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*Chair: Comparative Public Law*

*New trends in Constitution-Making: the cases of Tunisia and  
Egypt*

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## Table of contents

1	Introduction .....	4
2	Constitutions as drivers for the democratic development of societies .....	9
2.1	Constitutional waves in modern states.....	10
2.2	Basic constitutional models .....	15
2.3	Constituent power and the legitimacy of constitution-making .....	21
2.3.1	Introduction into the concept of constituent power .....	21
2.3.2	Constituent power in the Constitutional thought.....	24
2.4	Transitional Constitutionalism.....	26
2.4.1	Transition and the Constitutional moment .....	26
2.4.2	The Backward- and the Forward-Looking Constitution.....	28
2.5	Introduction into Constitutionalism in Islamic World .....	30
3	The Arab Spring in the context of the Arab World .....	41
3.1	A historical overview of the Arab Spring .....	42
3.2	Autocracy and Democracy in Transition: Tunisia and Egypt.....	48
3.2.1	Social drivers of protest.....	49
3.2.2	Authoritarian capacity .....	58
3.2.3	Centralization of power and modes of contention.....	63
4	Framework for advancing Constitutional Legitimacy in Transition states .....	68
4.1	Processual Legitimacy: Broadly participatory drafting process .....	69
4.1.1	Constitution Drafting Process: the case of Tunisia .....	70
4.1.2	Constitution Drafting Process: the case of Egypt.....	92
4.2	Substantive legitimacy: International human rights law norms incorporation	
	118	
4.2.1	Civil and political rights .....	121
4.2.2	Equal protection of the Law .....	126

4.2.3	Due process and freedom from state abuse .....	128
4.3	‘Applicatory’ legitimacy: Enforcement and potential for further implementation 132	
4.3.1	State Institutions in the pre-Arab Spring period .....	133
4.3.2	State Institutions in the Post-Arab Spring period .....	135
5	Conclusion .....	148
6	Bibliography .....	155
6.1	Legal documents .....	155
6.2	Bibliographic references .....	156
6.3	Online sources .....	163
7	Summary .....	175
7.1	Introduction .....	175
7.2	Constitutions as drivers for the democratic development of societies .....	176
7.3	The Arab Spring in the context of the Arab World .....	180
7.4	Framework for advancing Constitutional Legitimacy in Transition states ....	183
7.5	Conclusion .....	196

# 1 Introduction

In 2011 an unexpected series of mass revolutionary protests hit the Middle East,<sup>1</sup> namely, the ‘Arab Spring’. The bottom-up factors driving popular discontent and subsequent revolutions, included significant levels of inequality and a pervasive official corruption, an excessive youth bulge, high rates of unemployment, which were most noticeable among the college-educated, and new generation media ensuring more open access to information for the public.<sup>2</sup> However, the outcomes of the revolutions were very different. For instance, in Syria and Bahrain, dictators remained in power through fierce repression. In Tunisia and Egypt, authoritarians had to step down without referring to great levels of violence, while in Libya rebels overthrew the dictator with foreign military aid and in Yemen after the high degree of violence the ruler stepped down in a negotiated transfer of power.

Eventually, Tunisia, Libya and Egypt turned out to be three cases, where the Arab Spring led to at least an interlude of democratic and semi democratic politics.<sup>3</sup> All three countries adopted new constitutions, even if the first Egyptian democratic constitution was repealed after a military coup in 2013 and Libya was governed by two provisional constitutions before collapsing into tribal warfare. It is important to note that the main intention of framers of these constitutions was to establish a new, democratic polity launching the future course of day-to-day politics. Politicians of all three states faced similar difficulties and a daunting task: how to ensure peace, stability and unity in the new polity while impeding a return to illiberal and authoritarian rule? Despite having similar backgrounds, these constitutions finally diverged widely in their degree of liberalism, in other words, the extent to which they structure institutions in order to preserve individual rights and the balance between majority and minority rights.

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<sup>1</sup> L. Anderson, ‘Demystifying the Arab Spring’, HeinOnline -- 90 Foreign Affairs 2, (2011).

<sup>2</sup> V. Durac, ‘Protest Movements and Political Change: An Analysis of the ‘Arab Uprisings of 2011’’, *Journal of Contemporary African Studies*, (2013).

<sup>3</sup> A. Stepan, J.J Linz, ‘Democratization Theory and the “Arab Spring”’, *Journal of Democracy*, (2013), p. 15-30.

In this thesis, I will analyze the constitution-making processes in Tunisia and Egypt in the aftermath of the Arab Spring, and how the political polarization among key fractions in both countries influenced the process of the constitution - making and, as a consequence, the legitimacy of their constitutions. My analytical framework will be drawn from comparative constitutional scholarship theory on constitution-making in post-conflict and transitioning states.<sup>4</sup> Based on the theory of Gluck and Brandt, the framework includes three markers of the constitutional legitimacy. The first one is called processual legitimacy, an inclusive drafting and ratification process; the second is substantive legitimacy through the incorporation of international human rights law principles; the third sort of legitimacy is the applicatory one, ensured through the inclusion of institutional apparatuses for the fair and complete implementation of constitutional protections.<sup>5</sup>

In January 2014, three years after the outbreak of the Arab Spring revolutions, both Tunisia and Egypt adopted new constitutions. Throughout their constitution-making processes, Tunisia and Egypt faced the same challenge: how to balance the interests of dominant Islamist parties against the interests of secular and left-leaning parties that had historically controlled the government and its institutions. Despite the common challenge, the processes of constitution-drafting evolved quite differently in Tunisia and Egypt. In Tunisia, although the constitution-drafting process was characterized by conflict between Islamists and secularists, it led to a consensus constitutional text that revealed popular input. The drafting process in Egypt, instead, was managed by successive, closed, non-public bodies who did not establish consensus document, and whose actions polarized already existing divisions in Egyptian society. While in both constitutions adopted in January 2014, international human rights law norms are broadly incorporated, the Constitution of Tunisia contains more robust enforcement mechanisms for the rights

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<sup>4</sup> J. Gluck, M. Brandt, 'Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring', United States Institute of Peace, (2015).

<sup>5</sup> Ibidem.

guaranteed in the constitution. Egypt, in its turn, lacks such effective implementation mechanisms to ensure constitutional rights are fulfilled.

In this work, I will answer the following research questions: What are the new trends in constitution making and how do they influence the constitution-making processes in Tunisia and Egypt? To what extent the substantive provisions of Tunisia's and Egypt's new constitutions comport with international human rights law norms? Do new Tunisian and Egyptian constitutions include institutional and enforcement mechanisms for the full and fair implementation of substantial constitutional rights? Are constitutions adopted by transitional states legitimate?

In order to answer the abovementioned questions, a gradual approach is needed. The research will be structured as follows: The second chapter will provide a historical introduction into 'constitutionalism' and its gradual development; the basic constitutional models and trends will be described and applied to real country examples. Further, the focus will shift towards the notion of 'constituent power' that has a fundamental impact on the modern constitution-making process. The main point stipulated in the theory of constituent power is that the legitimacy in the constitution-making process must be demanded in the name of the people. Then, the focus will move to the relatively recent phenomenon of incorporation of principles of constitutionalism into the discourse of transition. The model of transitional constitutionalism implies that constitution becomes the indispensable and final stage of the revolution.<sup>6</sup> The final part of the second chapter will be dedicated to the constitutionalism in Islamic World. It will explain how the trend of written constitutionalism spread almost in all Muslim nations and became a part of the legal systems of both Tunisia and Egypt. The existing religious provisions in Tunisian and Egyptian constitutions will be analysed and compared.

In the third chapter, the phenomenon of the Arab Spring will be explained from both the historical and theoretical perspectives. From the theoretical perspective, there are two prevailing types of explanations for the recent breakdown of autocracies in Tunisia and

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<sup>6</sup> R. Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', New York Law School, (1997), p. 2055.

Egypt: the first one concentrates on the social drivers of unrest in the cases of Tunisia and Egypt, such as youth unemployment, socioeconomic inequality, corruption, and an increasingly ‘technologically advanced’ population; the second investigates capacity-centered explanations for the strength and resilience of authoritarian regimes.<sup>7</sup>

The fourth chapter will specifically deal with the constitution-making processes in Tunisia and Egypt after the 2011 revolutions. The analytical framework will be adopted and divided into three parts corresponding to the three markers of the constitutional legitimacy. In the first part, I will describe the first marker of the constitutional legitimacy- a processual one. It includes the broadly participatory constitution drafting. I will assess the constitution drafting and approval processes in Tunisia and Egypt and answer on the first research question: whether these processes were broadly participatory and inclusive. In the second part of the chapter, I will answer on the second research question, examining whether the substantive provisions of new Tunisian and Egyptian constitutions correspond to international human rights law norms. I will, particularly, discuss civil and political rights that were frequently rejected in the period before Arab Spring in Tunisia and Egypt. In the last part of the chapter I will assess whether Tunisia’s and Egypt’s new constitutions comprise institutional and enforcement mechanisms that will provide for the full and fair implementation of those substantive constitutional rights. I will examine the difficulties to the independent enforcement of constitutional guarantees that existed in the pre-Arab Spring period in Tunisia and Egypt. I will then answer the third research question, whether Tunisia’s and Egypt’s new constitutions provide sufficient institutional and enforcement mechanisms to ensure that substantive constitutional provisions will be enforced. In the end of all research conducted, I will answer the last research question: whether new constitutions adopted in Tunisia and Egypt can be considered legitimate. In fact, it will be seen that Tunisia’s new Constitution is legitimate because of the inclusive manner in which it was drafted and the institutional safeguards that it comprises for protecting civil and political rights. It will be also seen

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<sup>7</sup> B. Hounshell, ‘Dark crystal: Why didn’t anyone predict the Arab revolutions?’, Foreign Policy, (2011), [http://www.foreignpolicy.com/articles/2011/06/20/dark\\_crystal](http://www.foreignpolicy.com/articles/2011/06/20/dark_crystal).

that the legitimacy of Egypt's new Constitution is in doubt due to its non-inclusive drafting process and lack of potential for its substantive constitutional protections to be fully and fairly implemented.



## **2 Constitutions as drivers for the democratic development of societies**

One of the most remarkable global political trends of the past century is the spread of constitutionalism.<sup>8</sup> With few exceptions, every country in the world has its fundamental precondition and structure embedded in a written document that guarantees the legitimacy of its rulers to its people and its sovereignty to other international actors.<sup>9</sup> The will for constitution-making unites the East and West, the First and the Third Worlds, the former colonizers and the formerly colonized. Any governmental entity interested in drafting a new constitution faces no shortage of examples to draw upon.

The idea of the constitution as the basic law of the state that establishes the basis of its organization and of the legal status of the individual was born in the end of the XVIII century. Ideologists, like Thomas Paine<sup>10</sup> that were fighting against the absolutism, considered constitution as the law designed to protect the rights and freedoms of the individual. This idea was formulated in the French Declaration of Human Rights and Citizen of 1789: ‘a society in which the observance of the law is not assured, nor the

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<sup>8</sup> However, it is also true that over the last few years we are witnessing in Europe and in other parts of the world a phenomenon, which has been described as a constitutional backlash. ‘The backlash can be understood as one of many practices of norm contestation through which the public seeks to influence the content of constitutional law. It is a commonplace of history and political science that these practices can eventually be successful because, in the long run, the constitutional law is plainly sensitive to political influence’, B. Friedman, ‘The Importance of Being Positive: The Nature and Function of Judicial Review’, 72 U. CIN. L. REV. 1257, 1278, (2004) (‘The claim here simply is that the Court's dependence on the other branches to enforce decrees and to refrain from attacking the institution of judicial review necessarily acts as a moderating force’, ensuring that judicial review is never wholly independent from politics; positive analysis questions the extent to which judicial review imposes limits on majority rule and so can function either as democracy's ‘hope’ or ‘threat’).

<sup>9</sup> Davis S. Law, Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’, California Law Review, (2011), ‘Constitutionalism is the idea ... that the government can and should be legally limited in its powers, and its authority or legitimacy depends on its observing these limitations’, p.1171-1172.

<sup>10</sup> According to T. Paine, Constitution is a Thing antecedent to Government, and a Government is only the Creature of a Constitution. The Constitution of a Country is not the act of its Government, but of the People constituting a Government.

separation of powers defined, has no constitution at all'.<sup>11</sup> It proved to be an extraordinary and potent instrument of political change, able to foster a spectacular process of transformation bound to influence the main political institutions in the entire European continent for many years to come.

Although the history of the institution of the state, especially if we consider also the city-states in ancient Greece, and the extensive teachings about it are thousands of years old, the first modern constitutional acts and constitutions appeared only in the XVII-XVIII centuries: in Great Britain- the 'Habeas Corpus Act' of the year 1689; in the USA-the Constitution of 1787 and the Bill of Rights of 1789; in France- the Declaration of the Rights of the Man and the Citizen of 1789 and the constitutions of 1791 and 1793. The very fact of the adoption of these documents reflected the achievement of a relatively high level of political and legal development of mankind.<sup>12</sup>

Constitutions, and in particular rigid constitutions (i.e amendable only with a special procedure and with super majorities), are deemed to be the most important vehicle for Democracy that at its origin reflects the urgent public need for establishing a certain legal framework for the activities of the state and that ensures the reliable protection of individual rights and freedoms. Therefore, it is quite natural that the first constitutional documents appeared on the wave of democratic anti-absolutist revolutions of the 17-18 centuries.<sup>13</sup>

## **2.1 Constitutional waves in modern states**

The modern concept of the constitution has been formed through the development of the world constitutional process, conditioned by the evolution of society and the state. In this

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<sup>11</sup> Rett R. Ludwikowski, 'The French Declaration of the Rights of Man and Citizen and the American Constitutional Development', 38 American Journal of Comparative Law, (1990), pp. 447-450.

<sup>12</sup> Ibidem.

<sup>13</sup> Chirkin V.E, Yudin J.A, 'Сравнительное Конституционное Право', MANUSCRIPT, 96-03-16027, Moscow (1996), p 43-442 (own translation).

development, according to Chirkin and Judin, there are four main stages.<sup>14</sup> The first one covers the period from the end of the 18th century until the end of the First World War; the second period between the two world wars; the third period from the end of the Second World War until the end of the 1980s; the fourth is the modern stage.<sup>15</sup> It was clearly marked at the turn of the 80s-90s of the 20th century in connection with the collapse of totalitarianism, but the origins of this stage are in earlier periods and are partly related to the influence of socialist constitutions.<sup>16</sup>

The first stage of the constitutional development is the period of the formation and establishment of bourgeois society in the advanced countries of Europe and America. It is here where the first constitutions appear – the US Constitution in 1787, the French one in 1791, along with previous declarations such as the Independence Declaration of 1776 and the Declaration of the rights of the man and the citizen of 1789. This had a huge influence on the global constitutional development.<sup>17</sup>

The framework of the constitutional process in the reviewed period was quite limited and the passage to constitutional statehood was carried out mainly in the countries of Europe and America. Only by the end of the period the first constitutions appear in Latin America and in Asia.<sup>18</sup> On the African continent apart from South Africa only Liberia had the Constitution, adopted in 1847- it was copied from the US Constitution. At the heart of this model laid the liberal concept of the constitution as a legislative act designed to limit state interference in the life of civil society and individuals. Such approach determined

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<sup>14</sup> Ibidem.

<sup>15</sup> Ibidem.

<sup>16</sup> Ibidem.

<sup>17</sup> Maklakov V.V., 'Буржуазные Конституции: Основные Тенденции Развития (сравнительный анализ)', Moscow (1989), (own translation).

<sup>18</sup> The first Constitution in Latin America was adopted in Venezuela in 1811. In Asia, first constitutions were adopted in Japan in 1189, in China in 1912 and in Iran in 1906.

the legal content of the constitution, which was reduced to norms governing the organization of state power and the legal status of the individual.<sup>19</sup>

Already in the second half of the 19<sup>th</sup> century, the Western liberal influence reached the North Africa.<sup>20</sup> In Tunisia, the first modern Constitution was launched in 1861, granting equal rights to Christians and Jews.<sup>21</sup> Five years later, the ruler of Egypt inaugurated the first Parliament and, in 1876, following the round of Tanzimat reforms<sup>22</sup>, the Ottoman Empire convened the first Parliament.<sup>23</sup>

The second stage of the constitutional development is characterized by the fact that it covers a period of time when a previously single world process turned out to be divided, as a result of the creation of socialist statehood in Russia.<sup>24</sup> Actually, the impulse and effect of the Revolution of 1917 was unconstitutional. In the revolutionary vision of constitutionalism, the dictatorship of the proletariat was not linked to a constitutional democracy, but to a direct democracy based upon the Rousseau's model, yet not corresponding to the appreciation of the power limits.<sup>25</sup>

Constitutional development of countries of the world community (with the exception of Russia) at this stage was characterized by the following main features:

- 1) Firstly, the high degree of activity of constitutional lawmaking (especially at the beginning of the period), which was due to two factors: the formation of a large number

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<sup>19</sup> Maklakov V.V., *supra* note 10.

<sup>20</sup> F. M. Corrao, 'Islam, Religion and Politics', Luiss University Press, (2016), p. 78.

<sup>21</sup> *Ibidem*.

<sup>22</sup> *Ivi*, p. 77. (The Tanzimat reforms (1839-1876) were a series of liberal reforms in the Ottoman Empire that included universal conscription, reform of the educational system and government institutions, and action against corruption).

<sup>23</sup> *Ivi*, pp. 79-80.

<sup>24</sup> *Ibidem*.

<sup>25</sup> John N. Hazard, 'The Common Core of Marxian Socialist Constitutions', 19 San Diego Law Review 297 (1981-82), pp. 298-299.

of new states (for example, in Europe as a result of the collapse of the Russian and Austro-Hungarian Empire; in Asia-the crisis of the colonial system) and the democratization of political regimes both in old constitutional countries (Germany, Spain, Mexico) and in some countries that didn't have previous constitutions (Thailand, Ethiopia, Egypt and others).<sup>26</sup>

2) Secondly, although the constitutional model that prevailed at the first stage did not undergo any significant changes (it was still based on the same concept of liberalism), its constitutional principles, which determine the democratic organization of state power and the legal status of the individual, acquire a new quality in this period. They are becoming increasingly recognized as universal values and start to gain a universal character.<sup>27</sup>

3) Thirdly, new trends of constitutional development start to be formed: the inclusion of a new set of social relations in the subject of constitutional regulation (especially social and economic); the expansion of the constitutionally established limits of government intervention in the life of society and individuals (recognition of its social and economic role); giving constitutional status to new institutions of the political system (political parties and trade unions); the emergence of a new category of human rights and freedoms (socio-economic); the constitutional definition of the principles of a peaceful foreign policy.<sup>28</sup>

Most clearly, these trends were reflected (although not in the same degree) in the Weimar Constitution of Germany of 1919, constitutions of Czechoslovakia of 1920, Yugoslavia of 1921, Ireland of 1937, Mexico of 1917 and Spain of 1931. However, these constitutions represented an exception to the general process of the constitutional development in that

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<sup>26</sup> Maklakov V.V., *supra* note 8.

<sup>27</sup> *Ibidem*.

<sup>28</sup> *Ibidem*.

period. New tendencies that appeared in those constitutions as a whole did not affect the constitutional model developed in the 19th century.<sup>29</sup>

A complete break with this model characterizes the constitutional development of Russia and then of the USSR (Union of Soviet Socialist Republics) in the reviewed period.<sup>30</sup> A fundamentally new "socialist" model was created, embodied in the Constitution of the RSFSR (Russian Soviet Federative Socialist Republic) of 1918 and then constitutions of the USSR of 1924 and 1936. It was based on the postulates of the Marxist theory of laws of the development of the society and the state. The principles of the organization of the state power, political, social and economic organization of the society, the legal status of a person and his relations with the society and the state, enshrined in these constitutions, radically differed from the constitutional principles worked out by that time by the world constitutional development. The principle of popular sovereignty was replaced by the principle of the ownership of state power only by working people, led by the working class; the principles of political, economic and ideological pluralism were replaced by the principle of monism as the basis for the political and economic organization of society and its spiritual life (one-party system, the omnipotence of the Soviets, the absolute dominance of socialistic property and the Marxist-Leninist ideology); the principle of freedom and autonomy of an individual enjoying broad rights and freedoms was replaced with its subordination to the society and the state, in other words, the allocation of his rights and freedoms 'in the interests of the socialist construction'.

Conceptually, the above-mentioned constitutions, although in a hypertrophied and distorted form, reflected some new tendencies in the world constitutional development, namely the growing economic and social role of the modern state. In particular, they first

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<sup>29</sup> Ibidem.

<sup>30</sup> Chirkin V.E., Yudin J.A, *supra* note 6.

consolidated the system of social and economic rights, which had a significant impact on the constitutional legislation of many countries.<sup>31</sup>

The third stage of constitutional development is characterized by the expansion of the constitutional process and significant changes in its content.<sup>32</sup> For the first time this process has become truly global and has spread to almost all countries. It included more than 130 new states in Africa, Asia, Latin America and Oceania that arose from the liquidation of the colonial system. The adoption of the constitution became for the peoples of the former colonies not only a symbol of the newly acquired statehood, but also the belonging to the world community as its equal members.<sup>33</sup>

The fourth stage of constitutional development is related to the collapse of totalitarian and authoritarian regimes in the majority of socialist and developing countries and the beginning of the democratic transformation of society and state. As a result of the collapse of totalitarian socialism in a number of countries in Europe and Asia (Bulgaria, Hungary, Mongolia, Poland, Russia and others), a post-socialist constitutional model emerged. It reflected a transitional period in the development of society.<sup>34</sup>

## **2.2 Basic constitutional models**

The constitutional process includes the diversity of the basic constitutional models and their varieties. The main ones were the Western constitutional model, formed at previous stages; "the socialist" model represented at the beginning only by soviet constitutions and later by the constitutions of other socialist states (Albania, Bulgaria, Hungary, Vietnam, GDR, DPRK, China, Cuba, Poland, Romania, Czechoslovakia, Yugoslavia, Mongolia);

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<sup>31</sup> John N. Hazard, 'The Common Core of Marxian Socialist Constitutions', 19 San Diego Law Review 297 (1981-82), pp. 299-306

<sup>32</sup> Chirkin V.E., Yudin J.A, *supra* note 6.

<sup>33</sup> Martin Loughlin, Neil Walker, 'The Paradox of Constitutionalism: Constituent Power and Constitutional Form', Oxford University Press, (2007), chapter 3, pp. 209-338.

<sup>34</sup> Chirkin V.E., Yudin J.A, *supra* note 17.

a new constitutional model embodied in the constitutions of developing countries. Each of these models had its own varieties and development trends.

For the Western constitutional model, the appearance of constitutions of the 'second wave' or 'new generation' is peculiar in the period under consideration. They were adopted in countries, where totalitarian regimes were eliminated after the Second World War (Germany, Greece, Italy, Spain, Portugal, Japan and also France in 1946).<sup>35</sup>

Constitutions of "the second wave" included in the subject of the constitutional regulation a new block of public relations, primarily economic and social. In addition, one of the characteristic features of the 'second wave' constitutions is the regulation of a significant amount of foreign policy activity of the state: principles of a peaceful foreign policy of the state, state's participation in global and regional integrational processes, a set of constitutional norms concerning the possibility of limiting national sovereignty, the competence of the highest state bodies and the regulation of the ratio between international and domestic law. <sup>36</sup>

The second constitutional model of the third stage was represented by the socialist constitutions. It was based on Soviet constitutions, first of all on the USSR Constitution of 1936. Their fundamental features were reproduced by the basic laws of the socialist states that arose after the Second World War. Altogether, the latter had a number of features that were conceptually explained by the difference in the building process of socialism in two stages: the creation of the basis of socialism and the developed or "mature" socialism. Accordingly, it is proper to refer to two types of the "socialist" constitutional model: constitutions of the dictatorship of the proletariat and the so-called nationwide socialist state.

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<sup>35</sup> Martin Loughlin, Neil Walker, *supra* note 26.

<sup>36</sup> A. J. Zurcher, 'Constitutions and Constitutional Trends since World War II: An Examination of Significant Aspects of Post-war Public Law with Particular Reference to the New Constitutions of Western Europe', (1951).



Despite their differences, both enshrined the total 'etatization' of society: the submission to the state of all its spheres of life; the extensive institutionalization of the Marxist-Leninist party as the sole governing force of society and the state (the formal preservation of the multiparty system in the number of countries had no practical significance); the extensive implementation of the Basic law.

In the conditions of the growing crisis of the socialist system in the 80's (USSR, Hungary, Poland, Yugoslavia), a trend towards a certain democratization begins in the constitutional development of a number of countries. Thus, some new political and civil rights are declared, and their legal guarantees are introduced (judicial protection, institutions of the parliamentary commissioner for human rights, judicial constitutional control). However, these novels did not include the very basis of the 'socialist' model and often did not have practical significance. For example, the Article 58 of the USSR Constitution of 1977 providing for the judicial protection of rights, didn't function more than ten years.<sup>37</sup>

The third model refers to the new experience of countries liberated from the colonial dependence. Under the conditions of the third stage, more than 130 constitutions were adopted in the developing countries. Newly adopted constitutions reflected the motley "constitutional face" of the world. They were influenced by "old" constitutions of the West, new constitutions of the 'second wave' and constitutions of the totalitarian socialism. They also reflected the conditions of their own society – e.g. the role of tribal leaders in Africa, Islam in the Arab and some other countries.

In the first period, the Western model had a decisive influence on the constitutional development of these countries, represented mainly by the constitutions of the former colonial powers - the Westminster model (in the former British colonies), the 'rationalized parliamentarism' of the 5<sup>th</sup> Republic (in the former French colonies)<sup>38</sup>.

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<sup>37</sup> John N. Hazard, *supra* note 24.

<sup>38</sup> The French Constitution in 1958 established a political regime that received the name of the Republic. In accordance with the French political and legal tradition it is considered that the 1<sup>st</sup> Republic existed in 1848-1852, 2<sup>nd</sup> Republic in 1848-1852, 3<sup>rd</sup> Republic in 1875-1940, 4<sup>th</sup> Republic in 1946-1958.

Constitutions of many liberated countries were developed with the direct participation of representatives of the former colonialists.<sup>39</sup> According to the calculations of W. Dale, officials of the Ministry of Colonies have developed constitutions for 33 countries of the Commonwealth. In addition, for the representatives of the local political elite educated in the former colonial states, their constitution was a natural example with which they were well acquainted. The authors of the report of the constitutional commission for the preparation of the first constitution of 1947 wrote: 'Recommending for Ceylon an English-style constitution, we propose a method of governance that we know well'.<sup>40</sup>

The first constitutions of many liberated countries were the result of a compromise between the forces of the national liberation movement and the retreating colonialism, which also affected their content. Former colonial countries often sought to include constitutional provisions aimed at preserving their economic and political positions in the young states. This is especially true for the constitutions of states that emerged on the site of English colonial possessions (for example, the consolidation of the dominion status, the preservation of rights and privileges of the tribal and feudal elite, which was the social pillar of the colonial regime).<sup>41</sup>

The influence of the 'socialist' constitutional model on the constitutions of liberated countries was very limited during this period. It was traced only in a few of them and was mainly reflected in the provisions determining the role of the state in the economic, social and spiritual spheres (for example, the guiding principles of state policy in the constitutions of India in 1949 and Burma in 1948).

The 'first generation' constitutions of the liberated countries were short-lived. By the mid-sixties they had been abolished or substantially changed. In particular, institutions that were the result of a compromise with colonialists had been liquidated and the borrowed constitutional models had been abandoned. The main reason for the fragility of

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<sup>39</sup> Martin Loughlin, Neil Walker, *supra* note 26.

<sup>40</sup> Chirkin V.E., Yudin J.A, *supra* note 17.

<sup>41</sup> *Ibidem*.

those constitutions, according to the opinion of researchers of that period, was the inconsistency of their models with the realities of the society, in which they were transferred - the absence of economic, social and cultural prerequisites for their successful functioning.

The crisis of Western constitutionalism in developing countries was accompanied by an increase in the influence of the "socialist" constitutional model on their constitutional development. Such constitutions limited the principle of political and ideological pluralism - right up to the legislative consolidation of a one-party system and state ideology; limited human rights and freedoms (especially political and civil); enshrined the decisive role of the state in the economic, social and spiritual life of society; provided for an undemocratic organization of state power (up to the introduction of the post of lifelong president).<sup>42</sup>

The characteristics of the socialist model revealed the aftermath of decolonization process- both Egypt (1956) and Tunisia (1959) adopted new Constitutions.<sup>43</sup> Due to the economic support received from the Union of Soviet Socialist Republics (USSR), the two countries established their own version of 'Arab socialism'.<sup>44</sup> However, the Tunisian Constitution granted significantly more rights to women, such as the right to vote and to file for divorce, with equal rights in the workplace and abolition of polygamy.<sup>45</sup> The same features were, as well, reflected in the constitutions of countries that were oriented towards capitalism and in the basic laws of the socialist oriented countries (for example, the constitution of Algeria in 1976, Benin 1977, Congo 1979, Mozambique, 1975, Ethiopia, 1987). These constitutions, often created with the participation of consultants

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<sup>42</sup> John N. Hazard, *supra* note 24.

<sup>43</sup> F.M. Corrao, *supra* note 11, p. 97-99.

<sup>44</sup> *Ibidem*.

<sup>45</sup> *Ibidem*.

from the socialist countries, adopted the basic ideas, principles and institutions of 'socialist' constitutionalism.<sup>46</sup>

Dealing with the influence of the two-main world constitutional models on the constitutional development of the liberated countries, it is worth noting the appearance in this period of a new factor – the interference of the constitutions of the young states themselves. This is the case of the Constitution of India of 1949, which had a significant impact on the basic laws of many young states (the inclusion of sections on the guiding principles of state policy, the content of which is very similar to the corresponding section of the Indian constitution); the Constitution of Tanzania of 1965, which provisions on the leader's code were reproduced by the basic laws of a number of countries, such as Zambia, Papua New Guinea, Seychelles, the Salomon Islands.

The fourth and the final model of the constitutional process appeared by the end of the 20<sup>th</sup> century. It is associated with the rejection of totalitarian and authoritarian constitutional models and the adoption of basic democratic laws, in which personal experience, principles and institutions related to universal human values are embodied.<sup>47</sup> During the period from 1989 to 1995, about 100 new constitutions were adopted in different countries, as well as in the states formed in connection with the collapse of the Soviet, Yugoslav and Czechoslovak federations. The global impact of the constitutional process can be seen as well as in the example of Africa: until year 2000, 40 out of 53 African countries adopted new constitutions.

The movement of modern constitutionalism goes in a general direction. However, this does not mean that it is possible to refer to the formation of a single constitutional model. Although the socialist model has actually ceased to exist (it persists in only a few countries- China, Cuba, North Korea, Laos, Vietnam), the constitutional model of developing countries has lost many of its features and characteristics. The basis of the new constitutions of all countries is a set of universal human values, and still there are

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<sup>46</sup> Ibidem.

<sup>47</sup> V. Federico, C. Fusaro, 'Constitutionalism and democratic transitions', Firenze University Press, (2006), pp. 19-22.

differences between the constitutions of individual countries due to the peculiarities of the development of society and state.<sup>48</sup>

## **2.3 Constituent power and the legitimacy of constitution-making**

### **2.3.1 Introduction into the concept of constituent power**

Constituent power is related to the modern notion of Constitutionalism. Despite its origins lying in the medieval thought, it emerges in a distinct form only with the creation of the modern institution of the state. Its main function is to specify in the Constitution the ultimate source of authority in the country. Concerning the means by which the authority is acquired, Max Weber defined three sources of legitimacy: charismatic (involving the obedience to the sacred character of a leader); traditional (acceptance of the customary authority); rational (belief in the rightful nature of a ruler's authority to make laws).<sup>49</sup> All of them follow a sequential pattern and suggest a gradual order of clarity, from opaque to transparent. Concretely, according to Weber, constituent power derives from the emergence of the third source of legitimacy- the rational one.

The rational concept arises from the rationalizing and secularizing movement of the Enlightenment period (XVIII century) and is based on two conditions: firstly, the recognition that the ultimate source of political authority derives from the people; secondly, the acceptance of the idea of the constitution as something that is created. Specifically, the concept comes into force when constitution is perceived as a juridical tool and it is an expression of the constituent power of the people to make or change the institutional arrangements through which they are governed.

In the European legal thought, the process of the constitution-making has traditionally been attributed to a power defined as 'constituent power', known in French as 'pouvoir constituant' (the power through which the Prince's power to rule was authorised). This

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<sup>48</sup> Ivi, pp. 29-31.

<sup>49</sup> M. Weber, 'Economy and Society', Berkeley: University of California Press (1978), volume 1, pp. 26-56, pp. 212-226.

power is absolutely opposed to ‘constituted power ’or ‘pouvoir constitué’ (the power vested in the Prince to rule: for example, the existing legislation).<sup>50</sup> This distinction left its mark on the late XVIII century revolutionary thought. For instance, in the American Declaration of Independence it is stated that: ‘whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government’.<sup>51</sup> Furthermore, the constituent power of the people is invoked to install the authority of the Federal Constitution, despite its unlawful break with the Articles of Confederation. However, more explicitly it was established in the French revolutionary discourse: ‘not only is the nation not subject to a constitution, but it cannot be and must not be’.<sup>52</sup>

By whom the constituent power is exercised? In ‘Political Theology’, Carl Schmitt tries to find an answer on this question by asking ‘who is entitled to decide those actions for which the Constitution makes no provision?’.<sup>53</sup> Although in the early modern theory constituent power was exercised by the Prince, Schmitt considers that since the XVIII century the personalist and decisionist features of the sovereign became incorporated in the concept of “the people” as an organic unity.<sup>54</sup> He also recognizes that the bearer of constituent power varies over time. According to the scholar, there are two main types of legitimacy: the dynastic (implying the charismatic and traditional Weberian categories) and the democratic (as an expression of the rational). Both of them correspond to the two main bearers of the Constituent power- the prince and the people.<sup>55</sup> Referring to the example of the Weimar Republic in Germany, Schmitt confirms that the sovereign people

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<sup>50</sup> C. Klein, A. Sajo, ‘Constitution-Making: Process and Substance’, the Oxford Handbook of Comparative Constitutional Law” (2012), p.422; In particular, Abbé Seyés elaborated on this divide based on the French revolutions.

<sup>51</sup> J. Locke, ‘Two Treatises of Government’, in American Declaration of Independence, ed. P. Laslett, Cambridge University Press, volume 2, (1998), paragraph 222.

<sup>52</sup> E-J. Sieyes, ‘What is the Third Estate?’, London: Pall Mall Press, (1963), p.126.

<sup>53</sup> C. Schmitt, ‘Political Theology’, tr. G. Schwab, The University of Chicago Press, (2005), p. 64.

<sup>54</sup> Ivi, pp. 99-102.

<sup>55</sup> C. Schmitt (1928), ‘Constitutional Theory’, Durham NC: Duke University Press (2008), p. 125.

have chosen their mode of political existence by adopting a modern constitution and allocating governmental powers to different institutions. The concept of ‘the people’ has taken a representative form in the Weimar Constitution of 1919 and therefore the constituent power of the people has been delegated to their elected representatives.<sup>56</sup>

From a relational perspective, constituent power is vested in the people, but this does not mean that the political authority is situated within the people. Constituent power demonstrates a virtual equality of people. This is generated by the establishing of the principle of unity and the actual division of the society into rulers and ruled in a relation of domination- the principle of hierarchy.<sup>57</sup> Power is created through a symbolic act in which a plurality of people recognize themselves as creating a unity – we the people. However, it is a matter of fact that the use of force and political conflicts are inevitable, so political power is maintained and enhanced through institutionalization and the establishment of a constitution. This constitution endows authority in the constituted bodies to legislate, adjudicate and govern in the interests of the group. By limiting, directing and formalizing these competences, the constitution itself becomes a tool of power-generation. Despite the latter, constituted bodies retain the discretionary authority to determine which are the best interests of the group. Political power thus resides neither in “the people” nor in the constituted authorities-it exists in the established relation between constitutional imagination and governmental action.

Concerning form and composition of representation of the people behind the constituent assembly, they might be decisive and not necessarily subjected to the original design. Thus, ‘the people’ of France in 1945 was pretty distinct from ‘the people’ in 1936, when the last elections before the Second World War were held. For example, in 1936 women still didn’t have the right to vote in France, whereas in 1945 the decision by French

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<sup>56</sup> C. Schmitt, ‘Legality and Legitimacy’, tr. J. Seitzer, Durham NC: Duke University Press (2004), p. 89.

<sup>57</sup> P. Ricoeur, ‘The Political Paradox in his History and Truth’, Northwestern University Press (1965), pp. 247-270.

President De Gaulle made it possible for women to participate in the political life of the state.<sup>58</sup>

### **2.3.2 Constituent power in the Constitutional thought**

The meaning of the constituent power in constitutional thought can be formulated as follows: constituent power signifies the generative element of the political power relationship. It exists only when the multitude is expressed by the unity of people and is produced by the connection between the symbolic and actual representation, which expresses the dynamic element of constitutional discourse.<sup>59</sup>

According to the Social Contract theory developed by Rousseau, the written constitution formalizes precepts of political right that expresses the political unity of the people. The scholar claims that the constitution is eventually corrupted, because the people remains a non-institutionalized entity. Answering to his claim, Schmitt emphasizes that the peoples' potential political role is not exhausted by the allocation of competences and thus continues to exist. In a Democracy, people cannot become the mere organ of the state, they must persist 'as an entity that is unorganized and unformed'. As a consequence, the people in its non-instituted manifestation irritates the instituted power in an engagement through which real political will is exercised.<sup>60</sup>

One of the biggest challenges of modern republican state has been to maintain the power of 'ordinary citizens'. In a political regime that enjoys symbolic authority as 'a government of the people, by the people and for the people', it is the institutionalized co-optation that can pose the main danger. The standard solution to the problem of the participation of the people is one based on representation: a specifically established body, elected by the majority will exercise the constitution-making power. Precisely this idea

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<sup>58</sup> C. Klein, A. Sajo, p. 424.

<sup>59</sup> Cf. Zoran Oklopčič, 'Constitutional (Re)vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans', 19 *Constellations*, (2012), pp. 81–101, discussing 'external constituent powers'.

