> Brown (2006)

political authorities. It would now review legislation drafted by the parliament, rather than just concrete cases appealed to it from the lower courts. Still, the power of a priori review of electoral laws builds on the SCC's past activity. The SCC dissolved the parliament as the result of flaws in the electoral law during the Mubarak era as well<sup>385</sup>.

The most important decisions of the transition were based on the SCC's review of electoral law. The judiciary's involvement in the electoral arena extended beyond the SCC's decisions. The requirement that judges supervise elections connected the decisions of the SCC to partisan politics and a protest movement by ordinary judges.

#### Fundamental Rights and the Nature of the Egyptian Constitution

The main question facing the drafting bodies was what aspects of the existing constitution should be suspended. If the fundamental rights included in the constitution are derived from natural law, they should not be suspended. If they are also included in international treaties and form an important part of the court's past jurisprudence, suspending them would also create some legal difficulties. The SCC's past use of fundamental rights made it difficult to suspend them as both a legal and political matter.

The SCAF's Constitutional Decree included several fundamental rights: Article 4 (right to association), Article 6 (right to property), Article (personal freedom, freedom from unwarranted searches and detentions), Article 12 (freedom of religion and opinion), Article 16 (right of assembly), Article 21 (right to natural judge), Article 22 (right to legal defense), Article

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<sup>385</sup> In 1990, the SCC ruled that the 1987 elections were invalid because the electoral law discriminated against independents - the same argument it used in its 2012 decision. "Egypt: Elections Held in 1990," *Inter-Parliamentary Union*. [http://www.ipu.org/parline-e/reports/arc/2097\\_90.htm](http://www.ipu.org/parline-e/reports/arc/2097_90.htm)

23 (rights of detainees)<sup>386</sup>. The Ben Achour Commission's decree did not include a list of rights or any reference to fundamental rights. The rights decisions of the Administrative Tribunal did not depend on the provisions of the Ben Achour Commission's decree or the Assembly's organic law of December 2011<sup>387</sup>.

In its decisions from 2011 to 2014, the SCC also considered a broader range of rights drawn from sources other than the SCAF's Constitutional Decree. Although the 1971 Constitution was suspended, its rights provisions still informed the decisions of the SCC. International treaties provided another source of fundamental rights. Even from a purely legal standpoint, suspending the constitution is not enough to stop the SCC from using the fundamental rights as a source of law. From a political standpoint, numerous actors were invested in fundamental rights review by the SCC, including civil society, the ordinary judges, and property owners.

The SCC issued relatively few decisions resulting from civil society litigation during the transition. However, it did use fundamental rights in its decisions, often in unexpected ways. It ruled that diplomats do not have a right to marry foreign nationals. It ruled overturned some aspects of the emergency law on June 2, 2013<sup>388</sup>. Still, fundamental rights arguments make their way into the SCC's other decisions. For example, the SCC argued that the party-list system violated the rights of independent candidates. The SCC's decisions certainly drew on its own precedents. As long as the SCC continued to operate, fundamental rights would form an important part of its activity. This is not true of all constitutional courts, or even all courts showing a high level of independence and activity. The US Supreme Court rarely used the Bill

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<sup>386</sup> "Constitutional Declaration 2011," *Egypt State Information Service*, 30 March 2011. <http://www.egypt.gov.eg/english/laws/constitution/default.aspx>

<sup>387</sup> These decisions are discussed in chapter 4 of the dissertation.

<sup>388</sup> Brown (2013), The rights decisions of the SCC during the transition are discussed in chapter 3 of the dissertation.



of Rights in its decisions before Reconstruction. Following Kelsen's model, the interwar German and Austrian courts did not have jurisdiction over rights cases<sup>389</sup>.

In the decades before 2011, the SCC often built its decisions on fundamental rights and the shariah. By presenting itself as a defender of these principles, the SCC was able to build its legitimacy. Such principles can be conceived as super constitutional. This model influence the formal powers of the SCC at two critical points during the transition: in the SCAF's decision to give the SCC a power of transitional constitutional review in the February 2011 Constitutional Decree, and in the SCAF's June 18, 2012 amendment to the Decree, which granted the SCC a power to review the draft constitution for conformity to the "any principle agreed upon in all of Egypt's previous constitutions."<sup>390</sup>

#### The SCC's Constituent Power

During the transition, the SCC presented itself not just as a defender of fundamental rights, but also as a defender of a particular tradition of Egyptian law. This tradition was embodied in Egypt's past constitutions and its political and legal institutions. This tradition could not be broken by any political authority. This view of the Egyptian constitution implied that the SCC itself should have a role in deciding the content of Egypt's post-2011 constitution, or at least a veto over the constituent power exercised by the elected Constituent Assembly. This view of the SCC's role manifested itself three times during the transition: the SCC's review of the draft constitution, the SCC decisions during the transition, which drew on varied sources of

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<sup>389</sup> Kelsen (1942), Sweet (1992), Lasser (2009), Whittington (2007)

<sup>390</sup> Brown (2013),

"English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012.

<http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

law, and the SCC's involvement in drafting the 2014 constitution. In each of these areas, the SCC built on its activity before 2011 to issue decisions on the most contentious issues of the transition.

The SCAF amended the Constitutional Declaration in June 2012, soon after Mursi won the presidential elections. The Muslim Brotherhood's victory in the legislative elections also allowed it to elect a Constituent Assembly dominated by Islamists. As a result, the SCAF feared that the Constituent Assembly would produce a draft constitution that would be threatening to non-Islamists. Article 60 B1 of the Amended Constitutional Declaration reads,

If the president, the head of SCAF, the prime minister, the Supreme Council of the Judiciary or a fifth of the constituent assembly find that the new constitution contains an article or more which conflict with the revolution's goals and its main principles or which conflict with any principle agreed upon in all of Egypt's former constitutions, any of the aforementioned bodies may demand that the constituent assembly revises this specific article within 15 days. Should the constituent assembly object to revising the contentious article, the article will be referred to the High Constitutional Court (HCC) which will then be obliged to give its verdict within seven days. The HCC's decision is final and will be published in the official gazette within three days from the date of issuance<sup>391</sup>.

The language of this amendment granted a lot of leeway to the SCC. The principles of Egypt's past constitutions included extensive lists of fundamental rights, statements of Egypt's national identity, and definitions of the state's relationship to Islam. The SCC could use any of these principles to rewrite the draft constitution. On the other hand, the amendment did not prevent Islamist government from adopting a constitution very similar to the 1971 Constitution, which would concentrate power in Mursi's hands the way that the old constitution had

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<sup>391</sup> "English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012. <http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

concentrated power in the hands of Mubarak and Sadat. As a result, the amendment is not a foolproof protection against the sort of Islamist takeover feared by the Brotherhood's opponents.

Like the requirement that judges supervise the constitutional referendum, the possibility that the SCC might overturn the draft constitution gave the judiciary an additional veto over the Constituent Assembly, although the SCC accepted the 2012 draft constitution without any changes. The amendment is certainly part of the SCAF's strategy of constraining the Mursi government. However, the amendment was also a delegation of power by the SCAF to the SCC. With this amendment, the SCAF also risked an unfavorable ruling by the SCC. Despite the involvement of the SCAF and other state institutions in forwarding the draft constitution, the SCC was the final decider. The SCAF could have created a set of principles to guide the SCC's review of the draft constitution. Instead it preferred a reference to Egypt's past constitutions, which gave the SCC the final say in deciding whether the draft constitution was acceptable or not. This choice reflects the legitimacy of Egypt's past constitutions, even those like the 1956 and 1964 constitutions that were clearly the product of authoritarian regimes. It also shows the SCAF's eagerness to portray any veto of the draft constitution as a judicial decision by the SCC rather than a political decision by the SCAF itself.

The power of a constitutional court to review a constitution may seem paradoxical. It certainly poses problems for the hierarchy of norms theory that undergirds the Egyptian and Tunisian ordinary and administrative judiciaries. In an interview, Habib Koubaa objected to even the very limited role of the Tunisian Constitutional Court in reviewing constitutional amendments to ensure that they have been adopted according to the procedures outlined in the 2014 Constitution. This review does not touch on the content of the amendments in anyway, but Koubaa still opposed it because it means that the court "can judge the source of its own

authority, the constitution”<sup>392</sup>. Egyptian legal scholars have expressed a similar skepticism of the SCC’s review of the draft constitution<sup>393</sup>.

The activity of the SCC before 2011 shows how this power of constitutional review of the constitution can be justified. As a practical matter, the SCC had been involved in previous periods of constitutional change, such as the adoption of the 2005 constitutional amendment allowing multi-candidate presidential elections. Moreover, the doctrine of the SCC is compatible with review of the constitution. As Abdelal notes, the SCC’s power to review the constitutionality of constitutional acts depends on something approximating a basic structure doctrine, which states that a court can overturn amendments to the constitution that violate the basic structure of the constitution. The basic structure may be fundamental rights, the democratic nature of the state or a super-constitutional norm, such as human dignity. The Supreme Court of India used the basic structure doctrine to overturn amendments to the constitution in the *Minerva Mills* case. The basic structure doctrine is common in former British colonies<sup>394</sup>. Although, the SCC had never asserted such a doctrine, its basic ingredients are present in the SCC’s decisions and its conception of the Egyptian constitution: the SCC had hinted at extra-constitutional and super-constitutional sources of law in its previous decisions. These include human rights norms, the shariah, and national security. Of course, the SCC could not use any of these principles to remove provisions from the constitution. It did act on the assumption that the constitution, human rights and the shariah do not contradict each other. As a result, the SCC is compelled to interpret the constitution in such a way that it is compatible with

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<sup>392</sup> Interview with Habib Koubaa

<sup>393</sup> Mohamed Abdelal, “Constitutionality of Constitutional Acts in Egypt,” 9 October 2014. <http://jurist.org/forum/2014/10/mohamed-abdelaal-egyptian-court.php>

<sup>394</sup> Mohamed Abdelal, “Constitutionality of Constitutional Acts in Egypt,” 9 October 2014. <http://jurist.org/forum/2014/10/mohamed-abdelaal-egyptian-court.php>

Kommers (2012) on human dignity in the German constitution.

The Indian Supreme Court argued that the amendment would give parliament the power to dissolve the democratic system and was thus incompatible with the basic structure of the constitution. Krishnaswamy (2009)

human rights and the shariah. These views are evident in the writings of al-Murr. The decisions of the SCC on the right to private property show a similar logic. The shariah provides a basis for interpreting the constitutional right to property in a particular way<sup>395</sup>.

After the 2013 coup, the Sisi regime began a new constitution drafting process. In August 2013, the government appointed a group of ten legal experts, including judges and law professors, to draft a new constitution. A larger ‘Group of Fifty,’ made up of political, religious and legal figures then approved the draft. The post-coup Group of Fifty charged with drafting the new constitution included a handful of judges and lawyers, none of which were from the SCC<sup>396</sup>. However, these numbers underestimate the influence of the SCC over the drafting process. Adly Mansour, formerly chief justice of the SCC, served as interim president of Egypt from July 2013 until July 2014. The SCC retained the power to review the draft constitution. The text of the constitution reveals the influence of the SCC on the process. The provisions of the 2014 Constitution favored the judiciary, especially the SCC. The SCC’s right to select its own president was included in the new constitution, as was a provision preventing the removal of sitting SCC judges. The ordinary judiciary also won the power to veto legislation affecting its own organization<sup>397</sup>.

The Sisi government intended to draft an expert constitution as opposed to the political constitution drafted by the Mursi government in 2012<sup>398</sup>. Such a project would naturally require legal expertise from judges and lawyers. However, it does not necessarily imply a major role for the SCC or any existing legal institution. Yet the SCC not only played an important role in the

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<sup>395</sup> Al-Murr in Cotran and Sherif (1999)

<sup>396</sup> Muhammad Mansour, “Members of Constitutional Committee of 50 Announced,” *Egypt Independent*, 1 September 2013. <http://www.egyptindependent.com/news/members-constitutional-committee-50-announced>

<sup>397</sup> Articles 158, 163, 164 of the 2014 Constitution. “Constitution of the Arab Republic of Egypt, 2014,” *State Information Service*. January 18, 2014. <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>

<sup>398</sup> Yussef Auf, “Egypt’s Constitutional Committees,” *The Atlantic Council*, 5 September 2013. <http://www.atlanticcouncil.org/blogs/egyptsource/egypt-s-constitutional-committees>

drafting process, its jurisprudence is an important part of the constitutional text. The preamble to the 2014 includes a reference to the SCC: “We are drafting a Constitution that affirms that the principles of Islamic Sharia are the principal source of legislation, and that the reference for the interpretation of such principles lies in the body of the relevant Supreme Constitutional Court Rulings.” Like the SCC’s review of the draft constitution, this provision poses a problem for the hierarchy of norms. This provision also blocks influence from other, more radical interpretations of the shariah. It preempts any role for al-Azhar in interpreting the shariah provision of the constitution. The provision is also a good example of how the SCC’s role in the constitution-drafting process can be justified. If the shariah is a super-constitutional norm, then the SCC’s interpretation of the shariah is too. As a practical matter, the SCC predates the 2014 Constitution.

