



ISSUE IN FOCUS

BY DUNCAN PICKARD

Tunisia's New Constitutional Court

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Implementing the Constitution

The adoption of the Tunisian constitution in January 2014 was a milestone of Arab democracy. This first democratic Arab constitution drafted outside the influence of the domestic military or a foreign power was also remarkable for the consensus built around the final text. The constitution reflected a genuine compromise between the Islamic, socialist, liberal, and nationalist parties represented in the National Constituent Assembly. To date, Tunisia stands the best chance of achieving a homegrown democracy in the modern Arab world. Amid the constitutional euphoria in Tunisia, however, it is axiomatic that building a democracy is a never-ending process. Though the first phase of the constitutional process is over, US policymakers should follow through and strengthen their existing commitments to help build an enduring Tunisian democracy.

Tunisia's judicial system is in particular need of assistance. The former regime of Zine El-Abidine Ben Ali deliberately weakened the capacity of the judiciary to undermine the courts' ability—especially those with jurisdiction over the constitution—to ensure the defense of human rights and the proper functioning of democratic institutions. Constitutional courts generally act on the principle of constitutional supremacy: no subordinate law or decision can violate the constitution, and the constitutional court is its ultimate guarantor. Generally, constitutional courts promote the rule of law and the separation of powers, protect individual rights, provide a forum for resolving disputes peacefully, and serve as a bulwark against the return of authoritarianism during political transitions.¹

The new Tunisian constitution follows the modern trend to include a constitutional court to prevent backsliding to dictatorship, but constitutional

1 Center for Constitutional Transitions and International IDEA, *Constitutional Courts After the Arab Spring* (2014), p. 9.

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measures are only words on paper until they are implemented by a functioning judicial system.² The credibility of judicial decisions and subsequent adherence are derived in part from the environment in which the decisions are made: respect for the rule of law and acceptance of the legitimacy of the constitutional order and courts as its arbiter. A further necessary condition is the ability of courts to render proper judgments and stand up to the tasks put to them. The new Tunisian constitution places many expectations on judicial institutions (the Constitutional Court, in particular) that will be created from scratch.

This paper provides an overview of the Constitutional Court of Tunisia. It describes the court's structure, anticipates several challenges that the new parliament will face in drafting an organic law to establish the court in 2015, and provides policy options for the United States and Europe to support this nascent institution.

The Court's Structure

Chapter 5, Section 2 of the Tunisian constitution establishes the Constitutional Court with competencies never before seen in post-independence Tunisia. The Constitutional Council of the former regime was an executive tool: only the President could refer questions, and he alone effectively controlled the appointment of

2 Constitutional courts have become a staple of new constitutions. See, for example, Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2nd ed. (New York and London: Springer, 2014).

members (the interim President dissolved the council by decree in March 2011). In contrast, the new constitution defines the competence of the Constitutional Court to include the “constitutionality” of draft laws—laws referred to it by lower courts, and the rules of procedure of the parliament, as well as various other questions. The court will have twelve members total; the President, parliament, and the Supreme Judicial Council (the governing board of the judiciary) each appoint four members.

THE VAST MAJORITY OF TUNISIA’S JUDGES SERVED UNDER THE FORMER REGIME AND ARE USED TO WORKING WITH THE PREVIOUS CONSTITUTIONAL COUNCIL, WHICH WAS MUCH WEAKER THAN THE ROLE ENVISIONED FOR THE NEW COURT.

The chapter on the judiciary was drafted by a constitutional commission of the National Constituent Assembly with broad representation from the political parties in the assembly. Provisions in other chapters relevant to the Constitutional Court were debated by other constitutional commissions, chiefly the one looking at executive and legislative powers. A consensus commission harmonized the text between the commissions to prepare the final document.

The Constitutional Court created by the commissions is not equivalent to the US Supreme Court. Rather, it resembles the high constitutional courts and councils of other civil law countries, like France. The Tunisian Constitutional Court is not an appellate court; it has the exclusive authority to rule on questions of constitutional law, and only constitutional law. If a lower court encounters a constitutional question in the course of its proceedings, they will grind to a halt until the Constitutional Court can provide an answer. Other questions, such as the constitutionality of draft legislation, are referred to the Constitutional Court directly with no opportunity for appeal.