<sup>60</sup> C. Schmitt (1928), *supra* note 48, p. 271.



was behind the formulation of Article 3 of the French Declaration: 'The principle of all sovereignty resides essentially in the nation'. People are replaced by the concept of the nation to avoid statements of being responsible to electorate's whims. The original word 'principe' refers to source- and to be a source of sovereignty is different from being the sovereign.<sup>61</sup>

In British history, for example, the Parliament played a primary role in constitutional struggles over such a long period of time that it started to be perceived as the 'nation assembled', acting not purely as a legislative body but also as the constituent power.<sup>62</sup> The growth of presidential forms of government, as well, has led many to accept the Schmitt's claim that the President is the bearer of constituent power in the state.<sup>63</sup> Following the recent development in the constitutional jurisdiction of courts, one can refer that constitutional courts no longer speak in legislative voice- they speak directly in the name of sovereign people and as the genuine voice of constituent power.<sup>64</sup>

The final point can be formulated as follows: the understanding of constituent power has a fundamental impact on the constitution-making process. Despite different competing concepts emerged in the last 250 years, the legitimacy in the constitution-making process must be demanded in the name of the people. In modern democracy, the political space is overcrowded with different actors who claim the genuine voice of constituent power. This well explains why the question about who represents the people remains the indeterminate question of modern politics. Notwithstanding all the difficulties of defining

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<sup>61</sup> Keith. M. Baker, 'Constitution' in F. Furet and M. Ozouf, 'A Critical Dictionary of the French Revolution', Tr. A. Goldhammer, (1989), p. 484.

<sup>62</sup> N. Johnson, 'In Search of the Constitution: Reflections of State and Society in Britain'. Oxford: Pergamon Press (1977); M. Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Discourse', In: Paradox, eds Loughlin and Walker, chapter 2.

<sup>63</sup> Schmitt's argument had been made earlier in W. Wilson, 'Constitutional Government in the U.S.', (1908), Columbia University Press, p. 68. ('The President is the representative of no constituency, but the whole people. ... If he rightly interprets the national thought and boldly insists upon it, he is irresistible').

<sup>64</sup> P. Kahn, 'Political Theology: Four New Chapters on the Concept of Sovereignty', New York: Columbia University Press, (2011), pp. 13-17.

the bearers of constituent power, a concept that conjoins right and interest- the symbolic representation of all - must not disappear from constitutional thought. <sup>65</sup>

## **2.4 Transitional Constitutionalism**

### **2.4.1 Transition and the Constitutional moment**

During recent years the gradual incorporation of principles of constitutionalism into the discourse of transition has been seen. It is claimed that constitutions ‘can secure functions of securing and sustaining short-term and long-term governance, which place (them) within a quintessentially transitional rubric’.<sup>66</sup> While being still a relatively under-theorized notion, the idea of transitional constitutionalism becomes highly apparent both in theory and practice. Correspondingly there is a growing trend to view peace agreements that mark the beginning of transition as a constitutional moment, thereby making constitutionalism immanent to the concept of transition. <sup>67</sup> Consequently, the design of the post- conflict state is supposed not only to reflect international standards of human rights protection and rule of law, but to incorporate them into the constitutional framework. <sup>68</sup>

While transitional constitutionalism refers to a relatively new concept, revolution, war and the founding and refounding of law do not. The traditional idea of constitutionalism is that it codifies and reveals consensus among the population on the organization of the

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<sup>65</sup> A. Somek, ‘Constituent Power in National and Transnational contexts’ 3 *Transnational Legal Theory*, (2012), pp. 31–60.

<sup>66</sup> K. McConnachie, J. Morrison, ‘Constitution-making, Transition and the Reconstruction of Society’ in K. McEvoy, L. McGregor, ‘Transitional Justice from Below: Grassroots Activism and the Struggle for Change’, Hart Publishing, (2008), n 2, p. 80.

<sup>67</sup> C. Bell, ‘On the Law of Peace: Peace Agreements and the Lex Pacificatoria’, Oxford University Press, (2008), p. 392.

<sup>68</sup> Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations, UN Doc S/2004/616 on the use of normative principles to guide transition, (2004).

State.<sup>69</sup> This differs from the vision of constitutionalism in the aftermath of the revolution, where it results in a break or a rupture with the past organization of the State.<sup>70</sup> The task of the constitution in these environments is to constitute the new nation with the authority of the revolution. This model does not necessarily seek to reach the consensus of the society, but rather to preserve political gains into constitutional law in the name of the people. According to this model, it is the constitution that becomes the indispensable and final stage of the revolution.<sup>71</sup> Nevertheless, it has been claimed that in the context of modern transitions neither revolutionary constitutionalism, nor the classical one capture the constitutional dynamics.<sup>72</sup> This is explained by the fact that in many contemporary transitional environments, power has not been seized as the result of a complete revolution, but as the result of the negotiated settlement or transfer of power which demands more sensitive negotiation on the future of the country. Here the role of the constitution is to govern such processes of negotiation rather than simply to codify the finalized outcome.<sup>73</sup>

In order to address the possible future challenges, a transitional constitution shall be both backward- and forward-looking and must take into account the history of injustice that has given rise to the transition.<sup>74</sup> In comparison with traditional and revolutionary constitutional models, this concept implies not only the break with the past and a newly found legal order, but its main task is rather to acknowledge the past. As a result of this, R. Teitel suggests that ‘what is considered constitutionally just is contextual and contingent, relating to the attempt to transform legacies of the past’.<sup>75</sup> In order to make it

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<sup>69</sup> R. Teitel, ‘Transitional Justice’, Oxford University Press, (2000), pp. 191-194.

<sup>70</sup> Ibidem.

<sup>71</sup> R. Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’, New York Law School, (1997), p. 2055.

<sup>72</sup> R. Teitel, *supra* note 53.

<sup>73</sup> Ivi, p. 191.

<sup>74</sup> K. McConnachie, J. Morrison, (n 48), p.83

<sup>75</sup> R. Teitel, *supra* note 55, p. 2057.

work, transitional constitutionalism is based on the existing principles of international law with the aim to provide a normative basis for reform and to incorporate values of natural law.<sup>76</sup>

### **2.4.2 The Backward- and the Forward-Looking Constitution**

What is the primary role of the constitution in transition? It includes not only the action to distance a successor regime from its abusive predecessor, but also to incorporate in the new State democratic principles through the prosecution of the human right violations and strict commitment to the rule of law.<sup>77</sup> In order to achieve this, transitional constitutionalism establishes internationalized standards of justice to ensure that the normative goals, such as the accountability for human rights violations and the non-recurrence through the consolidation of democracy are met.<sup>78</sup> Here the traditional link between constitutionalism and international law can be seen: with the process of decolonization, the constitutional process became internationally assisted, and by this procedurally defined.

The new transitional model will define the limits of political and judicial order and does not simply imply the existing national identity, but rather plays a key role in building the new society.<sup>79</sup> The latter means the inclusiveness of the previously excluded or marginalized social and political units, addressing questions of social justice, such as the property rights and the recognition of social and economic rights.<sup>80</sup> The example of this new transitional constitutionalism can be the interim constitution of South Africa. A clear statement of the new order was evident placing questions of equality at the forefront of

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<sup>76</sup> R. Teitel *supra* note 53, p. 21.

<sup>77</sup> Report of the UN Secretary General, *supra* note 61, including a detailed definition of the rule of law.

<sup>78</sup> R. Teitel, *supra* note 53.

<sup>79</sup> R. Teitel, *supra* note 53, p. 2062.

<sup>80</sup> A.M. Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel', *Stanford Journal of International Law*, (2004), p. 57.

the constitution. The incorporation of substantive human rights principles was the means by which the South African constitution responded to the legacy of injustice.<sup>81</sup>

Nowadays constitutional reform is viewed by the international community as a necessary tool of ensuring that a post-conflict State is in compliance with the best practices of the international law.<sup>82</sup> This has been especially seen both in the case of States that became subject to administration by international organizations and States that attempted to guide their own transitions.<sup>83</sup> However, it is important to state that international involvement does not start with the constitution, but rather it is the content of the constitution that reflects a very long process of engagement with international law and actors. For instance, it may begin with the United Nations authorized mission in a State- the case of East Timor and Cambodia.<sup>84</sup>

More smooth beginning of the international intervention can be ensured through an internationally mediated peace agreement. In this case very often parties to the conflict and peace mediators will issue international law guidelines: UN resolutions, treaties, recommendations and sometimes even established principles of customary international law to frame the content of the agreement. All this demonstrates the increased willingness of the international community to manage and evaluate constitutional processes and new governance entities emerging in the transitional States.<sup>85</sup> A broader range of issues today become a subject of international concern, for instance the inclusion of women within the process of negotiations and the protection of minorities within constitutional provisions.

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<sup>81</sup> R. Teitel, *supra* note 53.

<sup>82</sup> E. Hay, 'International(ized) Constitutions and Peace Making', *Leiden Journal of International Law*, (2014), p. 141.

<sup>83</sup> N. Feldman, 'Imposed Constitutionalism', *Connecticut Law Review*, (2005), p. 857.

<sup>84</sup> The UN Security Council Resolution 1272 on East Timor (2002) and Resolution 746 on Cambodia (1992).

<sup>85</sup> C. Turner, R. Houghton, 'Constitution Making and Post-Conflict Reconstruction' in M. Saul and J. Sweeney, 'The Role of International Law in Post-Conflict Reconstruction', Routledge, (2015).

Even in the situation where a State itself attempts to guide its own political transition, as is presently happening in Tunisia and Egypt, constitutional processes will inevitably be evaluated on the extent to which they comply with international law norms.

Consequently, those who draft the Constitution must take into account not only the domestic political priorities, but as well the interests of the entire international community. Moreover, the international structure provides a list of indicators that can be taken into account in order to signify the success or the failure of transition.<sup>86</sup>

The approach to view international law as the platform for discussion and participation rather than as a prescriptive framework for constitutional reform, opens up new possibilities to combine the transitional constitutionalism with the more traditional concept of international law. No less important is that it addresses the context of past injustice not by imposing a model on citizens, but by opening up the debate. Both the Tunisian and Egyptian experiences show that it is not possible to separate politics from law in transition. As N. Brown describes: 'there is no force outside the political process that designs a transition; there is no time out when politics ceases so that political systems can be designed in a pristine atmosphere...'.<sup>87</sup> However, if the transformative potential of a constitution is to be reached, we must be conscious of some ideological assumptions that are brought to stand by an internationalized discourse of transition that seeks to use the constitution to embed substantive principles of law and politics.

## **2.5 Introduction into Constitutionalism in Islamic World**

The key principle of Islamic Jurisprudence is that sharia, God's will, cannot be known with certainty.<sup>88</sup> In the Quran, the term 'sharia' denotes the perfect Way of God- the way God advises people to live a virtuous life. This Way of God is mentioned in the Quran

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<sup>86</sup> V. Hart, 'Constitution Making and the Transformation of Conflict', (2001), p. 157.

<sup>87</sup> N.J. Brown, 'Egypt's Failed Transition', 24 Journal of Democracy, (2013), p. 45.

<sup>88</sup> A. Zysow, 'The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory', Journal of Islamic Studies, Volume 26, (2015), pp. 204-206.

and the Hadith, Prophet Muhammad's life example.<sup>89</sup> However, there are no clear answers on everything in those two sources, so Muslim intellectuals perform 'ijtihad' (accurate legal reasoning) to extrapolate from those sources more detailed guidance for life in accordance with sharia. This guidance is presented in the form of 'fiqh' ('understanding'), detailed legal rules. Due to the fact that Muslim population never created any central institution to establish Islam's official religious doctrine, the religious rules of Islam are the result of the work of a various community of fiqh experts acting in accordance with their own standards of professionalism and integrity. With time, as more and more Muslim scholars established more and more fiqh rules, several schools of law, each with a different methodology of interpretation, emerged.<sup>90</sup> Consequently, the reality of sharia in the world is not a monolithic single code of law, but rather the various doctrines of numerous fiqh schools, each equally and truly representing the Law of God.<sup>91</sup>

In pre-modern Muslim communities, the application of fiqh in individual lives occurred through this diversity.<sup>92</sup> Every Muslim had a choice to decide which school of Islamic law he/she would follow, as fiqh law was in open access to the public.<sup>93</sup> Taking into account geographical and temporal dimension, individuals usually identified themselves with one fiqh school or at times even two, asking intellectuals of that school for guidance when they needed to find an answer on specific legal questions, such as whether the contract was valid or not or how to define inheritance beneficiaries.<sup>94</sup> The fiqh scholars

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<sup>89</sup> F.M. Corrao, *supra* note 11, pp. 10-11. ('Looking at the origins of the Muslim community, it comes out that 'dying', the Prophet Muhammad left no indications about how government of the community should be organized... Hadith constitute the second source of reference to regulate the life of the Muslims').

<sup>90</sup> A. Quraishi, 'Interpreting the Quran and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence', *Cardozo Law Review* 28, (2006), p. 67-68. (Once numbering in hundreds, today there are around five dominant Islamic schools of law: Hanafi, Maliki, Shafi'i, Hanbali in Sunni Islam and Ja'fari in Shi'ah Islam).

<sup>91</sup> *Ibidem*.

<sup>92</sup> *Ibidem*.

<sup>93</sup> *Ibidem*.

<sup>94</sup> *Ibidem*.

answered on such individual questions in the form of ‘fatwa’ (legal responsa), which were voluntarily self-enforced by the questioner himself.<sup>95</sup> Another type of law, operating in an interdependent relationship with the fiqh, was the so-called ‘siyasa’, law created by the rulers.<sup>96</sup> Unlike fiqh, siyasa laws were not extrapolated from writings of religious legal intellectuals.<sup>97</sup> Muslim rulers designated siyasa correspondingly to their own philosophies of governance. Siyasa laws were usually pragmatic, governance-related laws, including such spheres as security, taxes and marketplace regulation.<sup>98</sup>

For centuries, Islamic law has developed without the notion of constitutionalism, and the fiqh knew no constitution, nor was their vibrancy dependent on one.<sup>99</sup> The absence of an Islamic written constitution is attributed to the presence of Basic Code described above, which served as a reference for Muslim empires and communities for legal matters.<sup>100</sup> However, legal systems without written constitutions may gradually develop constitutional conventions that may ensure political and normative stability.<sup>101</sup> In the nineteen-century Ottoman Empire, Islamic constitutionalism started to emerge through the Ottoman Constitution of 1876.<sup>102</sup> Due to the combined pressure of domestic instability and the dominance of European colonial powers, this Constitution was created to

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<sup>95</sup> Ibidem.

<sup>96</sup> G. Parolin, ‘Religion and the Sources of Law: Shari’a in Constitutions’ in ‘Law, Religion, Constitution; Freedom of Religion, Equal Treatment and the Law’, Durham, (2013), pp. 95-97. (The author describes the difference between fiqh and siyasa as ‘microcosmic’ and ‘macrocosmic’ law).

<sup>97</sup> Ibidem.

<sup>98</sup> Ibidem.

<sup>99</sup> L.A. Khan, H.M. Ramadan, ‘Contemporary Ijtihad: Limits and Controversies’, Edinburgh Scholarship Online, (2012).

<sup>100</sup> Ibidem.

<sup>101</sup> Ibidem.

<sup>102</sup> F.M. Corrao, supra note 11, p. 80. (In 1876, the Ottoman Sultan established the first Parliament and conducted significant reforms, such as the establishment of public elementary schools, the penal and commercial codes, the formulation of the concept of citizenship. This led to the development of a rudimentary conception of the modern state).



introduce elementary principles of liberalism in a decadent empire that the Ottoman sultans had ruled for almost four centuries.<sup>103</sup> However, after the end of the World War I, it was abandoned in favour of another constitution that would establish a secular Turkish state.<sup>104</sup> Other Muslim elites, as well, became familiar with Western ideas of law and governance in the nineteenth century.<sup>105</sup> The Middle Eastern countries, under Western mandate, appeared to be relatively weak in establishing and protecting political freedoms, which resulted in their incapability to confront European powers.<sup>106</sup> Hence, when Muslims started looking for legal means in order to restrain despotic rulers, they referred not to the Islamic tradition, but to European models.<sup>107</sup> Later, in the twentieth century, a new wave of constitutionalism rose to prominence after a number of Muslim nations obtained independence from Western colonialism. Cognisant with the trend of written constitutionalism throughout the world, almost all Muslim nations of diverse cultures, political persuasions, historical experience and ethnic compositions have accepted constitutionalism as part of their legal systems.

### ***Tunisia***

Tunisia can be considered the birthplace of Arab constitutions, as its Constitution of 1861<sup>108</sup> was the first one drafted in the Arab World.<sup>109</sup> However, the main Constitution in Tunisia is the post-independence Constitution of 1959,<sup>110</sup> which lasted until the

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<sup>103</sup> Ibidem.

<sup>104</sup> Ibidem.

<sup>105</sup> A.E. Mayer, 'Islam and Human Rights: Tradition and Politics', Westview Press 5<sup>th</sup> Edition, (2013), p. 47.

<sup>106</sup> Ibidem.

<sup>107</sup> Ibidem.

<sup>108</sup> Constitution of the Republic of Tunisia, (26 April 1861).

<sup>109</sup> N.J. Brown, 'Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government', State University of New York Press (2002), pp. 5-10.

<sup>110</sup> Constitution of the Republic of Tunisia, (1 June 1959).

December 2010 revolution. Despite the influence of the Turkish secular model on the President Habib Bourguiba, he did not follow that model declaring the state secular in the Constitution.<sup>111</sup> Differently from President Atatürk, he did not refer religion to the private sphere and did not establish a wall between religion and state law and politics.<sup>112</sup> Instead, Article 1 of the 1959 Tunisian Constitution states: ‘Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic is its language’.<sup>113</sup> According to Malika Zeghal, the President Bourguiba believed that, first of all, a gradual approach is needed in order to modernize the country; secondly, modernization should include modernizing religion itself through state regulation and control; and thirdly, the state should develop an emotional attachment in its citizens’ hearts and in order to do this, it should use religion.<sup>114</sup> Zeghal, as well, mentions the change in Bourguiba’s position towards women’s Islamic dress code: In 1929, during the battle against French colonialism, Bourguiba defended hijab and used it as a resistance tool against French colonization.<sup>115</sup> After Tunisia became independent, Bourguiba’s position changed.<sup>116</sup> In 1981 he legally banned hijab, as a reaction to the growing Islamist influence in the aftermath of the Iranian revolution.<sup>117</sup> The main institute for religious learning, Al-Zaytuna was closed and turned into a mere course of study in secular universities.<sup>118</sup>

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<sup>111</sup> M. Zeghal, ‘Public Institutions of Religious Education in Egypt and Tunisia: Contrasting the Post-Colonial Reforms of Al-Azhar and the Zaytuna’ in ‘Trajectories of Education in the Arab World’, Osama Abi-Mershed, (2010), pp. 111-112.

<sup>112</sup> Ibidem.

<sup>113</sup> Constitution of the Republic of Tunisia, (1 June 1959), Article 1.

<sup>114</sup> M. Zeghal, ‘Veiling and Unveiling Muslim Women: State Coercion, Islam, and the ‘Disciplines of the Heart’ in ‘The Construction of Belief: Reflections on the Thought of Mohammed Arkoun’, A. Filali-Ansary, A. Esmail, (2012), p. 127.

<sup>115</sup> Ivi, p.127, pp. 129-30.

<sup>116</sup> Ibidem.

<sup>117</sup> Ibidem.

<sup>118</sup> Ibidem.

The Tunisian historical path partially explains the choices made by Tunisian constitution makers in the June 2013 draft of the constitution. The Islamist party Al-Nahda, on the one hand, clearly expressed a desire to liberate religion from state domination and, on the other hand, they also insisted that the state must organize religion without controlling it, given its experience prior to the Arab Spring.<sup>119</sup> The 2013 draft contained the statement: ‘Tunisia is an independent state whose religion is Islam’ and, at the same time, pointed out: ‘Tunisia is a civil state, based on citizenship, people’s will and supremacy of law’.<sup>120</sup>

The draft also makes the state the protector of religion, the guarantor of freedom of belief and neutrality of places for worship.<sup>121</sup> A previous draft version contained the text: ‘[t]he state criminalizes all attacks on the sacred’, which raised serious anxieties regarding freedom of speech.<sup>122</sup> Already in the June 2013 constitution draft, the word ‘criminalization’ was removed and the phrase ‘protecting the sacred’ became more vague.<sup>123</sup> Moreover, Article 73 excludes the non-Muslim population from eligibility to the position of the head of state, stating that the candidate must be a Muslim.<sup>124</sup> As will be discussed more in detail in chapter three, the Islamist party Al-Nahda initially

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<sup>119</sup> M. Zeghal, ‘Competing Ways of Life: Islamism, Secularism and Public Order in the Tunisian Republic’, *Constellations*, Volume 20, (2013), pp. 254-256, p. 261.

<sup>120</sup> Draft Constitution of the Republic of Tunisia, (1 June 2013), Articles 1-2.

<sup>121</sup> Ivi, Article 6.

<sup>122</sup> ‘Tunisia: Fix Serious Flaws in Draft Constitution’, Human Rights Watch, (13 September 2012), <https://www.hrw.org/news/2012/09/13/tunisia-fix-serious-flaws-draft-constitution>.

<sup>123</sup> Draft Constitution of the Republic of Tunisia, (1 June 2013), Article 6.

<sup>124</sup> ‘Tunisia: Revise the Draft Constitution’, Human Rights Watch, (13 May 2013). (This provision existed in previous drafts and was strongly criticized by human rights organizations. It contradicts Article 6, which states, ‘All citizens are equal in rights and obligations before the law, without discrimination’). In the 2014 Constitution the article’s number is 74.

<https://www.hrw.org/news/2013/05/13/tunisia-revise-draft-constitution>.

attempted to add a clause similar to the Egypt's Article 2 of the Constitution, but due to the strong secularist opposition it changed its position.<sup>125</sup>

### *Egypt*

In Egyptian history, the main constitutional document that introduced Islam as the state's official religion is the Constitution from 1923, which was adopted by King Fouad I under British colonial rule.<sup>126</sup> This document lasted till 1952, with a brief interruption in the period 1930-1935, when the Three Officers organized a revolt against King Farouk leading Egypt towards the independence from the British.<sup>127</sup> The 1923 Constitution's Article 149 stated that 'Islam is the state's religion and Arabic its language'. The provision will be later repeated in all the following constitutions, except in the short-lived constitution of 1958-1960, when Egypt and Syria were united under the rule of Abdel Nasser.<sup>128</sup> Two other constitutions during Nasser's era, 1956 and 1964, contained the provision. As was already mentioned in case of 'secular' Tunisia under President Bourguiba, an article making Islam the official state religion quite often occurs in Arab constitutions.<sup>129</sup>

However, the statement of official religion in Arab countries' constitutions is declarative and quite limited due to the lack of tools and policies to apply them and make them

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<sup>125</sup> M. Koss, 'Resistance, Power and Conceptions of Political Order in Islamist Organizations: Comparing Hezbollah and Hamas', Routledge, (2018), (Chapter 6.1: Ennahda in power: compromise and power-sharing in the constitution-making process).

<sup>126</sup> J. Feuille, 'Reforming Egypt's Constitution: Hope for Egyptian Democracy?', 47 Texas International Law Journal, (2011), p. 237, pp. 239-240.

<sup>127</sup> Ibidem.

<sup>128</sup> Provisional Constitution of the United Arab Republic, (5 March 1958). (The provision 'Islam is the state's religion and Arabic its language' was omitted).

<sup>129</sup> A.N. Mayer, 'Law and Religion in the Muslim Middle East', The American Journal of Comparative Law, Volume 35, (1987), pp. 135-138.

effective.<sup>130</sup> Nonetheless, limited does not mean lack of effect.<sup>131</sup> For the first time the provision ‘Islam is the state religion’ was turned into reality during the rule of President Anwar Sadat.<sup>132</sup> The 1971 Constitution that survived in most of its form until early 2011 revolt, included Article 2, which for the first time stipulated that ‘the principles of Islamic shari’a are a principal source of legislation’.<sup>133</sup> In 1980 Sadat committed this provision, and the text ‘a principle source of legislation’ became ‘the principle source of legislation’. This small verbal change meant a greater emphasis on religious identity and compliance.<sup>134</sup> The change of the provision was committed by Sadat, firstly, due to the growth of Islamism after the Iranian revolution in 1979 and, secondly, because of the increasing criticism towards Sadat, after he signed the Camp David Agreement with Israel in 1979, which led to Egypt’s isolation in the Islamic world.<sup>135</sup>

The tool for applying the Article 2 of the Egyptian Constitution occurred in 1979 with the formation of the Supreme Constitutional Court. The Constitutional Court was authorized to review the constitutionality of regulations and laws, including whether they comply with the principles of Islamic sharia.<sup>136</sup> The main reason for creating the Court was the Sadat’s desire to encourage domestic and foreign investment in Egypt given the bad economic conditions after the war with Israel.<sup>137</sup> The Court’s task was to guarantee

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<sup>130</sup> N.J. Brown, ‘Constitutions in a Nonconstitutional World: Arab basic Laws and the Prospects for Accountable Government’, (2002), p. 10-13.

<sup>131</sup> Ibidem.

<sup>132</sup> Constitution of the Arab Republic of Egypt, (11 September 1971), Article 2, amended by 22 May 1980, 25 May 2005, 26 March 2007.

<sup>133</sup> Ibidem.

<sup>134</sup> M.C. Bassiouni, M. Helal, ‘The Second Republic of Egypt’, (2012), p. 253.

<sup>135</sup> A.N. Mayer, *supra* note 120, p. 138.

<sup>136</sup> Law No. 48 of 1979 (Law on the Supreme Constitutional Court), *Al-Jarīda Al-Rasmiyya*, 9 Jun. 1979, Article 25 (Egypt), amended by Law No. 168 of 1998.

<sup>137</sup> T. Moustafa, ‘Law Versus the State: the Judicialization of Politics in Egypt’, *Law & Social Inquiry*, Volume 28, (2003), pp. 889-890.

investors the existence of a mechanism for protecting property and economic rights.<sup>138</sup> Within time the Constitutional Court reversed many of Nasser's socialist reforms and became the supporter of economic liberalism and defender of private property.<sup>139</sup>

With regard to Article 2, the Court limited its applicability, specifying that it cannot be applied retroactively on legislation that preceded Article 2.<sup>140</sup> The Court interpreted only principles that were unambiguous and non-controversial.<sup>141</sup> However, the problematic provision in both the 2012 Constitution and the 8 July 2013 constitutional declaration was Article 4, which empowered Al-Azhar,<sup>142</sup> a respected religious institution of learning, as a supreme authority for the interpretation of sharia, by vesting it with a consultative role.<sup>143</sup> Thus, the text on the conditions when this consultative role should be applied and how it would coexist with the Court's interpretative power remained unclear. Moreover, the Islamist Muslim Brotherhood party attempted to ignore this article, while negotiating a loan with the International Monetary Fund (IMF), whereas the Salafis sought to activate it in order to prevent the loan on the basis of violating sharia prohibitions to charge interests on loans.<sup>144</sup>

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<sup>138</sup> Ibidem.

<sup>139</sup> Ivi, pp. 908-913.

<sup>140</sup> M.C. Bassiouni, M. Helal, *supra* note 125, pp. 256-268.

<sup>141</sup> Ibidem.

<sup>142</sup> M. Zeghal, *supra* note 102, p.115-116. (Under Nasser's rule in 1960s, Al-Azhar was retained as an institution (differently from Tunisia's Al-Zaytuna), being internally modernized- it included non-religious subjects in the curriculum. Such Nasser's reforms paved the way for Azhar's advent in the 1970s and 1980s as a political player. In 1990s Al-Azhar would become an influential institution due to President Mubarak's need for the legitimacy stamp in his fight against extremist Islamic groups. As a consequence, modernization did not produce secularization in Egypt).

<sup>143</sup> Draft Constitution of the Arab Republic of Egypt, (8 July 2013), Article 29.

<sup>144</sup> T. Perry, 'Egypt Islamists Say Clerics Must Approve IMF Loan', Reuters, (12 February 2013),

<https://www.reuters.com/article/us-egypt-islamists-imf/egypt-islamists-say-clerics-must-approve-imf-loan-idUSBRE91B1DA20130212>.

Another provision on religion in the 2012 Constitution is Article 219, which sought to outline the interpretative reference materials of principles of sharia.<sup>145</sup> This Article was a reaction to the abovementioned jurisprudence of the Supreme Constitutional Court.<sup>146</sup> It became a sort of compensation for Salafis who attempted to use a stricter language for Article 2.<sup>147</sup> The provision sought to restrict the discretion of the judges and their ability to manipulate sharia documents.<sup>148</sup> However, such an attempt was a failure, as judges will still have discretion to interpret and apply the documents no matter how clear and strict is the constitutional language.<sup>149</sup> Including this Article into constitution will allow for gaps, contradictions and ambiguities. In any case, the 2014 Constitution removed Article 219.<sup>150</sup>

Another important provision in the 2014 Constitution is Article 10, which states that family is a basic unit of society and that it is founded on religion, morals and patriotism.<sup>151</sup> It also stipulated that the state will guarantee the conformity of women's duties towards their families and employment.<sup>152</sup> This patriarchal provision is very similar to Article 7 of 1964 Nasser's Constitution and Article 9 of 1971 Sadat's Constitution.<sup>153</sup> There can be

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<sup>145</sup> Draft Constitution of the Arab Republic of Egypt.

<sup>146</sup> C. Lombardi, N.J. Brown, 'Islam in Egypt's New Constitution', Foreign Policy, (13 December 2012), <https://foreignpolicy.com/2012/12/13/islam-in-egypts-new-constitution/>.

<sup>147</sup> Ibidem.

<sup>148</sup> Ibidem.

<sup>149</sup> J.M. Balkin, 'Living Originalism', Belknap press, (2011), pp. 3-6, pp. 16-20. (The discussion of Islamic constitutionalism: originalism can be abused and manipulated with respect to religious questions).

<sup>150</sup> Constitution of the Arab Republic of Egypt, (18 January 2014).

<sup>151</sup> Constitution of the Arab Republic of Egypt, (11 September 1971), as amended 22 May 1980, 25 May 2005, 26 March 2007, Article 10.

<sup>152</sup> Ibidem.

<sup>153</sup> Ivi, Article 9.

found as well similarity of this Article with the June 2013 Draft Constitution of Tunisia.<sup>154</sup> However, the 2012 Egyptian Constitution already did not include such a provision.<sup>155</sup> It can be seen that the Islamization of constitutional order started not with Morsi and the Muslim Brotherhood party, but yet with President Sadat.

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<sup>154</sup> Draft Constitution of the Republic of Tunisia, (1 June 2013), Article 7.

<sup>155</sup> Draft Constitution of the Arab Republic of Egypt, (30 November 2012).



### 3 The Arab Spring in the context of the Arab World

In new democracies constitution drafters face a big challenge- striking an enduring political bargain during anxious times. As Elster states: ‘The task of constitution- making demands procedures based on rational argument, but the external circumstances of constitution- making generate passion and invite resorts to force’ <sup>156</sup>

In 2011 an unexpected series of mass revolutionary protests hit the Middle East<sup>157</sup>, namely, the “Arab Spring”.<sup>158</sup> For instance, in Syria and Bahrain, dictators remained in power through fierce repression. In Tunisia and Egypt, authoritarians had to step down without referring to great levels of violence, while in Libya rebels overthrew the dictator with foreign military aid and in Yemen after the high degree of violence the ruler stepped down in a negotiated transfer of power.<sup>159</sup>

Eventually, Tunisia, Libya and Egypt turned out to be three cases, where the Arab Spring led to at least an interlude of democratic and semi democratic politics.<sup>160</sup> All three countries adopted new constitutions, even if the first Egyptian democratic constitution was repealed after a military coup in 2013 and Libya was governed by two provisional constitutions before collapsing into tribal warfare. It is important to note that the main intention of framers of these constitutions was to establish a new, democratic polity launching the future course of day-to-day politics. Politicians of all three states faced

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<sup>156</sup> J. Elster, ‘Deliberation and Constitution Making’, Cambridge University Press, (2012), p. 118.

<sup>157</sup> L. Anderson, ‘Demystifying the Arab Spring’, HeinOnline -- 90 Foreign Affairs 2, (2011).

<sup>158</sup> Arab Spring was first coined by the American Journal of Foreign Policy and popularized by Western Media and later by Arab TV channels, labels the anti- regime protests that occurred in Tunisia, Libya, Egypt, Yemen, and Syria in 2011; and erupted on a smaller scale in Bahrain, Algeria, Jordan, Morocco, and Sudan.

<sup>159</sup> T. Thiel, ‘Yemen’s Negotiated Transition between the Elite and the Street’, The London School of Economics and Political Science, (2014),

<http://blogs.lse.ac.uk/mec/2014/03/03/yemens-negotiated-transition-between-the-elite-and-the-street/>.

<sup>160</sup> A. Stepan, J.J Linz, ‘Democratization Theory and the “Arab Spring”’, Journal of Democracy, (2013), p. 15-30.

similar difficulties and a daunting task: how to ensure peace, stability and unity in the new polity while impeding a return to illiberal and authoritarian rule? Despite having similar backgrounds, these constitutions finally diverged widely in their degree of liberalism, in other words, the extent to which they structure institutions in order to preserve individual rights and the balance between majority and minority rights. In the next chapter, on the examples of Tunisia and Egypt, I will examine why do constitutions in these countries differ and how the political polarization among key fractions influenced the process of the constitution - making and consequently the legitimacy of constitutions in these countries. <sup>161</sup>

### **3.1 A historical overview of the Arab Spring**

On 17 December 2010 twenty-six-year old Tarek al-Tayeb Mohamed Bouazizi set himself on fire in front of a local public office after being harassed by police officers in the central Tunisian town of Sidli Bouzid.<sup>162</sup> His actions were followed by demonstrations and riots in his hometown, where citizens protested against poor economic conditions and widespread unemployment.<sup>163</sup> However, it was not only Bouazizi's shocking death that became a sort of trigger for the continuing wave of uprisings, but as well a great fatigue from humiliation and repression that people suffered for years from the dictatorship of North African leaders.<sup>164</sup> Moreover, all the images of protests and fierce police actions were featured on and circulated through social media sources (such as Facebook and YouTube).<sup>165</sup> The most popular slogans of the demonstration across the country were

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<sup>161</sup> Ibidem.

<sup>162</sup> J. Brownlee, T. Masoud, 'The Arab Spring: Pathways of Repression and Reform', Oxford University Press, (2015), p. 10.

<sup>163</sup> Ibidem.

<sup>164</sup> M. Althani, 'The Arab Spring and the Gulf States: Time to Embrace Change', Profile Books, (2012), pp. 8-11.

<sup>165</sup> Ibidem.

“Tunisia free”, “Jobs for all”, “Down with the bribes and favouritism” and “Ben Ali get lost”<sup>166</sup>.

In order to constrain the rage of the youth demonstrators and to maintain security and stability in the region, President Ben Ali promised to create 300,000 new jobs in the next two years,<sup>167</sup> although ironically shortly afterwards he issued a judgement to close down schools and universities and named the protesters as “terrorists”. This self-contradicting decision provoked the protesters and encouraged them to further clashes with the police and security forces. Under this growing pressure, Ben Ali fired part of his ministerial cabinet, called for early parliamentary elections within six months, and promised the demonstrators that he would resign by the end of his presidential term in 2014. However, these promises did not settle down the protestors, whose objective instead was replacing the actual authoritarian regime with a democratic one. When Ben Ali realized that he had no more choices, he fled to Saudi Arabia together with his family on 14 January 2011, marking the end of his 24 years of authoritarian rule in Tunisia.<sup>168</sup>

Already few days later on 25 January 2011 in Egypt, street activists protested against the poverty, unemployment, and corruption committed by Hosni Mubarak’s regime and his closest supporters. The key movements that headed protests involved the following:

1) Kefaya- it is the unofficial name of the Egyptian Movement for Change that was created in 2004 with the aim of changing the political situation in Egypt. It gained vast support at the popular level after criticizing the 2005 constitutional referendum and

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<sup>166</sup> ‘Timeline of the Tunisian Revolution’, Bulletin of Mass Strike,

<http://www.luxemburgism.lautre.net/spip.php?article127>.

<sup>167</sup> al-Baik, D. Tunisia’s opposition dismisses Bin Ali’s warnings, The Gulf News, (11 January 2011),

<https://gulfnews.com/news/mena/tunisia/tunisia-s-opposition-dismisses-bin-ali-s-warnings-1.744604>.

<sup>168</sup> V. Walt, ‘Tunisia’s Nervous Neighbours Watch the Jasmine Revolution’, Time, 177 (4), (31 January 2011), pp. 17–21.

presidential election campaigns. The movement also opposed the re-election of Hosni Mubarak in 2010 and the idea of transferring power to his son, Gamal. Actually, it was one of the central groups and movements that contributed to the success of the 25 January Revolution;

2) The National Association for Change- a free political association that is comprised of activists from different segments of Egyptian society. It was established in 2010 with the objective of changing the political setting in Egypt through democracy, social justice, and free elections. The movement played an important role in the demonstrations of 2011 that put an end to the rule of the Egyptian dictator Hosni Mubarak;

3) The 9 March Group for the Independence of Egypt's Universities was formed in 2003. It received its name from the event of March 9, 1932, when Lotfi el-Sayed, the first president of Cairo University, resigned in protest against the ministerial judgment to fire Taha Hussien from the deanship of the Faculty of Arts. The group's primary objective was to guarantee the independence of Egyptian universities from military and government interference. It, as well, played a key role in the 2011 protests that led to the resignation of Hosni Mubarak;

4) The April 6 Youth Movement- an Egyptian activist faction formed in 2008 to support workers in an industrial town of El-Mahalla El-Kubra, who were planning to strike on April 6. The forefathers of April 6 movement actively used social media (such as Facebook, Twitter, Flickr) to spread the workers' demands and grievances and to mobilize the public support for their strikes. Khaled Mohamed Saeed was a young Egyptian man who died under disputed circumstances in Alexandria on June 6, 2010, after being arrested and beaten by Egyptian security forces. Images of his disfigured corpse were distributed via the Internet and mobile phones, horrifying Egyptian security forces and encouraging the anger of the public against Mubarak's regime. A well-known

Face Group was founded under his name (“We are all Khaled Said”) and led by Wael Ghonim, a prominent figure in the Egyptian Revolution of 2011.<sup>169</sup>

The protesters pressed Mubarak to resign in favour of an elected democratic government that would correspond to their demands. A day later the government prohibited all public demonstrations and security forces dispersed a number of peaceful protests. After this all forms of communication were blocked, and a curfew was set up. Revolts spread from the al-Tahrir Square in Cairo to other squares in the country, urging for the departure of Mubarak and his undemocratic regime.<sup>170</sup> The immediate reaction of the president was to dissolve his cabinet and form a new one chaired by the former Air Force Chief, Ahmed Shafik. He as well, appointed Omar Sulaiman, Egypt’s intelligence chief, as vice - president and assigned him a task to begin negotiations with the key figures of political parties.<sup>171</sup> However, on 4 February 2011, thousands of protesters gathered at al-Tahrir Square in Cairo and other principal cities of Egypt, calling for Mubarak’s removal and regime change. There was no other choice left for President Mubarak except to step down before completing his presidential term in 2013. Under the escalating pressure of the protests and in the face of external requests for democratization, he left his office on 11 February 2011, transferring the administration of the country to a military council commanded by Mohamed Hussein Tantawi and a team of senior military officers.<sup>172</sup>

The growing significance of the Arab Spring constrained the Libyan dictator Muammar al-Gaddafi to take precautionary measures, such as the reduction of food prices, the removal of military officer defectors and the release of several Islamist detainees.