### **Conclusion: From Activity to Formal Powers**

The chapter outlines the path from judicial activity to ideas about the judicial role to the formal status of the court after 2011. The example of the ordinary judiciary is particularly instructive because lower court judges are threatened by the wrong kind of constitutional court just as it is protected by the right kind. The introduction of constitutional review into the Egyptian legal system forced judges to consider the sources of their independence. At the broadest level, the SCC’s constitutional review introduced a new conception of the Egyptian constitution. By putting fundamental rights and shariah at the center of the constitution, the SCC promoted an interpretation of the constitution as a reflection of a higher law. Naturally, such higher law could not be repealed or suspended, even if the 1971 Constitution was. The SCC also

introduced a new conception of the judicial role, relations between the SCC and the ordinary judiciary and between the judiciary and the political branches.

The SCC's activity during the transition shows the ongoing importance of these ideas. It also hints at how the SCAF viewed the judiciary and its purpose in the transitional regime, and why the SCAF the SCC expanded formal powers. It is possible that the SCAF was influenced directly by normative ideas about the judicial role. Even if it was not, these ideas still define the limits of the SCC's possible activity and thus the uses that it could have for the SCAF. The judicial role advocated by the SCC allowed the SCC and other courts to act as countermajoritarian institutions. This activity was only possible because of the SCC's development of this role. Even seemingly radical court decisions, such as those dissolving the House of Representatives and the Constituent Assembly, actually had roots in the pre-revolutionary period. The next chapter looks at how the Ben Achour Commission and the SCAF designed the transitional institutions in light of ideas about the judicial role.

## CHAPTER 7: INSTITUTIONAL CHOICES, 2011-2014

### Introduction

The drafting bodies - the Ben Achour Commission in Tunisia and the Supreme Council of the Armed Forces (SCAF) in Egypt - faced many pressures while designing the transitional institutions, from the protest movement, civil society and the military for example. However, ideas about the judicial role proved to be a surprisingly strong constraint on the drafting bodies' decision making for two reasons. First, conceptions of the judicial role remained stable from the old regime through the transition. The judicial role includes a basic conceptual framework - legal positivism in Tunisia and new constitutionalism in Egypt - and a set of practices - administrative review by the Tunisian Administrative Tribunal and constitutional review by the Egyptian Supreme Constitutional Court. Both the conceptual framework and the practices were difficult to change. Second, ideas about the judicial role could influence the formal powers of courts through several mechanisms. In both cases, the judicial role contains a set of normative prescriptions about what powers courts should have and about how the broader legal system should be structured. These normative ideas could influence the drafting bodies directly or through pressure from civil society or the protest movement. Ideas about the judicial role also guide actors' understanding of how courts are likely to act in particular circumstances. The drafting bodies had to take the likely behavior of courts into consideration when designing the transitional institutions; formal powers can only act as a countermajoritarian mechanism if courts choose to exercise them.

The formal powers of courts were determined in two turning points: the drafting of the transitional documents in 2011, and during political contests in 2012 and 2013. Ideas about the judicial role affected the outcome at each of these turning points. The first issue facing the drafting bodies after the revolutions was whether to suspend the existing constitution and how to draft a new constitution. In Egypt, the SCAF opted for separate legislative, executive,



constituent and judicial branches while in Tunisia the Ben Achour Commission opted for a single Constituent National Assembly. This first choice was not determined by the judicial role, but the drafting bodies still designed systems that were compatible the dominant conceptions of the judicial role in each country. The transition itself offered another opportunity for both governments and courts to redefine the status of the judiciary. Different actors, including the transitional governments and the courts, had the opportunity to redesign the formal powers of courts after the adoption of the original transitional documents in 2011. In Tunisia, the National Dialogue renegotiated the transitional institutions in 2013, and the Administrative Tribunal emerged as an important political actor<sup>399</sup>. In Egypt, both the SCAF and President Mursi issued constitutional decrees in 2012, and the Supreme Constitutional Court (SCC) issued decisions that re-interpreted the transitional documents<sup>400</sup>. The courts themselves had the opportunity to redefine their powers through activity. Despite changing political circumstances, underlying features of the judicial system remained the same.

I outline each of these two turning points, first in early 2011 during the drafting of the transitional documents and then later during the transitional period. In each of these turning points, there were several proposals for the design of the formal powers of courts that were seriously considered but ultimately rejected by both political actors and the courts. These alternative proposals were compatible with the countermajoritarian hypothesis, yet the drafting bodies did not select them. I conclude that ideas about the judicial role influenced both political actors and courts to reject these alternatives.

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<sup>399</sup> See Chapter 4 on the Administrative Tribunal.

<sup>400</sup> “English Text of SCAF Amended Constitutional Declaration,” *Al-Ahram*, 18 June 2012. <http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

## The Assembly System and the Courts in Tunisia, 2011

Although the Ben Achour Commission was responsible for drafting Tunisia's transitional document, other actors, including the transitional government and protests movements, also shaped the decision to adopt the Assembly system. The transitional government and supporters of the old regime favored legal continuity through amendment of the 1959 constitution. This plan was rejected by the Kasbah protest movement, which forced the government to convene the Ben Achour Commission<sup>401</sup>. The Kasbah protesters demanded the election of a National Assembly followed by the drafting of a new constitution. However, these demands did not completely tie the hands of the Commission. The Commission could limit the Assembly system through a more comprehensive Transitional Decree, which would be enforced by the Administrative Tribunal or other courts. The second alternative would be in the interest of the Commission, but it is at odds with the judicial role and so would likely not be enforced by the Tribunal. The rejection of this alternative reveals the influence of the judicial role on the deliberations of the Commission.

Alternative 1. Rapid presidential elections, preservation of existing institutions, and amendment of the constitution through existing procedures.

Supporters of the old regime favored a short transition that would amend but not replace the 1959 Constitution. By holding quick elections, Mohamed Ghannouchi, who was Prime Minister before the revolution, could be eased into the presidency. Many judges are also

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<sup>401</sup> Lauranne Provenzano, "Grande manifestation contre le gouvernement place de la Kasbah a Tunis," *Jeune Afrique*, 25 February 2011. <http://www.jeuneafrique.com/182221/politique/grande-manifestation-contre-le-gouvernement-place-de-la-kasbah-tunis/>

supporters of the old regime<sup>402</sup>. For example, Zouheir M'dhaffar, former President of the Constitutional Council and former Minister of Property, supported this approach. He stated that “the problem with the old regime was in its practices not in its constitution. The procedure of amendment would take '15 days.”<sup>403</sup> In contrast he argued that “the country lost three years” because of the Assembly system. This approach had obvious political advantages to supporters of the old regime, including judges. Moreover, this approach seems like it should appeal especially to judges because it maintains legal continuity. Courts would be more empowered by this option than the Assembly system. The Constitutional Council could continue exercising constitutional review, and the maintenance of the 1959 Constitution would prevent any radical reforms that might undermine the judiciary. Despite these considerations, the judiciary still accepted the Assembly system once it had been adopted. Even M'dhaffar did not believe that the Assembly was illegal, only that it was politically unwise given Tunisia's circumstances. Judges who remained in official positions, such as Hichem Hammi and Leila Chikhaoui, openly accepted the Assembly system and the decision to suspend the 1959 Constitution<sup>404</sup>.

Judges' acceptance of the suspension of the 1959 Constitution can be explained by the normative aspects of the judicial role. Leila Chikhaoui stated as a matter of fact that “there was a juridic void after the repeal of the 1959 Constitution in January 2011. Thus there was no legal basis for constitutional review.” The suspension of the constitution and constitutional review does not mean the suspension of the rule of law. As Mahfoudh argues, the courts must operate differently in the absence of a constitution, but there is nothing illegitimate about such a

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<sup>402</sup> Interview with Zouheir M'dhaffar

<sup>403</sup> Interview with Zouheir M'dhaffar

<sup>404</sup> Interviews with Zouheir M'dhaffar, Hichem Hammi and Leila Chikhaoui

situation<sup>405</sup>. Tunisian judges consider the choice between the Assembly system and legal continuity under the 1959 Constitution to be a political question. The hierarchy of norms places this decision beyond the competency of the judiciary<sup>406</sup>. As a practical matter, the importance of administrative review rather than constitutional review in Tunisia made the decision to suspend the 1959 Constitution less threatening to the judiciary. Constitutional hiatus would mean the dissolution or suspension of the Constitutional Council, but it would not affect the activity of the Administrative Tribunal. The interests of the leading court in Tunisia were not at stake in the decision to suspend the 1959 Constitution.

The transitional government's decision to suspend the 1959 Constitution and create the Assembly system was the result of pressure from the protest movement. The judiciary was not a major player in this stage of the transition. However, the influence of conceptions of the judicial role can still be found in this example. The partisan affiliation and professional self-interest of most judges would lead them to support legal continuity and reject the Assembly system. That the judges did not reject the Assembly system is an indication of the importance of their conception of the judicial role<sup>407</sup>. In contrast, Egyptian judges saw legal continuity and the avoidance of any constitutional hiatus as essential to the judiciary as a matter of both law and politics<sup>408</sup>.

The protest movement was able to ensure the creation of the Assembly system because the different strands of the movement agreed on the principle of the Assembly system. However, there were other decisions about the transitional institutions, such as the status courts and the

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<sup>405</sup> Amine Mahfoudh, "Le Tribunal Administratif: Juge Constitutionnel" *La Presse*, 19 November 2013. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

<sup>406</sup> Interviews with Hichem Hammi and Habib Koubaa

<sup>407</sup> Chapter 4 of the dissertation describes the Administrative Tribunal's refusal to decide the question of the Assembly's legitimacy.

<sup>408</sup> See Chapter 6 of the dissertation.

content of the transitional decree, that the protest movement did not agree on and did not make a central part of their program. As a result, the alternative discussed below - review of the Assembly based on an expanded transitional decree - remained a viable option even given the influence of the protest movement over the drafting the transitional documents.

Alternative 2. Review of the Assembly based on an expanded transitional decree.

The Ben Achour Commission's Decree of March 23, 2011 made only minimal arrangements for the transitional institutions, the Assembly and an independent elections committee, the ISIE<sup>409</sup>. The Commission could have made the Decree more detailed, perhaps by including a strict time limit on the Assembly, a description of the Assembly's legislative powers, or a list of fundamental rights. It could also formally empower a court to enforce these provisions. Such review could be by the Constitutional Council, the Administrative Tribunal, or a provisional instance created for this purpose. This approach approximates the Egyptian model of a detailed interim constitutional document enforced by judicial review.

This approach was more plausible than the first approach of legal continuity and rapid presidential elections given the context of popular mobilization in 2011. The Ben Achour Commission had broad support and no formal limits on what it could include in the transitional decree. The protest movement did not emphasize the suspension of constitutional review as much as the creation of the Assembly system. The factions involved in the Ben Achour Commission may have had difficulty agreeing on some points, but a broad statement of fundamental rights might have been acceptable to all sides. As described in chapter 2, the Ben

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<sup>409</sup> "Decree -law n° 2011-14 dated 23 March 2011, relating to the provisional organization of the public authorities" *World Intellectual Property Organization*, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=245403](http://www.wipo.int/wipolex/en/text.jsp?file_id=245403)

Achour Commission's interests did not overlap completely with those of the protest movement or the revolutionary parties. The Commission included few Islamists, and some members of the Commission, including Yadh ben Achour himself, were known to be suspicious of Ennahda. In this light, the Commission had an interest in restraining a future Islamist government<sup>410</sup>. If formal powers of courts are a countermajoritarian instrument, the Commission should have empowered the Tribunal or the Constitutional Council through an expanded transitional decree.

An expanded decree could greatly empower the Administrative Tribunal and other courts. Fundamental rights provisions could form the basis for the review of many different kinds of legislation. Structural provisions, such as a time limit on the Assembly's mandate or limiting the Assembly's role to drafting a new constitution, could make the Tribunal an arbiter of transitional politics similar to the SCC in Egypt. However, the Tribunal would be unlikely to exercise these formal powers because doing so would cross the line between law and politics as defined by the judges of the Tribunal.