Membership and Judicial Independence

According to Article 118, the Constitutional Court is “an independent judicial body, composed of twelve ‘competent’ members, three-quarters of whom are legal experts with at least twenty years of experience.” The President of the Republic, the parliament, and the Supreme Judicial Council (created in Article 112) will each name four members to the court, including one non-legal expert each. Article 119 prohibits members of the court from serving in any other official function.

The nomination procedure for the membership of the court is complicated, with jurist and non-jurist members appointed by three nominators. The system seeks to diffuse and stagger the nomination process in order to avoid partisan domination. The constitution neglects, however, to include protections against the partisan removal of judges, which can have as significant an effect on judicial independence as appointment.³ Subsequent legislation should state the conditions under which a member of the court can be removed and the procedure for doing so. The United Nations’ (UN) Basic Principles on the Independence of the Judiciary recognizes only misconduct and incapacity as proper grounds for removal, and defends judges’ access to “independent review.” Furthermore, international best practice calls for the political actors with the power to appoint members of the court not be the same actors with the power to remove members.⁴ Meeting this standard could prove challenging given the broad range of actors engaged in appointment. Tunisia could draw from the German and Italian examples, where consent of the Constitutional Court is required to remove one of its members.

The members of the court will name its President and Vice President, both of whom will be among the legal experts. Members will serve for a nonrenewable nine-year term, with one-third of members replaced every three years. A forthcoming law on the structure of the judiciary (Article 124) will stipulate how the first members will be appointed in order to fulfill the staggering clause.

The constitution gives the Supreme Judicial Council (SJC) an important role in guaranteeing the independence of the judiciary as a whole, but also of the Constitutional Court, in appointing one-third of its members. The general logic of judicial councils is to protect independence by allowing judges to manage

3 Nuno Garoupa and Tom Ginsburg, “Guarding the Guardians: Judicial Councils and Judicial Independence,” *American Journal of Comparative Law* vol. 57, no.1, 2009.

4 Center for Constitutional Transitions and International IDEA, *Constitutional Courts after the Arab Spring*, p. 95.

their own affairs. Article 112 states that two-thirds of SJC members will be judges and one-third non-judges, elected for a nonrenewable six-year term. Subsequent legislation will further determine the SJC's structure, including the number of members.

Establishing the SJC, and later mobilizing it to appoint members of the Constitutional Court, could be challenging given the Council's membership. The vast majority of Tunisia's judges served under the former regime and are used to working with the previous Constitutional Council, which was much weaker than the role envisioned for the new court. Judges might have to be trained to work under the new Constitutional Court: most importantly, how to refer questions of constitutional law to it, since judges before did not have the authority to access the Constitutional Council. Furthermore, there is a notorious conflict between two judges' unions—the Tunisian Association of Judges and the Union of Tunisian Judges—seen as a battle between older and younger judges. The conflict might manifest itself in fights over SJC leadership and appointments to the court.

The law on the structure of the judiciary will be adopted by parliament. After the law is passed, appointments to the court will have to be made and the court formally established. The court, therefore, might not fully function for another year or two. In the meantime, the National Constituent Assembly adopted a law to create an Interim Commission for the Constitutional Review of Draft Laws (*Instance provisoire de Contrôle de Constitutionnalité des Projets de Lois*).⁵ The organic law that created the Interim Commission limits its mandate to the review of draft laws referred to it in accordance with the procedure put forth in the constitution. It will not discharge all functions of the permanent Constitutional Court (see below). The Interim Commission has six members: the first President of the Court of Cassation (also the President of the Interim Commission); the first Presidents of the Administrative Court and the Financial Court; and three experts named respectively by the former President of the Republic, Prime Minister, and Speaker of Parliament.

Upcoming Challenges *Competencies, Prerogatives, and Mandate*

Article 120 is the main article that declares the Constitutional Court the “sole body competent to oversee” the constitutionality of various legal questions, including those referred to it by lower courts “in the case of the invocation of a claim of unconstitutionality by one

⁵ The full text (in French) of the law is available from Marsad at <http://www.marsad.tn/fr/docs/5346a02e12bdaa6d85e14cbf>.