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<sup>169</sup> Yasin, A. al-Q., ‘Al-Dal’ al-Ghaib min al-Muthalath’ in A. Al-Q. Yasin (Ed.), 25 Yanair: Mabathith wa Shihadat, Doha, QA: al-Markaz al-Arabi lil al-Abhath wa Dirasat al-Siyasa. (2013).

<sup>170</sup> B. K Rutherford, ‘Egypt: The origins and consequences of the January 25 Uprising’. In M.

L. Haas & D. W. Lesch, ‘The Arab Spring: Change and resistance in the Middle East’, Boulder, CO: Westview Press, (2013), pp. 35–63.

<sup>171</sup> Mubarak’s speech, (2011, February 1), <https://www.youtube.com/watch?v=5I931zZcUbWU>.

<sup>172</sup> F. Ajami, ‘Demise of Dictators’, Newsweek, (2011, February 14), pp. 14–21; B. Dehghanpisheh, C. Dickey & M. Giglio, ‘Rage Against the Regime’, Newsweek, (2011, February 14), pp. 19–25.

However, these preventative measures seem not to have been effective because, on February 17, 2011, major protests exploded in Benghazi against al-Gaddafi's dictatorial regime. The escalating dissatisfaction of the protesters was correlated with the corruption of the authoritarian regime, deep-rooted systems of patronage and high level of unemployment among the Libyan youth. During his first appearance on media broadcasts, al-Gaddafi alleged the demonstrators of being "drugged" and collaborating with al-Qaeda in the region.<sup>173</sup>

As a consequence, he denied their demands for regime change and declared that he would prefer to die a martyr rather than leave Libya for the "drugged" and legionnaires of the West.<sup>174</sup> Because of the complexity of this situation, some diplomats at Libya's mission to the United Nations in New York took the side of the protesters and urged the Libyan army to support them.<sup>175</sup> By the end of February 2011, al-Gaddafi lost control over the major cities of Libya, and the military confrontation between his allies and revolutionary forces gradually intensified and became a full-scale civil war. The UN Security Council and EU governments enacted sanctions on al-Gaddafi and his family and suspended the membership of Libya in the UN.<sup>176</sup> On March 17, 2011, the UN Security Council enforced a no-fly zone in the country's airspace and proclaimed that "all necessary measures" should be taken to protect civilians against al-Gaddafi's forces.<sup>177</sup> With the support of the NATO air forces, the Libyan National Council in Benghazi declared itself the legitimate representative of the Libyan population.<sup>178</sup> The declaration was recognized

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<sup>173</sup> al-Gaddafi's speech, (22 February 2011), [https://www.youtube.com/watch?v=v5RSh6QAs\\_my8](https://www.youtube.com/watch?v=v5RSh6QAs_my8).

<sup>174</sup> Ibidem.

<sup>175</sup> L. Noueihed, A. Warren, 'Libya's Revolution from Above' in L. Noueihed, A. Warren, 'The battle for the Arab Spring: Revolution, counter-revolution and the making of a new era' New Haven, CT: Yale University Press, (2012), pp. 164–194.

<sup>176</sup> Ibidem.

<sup>177</sup> United Nations Security Council Resolution 1973, (17 March 2011), <https://www.un.org/press/en/2011/sc10200.doc.htm>.

<sup>178</sup> Security Council Report on Libya, (2011),

both by Western and Arab countries that consequently denounced the legitimacy of al-Gaddafi to chief his own nation.<sup>179</sup> The military confrontation continued between the two parties for several months until the forces of the revolutionaries entered Tripoli in the last week of August 2011, and al-Gaddafi and his forces left the city, taking their final asylum in Bani Walid, Sirte and other cities.<sup>180</sup> After the liberation of Tripoli, struggling continued for about two months until Colonel al-Gaddafi was captured on October 20, 2011 and killed in the city of Sirte.<sup>181</sup> His death marked the end of his 42-year rule, and 3 days after the Libyan National Council declared the liberation of the country and started the process of drafting a new constitution and establishing a new government.<sup>182</sup>

Apart from these three MENA region countries, the events of the Arab Spring also inspired pro-democratic reformers in Yemen that resulted in an agreed power transfer<sup>183</sup> and a consequent regime change. Antigovernment demonstrations and demands for the democratic regime, as well, spread to Morocco, Bahrain, Algeria, and Syria. In Morocco, the Arab uprisings met a particular political field that determined the outcome and future prospects of reforms, which included a new constitution and referendum.<sup>184</sup> On the contrary, the protestors in Bahrain and Algeria were repressed by security and police

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<https://www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTIsG-b-6621881.php?print=true>.

<sup>179</sup> Ibidem.

<sup>180</sup> Ibidem.

<sup>181</sup> L. Noueihed, A. Warren, *supra* note 164.

<sup>182</sup> Ibidem.

<sup>183</sup> Ali Abdallah Saleh's signing the transition of power agreement, Riyadh, [https://www.youtube.com/watch?v5j\\_7qA\\_X3MF8](https://www.youtube.com/watch?v5j_7qA_X3MF8).

Ali Abdallah Saleh's speech after the transition of power agreement, Riyadh, <https://www.youtube.com/watch?v55GyFNp6o9OU>.

<sup>184</sup> J.N. Sater, 'Morocco's Arab Spring', Middle East Institute (2011), [http://www.mei.edu/content/morocco's-\"arab\"-spring](http://www.mei.edu/content/morocco's-\) (The head of state has stayed in power but responded to social pressures through a variety of measures, including parliamentary elections, reshuffling the cabinet, changing the constitution or lifting decades-long states of emergency).

forces, while in Syria, military confrontation escalated and reached the state of civil war between die-hard supporters of al- Assad's regime and their political adversaries — a conflict that still rages to date.

### **3.2 Autocracy and Democracy in Transition: Tunisia and Egypt**

The prevailing perception of the uprisings that captured the Arab world in late 2010 and early 2011 is that they have not succeeded in achieving a long-awaited transition to liberal democracy in the region. The question has shifted from whether the so-called 'Arab spring' overthrows accepted wisdoms about the Middle East to 'why did the 'Arab Spring' yield so modest a harvest?'.<sup>185</sup> Posing the question in this manner turns the study of comparative politics in the Arab world to the status quo ante the uprisings: a debate rotating between searching for weak signs of "democratic transition" on the one side, and the attempt to understand an apparently resilient authoritarianism on the other.<sup>186</sup>

The sudden, unexpected collapse of seemingly stable autocracies in Tunisia and Egypt has raised important questions about the conventional wisdom on authoritarian resilience. There are two prevailing types of explanations for the recent breakdown of autocracies in Tunisia and Egypt: the first one concentrates on the social drivers of unrest in the cases of Tunisia and Egypt, such as youth unemployment, socioeconomic inequality, corruption, and an increasingly 'technologically advanced' population; the second investigates capacity-centered explanations for the strength and resilience of authoritarian regimes.<sup>187</sup> Despite good economic performance, many factors were often identified as

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<sup>185</sup> J. Brownlee and others, 'Tracking the "Arab Spring": Why the Modest Harvest?', *Journal of Democracy*, (2013), p. 29.

<sup>186</sup> O. Schlumberger, "Opening Old Bottles in Search of New Wine", Salame, 'Democracy Without Democrats', Valbjorn, "Upgrading Post-democratization Studies", Cavatorta, 'The Convergence of Governance', Cavatorta and Pace, 'The Arab Uprisings in Theoretical Perspective'.

<sup>187</sup> B. Hounshell, 'Dark crystal: Why didn't anyone predict the Arab revolutions?', *Foreign Policy*, (2011),

[http://www.foreignpolicy.com/articles/2011/06/20/dark\\_crystal](http://www.foreignpolicy.com/articles/2011/06/20/dark_crystal).



the drivers of unrest in the MENA (Middle East and Northern Africa) region.<sup>188</sup> Even in a context of economic growth, which might entail a greater satisfaction with the regime, social unrest has been on the rise. Furthermore, prior to 2011, Tunisia and especially Egypt were rated as highly durable according to the primary elements of authoritarian capacity.<sup>189</sup> Here the question occurs: which have been the main sources of vulnerability within seemingly high-capacity regimes as in Tunisia and Egypt?

### **3.2.1 Social drivers of protest**

Various studies on the Arab Spring have demonstrated the bottom-up factors driving Middle Eastern discontent and subsequent protests.<sup>190</sup> Regarding the participants involved in mass street demonstrations and their specific grievances, these interpretations have found out that instability in the MENA region is most closely linked to socioeconomic imbalances, the perception of official corruption, the presence of the new non-institutional actors, such as women and youth, high rate of unemployment and the widespread use of modern communication technologies.<sup>191</sup>

The discussion of social forces driving unrest in the Middle East must start with the development of economic trajectory of the region. During the past three decades, MENA economies have grown at a comparatively slow rate of 3.59 percent, with Egypt (5.10 percent) and Tunisia (4.52 percent) moderately outperforming the region as a whole.<sup>192</sup> Evidently, this variation in overall economic growth is no commonplace consideration. As was pointed out by Huntington, Diamond and Linz, and Bermeo, in autocratic regimes lacking the sort of legitimacy stipulated by democratic procedures, the sustainability of

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<sup>188</sup> Ibidem.

<sup>189</sup> Ibidem.

<sup>190</sup> V. Durac, 'Protest Movements and Political Change: An Analysis of the 'Arab Uprisings of 2011'', *Journal of Contemporary African Studies*, (2013).

<sup>191</sup> Ibidem.

<sup>192</sup> World Bank (2012) World Development Indicators: 2011, <http://data.worldbank.org/>.

political power is heavily dependent on economic performance criteria.<sup>193</sup> The large-N quantitative research of Przeworski and Limongi has expressed some general support for this hypothesis, demonstrating that autocracies with high per capita incomes have been extremely highly resilient to breakdown.<sup>194</sup>

Contradicting in some respects these judgements, Geddes and, more recently, Ulfelder have discovered that poor long-lasting economic performance in itself has little in common with destabilizing autocracies.<sup>195</sup> While low growth 'is never good news,' only abrupt and severe economic crisis in the short term seems to be capable of undermining otherwise-resilient personalist and single-party autocracies. Since the 1970s, single-party autocracies that have collapsed, have faced average declines in per capita income of around 4 percent one year before their respective political transitions.<sup>196</sup> This phenomenon has been evident on examples of the Philippines in 1986 and Indonesia in 1998, where regime breakdown was preceded by drastic and sudden economic declines.

Taking into account that the Arab Spring uprisings have occurred afterwards the global financial crisis of 2008, a rapid economic downturn results to be a likely source of the internal discontent that emerged in many MENA countries.<sup>197</sup> Nonetheless, according to World Bank data, the cases in question experienced some growth and were not an

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<sup>193</sup> S. Huntington, 'The Third Wave: Democratization in the Late Twentieth Century', Norman: University of Oklahoma Press, (1993); L. Diamond, J. Linz, 'Introduction: Politics, society, and democracy in Latin America' in: L. Diamond, J. Linz (eds), 'Democracy in Developing Countries: Latin America', Boulder, CO: Lynne Rienner, (1989); N. Bermeo, 'Rethinking regime change', Comparative Politics, (1990), pp. 359–377.

<sup>194</sup> A. Przeworski, F. Limongi, 'Modernization: Theories and facts', World Politics, (1997), pp.159-160.

<sup>195</sup> B. Geddes, 'What do we know about democratization after twenty years?', Annual Review of Political Science, (1999), pp. 115–144; J. Ulfelder, 'Crystal clear: Yes, rows of numbers can help predict revolutions. You just have to know where to look', Foreign Policy, (2011), pp. 311-334.

<sup>196</sup> Ivi, pp. 134-136.

<sup>197</sup> The European financial crisis of 2008 had reached its global dimensions that were going beyond the Europe's geographical borders. Europe is the Arab countries' first trade partner, so the weakness of European countries economy and a decreasing demand were reflected negatively in the Arab countries economies.

absolute collapse on the threshold of the instable year of 2011. In particular, Tunisia's GDP per capita increased 3.5 percent in 2008, 2.0 percent in 2009, and 2.6 percent in 2010, while Egypt's grew by 5.3 percent in 2008, 2.9 percent in 2009, and 3.3 percent in 2010.<sup>198</sup> It is evident that both states were not exposed to the kind of deep economic crises that have typically undermined autocratic regimes.

### *Social and economic inequalities*

Constantly increasing socioeconomic inequality can be indicated as the first social driving force, leading to the Arab Spring protests in Tunisia and Egypt.<sup>199</sup> The contrast between the ones living in poverty and having material hardship and those who were better allied with the regime, stimulated the working-class citizens to join educated youths and to pour into the streets in the regime dismantling protests of 2011.<sup>200</sup> Looking at the protests preceding the Arab Spring in Tunisia and Egypt, it becomes evident that popular complaints concentrated on the regime's inability to curtail growing food prices or provide other basic services.<sup>201</sup> For instance, in Egypt more than 1000 protests took place in the period from 1998 to 2004.<sup>202</sup> After the implementation of economic liberalization policies, which cut social services and government spending, protests increased by 200 percent, amounting to 250 in 2004 alone.<sup>203</sup> In April 2008, already half-million Egyptians participated in more than 400 actions, including a general strike taking place in al-Mahalla al-Kubra and comprising tens of thousands of state workers, youth activists and

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<sup>198</sup> World Bank (2012), World Development Indicators: 2011, <http://data.worldbank.org/>.

<sup>199</sup> E. Knickmeyer, *supra* note 123.

<sup>200</sup> *Ibidem*.

<sup>201</sup> M. Ottaway, A. Hamzawy, 'Protest movements and political change in the Arab world', Carnegie Endowment for International Peace Policy, (2011), pp. 2-6.

[http://carnegieendowment.org/files/OttawayHamzawy\\_Outlook\\_Jan11\\_ProtestMovements.pdf](http://carnegieendowment.org/files/OttawayHamzawy_Outlook_Jan11_ProtestMovements.pdf).

<sup>202</sup> *Ibidem*.

<sup>203</sup> *Ibidem*.

professionals.<sup>204</sup> During the same period, in Tunisia materially disadvantaged population organized collective actions against a mining company in 2008, which soon started to involve demonstrators protesting against mounting inflation and growing unemployment in other parts of the country.

Concerning the data on socioeconomic inequality, the gap between the rich and poor has widened in both Arab countries: in 2001, Egypt's Gini index for the distribution of family inequality was estimated at 34.4 (90th most unequal of 136 countries), whereas Tunisia's was calculated at 40.0 (61st most unequal) in 2005.<sup>205</sup> On the whole, the economic injustice has become a troubling source of social instability in the region and brought citizens to the Arab Spring protests.

### ***Corruption***

The popular discontent in the MENA region has been, as well, inflamed by the widespread presence of official corruption. As Levey stresses out, the official corruption has been a 'key grievance' driving revolts throughout the Arab world; it is a reality underlined by the recent trials of Ben Ali and Mubarak for corrupt practices varying from money laundering to drug trafficking.<sup>206</sup> According to the 2010 Corruption Perceptions Index (CPI), a measure of the total level of corruption as perceived by foreign and domestic country experts and business leaders, Tunisia and Egypt received a score of 4.3 and 3.1, respectively, placing them at the ranks of 59th and 98th of 178 participating countries.<sup>207</sup> In short, both in Tunisia and Egypt, an average citizen considers corruption to be a pervasive and very serious problem. It is evident that the perception of official

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<sup>204</sup> Ibidem.

<sup>205</sup> CIA World Factbook, Country reports, (2011), <https://www.cia.gov/library/publications/the-world-factbook/>.

<sup>206</sup> S. Levey, 'Fighting Corruption After the Arab Spring', Foreign Affairs, (2011), [www.foreignaffairs.com/articles/6789,5/stuart-levey/fighting-corruption-after-the-arab-spring](http://www.foreignaffairs.com/articles/6789,5/stuart-levey/fighting-corruption-after-the-arab-spring).

<sup>207</sup> Transparency International, Corruption Perceptions Index: 2010 results, (2011), [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results).

corruption has become as a driver of social unrest with growing frequency. Often encompassing the devastation of the property and offices of local governments, mass revolts have been urged by specific incidents of officials abusing citizens. As underlined by Heineman, 'this corruption – both in the sense of officials/cadres taking money illicitly or in the arbitrary use of "law" for personal ends – only increases, in turn, the pressure for protests'.<sup>208</sup> Both in Tunisia and Egypt, governments had not effectively managed the widespread problem of official corruption what later culminated in the collapse of their autocratic regimes.

### ***Arab youth: the new strategic actor***

Another social driving force behind the uprisings and political upheavals that spread across the Middle East and North Africa is well described by Knickmeyer as the 'Arab world's youth army...chronically unemployed twenty - somethings'.<sup>209</sup> In fact, both in Tunisia and Egypt high fertility rates had created a considerable youth bulge, so that by 2005 around 56.1 percent and 62.7 percent of the population, respectively, was under the age of 30.<sup>210</sup> These numbers demonstrate a great unexploited human potential, which can be utilised to help alleviate and overcome social and economic problems. However, authoritarian regimes have underestimated the repercussions of having youth and women underrepresented in civic and political roles in most part of the Arab World.<sup>211</sup>

Disproportional rates of progress of a number of Arab states in diverse components of development indicators have resulted in an imbalance between the supply and demand on the labour market.<sup>212</sup> The large angry unemployed youth became increasingly frustrated

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<sup>208</sup> B. Heineman, 'In China, corruption and unrest threaten autocratic rule', The Atlantic, (2011).

<sup>209</sup> E. Knickmeyer, 'The Arab world's youth army', Foreign Policy, (2011),

[http://www.foreignpolicy.com/articles/2011/01/27/the\\_arab\\_world\\_s\\_youth\\_army](http://www.foreignpolicy.com/articles/2011/01/27/the_arab_world_s_youth_army).

<sup>210</sup> J. Goldstone, 'Understanding the Revolutions of 2011'. Foreign Affairs, (2011), p. 12.

<sup>211</sup> Ibidem.

<sup>212</sup> A. Ragui, F. Roudi-Fahimi 'Youth in the Middle East and North Africa: Demographic Opportunity or Challenge?', Population Policy Bureau, Mena Policy Briefs (2007).

with its poor career opportunities, which likely played a major role in escalating 2011 unrest.<sup>213</sup> Considerable numbers, as well, joined the growing ranks of the hittistes (Arab slang for ‘those who lean against walls’).<sup>214</sup> The official unemployment rate in 2005 had reached rates of 14.2 percent in Tunisia and 11.2 percent in Egypt respectively, leaving many youths highly unsatisfied with the political and economic status quo.<sup>215</sup> This gave an impulse to continue preparing and organizing anti-regime rallies.

The Bouazizi<sup>216</sup> effect triggered local demonstrations and protests of the educated Arab youth, which sought to attract attention of authorities to high unemployment, low wages, corruption and security apparatus harassment. These collective actions have succeeded and have been strongly supported by the actively participating mass public.<sup>217</sup> Later, other groups joined demonstrations in both Egypt and Tunisia- mostly the traditional civil society organisations including not only trade unions, Islamists and other political parties, but also all other citizens who were disappointed by the regime and its autocratic governance.<sup>218</sup>

Youth movements occurred in many countries of the Arab World being the most successful in Tunisia and Egypt. In Tunisia, un-politicised youth – some employed and others unemployed – protested on the streets against the regime imposed by the non-representative Ben Ali’s government.<sup>219</sup> Soon after Ben Ali’s ouster, youth movements have formed different entities with the aim to ensure the sustainable outcome of their

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<sup>213</sup> E. Knickmeyer, *supra* note 194.

<sup>214</sup> *Ibidem*.

<sup>215</sup> United Nations Development Program, Program on Governance in the Arab Region, ‘Country theme, local government’, (2009), <http://www.pogar.org/>.

<sup>216</sup> J. Brownlee, T. Masoud, *supra* note 153.

<sup>217</sup> J. Goldstone, *supra* note 197.

<sup>218</sup> *Ibidem*.

<sup>219</sup> R. Halaseh, ‘Civil Society, Youth and the Arab Spring’, Policy Paper, (2011), p. 267, [https://www.um.edu.mt/data/assets/pdf\\_file/0012/150411/Chapter\\_13\\_-\\_Rama\\_Halaseh.pdf](https://www.um.edu.mt/data/assets/pdf_file/0012/150411/Chapter_13_-_Rama_Halaseh.pdf).

revolt, such as newly-founded youth driven political parties, non-governmental civil society organisations and unstructured youth groups.<sup>220</sup> All these groups were actively cooperating, reporting and informing the public about developments and right violations.<sup>221</sup>

In case of Egypt, the youth movement was diversified in its social composition and in its political ideological expressions; yet, it referred itself to the leftist opposition.<sup>222</sup> Having learnt from the Tunisian revolution and the experience of Tunisian youth, the Egyptian youth movements and their supporters succeeded in mobilizing 15 million Egyptians from big and small cities, and even villages into demonstrations.<sup>223</sup> On 25 January, due to the growing in momentum and size demonstration, young protesters formed the Coalition of January 25 Youth in order to demand the following actions from the Mubarak's regime: the resignation of the regime leader, the removal of the state of emergency, the release of all political prisoners, the dissolution of parliament, the appointment of a government of independent technocrats and the drafting of a new constitution.<sup>224</sup>

### ***The media of the new generation***

The globalization process and, as following, the increased access to information also contributed to the 'awakening' of the younger generation of Arabs.<sup>225</sup> Access to the

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<sup>220</sup> Ibidem.

<sup>221</sup> Ibidem.

<sup>222</sup> D. Shehata, 'The Fall of the Pharaoh: How Hosni Mubarak's Reign Came to an End', Law Journal Library: Foreign Affairs, Volume 90, (2011), pp. 28-29,

[https://heinonline.org/HOL/Page?handle=hein.journals/fora90&div=43&start\\_page=26&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?handle=hein.journals/fora90&div=43&start_page=26&collection=journals&set_as_cursor=0&men_tab=srchresults).

<sup>223</sup> Ibidem.

<sup>224</sup> Ibidem.

<sup>225</sup> D. Khoury, 'Social Media and the Revolutions: How the Internet Revived the Arab Public Sphere and Digitalized Activism' in 'Perspectives: Political Analysis and Commentary from the Middle East', p. 83,

international community increased the exposure of average Arabs to the practices and freedoms available in other parts of the world. The younger generation's global interconnectedness through media and technology has presented them with images of possibilities besides their current realities. Such factors as job opportunities, role in decision making, the right to have free elections, and the right to determine your own destinies gave youth the impetus and most importantly, the vision to make the current regime change.<sup>226</sup> The information revolution backed by the Internet has ensured young Arabs the access to information, which otherwise can be intentionally blocked by the government. In its 2011 annual report, Amnesty International addresses the growing role of new technology, in the sense that 'it is and will continue to be a tool used by both those who want to challenge injustices around the world and those who want to control access to information and suppress dissenting voices'.<sup>227</sup> However, media analysts and observers have had contrary opinions on the role of social media in pushing Arab revolutions forward. Some people consider that, in case of Egypt, where the illiteracy rate is more than 42%, there was no internet access for the wide masses who led demonstrations in different cities of Egypt. As a response to this argument, it can be noted that social media has been utilised by young Arabs long before the revolutions – what we saw in Tunisia and Egypt was rather the peak of many years of accumulated 'vocalised dissent', which then reflected back to 'real space' in the form of strong confrontational popular action.<sup>228</sup>

The youth that was for many years restricted to express in real life, now has been discussing virtually with a higher degree of freedom.<sup>229</sup> Indeed, authoritarian governments, to some extent, had feared the repercussions of a free virtual space because

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[https://lb.boell.org/sites/default/files/perspectives\\_-\\_issue\\_2.pdf](https://lb.boell.org/sites/default/files/perspectives_-_issue_2.pdf).

<sup>226</sup> Ibidem.

<sup>227</sup> Amnesty International, 'Annual Report 2011: The State of the World's Human Rights', Amnesty International, p. 45,

<https://www.amnesty.org/download/Documents/32000/pol100012011en.pdf>.

<sup>228</sup> D. Khoury, *supra* note 212.

<sup>229</sup> Ibidem.



of a rapidly growing number of internet consumers.<sup>230</sup> Bloggers and online activists have been detained, harassed and even attacked by government security apparatuses.<sup>231</sup> An illustration of such power abuse is the case of 28-year old Khalid Said in Egypt, who died after the severe assault of two police officers in an internet café in Alexandria earlier in 2010, after posting controversial video making the police responsible for citizen aggression.<sup>232</sup>

Apart from the social media that has played a key role in organizing and mobilizing young activists on the national and regional levels, the traditional media remained also an important source of information for the public.<sup>233</sup> Since December 2010, Al-Jazeera, a state funded broadcaster, has by far surpassed all news and media agencies with its 24/7 coverage, widespread and extensive outreach, and even through monitoring social media and encouraging a new generation of local journalists.<sup>234</sup> The abovementioned forms of technological communications altogether have challenged limitations on the freedom of expression and transmitted the voices of the suppressed to the rest of the world.<sup>235</sup>

The virtual space also provided diverse opportunities for Arab women: it represented for them a virtual meeting place to come into contact with the outside world, eluding family control.<sup>236</sup> For instance, a historic female activist Siham Benseddrin, thanks to the online journal 'Kalima', played a key role in maintaining and spreading the spirit of resistance

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<sup>230</sup> M.B. Moussa, 'From Arab Street to Social Movements: Re-theorizing Collective Action and the Role of Social Media in the Arab Spring' in 'Westminster Papers in Communication and Culture: The role of social media in the Arab uprisings – past and present', M. Taki, L. Coretti, Volume 9, (2013), p. 49-51.

<sup>231</sup> D. Khoury, *supra* note 213.

<sup>232</sup> 'Anger on the streets of Cairo', The National, (14 June 2010), <https://www.thenational.ae/world/mena/anger-on-the-streets-of-cairo-1.578262>.

<sup>233</sup> R. Halaseh, *supra* note 206, p. 269.

<sup>234</sup> *Ibidem*.

<sup>235</sup> *Ibidem*.

<sup>236</sup> F.M. Corrao, *supra* note 11, pp. 131-132.

under the dictatorship of the Tunisian President Ben Ali.<sup>237</sup> Another activist from Egypt, the veiled blogger and supporter of the April 6 Youth Movement Asma Mahfuz used the web for political activity: on 18 January 2011 she called on the public to participate in Tahrir Square demonstration against the Mubarak's corrupt regime, demanding respect for human rights.<sup>238</sup>

The abovementioned social driving forces, including significant levels of inequality and a pervasive official corruption, an excessive youth bulge, high rates of unemployment, which is most noticeable among the college-educated, new generation media ensuring more open access to information helped the Arab population to realize the urgent need to fight for their rights and fueled the Arab Spring revolution.

### **3.2.2 Authoritarian capacity**

Exploring the Arab Spring phenomenon, analysts have followed the conventional wisdom, which concentrates on the power of autocratic regimes to preserve elite cohesion while at the same time suppressing challenges of the society. In this interpretation, authoritarian collapse is less related to the grievances, tactics or organization of popular protests and more to the top-down drawbacks of regimes themselves. In one such view of the Arab Spring, Goldstone has argued: 'Although such regimes often appear unshakable, they are actually highly vulnerable, because the very strategies they use to stay in power make them brittle, not resilient. It is no coincidence that although popular protests have shaken much of the Middle East, the only revolutions to succeed so far – those in Tunisia and Egypt – have been against modern sultans'.<sup>239</sup>

In other words, the major driving force behind the Arab Spring lies in the pre-existent structural deficiencies of the regimes themselves. Both the regimes of Tunisia and Egypt were gradually being eroded by their personalism and lack of effective institutional instruments for maintaining long- term internal cohesion among elites and power over

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<sup>237</sup> Ibidem.

<sup>238</sup> Ibidem.

<sup>239</sup> J. Goldstone, *supra* note 195, pp. 8–16.

populations. Nevertheless, as Goldstone admitted, this ‘degree of ... weakness is often visible only in retrospect,’ appearing after a regime has fallen in the face of popular challenges.<sup>240</sup> It becomes evident by many ways in which the MENA countries’ regimes, especially Egypt, received extraordinarily high marks in terms of their degree of ‘capacity.’ As stated by Tarek Masoud<sup>241</sup>, up to the troublesome year of 2011, Egypt was recognized particularly in academics as an ‘exemplar of something we called “durable authoritarianism” – a new type of modern dictatorship that had determined how to discipline the political, economic, and social forces that regularly did in autocracy’s slighter variants’.<sup>242</sup> The endurance of this type of dictatorship was based in an explanatory variable often used in studies of authoritarianism: the overarching quality of ‘authoritarian capacity.’ This variable involves three key elements: coercive capacity, political capacity and discretionary control over the economy.<sup>243</sup> Referring to all three criteria, the autocratic regimes of both Tunisia and Egypt have demonstrated high levels of strength, revealing the need to give greater accuracy to this approach.

The primary element embodies an effective internal security force, which increases a regime’s ‘coercive capacity, that is its ability to ‘prevent or crack down on opposition protest’.<sup>244</sup> Both Egypt and Tunisia, were marked for having a powerful and effective coercive apparatus. In their analysis of the coercive apparatuses of these Middle Eastern regimes, Bellin<sup>245</sup> and Brownlee<sup>246</sup> underlined their exceptional ‘robustness’ and

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<sup>240</sup> Ivi, pp. 8-16.

<sup>241</sup> T. Masoud, ‘The upheavals in Egypt and Tunisia: The road to (and from) Liberation Square’, *Journal of Democracy*, (2011), 22(3): pp. 20–34.

<sup>242</sup> Ivi, pp. 22-34.

<sup>243</sup> L. Way, ‘The real causes of the color revolutions’, *Journal of Democracy* (2008), 19(3): pp. 55–69

<sup>244</sup> S. Levitsky, L. Way ‘Competitive Authoritarianism: Hybrid Regimes after the Cold War’, New York: Cambridge University Press, (2010), p. 57.

<sup>245</sup> E. Bellin, ‘The Robustness of Authoritarianism in the Middle East: Exceptionalism in Comparative Perspective’, *Comparative Politics*, (2004), 36(2): pp. 139–157.

<sup>246</sup> J. Brownlee, ‘Unrequited moderation: Credible commitments and state repression in Egypt’, *Studies in Comparative International Development*, (2008), 45(4): pp. 468–489.

considered such capacity to be a key reason for the outstanding resilience of autocracies in the region.<sup>247</sup> During the year 2011, Egypt in particular was supplied with roughly US\$1.3 billion in annual military aid from the USA, its internal security forces resulted a surplus of 1.4 million personnel, and these forces had repeatedly proved their willingness and capability to suppress at all costs regime opponents, starting from moderate politicians to radical militants.<sup>248</sup>

However, apart from the impressive capability to harass and intimidate regimes' adversaries, as well as crack downs on protesters found in both regimes, a lower-intensity form of repression and control of media took place in discussions of the Arab Spring revolts. Evidently, new social media platforms, such as Twitter and Facebook, played a critical role in enabling opposition activists in these two MENA regimes to express publicly discontent of their respective governments and to organize massive anti-regime rallies. For instance, in Tunisia and Egypt, Internet infiltration rates burst from 0.7 percent and 1.0 percent, respectively, in 2000 to 21.1 percent and 33.4 percent, respectively, in 2009. As correctly mentioned by Lynch<sup>249</sup> and Morozov,<sup>250</sup> Internet technology and social media currently represent a double-edged sword to opposition activists in authoritarian environments. These technologies do not only provide new opportunities for anti-regime protestors, but can also help authoritarian regimes to monitor, silence, and even distract their counterparts, as well as their supporters.<sup>251</sup>

Under a more detailed assessment, the media-control capacity of various autocracies is complex— particularly during an era of 'authoritarian learning', where autocratic regimes quite fast adopt the best practices for managing unrest from their nondemocratic

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<sup>248</sup> S. Cook, 'Political instability in Egypt', Council on Foreign Relations Contingency Planning Memorandum 4, August. New York and Washington, DC: Council on Foreign Relations Press, (2009), p.3

<sup>249</sup> M. Lynch, 'After Egypt: The limits and promise of online challenges to the authoritarian Arab state', *Perspectives on Politics*, (2011), 9(2): 301–310.

<sup>250</sup> E. Morozov, 'The Net Delusion', Perseus Books, (2011).

<sup>251</sup> *Ibidem*; M. Lynch, *supra* note 142, pp.305-306.

adversaries.<sup>252</sup> After all, the regimes in Tunisia and Egypt were both prominent for their extensive classifying of network content, blocking of opposition websites, revocation of press licenses for media channels that broadcasted and published politically sensitive news, and use of the Internet and social media websites to conduct observation of political and social activists.<sup>253</sup> Evidently, in the long run all these actions were clearly insufficient in preventing innovative activists from using these technologies to organize anti-regime collective actions in Tunisia and Egypt, and finally to overthrow the dictators.

The second element of authoritarian capacity is a regime's discretionary control over the economy. In a large number of autocratic regimes, it becomes very important to fund a robust and professionally trained security apparatus, as well as to supply rents that can be distributed to adherents in exchange for their lasting loyalty.<sup>254</sup> As a rule, this reduces the risk that private economic interests might provide much-needed financial support to potential regime counterparts. This government control over economic resources limits the demands the state must make in obtaining revenue from the population and enables the regime to recompense its supporters, buy off potential challengers and famish opponents.<sup>255</sup>

Considering the distribution of economic resources within the MENA area, it must first be noted that among chief oil-exporting countries, such as Saudi Arabia, Iran, the United Arab Emirates, Kuwait, Qatar, and Bahrain, no autocratic regime collapsed during the troublesome year of 2011. Libya, which was overthrown in large part with the help of NATO military intervention, stands as the only exception.<sup>256</sup> Obviously, an economy that

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<sup>252</sup> V. Silitski, 'Contagion deterred: Pre-emptive authoritarianism in the former Soviet Union (the case of Belarus)', CDDRL Working Paper No. 66, (2006), [http://iis-db.stanford.edu/pubs/21152/Silitski\\_No\\_66.pdf](http://iis-db.stanford.edu/pubs/21152/Silitski_No_66.pdf).

<sup>253</sup> R. Deibert and others, 'Access Controlled: The Shaping Power, Rights and Rule in Cyberspace', Cambridge, MA: MIT Press, (2010), pp. 537-544, pp. 581-588.

<sup>254</sup> L. Way, 'The Real Causes of the Colour Revolutions', *Journal of Democracy*, (2008), 19(3): pp. 55–69.

<sup>255</sup> Ivi, pp. 64-65.

<sup>256</sup> M. Ross, 'Will oil drown the Arab Spring?', *Foreign Affairs*, (2011), <http://www.foreignaffairs.com/articles/68200/michael-l-ross/will-oil-drown-the-arab-spring>.

is heavily dependent on oil exports usually offers major benefits to an autocratic ruler, as is noted by proponents of the ‘resource curse’ hypothesis. At that same time, those countries most strongly affected by Arab Spring protests were among the poorest in the MENA region in terms of oil resources.

Despite the fact that authoritarian regimes of both Egypt and Tunisia lacked the oil reserves of many of their neighbors, they continued to actively maintain control over their economies. While they implemented some liberalizing reforms, these regimes by and large had firmly maintained their discretionary authority over the economy,<sup>257</sup> which principally contributed to the creation of a ‘rent-seeking urban bourgeoisie and landed elite with no interest in democracy or political participation’.<sup>258</sup>

The third key element that supports the endurance of authoritarian rule is the existence of a powerful, highly institutionalized political party.<sup>259</sup> Numerous observations expressed immediately after the Arab Spring argued that the ‘sultanistic’ nature of authoritarian regime in Tunisia and Egypt, made these regimes vulnerable to domestic divisions and breakdowns.<sup>260</sup> Looking at the large-N empirical work of Geddes<sup>261</sup> and Brownlee<sup>262</sup>, it is clearly seen that single-party regimes have greater surpassed their counterparts in durability. Apparently, if Zine El-Abidine Ben Ali and Hosni Mubarak ruled in respective countries as personal fiefdoms, relying predominantly on kinsmen and allies for their

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<sup>257</sup> E. Bellin, p. 139.

<sup>258</sup> S. King, ‘Sustaining Authoritarianism in the Middle East and North Africa’, *Political Science Quarterly*, (2007), 122(3): p. 434.

<sup>259</sup> J. Brownlee, ‘Authoritarianism in an Age of Democracy’, Cambridge: Cambridge University Press, (2007), pp. 42-43; B. Magaloni, ‘Credible power-sharing and the longevity of authoritarian rule’, *Comparative Political Studies* (2008), 41(4–5): pp. 715–742.

<sup>260</sup> J. Goldstone, ‘Understanding the revolutions of 2011’, *Foreign Affairs*, (2011) 90(3): pp. 8–16.

<sup>261</sup> B. Geddes, ‘What do we know about democratization after twenty years?’, *Annual Review of Political Science*, (1999), 2: pp. 131-132.

<sup>262</sup> B. Magaloni, *supra* note 152.

support; in the end this made them much more exposed to challenges of the population and internal defections.

However, the structure of institutional capacity among these two cases is not so transparent. A superficial analysis of research on Tunisia and Egypt shows that up to 2011 scholars of authoritarianism believed these countries were maintained by effective institutional apparatuses, varying from hegemonic parties to democratic elections. Such scholars as Brownlee,<sup>263</sup> King,<sup>264</sup> Lust<sup>265</sup> and Blaydes<sup>266</sup> determined political institutions in Tunisia and Egypt (i.e. hegemonic party systems, legislatures and elections) as dangerous regime backings that helped authoritarians in managing state internal divisions and isolating potential challengers. Egypt and Tunisia are instructive examples in a sense that the fragility of these seemingly durable autocracies only became evident after they were challenged by coordinated, national-level opposition movements. Subsequently, studies on authoritarian resilience demonstrate not only whether a regime is strong or weak in terms of capacity, but whether components of the regime tend to facilitate or prevent national-level conflict from emerging in the first place.