The actual case of the debate surrounding the Assembly's mandate, which is described in chapter 4 of the dissertation, provides insight into the likely responses of judges to the hypothetical situation of an expanded Decree. The Commission did not include a one year time limit on the Assembly's mandate in the Decree, but the parties agreed upon this limit informally. Opposition political figures argued that this informal agreement could be enforced by the

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<sup>410</sup> The Commission consisted of 155 members. Thirty-six of these were drawn from political parties, 33 from civil society, 12 from the provinces, and 74 from other categories. Ennahda had only three representatives in the Commission, the same number as the other twelve parties. Many of the representatives may have harbored pro-Ennahda sympathies, but the heavy representation from civil society and labor would seem to limit the influence of Islamists in the Commission. In any case, the March 23 Decree was approved by a nearly unanimous vote. See "Liste des membres du Conseil de la Haute instance pour la réalisation des objectifs de la révolution." [http://www.tunisie.gov.tn/index.php?option=com\\_content&task=view&id=1488&Itemid=518&lang=french](http://www.tunisie.gov.tn/index.php?option=com_content&task=view&id=1488&Itemid=518&lang=french) See Chapter 2 of the dissertation.

Tribunal, much like a hypothetical expanded decree<sup>411</sup>. However, legal professionals, such as Hichem Hammi, a current magistrate of the Tribunal, reject this argument. Hammi instead argues that “the Assembly is a sovereign constituent institution that can renew its own mandate,” and the question of a limit on the Assembly’s mandate is “completely political”<sup>412</sup>. To be legitimate in the eyes of Tunisian judges, review of the Assembly based on an expanded transitional decree would require a clear provision empowering the Tribunal or another court. The Tribunal did not reject any use of the Decree as a source of law. The Tribunal did use the provisions of the Decree describing the Instance Supérieure Indépendante pour les Élections (ISIE) to issue decisions blocking appointments to the ISIE by the Assembly. Such activity is based on a clear legal mandate and does not require the Assembly to decide political questions. In contrast, the sort of legal interpretation that would be required to find a limitation on the Assembly’s legislative and executive powers is at odds with the positivist ideology of Tunisian judges.

Judges pointed to the absence of such a provision as a reason not to rule on the Assembly’s mandate, but this is only the first reason<sup>413</sup>. Even if such a provision had been included in the transitional decree, review of the Assembly by the Tribunal would violate the hierarchy of norms. As Habib Koubaa, former Secretary of the Constitutional Council, stated, “Every level of legality should have its own guardian. The [Administrative Tribunal] is the guardian of statutes, not of constitutionality. Granting it a power of constitutional review would

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<sup>411</sup> Khemais Frini. “Vers la dictature de l’Assemblée” *La Presse*, 5 August 2013.

<http://lapresse.tn/10122014/70903/vers-la-dictature-dassemblee.html>

On the issue of the Assembly’s mandate, [https://islamwest.org/resources\\_Islam\\_and\\_the\\_West/Yadh-Ben-Achour-interview.pdf](https://islamwest.org/resources_Islam_and_the_West/Yadh-Ben-Achour-interview.pdf),

“Nous risquons une dictature pire que celle de Ben Ali.” 31 August 2012. <http://lapresse.tn/20012015/54651/nous-ripons-une-dictature-pire-que-celle-de-ben-ali.htm>

On the November 7, 2013 case: Amine Mahfoudh, “Le Tribunal Administratif: Juge Constitutionnel” *La Presse*. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

<sup>412</sup> Interview with Hichem Hammi

<sup>413</sup> See chapter 4 of the dissertation

destroy the distinction between statute and constitution.”<sup>414</sup> The Tribunal would be required to interpret what is essentially a constitution and enforce its provisions on the legislative and executive powers of the Assembly. Even if the review were described as administrative review based on an organic law (the transitional decree) rather than constitutional review, it would still require a form of judicial activity unprecedented in the Tribunal’s history. The interviewees were skeptical that the Tribunal would have the technical expertise for such activity, even if there were a clear mandate in the transitional Decree. Zouheir M’dhaffar insist on a sharp distinction between the practices of constitutional and administrative review and the sort of expertise needed to exercise them. In response to a question about the feasibility of constitutional review by the Tribunal, M’dhaffar stated, “The [Administrative Tribunal] is composed of public law judges with very specialized training. They are excellent public law judges, but they lack an understanding of politics and the fundamental principles of the constitution.”<sup>415</sup> As a practical matter, enforcing the expanded decree in a way that would actually limit the Assembly’s authority would involve the courts in politics. Given the judges’ conception of the origins of judicial independence, involvement in politics would pose a danger to the Tribunal as an institution<sup>416</sup>. The Commission would know that the Tribunal would likely not make extensive use of an expanded decree. Political party representatives also expressed skepticism about the potential for judicial activism by either the Council or the Tribunal, often in the same terms used by legal professionals. For Nidaa Tounes representative Fatma Bouraoui, the Constitutional Council “was a consultative institution. The Constitutional Council was not capable of exercising a power of constitutional review during the transition.” Bouraoui’s position is an

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<sup>414</sup> Interview with Habib Koubaa

<sup>415</sup> Interviews with Fatma Bouraoui and Zouheir M’dhaffar

<sup>416</sup> See chapter 4 of the dissertation



example of the second mechanism: ideas about the judicial role inform political authorities' expectations about the future behavior of courts.

### **Strategies to Maintain Constitutional Review within the Tunisian Assembly System, 2012-2014**

Even after the election of the National Assembly on October 23, 2011, several options remained open for courts to claim additional powers. First, the Administrative Tribunal could use international human rights treaties to review legislation passed by the Assembly. Second, the Administrative Tribunal could argue that the 1959 Constitution remained a valid source of law even after its suspension by the Ben Achour Commission. In fact, the courts did not claim additional powers after the establishment of the Assembly. From a political standpoint, such an outcome is unexpected because the balance of power among the different political factions changed drastically from 2011 to 2013, giving the courts an opportunity to claim additional powers. Ideas about the judicial role, particularly fears about the politicization of the judiciary, prevented such an expansion of judicial power during the transition. The behavior of the judiciary during this period is an example of how ideas about the judicial role can shape the actions of judges directly, which in turn shapes the formal powers exercised by courts.

Alternative 1. Review of legislation on the basis of fundamental rights found in international treaties.

Review based on international treaties seems to be compatible with the judicial role and seems to set the stage for a major expansion of judicial powers. In the absence of a constitution, as in the period from 2011 to 2014, the Administrative Tribunal is empowered to review the hierarchy of norms up to the treaty level. As a purely legal matter, the use of international treaties as a source of law superior to legislation is not controversial among Tunisian judges. In the hierarchy of norms, treaties are above legislation<sup>417</sup>. Tunisia is party to a number of international human rights treaties, including the United Nations Charter of Human Rights and the Convention of the International Labour Organization. As a result, even without being granted additional powers, the Tribunal could decide to make greater use of international treaties to block the application of laws passed by the Assembly<sup>418</sup>.

The Tribunal would exercise this power through review by exception. Through review by exception, the Tribunal can block the application of laws in particular cases if the laws are found to be contrary to the constitution or international treaties. Hammi describes this process in a situation where a constitution is in force: “The [Administrative Tribunal] bases its decisions on the hierarchy of laws, with the constitution at the top. If a law contradicts the constitution, the Tribunal will make its decision based on the constitution and ignore the law. It cannot overturn the law.”<sup>419</sup> Review based on international treaties would also occur through the mechanism of

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<sup>417</sup> Hammi and Koubaa cite the hierarchy of norms as an important principle of the Tribunal’s activities. Interviews with Hammi and Koubaa. The relationship between international treaties and the constitution in the hierarchy of norms was a matter of debate in Tunisia before and during the transition. The 2014 Constitution answered this question by giving international treaties an “infra-constitutional status.” Treaties are considered a source of law on the same level as the constitution. There is no such provision in either the 1959 Constitution or any of the transitional decrees. “Constitution of Tunisia, 1959,”

<http://confinder.richmond.edu/admin/docs/Tunisiaconstitution.pdf>

“Constitution of Tunisia, 2014,” *Constitute Project*. [https://www.constituteproject.org/constitution/Tunisia\\_2014.pdf](https://www.constituteproject.org/constitution/Tunisia_2014.pdf)

<sup>418</sup> Interviews with Taieb and Hammi

Mahfoudh cites the 2006 Tunisian League for Human Rights decisions as a rare example of the Tribunal’s use of international treaties. Amine Mahfoudh, “Le Tribunal Administratif: Juge Constitutionnel” *La Presse*, 19 November 2013. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

<sup>419</sup> Interview with Hichem Hammi

review by exception. Through this procedure, the Tribunal could claim a power of review based on international treaties without simultaneously claiming a power to rewrite the transitional documents or a broader power of constitutional review. As a result, review based on treaties would be less threatening to the Assembly than other methods of review by the Tribunal.

Courts did make limited use of international treaties during the transition<sup>420</sup>. However, the Tribunal never used an international treaty to block the application of a statute, and this power remained of little political importance. Two factors limit the potential for an expansion of judicial power on the basis of international treaties. First, these treaties would be of limited use to courts in deciding the major political issues of the transition without an expansive interpretation by courts. The international treaties that Tunisia had signed dealt with human rights. As a result, they were less useful in deciding issues of structural constitutional law. The most important questions of the transition - the mandate of the Assembly, elections, and the reform of state institutions - were structural issues, not fundamental rights issues. It would require creative reasoning by a court to apply international human rights norms to such cases. The interpretation necessary to apply treaties to cases that are not strictly about human rights would be at odds with the legal positivist methodology of legal interpretation. The Tribunal could have blocked legislation on the basis of international treaties, but such a scenario never arose. The provisions of these treaties on the rights of women is particularly important because it could be used to block changes to the Personal Status Code<sup>421</sup>.

Second, the desire to avoid political entanglements would prevent the Tribunal from using this power<sup>422</sup>. Although Tunisian courts accept that treaties are a source of law superior to

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<sup>420</sup> Amine Mahfoudh, "Le Tribunal Administratif: Juge Constitutionnel" *La Presse*, 19 November 2013. <http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

<sup>421</sup> See chapter 6 of the dissertation, Borrmans (1977)

<sup>422</sup> See chapter 4 on the Administrative Tribunal.

statutes, extensive use of international treaty runs into a different objection from the judicial role. The judicial role states that the courts should not exercise legislative or constituent powers or any powers not delegated to them by the constituent power, and that the courts should not involve themselves in political disputes that might undermine their independence. The key criterion is whether such a decision would divide the judges of the Tribunal.

Third, the Tribunal's established practice of administrative review resolved many of the rights issues addressed by international rights treaties. As discussed in chapter 4 of the dissertation, the years following the revolution saw a surge of legal activism focused on the Tribunal. The decisions of the Tribunal were based on statutes, not on international treaties. Tunisia's existing laws were adequate for these cases. As Mohamed Bennour put it, "the problem that the [Tribunal] faced in the Ben Ali period was the non-execution of its judgments by the executive."<sup>423</sup> Tunisian law guaranteed fundamental rights even in the Bena Ali period, even if the government did not always respect these laws. Through administrative review, the Tribunal could achieve its goals without a confrontation with the Assembly or the introduction of a new source of law.

On the question of constitutional review, the power of courts was limited by what formal powers the Commission chose to give to courts. However, on the question of review by international treaties, the Tribunal had broad scope to determine its own powers. That it did not claim such powers undermines the assumption of the countermajoritarian hypothesis that courts will check political authorities if they are granted the formal powers necessary to do so.

Alternative 2. Revival of the 1959 constitution as a source of law for judicial decisions.

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<sup>423</sup> Interview with Mohamed Bennour

The Ben Achour Commission's March 23, 2011 Decree suspended the 1959 Constitution and dissolved most of the institutions described in the 1959 Constitution, including the parliament, the presidency and the Constitutional Council. The Assembly had the power to issue organic laws describing the transitional institutions, such as the December 16, 2011 organic law<sup>424</sup>. These organic laws supplanted the 1959 Constitution as the law governing state institutions.

The Tribunal or another court could have used the 1959 constitution as a source of law despite the suspension of the Constitution by the Ben Achour Commission<sup>425</sup>. President Mechichi of the Administrative Tribunal claimed this power in the Tribunal's November 7, 2013 statement<sup>426</sup>. The 1959 Constitution could provide the basis for courts to rule against the government on a range of issues. The claim by the Administrative Tribunal to act as the final interpreter of the constitution would also mark an expansion of judicial powers, but the extent of these powers depends on the approach that the Tribunal takes to the 1959 Constitution<sup>427</sup>.