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of the parties in litigation.” The constitution makes no mention of adherence to precedents set by the Constitutional Court; the precedential authority of the court likely will be taken up in a forthcoming law on the judiciary. A new law on the judiciary might clarify when lawyers can invoke constitutional questions, or whether these questions should be vetted by an appellate judge for plausibility before they are referred to the Constitutional Court. Furthermore, Article 120 states that only laws, draft laws, treaties, and the rules of procedure of parliament may be submitted to the court; administrative decisions, including executive orders, are noticeably absent. The administrative courts, therefore, will control the constitutionality of administrative decisions, opening the door to inconsistent views on the proper application of particular constitutional articles between the administrative courts and the Constitutional Court.

Article 123 grants the court three months to consider the constitutionality of a law placed before it; the court can delay its decision for another three months only with justification.

The court also reviews draft laws, which are referred to the court by the President, the Prime Minister, or thirty members of parliament. Requests to the court are filed within seven days of parliament's adoption of the bill, but before the President signs it. Article 121 states that the court must issue decisions on constitutionality of draft laws within forty-five days; if the deadline passes, the draft is referred to the President. Decisions on constitutionality are made by absolute majority, though there is no mention of what should happen in the case of a tie. Article 66 further empowers the same persons or group to contest the constitutionality of budget bills; the Constitutional Court is compelled to issue its decision within five days, though it is not clear what happens if the court fails to do so. Draft laws declared to be unconstitutional are referred back to the parliament (Article 122).

QUESTIONS OF THE REMOVAL OF THE PRESIDENT ARE AMONG THE MOST IMPORTANT CONSTITUTIONAL CRISES THAT A COUNTRY CAN FACE.

The President can also refer treaties to the court before they are ratified, and the Speaker of Parliament can refer the parliamentary rules of procedure. Article 60 of the constitution protects the rights of the parliamentary opposition, including designated leadership posts on the committees for finance and foreign affairs to parties not in government. This and other articles require compliance by the rules of procedure. It appears that the President is not compelled to refer treaties and the rules of procedure to the court, but may do so on her or his own initiative.

The court must approve constitutional amendments after they are approved by parliament, or referendum, to ensure that the process followed the procedure outlined in Chapter 8. Also, the amendment must not tamper with the unamendable provisions, Articles 1 and 2, or undermine guaranteed rights and freedoms, as Article 29 states. So-called entrenched provisions can be an effective measure of defending against antidemocratic constitutional amendments. Such immutable clauses introduce a normative hierarchy within the constitution. Allowing the Constitutional Court to check whether proposed amendments conform to immutable clauses is a powerful tool, putting the court on par with the legislature in this aspect of the law-making process.

State of Emergency

Article 80 grants the Constitutional Court a role in ending states of emergency, a common tactic of Arab presidents to suspend law and consolidate their power.⁶ Article 80 creates strict criteria for the President to declare a state of emergency: “imminent danger threatening the nation’s institutions or the security or independence of the country.” Thirty days after the President declares the state of emergency, and at any point thereafter, the Speaker of Parliament or thirty members of parliament may petition the Constitutional Court to rule on whether the standard of “imminent danger” is still being met. The Constitutional Court must rule publicly on the question within fifteen days.

However, it is not clear in the constitution whether a ruling by the court would automatically lift a state of emergency. Article 80 states only: “These measures cease to be in force as soon as the circumstances justifying their implementation no longer apply.” This point should be clarified in subsequent legislation.

The standard of a state of emergency in the Tunisian constitution is consistent with that of a “public

⁶ Syria’s forty-eight-year emergency law, first enacted by Hafez al-Assad and continued but eventually lifted by Bashar al-Assad, is a classic example.

emergency threatening the life of the nation” set by the Siracusa Principles. The principles were established by the United Nations in 1985 as guidelines for the lawful derogation of rights guaranteed in the International Covenant on Civil and Political Rights. The role of the Constitutional Court implements another requirement of Siracusa, which states that the derogation should last “the shortest time required to bring to an end the public emergency.” The Siracusa Principles elsewhere guarantee that courts continue to function despite other derogations.