### **3.2.3 Centralization of power and modes of contention**

The discussion of authoritarianism in a deeper context has shown that scholars have always tended to focus on elite-level factors, such as competition between majority and minority parties within regimes<sup>267</sup> and to disregard dissent actors as independent agents of popular mobilization in their own right. As formulated by McGlinchey: ‘The existing

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<sup>263</sup> Ibidem.

<sup>264</sup> S. King, p. 433-459.

<sup>265</sup> E. Lust, ‘Competitive Clientelism in the Middle East’, *Journal of Democracy*, (2009), 20(3): pp. 122–135.

<sup>266</sup> L. Blaydes, ‘Elections and Distributive Politics in Mubarak’s Egypt’, New York: Cambridge University Press, (2011), pp. 2-5.

<sup>267</sup> B. Geddes, ‘What do we know about democratization after twenty years?’, *Annual Review of Political Science* (1999), 2: pp. 115–144.

literature, perhaps understandably given its focus on institutional weakness, [has] overemphasized state variables while underemphasizing the causal role of social opposition movements.’<sup>268</sup> Sharing a similar view, Bunce and Wolchik have been ‘extremely skeptical that structural factors alone’ can describe popular revolutions and underline the need for an integrated method that appreciates the fundamental role of popular opponents as agents of authoritarian collapse: ‘Put simply, structure, agency, and process are all important’.<sup>269</sup>

First of all, leaving social opposition movements outside their analyses and concentrating on authoritarian countries as entities that can be characterized as having high or low ‘strength’ or ‘capacity’, scholars of authoritarianism have neglected an important consideration that has gained crucial importance in the equivalent sub analysis of contentious politics: the mode in which the state and other political surroundings can perform as ‘structures of political opportunities’ that create certain ‘constraints or open avenues’ for various kinds of individual and collective political actions, highly affecting the way of their political behavior.<sup>270</sup> Seemingly, certain arrangements of opportunities might alternatively enable or impede the development of sustained, large-scale, high-participant forms of popular contention seen on the streets of Tunis and Cairo’s Tahrir Square in 2011.

Secondly, approaching popular protests as residual phenomena that derive from authoritarian weakness has signified that researchers have often failed to identify different modes of popular contention that tend to appear in these various political opportunity structures. As best communicated in the works of Tarrow and Tilly, parochial forms of contention are created around material and issue-specific discontents, lack coordinated and broad coalitions of social agents who are based in diverse societal and economic

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<sup>268</sup> E. McGlinchey, ‘Central Asian protest movements: Social forces or state resources?’, in A. Wooden and C. Stefes (eds), ‘The Politics of Transition in Central Asia and the Caucasus’, London: Routledge, pp. 124–125.

<sup>269</sup> V. Bunce, S. Wolchik, ‘Getting real about real causes’, *Journal of Democracy* (2009), 20(1): p. 70.

<sup>270</sup> P. Eisinger, ‘The conditions of protest behavior in American cities’, *American Political Science Review*, (1973), 67(1): pp. 11–12.



sectors and geographic areas and target in particular local officials or layers of the state. On the other hand, national forms of contention or movements are framed in general and inclusive terms that include outside groups, coordinated across many previously isolated sites and social actors united against a single object, such as a national government or ruler.<sup>271</sup>

These nationally coordinated movements can rapidly overthrow even the highest capacity regimes, for instance, the Shah's Iran, the Philippines under Marcos, regimes across Central and Eastern Europe and even the seemingly stable Ben Ali and Murabak authoritarianisms in Egypt and Tunisia, leading to elite fragmentation and further collapse. A study that treats the state as a structure of political opportunities for certain forms of popular contention would begin by detecting common features of these regimes and their respective state structures that might enable popular claimants rapidly to mobilize diverse fragments of society in concerted action against their respective governments. One important feature that immediately comes to attention is the extraordinarily high degree of state centralization in both Egypt and Tunisia. This centralization signifies the allocation of 'responsibility for planning, management and resource raising and allocation' between 'the central government and its agencies [and] the lower levels of government' and, of greatest importance in autocratic regimes, the distribution of power over a state's coercive resources and discretion over judgements related to the suppression of popular adversaries.<sup>272</sup>

However, there is a growing number of countries around the world experimenting with dramatic decentralizing reforms.<sup>273</sup> This shift towards greater decentralization has

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<sup>271</sup> C. Tilly, S. Tarrow, 'Contentious Politics', Boulder, CO: Paradigm, (2007), pp. 31-34.

<sup>272</sup> R. Work, 'Overview of decentralization worldwide: A stepping stone to improved governance and human development', in: 2nd International Conference on Decentralization, Manila, Philippines, (2002), p. 5.

<sup>273</sup> T. Falleti, 'Decentralization and Subnational Politics in Latin America', Cambridge University Press, (2010), pp. 6-7.

extended to non-democracies, which, according to World Bank (2011) data,<sup>274</sup> distributed an average of 14.9 percent of all government expenditure at the sub-national level in the 1970s and 1980s, a number that poured in the 1990s to 32.8 percent by 1999. While research on the issue of centralization and decentralization has been far-reaching on the global level, driven by the issue's emphasis on international financial institutions such as the World Bank and the International Monetary Fund, it has been quite restricted in the MENA region. The existing analysis, mainly on subjects of development and governance, demonstrates an extremely high level of centralization in many MENA countries, including Egypt and Tunisia.<sup>275</sup> This reflects the policy choices made by MENA states, which unlike many countries in Latin America, Africa, East Asia, and Eastern Europe, did not implement the decentralizing reforms encouraged by the World Bank and other international financial institutions in the 1980s and 1990s.<sup>276</sup>

Looking at available data on subnational shares of public expenditure and revenue, intergovernmental transfers, and the distribution of authority over personnel management and internal security forces, it becomes clear that researchers in the mid- to late 2000s defined the cases of Tunisia and Egypt as extraordinarily centralized in terms of operative and coercive state power.<sup>277</sup> In fact, conducting a research in 2006, Amin

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<sup>274</sup> World Bank, 'Fiscal decentralization indicators', (2011),

<http://www1.worldbank.org/publicsector/decentralization/fiscalindicators.htm>.

<sup>275</sup> K. Amin, R. Ebel, 'Egyptian intergovernmental relations and fiscal decentralization diagnostics and an agenda for reform', World Bank Policy Note, Egypt Public Expenditure Review, (2006), [http://lgi.osi.hu/cimg/0/1/3/2/1/Egypt\\_Decentralization\\_World\\_Bank\\_2006\\_Ebel\\_Amin.pdf](http://lgi.osi.hu/cimg/0/1/3/2/1/Egypt_Decentralization_World_Bank_2006_Ebel_Amin.pdf).

MS. Tosun, S.Yilmaz, 'Centralization, decentralization, and conflict in the Middle East and North Africa', World Bank Policy Research Working Paper 4774, World Bank, (2003).

<sup>276</sup> World Bank, 'Decentralization in client countries', (2008),

[http://siteresources.worldbank.org/EXTDECENTR/Resources/decentralization\\_eval.pdf](http://siteresources.worldbank.org/EXTDECENTR/Resources/decentralization_eval.pdf).

<sup>277</sup> J. Boex, 'Democratization in Egypt: The potential role of decentralization', Urban Institute Center on International Development and Governance Policy Brief, (2012),

<http://www.urban.org/uploadedpdf/412301-Democratization-in-Egypt.pdf>;

and Ebel noted that ‘one cannot [even] track how Egypt compares with other countries because all spending is carried out by central entities; thus expenditure flow data gets reported by ministry sector rather than by function’.<sup>278</sup> In their overall analysis of the Egyptian state, these authors particularly described Egypt as having ‘one of the most centralized public sector systems in the world’.<sup>279</sup>

These conclusions suggest that the similarity in state centralization between Tunisia and Egypt explains why popular protests provoked authoritarian collapse in 2011. In both cases, authoritarian regimes have revealed high levels of capacity: they have had powerful and efficient coercive apparatuses, highly institutionalized governing parties and equivalent levels of discretionary control over the economy. These factors provided academics with the conclusion that both regimes were extraordinarily durable – an assessment that has quickly fell to pieces with the fall of Ben Ali and Mubarak. Furthermore, the two regimes have combatted with the problem of social instability, which was driven mostly by high levels of corruption, inequality and youth unemployment. Finally, fragmented outbreaks of social unrest converted into coordinated protests and persisted on the national level in both Egypt and Tunisia that brought both regimes to further collapse.

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MS.Tosun MS, S. Yilmaz, pp.11-12; United Nations Development Program, ‘Program on Governance in the Arab Region’, Country theme, local government, (2009), <http://www.pogar.org/>.

<sup>278</sup> K. Amin, R. Ebel, p. 3.

<sup>279</sup> Ivi, p. 9.

## **4 Framework for advancing Constitutional Legitimacy in Transition states**

In the late XX and XXI centuries, countries switching from conflict to stability have often made-up new constitutions as part of their political transition. Correspondingly, modern constitutionalism has often followed the twofold purposes of creating a covenant of stipulated rights among different peoples and generating a process for bringing a political transition to an end.<sup>280</sup> Throughout the Arab Spring revolts, societies of all the MENA region protested against their rulers because of long-lasting economic and political discontent and anger over state abuse and pervasive corruption. Demonstrators pursued the removal of authoritarian rulers and the formation of new constitutions as part of the political transition.

In January 2014, three years after the beginning of the Arab Spring, Tunisia and Egypt adopted new constitutions. Throughout their constitution-making processes, Tunisia and Egypt combatted with a common problem- how to balance the interests of secular and left-oriented parties that had historically exercised control over the government and its institutions. Although having faced the common challenge, the constitution-drafting processes evolved quite differently in Tunisia and Egypt. In Tunisia, despite the fact that the constitution-drafting process was not without a conflict, it led to a consensus text that consisted of public input. The drafting process in Egypt, on the contrary, was ensured by consecutive, closed, nonpublic bodies who did not produce consensus documents and whose processes augmented already existing divisions in Egyptian society. While both constitutions embrace provisions that broadly incorporate international human rights law principles, the constitution of Tunisia includes more powerful enforcement mechanism for the rights set out in the constitution.

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<sup>280</sup> V. Hart, 'Constitution-Making and the Transformation of Conflict', *Peace and Change - a Journal of Peace Research*, (2002). (The author explains the importance of constitutions and the process of constitution-making to accomplishing the formation of a new polity).

According to Gluck and Brandt,<sup>281</sup> there are three markers of the constitutional legitimacy present in the analytical framework of comparative constitutional theory.<sup>282</sup> The first one is called processual legitimacy, an inclusive drafting and ratification process; the second is substantive legitimacy through the incorporation of international human rights law principles; the third sort of legitimacy is the applicatory one, ensured through the inclusion of institutional apparatuses for the fair and complete implementation of constitutional protections.<sup>283</sup>

#### **4.1 Processual Legitimacy: Broadly participatory drafting process**

The participatory constitution-making can be also defined as an inclusive and broadly participatory process that is a symbol of legitimacy for contemporary constitutions.<sup>284</sup> It underlines the citizens' inclusion and "participation" in the drafting of constitutions.<sup>285</sup> Already in the 1990s a trend towards greater involvement, citizen participation and transparency has appeared in the constitution-making rule.<sup>286</sup> Numerous academics have supported the implementation of participatory constitution-making in post conflict and transitional countries in order to resolve long-lasting conflict by involving a broad range

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<sup>281</sup> Jason Gluck is a senior political affairs officer and constitutional focal point for the United Nations Department of Political Affairs. Michele Brandt is the founder and director of Inter-peace's Constitution-Making for Peace Programme.

<sup>282</sup> J. Gluck, M. Brandt, 'Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring', United States Institute of Peace, (2015).

<sup>283</sup> Ibidem.

<sup>284</sup> A.L. Bannon, 'Designing a Constitution-Drafting Process: Lessons from Kenya', 116 Yale Law Journal, (2007), pp. 1824-1827; A.M. Banks, 'Expanding Participation in Constitution Making: Challenges and Opportunities', Wm. and Mary Law Review, (2008), pp.1043-1046; K.L. Cope, 'The Intermestic Constitution: Lessons from the World's Newest Nation', 53 Virginia Journal of International Law, (2013), (reflection on the influence of transnational and domestic forces on constitutional rights and relative provisions), p. 667.

<sup>285</sup> A.M. Banks, p. 1046.

<sup>286</sup> J. Gluck, M. Brandt, *supra* note 175.

of groupings in the process of drafting the constitution.<sup>287</sup> Such model of constitution-drafting process was chosen by many transition leaders, as in South Africa, Uganda, Papua New Guinea, Thailand, and Brazil, with different outcomes though. Among core reasons for this decision were: encourage consensus on fundamental national norms, encompass the aspirations of the formerly marginalized societal groups, increase the constitution makers' understanding of citizens' grievances; break with autocratic past by founding a basis for democratic principles and make the constitution and future governance more legitimate in the eyes of the people and the world.<sup>288</sup>

The idea of internal and external participatory structures helps to explain the kind of bodies and processes used in post-conflict inclusive constitution-making.<sup>289</sup> While external models prevail where the government nominates members of the drafting body through written submissions and public conferences,<sup>290</sup> internal systems allow citizens to participate directly or through representation in the constitution-drafting process.<sup>291</sup>

#### **4.1.1 Constitution Drafting Process: the case of Tunisia**

During the transition process in Tunisia, a strong divergence between historically powerful secular institutional actors and the Islamist political movement was a major issue. The revolts that brought to Tunisia's transition preceded Egypt's by a few months. In point of fact, the Arab Spring revolutions are considered to have started in Tunisia on December 17, 2010, when the population went out on the streets after the self-immolation of Mohamed Bouazizi.<sup>292</sup> The man took a last stand defending his dignity by demonstrating that he preferred burning himself to death rather than living a life of

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<sup>287</sup> A.M. Banks, p.1046; A.L. Bannon, pp. 1826-1827.

<sup>288</sup> J. Gluck, M. Brandt, *supra* note 175, pp. 5-6.

<sup>289</sup> A.M. Banks, 'Challenging Political Boundaries in Post-Conflict States', *University of Pennsylvania Journal of International Law*, (2007), pp. 105, 108.

<sup>290</sup> *Ivi*, pp. 108-109.

<sup>291</sup> *Ivi*, p. 109.

<sup>292</sup> M.A. Hadi, 'The Second Arab Awakening: A Historical Background', *PASSIA*, (2013), p. 29.

misery. His ‘jihad’ was an illustration of personal despair and suffering and his action presented a new ‘culture of struggle’, which meant achieving a better life.<sup>293</sup>

On 14 January 2011, the autocratic President Ben Ali and his family hastily fled Tunisia following the mass rallies that spread throughout the country requiring an end to his dictatorship.<sup>294</sup> However, the political police and the security institution continued to confront the society and hold back the judicial system.<sup>295</sup> Moreover, despite the breakdown of the ruling party, its tools of information remained active to make an effort and organize a counter revolution.<sup>296</sup>

The Tunisian population established a constituent assembly to start the constitution-drafting process, create democratic institutions and organize free elections. One of the returnees from exile was Rashid Ghannouchi- an outstanding Islamist leader who promoted a new idea of political Islam that consisted of having ‘a civil and not a religious state, a democratic and not a police state, a pluralistic state and not a single party state’.<sup>297</sup> He also confirmed his commitment concerning the Palestinian question declaring that ‘The people want to free Palestine’ and approved pan- Arab nationalist slogans, such as ‘The people want to reunite the Arabs’, by this asserting the demands for Arab sovereignty and national independence under the motto ‘The people want to cancel the agreements’.<sup>298</sup>

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<sup>293</sup> Ibidem.

<sup>294</sup> ‘Tunisia: Ex-President Ben Ali Flees to Saudi Arabia’, BBC, (2011), <http://www.bbc.com/news/world-africa-12198106>.

<sup>295</sup> M.A. Hadi, *supra* note 185, pp. 29-30.

<sup>296</sup> Ibidem.

<sup>297</sup> A. El-Sayed, ‘Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Egypt and Tunisia’, 2 Electronic Journal: Islamic and Middle Eastern Law, (2014), p. 39.

<sup>298</sup> M.A. Hadi, *supra* note 185, p. 29.

In order to fill the vacuum after Ben Ali's departure, Tunisian Prime Minister Mohamed Ghannouchi proclaimed that he would operate as interim President in accordance with Article 56 of the 1959 Tunisian Constitution, which specified that 'in case of temporary disability, the President may, by decree, delegate his powers to the Prime Minister'.<sup>299</sup> The Tunisian Constitutional Council interfered and declared that since Ben Ali's departure was permanent and he hadn't left any delegation, Article 57 of the Tunisian Constitution was the applicable provision. The article provided the following:

'Should the office of President of the Republic become vacant because of death, resignation, or absolute disability, ... the President of the Chamber of Advisors and... the president of the Chamber of Deputies... shall immediately be vested with the functions of interim president of the Republic for a period ranging from 45 to 60 days'.<sup>300</sup>

Subsequently, President of the Chamber of Deputies Fouad Mebazaa became president and Prime Minister Mohamed Ghannouchi remained at his previous position.<sup>301</sup> Following the breakdown of Ben Ali, enduring revolts brought about the step down of all of his former ministers and the dismissal of the Parliament.<sup>302</sup> Thus, Ghannouchi was constrained to resign from his post of Prime Minister.<sup>303</sup> Interim President Mebazaa appointed Beji Caid-Essebsi as new Prime Minister. In his turn, Caid-Essebsi was a veteran politician from the era of Tunisia's first post-colonial head of state - President

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<sup>299</sup> Ivi, p. 39.

<sup>300</sup> Constitution of the Republic of Tunisia, 1 June 1959, Article 57, as amended, 8 April 1976, 25 July 1988, 27 October 1997, 1 June 2002, 28 July 2008. (Translated from Arabic to English).

<sup>301</sup> M. Ottaway, 'Democratic Transitions and the Problem of Power', Wilsoncenter.org, (2014), p. 4. (The Chamber of Deputies was the lower house of the Parliament of Tunisia).

<sup>302</sup> 'Tunisia: Ex-President Ben Ali Flees to Saudi Arabia', BBC (January 15, 2011), <http://www.bbc.com/news/world-africa-12198106>.

<sup>303</sup> K. Willsher, 'Tunisian Prime Minister Mohamed Ghannouchi Resides amid Unrest', Guardian, (February 27, 2011), <http://www.theguardian.com/world/2011/feb/27/tunisian-prime-minister-ghannouchi-resigns>.



Habib Bourguiba.<sup>304</sup> The transitional government was composed of ministers unaffiliated with Ben Ali's prior party.<sup>305</sup> It finally appointed an electoral commission to organize the election of a constituent assembly, whose main task would be to draft a new Tunisian constitution.<sup>306</sup>

#### **4.1.1.1 Brief Analysis of the Constitution of 1959**

The independent state of Tunisia appeared with the signing of the Franco-Tunisian Protocol of 20 March 1956, thus ending 75 years of the Protectorate granted to France by the Treaty of Bardo in 1881 and the corresponding La Marsa Convention two years later.<sup>307</sup> On 25 March 1956, a Constituent Assembly was elected in order to draft a new national constitution. After numerous meetings at Bardo Palace, the Assembly finally approved the first Constitution of independent Tunisia.<sup>308</sup> It was signed by the Head of State, President Habib Bourguiba and was proclaimed a basic law of the Republic of Tunisia.

The objective of the new Constitution was to reinforce the rule of Habib Bourguiba, the nationalist leader who led Tunisia to independence. The document—amended in 1988, 2002 and 2005—also stressed the influence of Islam, placing Tunisia within the Great Arab Community and stating that Arabic is the national language. The Constitution vested

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<sup>304</sup> B.C. Essebsi, World Economic Forum,

<http://www.weforum.org/contributors/beji-caid-essebsi>.

<sup>305</sup> 'Ben Ali Allies Dropped from Cabinet', Al Jazeera, (January 28, 2011),

<https://www.aljazeera.com/news/middleeast/2011/01/201112720356405308.html>.

<sup>306</sup> The International Law Republican Institute, 'Tunisia Constituent Assembly Elections', Election Observation Mission Final Report 8, (October 23, 2011), <http://www.iri.org/sites/default/files/Tunisia%202011%20Constituent%20Assembly%20Elections.pdf>.

<sup>307</sup> Middle East Institute, 'The Tunisian Constitution', Middle East Journal, Vol. 13, No. 4 (1959), p.443-448,

<https://www.jstor.org/stable/4323169>.

<sup>308</sup> Ibidem.

executive powers in a President elected by a direct vote for a five-year term and assisted by a Prime Minister and a Cabinet. The Prime Minister was appointed by the President, while the other members of the Cabinet were appointed by the President on the recommendation of the Prime Minister.

The legislature encompassed a Chamber of Deputies and the Chamber of Advisors, which was created by constitutional amendment in 2002. Deputies were elected by direct vote to a five-year term. Half of the Advisors were elected from the regional and local level, one third were elected at the national level from among employers, farmers, and workers, and the remaining Advisors were appointed by the President from important national figures. Together, the two houses could, by an absolute majority, authorize the President to issue decrees and pass organic laws as indicated in the Constitution. Ordinary laws were passed by a simple majority of the two houses but were promulgated by the President.

The highest judicial authorities in Tunisia under this Constitution were the High Court and the Constitutional Council. The High Court was in charge of hearing cases related to high treason committed by government officials. The Constitutional Council, in its turn, had the authority of constitutional review.

#### **4.1.1.2 Ben Achour Commission**

The Ghannouchi's government set up the Higher Commission for Political Reform with the aim to amend the national constitution before new Parliamentary elections took place.<sup>309</sup> The Commission was led by Yadh Ben Achour who was a former member of the Tunisian Constitutional Council that resigned in protest against President Ben Ali.<sup>310</sup> Moreover, external actors also required a role in the transition process and established the National Council for the Protection of the Revolution in February 2011, the so-called 'National Council'- an organization that included twenty-eight members together with a

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<sup>309</sup> M. Ottaway, *supra* note 194, p. 5.

<sup>310</sup> *Ibidem*.

labour union federation, the bar association, several non-governmental organizations and centrist, leftists and Arab nationalist parties.<sup>311</sup>

Holding his new post of Prime Minister, Essebsi asked Ben Achour to unite the Higher Commission for Political Reform and the National Council, and by doing this, to create one organization, encouraging the creation of the Higher Authority for the Realization of the Objectives of the Revolution, Political Reform and Democratic Transition.<sup>312</sup> The formed group became known as the 'Ben Achour Commission'.<sup>313</sup> Initially, it was composed of 72 members and gradually expanded to 155 members representing inter alia, trade unions, political parties, regional organizations, civil society representatives, youth and the Tunisian diaspora.<sup>314</sup>

On 23 March 2011, interim President Mebazaa issued Presidential decree 2011-2014 that abolished the Tunisian Constitution of 1959 and designed interim governance authorities.<sup>315</sup> Consequently, both houses of Parliament were dissolved, and the interim President was granted the general legislative power until the appointment of a national constituent assembly.<sup>316</sup> On April 6, by presidential decree, Mebazaa vested the Ben Achour Commission with a legal status and delegated writing the election law and organizing the election of the national constituent assembly to it.<sup>317</sup> The commission then voted on a number of documents, the first of which referred to procedures for electing the constituent assembly. The elected assembly would then draft a constitution, which would express whether Tunisia would have a presidential, semi-presidential or parliamentary

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<sup>311</sup> Ibidem.

<sup>312</sup> Ibidem.

<sup>313</sup> A. Stepan, 'Tunisia's Transition and the Twin Tolerations', Journal of Democracy, Volume 23, Number 2, Johns Hopkins University Press, (2012), p. 92.

<sup>314</sup> M. Ottaway, *supra* note 194, p.4.

<sup>315</sup> Decree -law n° 2011-2014, 23 March 2011, Tunisia (Translated from Arabic to English).

<sup>316</sup> Ivi, Articles 2, Article 4, Article 8.

<sup>317</sup> M. Ottaway, *supra* note 194, p. 4.

system.<sup>318</sup> The Commission then agreed that the Constituent Assembly would possess powers like those of a parliament, in that it would form a government that would be responsible to the Assembly and be subject to its vote of no confidence.<sup>319</sup> Furthermore, the Ben Achour Commission defined the electoral system for the constituent assembly- it would be one of proportional representation. Moreover, in order to ensure strong participation of women in the constitution- drafting process, it was agreed to achieve male-female parity in candidates by having every other candidate on the party list to be a woman.<sup>320</sup>

For the first time, Tunisia's independent electoral commission was created, and various international observers were invited to participate in the election process with the aim to increase public confidence in the electoral results.<sup>321</sup> The former party of Ben Ali was banned by the commission, although former party members were given authorisation to take part in the election through other parties or new parties that they might establish.<sup>322</sup> The commission's decisions revealed the consensus of a large group of Tunisians and on 11 April 2011 around 155 members of the commission voted for the package of reform procedures, with the exception of two members who abstained and two members who left the session.<sup>323</sup> It is important to note that the inclusive and wide-ranging membership of the Ben Achour Commission formed its decision-making and finally resulted in a more transparent and participatory transition. It stands in complete contrast with the situation in neighbouring Egypt, where dictator Hosni Mubarak fell shortly after Ben Ali but was replaced not by a transparent civilian body, but rather by the Supreme Council of the

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<sup>318</sup> A. Stepan, *supra* note 206, p. 92.

<sup>319</sup> *Ivi*, p. 93.

<sup>320</sup> *Ibidem*. (Stating that the system of proportional representation brought to a more inclusive result with the Islamist Ennadha party winning about 40 per cent of the constituent assembly seats rather than 90 per cent, as would have occurred under a 'first-past-the-post' single-member electoral system).

<sup>321</sup> *Ibidem*.

<sup>322</sup> *Ibidem*.

<sup>323</sup> *Ivi*, pp. 93-94.

Armed Forces (SCAF), with its desire for attempting to accomplish fundamental political change by means of unilateral statements. This led to decisions by the SCAF, such as originally refusing to authorise the presence of international election observers, that would have been unlikely, if diverse civil society organizations had taken part in the decision-making process concerning the democratic transition.<sup>324</sup>

#### **4.1.1.3 The National Constituent Assembly**

The new Tunisian Constitution was adopted by the constituent assembly and this distinguishes it from the experience of Egypt, where the process of the constitution-making went through the national referendum. In case of Tunisia, citizens obtained the opportunity to influence the constitution by directly electing the representatives of the constitution-drafting body and by taking part in a public review process of the draft constitution. On 23 October 2011, the National Constituent Assembly ('NCA') was elected.<sup>325</sup> With the help of the proportional list voting system, 217 representatives were elected to the body.<sup>326</sup> The popular turnout for the election marked seventy per cent of eligible voters and moderate Islamic party Ennahda attained around forty-one per cent of the seats in the NCA, which was a plurality.<sup>327</sup> According to the party list rules, all the political parties were required to include women in their lists and in the end forty-nine women were elected to the assembly that signifies around twenty-five per cent of the body.<sup>328</sup> Ennahda formed an alliance with the center left secular party Ettakatol and with the left-leaning nationalist party Congress for the Republic in order to create the first

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<sup>324</sup> Ibidem, p. 93.

<sup>325</sup> B. Proctor, I.B. Moussa, 'The Tunisian Constituent Assembly's By-Laws: A Brief Analysis', International Law Institute for Democracy and Electoral Assistance, (2012), <http://www.idea.int/publications/tunisian-constituent-assemblies-by-laws/loader.cfm?csModule=security/getfile&pageid=56635>.

<sup>326</sup> Ivi, p. 11, p. 34.

<sup>327</sup> Ibidem.

<sup>328</sup> D. Pickard, 'How Well Did Women Really Fare in Tunisia's Elections', Power and Policy, (2011), <http://www.powerandpolicy.com/2011/12/06/how-well-did-women-really-fare-in-tunisia%E2%80%99s-elections/#.VT8CqSHBzGc>.

transition government under the leader of the winning party and Prime Minister, Hamadi Jebali .<sup>329</sup>

The NCA played a double role: it was functioning as a legislative authority and at the same time as the constitution-drafting body. On December 16, 2011, the NCA issued Constitutional Act Number 2011-2016, the so-called ‘interim constitution’, identifying provisional authorities for the country until the time a new constitution is approved. One-year term was provided to the NCA to accomplish its task, and already in August 2012 a draft version of the constitution was created and consequently released for discussion.<sup>330</sup>

One of the most controversial issues to be resolved by the assembly was the status the sharia law should hold in the new constitution.<sup>331</sup> Despite the Tunisian Constitution of 1959 was a secular document, Islamist groups represented a large part of the assembly.<sup>332</sup> In Spring 2012, the national debate centered on the role of the religion in the state and whether the sharia law should be cited in the Constitution. Ennahda’s internal draft text specified that sharia law would be a ‘source among sources’ of Tunisian legislation. Such a contradictory statement provoked an upheaval in the Tunisian political landscape and throughout the society. Although, only few members of Ennahda really had intention to implement the shari’a in the Constitution and the majority only wanted to discuss this issue- an opportunity Ennahda never had before- politicians and ordinary citizens

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<sup>329</sup> M. Ottaway, *supra* note 194, pp. 5-6.

<sup>330</sup> K. Zoglin, ‘Tunisia at a Crossroads: Drafting a New Constitution’, American Society of International Law, (2013),

<http://www.asil.org/insights/volume/17/issue/18/tunisia-crossroads-drafting-new-constitution>.

<sup>331</sup> B. Daragahi, ‘Term Used for Women in Tunisia’s Draft Constitution Ignites Debate, Protests’, Washington Post, (August 16, 2012),

[http://articles.washingtonpost.com/2012-08-16/world/35492683\\_1\\_ennahdha-officials-draft-constitution-islamist-ennahdha-party](http://articles.washingtonpost.com/2012-08-16/world/35492683_1_ennahdha-officials-draft-constitution-islamist-ennahdha-party).

<sup>332</sup> M. Ottaway, *supra* note 194, p. 6.

suspected Ennahda of pursuing ‘the constitutionalization of the sharia’.<sup>333</sup> Especially the chairman of the assembly and simultaneously the chief of the secular left-leaning Ettakatol party, Mustapha Ben Jaafar, threatened that his party would withdraw its support from the governing coalition of Ennahda and would bring down Jebali’s government if there was a reference to sharia law in the new constitution.<sup>334</sup> This influenced the decision of Ennahda, and finally the party conceded- the August 2012 Constitution draft included no reference to sharia.<sup>335</sup> It was decided that the reference to Islam would appear in the form of Article 1 of Tunisia’s 1957 constitution, which states: “Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic, and its type of government is the Republic.”<sup>336</sup> Ennahda’s compromise pursued mainly to avoid challenging its pre-election program, as well as to indicate its determination to adopt the constitution by consensus—and the sharia issue had emerged as a red line for its coalition partners. Ennahda searched to prove to the world that including a reference to sharia in the constitution is not necessary for establishing a democracy that is compatible with Islam.<sup>337</sup> At the same time, it is good to bear in mind that if Ennahda had insisted on implementing shari’a into the constitution, the Trojka-coalition would very likely have been collapsed. In that case, Ennahda would have lost power, i.e its chief position in the coalition government. That is why Ennahda’s pragmatic

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<sup>333</sup> M. Hachemaoui, ‘Tunisia at Crossroads: Which Rules for Which Transitions’, Stiftung Wissenschaft und Politik, (2013), p. 25.

<sup>334</sup> D. Pickard, ‘The Current Status of Constitution Making in Tunisia’, Carnegie Endowment for International Law Peace, (2012), <http://carnegieendowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia>.

<sup>335</sup> ‘Tunisia Draft Constitution Not Based on Sharia’, Middle East Online, (June 2, 2013), <http://www.middle-east-online.com/english/?id=59160>.

<sup>336</sup> D. Pickard, *supra* note 227, p. 3.

<sup>337</sup> *Ibidem*.

decision to resign from constitutionalizing shari'a can also be interpreted as a means towards power preservation.<sup>338</sup>

The status of women, as well, belongs to those norms that were among most disputed when the first draft of the constitution was proclaimed in August 2012. In fact, the language implemented in Article 28 of the draft was more than contradictory.<sup>339</sup> The article stated: 'The state guarantees the protection of women and supports their achievements, considering them as men's true partners in building the nation'. 'Their [men's and women's] roles complement one another within the family'.<sup>340</sup> Although Article 28 did not clearly say that women would hold a status subordinate to men, the formulation immediately evoked waves of discontent and criticism across all Tunisia.<sup>341</sup> Especially after the 2012 constitution draft was presented to the public, civil society organizations, opposition parties and ordinary citizens feared that Ennahda party having the advantage in the Congress would use this article to install a more conservative role for women in the society closely related to responsibilities to be fulfilled in the family.<sup>342</sup> Criticizers also suspected Ennahda of trying to revoke Tunisia's Personal Status Code, which is famous outside Tunisia in the MENA region for its progressive standpoints on women's rights.<sup>343</sup> In particular, some Ennahda's members had proposed to withdraw

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<sup>338</sup> M. Koss, 'Resistance, Power and Conceptions of Political Order in Islamist Organizations: Comparing Hezbollah and Hamas', Routledge, (2018), (Chapter 6.1: Ennahda in power: compromise and power-sharing in the constitution-making process).

<sup>339</sup> M. Marks, 'Complementary' status for Tunisian women', the Middle East Channel, (2012).

<sup>340</sup> Ibidem.

<sup>341</sup> D. Pickard, *supra* note 227, p. 4.

<sup>342</sup> D. Tavana, A. Russell, 'Previewing Tunisia's Parliamentary and Presidential Elections', Project on Middle East Democracy, (2014), p. 2.

<sup>343</sup> S. Deane, 'International Alert, Transforming Tunisia: The Role of the Civil Society in Tunisia's Transition', (2013), pp. 15-16, <http://www.internationalalert.org/sites/default/files/publications/Tunisia2013EN.pdf>.

(Tunisia's civic activists succeeded in bonding similar groups, while simultaneously bridging the gap between diverse groups around their opposition to the regime, and their demands for the free exercise of their rights as citizens).



some of the women's rights that are protected by the Tunisia's Personal Status Code, such as the protection of single mothers and their children.<sup>344</sup> Overall, the society interpreted the language used in Article 28 as the Islamist's effort to restrict equal rights of women within the new constitution.<sup>345</sup> Against the backdrop of the massive criticism the wording of the Article 28 had raised in Tunisia and abroad, Ennahda took a decision to change the article and to grant equal rights to men and women in a much clearer language.<sup>346</sup> Thus, the final constitution draft did not encompass any reference to women being complementary' to men.<sup>347</sup>

Another subject for the debate between the Islamist and secular parties in the NCA referred to the system of government in Tunisia, meaning whether the state would have a parliamentary system with a Prime Minister ahead or a presidential system with direct presidential elections.<sup>348</sup> While Islamist parties wanted to consolidate their electoral gain establishing a parliamentary system of government where they would have power to nominate the Prime Minister, the secular parties considered that a direct election of the President could provide a chance to establish a sort of control over the Islamist's advantage in Congress.<sup>349</sup> In the constitutional draft of August 2012, a partial compromise was reached by political parties, stating that both legislative and presidential elections

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<sup>344</sup> S. Feuer, 'Islam and Democracy in Practice', Crown Center for Middle East Studies, (2012), p. 4.

<sup>345</sup> ST. McNeil, 'Wording on Women Sparks Protest in Tunisia', Al Jazeera, (August 19, 2012), <http://www.aljazeera.com/indepth/features/2012/08/201281981854620325.html>. ('This position will deny women their full citizenship and independence as human beings, as equals of men whose duty is to enjoy their human rights just like men.', quoting a press release of human rights organizations and Tunisian General Labour Union).

<sup>346</sup> M. Marks, *supra* note 232.

<sup>347</sup> *Ibidem*.

<sup>348</sup> M. Ottaway, *supra* note 194, p. 6.

<sup>349</sup> D. Pickard, 'Tunisian Politics After Constitution Making', Muftah, (2014), <http://muftah.org/getting-alternance-tunisian-politics-constitution-making/#>.

(Despite Ennahda's strong preference for a parliamentary system of government, it agreed to have a semi-presidential framework with a strong President ahead).

would take place in June 2013.<sup>350</sup> However, the allocation of power between President and Prime Minister remained a contentious issue inside the Congress.<sup>351</sup>

Events taking place outside of the assembly's constitutional debates, as well, contributed to tensions within the body between Islamists and secularists. The murder of secular leaders as Chokri Belaid and Mohamed Brahmi in 2013 backed the belief among secularists that the Islamist-ruled government remained reluctant to contest violent Islamist terrorist groups.<sup>352</sup> In his reaction on the disorder after the assassination, Prime Minister Jebali tried to call for a new impartial and technocratic government to be formed but remained without support of his Ennahda party and was obliged to resign.<sup>353</sup> Having resisted the calls to form a new government, Islamist Ali Laarayedh was voted as new Prime Minister.<sup>354</sup> Laarayedh, in his turn, formed a more representative Ennahda- run coalition government with participation of independents.<sup>355</sup>

Belaid's assassination brought to significant changes within the NCA. The Assembly's procedural rules established a Joint Committee for Coordination and Drafting, the main duties of which were to resolve extraordinary issues with the other committees and to prepare a final constitution draft.<sup>356</sup> Originally the Committee's composition was based upon the proportionate results of the election that formed the Assembly, and thus the

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<sup>350</sup> 'Tunisia reveals date for 2013 Elections', Al Jazeera, (October 14, 2012), <https://www.aljazeera.com/news/africa/2012/10/2012101453125756743.html>.

<sup>351</sup> M. Koss, supra note 231.

<sup>352</sup> A. El-Sayed, supra note 139, p. 45.

<sup>353</sup> Ivi, p. 46.

<sup>354</sup> Ibidem.

<sup>355</sup> D. Tavana, A. Russell, supra note 235, p. 2.

<sup>356</sup> Tunisian National Constituent Assembly, Preparation of the Draft Constitution: Rules of Procedure 103, 104, (16 December 2011), p.28, [http://www.constitutionnet.org/sites/default/files/tunisia\\_ca\\_rules\\_of\\_procedure\\_-\\_english-final.pdf](http://www.constitutionnet.org/sites/default/files/tunisia_ca_rules_of_procedure_-_english-final.pdf).