From one perspective, the legal effect of the 1959 Constitution would be limited. The structural provisions of the 1959 Constitution had been suspended through the dissolution of the presidency, the parliament and the Constitutional Council in 2011. If read simply as a source of fundamental rights, the text of the 1959 Constitution would have little to add to the Tribunal's decisions. The rights guarantees of the 1959 Constitution would add little to the protections already available to the Tribunal through international treaties. Even this limited approach to the 1959 Constitution has the same problems as review of the Assembly based on international

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<sup>424</sup> "Loi constituante no. 2011-6 du 16 decembre 2011 portant organisation des pouvoirs publics"  
[http://www.legislation.tn/sites/default/files/constitution/Pdf/loi2011\\_6fr1.pdf](http://www.legislation.tn/sites/default/files/constitution/Pdf/loi2011_6fr1.pdf)

<sup>425</sup> The Ben Achour Commission could also have left some parts of the 1959 constitution in place. This possibility is addressed in the section on an expanded transitional decree.

<sup>426</sup> See chapter 4 of the dissertation.

<sup>427</sup> Mahfoudh introduces these two approaches.

Amine Mahfoudh, "Le Tribunal Administratif: Juge Constitutionnel" *La Presse*, 19 November 2013.  
<http://www.lapresse.tn/20012015/75116/le-tribunal-administratif-juge-constitutionnel.html>

treaties. Such review would involve the Tribunal or other courts in politics. It would go beyond the technical competence of the judges. As Leila Chikhaoui put it “before the adoption of the new constitution [in January 2014], the ‘review’ of the Assembly was a political question, not a legal question. Civil society exercised such ‘review’ through organizations such as Bawsala, which examined and publicized the activities of the Assembly.”<sup>428</sup> Such activity is more suited to civil society than to the courts.

Review based on the 1959 Constitution raises further problems. Positivist doctrine limits the Tribunal’s sources of law to the constitutional text and positive legislation. Just as legislation is produced by the legislative power, the constitution is produced by the constituent power. Courts should have no role in either process. As described above, the use of the 1959 Constitution as a source of law would entail the exercise of a constituent power by the Tribunal because the Tribunal would itself define what counts as the interim constitution. The courts would have to decide between two legal and political models - the Assembly system or some form of legal continuity based on the 1959 Constitution. Furthermore, the establishment of the Assembly system contradicts the procedures of the 1959 Constitution, which contains no provision for the establishment of a National Constituent Assembly or the drafting of a new constitution<sup>429</sup>. There is no way to compromise between legal continuity and the Assembly system. This is a decision that could not possibly be based on any form of positive law.

The Tribunal’s behavior during the summer 2013 crisis, when the Arrahil movement tried to dissolve the Assembly, shows why the Tribunal was suspicious of any use of the 1959

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<sup>428</sup> Interview with Leila Chikhaoui. Bawsala is a civil society organization dedicated to publicizing the activities of the Assembly. <http://www.albawsala.com/>

<sup>429</sup> “The Constitution of Tunisia, 1959,” *World Intellectual Property Organization* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188948](http://www.wipo.int/wipolex/en/text.jsp?file_id=188948)

Constitution during the transition<sup>430</sup>. During the summer of 2013, the Arrahil protests movement demanded the dissolution of the Assembly. One way to achieve this goal was to have the Tribunal to either dissolve the Assembly or at least issue a decision that would force the Assembly and the Troika government to make concessions<sup>431</sup>. The political environment favored dissolving the Assembly. Dissolving the Assembly was politically risky, but it was supported by much of the opposition, including the Nidaa Tounes party, which would win the 2014 elections. It was legal considerations that prevented the Tribunal from doing so. The Tribunal could have used the 1959 Constitution to overturn the transitional Decree. On the other hand, dissolving the Assembly would require the problematic legal reasoning described above. If the Tribunal claimed that the 1959 Constitution remained in effect, it would implicitly overturn the actions of the Ben Achour Commission that had suspended the Constitution. Such a claim would make the Tribunal the real source of the transitional constitution. The example of the 2013 crisis shows how far the Tribunal would have to push its jurisprudence to justify dissolving the Assembly<sup>432</sup>.

### **The Convention System and Interim Constitutional Review in Egypt, 2011**

The SCAF took sole responsibility for drafting the 2011 Constitutional Declaration. However, the military's original decision to convene the SCAF and suspend the 1971 Constitution was the result of pressure from the protestors. The provisions of the Declaration

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<sup>430</sup> See chapter 4 of the dissertation.

<sup>431</sup> "Le sit-in Arrahil se poursuivra jusqu'au départ du gouvernement" *La Presse*, 23 August 2013. <http://lapresse.tn/13012015/71498/le-sit-in-arrahil-se-poursuivra-jusquau-depart-du-gouvernement.html>

<sup>432</sup> See chapter 4 of the dissertation for a description of this case. Legal professionals who opposed constitutional review by the Tribunal include Habib Koubaa, Hichem Hammi and Zouheir M'dhaffar.

were also shaped by the political pressures of the revolutionary environment. As a result, the SCAF's Declaration did not maximize the powers of the military, although it did not handover power completely to the elected government either. Two alternatives existed which would have expanded the powers of the military in the transition while marginalizing the courts. First, the SCAF could rule directly during the transitional period. Second, the SCAF could have reduced the formal powers of courts by limiting the SCC's mandate to structural constitutional issues, by not granting the SCC a power of a priori review of electoral laws, or by creating a non-judicial elections agency. The SCAF did not choose these alternatives because doing so would provoke opposition from the protest movement. The SCAF chose to give powers to the courts that the opposition would consider acceptable. The boundaries of acceptable powers for the courts is evidence of the influence of ideas about the judicial role on the thinking of the SCAF and the protest movement.

#### Alternative 1. Direct rule by the military

The first question of the transition was how and when to draft a new constitution and hold elections. The Muslim Brotherhood and the protest movement favored early legislative and presidential elections followed by the drafting of a new constitution<sup>433</sup>. Supporters of the military suggested that the military should govern the country during the transition and appoint a committee of experts to draft a constitution before the elections<sup>434</sup>. The SCAF's Constitutional Declaration is a plan for the first option of early elections followed by constitution drafting. If the military had instead chosen the second option, the transition would have unfolded very

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<sup>433</sup> Moustafa (2011)

<sup>434</sup> David D. Kirkpatrick. "Judge Helped Egypt's Military to Cement Power," *New York Times*, 3 July 2013. [http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html?\\_r=0](http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html?_r=0)



differently from the beginning, and courts would have very different powers. In the absence of a constitution, the SCAF would effectively replace the SCC as the arbiter of constitutional questions. There would be no structural constitutional cases or election cases to decide because state institutions would be suspended.

Judges were divided on the question of direct rule by the SCAF. SCC justice Tahany Gebali supported a constitution drafting process controlled directly by the military<sup>435</sup>. This stance assumes that the military would allow the SCC to maintain its status under a new constitution. Gebali's position draws on the judiciary's longstanding respect for acts of sovereignty, or more broadly what Rutherford would label the statist tradition in Egyptian law<sup>436</sup>. However, Gebali later repudiated this position, which is evidence of how unpopular it was. The SCC had spent much of its history establishing itself as the guardian of fundamental rights. The suspension of constitutional review, even for a short period would undermine the claim that the SCC was the guardian of universal rights. The suspension of the constitution would assert a positivist view of law that the SCC had worked against for decades.

The protest movement was opposed to this option for political reasons, but the SCAF's choice to concede this point depends on the judicial role. The prevalence of ideas about the judicial role gave the military another option. The military might have overruled the protest movement, or acquiesced fully to its demands, but interim constitutional review by the SCC gave it another option: a relatively long transitional period under judicial supervision. This option allowed the SCAF to placate the protest movement's demands while also keeping the judiciary as a check on any elected government. The SCAF was aware that the role played by the SCC under Mubarak was compatible with interim constitutional review. The SCAF could be

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<sup>435</sup> David D. Kirkpatrick. "Judge Helped Egypt's Military to Cement Power," *New York Times*, 3 July 2013. [http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html?\\_r=0](http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html?_r=0)

<sup>436</sup> Rutherford (2008)

confident that the SCC would use the powers given to it by the Decree. If Egypt had an apolitical judiciary and a narrow conception of the judicial role, the protest movement would not consider the maintenance of judicial review a concession, and the SCAF could not count on the courts to use the powers granted by the Decree.

#### Alternative 2. Limitation of the SCC's powers: Elections

The SCC and the broader Egyptian judiciary have an unusual set of formal powers compared to courts in other countries. The SCC has the power to review draft electoral laws. Constitutional courts exercising a posteriori review like the SCC usually do not have an additional power of a priori review<sup>437</sup>. The ordinary judiciary must supervise elections and certify their results. Most countries have an independent non-judicial electoral commission to supervise elections. The SCAF's Constitutional Proclamation confirmed this set of powers. This decision is surprising because the military might oppose the courts' influence over the electoral process, which had created problems for the Mubarak regime in 2005. Elections and electoral laws were likely to be of even greater importance as Egypt embarked on a democratic transition. In practice, many of the most important decisions of the transition were based on this power, including the decisions dissolving the House of Representatives and the Constituent Assembly.

The SCAF could have removed the courts' power over elections. It could have removed the SCC's power of a priori review of electoral laws from the Constitutional Proclamation. It

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<sup>437</sup> Some constitutional courts do combine these two forms of review. In 2008, the French Conseil Constitutionnel began a posteriori review of cases to its existing jurisdiction of a priori review. The Hungarian Constitutional Court primarily exercises a posteriori review but can also exercise a priori review under some conditions. The limitation of the SCC's a priori review to electoral laws is more rare. Arato (2000), Ginsburg (2003), Lasser (2009)

could also have removed the provision requiring the ordinary judiciary to supervise elections, and created an independent non-judicial elections agency instead. These moves would have brought Egypt in line with international models. Tunisia adopted this approach by creating the ISIE, and it is much more common internationally than Egypt's model of direct judicial supervision of elections and electoral laws<sup>438</sup>. In addition to conforming to the international model, these moves would also have insulated the judiciary from contentious political issues surrounding elections. The requirement that judges supervise elections made possible the confrontation between Mursi and the judiciary over the supervision of the 2012 constitutional referendum. The main advantage of a priori review of electoral laws was to protect the parliament and the Constituent Assembly from dissolution by court order, as happened during the Mubarak era. However, this power actually caused the courts to dissolve both the House of Representatives and the Constituent Assembly<sup>439</sup>. Given these problems, it is surprising that the SCAF did not remove the judiciary's special powers to regulate elections.

This outcome is a result of the judiciary's history of regulating elections in Egypt. A priori review of electoral laws is separate from the issue of transforming all of the SCC's activity to a priori review. A priori review of electoral laws had been included in the 1971 Constitution as well<sup>440</sup>. The SCC's power of a priori review of electoral laws is part of the judiciary's role in supervising elections. The SCC's decisions dissolving the parliament during the Mubarak era indicate a longer history of the judiciary's power to rule on the legitimacy of elected institutions.

The judiciary claimed the power to supervise elections as the result of disputes over the 2000 and

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<sup>438</sup> Moustafa (2007) pg. 197-198 on role of Egyptian judges in supervising elections. Bernard-Maugiron (2008)

Global Network of Domestic Election Monitors, "Declaration of Global Principles for non-Partisan Election Monitoring," 3 April 2012 <http://www.gndem.org/declaration-of-global-principles> for a description of the international consensus for elections monitoring.

<sup>439</sup> Moustafa (2007), Bernard-Maugiron (2008)

<sup>440</sup> "Egypt Constitution 2005," *ACE Project*, <http://aceproject.org/en/regions/mideast/EG/Egyptian%20Constitution%20-%20english.pdf/view>

2005 elections. The 2005 elections were the most competitive elections since the Free Officers' coup in 1952. The involvement of the judiciary was essential to the relative success of the opposition in these elections. Because of this history, a broad range of actors, including civil society, the Muslim Brotherhood, the judiciary and the SCAF, agreed on the principle of judicial supervision of elections<sup>441</sup>.

### **Possible Limitations on Constitutional Review in Egypt, 2012-2013**

The SCAF made several decisions in the Constitutional Declaration: separate branches, early elections followed by the drafting of a new constitution, electoral supervision by the judiciary, and interim constitutional review by the SCC. However, these provisions could still be altered. The SCAF retained the right to issue amendments to the Constitutional Decree. It did issues such an amendment in June 2012, following the election of Mursi to the presidency. Mursi claimed a similar power with his Constitutional Decrees of August and November 2012. The SCC could reinterpret the Constitutional Decree through its decisions. These reforms were steps toward two alternative models for the transitional institutions: constitutional hiatus with full legislative and constituent powers exercised by the president, and frequent intervention in transitional politics through constitutional decrees issued by the SCAF. Through its own power to issue constitutional decrees, the SCAF could also have limited the scope of the SCC's power of constitutional review, even in the context legal continuity and the Convention system. Even in Egypt, courts need not be the final interpreters of the constitution. These events show that a constitutional hiatus could exist in the Egyptian system as well. However, considerations of the judicial role prevented both of these models from taking hold. The judges resisted Mursi's

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<sup>441</sup> Bernard-Maugiron (2008), Chapter 6 of the dissertation on judicial supervision of election in Egypt.

decrees, and the SCAF was careful not to push its decree powers beyond what the judiciary would accept.