Balancing the Executive

Strategies for checking executive power are a key theme of the constitutional debate in Tunisia, which helps explain the convoluted semi-presidential system outlined in Chapter 4. The president is given authority over national security and foreign policy, and can appoint the Ministers of Defense and Foreign Affairs. The President can also dissolve parliament and veto legislation under certain circumstances. The Prime Minister appoints the other members of the cabinet and sets the general policy of the state. The Prime Minister also chairs meetings of the cabinet, except when the agenda includes national security or foreign affairs, in which case the President chairs. The line between domestic and foreign policy is not entirely clear: what about domestic intelligence, the coercive arm of the former regime? The President and the Prime Minister also might conflict more broadly over who represents the state or state policy, especially if they represent different parties. The Prime Minister will carry the support of the ruling coalition in a newly empowered parliament, but the President will be the only leader directly elected by the whole country. The constitution’s strategy for checking executive power includes overlapping and competing competencies, making conflicts inevitable. When, for example, does a police action cross the line from a question of state policy for the Prime Minister into a matter of national security for the President? Article 101 empowers the Constitutional

Court to settle “disputes that arise regarding the respective powers” of the President and Prime Minister. The disputes can be referred by either party. The court has one week to rule on the dispute, though it is not clear what happens if the court fails to meet the deadline.

Chapter 4 provides the court a role in declaring the temporary or permanent vacancy of the office of the President, which recalls a milestone in the Tunisian Revolution when the Constitutional Council declared Zine El-Abidine’s departure permanent in January 2011. Article 84 states that the court will “declare the temporary vacancy of the office” if the position becomes “temporarily vacant for reasons that prevent the President of the Republic from delegating his/her powers,” passing the powers of the President temporarily to the Prime Minister. Article 84 states that the court will declare “permanent vacancy” of the President in the event of death, “absolute incapacity,” or “any other reason that causes a permanent vacancy.” Under these circumstances the Speaker of Parliament would assume the presidency until elections could be held. The article is vague as to whether the court has the authority to decide when the conditions for permanent or temporary vacancy have been met, or whether the court simply declares the temporary or permanent vacancy of the office.

Article 88 deals with impeachment and removal of the President for a “grave violation of the Constitution.” Articles of impeachment are referred to the Constitutional Court by two-thirds of parliament, which in turn can remove the President if found guilty of “grave violation” by two-thirds of its members. The legal basis of “grave violation” is vague, and seems to exclude removal on other criminal grounds.

More importantly, Articles 84 and 88 do not state the process by which the Constitutional Court decides on the removal, whether temporary or permanent. For example, should there be a public hearing? If so, would the court hear testimony from witnesses? Would it hear arguments by advocates for and against the President? Would the President be heard? Will the votes of the members be made public? Questions of the removal of the President are among the most important constitutional crises that a country can face. Specificity in these moments is extremely important, and should be provided by subsequent legislation.

Conclusions and Recommendations

Tunisia’s new Constitutional Court is designed to be an effective guarantor of human rights, the balance of power, and constitutional supremacy. The constitution empowers the court with extensive competencies. Indeed, the heavy responsibilities that the constitution

places on the court could be its biggest challenge. The constitution expects the court to act decisively and quickly on a range of thorny issues, including constitutionality of laws, executive powers, and the removal of the President. A summary of the court’s competencies and the timelines imposed by the constitution appear in the table on the following page. The deadlines are especially quick and appear to assume that the court will be in continuous session. The US Supreme Court, by comparison, first hears cases in October and often issues decisions shortly before their session ends the following summer. Giving time to thoughtful decisions and written opinions is important for the highest court in Tunisia.

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The constitution does not state that the competencies listed are exhaustive, leaving open the possibility that the law will define further roles for the court. In particular, subsequent legislation might provide a mechanism for citizens or government officials to make appeals of constitutionality directly to the Constitutional Court. Article 128 creates a Human Rights Commission, and subsequent legislation might provide the power to challenge the constitutionality of laws directly to the Constitutional Court. Furthermore, Article 120 only empowers the court to decide on the constitutionality of legislation referred to it by other courts. Article 120 does not mention whether the court also has jurisdiction over other government decisions in force, such as executive orders, ministerial regulations, or decisions of subnational governments.

The court will be established in the context of Tunisia’s existing legal structure. Current judges will be among those sitting on the court, and judges on other courts will have to know how to interact with the Constitutional Court by referring questions to it and incorporating the court’s decisions into theirs. This will