Islamist party Ennahda had the uppermost representation.<sup>357</sup> Though, tensions between Islamist and secular parties led to stalemate over fundamental subjects.<sup>358</sup> The stalemate inside the Joint Committee brought to the NCA's amendment of its bylaws. The Assembly dissolved the Joint Committee and formed a new institution- the Consensus Committee, which in comparison with the previous one provided the equal representation for all political parties.<sup>359</sup> The new Committee was given the task to resolve the remaining disputes over the 2013 draft Constitution.<sup>360</sup> Due to the long-lasting disagreements over the content of the final constitution draft, such as the nature of the political regime, transitional provisions and women's rights and draft's further incompleteness, presidential and parliamentary elections that were supposed to take place in June 2013, had to be delayed.<sup>361</sup>

Apart from the assassination of secular leaders, several other events that only increased the conflict between Islamic and secular parties occurred in Tunisia. In Egypt, President Morsi was overthrown by mass protests and the main reason for this was the reaction of the society on the Islamist political deception.<sup>362</sup> In Tunisia, the influential Tunisian General Labor Union ('UGTT') joined the revolts and called for a general strike.<sup>363</sup> As a

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<sup>357</sup> Z. Al-Ali, D.B. Romdhane, 'Tunisia's New Constitution: Progress and Challenges to Come', Open Democracy, (16 February 2014), <https://www.opendemocracy.net/north-africa-west-asia/zaid-al-ali-donia-ben-romdhane/tunisia's-new-constitution-progress-and-challenges-to->.

<sup>358</sup> Ibidem.

<sup>359</sup> Ibidem.

<sup>360</sup> A. El-Sayed, supra note 139, p. 46.

<sup>361</sup> 'New Tunisia Constitution Ready in October', Speaker, Reuters, (11 May 2012), <https://www.reuters.com/article/us-tunis-constitution-deadline/new-tunisia-constitution-ready-in-october-speaker-idUSBRE84A0UN20120511>.

<sup>362</sup> 'Protesters Across Egypt call for Mohamed Morsi to Go', The Guardian (30 June 2013), <https://www.theguardian.com/world/2013/jun/30/mohamed-morsi-egypt-protests>.

<sup>363</sup> M-S. Omri, 'Trade Unions and the Construction of a Specifically Tunisian Protest Configuration', Open Democracy, (2013), <https://www.opendemocracy.net/mohamed-salah-omri/trade-unions-and-construction-of-specifically-tunisian-protest-configuration>.

response to assassinations of secular politicians and strikes, the government proclaimed Salafist group Ansar al-Sharia in Tunisia (AST) a terrorist organization<sup>364</sup> and declared a war to it.<sup>365</sup>

The political crisis led to the interruption of the NCA's work in August 2013.<sup>366</sup> The situation was so tense and rhetoric that Tunisians at all levels feared that the country would suffer from the same chaotic armed struggle or a new authoritarian, repressive, regime which was what they saw elsewhere in the region. Hence, the Tunisian National Dialogue served as an instrument for crisis management and the instrument was implemented while the crisis was still unfolding.<sup>367</sup> The Tunisian National Dialogue was indeed an ad hoc process. In the framework of the National Dialogue, several initiatives were created to accelerate the process.<sup>368</sup> One of these, known as "Quartet", was formed by the Tunisian General Labour Union (UGTT) together with the Tunisian Union for Industry, Trade and Handicraft (UTICA), the Tunisian League for Human Rights (LTDH) and the Bar Association, and emerged as the key mediator.<sup>369</sup> The set-up of the Quartet was not an outcome of regular meetings but the result of a numerous talks and informal meetings with representatives of civil society, political parties and ambassadors in

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<sup>364</sup> 'Tunisia Declares Ansar Al-Sharia a Terrorist Group', BBC News, (27 August 2013), <http://www.bbc.com/news/world-africa-23853241>.

<sup>365</sup> D. Gartenstein-Ross, B. Moreng, 'Tunisia's War with Ansar Al-Sharia: New Revelations About Al-Qaeda's North African Network', War on the Rocks, (2013), <http://warontherocks.com/2013/10/tunisias-war-with-ansar-al-sharia-new-revelations-about-al-qaedas-north-african-network/>.

<sup>366</sup> R.H. Haugbølle, A. Ghali and others, 'Tunisia's 2013 National Dialogue: Political Crisis Management', (February 2017), Berghof Foundation, pp. 29-30, [https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Other\\_Resources/NationalDialogue/NDH\\_Tunisia.pdf](https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Other_Resources/NationalDialogue/NDH_Tunisia.pdf).

<sup>367</sup> Ibidem.

<sup>368</sup> Ibidem.

<sup>369</sup> Comprendre le "Dialogue national" en Tunisie: Quand le "consensus" Prime sur la Légitimité Electorale', Huffpost Tunisie, (10 October 2015), (own translation) [https://www.huffpostmaghreb.com/2015/10/10/dialogue-national-tunisie\\_n\\_8270372.html](https://www.huffpostmaghreb.com/2015/10/10/dialogue-national-tunisie_n_8270372.html).

Tunisia.<sup>370</sup> In October 2013, Quartet prepared a clear roadmap designating three tracks for completing democratic transition- electoral, constitutional and governmental- accompanied by the conditions and deadlines for concluding each aspect.<sup>371</sup> By October, most part of the political parties signed the roadmap and the Quartet mediated a national dialogue among the diverse actors.<sup>372</sup> In January 2014, Prime Minister Laarayedh resigned and his place was taken by Mehdi Jomaa who consequently established a new technocratic government.<sup>373</sup>

#### **4.1.1.4 Tunisia's 2014 Constitution**

After the Quartet helped to put the transition back on track, the Consensus Committee succeeded in negotiating a resolution of outstanding issues in the draft constitution, and in February 2014 with an article-by-article vote in the NCA, the Tunisia's new constitution was adopted based mostly on a nationwide compromise.<sup>374</sup>

The constitution-drafting process in Tunisia became evidently more participatory, especially after the constituent assembly presented a draft for public review.<sup>375</sup> However, this was more an internal participatory process than an external one, as the Tunisian population directly elected the representatives that further served on the NCA. It is important to state that although the public was not allowed to directly participate in the constitution drafting, each Tunisian voter was a direct constituent of a member of the drafting body. Correspondingly, there existed a sort of electoral accountability between the NCA members and those who elected them. This is absolutely in contrast with the

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<sup>370</sup> Ibidem

<sup>371</sup> R.H. Haugbølle, A. Ghali and others, *supra* note 259.

<sup>372</sup> D. Tavana, A. Russell, *supra* note 235, pp. 2-3.

<sup>373</sup> Ibidem,

<sup>374</sup> Ibidem.

<sup>375</sup> N. Bernard-Maugiron, 'State Powers and Constitution Drafting Processes in Post-Revolutionary North Africa', p.120, <http://www.iemed.org/publicacions/historic-de-publicacions/monografies/sumaris-fotos-monografies/transitions-north-africa-bernard-maugiron-nathalie.pdf>.

case of Egypt, where the body that drafted the 2014 Egyptian Constitution, was appointed by the SCAF and therefore was not accountable to the public.<sup>376</sup>

The dynamics in consultation and public participation augmented since August 2012, when the NCA released the first draft of the Tunisian Constitution for public review.<sup>377</sup>

After the constituent assembly issued the second constitution draft, it ‘launched a two-month outreach campaign that included public meetings in the NCA representatives’ constituencies, hearings with interest groups, and television broadcasts of most NCA debates and proceedings’.<sup>378</sup> During 2012 and 2013, the United Nations Development Programme (UNDP) helped the NCA to open to the public and to consult with civil society, experts, and the population (in public forums in the regions) in drafting the constitution.<sup>379</sup> Its support resulted in 6000 citizens, 320 university representatives and 300 civil society groups providing opinions and comments on the constitution directly to the representatives.<sup>380</sup> As a consequence, significant changes were made to the first draft: the provision guarantying the right to vote was added to the constitution; the provision expressing that state has authority over religious practice was removed from the constitution; and the language saying that women were ‘complementary’ in their rights to men was revised.<sup>381</sup>

Despite the long and complex negotiations this constitutional drafting process required, the result was one of nearly unequivocal praise. As writer and cultural critic Shajahan

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<sup>376</sup> One could consider that having a drafting body not subject to a constituency protects the independence and impartiality of the drafting body. However, when drafting a constitutive document of the country, accountability to the constituency- as opposed to a transitional military regime-ensures a greater probability that the voters interests will be represented.

<sup>377</sup> J.Gluck, M. Brandt, *supra* note 175, p. 10.

<sup>378</sup> *Ibidem*.

<sup>379</sup> R.H. Haugbølle, A. Ghali and others, *supra* note 259, p. 27.

<sup>380</sup> J.Gluck, M. Brandt, *supra* note 175, p. 10.

<sup>381</sup> *Ibidem*.

Madampat considers: Of all the Arab countries, “Tunisia has arguably the most progressive, most secular and least misogynistic constitution, approved near-consensually last year.”<sup>382</sup> Similarly, Marks summarizes that Tunisia’s 2014 Constitution was ‘the first constitution freely created by a representative, democratically elected assembly anywhere in the Arabic-speaking world’.<sup>383</sup> All this is the result of the NCA’s ability to achieve consensus through a broadly participatory process, which legitimized the final Tunisian Constitution in such a manner that Egypt’s highly exclusionary process could not.

#### **4.1.1.5 The religious element in the new Tunisian Charter**

The inclusive and participatory form of the constitutional process in Tunisia resulted in certain textual ambiguities. In particular, there were three issues of major controversy: the nature of the state/the concept of a state religion (Articles 1 and 2); the guarantee of freedom of religion and the state as the guardian/protector of religion (Article 6); the requirement of being Muslim to run for President and the antidiscrimination clause (Article 74 (1) and Article 21).<sup>384</sup>

Article 1 of the new constitution, imitated the first post-independence version of 1959, saying that ‘Tunisia is a free, independent and sovereign state. Islam is its religion’. The language thereby permits a dual reading: the expression ‘its religion’ could refer either to the state or to the country of Tunisia.<sup>385</sup> While the first reading advocates that Islam is the religion of the State; the second one is putting a greater emphasis on cultural legacy, by meaning the country rather than its institutional form. Initially, Article 1 was supposed to

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<sup>382</sup> S. Madampat, ‘An Arab Exception Called Tunisia’, Outlook, (13 May 2015), <http://www.outlookindia.com/article/an-arab-exception-called-tunisia/294305>.

<sup>383</sup> M.L. Marks, ‘Convince, Coerce, or Compromise? Ennahda’s Approach to Tunisia’s Constitution’, Brookings Doha CTR. 11 (2014), p. 3, <https://www.brookings.edu/wp-content/uploads/2016/06/Ennahda-Approach- Tunisia-Constitution-English.pdf>.

<sup>384</sup> Constitution of the Republic of Tunisia, Articles 1, 2 , 6, 71, 21 (Translated from Arabic to English), (27 January 2014).

<sup>385</sup> The same ambiguous reading derives from the official Arabic version of the text.

establish the continuity between the 1959 Constitution and the new constitution to arise. Under Bourguiba's rule, this provision did not seek to impose Islam as a religion, but rather to represent the fact that a vast majority of the Tunisian society are Muslims.<sup>386</sup>

The dispute officially emerged after the amendment clause was introduced, in which the scope stipulated in Article 1 was preempted by using a different language. This clause enumerated constitution's 'Unamendable Components' and specified that 'No amendment to the Constitution may bring prejudice to . . . Islam [as] the religion of the state'.<sup>387</sup> It was only omitted in the final version of the text.

In the new constitution, the non-amendability of Article 1 is guaranteed by an additional paragraph (2) within the article itself, thus leaving the correlation of Islam contradictory again. What speaks in favor of interpreting Article 1 still as referring to Islam as a state religion are the other two subjects addressed in the same article: Arabic as "its language" and republic as "its system" might be defined as characterizations that rather relate to a state as an institution than to a country.<sup>388</sup>

In the third constitution draft, a new Article 2 was introduced, saying that 'Tunisia is a civil state [. . .]'. However, 'civil state' is not equivalent to 'secular', the provision names "citizenship, the will of the people, and the supremacy of law" as its substance. Moreover, the language of the preamble and its reference to Islam were changed in the final version: previous drafts stated that members of the NCA drafted the constitution while 'building on the fundamentals and the open and moderate objectives of Islam', whereas the final text only expressed 'our people's commitment to the teachings of Islam [. . .]'. While the

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<sup>386</sup> According to the International Religious Freedom Report (2013), the Tunisian society is 99% Sunni Muslim, with the remaining 1% composed of Shia Muslims, Baha'is, Jews, and Christians. (The latter group includes Roman Catholics, Protestants, members of the Greek and Russian Orthodox churches, French Reformists, Anglicans, Seventh-day Adventists and Jehovah's Witnesses). <http://www.state.gov/documents/organization/222527.pdf>.

<sup>387</sup> The English-language version of the Tunisian fourth constitutional draft, [http://www.constitutionnet.org/files/fourth\\_draft\\_english\\_idea.pdf](http://www.constitutionnet.org/files/fourth_draft_english_idea.pdf).

<sup>388</sup> Constitution of the Republic of Tunisia, Article 1, (Translated from Arabic to English), (27 January 2014).



former versions of the writing contain Islam still as an inspiration for the drafters, the latter restricts itself to the (presumed) commitment of the Tunisian population.

The same way, the only reference to the principles of Sharia that existed in earlier texts was omitted in the final document. During the constitution-drafting process, secular political parties quickly refused to include a reference to shari'a within the new constitution, but the Islamist party Ennahda engaged in a complex internal debate over the importance of including a clause or article referencing shari'a.<sup>389</sup> Such secular politicians as Mohsen Marzouk of the Nidaa Tounes party, were against such kind of discussions, arguing that the 1959 Constitution's exclusion of shari'a was 'perfectly fine', and that this deliberation was simply a strategic method to gain time.<sup>390</sup> Similarly, some academic critics encouraged 'emerging democracies', such as Tunisia, to shape their 'new national identities' on 'unqualified grants of religious freedoms as well as specifically enumerated human rights consistent with international law'.<sup>391</sup>

Although well-intentioned, such considerations disregard Tunisia's pluralist past and that the denial of religious freedoms and human rights appears not from Islamist groups or an inadequate constitution, but almost completely from Tunisia's authoritarian secular governments. Indeed, proclamations such as, '[c]hanging the text of a constitution will not immediately change a culture, but it can guide it in future generations as legislatures and courts look to their founding documents in interpreting the laws', minimize the responsibility of previous governments for past injustices and oversees the country's rich legal tradition.<sup>392</sup> In addition, it is contentious what legal effect, if any, a non-binding reference to sharia would have had on the constitution, especially since Ennahda started

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<sup>389</sup> Ivi, p. 21.

<sup>390</sup> Ibidem.

<sup>391</sup> B. O'Connell, 'Constitutional Apostasy: The Ambiguities in Islamic Law After the

Arab Spring', 11 Northwestern University Journal of International Human Rights, (2012), p. 83, p. 103.

<sup>392</sup> Ibidem.

to adhere to a tolerant and progressive version of sharia.<sup>393</sup> In fact, Marks reports that Rachid Ghannouchi, the Ennahda party leader, overruled rigid legal codes and claimed for a progressive interpretation of sharia that concentrated ‘on more expansive notions of Islamic ethics, including social justice, equality between persons, and the like’.<sup>394</sup>

Finally, Ennahda conceded on ‘the sharia question’, even though the more conservative party members have expressed concerns that this concession could carry it too far.<sup>395</sup> However, Tunisia’s post-revolutionary constitution identifies Tunisia as a civil state, and while it refers to the teachings of Islam, it does not refer to sharia.<sup>396</sup> It is highly important that the constitution grants the right to ‘freedom of conscience and belief’ (*hurriet al-damir*). In the Arab world, this principle belongs to a ‘truly revolutionary’ one.<sup>397</sup>

Apparently, the most contentious provision related to state and religion is Article 6, a compromise on which exact language was achieved at the very last minute. It stipulates that: ‘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 from all partisan instrumentalization. The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred’.<sup>398</sup>

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<sup>393</sup> M.L. Marks, *supra* note 276, pp. 20-21.

<sup>394</sup> *Ibidem*. (Similarly, to other progressive Islamic legal scholars mentioned in Part III, Ghannouchi argued for the application of *maqasid* (high objectives) and *masalah* (human interests) to trump *hudud* (rigid rules).

<sup>395</sup> *Ivi*, pp. 20-22.

<sup>396</sup> K. L. Netterstrøm, ‘The Islamists’ Compromise in Tunisia’, 26 *Journal of Democracy*, (2015), p. 110.

<sup>397</sup> *Ivi*, pp. 110-111.

<sup>398</sup> Constitution of the Republic of Tunisia, Article 6, (Translated from Arabic to English), (27 January 2014).

Article 6 addresses several interrelated issues: the freedom of religion; its protection, including some limitations to the freedom of speech/opinion.<sup>399</sup> The first sentence requires the state to be the guardian of religion. Theoretically, this could either mean it is the supervisor of religion or it is rather the active promoter of a specific type of religion. Reading the first sentence together with the following statements in Article 6 and our previous findings, it becomes obvious that the first sentence needs to be understood in the former way: The civil state functions as a guardian to guarantee the rights expressed in the following sentence. Furthermore, places of worship shall not become part of partisan instrumentalization. Taking into account that the strongest political party in the NCA was a religious one, this message is noteworthy even more since it had not been challenged throughout the drafting process.

Regarding the eligibility for President, it is important to state that running for the highest office in the State is subject to limitations in any country. Traditional monarchies include the most restrictive criteria. At the same time, in countries where the Head of States are directly elected, a variety of eligibility criteria apply differentiating between those who are qualified for office and those who are not. At first sight, these criteria may represent a violation of antidiscrimination provisions in constitutions, especially if they are as broadly defined as in the Tunisian Constitution. Article 21 states that all citizens have equal rights and duties and are equal before the law without any discrimination.<sup>400</sup> Nevertheless, this guarantee is not absolute. It needs to be balanced alongside other constitutional provisions. Eligibility criteria for public offices are one of that kind.

At that point, the requirements of Article 74 (at least 35 years of age; Islam as his or her religion; Tunisian citizenship by birth) are shaping the rights guaranteed in Article 21 of the Tunisian Constitution without compromising the substance of this provision.<sup>401</sup> The

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<sup>399</sup> Ibidem.

<sup>400</sup> Ivi, Article 21.

<sup>401</sup> Citizens who are not nationals by birth or not Muslims are not generally preempted to actively participate in the political life of Tunisia (i.e., as member of parliament). Though there is an uncontested discrimination, its actual and practical negative impact is not overly intense (with regard to the discrimination on the basis of religion: To the knowledge of the author, there is no single country around the world in which over 99% of citizens adhere to one religion and the elected Head of State is not from

last two requirements may be in contrast with provisions of International Human Rights Treaties,<sup>402</sup> but since international agreements ratified by Tunisia are explicitly categorized below the constitution, they do not legally influence the constitutional limitations of Article 74.

#### **4.1.2 Constitution Drafting Process: the case of Egypt**

The central topic of Egypt's three-year struggle to complete a constitution was a multifaceted debate over the composition of constitution-drafting bodies. The drafting process involved serious tensions between historically powerful secular institutional actors, such as the Egyptian judiciary and the military, the historically prohibited Islamist political movement known as the Muslim Brotherhood and the youth, who actively participated during the Arab Spring revolution.

In 18 days of revolution, the permanent head of the Egyptian state, Hosni Mubarak, who had ruled the country from 1981 to February 2011, was removed.<sup>403</sup> The main request of the revolution was a new beginning in Egyptian politics- a parliamentary system, a new constitution and inclusive politics.<sup>404</sup> Before the revolution, the government of Egypt was extremely repressive. During the Mubarak's era, the country witnessed a serious degradation, losing its leading position in the nationalist domain, as well as its central role

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this very religion). Moreover, Article 74 is neither an enshrined nor an immutable clause and can be amended.

<sup>402</sup> International Covenant on Civil and Political Rights, Article 25: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; [...]'.

<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

<sup>403</sup> N. Pillay, 'The Rule of Law and the New Egyptian Constitution', *Liverpool Law Review*, (2014), pp. 135-136.

<sup>404</sup> Ibidem.

on the international arena in relation to Middle Eastern affairs.<sup>405</sup> A corrupted elite had controlled the Egypt's resources for decades. Moreover, the ruling class limited the activities of the civil society till the point it became completely paralyzed. It also introduced an 'Emergency Law' and restricted the formation of opposition parties, as well as multi-party competition, by this paving the way to the governing National Party that was under the control of a group of businessmen.<sup>406</sup>

Notwithstanding the circumstances, several opposition movements emerged in Egypt. One of them was the Egyptian movement for change called 'Kefaya', which was created on 22 September 2001.<sup>407</sup> This movement claimed for the end of the monopolistic rule of the National Party, the independence of the judicial branch and the enforcement of the rule of law. Such topics as the equal distribution of wealth and the restoration of the Egypt's authority in the region were raised by the Kefaya party as well.<sup>408</sup> Furthermore, national leaders as Dr. Mohammed Al-Baradei, Ahmad Zewall, Hamid Sabahi and Ayman Nour decided to make a radical change, calling for the breakdown of the current regime and presenting political alternatives.<sup>409</sup> At the same time, different opposition movements including the National Association for Change, the 6<sup>th</sup> April movement and Kulna Khaled Said, actively used social media platforms in order to advocate their cause and to attract the Egyptian society's attention.<sup>410</sup>

The success of the uprising in Tunisia in 2011 encouraged the angry Egyptian youth, especially after the self-immolation of Mohammed Bouazizi that brought to mass revolts

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<sup>405</sup> M.A. Hadi, *supra* note 185, pp. 30-31.

<sup>406</sup> *Ibidem*.

<sup>407</sup> M. Shorbagy, 'Understanding Kefaya: The New Politics in Egypt', *Arab Studies Quarterly*, Volume 29, (2007), pp. 39-60.

<sup>408</sup> *Ibidem*.

<sup>409</sup> M.A. Hadi, *supra* note 185, p. 30.

<sup>410</sup> *Ibidem*.

demanding the downfall of the regime.<sup>411</sup> The ousting of the Tunisian authoritarian ruler, Ben Ali, and his further escape to Saudi Arabia inspired the Egyptian society and motivated them to organize a protest.<sup>412</sup> Through Facebook and other social media websites people were asked to go out to the streets and squares demanding “Bread, Freedom and Social Justice”.<sup>413</sup> Mubarak’s security forces responded with violence, conducting a huge campaign of arrests, provoking serious injuries and numerous deaths. State-run media, in its turn, started a vicious campaign, the aim of which was to discredit the activists and turn the public opinion against them.<sup>414</sup>

Despite all powerful means used by Mubarak and his allies, on 1 February 2011 millions of Egyptians gathered on the Tahrir Square and continued to demand the regime change and the ouster of their leader.<sup>415</sup> The square was captured by armed forces trying to disperse demonstrators. The following speech of Mubarak concerning a national dialogue invitation and nomination of the new Prime Minister were categorically refused by the opposition leaders.<sup>416</sup> On 11 February 2011, Vice- President Omar Suleiman declared in a brief statement: ‘Citizens of Egypt, in reaction to the instability prevailing in the country, President Hosni Mubarak decided to step down from his post and delegate all his responsibilities to the SCAF (the Supreme Council of the Armed Forces), may God help us all’.<sup>417</sup>

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<sup>411</sup> N. Pillay, pp. 135-136.

<sup>412</sup> Ibidem.

<sup>413</sup> A. Mubarak, “Two million Egyptians joined Facebook since the Revolution,” Egypt Independent, (18 April 2011), <http://www.egyptindependent.com/news/two-million-egyptians-joined-facebook-revolution>.

<sup>414</sup> M.A. Hadi, pp. 30-31.

<sup>415</sup> Ibidem.

<sup>416</sup> N. Pillay, pp. 136.

<sup>417</sup> A. Shawki, M. Omar, ‘Egypt: Chronicle of a revolution’, International Socialist Review, (Friday, 11 February 2011), (Mostafa Omar reports from Cairo), <https://isreview.org/issue/76/egypt-chronicle-revolution>.

After the resignation of the Egyptian leader, the Parliament was dissolved, and the 1971 Constitution was suspended by the SCAF. On March 30, 2011 the SCAF released an interim constitutional declaration.<sup>418</sup> It incorporated provisions from the 1971 constitution<sup>419</sup> and combined them with new measures, approved by the referendum in March 2011, to ensure more transparent elections, impose restrictions on the presidential term and limit the use of emergency laws. In addition, the constitutional declaration comprised provisions for presidential and legislative elections and for the consequent drafting process of a new permanent constitution.<sup>420</sup> In comparison with Tunisia, where the constitution draft was decided first, and elections were held under its terms, Egypt organized a referendum in order to approve amendments to the existing constitution and to agree the terms of an interim government.<sup>421</sup>

#### **4.1.2.1 Brief analysis of the Constitution of 1971 and further amendments**

Following the popular revolts that led to the ouster of President Mubarak, Egyptians voted on a set of constitutional amendments, drawn up by the SCAF, to administer the transitional period. For this purpose, on February 15, 2011 the SCAF created a Constitutional Review Committee.<sup>422</sup> Eight legal experts, some of whom previously strongly criticized the Mubarak's regime, were appointed for the Commission. Among them were three judges from the Supreme Constitutional Court, one of whom was a Christian and others were

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<sup>418</sup> A.F. Lang, 'From Revolutions to Constitutions: the case of Egypt', *International Affairs* 89, (2013), p. 344.

<sup>419</sup> 'Constitutional History of Egypt', *Constitution Net*, (2015), (The 1971 Constitution was adopted by public referendum after President Anwar Sadat took office in 1971),

<http://www.constitutionnet.org/country/constitutional-history-egypt>.

<sup>420</sup> *Ibidem*.

<sup>421</sup> D. Tschirgi, W. Kazziha, S.F. McMahon, 'Egypt's Tahrir Revolution', Boulder: Lynne Rienner Publishers, (2013), p. 2.

<sup>422</sup> D. Kirkpatrick, K. Fahim, 'In Egypt, a Panel of Jurists Is Given the Task of Revising the Country's Constitution', *New York Times*, (15 February 2011), <https://www.nytimes.com/2011/02/16/world/middleeast/16egypt.html>.

secular liberal intellectuals.<sup>423</sup> The Committee was supervised by Tareq el-Bishri, a retired senior justice, who before entering the body, was one of the legal advisors to a major Mubarak opposition movement, Kefaya, and even published a critique of Mubarak's rule.<sup>424</sup> In earlier times, el-Bishri had been politically affiliated both with moderate Islamist groups and left-leaning secular parties, representing a sort of connecting link between the two greatest opponents to the Mubarak's authoritarian regime- the Muslim Brotherhood and the April Six Movement.<sup>425</sup> Maher Samy Youssef, the judge of the Constitutional Court and by religiosity a Coptic Christian, became another member of the Review Committee.<sup>426</sup> It is important to note that Coptic Christians constitute around ten per cent of the Egyptian population and are considered the largest minority group in the country.<sup>427</sup> The next member appointed to the panel was a former member of the Egyptian Parliament and a Muslim Brotherhood chief, lawyer Sobhi Saleh.<sup>428</sup> The rest of the Committee members included law professors Mohamed Hassanein Abdel-Al, Mahmoud Atef el-Bannna and Mohamed Bahey Abou Younis and Supreme Constitutional Court judges Hassan el-Badrawi and Hatem Bagatou, who were generally considered politically neutral.<sup>429</sup> The coalition of youth groups, such as the April 6 Movement, remained widely satisfied with the composition of the committee and advised the SCAF to move forward with the amendments of the Constitution.<sup>430</sup>

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<sup>423</sup> Ibidem.

<sup>424</sup> Ibidem.

<sup>425</sup> J. Jacob, 'What is Egypt's April 6 Movement?', International Business Times, (1 February 2011), <https://www.ibtimes.com/what-egypts-april-6-movement-261839>.

<sup>426</sup> D. Kirkpatrick, K. Fahim, *supra* note 315.

<sup>427</sup> Ibidem.

<sup>428</sup> Ibidem.

<sup>429</sup> Ibidem.

<sup>430</sup> Ibidem.



On February 26, the Review Committee proposed nine amendments to the 1971 Egyptian Constitution and made them a subject to the popular referendum.<sup>431</sup> The proposed amendments reflected the most prominent abuses of the Mubarak's regime. According to the 1971 Egyptian constitution,<sup>432</sup> the President enjoyed an extensive executive authority which gave him a possibility to stay in power for three decades.<sup>433</sup> Due to certain gaps and opaqueness of some constitutional provisions, the former Egyptian leader abused many times the emergency law, monopolized the political power, preventing opposition candidates from participating in presidential elections, and quite often initiated proceedings against civilians (often opposition group members) in front of closed military tribunals.<sup>434</sup>

Under the old constitution, the judiciary enjoyed the power of review over both presidential legislative and administrative authority.<sup>435</sup> The courts' activity concentrated on the supervision of the electoral processes, strengthening political rights, freedom of the press and legal due process (when the opportunity appeared) and proved to be successful.<sup>436</sup> Hence, the regime opponents were effectively dealt with outside the normal judicial procedures.<sup>437</sup> Although, the courts enjoyed Egyptian community's support and remained

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<sup>431</sup> Y. Saleh, 'Factbox: Proposed Changes to Egypt's Constitution', Reuters, (26 February 2011),

<https://www.reuters.com/article/us-egypt-constitution-changes/factbox-proposed-changes-to-egypts-constitution-idUSTRE71P28520110226>.

<sup>432</sup> 'Constitutional History of Egypt', Constitution Net, (2015), (The 1971 Constitution was adopted by public referendum after President Anwar Sadat took office in 1971),

<http://www.constitutionnet.org/country/constitutional-history-egypt>.

<sup>433</sup> A. Taher, 'The New Egyptian Constitution: An Outcome of a Complex Political Process', *Insight Turkey* 15 (1), (2013), pp. 25-36.

<sup>434</sup> *Ibidem*.

<sup>435</sup> R. Hirschl, 'Constitutional Courts vs Religious Fundamentalism: Three Middle Eastern Tales', *Texas Law Review* 82 (7), pp. 1819-1860.

<sup>436</sup> *Ibidem*.

<sup>437</sup> T. Moustafa, 'The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt', New York, Cambridge University Press, (2007).

mostly non-political, they had never directly questioned the authority of the executive branch, the army or the religious authorities.<sup>438</sup>

The proposed changes to the 1971 Constitution were the following: shorten the presidential term from six to four years and introduce a two-term limit, ensure the greater number of eligible presidential candidates, reestablish judicial supervision of elections, prepare the ground for a new constitution after elections, and limit the capacity to proclaim and renew a state of emergency.<sup>439</sup> The Constitutional amendments also comprised Article 189 that allowed for a new constitution to be demanded either by the president (with the approval of the cabinet) or by minimum half of the members within both houses of Parliament.<sup>440</sup> In case a new constitution was demanded, Article 189 required that both houses of Parliament during a joint session form a one hundred- member constituent assembly to draft the constitution in the next six months and consequently to make it a subject for a national referendum.<sup>441</sup> This provision revealed a sort of compromise between the Egyptian society and the transitional government- whether to merely revise some provisions of the 1971 Constitution or to remove and replace the constitution with a new one.<sup>442</sup> The Constitutional Review Committee identified itself as a purely technical and not political body and rejected any contact or affiliation with youth opposition leaders, the SCAF or the Muslim Brotherhood.<sup>443</sup> Finally, it took the panel two weeks to complete draft

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<sup>438</sup> Ibidem.

<sup>439</sup> J. Feuille, *supra* note 117, (2011), pp. 245-248.

<sup>440</sup> N.J. Brown, M. Dunne, 'Egypt's Draft Constitutional Amendments Answer Some Questions and Raise Others', Carnegie Endowment for International Peace, (1 March 2011), <http://carnegieendowment.org/2011/03/01/egypt-s-draft-constitutional-amendments-answer-some-questions-and-raise-others-pub-42817>.

<sup>441</sup> Ibidem.

<sup>442</sup> Ibidem.

<sup>443</sup> N.J. Brown, 'Egypt's Revolution Struggles to Take Shape', Carnegie Endowment for International Peace, (17 March 2011), <https://carnegieendowment.org/2011/03/17/egypt-s-revolution-struggles-to-take-shape-pub-43106>.

amendments for the public review in early March.<sup>444</sup> However, some members of the opposition and civil society groups considered the drafting process quite opaque and expressed concerns over the continuing use of the 1971 Constitution, even if many of its provisions were revised.<sup>445</sup> Some doubts on the positive outcome of the upcoming referendum started to appear in the public.

The national constitutional referendum took place on 19 March 2011.<sup>446</sup> Despite all the critique, the turnout resulted in around forty-one percent of eligible voters and the constitutional amendments were approved by seventy-seven percent of Egyptians.<sup>447</sup> For the international community, it became the first legitimate referendum conducted in Egypt since it became a republic in 1956.<sup>448</sup>

The first stage of the constitution-drafting process in Egypt can be considered as external participatory process with a small panel appointed completely by the transitional military government and limited opportunity for public participation until a final draft was shaped. Even though in response to public feedback, the committee decided to introduce one substantive change, by shifting review of parliamentary electoral disputes from the Supreme Constitutional Court to the Court of Cassation,<sup>449</sup> external participatory processes rarely provide clear rules guaranteeing that the public's commentaries are revised and reflected in the final document.<sup>450</sup> The process in Egypt was viewed as opaque for the following reason: while the panel represented key factions of the Egyptian public- Coptic

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<sup>444</sup> N.J. Brown, M. Dunne, *supra* note 333.

<sup>445</sup> N.J. Brown, 'Why Nobody Noticed What Egypt's Opposition Has Won', *Foreign Policy*, (28 March 2011).

<sup>446</sup> *Ibidem*.

<sup>447</sup> 'Egypt Referendum Strongly Backs Constitution Changes', BBC, (20 March 2011), <https://www.bbc.co.uk/news/world-middle-east-12801125>.

<sup>448</sup> J. Feuille, *supra* note 117, p. 237, p. 245.

<sup>449</sup> N.J. Brown, *supra* note 327.

<sup>450</sup> A.M. Banks, p. 1049.

Christians, Islamists and secular scholars, the drafters themselves considered their work as mostly technical and did not represent directly the views of broader constituencies. Although, the drafting process was not broadly participatory and inclusive, it is difficult to reject the fact that all eligible voters had the opportunity to express their opinion on the text in the Egyptian national referendum. According to the constitution-drafting expert, Mark Tushnet, there are two aspects that shall be taken into account while assessing the inclusiveness of the constitution-drafting process: 1) the inclusiveness at the drafting phase and 2) the inclusiveness at the adoption phase.<sup>451</sup> In the Egyptian case, the opportunity of the society to decide on the work done by the Constitutional Review Committee offsets somehow the lack of public participation in the drafting of the reviewed constitutional provisions. However, the phase of the constitution-drafting process in Egypt cannot be viewed as broadly participatory.

#### **4.1.2.2 The Egyptian Constitutional Declaration of 30 March 2011**

Two weeks after the national referendum approving constitutional revisions, the SCAF unexpectedly abolished the recently amended constitution and replaced it with an interim constitutional declaration on 30 March 2011.<sup>452</sup> The issued declaration was composed of 63 articles, mainly selected from the 1971 document (including clauses amended by the referendum).<sup>453</sup> This sudden decision became a surprise for the Egyptian public.<sup>454</sup> Some observers consider that the constitutional declaration was a reaction of the SCAF to the opposition who had been very skeptical regarding the continued use of the 1971 Constitution.<sup>455</sup> The SCAF simply replaced the document with a constitutional declaration

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<sup>451</sup> M. Tushnet, 'Constitution-Making: An Introduction', 91 Texas Law Review, (2013), p. 1983, p. 1994, p. 1997.

<sup>452</sup> N.J. Brown, K. Stilt, 'A Haphazard Constitutional Compromise', Carnegie Endowment for International Law Peace, (11 April 2011), <http://carnegieendowment.org/2011/04/11/haphazard-constitutional-compromise-pub-43533>.

<sup>453</sup> Ibidem.

<sup>454</sup> Ibidem.

<sup>455</sup> Ibidem.

and kept in it some fundamental provisions of the 1971 Constitution, all the articles reviewed in the national referendum and a framework for drafting a new constitution.<sup>456</sup>

By releasing the constitutional declaration, the SCAF tried to balance the interests of the two parties: the opposition groups that claimed for the suspension of the 1971 Constitution and doubted the outcome of the referendum and the Egyptian citizens who had participated in the referendum. After the interim declaration was issued, the 1971 Constitution became suspended, while the provisions reviewed through the referendum remained in force.<sup>457</sup> Moreover, the military included additional provisions from the old constitution in the constitutional declaration, creating a framework for constitutional authority during the transition period.<sup>458</sup> After abolishing the 1971 Constitution, the SCAF ensured that the process of drafting the new constitution would take place.<sup>459</sup> In addition, legislative elections and constitution-drafting process were closely linked, as according to Article 60 of the Constitutional Declaration, ) a 100-member committee would be appointed by an elected Parliament to prepare a new constitution for Egypt.<sup>460</sup>

The public reaction on the issue of SCAF's March constitutional declaration was very similar to its earlier appointment of the Constitutional Review Committee. The military's decisions were opaque, no public record of its negotiations was supported, and it was not clear who took part in the consultation with SCAF before it issued the declaration.<sup>461</sup> As a result of the military's failure to explain its constitution-drafting procedure, a great

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<sup>456</sup> Ibidem.

<sup>457</sup> Ibidem. (The SCAF quoted the Constitution of 1971 as the source of its authority in order to suspend the very same, referring to the text that gave the military the responsibility to defend the country).

<sup>458</sup> Ibidem

<sup>459</sup> N. Mihalakas, 'SCAF's Constitutional Declaration- Uncertainty and Hope for Egypt's Bicameral Legislation', Foreign Policy Association, (27 February 2012), <https://foreignpolicyblogs.com/2012/02/27/scafs-constitutional-declaration-uncertainty-hope-egypts-bicameral-legislature/>.