#### Alternative 1. Constitutional hiatus and Mursi's Constitutional Decrees.

President Mursi's Constitutional Decrees revived the possibility of a constitutional hiatus, which the SCAF had rejected in 2011. Mursi issued two Constitutional Decrees, first in August 2012 and again on November 22, 2012<sup>442</sup>. The August Decree gave Mursi the power to appoint a new Constituent Assembly if the current Assembly was unable to complete the draft constitution. The November Decree insulated the Constituent Assembly and the president's own decrees and actions from judicial review. Mursi's Decrees are an example of executive intervention in the process of constitution drafting and in the design of the transitional institutions. From August 2012 to December 2012, Mursi tilted the balance of power among the transitional institutions toward the presidency, an outcome that was at odds with the SCAF's original plans as described in its Constitutional Declaration. The Decrees hint at a political and legal theory to justify these changes. In issuing the November 2012 Constitutional Decree, Mursi asserted that the transitional situation made constitutional review illegitimate<sup>443</sup>. During this hiatus, the executive can act without any judicial review and it can issue its own constitutional decrees, which are authoritative interpretations of the transitional constitution.

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<sup>442</sup> "English text of President Morsi's new Egypt Constitutional Declaration." *Ahram Online*, 12 August 2012. <http://english.ahram.org.eg/NewsContent/1/140/50248/Egypt/First--days/English-text-of-President-Morsi-new-Egypt-Constit.aspx>

"English Text of Morsi's Constitutional Declaration." *Ahram Online*, 22 November 2012. <http://english.ahram.org.eg/NewsContent/1/64/58947/Egypt/Politics-/English-text-of-Morsi-Constitutional-Declaration-.aspx>

<sup>443</sup> "English Text of Morsi's Constitutional Declaration." *Ahram Online*, 22 November 2012.

The Constituent Assembly should be able to draft a new constitution without interference from the SCC.

The Decrees produced a sharp reaction from the judiciary. The ordinary judiciary organized protests and threatened to boycott the constitutional referendum. In December 2012, the SCC briefly suspended its meetings in protest of Mursi's Decree and the actions of Islamists demonstrators, who had surrounded the court building<sup>444</sup>. There are several reasons for this response. The Decrees concentrated power in the hands of the president. The Egyptian military and judiciary denounced Mursi's decree as an attack on Egyptian constitutionalism. The Decrees removed any means for the courts to intervene in transitional politics. The Decrees also asserted Mursi's power to redesign the transitional institutions, posing a further threat to the courts. As a result, the SCC and the ordinary judiciary vehemently opposed Mursi's Decrees, especially the November Decree.

The Egyptian judiciary's response is more puzzling when compared with the Tunisian example. The Tunisian Assembly system represents a much more far-reaching version of the system outlined in Mursi's decree, that is the drafting of the new constitution by elected authorities without judicial oversight. The Decree seems less threatening to minorities and established institutions than the open-ended constitutional hiatus in Tunisia. From a purely political standpoint, the judiciary's opposition to the Decrees seems like an overreaction. The judicial role can help explain the thinking of the judiciary.

Given the conflicts between Mursi and the courts, it is surprising how quickly the crisis was resolved and how many concessions the judiciary was willing to make to Mursi. By

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<sup>444</sup> "Egypt Judges Refuse to Oversee Morsi Referendum," *BBC*, 3 December 2012.

<http://www.bbc.com/news/world-middle-east-20575547>

David K. Kirkpatrick. "Egyptian Court Postpones Ruling on Constitutional Assembly," *New York Times*, 2 December 2012. [http://www.nytimes.com/2012/12/03/world/middleeast/egypt-morsi-constitution-vote.html?\\_r=0](http://www.nytimes.com/2012/12/03/world/middleeast/egypt-morsi-constitution-vote.html?_r=0)

December 2012, the judiciary agreed to supervise the constitutional referendum, and the draft Constitution was adopted. Both of the Decrees state that they would expire upon the adoption of a permanent constitution. The November Decree was only in effect for several weeks before the new constitution was adopted. However, the judiciary ultimately accepted the 2012 Constitution. The SCC accepted the new Constitution as a valid source of law in its decisions from the first half of 2013<sup>445</sup>.

The judiciary's truce with the Mursi government following the 2012 crisis requires some explanation. The judiciary's objections came down to two legal issues: the retroactive annulment of past legal decisions, and the possibility of a constitutional hiatus. Both of Mursi's Constitutional Decrees were intended to overturn past judicial decisions and to insulate the government from future judicial decisions. Article 3 of the August 2012 Constitutional Decree reads,

If the Constituent Assembly [tasked with drafting a new constitution] is prevented from doing its duties, the president can draw up a new assembly representing the full spectrum of Egyptian society mandated with drafting a new national charter within three months of the assembly's formation. The new draft constitution is to be put before a nationwide referendum within 30 days after it is written. Parliamentary elections are to be held within two months of the public's approval of the draft constitution.<sup>446</sup>

The phrase "prevented from doing its duties" likely refers to the possibility of dissolution of the Constituent Assembly by a judicial decision. This approach limits the powers of the judiciary, but it also poses problems for the judicial role. The judiciary accepts the authority of the constituent power to make constitutional rules. It even accepts a super-constitutional or extra-constitutional power of the presidency and the military to commit sovereign acts.

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<sup>445</sup> Brown, Nathan J. "Egypt: A Constitutional Court in an un-Constitutional Setting," 23 October 2013. [http://www.constitutionnet.org/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting\\_0.pdf](http://www.constitutionnet.org/files/brown-egypt-a-constitutional-court-in-an-unconstitutional-setting_0.pdf)

<sup>446</sup> "English text of President Morsi's new Egypt Constitutional Declaration." *Ahram Online*, 12 August 2012.

However, the August 2012 Decree goes further. The Decrees decide particular issues, in some cases reversing decisions already issued by the courts, rather than just listing constitutional rules. The Decrees suspend all judicial review of certain subjects.

The November 2012 Decree amplifies these problems. Article 5 of the November 2012 Constitutional Decree read, “No judicial body can dissolve the Shura Council [upper house of parliament] or the Constituent Assembly.”<sup>447</sup> Article 2 of the November 2012 Constitutional Decree reads,

Previous constitutional declarations, laws, and decrees made by the president since he took office on 30 June 2012, until the constitution is approved and a new People’s Assembly [lower house of parliament] is elected, are final and binding and cannot be appealed by any way or to any entity. Nor shall they be suspended or canceled and all lawsuits related to them and brought before any judicial body against these decisions are annulled.

Both of the articles limit judicial review. Article 2 of the Decree also annuls past judicial decisions retroactively.

In the end, the judiciary seemed to give Mursi everything he demanded in the Decrees. The ordinary judiciary agreed to supervise the constitutional referendum. The SCC accepted the 2012 Constitution as a source of law. However, the judiciary’s main objection was to suspension of judicial review and the retroactive cancellation of previous judicial decisions and the SCAF’s amendments to the Constitutional Proclamation. Mursi yielded on these points, allowing the compromise to proceed. This resolution to the crisis shows that the judiciary’s objections were about defending the judiciary’s idea of how the legal system should work as maintaining a balance of power between the judiciary and other actors. The judiciary sided with its political adversary, the Mursi government, but defended the principle of legal continuity threatened by Mursi’s decrees.

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<sup>447</sup> “English Text of Morsi’s Constitutional Declaration.” *Ahram Online*, 22 November 2012.



## Alternative 2. Extensive Amendments to the Constitutional Proclamation by the SCAF

The SCAF always retained the power to issue amendments to the Constitutional Proclamation. The SCAF did use this power once during the transition. It issued amendments to the Proclamation on June 2012, immediately following the election of Muhammad Mursi<sup>448</sup>. The SCAF's June 2012 amendment increased the powers of the SCC, but the extended use of amendments or constitutional decree powers by the SCAF would undermine the status of the SCC, especially if the SCAF used these decrees to decide particular issues that arise during the transition rather than establishing general rules. The SCAF could have used such amendments to decide some the issues that were addressed by the SCC's rulings, such as the validity of the election of the House of Representatives and the Constituent Assembly. Such an action would produce the same result, but it would make courts irrelevant to transitional politics.

At first glance, the SCAF's June 2012 amendment seems similar to Mursi's November 2012 Decree. Both of these documents were a unilateral claim on the power to redesign the transitional institutions, yet the judiciary accepted the SCAF's Decree and opposed Mursi's Decree. The judiciary's different responses to these decrees suggests a political explanation: the judges accepted the SCAF's amendment but resisted Mursi's Decree because they supported the military against the Muslim Brotherhood. It also suggests a similar explanation based on the judiciary's self-interest: the SCAF's amendment increased the powers of the SCC, while Mursi's Decree suspended judicial review. The SCAF's amendment also posed a danger to the courts

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<sup>448</sup> "English Text of SCAF Amended Constitutional Declaration," *Al-Ahram*, 18 June 2012. <http://english.ahram.org.eg/NewsContent/1/64/45350/Egypt/Politics-/URGENT-English-text-of-SCAF-amended-Constitutional.aspx>

because it showed that the SCAF could change the interim constitution - the guarantor of judicial independence and the basis for all of the SCC's decisions - at will.

Still, the judicial role can explain why the judiciary responded differently to the decrees issued by the SCAF and Mursi. The SCAF's constituent power represents the ultimate veto of the military over the courts and any civilian government. However, the SCAF's Constitutional Proclamation and the June 2012 amendment were also a delegation of power by the military and a promise by the military to not intervene directly in politics. As long as the SCAF limited its activity to occasional constitutional decrees, it did not threaten the existing legislative, executive and judicial institutions. The Egyptian courts accept the exceptional use of the constituent power by the military, just as it accepts emergency rule, military courts and acts of sovereignty under Mubarak. The SCC's pre-2011 decisions include a well-developed definition of acts of sovereignty that leaves broad areas open to discretion by the executive and the military. As long as these acts can be justified as exceptional, they are acceptable to the SCC<sup>449</sup>. In theory the SCAF's constituent decree power could be used to usurp the power of the courts, but in practice the SCAF's decrees left the basis of the court's power intact. The SCAF's amendment left in place a list of fundamental rights protections and the mechanism of judicial review. The SCAF's amendment also did not decide a particular issue, but rather established a set of general principles for the courts to interpret and apply. As a result, the amendment did not usurp the SCC's role as an arbiter of constitutional cases. In contrast, Mursi's Constitutional Decree did address a particular case - the question of whether the Constituent Assembly could be dissolved by court order - and it blocked any further judicial decisions on this issue.

## **Conclusion**

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<sup>449</sup> Brown (2006), Moustafa (2007) describe the SCC's conception of acts of sovereignty.

Ideas about the judicial role influenced the outcome of each of the turning points of the transition, including the drafting of the transitional documents in 2011 and later conflicts about the design of the transitional institutions in 2012 and 2013. Ideas about the judicial role remained relatively stable throughout the transition, even as other actors radically redefined their own roles<sup>450</sup>. The judicial role could influence the design of the transitional institutions through several mechanisms. Numerous actors - judges, political parties, protestors, and the drafting bodies themselves - might accept these ideas as normatively valid. Judges also saw these ideas as crucial to protecting their independence. These actors could pressure the drafting bodies. During the later phase of the transition, these actors interpreted the formal powers in light of ideas about the judicial role. These ideas describe the likely behavior of courts. The drafting bodies could give the courts additional powers, but they could not force the courts to exercise these powers.

Ideas about the judicial role acted as a real constraint on decision-makers. This constraint trumped other considerations in both countries, including those posited by the alternative hypotheses. The drafting bodies could not assign powers arbitrarily as suggested by the counter-majoritarian hypothesis. They chose from among several models, and even this choice was constrained by considerations of the judicial role.

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<sup>450</sup> The Egyptian military avoided governing directly for decades before 2011. The creation of the SCAF and the 2013 coup broke with this tradition. Tunisia created a highly parliamentary system during the transition and in the 2014 constitution, which broke with a tradition of presidentialism going back to independence.

# CONCLUSION: CONSTITUTIONAL POLITICS, DEMOCRACY, AND AUTHORITARIANISM

## Introduction

The dissertation has concluded that ideas about the judicial role account for the formal powers assigned to courts in the Tunisian and Egyptian transitions. The chapters trace a two step process leading to this outcome. Judicial activity before 2011 led to a set of ideas about the judicial role. During the transitions, these ideas shaped the formal powers that the drafting bodies and transitional governments gave to the courts. These ideas include a set of norms about how courts should act as well as a set of causal beliefs about how courts will act.