Competencies of the Constitutional Court of Tunisia

Competency	Deadline	Relevant Article(s)
“Laws referred to it by courts as a result of a request filed by a court, in the case of the invocation of a claim of unconstitutionality by one of the parties in litigation.”	Three months; extended once by three months with justification	120, 123
“Draft laws, upon the request of the President of the Republic, the Prime Minister, or thirty” members of parliament.	Forty-five days	120, 121
“Provisions of the draft finance law...upon the request of the President of the Republic, the Prime Minister, or thirty” members of parliament.	Five days	66, 120
“Treaties presented to it by the President of the Republic before their legislative ratification.”	Forty-five days	120, 121
“The rules of procedure” of the parliament, submitted to it by the Speaker of Parliament.	Forty-five days	120, 121
Draft constitutional amendments “to determine whether the procedures of amending the Constitution have been respected.”	Forty-five days	1, 2, 49, 120, 143, 144
Requests from the Speaker of Parliament or thirty members of parliament on whether the state of emergency called by the President should remain in force, at least thirty members of parliament after the state of emergency was called.	Fifteen days	80
“Any disputes that arise regarding the respective powers of the President of the Republic and of the Prime Minister can be referred to the Constitutional Court by either party.”	One week	101
Declaring the “temporary vacancy” of the office of the President.	None	84
Declaring the “permanent vacancy” of the office of the President.	None	84

be a new exercise for judges who have not been trained or reviewed by a lustration commission since the fall of Ben Ali.

The court will also work within the context of the new constitution, a new institution in Tunisia. Tunisian commentators have described the text as “schizophrenic,” or at least a “compromise.”⁷ Naturally, the text introduces many new concepts and standards into the Tunisian political-legal system, some of which are seemingly contradictory, that will need to be addressed in some cases by Constitutional Court rulings. The prerogatives of the President and the Prime Minister are one example. Article 6 provides a second example:

The state is the guardian of religion. It guarantees freedom of conscience and belief, and the free exercise of religious practices and the neutrality of mosques and places of worship....The state undertakes the...protection of the sacred....It undertakes equally to prohibit and fight against calls for apostasy and the incitement of violence and hatred.

The article appears internally contradictory: the state simultaneously is the “guardian of religion” and of the

sacred, but also guarantees the freedom of conscience. The prohibition against apostasy also seems to contradict Article 31, which guarantees the freedom of expression. Could a citizen not call another citizen a nonbeliever in defense of nonbelief?

These apparent contradictions will also need to be squared with Article 49, which provides standards for the lawful limitation of human rights. Noting that virtually no rights are unlimited, Article 49 draws from language in the International Covenant on Civil and Political Rights, stating that rights limitations must be based in law, that they cannot violate the essence of the right, and that they:

[Can] only to be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defense, public health, or public morals, and provided there is proportionality between these restrictions and the objective sought.

Article 49, one of the constitution’s most technical, certainly will require interpretation by the court in its application, especially with regard to how it interacts with other articles in Chapter 2 on rights and freedoms.

⁷ Sarah Mersch, “Tunisia’s Compromise Constitution,” *Sada*, January 21, 2014, <http://carnegieendowment.org/sada/2014/01/21/tunisia-s-compromise-constitution/gyze>.

Recommendations for Assistance

The international community should play a role in assisting the Tunisian government and legislature to establish a court that can meet the high expectations and heavy responsibilities put to it by the constitution. It is expected that an office will be established in the Prime Minister's office to manage the establishment of the court. The international community could support the office financially by refurbishing existing courtrooms, providing access to scholarly or research materials, or assisting in establishing a legal research department.

The new parliament also will be engaged in writing legislation around the organization of the court, and any other legislation that would add competencies to its docket. International experts could provide recommendations for the drafting of subsequent legislation, especially regarding questions left by the constitution around the appointment of the four nonlegal experts, disciplinary procedures and removal of court members, procedures for the removal of the president, the authority of the court to end a state of emergency, and recourse should the court fail to meet its deadlines.

The new parliament is also expected to tackle the question of transitional justice and lustration. International expertise on comparative experiences of judicial lustration might be helpful. European and American judges could also be engaged in training programs through the Supreme Judicial Council on working with a new constitutional court. Judges from civil law systems might be particularly useful, through lessons from the American system, where the Supreme Court is especially powerful on questions of constitutional law. The Committee on International Judicial Relations of the Judicial Conference of the United States—the policymaking committee of the US federal court system—facilitates peer-to-peer exchanges of US judges to foreign jurisdictions.

Finally, universities in the United States and Europe could establish exchanges with law faculties in Tunisia. The law faculties will train the next generation of lawyers and judges to argue before, sit on, and refer cases to the Constitutional Court. The law faculties should become an authoritative source of teaching and research on the legal practice of democracy.

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