<sup>460</sup> Ibidem

<sup>461</sup> N.J. Brown, K. Stilt

suspicion and critics spread throughout the country and the question of the legitimacy of the process arose.<sup>462</sup>

#### **4.1.2.3 The Egyptian Constituent Assembly**

In November 2011 first post-Mubarak Parliamentary elections were held <sup>463</sup> and the first opening session of Parliament took place on 23 January 2012.<sup>464</sup> The outcome of the elections was the victory of the Islamist parties: 47,2% of the new legislators were from the Muslim Brotherhood's Freedom and Justice Party and 24,3% of the Parliament members came from the Islamist Nour Party.<sup>465</sup> Independent and secular politicians obtained a measly 25% of parliamentary seats.<sup>466</sup> The political defeat of secular and independent parties occurred due to their fragmentation and lack of on-the-ground organization.<sup>467</sup> After the Parliament was set up, the SCAF transferred legislative authority to the body, while retaining the executive one.<sup>468</sup>

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<sup>462</sup> Ibidem

<sup>463</sup> D.D. Kirkpatrick, 'In a Surprise, Calm Prevails in Egypt's Elections', New York Times, (28 November 2011),

<https://www.nytimes.com/2011/11/29/world/middleeast/egyptians-vote-in-historic-election.html>.

<sup>464</sup> 'Egypt's first Post-Mubarak Parliament Holds Opening Session', Telegraph, (23 January 2012),

<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/9032323/Egypt-s-first-post-Mubarak-parliament-holds-opening-session.html>.

<sup>465</sup> 'Egypt's Islamist Parties Win Elections to Parliament', BBC News, (21 January 2012),

<https://www.bbc.com/news/world-middle-east-16665748>.

<sup>466</sup> M. Ottaway, N.J. Brown, 'Egypt's Transition in Crisis: Falling into the Wrong Turkish Model?', Carnegie Endowment for International Law Peace, (30 March 2012), <https://carnegieendowment.org/2012/03/30/egypt-s-transition-in-crisis-falling-into-wrong-turkish-model-pub-47696>.

<sup>467</sup> Ibidem.

<sup>468</sup> S.A. Kouddous, 'In Egypt, a President Without Power', Nation, (20 June 2012), (The military also tightened its rule over the drafting of Egypt's new constitution by granting itself an effective veto over any provisions that don't receive its approval), <https://www.thenation.com/article/egypt-president-without-power/>.

In accordance with the 2011 constitutional declaration, the Parliament enjoyed the right to select the members of the national constituent assembly.<sup>469</sup> The only restriction given to the Egyptian Parliament was a 6 months' time framework for the accomplishment of the constitution draft.<sup>470</sup> After the preparation of the draft, it would be presented to the public in the national referendum within fifteen days.<sup>471</sup> The composition of the constitution-drafting panel was decided to be the following: half of the constituent assembly members would come from the Parliament's membership and the other half would come from different groups of the Egyptian society- public figures, specialists, various associations and state bodies.<sup>472</sup> At the beginning, independent and secular parties held forty out of the hundred assembly seats, but in a while a majority of these liberal non-Islamist members left the panel.<sup>473</sup>

Secular parties attempted to prevent Islamists from dominating the functioning of the constituent assembly by collaborating with the military to introduce a set of supraconstitutional principles for the drafters of the constitution and to command the composition of the constituent assembly.<sup>474</sup> However, all the efforts of secularist leaders resulted to be unsuccessful and they started to pull their party representatives out of the assembly and even initiated two legal proceedings challenging the election laws according to which the Parliament and the constituent assembly were composed.<sup>475</sup> The legal action

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<sup>469</sup>M. Ottaway, 'Who Will Right Egyptian Constitution?', Carnegie Endowment for International Law Peace, (13 March 2012), <http://carnegieendowment.org/2012/03/13/who-will-write-egyptian-constitution>.

<sup>470</sup> N. J. Brown, 'Midnight for the SCAF's Cinderella Story', Foreign Policy, (19 March 2012), <https://foreignpolicy.com/2012/03/19/midnight-for-the-scafs-cinderella-story/>.

<sup>471</sup> Ibidem.

<sup>472</sup> Ibidem.

<sup>473</sup> M. Ottaway, N.J. Brown, *supra* note 359.

<sup>474</sup> Ibidem.

<sup>475</sup> Ibidem. (The boycott of the constitutional assembly's activity was as well supported by the Egyptian Supreme Constitutional Court, the Coptic Christian community and al-Azhar University representatives. At the same time, the non-Islamist youth movements and experts not represented in the panel, expressed their disappointment for the fact of being excluded).

proved to be effective- the administrative court of the State Council of Egypt (which has jurisdiction in cases in which the state or an official is a party) discovered that half of the assembly's members could no longer perform in the body.<sup>476</sup>

The court's reasoning stated that, according to the March 2011 interim constitutional declaration, which granted the Parliament the power to elect the members of the constituent assembly, parliamentarians could not 'elect' themselves to the body.<sup>477</sup> The narrow interpretation of the word 'elect' made the court vulnerable to the accusations that its ruling was highly political and aimed at the Islamist dominance both in the Parliament and in the constituent assembly.<sup>478</sup> Nonetheless, the Court's decision conditioned the leading Islamist party to shape a new constituent assembly involving more other parties and groups in the formation process.<sup>479</sup>

In a joint session on 13 June 2012, the Parliament elected a new constituent assembly.<sup>480</sup> However, the voting process was overshadowed by the absence of 57 independent, liberal, and leftist parliament members who boycotted the session over accusations that the Muslim Brotherhood's Freedom and Justice Party was still determined to monopolize the Constituent Assembly. Already on 14 June, the Supreme Constitutional Court ruled as unconstitutional the law on parliamentary elections, as the law in place when the Parliament was elected did not provide for independents the same chance to get elected as

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<sup>476</sup> N.J. Brown, 'A Guide Through the Egyptian Maze of Justice' Carnegie Endowment for International Law Peace, (6 June 2012), <https://carnegieendowment.org/2012/06/06/guide-through-egyptian-maze-of-justice-pub-48302>.

<sup>477</sup> N.J. Brown, 'Judicial Turbulence Ahead in Egypt, Fasten Your Seat belts', Carnegie Endowment for International Law Peace, (6 June 2012), <https://carnegieendowment.org/2012/06/06/judicial-turbulence-ahead-in-egypt-fasten-your-seat-belts-pub-48301>.

<sup>478</sup> Ibidem.

<sup>479</sup> Ibidem.

<sup>480</sup> M. Revkin, Y. Auf, 'Egypt's Constitutional Chaos', Foreign Policy, (14 June 2012), <https://foreignpolicy.com/2012/06/14/egypts-constitutional-chaos/>.



for party members.<sup>481</sup> Three days later, the SCAF has restored to itself legislative authority and issued a complementary declaration which gave it the power to form a new constituent assembly. This occurred after a new lawsuit had led to the dissolution of the current constituent assembly.<sup>482</sup> On 24 June, an Islamist representative from the Muslim Brotherhood party, Mohamed Morsi, became the President of Egypt with 51.7 % of the popular vote.<sup>483</sup>

#### **4.1.2.4 The 2012 Constitution of Egypt**

On 12 August 2012, Mohamed Morsi released his own supplement to the March 2011 constitutional declaration, where stated that from that moment he and not the military would take upon himself the authority to form a new constituent assembly in case that then-functioning constituent assembly was incapable to complete its work.<sup>484</sup> A Middle East expert at the Brookings Doha Centre and Exeter University, Omar Ashour, observed: ‘This is the first time in Egypt's political history that an elected civilian politician overrules the decisions of the heads of the military establishment’.<sup>485</sup> Such Morsi’s commitment constrained some secularists and independents in their decision to boycott the new constituent assembly. These groups clearly understood that although the current body was dominated by Islamists alone, any new constituent assembly would be appointed exclusively by President Morsi and would limit their ability to form the final constitution.<sup>486</sup> Hence, political parties were forced to work together in order to avoid the

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<sup>481</sup> Ibidem.

<sup>482</sup> M. Shukri, ‘Egypt’s New Constitutional Declaration’, BBC News, (18 June 2012), <https://www.bbc.co.uk/news/world-europe-18494178>.

<sup>483</sup> ‘Muslim Brotherhood-backed candidate Morsi wins Egyptian presidential election’, Fox News, (24 June 2012), <http://www.foxnews.com/world/2012/06/24/egypt-braces-for-announcement-president.html>.

<sup>484</sup> Y. Knell, ‘Morsi's Surprising Swipe at Military Power’, BBC News, (13 August 2012), <https://www.bbc.co.uk/news/world-middle-east-19240200>.

<sup>485</sup> Ibidem.

<sup>486</sup> Ibidem.

uncertainty that would have occurred from the appointment of yet another new assembly.<sup>487</sup> The Constituent Assembly continued to operate largely through deliberations and consensus, as the constitution draft had to be accessible to voters till the end of 2012.<sup>488</sup>

The urgent need to finalize the constitution draft within few months required the assembly to concentrate on adjusting the 1971 Constitution, rather than drawing a new one.<sup>489</sup> The protection of human rights, the place of the Islamic law in the Constitution and the degree of protection for the freedom of religion became central subjects of deliberations.<sup>490</sup> The organization of the assembly was the following: it divided itself into different committees, each of which was responsible for drafting a particular section of the constitution, as well as the committee to review and coordinate those sections.<sup>491</sup> The assembly's rules and operations were aimed at consensual drafting, with voting by the members as a last resort to resolve debatable issues.<sup>492</sup> However, the Islamist parties continued to have the leading position in the assembly, leaving to non-Islamists few options other than to threaten to get out from the body- an action they were unlikely to commit, as they would be even more limited in their rights while creating the final constitution.<sup>493</sup> It is important to note that, first of all, it was the Islamist's interest to form a consensus constitution draft, despite their dominant position in the constituent assembly.<sup>494</sup> A consensus document presented to the

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<sup>487</sup> N.J. Brown, 'Egypt Tries to Reconstitute Itself', Midan Masr, (6 September 2012), <http://www.midanmasr.com/en/article.aspx?ArticleID=209>.

<sup>488</sup> Ibidem.

<sup>489</sup> Ibidem.

<sup>490</sup> Ibidem.

<sup>491</sup> N.J. Brown, 'Egypt's Constitutional Racers Stagger Toward the Final Lap', Carnegie Endowment for International Law Peace, (1 October 2012), <https://carnegieendowment.org/2012/10/01/egypt-s-constitutional-racers-stagger-toward-final-lap-pub-49530>.

<sup>492</sup> Ibidem.

<sup>493</sup> Ibidem.

<sup>494</sup> Ibidem.

public would more likely lead to the political transition in Egypt in a non-divisive manner under the Islamist's political ascendancy.<sup>495</sup>

Notwithstanding the consensus-based constitution drafting process, the assembly's work lacked external transparency. Some committee's members contributed to the public leaking of drafts or its' parts, while others issued competing drafts of the constitution.<sup>496</sup> All these activities led to the complexity of the drafting process and the escalation of debates over particularly contentious subjects.<sup>497</sup> One of such subjects referred to the draft provisions dealing with gender - one of the draft provisions of article 68 guaranteed gender equality but only in a way that did not conflict with the 'judgements' of the sharia.<sup>498</sup> Another controversial subject provided for the freedom of religious belief, but the right for the construction of the house of worship and the freedom of religious practice were restricted to merely three authorised religions- Islam, Judaism and Christianity.<sup>499</sup> These provisions were actively debated between liberal secular and Islamist parties both within the committee and in the public.<sup>500</sup> Article 2 from the 1971 Constitution that made sharia law the main source of legislation was preserved in draft versions of the constitution.<sup>501</sup> The only difference was that while the 1971 Constitution was giving the Supreme Constitutional Court the authority to decide whether the law was in accordance with sharia,

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<sup>495</sup> Ibidem. ('Egypt's two longest-lived constitutions, the one from 1923 and the other from 1971, were hardly consensus products. ... For instance, the French Third Republic was created with a set of partial documents because the consensus necessary to write a full constitution did not exist; it lasted for seven decades and was revoked only by Nazi occupation').

<sup>496</sup> N.J. Brown, 'Egypt's Constitution: Islamists Prepare for a Long Political Battle', Carnegie Endowment for International Law Peace, (23 October 2012), <https://carnegieendowment.org/2012/10/23/egypt-s-constitution-islamists-prepare-for-long-political-battle-pub-49777>.

<sup>497</sup> Ibidem.

<sup>498</sup> Ibidem.

<sup>499</sup> Ibidem.

<sup>500</sup> O. El Sharnoubi, 'New Egyptian Constitution Offers Fewer Religious Freedoms, Critics Allege', Ahram Online, (2 October 2012), <http://english.ahram.org.eg/NewsContent/1/64/54582/Egypt/Politics-/New-Egyptian-constitution-offers-fewer-religious-f.aspx>.

<sup>501</sup> N.J. Brown, *supra* note 384.

the actual constitution draft made the Sunni University, mosque and research institution-al-Azhar- the advisor on sharia law.<sup>502</sup> In addition, a new provision which limited sharia principles to Sunni Islam principles was added to the draft (emphasising Sunni Islam over Shia Islam).<sup>503</sup>

Opposition parties and groups inside and outside the drafting committee blocked the final phases of the constitution-drafting, as Islamists were pushing their interests inside the body by clearly dominating the committee.<sup>504</sup> The boycott resulted in a request from the opposition, judiciary and some state institutions to postpone the previously scheduled December referendum.<sup>505</sup> For instance, numerous judicial organizations refused to perform their historic task of monitoring the elections process.<sup>506</sup> Other judges instead expressed their support for Morsi and agreed to supervise the elections. However, foreseeing a shortage of judicial monitors, Egypt's electoral commission called for votes on two consecutive Saturdays.<sup>507</sup> Finally, in two rounds, on 15 and 22 December, the constitution draft was approved by the Egyptian population.<sup>508</sup> The new constitution was

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<sup>502</sup> Ibidem.

<sup>503</sup> Ibidem. (In one draft version of the constitution, these principles were included in article 221. In the final version of the constitution that was presented at the referendum, the principles referring to the sharia law were contained in article 219). N.J. Brown, 'Islam in Egypt's New Constitution', Carnegie Endowment for International Law Peace, (13 December 2012), <http://carnegieendowment.org/2012/12/13/islam-in-egypt-s-new-constitution-pub-50382>.

<sup>504</sup> M. Revkin, Y. Auf, supra note 368.

<sup>505</sup> 'Egypt's Constitutional Referendum: A Dubious Yes', Economist, (15 December 2012), <https://www.economist.com/middle-east-and-africa/2012/12/22/a-dubious-yes>

<sup>506</sup> S. McCrummen, 'Opponents of Egypt's Morsi-Backed Charter Urge 'NO' Vote Instead of Boycott', The Washington Post, (13 December 2012), <https://www.independent.co.uk/news/world/middle-east/opponents-of-egypts-morsi-backed-charter-urge-no-vote-instead-of-boycott-8412303.html>.

<sup>507</sup> Ibidem.

<sup>508</sup> H. Albrecht, 'Egypt's 2012 Constitution Devil in the Details, Not in Religion', United States Institute of Peace, PEACEBRIEF, (25 January 2013), <https://www.usip.org/sites/default/files/PB139-Egypt's%202012%20Constitution.pdf>.

ratified by a 64 % vote, but the lukewarm attitude of the Egyptians to the document could be noted from the mere 33 % turnout.<sup>509</sup>

Although President Morsi achieved his goal of forming a new constitution through the means of a referendum, the lack of consensus inside the assembly regarding the final constitution draft and the boycott of the judiciary undermined the legitimacy of the new constitution in the eyes of many Egyptian citizens. According to Tushnet's factors for assessing the legitimacy of the constitution-drafting process,<sup>510</sup> the process in Egypt at this phase would seem to fail; while in terms of the method of constitutional adoption, a popular referendum was definitely inclusive; even despite the fact that the final document, while originally designed for consensus, was not broadly supported by main constituencies. The polarizing nature of the draft constitution text can be explained by the limited time framework that was given to the assembly for the completion of its work (six months) and the limited opportunities available for the opposition to influence the Islamist-dominated assembly. However, more than the actual document, the failure of the assembly to reach an agreement made it difficult for the large numbers of the population to embrace the new constitution. The draft proposed at the referendum was opposed by considerable numbers of the opposition party members, many of whom decided to boycott the referendum.<sup>511</sup> Finally, the approval of the Constitution by a mere 30% of the eligible voters, hardly provided a mandate for the new Egyptian text.

The primary objective of participatory constitution-making process is to attain a national consensus on governing principles suggested in a new constitution by facilitating broad

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<sup>509</sup> S. McCrummen, 'After Chaos, Egyptians Narrowly Approve Controversial Draft Constitution', The Washington Post, (15 December 2012), [https://www.washingtonpost.com/world/middle\\_east/egypt-tense-ahead-of-vote-on-constitution/2012/12/15/b7605220-46aa-11e2-8061-253bccfc7532\\_story.html?utm\\_term=.a0f114d1759f](https://www.washingtonpost.com/world/middle_east/egypt-tense-ahead-of-vote-on-constitution/2012/12/15/b7605220-46aa-11e2-8061-253bccfc7532_story.html?utm_term=.a0f114d1759f).

<sup>510</sup> M. Tushnet, *supra* note 339.

<sup>511</sup> 'Egyptian Constitution 'Approved' in Referendum', BBC News, (23 December 2012), <https://www.bbc.co.uk/news/world-middle-east-20829911>.

citizen participation in fundamental discussions and deliberations.<sup>512</sup> The constituent assembly forming the Egypt's 2012 Constitution didn't succeed in reaching this objective, which in its turn threatened the legitimacy of the 2012 Constitution.

#### **4.1.2.5 The 2014 Constitution of Egypt**

Disputes between secular and Islamist leaders continued to prevail even after the adoption of 2012 Constitution. The opposition groups, including youth activists, liberal secularists, officials in the security bodies and the judicial authorities, decided to unite their forces against the current Islamist rule with the goal of sending President Morsi away from office.<sup>513</sup> For the Islamist government and its' supporters, the opposition was attempting to undermine the results of a democratic political process that had given the mandate to Morsi to become Egyptian President and to the previously dissolved Islamist Lower House of Parliament and an Islamist Higher House of Parliament (Shura) to hold power.<sup>514</sup> On 30 June 2013 millions of Egyptians went out to the streets of Cairo to protest against Morsi's presidency and on 3 July 2013, the military intervened and committed a military coup, forcing Egypt's first democratically elected President from power.<sup>515</sup> With the widespread popular support, military forces suspended the constitution and appointed Adli Mansour, chief justice of the Supreme Constitutional Court, interim president until new elections could take place.<sup>516</sup> The chief of the military, Defense Minister General Abdel Fattah el-Sisi, issued a roadmap for going ahead with the political transition: the first step consisted of proposing revisions to the 2012 Constitution, subsequent national referendum and

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<sup>512</sup> A.M. Banks, *supra* note 181.

<sup>513</sup> N.J. Brown, 'Will June 30 Be Midnight for Morsi's Cinderella Story?', *Foreign Policy*, (27 June 2013), <https://foreignpolicy.com/2013/06/27/will-june-30-be-midnight-for-morsis-cinderella-story/>.

<sup>514</sup> *Ibidem*.

<sup>515</sup> N.J. Brown, 'After the Egyptian Coup', *Carnegie Endowment for International Law Peace*, (20 August 2013), <https://carnegieendowment.org/2013/07/04/after-egyptian-coup-pub-52307>.

<sup>516</sup> *Ibidem*.

parliamentary and presidential elections.<sup>517</sup> Firstly, the committee of legal and judicial experts was created in order to draft a series of amendments. The committee kept its work in secret, explaining it by an attempt to avoid public agitation.<sup>518</sup> It accomplished its work by the end of August, and a committee composed of fifty politicians nominated by President Mansour reviewed the constitution and discussed the amendment drafts.<sup>519</sup> The members of the committee became representatives of syndicates and unions, leaders selected by state institutions.<sup>520</sup> The distribution of seats in the committee did not reflect previous political results, so the Islamist party received only one seat in the body.<sup>521</sup> While the prior constituent assembly had been considered as an Islamist- dominated body, the ‘committee of 50’ could be more viewed as a state-institution dominated assembly.

On 2 December, Egyptian transitional President Mansour received finalized amendment drafts. The new draft constitution removed language and articles favoured by Islamists. There is no surprise that the new text spoke in support of state institutions that had been present in the assembly and had been strongly constrained in constitution-drafting process during Morsi’s leadership.<sup>522</sup> In particular, the new constitution draft preserved the autonomy for the military, which had already been granted a considerable measure of independence by the 2012 constitution.<sup>523</sup> According to the new provision, the military was

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<sup>517</sup> N.J. Brown, ‘Mrs. Lincoln’s Egyptian Constitution’, Foreign Policy, (20 August 2013), <https://foreignpolicy.com/2013/08/20/mrs-lincolns-egyptian-constitution/>.

<sup>518</sup> Ibidem.

<sup>519</sup> Ibidem.

<sup>520</sup> Ibidem.

<sup>521</sup> N.J. Brown, ‘Egypt’s Daring Constitutional Gang of 50’, Carnegie Endowment for International Law Peace, (20 September 2013), <https://carnegieendowment.org/2013/09/20/egypt-s-daring-constitutional-gang-of-50-pub-53079>.

<sup>522</sup> N.J. Brown, M. Dunne, ‘Egypt’s Draft Constitution Rewards the Military and Judiciary’, Carnegie Endowment for International Law Peace, (4 December 2013), <https://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary-pub-53806>.

<sup>523</sup> Ibidem.

treated as an independent ‘branch’ of government.<sup>524</sup> The most significant change occurred under article 234, where the military was vested with the right to approve the Defense Minister for the next two presidential terms.<sup>525</sup> The broad jurisdiction of military courts over the civilians continued in Egypt, provoking great concern among youth activists.<sup>526</sup> In fact, during the Mubarak era, military courts had been seriously abused by the government in order to punish political adversaries and protesters. Another state institution that profited from the Morsi’s dismissal was the judiciary. In the new constitution draft, judicial authorities were granted greater autonomy, and the Supreme Constitutional Court was even authorised to appoint its own chief justice.<sup>527</sup> The police and intelligence and security apparatus also achieved greater autonomy.<sup>528</sup> In the new text, the Supreme Police Council must be consulted about any law that could have an effect on police institutions.<sup>529</sup> Article 204 keeps intelligence officers from the civilian oversight and prosecution, making them subject to military courts.<sup>530</sup>

The clear losers of the new draft constitution became Islamists, who lost all gains they had introduced in the 2012 Constitution. The article that previously required al-Azhar to be consulted in questions relating to sharia, was eliminated.<sup>531</sup> Article 219, where ‘principles of Islamic sharia’ had been listed, was as well removed from the new text, and preamble language was introduced into the article to clarify that the Supreme Constitutional Court

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<sup>524</sup> Ibidem.

<sup>525</sup> Ibidem.

<sup>526</sup> Ibidem.

<sup>527</sup> Ibidem.

<sup>528</sup> Ibidem.

<sup>529</sup> Ibidem.

<sup>530</sup> Ibidem.

<sup>531</sup> Ibidem.



preserved power on the definition of sharia.<sup>532</sup> The political activity based on religion was also banned under new constitution draft, before it existed only in the legislation.<sup>533</sup>

However, not all the members of the coalition that ousted Morsi were satisfied with the new constitution draft. The April Six Youth Movement, which strongly supported protests against Mubarak and then against Morsi, started to urge the Egyptian public to deny the national referendum.<sup>534</sup> The main point of concern was the greater level of autonomy granted to the police, military and security institutions, that even did not exist during the Mubarak's rule.<sup>535</sup> Supporters of the Muslim Brotherhood, who had been fiercely suppressed by the transitional government, as well continued to contest the new constitution.<sup>536</sup>

On 14 and 15 January 2014, Egyptians overwhelmingly approved a new constitution by referendum.<sup>537</sup> The text proposed by the constitutional committee was approved by 98 % of Egyptians with an official turnout reported as 38.6 % of Egypt's 52 million eligible voters.<sup>538</sup> Although the number of Egyptians who voted in favour of the 2014 Constitution was nearly double of the number of those who supported the 2012 Constitution, issues concerning the legitimacy of the drafting process are still in place. Notwithstanding the fact, that the constitutional committee included a wide cross section of interests, it did not provide the Islamist party the number of seats in proportion to their support amongst the public, nor did it install a clear mechanism for public participation. Both these factors

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<sup>532</sup> Ibidem.

<sup>533</sup> Ibidem.

<sup>534</sup> Ibidem.

<sup>535</sup> Ibidem.

<sup>536</sup> N.J. Brown 'Egypt has Replaced a Single Dictator with a Slew of Dictatorial Institutions' Op-Ed, The New Republic, (28 January 2014), <http://egyptelections.carnegiendowment.org/2014/01/28>.

<sup>537</sup> R. Grote, 'Constitutional Developments in Egypt: The New 2014 Egyptian Constitution', Oxford University Press, (2014), <http://oxcon.oup.com/page/egyptian-constitution/constitutional-developments-in-egypt-the-new-2014-egyptian-constitution>.

<sup>538</sup> Ibidem.

undermined the legitimacy of the constitution-drafting process and as a consequence the legitimacy of the final document presented to the people.

#### **4.1.2.6 The evolution of the confessional clause of Article 2 (1971, 2012 and 2014 Constitutions)**

Over the last thirty years, several Muslim countries have adopted constitutions that comprise provisions requiring the law of the state to be coherent with the norms of sharia, meaning Islamic law.<sup>539</sup> Even today the trend towards constitutional Islamization in the Muslim world shows no signs of abating.<sup>540</sup> In case of Egypt, it was the government that took a decision to enact a constitutional provision-Article 2- that apparently required all Egyptian laws to be consistent with sharia principles.<sup>541</sup>

In 1970, on the eve of the adoption of a new constitution, Egyptian Islamists succeeded in convincing the government to ensure an explicit constitutional role for the Islamic sharia.<sup>542</sup> Consequently, Egypt's 1971 Constitution became the first Egyptian constitution to refer to the Islamic law (and not purely Islam as a religion), and to grant Islamic law an explicit role. Article 2 of the Constitution stated that 'the principles of the Islamic shari'a are a chief source (masdarun ra'isiun) of legislation'.<sup>543</sup> Moreover, during the 1970s, the influence of Islamism intensified, and the government started to plan Islamic

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<sup>539</sup> Countries with a majority Muslim population that have, through enactment or amendment, granted Islamic legal norms a preferred position in the constitutional system include, inter alia, Afghanistan, Afg. Const. Art. 3; Egypt, Egypt Const. Art. 2; Iran, Iran Const. 1358 [1980] Arts. 2-4; Pakistan, Pak. Const. Art. 227; Qatar, Qatar Const. Art. 1; Sudan, Sudan Transitional Const. Art. 4; Saudi Arabia, Royal Decree No. A/90 art. 1, and Yemen, Yemen Const. Art. 3.

<sup>540</sup> C.B. Lombardi, N.J. Brown, 'Do Constitutions Requiring Adherence to Sharia Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law', (2006), [https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/5578ea2be4b042afe8e95c92/1433987627782/2006\\_AILR\\_Egypt\\_Article.pdf](https://static1.squarespace.com/static/554109b8e4b0269a2d77e01d/t/5578ea2be4b042afe8e95c92/1433987627782/2006_AILR_Egypt_Article.pdf).

<sup>541</sup> Ibidem.

<sup>542</sup> Ibidem.

<sup>543</sup> Egypt Constitution 1971, Article 2, (Translated from Arabic to English).

revisions to Egyptian law.<sup>544</sup> Additionally, the Article's 2 language was subtly but significantly strengthened in 1980.<sup>545</sup> In the provision of Article 2 cited above, the word 'a' was substituted with 'the'. With that change, the principles of the Islamic sharia ceased to be one among many chief sources of Islamic law and became 'the chief source' (al-masdar al-ra'isi) of Egyptian legislation. The legislative history advocated that amended Article 2 obliged all Egyptian laws to conform to 'the principles of the Islamic sharia'.<sup>546</sup> The amendment of Article 2 brought a significant symbolic victory for Islamists. However, Article 2 did not explain what the term 'the principles of the Islamic sharia' signified, and the legislative history did not provide much expertise either.<sup>547</sup> This lack of instruction triggered serious problems for a Supreme Constitutional court attempting to interpret and enforce Article 2.

In comparison to previous constitutions, the 2012 constitution put a stronger emphasis on religion.<sup>548</sup> However, Article 2 comprised only a minor change of that very article in the 1971 constitution and generally remained vague.<sup>549</sup> Article 219 arose as part of an

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<sup>544</sup> G. Kepel, 'Jihad: The Trail of Political Islam', Belknap Press, (2002), pp. 80-88.

(The author provides a brief overview of the Egyptian Islamist movement occurring in the 1970s, which attracted students and played a pioneering role in the wider movement that later spread throughout the Muslim world).

<sup>545</sup> Ibidem.

<sup>546</sup> C.B. Lombardi, 'State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law', (2006), pp.132-135. (The discussion of the report of the committee in charge of drafting amendments and some of the debates in parliament).

<sup>547</sup> J.P. O'Kane, 'Islam in the New Egyptian Constitution: Some Discussions in al-Ahram', 26 Middle East Journal 137, (1972), pp. 143-48.

(In fact, the meaning of the amendment was debated both inside the drafting committee and by outside commentators and political figures, but prior to adoption, there was no agreement achieved on the precise implications of the various formula considered).

<sup>548</sup> H. Albrecht, 'Egypt's 2012 Constitution Devil in the Details, Not in Religion', United States Institute of Peace, Peacebrief, (25 January 2013), <https://www.usip.org/sites/default/files/PB139-Egypt's%202012%20Constitution.pdf>.

<sup>549</sup> Ibidem.

amendment to the constitution's main text and reflected, in a more detailed manner, on those 'principles of Islamic Sharia.'<sup>550</sup> Probably the most controversial article is Article 4, which nominates al-Azhar as an autonomous institution observing the application of Islamic law.<sup>551</sup> The article's formulation itself provokes speculations about a substantial impact of al-Azhar in future law-making and censorship. The provision as well demonstrates the authors' priority in empowering al-Azhar as an institution autonomous from state control.<sup>552</sup>

In the 2014 Constitution some of the most controversial articles of the 2012 constitution, which had advanced the role of institutionalized Islam, were removed.<sup>553</sup> In particular, the former Article 219 became a reason for public concerns, as it could be interpreted to establish a broad definition of Sharia that, in its turn, could undermine the catalogue of human rights.<sup>554</sup> The new constitution goes back to the formula from 1980, where 'principles of Islamic Shari'a are the main sources of legislation'.<sup>555</sup> According to a series of rulings issued by the Supreme Constitutional Court in the 1980s and 1990s, the preamble fixes and constitutionalizes the scope of Sharia.<sup>556</sup> These rulings are relatively 'liberal', as they restrict the legislature's capacity to take from the more conservative traditions of Islamic jurisprudence by narrowing their position to those 'definitive rules in the Qur'an and prophetic sayings' which are traditionally very few.<sup>557</sup> Nevertheless,

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<sup>550</sup> N.J. Brown, *supra* note 391.

<sup>551</sup> *Ibidem*.

<sup>552</sup> *Ibidem*.

<sup>553</sup> R. Grote, *supra* note 425.

<sup>554</sup> *Ibidem*.

<sup>555</sup> M. Meyer-Resende, 'Egypt: In-depth Analysis of the Main Elements of the New Constitution', Policy Department DG External Policies, (2014), p. 13, [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPOAFET\\_NT\(2014\)433846\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPOAFET_NT(2014)433846_EN.pdf).

<sup>556</sup> *Ibidem*.

<sup>557</sup> *Ibidem*.

establishing that definition could signify that even a very liberal parliament would not be able to challenge or amend certain laws, especially those concerning personal status, such as inheritance articles which discriminate against women.<sup>558</sup> The actual constitution, as well, puts limits on the role of Al-Azhar University by eliminating its previous power to veto legislation if it considers it un-Islamic, which would have undermined parliamentary privilege and the role of the courts.<sup>559</sup>

Finally, several statements can be added towards the final stance of the confessional clause of Article 2. Firstly, Article 219 of the 2012 constitution that had attempted to restrict the scope of interpretation of judicial bodies with regard to the principles of Sharia by defining them as including ‘general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community’ was removed from the constitution text.<sup>560</sup> Secondly, the requirement to consult Al-Azhar in all matters relating to Islamic law no longer figures in the new Article 7, which defines Al-Azhar’s role in Egyptian society as that of an ‘independent scientific Islamic institution’ responsible for preaching Islam in Egypt and the world.<sup>561</sup> However, the key provisions relating to the Islamic identity of Egypt have been preserved. Article 2 of the constitution, which declares that Islam is the religion of the state and the principles of Islamic Sharia are the principal source of legislation, has remained unchanged.<sup>562</sup>

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<sup>558</sup> Ibidem.

<sup>559</sup> Ibidem.

<sup>560</sup> R. Grote, *supra* note 425.

<sup>561</sup> Ibidem.

<sup>562</sup> Ibidem.

## **4.2 Substantive legitimacy: International human rights law norms incorporation**

The fundamental element of the substantive legitimacy of a new constitution is the incorporation of international human rights law norms. The adoption of new constitutions in Tunisia and Egypt after the Arab Spring revolution demonstrated to which extent these countries addressed the abuses of Ben Ali and Mubarak authoritarian regimes, such as state repression of fundamental civic and political rights by using international human rights law.<sup>563</sup>

Whereas the participatory constitution-making process has been a trend in constitutional design during the past twenty years, the incorporation of human rights law norms into national constitutions has become a trend since the end of World War II.<sup>564</sup> In fact, the main reason for such a trend after World War II was the necessity to restrain state action against its own citizens (the Nazi-Germany problem) and state aggression against other countries (the military aggression of Japan).<sup>565</sup> Due to compliance of more and more states with international human rights law institutions and treaties, this new international legal order started to strongly hold back state action. In course of time, former colonies, post-soviet states, and recovered from conflicts countries began to incorporate international human rights law norms and sometimes even references to multilateral treaties into their constitutions.<sup>566</sup> Debating on the issue of the growing adherence of countries to this

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<sup>563</sup> ‘Tunisia 2012 Human Rights Report’, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, (2012), <https://www.state.gov/documents/organization/204597.pdf>.

‘Egypt 2012 Human Rights Report’, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, (2012), <https://www.state.gov/documents/organization/204569.pdf>.

<sup>564</sup> L.C. Backer, ‘God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21<sup>st</sup> Century’, *Mississippi Law Review*, Volume 27, pp. 24-25.

<sup>565</sup> Ivi, p. 33

<sup>566</sup> Ivi, p. 26, p. 33, p. 35; K.L. Cope, ‘The Intermestic Constitution: Lessons from the World’s Newest Nation’, *Virginia Journal of International Law*, (2013), p. 673. (The discussion about the influence of transnational forces on constitutional rights and structural provisions).

international legal order, Backer points out that: ‘The synthesis of a Post-War system of norms applicable to all nation state constitutions, if they were to be recognized as legitimate by the international community of nations, constituted an expansion and constitutionalization of sources of a set of norms of human behaviour, and of the necessary constraints in the development of systems of institutions with effects on people. From the time of the establishment of the United Nations it dovetailed with expansion of role and legitimacy of international law and governance’.<sup>567</sup>

In 1948, the adoption of the Universal Declaration of Human Rights (‘UDHR’) signified that the United Nations member states proclaimed the civil, political, economic, social and cultural rights that they believed states should provide to their populations.<sup>568</sup> The elaboration of these rights occurred in the International Covenant on Civil and Political Rights (ICCPR)<sup>569</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>570</sup> that were adopted by the United Nations General Assembly in 1966 and came into effect in 1976. Altogether, the UDHR, the ICCPR and the ICESCR are recognized as the ‘Universal Bill of Human Rights’.<sup>571</sup> Both Tunisia and Egypt have ratified the ICCPR and the ICESCR.<sup>572</sup> Their national constitutions as well refer to the legal obligations arising from international human rights law treaties. In particular, Article 20 of the Tunisian Constitution points out that ratified international treaties ‘have a status superior to that of

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<sup>567</sup> L.C. Baker, *supra* note 555.

<sup>568</sup> General Assembly Resolution 217 (III), A Universal Declaration of Human Rights (UDHR), (10 December 1948).

<sup>569</sup> General Assembly Resolution 2200 A (XXI), International Covenant on Civil and Political Rights (ICCPR), (16 December 1966).

<sup>570</sup> General Assembly Resolution 2200 A (XXI), International Covenant on Economic, Social and Cultural Rights, (ICESCR), (16 December 1966).

<sup>571</sup> General Assembly Resolution 217 (III) F, Preparation of a Draft Covenant on Human Rights and Draft Measures of Implementation, (10 December 1948); United Nations Office of the High Commissioner of Human Rights, Fact Sheet 2, The International Bill of Human Rights (June 1996).

<sup>572</sup> International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 United Nations Treaty Series 14668; International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 United Nations Treaty Series 14531.

laws and inferior to that of the Constitution'.<sup>573</sup> In accordance with this article, any legislation that is inconsistent with international human rights agreements is void. However, the provision also demonstrates that any article of the Tunisian Constitution that is in conflict with an international human rights treaty would transcend the treaty and surpass it. An entirely new Article 93 of the 2014 Egyptian Constitution states, 'the State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law'.<sup>574</sup> The formulation that the state is bound by these international agreements potentially gives the possibility for Egyptian citizens to initiate claims domestically under Article 93 for any violations of the substantive provisions of these diverse agreements.<sup>575</sup>

The ICCPR<sup>576</sup> emphasises a number of civil and political rights that guarantee a person's freedom to freely participate in civil and political affairs of a country without being excessively constrained by the state. The rights are depicted as negative ones and refer to restrictions on a state's ability to limit a person's freedoms or behaviours.<sup>577</sup> Among the rights protected under the ICCPR are the rights to equal protection under the law and due

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<sup>573</sup> Constitution of the Republic of Tunisia, Article 20, (Translated from Arabic to English), (27 January 2014).

<sup>574</sup> Constitution of the Arab Republic of Egypt, Article 93, (Translated from Arabic to English), (18 January 2014).

<sup>575</sup> U.N. Office of the High Commissioner for Human Rights. (The ratification of the ICCPR became a significant step forward for Egypt, as the country has not adopted the Optional Protocol for the ICCPR and citizens are unable to contest the Egypt's alleged human rights violations in front of UN human rights treaty bodies).

<sup>576</sup> Status of the International Covenant on Civil and Political Rights, The United Nations Treaty Collection, (With 168 party states, the ICCPR has been nearly universally accepted by all 193 United Nations member countries. Therefore, the ICCPR reflects international human rights law norms in the area of civil and political rights.), [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtsg_no=IV-4&src=IND).