Beyond the Egyptian and Tunisian cases, the dissertation has made three broader contributions. First, it suggests a general theory of judicial power as the result of ideas about the judicial role. Second, it suggests some general conclusions about the role of courts in democratization. Third, the theory of judicial power explains the expansion of the formal powers of constitutional courts in several Arab Spring cases.

### **1. Ideas, the Judicial Role and Judicial Power**

The finding of the dissertation suggests a general approach to the study of judicial power. The approach emphasizes the two step process and the role of both ideas and legal practice. The

chapters show how this two step process played out in Tunisia and Egypt, and they suggest that this same process could be at work in other cases. This approach also has advantages in terms of methodology because it can distinguish between ideas as a justification or facade for political interests and ideas as a causal variable.

### From Judicial Practices to Ideas to Formal Powers

The dissertation addresses a classic question: is law an autonomous field or is it simply a tool of the powerful?<sup>451</sup> The dissertation argues against the view that law is simply a tool, which appears in the countermajoritarian hypothesis. In Egypt and Tunisia, the SCAF and the Ben Achour Commission could not design the courts however they wanted. They were constrained by characteristics of the legal system itself. Implicit in this argument is the notion that the ideational content of the law - norms, legal ideology, and expertise - has some impact on outcomes. The dissertation favors this argument as well. The question is how ideas come into being and how they have an impact on outcomes such as the content of laws and the design of legal institutions.

Watson answers this question by arguing that legal change is almost always the result of intellectual activity by legal professionals, not political activity by rulers, and legal change is almost always the result of borrowing or transplanted from other legal systems, rather than government-led reform of the domestic legal system<sup>452</sup>. The conclusion of the dissertation has

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<sup>451</sup> Thompson (1975)

<sup>452</sup> Watson (1974), Part of the difference between Watson's argument and the argument of the dissertation is the result of a difference in subject matter. Watson is interested mainly in the content of a state's legal code rather than the design of its legal institutions. Constitutional courts are particularly prominent institutions that are exposed to political pressures. Still, the finding of the dissertation supports the larger argument that the politics after the diffusion of an institutional matter are essential. The dissertation rejects the view that law is simply created by a

much in common with Watson's legal transplant perspective. The activity of legal professionals is essential to the creation of the judicial role, just as it is essential to the diffusion of legal transplants. In both perspectives, law and judicial institutions are not simply the products of political authorities. However, the dissertation expands the focus to include domestic politics<sup>453</sup>. The SCC is the result of the diffusion of the German model of constitutional review, and the Tunisian Constitutional Council is the result of the diffusion of the French model, but a broader set of actors beyond legal professionals must come to endorse ideas about the judicial role if these models can influence politics. In Egypt, the SCC won over Islamists, secular civil society and the ordinary judiciary through its activity. If the ideas about the judicial role had simply remained among an elite of legal professionals, the SCC and the practice of constitutional review may not have survived Egypt's transition. In Tunisia, the low level of activity by the Constitutional Council did not create a comparable level of support for constitutional review. Instead, the Administrative Tribunal's apolitical administrative review proved more effective.

This perspective has the advantage of addressing the unique characteristics of transitional periods. Explanations such as the diffusion of legal models and the interests of powerful actors can account for a lot of the variation in ordinary times<sup>454</sup>. Transitions throw both of these explanations into doubt. Institutions that were founded on a particular international model may play a very different role in transitions. Powerful actors may no longer be able to shape the legal system. Schmitter and O'Donnell consider transitions to be indeterminate periods in which the

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sovereign political authority, but it also argues that a broader set of political actors, including civil society, political parties, and ordinary judges, influence the form that an international model takes in a particular national context.

<sup>453</sup> Hilbink (2012) argues that the hierarchical structure of the Chilean judiciary made it less susceptible to the new constitutionalism than the Spanish judiciary.

<sup>454</sup> Versteeg (2014) notes that the fundamental rights included in constitutions have converged on a single international model. However, Ginsburg and Versteeg (2014) note that important differences remain among the powers given to constitutional courts.

voluntarist actions of can sway the outcome<sup>455</sup>. With regard to the courts, this characterization is two extreme. Of course, institutions do not remain unchanged during periods of political upheaval, but by focusing on the two steps, the hypothesis can suggest how the courts will respond to the transition.

## Ideas and Causation

The two step process addresses a methodological problem common to ideational explanations. Goldstein and Keohane argue that an ideational model can be tested against the predictions of non-ideational model<sup>456</sup>. Even if there is a difference between the predictions of these two models, the ideas might still be created to justify political interests. If this is the case, ideas cannot be said to have a causal effect on political outcomes. The connection between judicial practices and the judicial role addresses some of the common problems in ideational explanations. If ideas can be shown to be the result of historical practices, then they are not simply a response to changing political circumstances. In the cases, the choice of institutional model for the constitutional court is the result of contingent factors. However, this choice led to a different form of judicial activity, which in turn produced different ideas about the judicial role. This history shows that ideas about the judicial role are stable before and after the revolution, even as political circumstances changed.

The cases also show the independence of ideas from political authorities. The transitions saw the activation of ideas that previously had limited political importance or the use of ideas for new ends. The Egyptian regime created the SCC, but it could have foreseen the influence of the

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<sup>455</sup> Schmitter, O'Donnell and Whitehead (1986)

<sup>456</sup> Goldstein and Keohane (1993)

SCC's practices on ideas about the judicial role or the influence of these ideas on the judiciary after 2011. The activist role of the Egyptian judiciary was a problem for the Mubarak regime, but helped the military during the transition<sup>457</sup>. The conclusion of the dissertation confirms the autonomy of law from political authority. However, the two step process also shows the enduring influence of the authoritarian regime over the judiciary. This legacy has implications for the process of democratization, which are examined below.

## **2. Constitutionalism, Liberalization and Revolution**

### Revolutions and Transitions

The Arab Spring of 2011 showed that popular revolution remained a real possibility in the modern world. The transitions literature did not reject the possibility of revolution but it did theorize a path to democratization that did not lead through revolution. The elite pacts of Schmitter, O'Donnell and Whitehead and the 'revolution according to legality at all steps' of Arato fall into this category<sup>458</sup>. This approach has several implications for the process of democratization. A lengthy process of liberalization could ease the eventual transition to democracy. A country could have democratization and the rule of law at the same time. Democratization could be separated from the process of constitution drafting<sup>459</sup>.

The transitions literature reflects a desire to avoid the practical and theoretical problems of revolution. Early work on democratization left few options for countries not favored by

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<sup>457</sup> Bernard-Maugiron (2008)

<sup>458</sup> Arato (2000), Schmitter, O'Donnell and Whitehead (1986), Linz and Stepan (1996)

<sup>459</sup> Hungary, Chile and Brazil are all examples of countries that democratized while retaining a constitution written by an authoritarian regime. Hilbink (2007), Arato (2000)



historical circumstances. In part, this view reflects the small number of consolidated democracies before the middle of the twentieth century. The civic culture approach emphasized the long term development of attitudes compatible with democracy in some societies<sup>460</sup>. The organic path to democracy followed by countries such as Britain required centuries of benign political development. Revolution was the only alternative path to democracy, but it posed theoretical and practical problems. Theoretical issues center on the problem of creating a break with the old regime and institutionalizing a new regime without losing legitimacy. The main practical problem is the possibility of violence that accompanies any revolution. For Hannah Arendt, most democratic revolutions would be doomed to descend into terror, like the French Revolution. The success of democratic revolution in America is exceptional, the result of strong local institutions<sup>461</sup>. The success of democracy in post-war Europe and the third wave of democratization across the developing world allayed these fears. By the 1990's, observers would ask whether a new case of democratization, such as the Eastern European and South African cases, could fit in the transitions paradigm? If not, the alternative was full revolution, civil war or a return to authoritarianism<sup>462</sup>.

Several features of the Tunisian and Egyptian cases do not match the transitions paradigm and resemble the classic conception of revolution. The 2011 revolutions brought down the dictators with remarkable speed. Tunisia and Egypt had been liberalizing for decades, but there was no discernible authoritarian opening in the years and months before the uprisings. Moreover, the process of liberalization initiated by the Ben Ali and Mubarak regimes, of which the courts were a key part, did not necessarily help democratization. Just because the courts were an agent of liberalization during the Mubarak era did not mean that they would be agents of

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<sup>460</sup> Almond and Verba (1963)

<sup>461</sup> Arendt (1963), pg. 165

<sup>462</sup> Gloppen (1994), Arato (2000), Ackerman (1992)

democratization after 2011. In both countries, revolutionaries demanded the drafting of a new constitution. They believed that democratization required constitutional change in the full sense, not just constitutional amendment or an elite pact<sup>463</sup>. As a result of these characteristics, Tunisia and Egypt ended up with the classic revolutionary problem: in order to democratize, these countries had to suspend the constitutional order. In both countries, this process unsettled state institutions far more than amendment of the existing constitution could have.

### The Problem of Authoritarian Constitutionalism

As Moustafa argues, the protesters' focus on constitution drafting is the result of characteristics of the old regime, which I label constitutional authoritarianism.<sup>464</sup> The success of both transitions hinged on whether and how the new constitution was drafted. Both Tunisia and Egypt were caught between a minimalist and a maximalist approach to the transition. In the minimalist approach, conservatives or reformers could argue that the old regime was a dictatorship headed by an individual dictator. Such an approach would be suitable for an exceptional regime. Constitutional authoritarian regimes have engaged in lengthy processes of institution building. The flight of the dictator does not mean the end of authoritarianism.

In the maximalist approach, revolutionaries could argue that the entire political and legal realm need to be reworked to rid it of the influence of the authoritarian regime. Such an approach would be suitable for democratizing a non-constitutional or totalitarian regime, but naturally raised the prospect of violence. As in totalitarian regimes, the influence of the constitutional authoritarian regime extends beyond politics into law and society, and the

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<sup>463</sup> Moustafa (2011)

<sup>464</sup> Moustafa (2011)

maintenance of everyday legal order is closely tied to the broader system of authoritarianism. The constitution drafting process was so important to the Tunisian and Egyptian transitions because it provided a means to implement real institutional change without plunging the country into chaos.

The characteristics of constitutional authoritarian regimes pose a dilemma for the transition. The transition is a legal process dominated by the drafting of a new constitution. However, the transitional regime must be suspicious of existing legal institutions, which were created by the old regime. The Tunisian and Egyptian transitional systems addressed these issues in different ways, which are outlined below.

#### Revolution and Legal Positivism in Tunisia

In the end, Tunisia found a way out of this dilemma, but Egypt did not. Democratization succeeded in Tunisia because of factors besides the courts. The prominence of the UGTT trade union, the moderation of Ennahda's leadership and the absence of a politicized military are all potential factors. There is a lot of truth to the view that the success of Tunisia's transition is a "gift from heaven."<sup>465</sup> The courts could not make the Tunisian transition succeed, but they could have derailed the transition through the wrong kind of activity. The legal system contributed to democratization in two ways.

First, Tunisian courts helped democratization by not interfering in the political process. The deference of the Tunisian courts to the Assembly is not simply a failure to act, but instead the result of this carefully thought-out legal ideology. In Tunisia, the basic elements of a

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<sup>465</sup> H.L. "L'unité tunisienne est un don du ciel," *La Presse*, 22 October 2014. <http://lapresse.tn/17012015/89573/lunite-tunisienne-est-un-don-du-ciel.html>

countermajoritarian and counter-revolutionary judiciary seemed to be in place. The judges were holdovers from the Ben Ali era. They opposed the Troika government and supported the secular ex-RCD opposition parties such as Nidaa Tounes. Transitional politics gave courts, especially the Administrative Tribunal, the opportunity to intervene against the Troika government and the Assembly system. Ideas about the judicial role and the nature of the Tunisian constitution were essential to the judiciary's acceptance of the Assembly. The judiciary's acceptance of the Assembly was essential to the stability of the Tunisian transitional regime. If the Tribunal had intervened in the 2013 crisis, it may have derailed the transition. According to this argument, the Tunisian judiciary's stance did not guarantee the success of the transition, but in a counterfactual where the judiciary adopted an activist approach, the failure of the transition would be likely.

Second, individual legal professionals played a key role in the transition, even if they did not act through existing legal institutions. Legal professionals were involved in partisan politics and the drafting of the transitional documents. Yadh ben Achour, who served as a judge of the Constitutional Council from 1987 to 1992, is the most prominent example<sup>466</sup>. The contribution of jurists was particularly important because the successful design of the Assembly system depended on a thorough understanding of the Tunisian legal system and the likely behavior of Tunisian courts. Legal professionals also acted as public intellectuals. Judges, lawyers and legal academics were involved in the development of ideas about the judicial role and its adaptation to the transition. Tunisian judges articulated a legal theory that is at odds with the prevailing global trend toward the new constitutionalism. Without these theories, the Ben Achour Commission could not have designed the Assembly system in a way that was compatible with the Tunisian legal system.