<sup>577</sup> E.A. Posner, 'Human Welfare, Not Human Rights', 108 Columbia Law Review, (2008), p.1758, pp. 1764-1765.



process, rights of peaceful assembly, freedom of the expression, freedom of the religion, freedom of the press and freedom of the assembly.<sup>578</sup>

In Part II of the Tunisian Constitution, titled ‘Rights and Freedoms’, the emphasized civil and political rights are similar to those laid out in the ICCPR.<sup>579</sup> Part III of the Egyptian Constitution, titled ‘Public Rights, Freedoms and Duties’ details many of the civil and political rights contained in the ICCPR.<sup>580</sup>

#### **4.2.1 Civil and political rights**

The ICCPR’s Article 21 states that every citizen shall have the right to freedom of assembly, except where there is a threat for public safety, health, or morals.<sup>581</sup> Article 37 of the Constitution of Tunisia similarly provides that ‘the right to assembly and peaceful demonstration is guaranteed’.<sup>582</sup> Article 73 of the Constitution of Egypt, as well, states that ‘citizens shall have the right to organize public meetings, marches, demonstrations and all forms of peaceful protests’ as long as they are unarmed and proclaimed in advance.<sup>583</sup> Due to the fact that both revolutions that overthrew Ben Ali and Mubarak resulted from political protest, protection of the right to freedom of assembly without undue state restriction remains a significant priority in post- Arab Spring Tunisia and Egypt. In case of Egypt, the willingness of the courts to give strong effect to these constitutional provisions will be verified by a constitutional challenge that occurred due to the highly criticized political protest law, which was introduced by the interim government after Morsi’s ouster.<sup>584</sup> This

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<sup>578</sup> Ibidem.

<sup>579</sup> Constitution of the Republic of Tunisia, *supra* note 460.

<sup>580</sup> Constitution of the Arab Republic of Egypt, *supra* note 461.

<sup>581</sup> ICCPR, Article 21.

<sup>582</sup> Constitution of the Republic of Tunisia, Article 37.

<sup>583</sup> Constitution of the Arab Republic of Egypt, Article 73.

<sup>584</sup> J. Malsin, ‘Egypt’s New Protest Law May Spark Another Crisis’, *Time*, (27 November 2013), (Egypt’s interim President Adly Mansour approved a new law criminalizing protests that take place without

law was viewed by many as legal justification for the government's violent crackdown on Islamists and dissenters who supported the Muslim Brotherhood and rallied against Morsi's removal.<sup>585</sup>

Article 22 of the ICCPR states that 'everyone shall have the right to freedom of association with others, including the right to form and join trade unions' except the cases, where limitations are provided by law and are indispensable for 'national security or public safety, public order, ...the protection of public health or morals or the protection of the rights and freedoms of others'.<sup>586</sup> Article 35 of the Constitution of Tunisia guarantees the freedom to establish unions, associations and political parties.<sup>587</sup> However, it obliges that those bodies abide by Tunisian law including laws that reject violence and financial transparency laws.<sup>588</sup> Constitution of Egypt comprises political party formation in a different constitutional article. Article 74 ensures that all citizens have the right to establish political parties, but the establishment of a new party requires prior notification as regulated by a law to be enacted.<sup>589</sup> In addition, political parties may not be formed on the basis of religion and may not discriminate on the basis of origin, sex, sectarian status or geographic position.<sup>590</sup> The article, as well, prohibits activity hostile to democratic principles and activity of a military nature.<sup>591</sup> The 2012 Constitution, in its turn, did not comprise such limitations and had the same treatment for both the formation of political parties and union

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government permission), <http://world.time.com/2013/11/27/egypts-new-protest-law-may-spark-another-crisis/>.

<sup>585</sup> Ibidem.

<sup>586</sup> ICCPR, Article 22.

<sup>587</sup> Constitution of the Republic of Tunisia, Article 35.

<sup>588</sup> Ibidem.

<sup>589</sup> Constitution of the Arab Republic of Egypt, Article 74.

<sup>590</sup> Ibidem.

<sup>591</sup> Ibidem.

and association formation.<sup>592</sup> It becomes evident that such an amendment may have been introduced by the drafting committee appointed by SCAF to ban such organizations as the Muslim Brotherhood, thus providing a constitutional basis for the temporary military regime's crackdown on the Muslim Brotherhood after President Morsi's removal.<sup>593</sup>

The Egyptian Constitution's Article 75 ensures that 'all citizens shall have the right to form non-governmental associations and foundations...that shall have the right to practice their activities freely', but the creation of such bodies is conditioned to prior notification to government authorities.<sup>594</sup> These bodies, as well, can be banned by court order.<sup>595</sup> However, the constitution does not specify the basis upon which these groups may be prohibited, so the strength of this constitutional protection is yet to be tested. Throughout the Egypt's transition process, establishment of nongovernmental organizations (NGOs) and freedom of association have been very important issues, as the government has discussed diverse drafts of an NGO registration law.<sup>596</sup> Finally, the robustness of the constitutional protection will be estimated by the judiciary's assessment of the legislation in view of Article 75.

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<sup>592</sup> J. Fedtke, 'Comparative Analysis Between the Constitutional Processes in Egypt and Tunisia- Lessons Learnt- Overview of the Constitutional Situation in Libya', Directorate General for External Policies of the Union, (2014), [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET\\_NT\(2014\)433840\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET_NT(2014)433840_EN.pdf).

<sup>593</sup> A. Alsharif, 'Egypt's Crackdown on the Muslim Brotherhood Intensifies', Huffington Post, (2 March 2014), [https://www.huffingtonpost.com/2013/12/31/egypt-muslim-brotherhood-crackdown\\_n\\_4523633.html?guccounter=1](https://www.huffingtonpost.com/2013/12/31/egypt-muslim-brotherhood-crackdown_n_4523633.html?guccounter=1).

<sup>594</sup> Constitution of the Arab Republic of Egypt, Article 75.

<sup>595</sup> Ibidem.

<sup>596</sup> 'Egyptian Minister Urges Civil Society Groups Not to Fear Draft NGO Law', Project on Middle East Democracy, (24 October 2014). (The new draft law governing civil society and NGO activist activity provoked activists' fear that, if enacted into law, the bill would impose crippling restrictions on the freedoms Egyptians feel they "won" in the 2011 uprisings against former President Hosni Mubarak).

<https://pomed.org/egyptian-minister-urges-civil-society-groups-not-to-fear-draft-ngo-law/>.

Article 19 of the ICCPR states that ‘everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information’.<sup>597</sup> Here, as well, the ICCPR allows restrictions to be installed upon the freedom of expression for the reasons of national security, public order or morality.<sup>598</sup> Both the Egyptian and Tunisian Constitutions seem to provide strong constitutional protections for the freedom of expression. Article 31 of the Tunisian Constitution provides that ‘freedom of opinion, thought, expression, information and publication shall be guaranteed’<sup>599</sup> and Article 65 of the Egyptian Constitution states that ‘freedom of thought and opinion is guaranteed’.<sup>600</sup> Further, in Article 70 of the Egyptian Constitution similarly broad language is used in guaranteeing freedom of the press: ‘Freedom of the press, printing and paper, visual, audio and electronic publication is guaranteed’.<sup>601</sup> However, in case of Egypt, the issue of freedom of expression has been especially challenging after the events of the Arab Spring, as blasphemy laws<sup>602</sup> prevailing under Mubarak’s and Morsi’s governments have enabled presidents to suppress political opponents and even media individuals.<sup>603</sup>

The ICCPR’s Article 18 claims:

‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either

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<sup>597</sup> ICCPR, Article 19.

<sup>598</sup> Ibidem.

<sup>599</sup> Constitution of the Republic of Tunisia, Article 31.

<sup>600</sup> Constitution of the Arab Republic of Egypt, Article 65.

<sup>601</sup> Ivi, Article 75.

<sup>602</sup> M. Salem, ‘Blasphemy in New and Old Egypt’, Middle East Institute, (12 June 2013), <http://www.mei.edu/content/blasphemy-new-and-old-egypt>.

<sup>603</sup> A. Youssef, ‘Egypt is witnessing less freedom of expression than under Mubarak or Morsi: John. R. Bradley’, Daily News Egypt, (23 August 2014), <https://dailynewsegypt.com/2014/08/23/egypt-witnessing-less-freedom-expression-mubarak-morsi-john-r-bradley/>.

individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.<sup>604</sup>

Article 6 of the Constitution of Tunisia states:

'[t]he state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalization'.<sup>605</sup>

Despite the fact that Article 1 of the Constitution defines Islam as the religion of the State, no restriction is provided for the free practice of religion elsewhere in the constitution. Indeed, Article 6, as well, describes the role of the state in protecting the free practice of religion:

'The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred'.<sup>606</sup>

Analysts of the Tunisia's and Egypt's transitions believe that the removal of the Egyptian Islamist leader Mohamed Morsi affected Tunisia's drafting committee, dominated by Islamists to moderate its draft text in relation to Islam. Unlike the Muslim Brotherhood, which took a majoritarian approach to power in the wake of Egypt's revolution, Ennahda adopted a number of participation-oriented positions that demonstrated a much fuller understanding of democratic politics.<sup>607</sup>

In the Egyptian Constitution, Article 64 provides that '[f]reedom of belief is absolute. The freedom of practicing religious rituals and establishing worship places for the followers of Abrahamic religions is a right regulated by Law'.<sup>608</sup> The language describing the freedom

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<sup>604</sup> ICCPR, Article 18.

<sup>605</sup> Constitution of the Republic of Tunisia, Article 6.

<sup>606</sup> Ibidem.

<sup>607</sup> M. Marks, 'How Egypt's Coup Really Affected Tunisia's Islamists', The Washington Post, (16 March 2015), [https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/16/how-egypts-coup-really-affected-tunisias-islamists/?noredirect=on&utm\\_term=.14f4a61fcfdb](https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/16/how-egypts-coup-really-affected-tunisias-islamists/?noredirect=on&utm_term=.14f4a61fcfdb).

<sup>608</sup> Constitution of the Arab Republic of Egypt, Article 64.

of belief as ‘absolute’ seems pretty broad. Nevertheless, the mentioning of ‘Abrahamic religions’, Judaism, Christianity and Islam, considerably narrows the scope of protected freedoms of belief. Hence, the adherents to other religions, such as a meaningful Egyptian minority- Ba’hai<sup>609</sup> - do not receive the same constitutional protections as those who follow the Abrahamic faiths.<sup>610</sup> Other constitutional provisions, such as articles 2 and 3 of the Egyptian Constitution which state that ‘Islam is the religion of the State, ... [t]he principles of Islamic Sharia are the principle source of legislation’,<sup>611</sup> and ‘[t]he principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders’<sup>612</sup> only reinforce the limited scope of the freedom of religion. In the result, no such recognition or guarantees exist for other religious groups.

#### **4.2.2 Equal protection of the Law**

According to Article 2 of the ICCPR, all parties to the agreement undertake to ensure that all individuals within their territories or subject to their jurisdiction are granted the rights within the ICCPR ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>613</sup> The similar text is used both in Tunisian and Egyptian constitutions. Article 21 of the Constitution of Tunisia states that ‘[a]ll citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination’.<sup>614</sup> Compared to

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<sup>609</sup> One of the non-Abrahamic beliefs.

<sup>610</sup> M.A. Arafat, ‘Whither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup or a Military Coup D’Etat?’, *Indiana International and Comparative Law Review*, (2014), pp. 859-860, pp. 890-892.

<sup>611</sup> Constitution of the Arab Republic of Egypt, Article 2.

<sup>612</sup> Ivi, Article 3.

<sup>613</sup> ICCPR, Article 2.

<sup>614</sup> Constitution of the Republic of Tunisia, Article 21.

Tunisian Constitution, the Constitution of Egypt enumerates all the categories of discrimination:

‘[c]itizens are equal before the law. They are equal in rights, freedoms and general duties, without discrimination based on religion, belief, sex, origin, race, colour, language, disability, social class, political or geographical affiliation or any other reason’.<sup>615</sup>

The provision referring to gender equality is placed in Article 3 of the ICCPR, which claims that ‘the parties to the covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights’ in the agreement.<sup>616</sup> The question of women’s equality was one of the major concerns during the constitution drafting processes in Tunisia and Egypt. The current Tunisian Constitution is considered an advancement for gender equality. The issued 2012 constitution draft text contributed mainly by Islamists, provided that women were ‘complementary’ to men.<sup>617</sup> However, the opposition parties’ pressure led to the removal of the provision.<sup>618</sup> The 2014 Tunisian Constitution states that ‘[a]ll citizens, male and female, ... are equal before the law’.<sup>619</sup> In addition, it provides that ‘[t]he state commits to protect women’s accrued rights and work to strengthen and develop those rights’.<sup>620</sup>

In case of Egypt, the 2012 Constitution did not include any text on gender equality, as Islamists impeded it claiming that such a provision would contravene sharia law.<sup>621</sup> However, the constituent assembly formed in 2014 by the interim military government did not comprise any meaningful Islamist representation and included the text on gender equality in the final constitution draft. The 2014 Egyptian Constitution contains Article 11

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<sup>615</sup> Constitution of the Arab Republic of Egypt, Article 53.

<sup>616</sup> ICCPR, Article 3.

<sup>617</sup> ST. McNeil, *supra* note 237.

<sup>618</sup> *Ibidem*.

<sup>619</sup> Constitution of the Republic of Tunisia, Article 21.

<sup>620</sup> *Ivi*, Article 46.

<sup>621</sup> N.J. Brown, M. Dunne, *supra* note 410.

that significantly advances gender equality: ‘The State shall ensure the achievement of equality between women and men in all civil, political, economic, social and cultural rights in accordance with the provisions of this Constitution’. Compared to the Constitution from 1971 which conditioned gender equality on compliance with sharia law,<sup>622</sup> the 2014 Egyptian Constitution comprises no such limitation.

### **4.2.3 Due process and freedom from state abuse**

According to the ICCPR, ‘[n]o one shall be subjected to arbitrary arrest and detention,’<sup>623</sup> and ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,’<sup>624</sup> and ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.<sup>625</sup> Historically, autocratic governments in Tunisia and Egypt have selectively used state oppression measures, such as detention, arbitrary arrest and the denial of due process through secret courts against dissent and civil society.<sup>626</sup>

In the current Constitution of Tunisia it is stated that ‘[n]o person may be arrested or detained unless apprehended during the commission of a crime or on the basis of a judicial order’<sup>627</sup> and ‘[e]very prisoner shall have the right to humane treatment that preserves their dignity’.<sup>628</sup> Further, Article 27 provides that ‘[a] defendant shall be presumed innocent until proven guilty in a fair trial in which he/she is granted all guarantees necessary for his/her

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<sup>622</sup> Constitution of the Arab Republic of Egypt, (11 September 1971), Article 11, as amended on 22 May 1980, 25 May 2005, 26 March 2007, (Translated from Arabic to English).

<sup>623</sup> ICCPR, Article 9.

<sup>624</sup> Ivi, Article 14.

<sup>625</sup> Ivi, Article 7.

<sup>626</sup> S. Berman, ‘The Promise of the Arab Spring’, *Foreign Affairs*, (2013), pp. 65-66.

<sup>627</sup> Constitution of the Republic of Tunisia, Article 29.

<sup>628</sup> Ivi, Article 30.



defence throughout all the phases of prosecution and trial'.<sup>629</sup> In Article 23 of the Constitution it is, as well, stated that '[t]he State protects human dignity and physical integrity, and prohibits mental and physical torture'.<sup>630</sup>

Article 54 of the Egyptian Constitution states that '[e]xcept for the case of being caught in 'flagrante delicto',<sup>631</sup> it is not permissible to arrest, search, detain or restrict the freedom of anyone in any way except by virtue of a reasoned judicial order,' and those individuals who have their freedom in a limited state possess the right of recourse in front of judiciary.<sup>632</sup> In Article 55 the Constitution provides that '[every person who is either arrested, detained, or his freedom is restricted shall be treated in a manner that maintains his dignity. He may not be tortured, intimidated, coerced, or physically or morally harmed]'.<sup>633</sup>

As cited above, both Tunisian and Egyptian Constitutions provide their citizens with protection from detention and arbitrary arrest, guarantee a fair trial and prohibit torture. However, the language of the 1959 Tunisian Constitution and the 1971 Egyptian Constitution comprised similar provisions.<sup>634</sup> The main drivers of the Arab Spring revolutions were the society's anger and frustration with state abuse and oppression. Despite both the Tunisian and Egyptian constitutions in place throughout the Arab Spring revolts guaranteed due process and prohibited state abuse and torture by state officials, many of these guarantees remained unenforced. At the time of uprising, numerous youth

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<sup>629</sup> Ivi, Article 27.

<sup>630</sup> Ivi, Article 23.

<sup>631</sup> 'Flagrante Delicto' means in the very act of committing the offense; red-handed.

[https://en.oxforddictionaries.com/definition/in\\_flagrante\\_delicto](https://en.oxforddictionaries.com/definition/in_flagrante_delicto).

<sup>632</sup> Constitution of the Arab Republic of Egypt, Article 54.

<sup>633</sup> Ivi, Article 55.

<sup>634</sup> Constitution of the Republic of Tunisia, (1 June 1959), articles 12-15, as amended on 8 April 1976, 25 July 1988, 27 October 1997, 1 June 2002, 28 July 2008; Constitution of the Arab Republic of Egypt, (11 September 1959), articles 41-42, 64-72, as amended on 22 May 1980, 25 May 2005, 26 March 2007.

and opposition leaders remained deprived of legal recourse and were detained and tortured by the state.<sup>635</sup> For instance, the use of emergency laws by state officials was one of the means to suspend these and many other rights.

Article 4 of the ICCPR states:

‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’.<sup>636</sup>

As cited above, there are clear restrictions placed on proclaiming a state of emergency -it cannot be used to, inter alia, discriminate on various basis and it cannot, as well, restrict freedom from torture, slavery, debtor’s prison, freedom of thought, or the right to life.<sup>637</sup> Article 80 of the Tunisian Constitution authorises the President to issue a state of emergency.<sup>638</sup> However, it determines the circumstances under which a state of emergency can be used and how long it can remain in effect.<sup>639</sup> Compared to the 1959 Tunisia’s Constitution, where there was no time limit imposed for a President to operate under a state of emergency, the 2014 Constitution represents an advancement in the use of this right.

In Egypt, prior to the Arab Spring uprisings, the authoritarian leader held the country in a perpetual state of emergency for decades, by this justifying his regime restrictions set on

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<sup>635</sup> ‘The Arab Spring: Five Years On’, Amnesty International, (25 January 2016), <https://www.amnesty.org/en/latest/campaigns/2016/01/arab-spring-five-years-on/>.

<sup>636</sup> ICCPR, Article 4.

<sup>637</sup> Ibidem.

<sup>638</sup> Constitution of the Republic of Tunisia, Article 80.

<sup>639</sup> Ibidem.

citizens' rights.<sup>640</sup> According to the 2014 Egyptian Constitution, the President may impose a state of emergency only within a three-month's time limit.<sup>641</sup> Additionally, it is stated that the state of emergency must be approved by a majority members of the Parliament.<sup>642</sup> Concerning the extension of the state of emergence, it can only be extended by another three-months period upon the approval of two-thirds of Parliament members.<sup>643</sup> Although the Egyptian Constitution restricts the President's ability to declare a perpetual state of emergency,<sup>644</sup> it does not specify the circumstances under which the state of emergency can be proclaimed, nor provide information about the effect of the state of emergency on the citizen's constitutional rights and freedoms.

The substantive rights encompassed in the Tunisian and Egyptian Constitutions, such as civil and political rights, equal protection and due process are generally in accordance with international human rights law norms. Both the 1959 Tunisian Constitution and the 1971 Egyptian constitution, as well, comprised similar provisions, though citizens and the international community viewed the constitutional systems in place as illegitimate for the reason of fierce human rights violations and the lack of enforcement of constitutional protections.<sup>645</sup> The capacity of each of these countries to enforce the rights contained in their constitutions will define the legitimacy of their new constitutional systems.

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<sup>640</sup> Y. Auf, 'The State of Emergency in Egypt: An Exception or Rule?', (2 February 2018), Atlantic Council, <http://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule>.

<sup>641</sup> Constitution of the Arab Republic of Egypt, Article 154.

<sup>642</sup> Ibidem.

<sup>643</sup> Ibidem.

<sup>644</sup> Ibidem.

<sup>645</sup> 'Tunisia 2012 Human Rights Report', 'Egypt 2012 Human Rights Report', supra note 451.

### **4.3 ‘Applicatory’ legitimacy: Enforcement and potential for further implementation**

Having assessed whether the Tunisian and Egyptian Constitutions are legitimate from a procedural and substantive constitutional standpoint, based on their constitution-drafting processes and the incorporation of international human rights law norms, it is important to investigate the capacity of the new constitutional systems in Tunisia and Egypt in order to fairly and fully implement and protect the rights and freedoms included in the new constitutions. This final element of legitimacy, also called ‘applicatory’ legitimacy<sup>646</sup> is considered the most critical one, as during the transition periods there is a threat that authoritarian regimes and dominant leaders will manipulate processes of the constitution-drafting and state institutions to push their own interests and, as consequence, undermine the emergence of democracy.<sup>647</sup> Before the Arab Spring events, both Tunisia and Egypt were governed by oppressive authoritarian leaders.<sup>648</sup> However, the two countries were viewed as putative constitutional democracies with regular elections and long-lasting constitutions.<sup>649</sup> Newly adopted constitutions face an important task- to secure the aspirations of the Arab Spring protesters. In order to do so, effective state institutions have to be present to ensure competitive multiparty elections, to protect citizens from state abuse and from oppression of their civil and political rights. During the period of political instability in Tunisia and Egypt, not only youth and civil society activists participated in revolts, but as well other organised groups, such as the Ennahda party in Tunisia and the Muslim Brotherhood in Egypt, and even former regime alliances that could manipulate the constitution-drafting process. In one of his works, Comparative Constitutional Law professor David Landau reflects on the use of mechanisms of constitutional change called ‘abusive constitutionalism’ in order to make a state

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<sup>646</sup> J. Gluck, M. Brandt, *supra* note 273.

<sup>647</sup> W. Partlett, ‘The Dangers of Popular Constitution-Making’, *Brooklyn Journal of International Law* 38, p. 234.

<sup>648</sup> ‘Tunisia 2012 Human Rights Report’, ‘Egypt 2012 Human Rights Report’, *supra* note 451.

<sup>649</sup> *Ibidem*.

significantly less democratic than it was before.<sup>650</sup> He elaborates that ‘Powerful incumbent presidents and parties can engineer constitutional change so as to make themselves very difficult to dislodge and so as to defuse institutions such as courts that are intended to check their exercises as power. The resulting constitutions still look democratic from a distance and contain many elements that are no different from those found in liberal democratic constitutions. But from close up they have been substantially reworked to undermine the democratic order’.<sup>651</sup>

According to Landau, a state’s constitution-making process is more predisposed to being exploited by dominant political leaders or authoritarian parties when there is a period of transition, as there tends to be a lack of governing rules and solid institutions managing the transition process.<sup>652</sup> Both Tunisia and Egypt turned out to be vulnerable during the process of the constitution-making, so it is fundamental to examine state institutions before the Arab Spring revolution, their role during the constitution-making process and their potential for enforcement of new constitutional provisions.

#### **4.3.1 State Institutions in the pre-Arab Spring period**

Before the Arab Spring revolution, both in Tunisia and Egypt, the authority was concentrated in the hands of the executive, who in many cases remained unaccountable to any state institution.<sup>653</sup> The overall decision-making was dominated by a small circle around the President and was completely disconnected from public opinion and could

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<sup>650</sup> D. Landau, ‘Abusive Constitutionalism’, 47 The University College Dublin Law Review, (2013), p. 195.

<sup>651</sup> Ivi, p. 191.

<sup>652</sup> Ivi, p. 925.

<sup>653</sup> N.J. Brown, ‘Constitutional Rebirth: Tunisia and Egypt Reconstruct Themselves’, United Nations Development Programme, (2011), pp. 20-25, [http://www.constitutionnet.org/sites/default/files/constitutional\\_rebirth\\_tunisia\\_and\\_egypt\\_reconstruct\\_themselves.pdf](http://www.constitutionnet.org/sites/default/files/constitutional_rebirth_tunisia_and_egypt_reconstruct_themselves.pdf).

govern without any meaningful oversight from anybody.<sup>654</sup> In both countries, there were weak parliaments, the judiciary was undermined (especially in political cases), and human rights protections were unenforceable in the face of a determined executive.<sup>655</sup>

According to Brown, the mechanisms in place in both countries were often circular in nature: both Tunisia and Egypt had a theoretically pluralistic party system, an elected parliament, and a host of state institutions that had some promise of autonomy.<sup>656</sup> However, a multiplicity of techniques, including closely supervised elections, dominant parties, and key presidential appointments, made paper mechanisms of accountable completely circular.<sup>657</sup> For instance, the chief of the Egyptian ruling party and the head of the state was the same person.<sup>658</sup> According to constitution design experts, Tunisia and Egypt were defined as countries that lacked, the so-called, ‘horizontal accountability’ (in which various institutions and authorities keep a watchful eye on each other), since the diverse bodies, such as judicial councils, administrative courts, constitutional courts, and human rights commissions did not receive full autonomy from the presidency.<sup>659</sup> Citizens of both countries did not possess any effective tools to protect his/her rights against the abuse of the security services.<sup>660</sup> Even where legal mechanisms, guarantying citizens some protections, existed on paper, they often resulted to be meaningless due to perpetual emergency measures.<sup>661</sup> The language of Tunisian and Egyptian constitutions was quite extensive and fulsome but at the same time very vague.<sup>662</sup> For instance, diverse freedoms

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<sup>654</sup> Ibidem.

<sup>655</sup> Ibidem.

<sup>656</sup> Ibidem.

<sup>657</sup> Ibidem.

<sup>658</sup> Ibidem.

<sup>659</sup> Ibidem.

<sup>660</sup> Ibidem.

<sup>661</sup> Ibidem.

<sup>662</sup> Ibidem.

and procedures were guaranteed only in a general way with details left legislation. The legislation was then written in a manner to enable rather than restrict state discretion.<sup>663</sup>

Despite the existing Supreme Constitutional Court in Egypt and Constitutional Council in Tunisia, enforcement mechanisms for constitutional rights were often weak and sometimes even absent. The Egypt's Supreme Constitutional Court was able preserve some independence, especially in the late 1980s and the 1990s and administrative courts, as well, demonstrated some ability to enforce the law against government authorities. However, in its entirety, Tunisia and Egypt lacked real institutional guarantees for the rights provided in their constitutions.<sup>664</sup>

#### **4.3.2 State Institutions in the Post-Arab Spring period**

Following Ben Ali's flight from Tunisia, his successor Mohamed Ghannouchi appointed an interim commission involving lawyers and judges, while the revolutionaries established a parallel transition body.<sup>665</sup> On 18 February 2011, the two commissions agreed to merge, setting up the Commission for the Fulfillment of Revolutionary Goals, Political Reform and Democratic Transition (HCFRG).<sup>666</sup> In October 2011, the HCFRG held elections to a constituent assembly and disbanded.<sup>667</sup> In the result, a coalition government was formed, including the three largest parties elected to the constituent assembly. The leading role in the coalition was acquired by the moderate Islamist party Ennahda that ruled alongside the left-liberal, non-Islamist Congress for the Republic and social-democratic Ettakatol.<sup>668</sup>

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<sup>663</sup> Ibidem.

<sup>664</sup> Ibidem.

<sup>665</sup> M. Ottaway, *supra* note 193, pp. 4-5.

<sup>666</sup> J. Brownlee and others, *supra* note 111, p. 97.

<sup>667</sup> Ibidem.

<sup>668</sup> *Ivi*, p. 165.

In 2013, the assassinations of two liberal political leaders and a series of demonstrations against the Ennahda-led government temporarily disrupted the drafting process.<sup>669</sup> However, the long-lasting political deadlock between Islamists and secularists was resolved by the means of mediation from four civil society organizations known as the Quartet: the General Union of Tunisian Workers, the Human Rights League, the bar association, and the employers' union.<sup>670</sup> The outcome was a new government formed largely of nonpartisan technocrats.<sup>671</sup> During the constitution-drafting process Ennahda insisted on a parliamentary system, while other parties suggested a presidential one in order to constrain future parliamentary coalitions headed by Ennahda.<sup>672</sup> Finally, both camps agreed on a semi-presidential constitution with a weak president.

On 26 January 2014, the constituent assembly adopted a new constitution with two hundred twenty voting for, twelve against and four abstaining.<sup>673</sup> The constitution was not a subject to a public referendum, as the vote exceeded a two-thirds majority.<sup>674</sup> The new constitution came into force immediately, and parliamentary and presidential elections were held in October and November 2014 accordingly.<sup>675</sup>

The 2014 Tunisian Constitution established a semi-presidential system, with the President of the Republic and the government headed by the Prime minister sharing the exercise of executive power.<sup>676</sup> The President is directly elected by the people for a maximum of two

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<sup>669</sup> A. El-Sayed, *supra* note 189, p. 45.

<sup>670</sup> R.H. Haugbølle, A. Ghali and others, *supra* note 258; M. Yahya, 'Beyond Tunisia's Constitution: The Devil in the Details', Carnegie Endowment, Middle East Center, (28 April 2014), <http://carnegie-mec.org/2014/04/28/beyond-tunisia-s-constitution-devil-in-details-pub-55398>.

<sup>671</sup> *Ibidem*.

<sup>672</sup> D. Pickard, *supra* note 241.

<sup>673</sup> D. Tavana, A. Russell, pp. 2-3, *supra* note 234; R. Grote, 'The New 2014 Tunisian Constitution', Oxford University Press, (2018).

<sup>674</sup> *Ibidem*.

<sup>675</sup> *Ibidem*.

<sup>676</sup> Constitution of the Republic of Tunisia, *supra* note 460, Article 71.



five-year terms.<sup>677</sup> The Head of State is the commander in chief of the armed forces, chairs the national security council, and may declare war upon the approval by a majority of three-fifths of the Parliament members.<sup>678</sup> The President may dissolve Parliament in circumstances specified in the constitution.<sup>679</sup> The Parliament, in its turn, can impeach the President in case of grave violations of the constitution by a two-thirds majority vote of its members, which must be confirmed by two-thirds of the new constitutional court.<sup>680</sup>

The Prime Minister is responsible for the proper functioning of government ministries and ensures the enforcement of laws.<sup>681</sup> He, as well, determines, together with the President, general policies on domestic matters<sup>682</sup>. The President can ask the party leader or coalition with the largest representation in Parliament to form the government.<sup>683</sup> The Prime Minister has to consult with the President issues concerning defense, foreign policy and national security.<sup>684</sup> If the government that enjoys the support of the Parliament cannot be formed, the President has the right to dissolve the Parliament and call for a general election after four months.<sup>685</sup> The Parliament may remove the Prime Minister with a vote of no-confidence, if an absolute majority presents an alternative candidate to the Head of Government.<sup>686</sup> In addition, the new Constitution provides strong support for

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<sup>677</sup> Ivi, Article 75.

<sup>678</sup> Ivi, Article 77.

<sup>679</sup> Ibidem.

<sup>680</sup> Ivi, Article 88.

<sup>681</sup> Ivi, Article 92.

<sup>682</sup> Ivi, Article 91.

<sup>683</sup> Ivi, Article 89.

<sup>684</sup> Ivi, Article 77, Article 93.

<sup>685</sup> Ivi, Article 89.

<sup>686</sup> Ivi, Article 97.

equality in women's political representation. Article 45 states: 'The state works to attain parity between women and men in elected Assemblies.'<sup>687</sup>

The 2014 Tunisian Constitution upholds many significant civil, political, social, economic, and cultural rights.<sup>688</sup> These rights refer to citizenship, to creation of political parties, to bodily integrity and freedom of movement, opinion, expression, assembly, and association.<sup>689</sup> The constitution also guarantees a right not to be detained arbitrarily and fair trial guarantees.<sup>690</sup> According to the new constitution, torture or any statute of limitations on prosecuting torture are prohibited.<sup>691</sup> The document, as well, guarantees the right to political asylum.<sup>692</sup> The Tunisian Constitution also provides key committee positions for opposition party representatives and grants them the right to establish and head a committee of enquiry annually.<sup>693</sup> The new document includes stronger protection for women's rights, including Article 46, which stipulates that, 'The state commits to protect women's established rights and works to strengthen and develop those rights,' and guarantees 'equality of opportunities between women and men to have access to all levels of responsibility and in all domains'.<sup>694</sup> In addition the 2014 Constitution protects the rights to health, education and work.<sup>695</sup> The Tunisian government should adopt specific measures to achieve progressively the full realization of these rights to the

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<sup>687</sup> Ivi, Article 46.

<sup>688</sup> Joint Public Statement by Al Bawsala, 'Tunisia: Let Constitution Herald Human Rights Era Judges Should Base Interpretation on International Standards', Amnesty International and Human Rights Watch, (31 January 2014), <https://www.hrw.org/news/2014/02/01/tunisia-let-constitution-herald-human-rights-era>.

<sup>689</sup> Ibidem.

<sup>690</sup> Constitution of the Republic of Tunisia, *supra* note 460, Article 27.

<sup>691</sup> Ivi, Article 23.

<sup>692</sup> Ivi, Article 26.

<sup>693</sup> Ivi, Article 60.

<sup>694</sup> Ivi, Article 46.

<sup>695</sup> Ivi, Article 38, Article 39, Article 40.

maximum of the country's available resources, in accordance with the standards of the ICCPR, which Tunisia has ratified.<sup>696</sup>

The section on judicial authority contains significant guarantees for the independence of the judiciary. For instance, Article 102 stipulates that '[t]he judiciary is an independent authority that ensures the administration of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms'.<sup>697</sup> In accordance with the new Constitution, judges remain accountable solely to the constitution and the law in the performance of their duties. The following Article 109 prohibits any outside interference in the functioning of the judiciary.<sup>698</sup> In addition, the constituent assembly amended the provisions on the High Judicial Council, the independent supervisory body for the judiciary.<sup>699</sup> Earlier constitution drafts provided that half of the members of the body would be judges and half would be not, but with the new constitution, the number of judges in the Supreme Judicial Council has increased from one half to two-thirds.<sup>700</sup> Moreover, the Supreme Judicial Council is tasked, among other issues, with proposing reforms, reviewing draft laws related to the judiciary, and managing the conduct and disciplinary measures for judges.<sup>701</sup> In the opinion of North Africa Deputy Director at Amnesty International, Hassiba Hadj Sahraoui: 'The adoption of the constitution must mark a definitive end to the interference of the authorities in the judiciary... Tunisia must put in place a Supreme Judicial Council that can act fully independently from the authorities, and whose members are selected transparently. This will help ensure the council's credibility, including when it votes on disciplinary measures against judges'.<sup>702</sup>

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<sup>696</sup> Joint Public Statement by Al Bawsala, *supra* note 583.

<sup>697</sup> Ivi, Article 102.

<sup>698</sup> Ivi, Article 109.

<sup>699</sup> Joint Public Statement by Al Bawsala, *supra* note 583.

<sup>700</sup> Ivi, Article 113.

<sup>701</sup> Ivi, Article 114.

<sup>702</sup> Joint Public Statement by Al Bawsala, *supra* note 583.

The new Constitution provides for the creation of a constitutional court that will have the power to strike down laws that are not in harmony with the constitution and will be composed of twelve members.<sup>703</sup> Each four members of the constitutional court will be appointed by the President, Parliament and Supreme Judicial Council for a term of nine years.<sup>704</sup> It also calls for the establishment of several new independent constitutional commissions, such as a national Human Rights commission, an Electoral Commission, and a Good Governance and Anticorruption Commission that will oversee enforcement of constitutional rights and investigate respective right violations.<sup>705</sup> For instance, Article 125 of the new Constitution states: ‘The Human Rights Commission oversees respect for, and promotion of, human freedoms and rights, and makes proposals to develop the human rights system. It must be consulted on draft laws that fall within the domain of its mandate.

The Commission conducts investigations into violations of human rights with a view to resolving them or referring them to the competent authorities. The Commission shall be composed of independent and impartial members with competence and integrity. They undertake their functions for a single six-year term.’<sup>706</sup> On the whole, the new Tunisian Constitution appears to provide appropriate horizontal accountability and the potential for the full and fair implementation of constitutional rights through new enforcement mechanisms drawn in the constitution.

The crucial element in Egypt’s post-uprising trajectory is the dominant national military.

In February 2011, Mubarak stepped down, and the transitional military government declared parliamentary elections to be held from November 2011 to January 2012.<sup>707</sup> In the elections, the Muslim Brotherhood and its allies obtained 46% of the seats and the extreme Islamist (Salafist) Alliance obtained 24% of the seats, hence ensuring a 70%

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<sup>703</sup> Constitution of the Republic of Tunisia, *supra* note 460, Article 118.

<sup>704</sup> *Ibidem*.

<sup>705</sup> *Ivi*, Articles 125-130.

<sup>706</sup> *Ivi*, Article 128.

<sup>707</sup> D.D. Kirkpatrick, *supra* note 351.

supermajority for Islamic parties.<sup>708</sup> The military temporarily backed their ascent to power by identifying the Muslim Brotherhood as the single most powerful and well-organized civil institution in Egypt.<sup>709</sup> Appointed under Mubarak judiciary, survived his fall and intervened to weaken Morsi's Islamic government. Yet, enjoying their dominant position in the second and ultimately successful constituent assembly of 2012, which had been elected by parliament, the Islamic parties preferred to ignore the vocal opponents from liberal and secularist parties and impose a conservative constitution.<sup>710</sup> Throughout the year 2012, it seemed that the military forces and the ruling Muslim Brotherhood party had reached an accommodation, excluding liberals.<sup>711</sup> The level of polarization became so high that Christian, socialist, and liberal members of the two constituent assemblies established during 2012 many times left the bodies protesting against the Islamic dominance.<sup>712</sup> After the Muslim Brotherhood- dominated Parliament was dissolved by court order, Morsi ensured that the assembly completed its work and that the draft constitution was proposed to citizens for a vote.<sup>713</sup>

Observers viewed the Islamist constitution as an attempt to create a 'competitive authoritarian regime' where elections take place, but the dominant governing party remains unchecked in its power and difficult to remove.<sup>714</sup> In fact, the actions of Morsi and his supporters only confirmed this view. The interim President undertook several measures that placed him in opposition to the judiciary and the military. Morsi took steps

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<sup>708</sup> J. Brownlee and others, *supra* note 111.

<sup>709</sup> *Ibidem*.

<sup>710</sup> H. Albrecht, *supra* note 396.