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<sup>466</sup> Among the interviewees, Samir Taieb and Fatma Bouraoui are examples of legal professionals who moved into party politics after 2011.

## Authoritarianism and New Constitutionalism in Egypt

The dissertation does not conclude that the Egyptian courts were agents of the old regime or the military. Even without direct control by the military, the courts still ended up acting as supporters of the old regime. Ideas about the judicial role and the nature of the Egyptian constitution were essential to the judiciary's pro-military stance during the transition.

In Egypt, the constitution drafting process gave the courts the means to intervene in politics, and it threatened the established constitutional order that the courts wanted to preserve. The courts dissolved the Constituent Assembly and the House of Representatives. The courts would not accept even a brief constitutional hiatus after Mursi's November 2012 Constitutional Decree<sup>467</sup>. Such a period of constitutional hiatus proved essential for democratization in Tunisia. That does not mean that the transition would have succeeded without the courts or that the courts could never accommodate themselves to a democratic regime. There were alternative scenarios that could have led to democratization, but the courts and their conception of the judicial role were a factor working against democratization. If the Egyptian judiciary had a different conception of its role, it is possible but not certain that a more democratic alternative may have taken hold. If the courts had refrained from dissolving the House of Representatives and the Constituent Assembly, the transition may have been less contentious, although the conflict between the military and the Brotherhood would remain. The Egyptian transitional system of 2011 to 2013 could not exist without politically active courts holding a broad conception of the judicial role. Courts were needed to decide disputes among the different transitional institutions,

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<sup>467</sup> "English Text of Morsi's Constitutional Declaration." *Ahram Online*, 22 November 2012. <http://english.ahram.org.eg/NewsContent/1/64/58947/Egypt/Politics-/English-text-of-Morsis-Constitutional-Declaration-.aspx>

and it is likely that the military would not have created such a system if it could not count on the courts as allies. Egypt could have ended up with the Turkish scenario of an opposition president who governs within limits imposed by the military. If Ahmed Shafik had won the 2012 elections, Egypt would qualify as an electoral democracy even if the military continued to dominate politics. If there had been a procedure to remove Mursi without a military coup, Egypt might still qualify as an electoral democracy. The military may have decided to rule directly until the adoption of a new constitution. A military-drafted constitution may have set the stage for one of the scenarios outline above. In any case, democratic consolidation was unlikely because of the expansive role of the military and the deep hostility between the military and the Muslim Brotherhood.

The dissertation does not argue that ideas about the judicial role determined the success of the Tunisian transition or the failure of the Egyptian transition. However, the processes identified by the judicial role hypothesis do have implications for democratization. They also have implications for authoritarian regimes, which are examined in the next section.

### **3. Judicialization after the Arab Spring**

This section considers what lessons authoritarian rulers might draw from the Egyptian and Tunisian cases and how they might use not just courts, but also judicial ideology, to bolster their rule. Scholars have long associated legal positivism with authoritarianism<sup>468</sup>. The case of Tunisia shows how legal positivism can cement democratization, and the case of Egypt shows how the new constitutionalism can cement authoritarianism. Moreover, this lesson has not been lost on regimes considering legal reforms following the Arab Spring uprisings. I argue that in

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<sup>468</sup> Hilbink (2007), Radbruch (2006)

the reform cases of Morocco and Jordan, the regime adopted systems of a posteriori constitutional review on the Egyptian model in order to import ideas about the judicial role and the nature of the constitution that would protect these regimes against popular revolution. I compare this explanation with two counter explanations for the reforms in Morocco and Egypt based on the countermajoritarian function of courts and the diffusion of international models. The veto exercised by constitutional courts would be of little use, especially without the support of judicial ideology. Constitutional courts are the result of institutional diffusion, but the model is not the German Constitutional Court, but rather the Supreme Constitutional Court of Egypt<sup>469</sup>.

I outline the patterns of judicial reform after the Arab Spring. I then suggest three explanations for this pattern: the constitutional court as countermajoritarian mechanism, as concession, and as proponent of legal ideology. I show how this view might inform the decisions of authoritarian regimes to reform their legal systems.

## Reform and Judicial Review after the Arab Spring

The Arab Spring resulted in constitutional changes even in countries where the regime was not overthrown. The final constitutions adopted by the revolution cases (Egypt and Tunisia) and by the reform cases (Morocco and Jordan) all granted additional powers to their constitutional courts.

Ginsburg conceives of the formal powers of a constitutional court as consisting of five categories: access, effect, and the procedures for appointing judges, court size, and term

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<sup>469</sup> The German Constitutional Court has been widely imitated. Both the German Constitutional Court and the Egyptian SCC are examples of a posteriori concrete review exercised by a specialized court. Ginsburg (2003), Ginsburg and Versteeg (2014), Moustafa (2007)

length<sup>470</sup>. The most powerful court would have numerous formal powers and numerous means for different actors to access the court. The powers of a constitutional court are the actions that the court can take, almost always including the power to declare legislation unconstitutional. Some courts can practice only a priori review of legislation. Some can practice only a posteriori review of cases. Some can do both.

In order for a court to exercise its formal powers, a case must be brought to it by some other actors. In general, the more ways a case can be brought to a constitutional court and the more actors that can do so, the greater the court's level of access. The French Conseil model was limited in the sense that it could practice only a priori review, but perhaps more importantly access to the council was strictly limited to members of the parliament, the president and certain government officials. As a result, the Conseil could exercise its veto on legislation only when it had the support of at least some parts of the other branches.

The last three categories deal with the appointment of judges to the constitutional court. Justices may be appointed by the executive, the legislative or by the constitutional court itself. Terms may be for only a few years or for life. The justices may be required to be judges, lawyers or law professors, or they may be politicians without legal training. The smaller the role of the political branches in appointments to the court, the longer the tenure of judges, and the more stringent the qualifications for judges, the greater the independence of the court from political pressures.

A huge number of combinations and variations of these five categories is possible. In practice, courts usually correspond to a particular model that is defined by a particular combination of these variables. The French Conseil model is defined by low access, only government officials can forward legislation to the Conseil; medium effect, the Conseil can

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<sup>470</sup> Ginsburg (2003)



exercise only a priori review; and the appointment of political figures rather than judges to the court. The Kelsen model is defined by high access, ordinary citizens can appeal cases to the court; high effect - the court can exercise both a priori and a posteriori review; and the appointment of judges or law professors to the court<sup>471</sup>.

Using these criteria, the formal powers of the constitutional courts of Egypt, Tunisia, Morocco and Jordan are outlined in the table below<sup>472</sup>.

Table 4: Formal Powers of Constitutional Courts: 2011-2014, (access/effect/model)

	Old Constitution	Transition	New Constitution
Egypt	high/high/Kelsen	high/very high/Kelsen	high/very high/Kelsen
Tunisia	low/medium/Conseil	none	high/high/Kelsen
Morocco	low/medium/Conseil	N/A	high/high/Kelsen
Jordan	low/medium/Conseil	N/A	high/high/Kelsen

The formal powers of the constitutional court have increased from the pre-2011 constitution to the present constitution in each of the four countries. All of the countries have adopted some variation of the Kelsen court. This shift has increased the powers of the courts - they can now conduct both abstract and concrete review. It has also increased access to the courts - individual litigants and lower courts can appeal cases to courts that could previously only be accessed by high-ranking government officials. In Egypt, the transitional Constitutional Decree, the 2012 Constitution and the 2014 Constitution have given the SCC an additional power of a priori review of electoral legislation. The only exception to this trend is the

<sup>471</sup> See Kelsen (1942) and Sweet (1992) on these two models.

<sup>472</sup> “Morocco approves bill on Constitutional Court,” *Middle East Monitor*, 25 June 2014.

<https://www.middleeastmonitor.com/news/africa/12359-morocco-approves-bill-on-constitutional-court>

“Law No. 15 of 2012 (Jordan) Issued on 16/06/2012 CONSTITUTIONAL COURT LAW,” *Constitutional Court Website*, <http://cco.gov.jo/en-us/documentsofthecourt/thelawoftheconstitutionalcourt.aspx>

dissolution of the Tunisian Constitutional Council in 2011. The constitution adopted by the Assembly in February 2014 includes a constitutional court on the Kelsen model.

There is a clear pattern across all of these cases, regardless of whether the constitutional changes were the result of reform or revolution and regardless of whether the end result was democracy or authoritarianism. What can explain these similar outcomes?

### Explaining Reform

There are two major theories of reform: reform as a concession, and reform as a counter-majoritarian mechanism<sup>473</sup>. According to the first explanation, by granting a genuine concession to the opposition, the regime may hope to prevent further unrest in exchange for giving up some power. Reforms might also be a facade intended to achieve the same effect as a concession without actually giving up any significant power. Both of these variations focus on the impact of the reforms on public opinion. A regime might institute reforms in order to boost its popularity and prevent an uprising before it happens. An important implication of this theory is that the regime would create a court that corresponds to normative views held by the opposition.

According to the second explanation, the regime might accept that some level of popular influence on the government is inevitable, even if it falls short of full democratization. The regime may allow freer elections with a greater chance of the opposition gaining real power. In this situation, the regime may create a constitutional court to limit the majoritarian effects of its

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<sup>473</sup> The explanation draws on different literatures with different assumptions. The first explanation assumes that states establish judicial review in order to comply with norms. Ackerman (1993) emphasizes the importance of the American model in the diffusion of judicial review. The rights provisions of constitutions have converged. Versteeg (2014). The second explanation assumes that judicial review can genuinely affect political outcomes. Ginsburg (2003) emphasizes the counter-majoritarian aspect of judicial review in newly democratic regimes.

electoral reforms. This explanation makes sense only in certain political circumstances: there must be a real possibility of a democratically-elected legislature passing legislation contrary to the interests of the elite. This explanation focuses on the actions that courts might take after the regime has given up some power to democratic institutions.

The experience of Tunisia, and especially Egypt, since 2011 suggests a third explanation. The events of 2011 have shown that popular uprisings can overthrow the leaders of even entrenched regimes. The events of 2011-2014 have shown that such uprisings are only the beginning of a lengthy process of transitional or constitutional politics that can either consolidate democracy, as in Tunisia, or allow the revival of the old regime in a new form, as in Egypt. From the perspective of authoritarian rulers, the outcome in Egypt suggests a strategy to use courts to deflect pressures for democratization. The Egyptian case shows that courts can guide a transition towards outcomes that are favorable to the old regime. In the event of a democratic revolution, courts can side with the old regime or the revolutionaries. If judges accept the Egyptian view of the judicial role, they are more likely to act against a revolutionary democratic regime in the name of legal continuity. Each of these explanations is examined below.

#### Reform as Concession

For the regime, establishing a constitutional court may be a relatively costless way to deflect criticism from the opposition. The extent to which the establishment of either the Moroccan or the Jordanian constitutional court represents an actual delegation of power by the regime remains to be seen. The courts are closely tied to the monarchy in both countries. Judges are drawn from an elite social class that is unlikely to initiate radical change. On the other hand, the courts could deliver some real reforms, like the SCC did in Egypt in the 1990's and 2000's.

The explanation implies that the regime will create a court based on the model that the opposition considers appropriate. The adoption of a posteriori review by the Jordanian and Moroccan regimes is compatible with this implication. The opposition could see the constitutional court as a protector against abuses by the government. A posteriori review seems particularly suitable for such protection because it allows individuals to bring challenges against laws and government action. The Jordanian and Moroccan courts could also be the result of the diffusion of the global model represented by the German Constitutional Court. The opposition may hope that the new constitutional courts will launch a rights revolution like the German Constitutional Court, the Hungarian Constitutional Court, or other constitutional courts exercising a posteriori review.

The Jordanian and Moroccan cases are part of a larger global trend. Constitutional review has spread around the world since World War II. As Ginsburg and Versteeg note, new democracies, transitional regimes and liberalized authoritarian regimes have been the growth area for constitutional review over the past several decades. Jordan and Morocco fit into this broad category of regimes. The Kelsen model exemplified by the German Constitutional Court has become the most popular, surpassing the French Conseil model or the American Supreme Court<sup>474</sup>. The creation of the new constitutional courts in Jordan and Morocco may be the result of international norms diffusion described by Risse, Ropp and Sikkink, although Ginsburg and Versteeg reject this explanation<sup>475</sup>. If there is an international consensus in favor of a posteriori review, the Jordanian and Moroccan regimes may adhere to these norms to placate the domestic opposition and international opinion.

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<sup>474</sup> Ginsburg and Versteeg (2014)

<sup>475</sup> Risse, Ropp and Sikkink (1999), Ginsburg and Versteeg (2014).

## Reform as Countermajoritarian Mechanism

Constitutions and constitutional review can be useful to regimes or elites anticipating a transition to majority rule because a constitutional court can block actions taken by elected institutions<sup>476</sup>. The dissertation rejected this explanation for transitional constitutional review, but it might apply better to the provisions of the final constitution.

The countermajoritarian account of reform faces some problems in explaining the outcomes in these four countries. In theory, either model of constitutional review could check the elected institutions effectively. In Ginsburg's schema, the Kelsen model is more powerful because more actors are able to access the court. However, Ginsburg's and Hirschl's explanations do not really apply to a situation where a genuine transition to majority rule is unlikely. Despite the 2011 protests, neither Jordan nor Morocco would fit into this category. Even if they did, their constitutional reforms were not initiated by a multi-party legislature or constituent assembly, so Ginsburg would predict that they would adopt a weak form of constitutional review<sup>477</sup>.

The challenges faced by the Jordanian and Moroccan regimes are different from those imagined by Ginsburg. In Ginsburg's theory, a democratically elected legislature may pass laws that threaten the interest of the old regime or elites generally. Jordan and Morocco instead face the possibility of an open-ended transition lasting several years, like what occurred in Egypt from 2011 to 2013. During such a period, popular protest and constitutional change are the main threats to the regime, not legislation. As a result, constitutional review of legislation would be of limited use. The countermajoritarian (or counter-revolutionary) function of a constitutional court

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<sup>476</sup> Ginsburg (2003), Hirschl (2004)

<sup>477</sup> Ginsburg (2003)

in a transitional situation does not really depend on its formal power to overturn legislation. The findings of the dissertation suggest that only changes to the judicial role can make constitutional courts an effective counter-revolutionary actors. The next section outlines evidence that regimes have also drawn this conclusion.

### **Legal Ideology, Judicial Activity and Reform**

The concession explanation gives little insight into why actors consider constitutional courts desirable and how this notion spread throughout the Arab World. The judicial ideology explanation argues that the regime wants the constitutional court to promote ideas as well as veto legislation. There are three sets of evidence in favor of this explanation. First, the new constitutionalism is theoretically compatible with authoritarianism. Second, the mechanism outlined in the dissertation can be used intentionally by regimes. Third, the pattern of diffusion fits better with the legal ideology explanation than the concession explanation.

### **Legal Positivism, New Constitutionalism and Institutional Reforms**

In the modern world, regimes can choose from two broad legal ideologies: legal positivism and the new constitutionalism. Both of these ideologies have implications for the judicial activity, the sources of law and the structure of legal institutions. Legal positivism emphasizes deference of judges towards legislative authority. It emphasizes positive law or legislation over other sources of law, such as human rights, international norms, precedent or custom. At an extreme, legal positivism rejects any form of constitutional review. The French Conseil model is supposed to mitigate the problems that constitutional review poses for legal

positivism. The new constitutionalism emphasizes an active role for judges in interpreting and challenging legislation. It emphasizes human rights and international norms over positive law. The new constitutionalism demands some form of constitutional review. Hirschl and Hilbink equate the rise of new constitutionalism with the expansion of constitutional courts around the world<sup>478</sup>.

Scholars often assume that authoritarian regimes prefer legal positivism. An autocrat who controls the legislative power presumably wants judges to rigidly enforce legislation. Even in cases such as Chile, where the regime promulgated a constitution and gave the supreme court a power of constitutional review, it is assumed that the regime intended a rigid, literal reading of the constitution<sup>479</sup>. The new constitutionalism emphasis on rights, international norms and judicial review of legislation seems to be at odds with authoritarianism<sup>480</sup>.

The finding of the dissertation puts this choice in a different light. Leaving aside the question of democratization, authoritarian regimes are rarely all-powerful legislators. In Egypt for example, the will of the regime does not overlap completely with legislation. Egypt has inherited an enormous quantity of legislation that is not the work of a single regime. On the other hand, every Egyptian constitution, with the partial exception of the 2012 constitution, has been the work of a president and a small circle of experts<sup>481</sup>. In the competitive authoritarian regimes of the Arab World, the legislature is often the institution most susceptible to anti-regime influence. In a transitional situation, the opposition may take control of the legislature and other elected offices, while barely touching the ‘deep state’ of the military, police, bureaucracy, and judiciary.

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<sup>478</sup> Hilbink (2007), Hilbink (2008), Hirschl (2004)

<sup>479</sup> Hilbink (2007),

<sup>480</sup> Radbruch (2006), Hilbink (2007), Hirschl (2004), Ackerman (1994)

<sup>481</sup> Watson (1974) argues that the content of laws is more often the result of borrowing by legal experts rather than legislation by political authorities.

Legal positivism recognizes the authority of a new regime to rewrite the laws of an old regime. The supremacy of legislation poses a danger to regimes or elites facing a democratic transition. The 2012 crisis in Egypt is an example of how an ideology of constitutionalism can serve the interests of a non-democratic regime<sup>482</sup>.

### Using Judicial Activity to Propagate Ideas

The Tunisian example shows that in a transitional period, a power of constitutional review can only be effective if it is accompanied by an expanded conception of the judicial role. The case of Egypt shows that an elite legal institution like the SCC can over time propagate a new set of legal ideas through the judiciary and the broader society. The mechanism of the judicial role hypothesis has important implications for authoritarian regimes. Legal culture is not fixed. It can be influenced by the regime through judicial institutions and judicial activity.

The model chosen by the Jordanian and Moroccan regimes - a posteriori review - is compatible with this explanation. Both apriori and aposteriori review can act as counter-majoritarian institutions. As chapter 6 shows, a posteriori review has advantages for propagating legal ideas. A broad set of actors, including civil society and the ordinary judiciary, are involved in a posteriori review, whereas only the court and elite political figures are involved in apriori review. These actors adopt the ideology underlying constitutional review through their participation in it. A posteriori review also favors ideas linked to the new constitutionalism rather than legal positivism. Although both kinds of review can address fundamental rights, the involvement of civil society in a posteriori review tends to emphasize fundamental rights as the

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<sup>482</sup> See chapter 7 of the dissertation.



most important part of constitutional review<sup>483</sup>. In such systems, the constitution and the constitutional court become linked to the higher law of fundamental rights, a key component of the new constitutionalism.

### Diffusion of a Model

The concession theory suggests that regimes adhere to international models of constitutional review in order to enhance their image with the opposition. The models that most interest regimes may not be global but rather regional. Scholars have noted Egypt's role as a center for the diffusion of legal ideas and institutions to the rest of the Arab World<sup>484</sup>. Before 2011, the example of the SCC showed that a constitutional court could coexist with an authoritarian regime. The revolutions of 2011 showed why such a court might be useful to the regime.

Authoritarian regimes have adapted to a different set of challenges in different time periods. The strategies that they have employed have been influenced by the international context. In the 1950's and 60's, rulers responded to the wave of coups in the region by coup proofing their militaries. Lust links the rise of electoral authoritarianism to the economic crisis that hit the region starting in the 1980's<sup>485</sup>. The events of 2011 have shown that popular uprisings can overthrow the leaders of even entrenched regimes. The events of 2011-2014 have shown that such uprisings are only the beginning of a lengthy process of transitional or constitutional politics that can either consolidate democracy, as in Tunisia, or allow the revival of

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<sup>483</sup> The French Conseil Constitutionnel was originally not intended to review questions of fundamental rights. The Conseil claimed this power through the 1971 *Associations* decision. Sweet (1992)

<sup>484</sup> Brown (2006)

<sup>485</sup> Lust (2009)

the old regime in a new form, as in Egypt. The Moroccan and Jordanian regimes would likely see the Tunisian and Egyptian regimes as comparable to themselves. State collapse comparable to Libya or Syria is unlikely in either Jordan or Morocco, but popular protest comparable to Tunisia or Egypt did occur in both Morocco and Jordan from February to June 2011<sup>486</sup>.

The timing of the reforms in Jordan and Morocco is clearly related to the events in Egypt and Tunisia. The rulers of these countries portrayed these reforms as their own Jordanian and Moroccan 'springs.'<sup>487</sup> Morocco created its new constitutional court in 2011 as part of the constitutional amendments adopted on July 1, 2011. A law reorganizing the Moroccan Constitutional Council into a constitutional court exercising a posteriori review was passed in June 2014. Although these reforms had been discussed for a long time in Morocco, the protests in 2011 gave them greater impetus<sup>488</sup>. Jordan created its constitutional court by organic law on June 6, 2012<sup>489</sup>.

The content of the reforms reveal influences from Jordan and Morocco's history, as well as the experience of Tunisia and Egypt in the Arab Spring. Some of the reforms had been introduced before during past eras of liberalization by the Moroccan and Jordanian regimes. Both regimes have a long history of manipulating the electoral arena by banning opposition parties or by cultivating a loyal opposition<sup>490</sup>. The removal (or scapegoating) of a prime minister

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<sup>486</sup> Anouar Boukhars, "The Lesson from Morocco and Jordan: Reform or Perish," *Middle East Institute*, 1 September 2011. <http://www.mei.edu/content/lesson-morocco-and-jordan-reform-or-perish>

<sup>487</sup> Jamal Khashoggi, "Morocco and Jordan are successful Arab Spring models," 1 September 2014, *Al-Arabiya*. <http://english.alarabiya.net/en/views/news/middle-east/2014/09/01/Morocco-and-Jordan-successful-Arab-Spring-models.html>

<sup>488</sup> "Morocco approves bill on Constitutional Court," *Middle East Monitor*, 25 June 2014. <https://www.middleeastmonitor.com/news/africa/12359-morocco-approves-bill-on-constitutional-court>

<sup>489</sup> Issam Saliba, "Jordan: Constitutional Law Court Newly Established in Jordan," 3 December 2012, *Global Legal Monitor*. <http://www.loc.gov/law/foreign-news/article/jordan-constitutional-law-court-newly-established-in-jordan/> "Law No. 15 of 2012 (Jordan) Issued on 16/06/2012 CONSTITUTIONAL COURT LAW," *Constitutional Court Website*, <http://cco.gov.jo/en-us/documentsofthecourt/thelawoftheconstitutionalcourt.aspx>

<sup>490</sup> Lust-Okar (2005)

has been a familiar tactic of the Jordanian regime and other monarchies<sup>491</sup>. These reforms had long been part of the tool kit of the Moroccan and Jordanian regimes. On the other hand, there was no history of a posteriori constitutional review in either Jordan or Morocco before 2011. In this area, it is plausible that the example of a posteriori review in Egypt formed the basis of the reforms in Jordan and Morocco.

## **Conclusion**

The finding of the dissertation suggests a general approach to the study of judicial power and several specific hypotheses. The two step mechanism of the judicial role hypothesis is applicable to any transition. By tracing a process from the activity of courts under authoritarian regimes to the growth of a conception of the judicial role, it should be possible to gain some insight into the likely status of courts during and after the transitions. Judicial activity under the old regime produces ideas about the judicial role which shape the formal powers of courts during and after the transition.

The judicial role hypothesis also suggests hypotheses linking the institutions of a posteriori concrete constitutional review, the ideology of new constitutionalism, an expansive conception of the judicial role and expanded formal powers after the transition. These hypotheses can be tested in any case that had constitutional court exercising a posteriori constitutional review before it undergoes a transition. Such cases are rare, but they will likely be more common as a result of the global diffusion of a posteriori constitutional review and the

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<sup>491</sup> Ranya Kadri and Ethan Brunner, "King of Jordan Dismisses his Cabinet," *New York Times*, 1 February 2011. [http://www.nytimes.com/2011/02/02/world/middleeast/02jordan.html?\\_r=0](http://www.nytimes.com/2011/02/02/world/middleeast/02jordan.html?_r=0)

endurance of constitutional authoritarian regimes. The Tunisian and Egyptian cases offer insight into this kind of transition.

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Samir Taieb: Secretary General of Al-Massar Party, Tunis, October 3, 2014  
Samir Annabi: Director of the Tunisian anti-Corruption Agency, Tunis, October 21, 2014  
Hichem Hammi: Magistrate of the Administrative Tribunal, Tunis, October 29, 2014  
Habib Koubaa: former Secretary of the Constitutional Council, Tunis, November 12, 2014  
Walid ben Omrane: spokesman for CPR Party, Tunis, November 13, 2014  
Fatma Bouraoui: spokeswoman for Nidaa Tounes Party, Tunis, November 28, 2014  
Zouheir M'dhaffar: former President of the Constitutional Council, former Minister of Public Property, Tunis, November 18, 2014  
Leila Chikhaoui: Professor of Law and Judge of the IPCCPL, Tunis, December 2, 2014  
Ahmed Eid: Lawyer, Cairo, March 31, 2015