<sup>711</sup> N.J. Brown, *supra* note 379.

<sup>712</sup> *Ibidem*.

<sup>713</sup> *Ibidem*.

<sup>714</sup> D. Landau, *supra* note 536, p. 191.

to place his loyalists on the Supreme Constitutional Court.<sup>715</sup> On the eve of the presidential elections, he annulled the constitutional declaration released by the military, which had stated that the decisions of the military would not be subject to the President's authority.<sup>716</sup> Morsi, as well, replaced the Head of the SCAF Marshall Mohamed Hussein Tantawi with General Abdel Fattah el-Sisi.<sup>717</sup>

Presented to the public for a referendum, the 2012 constitution introduced Islam into the fabric of the state, strengthened the executive and institutionalized the role of the military in politics. On the whole, the 2012 struggle over the constitution of Egypt provides a tragic image of the consequences of constraining participation: the Muslim Brotherhood pushed through a document without involvement of other groups in the constituent assembly, producing a backlash of violent protests.<sup>718</sup> Remaining defiant against the protestors, the Muslim Brotherhood party alienated the military and judiciary, making them allies with the liberal and youth opposition, whose July 2013 revolts led to Morsi's ouster by the military.<sup>719</sup>

However, the Muslim Brotherhood party's fall only demonstrated that the military and judiciary retained significant influence throughout the evolution of Egypt's political transition. Professor Nathan Brown describes these two former Mubarak's affiliated actors as the 'deep state'.<sup>720</sup> The Egyptian public remained polarized towards the deep

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<sup>715</sup> D.D. Kirkpatrick, M. El Sheikh, 'Citing Deadlock, Egypt's Leader Seizes New Power and Plans Mubarak Retrial', New York Times, (23 November 2012), <https://cn.nytimes.com/world/20121123/c23egypt/en-us/>.

<sup>716</sup> N.J. Brown, *supra* note 379.

<sup>717</sup> K. Fahim, 'In Upheaval for Egypt, Morsi Forces Out Military Chiefs', New York Times, (12 August 2012), <https://www.nytimes.com/2012/08/13/world/middleeast/egyptian-leader-ousts-military-chiefs.html>.

<sup>718</sup> J. Blount, T. Ginsburg, 'Participation in Constitutional Design: Asian Exceptionalism', *Comparative Constitutional Law in Asia*, (2014), p. 23.

<sup>719</sup> *Ibidem*.

<sup>720</sup> N.J. Brown, 'Egypt's Wide State Reassembles Itself', *Foreign Policy*, (17 July 2013),

state's actions: secularists mostly viewed the deep state as protectors of the Egypt's transition from Muslim Brotherhood ascendancy, while the Islamist allies considered the deep state's actions as an illegitimate ouster of the first fairly and free elected President.<sup>721</sup>

Unfortunately, the actions undertaken by the military and judiciary after the removal of Morsi were just as polarizing as those of the Muslim Brotherhood and strengthened divisions within Egyptian society.<sup>722</sup> The new constituent assembly appointed by the SCAF and known as the "Committee of 50" was comprised of a large number of actors, including union representatives, prominent public figures, human rights leaders and religious groups.<sup>723</sup> Conspicuously, Muslim Brotherhood and other Islamist representatives were largely excluded from the constitution drafting process, despite enjoying support from at least half the Egyptian population.<sup>724</sup> Moreover, while the assembly removed the Islamist provisions contained in the 2012 Constitution, its process did not involve the public and did nothing to bridge the divide between Islamists and secularist. Instead, the draft constitution elaborated by the military's appointed assembly, expanded the power of 'deep state' elites.<sup>725</sup> Empowered and independent state institutions can effectively protect the state from authoritarian abuse, but in this case the

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<https://foreignpolicy.com/2013/07/17/egypts-wide-state-reassembles-itself/>.

<sup>721</sup> B. Momani, 'In Egypt, 'Deep State' vs. 'Brotherhoodization' ', Brookings, (21 August 2013),

<https://www.brookings.edu/opinions/in-egypt-deep-state-vs-brotherhoodization/>.

<sup>722</sup> A. Hauslohner, 'Egyptians Stage Mass Protests Against Morsi Edict', The Washington Post, (27 November 2012), [https://www.washingtonpost.com/world/middle\\_east/egyptians-stage-mass-protests-against-morsi-edict/2012/11/27/166d71ca-38c4-11e2-b01f-5f55b193f58f\\_story.html?noredirect=on&utm\\_term=.182205b97545](https://www.washingtonpost.com/world/middle_east/egyptians-stage-mass-protests-against-morsi-edict/2012/11/27/166d71ca-38c4-11e2-b01f-5f55b193f58f_story.html?noredirect=on&utm_term=.182205b97545).

(There was a widespread and violent crackdown against supporters of the Muslim Brotherhood who objected to Morsi's removal. In the result, several peaceful protesters were killed).

<sup>723</sup> M. Ottaway, 'The Egyptian Constitution: Mapping Where Power Lies', Wilson Center, (11 December 2013), pp. 1-3, <https://www.wilsoncenter.org/publication/the-egyptian-constitution-mapping-where-power-lies>.

<sup>724</sup> Ibidem.

<sup>725</sup> Ibidem.

empowered institutions of the deep state are the same institutions that were allied with Mubarak during his autocratic rule. The current Egyptian President and former chief of SCAF, Abdel Fattah el-Sisi, is a political independent.<sup>726</sup> The above-mentioned changes in political life of Egypt will demonstrate whether the deep state's assertion of control over political transition will lead to a renewed authoritarian regime, as existed under Mubarak, or whether the state will allow political pluralism to flourish and protect citizens' civil, political and human rights.

The newly created constitutional system in Egypt differs from the Tunisia's one in a number of aspects. As Tunisia's document, the Egyptian Constitution<sup>727</sup> also introduces a semi-presidential system, but the balance of powers between the President and the Prime Minister diverges from Tunisia's.<sup>728</sup> The president is directly elected by the people and serves as the head of state and head of the government.<sup>729</sup> The President presides over cabinet meetings and together with the cabinet, oversees the implementation of state policy.<sup>730</sup> He is supreme commander of the armed forces and represents the country in foreign relations.<sup>731</sup> In the 2014 Constitution, the President may issue and object to laws and the appointment of key ministers is within his- and not the Prime Minister's-mandate.<sup>732</sup> Such centralization of presidential power has always existed in the history of the Egyptian governance and is worrisome, as it weakens the prospects for an effective separation of powers-one of key demands of the 2011 Egyptian revolution. According to the new Constitution, the Head of State is vested with the right to call for referenda and

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<sup>726</sup> J.M. Lindsay, 'Hello (Ahlan), Abdul Fattah al-Sisi: President of Egypt', Council on Foreign Relations, Waters Edge, (9 June 2014), <https://www.cfr.org/blog/hello-ahlan-abdul-fattah-al-sisi-president-egypt>.

<sup>727</sup> Constitution of the Arab Republic of Egypt, *supra* note 461, Article 139, Article 143.

<sup>728</sup> J. Fedtke, *supra* note 479. (The discussion of the Egyptian Constitution's provisions which set out the president's power).

<sup>729</sup> *Ibidem*.

<sup>730</sup> Constitution of the Arab Republic of Egypt, *supra* note 461, Articles 154-155.

<sup>731</sup> *Ivi*, Articles 151-152.

<sup>732</sup> *Ivi*, Article 123.



appoint five percent of the Parliament members.<sup>733</sup> However, the President's authority is not absolute, he must receive the two-thirds majority of the Parliament vote to declare war.<sup>734</sup> The President can dissolve the cabinet only with Parliament majority support.<sup>735</sup> The Parliament can be dissolved only on the basis of the national referendum.<sup>736</sup> The President's declaration of a state of emergency must be approved by a majority of Parliament members.<sup>737</sup> The Parliament, in its turn, may remove the Prime Minister or the President by a no-confidence vote, but will face dissolution, if the vote fails.<sup>738</sup> Like in the Tunisian Constitution, where a strong support has been given for equality in women's political representation, the Article 11 of the Egyptian document introduces new legislation protecting women from violence and calling for equality between women and men in civil, political, social, economic and cultural rights.<sup>739</sup>

Despite the existing capacity between the legislative and executive branches to exercise a certain influence over one another, the horizontal accountability results to be difficult in Egypt, as both the military and the Supreme Constitutional Court are granted the independent authority in the constitution. In the new Constitution of Egypt, the Supreme Constitutional Court has its own independent budget and enjoys the right to self-select its members.<sup>740</sup> In a country like Egypt, where a highly politicized judiciary is in a strong need of reform, the new Constitution leaves the problem unaddressed and even strengthens the autonomy of the judiciary without necessary reforms to make it

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<sup>733</sup> Ivi, Article 102, Article 137.

<sup>734</sup> Ivi, Article 152.

<sup>735</sup> Ivi, Article 147.

<sup>736</sup> Ivi, Article 137.

<sup>737</sup> Ivi, Article 154.

<sup>738</sup> Ivi, Article 131, Article 161.

<sup>739</sup> Ivi, Article 11.

<sup>740</sup> Ivi, Article 191, Article 193. (The Supreme Constitutional Court, as well, is vested with the right to decide the size of its membership, as it is left undefined in the Egyptian Constitution).

independent and effective. In fact, Egypt differs quite strongly from Tunisia in relation to judicial reform. In the Tunisian Constitution, the independence of judiciary is guaranteed and the number of judges in the High Judicial Council was increased from one half to two-thirds. The Egyptian Constitution lacks details on the make-up of the Supreme Judicial Council, 'leaving its composition and most of its duties to be codified by legislation'.

Another constitutional setback that similarly threatens the checks and balances system includes the absence of civilian or any other oversight of the military's budget and the continued presence of the provision that allows the military to trial civilians.<sup>741</sup> The 2014 Constitution establishes no independent mechanisms for citizens to protest abuse by security forces. While Article 204 stipulates a description of circumstances under which civilians would be subjected to military trials, it remains still ambiguous and leaves military the room for the abuse of military trials for civilians. Article 204 of the Egyptian Constitution states:

'Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties.'<sup>742</sup>

It is not clear what would be interpreted as a 'direct assault' against the military because of the 'performance of its duties'. Due to a large number of military trials of civilians since the Mubarak's ouster in 2011,<sup>743</sup> Article 204 appears to be particularly disturbing as it ensures- even if in a slightly restricted manner than before- the continuation of this arbitrary activity. Moreover, Article 234 of the Constitution grants the military- and not the President as was previously the case- the power to select the Defense Minister for the

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<sup>741</sup> Ivi, Article 204.

<sup>742</sup> Ibidem.

<sup>743</sup> S. Fayed, 'Egypt Activists Urge Justice for Civilians Jailed by Army Courts', Reuters, (29 August 2012), <https://www.reuters.com/article/us-egypt-military-trials/egypt-activists-urge-justice-for-civilians-jailed-by-army-courts-idUSBRE87S0NJ20120829>.

next two presidential terms.<sup>744</sup> According to the 2014 Constitution, it is the National Defense Council and not the Parliament who determines the military budget.<sup>745</sup>

Under Egypt's new Constitution, while the power of the President is to some extent checked by the Parliament, the military and judiciary seem to be victors, possessing an independent status in the constitution. However, the most important setback is the lack of independent enforcement mechanisms allowing Egypt's citizens claim their rights against the state. While the Tunisian Constitution contains clear provisions for the protection and enforcement of human rights, the rights provided in the Egyptian Constitution remain only theoretical without any guarantees for their implementation. For instance, the inclusion of a more comprehensive list of socio-economic rights in Egypt's 2014 Constitution is a positive development, although it will not mean a lot without effective implementation mechanisms to ensure those rights are fulfilled. The problematic way in which the 2014 Egyptian Constitution was drafted reflects the political balance of power in favour of the military, police and judiciary trio. As Zaid Al-Ali notes: '...without democratic, effective, transparent and accountable institutions to enforce rights, they will remain just as theoretical as they did under the 1971 constitution, which is something that Egypt can ill afford today...constitutional reform is clearly far from over in this country'.<sup>746</sup>

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<sup>744</sup> Ivi, Article 201, Article 234.

<sup>745</sup> Ivi, Article 203.

<sup>746</sup> Zaid Al-Ali, 'Egypt's Third Constitution in Three Years: A Critical Analysis', IDEA, (16 December 2013), [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/902\\_criticalanalysisseg\\_902\\_criticalanalysisseg\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/902_criticalanalysisseg_902_criticalanalysisseg_en.pdf).

## 5 Conclusion

In conclusion, this thesis has elaborated on the recent trends in constitution making on the examples of two Middle East countries, Tunisia and Egypt, after the 2011 Arab Spring revolution. In particular, I have analyzed how the constitution-drafting processes of the two states evolved after the 2011 revolutions according to comparative constitutional theory. This thesis has also attempted to evaluate to which extent the new constitutional trends influenced constitution making in Tunisia and Egypt, furthermore to which extent the inclusive and participatory constitution drafting has been achieved in each of the countries and how it affected the legitimacy of newly adopted constitutions.

According to the main chapters of this thesis, both Tunisia and Egypt had very similar political order and socio-economic conditions in the pre-Arab Spring period. The bottom-up factors driving for protests in both countries involved new prominent civil society actors, such as unemployed youth, women and the rest of the population exhausted from abuse of the authoritarian regimes, pervasive corruption and socio-economic imbalances. Moreover, the demands of Tunisia's and Egypt's societies were similar, as well: the resignation of the regime leader, the removal of the state of emergency, the release of all political prisoners, the dissolution of parliament, the appointment of a government of independent technocrats and the drafting of a new constitution. Finally, revolutions in both Tunisia and Egypt culminated in the ouster of authoritarian regime leaders and the formation of new constitutions as part of the political transition. On the contrary, as far as the constitution-drafting process is concerned, occasionally, different paths were taken by the Tunisian and Egyptian interim political governments.

The structure of the thesis has been as follows: the second chapter has provided a historical introduction into 'constitutionalism' and its gradual development, where the basic constitutional models and trends have been described and applied to real country examples, in particular Tunisia and Egypt. The third chapter has focused specifically on the phenomenon of the Arab Spring from both the historical and theoretical perspectives: the 2011 breakdown of autocracies in Tunisia and Egypt could be explained, on the one side, by the social drivers of unrest, such as youth unemployment, socioeconomic inequality, corruption, and an increasingly 'technologically advanced' population. On the other side, the chapter has explained another cause of the protest: it refers to the power of

autocratic regimes to preserve elite cohesion, while at the same time suppressing challenges of the society- in case of Tunisia and Egypt, the authoritarian collapse occurred due to the top-down drawbacks of regimes themselves. The fourth chapter of the thesis dealt with the constitution-making processes in Tunisia and Egypt after the 2011 revolutions. The adopted analytical framework was divided into three parts corresponding to the three markers of the constitutional legitimacy. In the first part, one of the three markers of the constitutional legitimacy- a processual one, has been described. In the second part of the chapter, the substantive provisions of new Tunisian and Egyptian constitutions in relation to international human rights law norms have been analyzed. In particular, civil and political rights that were frequently rejected in the period before the Arab Spring in Tunisia and Egypt, have been discussed. In the last part of the chapter, Tunisia's and Egypt's new constitutions have been examined from the perspective of availability of institutional and enforcement mechanisms that, in their turn, would provide for the full and fair implementation of substantive constitutional rights.

In the fourth conclusive chapter, the answers on the all four research questions could be found, as well. Answering on the first research question, an inclusive and participatory constitution-making has become a recent trend for modern constitutions, emphasizing transparency, citizen 'participation' and inclusion in the constitution-drafting process. In case of Tunisia, the post-Arab Spring constitution-making process, while not without a conflict, led to a consensus document that was supported by a vast part of the population. In contrast, Egypt's constitution drafting was not broadly participatory and the process of the constitution-making itself only further polarized already existing divisions in Egyptian society. Concerning the answer on the second research question, I conclude that both the 2014 Tunisian and Egyptian constitutions include provisions that reflect international human rights law norms. Having assessed whether Tunisia's and Egypt's new constitutions comprise potential and enforcement mechanisms for substantive constitutional rights implementation, I conclude that while the 2014 Tunisian Constitution creates new institutions, the Egyptian one does not establish any meaningful institutional safeguards that will prevent state abuse, on the contrary, it reinforces security institutions- the police, military and judiciary- that have been traditionally involved in state abuse. The answer on the last research question is as follows: the constitution of Tunisia is legitimate because of the inclusive manner in which it was drafted and the

institutional safeguards that it comprises for protecting civil and political rights. On the contrary, Egypt's new Constitution is in doubt due to its non-inclusive drafting process and lack of potential for its substantive constitutional protections to be fully and fairly implemented.

The Tunisian and Egyptian experiences in constitution-making illustrate how new constitutions can be used to serve totally opposing purposes during the fragile period of transitions. Despite both the Tunisian and Egyptian documents provide their citizens with protections consistent with international human rights law norms, they strongly diverge in how they were drafted and in their potential for free and fair implementation. Both countries faced the similar problem in reconciling Islamist and secular political interests, however, Tunisia succeeded in creating a consensus document through a consultative method and the spirit of consensus-building. In the result, the constitution has been supported by numerous constituencies and the latter stages of the process have been marked by the broad public participation. Tunisia demonstrates the practice of constitution-making in a democratic transition, despite the tense political debates under which it was developed. The Egyptian Constitution, instead, was drafted in a secretive manner and, as the Constitution of 2012, adopted under the Muslim Brotherhood party leadership, did not receive a broad public consensus, because of the lack of public participation and inclusiveness in the drafting process. Taking into account the manner in which it was built, Egypt's Constitution fails to ensure citizens with enforcement mechanisms to challenge state abuse, and civil and political rights violations, and lacks horizontal accountability to check the traditionally powerful judiciary and military. Egypt represents a quite complicated case of constitution-making in a deeply polarized and volatile transition led by a de facto military government that has proved to be far from democratic during its rule.

The 2014 Constitution of Tunisia has been considered a great success and till now stands as a beacon of hope for Egypt and other countries in the region. It guarantees the freedom of belief and conscience and ensures human rights, legal and economic equality between

men and women, the right to a clean environment and gender parity in elected bodies.<sup>747</sup> However, during the last years after the adoption of the constitution, it became clear that the semi-presidential political system it formed led to a deadlock.<sup>748</sup> The famous compromise between the Islamist coalition and leftists resulted in a parliamentary government and a partially weakened presidency.<sup>749</sup> While the presidency in many other parliamentary systems is largely ceremonial, in Tunisia the president is a semi-independent executive with unclearly defined powers who approves laws, decides on the foreign policy, and appoints judges and national security and diplomatic figures – all on recommendations from the government.<sup>750</sup> Precisely this system has led to a chaos, as it is at times unclear where policy is made and who carries it out: the government enjoying its fragile coalition in the parliament, does not have the independence or stability to push through necessary political, social and economic reforms, such as for instance an overhaul of the police or the tax reform.<sup>751</sup>

The Tunisia's security services have also become the subject of scrutiny. An alarm was raised in January 2018 over the monitoring of recent economic protests, which resulted in more than 900 arrests and the harassment of journalists, as a 'return' to a police state.<sup>752</sup> However, human rights advocates reassure that concerns resulted more from the actions

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<sup>747</sup> Constitution of the Republic of Tunisia, (27 January 2014).

<sup>748</sup> M. Limam, 'Is Tunisia's 2014 Constitution already obsolete?', Middle East Monitor, (6 August 2014), <https://www.middleeastmonitor.com/20160806-is-tunisias-2014-constitution-already-obsolete/>.

<sup>749</sup> Ibidem.

<sup>750</sup> Constitution of the Republic of Tunisia, (27 January 2014).

<sup>751</sup> T. Luck, 'Tunisia's democracy: Freedom is disappointingly messy, but there's hope', The Christian Science Monitor, (17 April 2018), <https://www.csmonitor.com/World/Middle-East/2018/0417/Tunisia-s-democracy-Freedom-is-disappointingly-messy-but-there-s-hope>.

<sup>752</sup> Ibidem.

of individuals than from a systematic policy, trying to adapt to a new democratic era and to uphold both law and order in the country.<sup>753</sup>

In 2017, when the government proposed the administrative reconciliation law granting amnesty for officials and citizens who benefited financially from the Ben Ali regime, young activists returned to the street protests again.<sup>754</sup> The movement unified leftists, nationalists, Islamists and residents from small marginalized regions. The law being revised several times eventually passed in September, however, young revolutionaries saw it as a triumph: they were not afraid to protest peacefully, as it had been in the past and in this they saw a change and what the Tunisian revolution was about.<sup>755</sup>

In January 2018, Human Rights Watch confirmed Tunisia's leading role on women's rights in the Arab world.<sup>756</sup> In 2017 the Parliament adopted a comprehensive law to address violence against women, which comprises provisions to prevent violence, protect victims, and prosecute abusers. The law removed from the penal code a provision that allowed a rapist to escape punishment if he married his victim.<sup>757</sup> On 14 September, the Justice Ministry announced that it had repealed a 1973 directive prohibiting marriages of Tunisian women to non-Muslim men.<sup>758</sup>

Finally, the creation of a Constitutional Court in accordance with the 2014 Tunisian Constitution has not been accomplished yet. However, in March 2018, the appointment of Constitutional Court's members started. According to the International Commission of Jurists, this must happen through an open and transparent process and based on

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<sup>753</sup> Ibidem.

<sup>754</sup> Ibidem.

<sup>755</sup> Ibidem.

<sup>756</sup> 'Tunisia: Slow Reform Pace Undermines Rights', Human Rights Watch, (18 January 2018),

<https://www.hrw.org/news/2018/01/18/tunisia-slow-reform-pace-undermines-rights>.

<sup>757</sup> Ibidem.

<sup>758</sup> Ibidem.



prescribed, objective criteria of merit, integrity, and equality before the law.<sup>759</sup> The Tunisian authorities should also ensure that the composition of the Constitutional Court represents the diversity of the community it serves, granting the equal representation of women in the Court, as well as a significant representation of minority groups.<sup>760</sup>

The situation in Egypt, after the adoption of the 2014 Constitution and the election of a new President and a former head of SCAF el-Sisi, only aggravated. In particular, President Abdel Fattah al-Sisi's government continued its zero-tolerance policy towards dissent, introducing in 2017 repressive legislation, notably a nongovernmental organization (NGO) law that may ban independent associations, restoring a state of emergency and continuing near-absolute impunity for abuses by security forces under the pretext of fighting 'terrorism'<sup>761</sup>. The law criminalizes the work of NGOs, providing for up to five-year prison terms for failing to adhere to its provisions such as operating or receiving funds without government approval.

Security forces' abuses towards civilians, including judges and Muslim Brotherhood supporters resulted in around 378 persons disappeared and at least 87 remained unknown over the previous 12 months<sup>762</sup>. These numbers do not include those who were found killed after having been considered missing.<sup>763</sup> The responsibility for the most flagrant abuses, including systematic use of torture to obtain confessions, was incurred by the

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<sup>759</sup> 'Tunisia: appointment of constitutional court members must meet international standards', International Commission of Jurists, (12 March 2018), <https://www.icj.org/tunisia-appointment-of-constitutional-court-members-must-meet-international-standards/>.

<sup>760</sup> Ibidem.

<sup>761</sup> 'Egypt: Events of 2017', Human Rights Watch, (2018), <https://www.hrw.org/worldreport/2018/country-chapters/egypt>.

<sup>762</sup> Ibidem.

<sup>763</sup> Ibidem.

Interior Ministry's National Security Agency (NSA) that continue to operate with near-absolute impunity.<sup>764</sup>

Sexual harassment and violence against women remained widespread in Egypt. In 2013, women police officers, part of a special unit began to struggle against violence towards women and became more visible in public places especially during holidays. However, the prosecution of perpetrators was still rare. Two years passed since the declaration of the National Strategy to Combat Violence against Women, but local groups were sceptical of the results because of the lack of monitoring mechanisms. On the whole, women continued to face discrimination under Egypt's personal status law on equal access to divorce, child custody, and inheritance.<sup>765</sup>

To conclude, both Tunisia and Egypt nowadays face challenges in implementing provisions of 2014 constitutions and providing protections to their citizens' rights. However, the enforcement mechanism existing in Tunisia's 2014 document that include the creation of independent institutional commissions for human rights protection, fair elections and anti-corruption, leads the country much forward towards democracy than the Egypt's constitution, which does not contain any mechanisms for citizens to challenge state violations of civil and political rights that constantly occur in the country.

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<sup>764</sup> Ibidem.

<sup>765</sup> Ibidem.

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## 7 Summary

### 7.1 Introduction

This thesis has attempted to analyse the recent constitutional trends in two transition states, Tunisia and Egypt, in the aftermath of the Arab Spring, and how the political polarization among key fractions in both countries influenced the process of the constitution - making and, as a consequence, the legitimacy of Tunisia's and Egypt's constitutions. My analytical framework has been drawn from comparative constitutional theory on constitution-making in post-conflict and transitioning states.<sup>766</sup> Based on the theory of Gluck and Brandt, the framework includes three markers of the constitutional legitimacy. The first one is called processual legitimacy, an inclusive drafting and ratification process; the second is substantive legitimacy through the incorporation of international human rights law principles; the third sort of legitimacy is the applicatory one, ensured through the inclusion of institutional apparatuses for the fair and complete implementation of constitutional protections.<sup>767</sup>

In this thesis, I have tried to answer the following research questions: What are the new trends in constitution making and how have they influenced the constitution-making processes in Tunisia and Egypt? To what extent the substantive provisions of Tunisia's and Egypt's new constitutions comport with international human rights law norms? Do new Tunisian and Egyptian constitutions include institutional and enforcement mechanisms for the full and fair implementation of substantial constitutional rights? Are constitutions adopted by transitional states legitimate?

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<sup>766</sup> J. Gluck, M. Brandt, 'Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring', United States Institute of Peace, (2015).

<sup>767</sup> Ibidem.

## **7.2 Constitutions as drivers for the democratic development of societies**

The chapter has provided a historical introduction into ‘constitutionalism’ and its gradual development; the basic constitutional models and trends have been analysed and applied to real country examples.

The modern concept of the constitution has been formed through the development of the world constitutional process, conditioned by the evolution of society and the state. In this development, according to Chirkin and Judin, there are four main stages.<sup>768</sup> The first one covers the period from the end of the 18th century until the end of the First World War; the second period between the two world wars; the third period from the end of the Second World War until the end of the 1980s; the fourth is the modern stage.<sup>769</sup> It was clearly marked at the turn of the 80s-90s of the 20th century in connection with the collapse of totalitarianism, but the origins of this stage are in earlier periods and are partly related to the influence of socialist constitutions.<sup>770</sup>

The constitutional process includes the diversity of the basic constitutional models and their varieties. The main ones were the Western constitutional model, formed at previous stages; ‘the socialist’ model represented at the beginning only by soviet constitutions and later by the constitutions of other socialist states (Albania, Bulgaria, Hungary, Vietnam, GDR, DPRK, China, Cuba, Poland, Romania, Czechoslovakia, Yugoslavia, Mongolia); a new constitutional model embodied in the constitutions of developing countries. Each of these models had its own varieties and development trends.

Historically, constitution making referred to the content of the document itself rather than how that content was agreed upon, and until recently, the writing of a constitution was

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<sup>768</sup> Ibidem.

<sup>769</sup> Ibidem.

<sup>770</sup> Ibidem.



generally an act of power consolidation rather than political negotiation.<sup>771</sup> Imperial powers protected their own interests by determining which parties would take the reins of government and the terms under which they would rule. Especially during the Cold War, conquerors of defeated nations or new rulers trying to consolidate their power drafted their constitutions behind closed doors.

Times have changed, and in post-conflict settings, constitutions tend to be negotiated instruments. In the past two decades, a trend has begun to emerge towards greater transparency, inclusion and participation; constitution-making processes now tend to have greater levels of citizen participation.<sup>772</sup> Here, the understanding of constituent power has a fundamental impact on the constitution-making process. Despite different competing concepts emerged in the last 250 years, the legitimacy in the constitution-making process must be demanded in the name of the people.<sup>773</sup>

During recent years the gradual incorporation of principles of constitutionalism into the discourse of transition has been seen. The new transitional model defines the limits of political and judicial order and does not simply imply the existing national identity, but rather plays a key role in building the new society.<sup>774</sup> The latter means the inclusiveness of the previously excluded or marginalized social and political units, addressing questions of social justice, such as the property rights and the recognition of social and economic rights.<sup>775</sup> In order to achieve this, transitional constitutionalism establishes internationalized standards of justice to ensure that the normative goals, such as the accountability for human rights violations and the non-recurrence through the

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<sup>771</sup> Chirkin V.E, Yudin J.A, 'Сравнительное Конституционное Право', MANUSCRIPT, 96-03-16027, Moscow (1996), p 43-442 (own translation).

<sup>772</sup> Ibidem.

<sup>773</sup> A. Somek, 'Constituent Power in National and Transnational contexts' 3 Transnational Legal Theory, (2012), pp. 31–60.

<sup>774</sup> R. Teitel, 'Transitional Justice', Oxford University Press, (2000), pp. 191-194.

<sup>775</sup> A.M. Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel', Stanford Journal of International Law, (2004), p. 57.

consolidation of democracy are met.<sup>776</sup> Here the traditional link between constitutionalism and international law can be seen: with the process of decolonization, the constitutional process became internationally assisted, and by this procedurally defined.

With regard to Tunisia and Egypt, two case studies of this thesis, the discourse of constitutionalism in Islamic World becomes indispensable. For centuries, Islamic law has developed without the notion of constitutionalism, and the fiqh knew no constitution, nor was their vibrancy dependent on one.<sup>777</sup> Islamic constitutionalism started to emerge in the nineteenth century through the Ottoman Constitution of 1876.<sup>778</sup> Due to the combined pressure of domestic instability and the dominance of European colonial powers, this Constitution was created to introduce elementary principles of liberalism in a decadent empire that the Ottoman sultans had ruled for almost four centuries.<sup>779</sup> The Middle Eastern countries, under Western mandate, appeared to be relatively weak in establishing and protecting political freedoms, which resulted in their incapability to confront European powers.<sup>780</sup> Hence, when Muslims started looking for legal means in order to restrain despotic rulers, they referred not to the Islamic tradition, but to European models.<sup>781</sup> Later, in the twentieth century, a new wave of constitutionalism rose to prominence after a number of Muslim nations obtained independence from Western colonialism. Cognisant with the trend of written constitutionalism throughout the world,

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<sup>776</sup> R. Teitel, *supra* note 6.

<sup>777</sup> L.A. Khan, H.M. Ramadan, 'Contemporary Ijtihad: Limits and Controversies', Edinburgh Scholarship Online, (2012).

<sup>778</sup> F.M. Corrao, *supra* note 11, p. 80. (In 1876, the Ottoman Sultan established the first Parliament and conducted significant reforms, such as the establishment of public elementary schools, the penal and commercial codes, the formulation of the concept of citizenship. This led to the development of a rudimentary conception of the modern state).

<sup>779</sup> *Ibidem*.

<sup>780</sup> *Ibidem*.

<sup>781</sup> *Ibidem*.

almost all Muslim nations of diverse cultures, political persuasions, historical experience and ethnic compositions have accepted constitutionalism as part of their legal systems.

### ***Tunisia***

Tunisia can be considered the birthplace of Arab constitutions, as its Constitution of 1861<sup>782</sup> was the first one drafted in the Arab World.<sup>783</sup> However, the main Constitution in Tunisia is the post-independence Constitution of 1959, which lasted until the December 2010 revolution. Despite the influence of the Turkish secular model on the President Habib Bourguiba, he did not follow that model declaring the state secular in the Constitution.<sup>784</sup> Differently from President Ataturk, he did not refer religion to the private sphere and did not establish a wall between religion and state law and politics.<sup>785</sup> In fact, the Tunisian historical path partially explains the choices made by Tunisian constitution makers in the June 2013 draft of the constitution. The Islamist party Al-Nahda, on the one hand, clearly expressed a desire to liberate religion from state domination and, on the other hand, they also insisted that the state must organize religion without controlling it, given its experience prior to the Arab Spring.<sup>786</sup>

### ***Egypt***

In Egyptian history, the main constitutional document that introduced Islam as the state's official religion is the Constitution from 1923, which was adopted by King Fouad I under

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<sup>782</sup> Constitution of the Republic of Tunisia, (26 April 1861).

<sup>783</sup> N.J. Brown, 'Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government', State University of New York Press (2002), pp. 5-10.

<sup>784</sup> M. Zeghal, 'Public Institutions of Religious Education in Egypt and Tunisia: Contrasting the Post-Colonial Reforms of Al-Azhar and the Zaytuna' in 'Trajectories of Education in the Arab World', Osama Abi-Mershed, (2010), pp. 111-112.

<sup>785</sup> Ibidem.

<sup>786</sup> M. Zeghal, 'Competing Ways of Life: Islamism, Secularism and Public Order in the Tunisian Republic', Constellations, Volume 20, (2013), pp. 254-256, p. 261.

British colonial rule.<sup>787</sup> However, for the first time the provision ‘Islam is the state religion’ was turned into reality during the rule of President Anwar Sadat.<sup>788</sup> The 1971 Constitution that survived in most of its form until early 2011 revolt, included Article 2, which for the first time stipulated that ‘the principles of Islamic shari’a are a principal source of legislation’.<sup>789</sup> In 1980, Sadat committed this provision, and the text ‘a principle source of legislation’ became ‘the principle source of legislation’. This small verbal change meant a greater emphasis on religious identity and compliance.<sup>790</sup>

### **7.3 The Arab Spring in the context of the Arab World**

In 2011 an unexpected series of mass revolutionary protests hit the Middle East<sup>791</sup>, namely, the “Arab Spring”.<sup>792</sup> In Tunisia and Egypt, authoritarians had to step down without referring to great levels of violence, while in Libya rebels overthrew the dictator with foreign military aid and in Yemen after the high degree of violence the ruler stepped down in a negotiated transfer of power.<sup>793</sup> Ultimately, Tunisia, Libya and Egypt turned out to be three cases, where the Arab Spring led to the adoption of new constitutions. Despite having similar backgrounds, these constitutions finally diverged widely in their

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<sup>787</sup> J. Feuille, ‘Reforming Egypt’s Constitution: Hope for Egyptian Democracy?’, 47 Texas International Law Journal, (2011), p. 237, pp. 239-240.

<sup>788</sup> Constitution of the Arab Republic of Egypt, (11 September 1971), Article 2, amended by 22 May 1980, 25 May 2005, 26 March 2007.

<sup>789</sup> Ibidem.

<sup>790</sup> M.C. Bassiouni, M. Helal, ‘The Second Republic of Egypt’, (2012), p. 253.

<sup>791</sup> L. Anderson, ‘Demystifying the Arab Spring’, HeinOnline -- 90 Foreign Affairs 2, (2011).

<sup>792</sup> Arab Spring was first coined by the American Journal of Foreign Policy and popularized by Western Media and later by Arab TV channels, labels the anti- regime protests that occurred in Tunisia, Libya, Egypt, Yemen, and Syria in 2011; and erupted on a smaller scale in Bahrain, Algeria, Jordan, Morocco, and Sudan.

<sup>793</sup> T. Thiel, ‘Yemen’s Negotiated Transition between the Elite and the Street’, The London School of Economics and Political Science, (2014),

<http://blogs.lse.ac.uk/mec/2014/03/03/yemens-negotiated-transition-between-the-elite-and-the-street/>.

degree of liberalism, in other words, the extent to which they structure institutions in order to preserve individual rights and the balance between majority and minority rights. In this thesis, I have chosen Tunisia and Egypt as case studies.

In January and February 2011, protests in Tunisia and Egypt succeeded in a matter of weeks in ousting two regimes considered to be among the most stable in the region. The first demonstrations took place in central Tunisia in December 2010, triggered by the self-immolation of Mohamed Bouazizi, a 26-year-old street vendor protesting his treatment by local officials.<sup>794</sup> Labeled the ‘Jasmine Revolution’ in the media, a protest movement quickly spread throughout the country. The Tunisian government attempted to end the unrest by using violence against street activists and by offering political and economic concessions. However, protests soon overwhelmed the country’s security forces, forcing President Zine al-Abidine Ben Ali to step down and flee the country in January 2011.<sup>795</sup> In October 2011, Tunisians took part in a free election to select members of a council tasked with drafting a new constitution.<sup>796</sup>

In late January 2011, only days after Ben Ali’s ouster in Tunisia, massive protests broke out in Egypt.<sup>797</sup> The Egyptian government also attempted and failed to calm down protesters by offering concessions together with cracking down violently against street demonstrators. After several days of massive protests and clashes between activists and security forces in Cairo and around the country, a turning point came at the end of the month when the Egyptian army announced that it would refuse to use force against

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<sup>794</sup> J. Brownlee, T. Masoud, ‘The Arab Spring: Pathways of Repression and Reform’, Oxford University Press, (2015), p. 10.

<sup>795</sup> al-Baik, D. Tunisia’s opposition dismisses Bin Ali’s warnings, The Gulf News, (11 January 2011), <https://gulfnews.com/news/mena/tunisia/tunisia-s-opposition-dismisses-bin-ali-s-warnings-1.744604>.

<sup>796</sup> V. Walt, ‘Tunisia’s Nervous Neighbours Watch the Jasmine Revolution’, Time, 177 (4), (31 January 2011), pp. 17–21.

<sup>797</sup> B. K Rutherford, ‘Egypt: The origins and consequences of the January 25 Uprising’. In M.

L. Haas & D. W. Lesch, ‘The Arab Spring: Change and resistance in the Middle East’, Boulder, CO: Westview Press, (2013), pp. 35–63.

protesters calling for the removal of President Hosni Mubarak. Having remained without the support of the military, Mubarak left the office on February 11 after nearly 30 years of authoritarian rule, conceding power to a council of senior military officers.<sup>798</sup>

The sudden, unexpected collapse of seemingly stable autocracies in Tunisia and Egypt has raised important questions about the conventional wisdom on authoritarian resilience. There are two prevailing types of explanations for the recent breakdown of autocracies in Tunisia and Egypt: the first one concentrates on the social drivers of unrest, such as youth unemployment, socioeconomic inequality, corruption, and an increasingly 'technologically advanced' population; the second investigates capacity-centered explanations for the strength and resilience of authoritarian regimes.<sup>799</sup>

Various studies on the Arab Spring have demonstrated the bottom-up factors driving Middle Eastern discontent and subsequent protests.<sup>800</sup> Regarding the participants involved in mass street demonstrations and their specific grievances, these interpretations have found out that instability in the MENA region is most closely linked to socioeconomic imbalances, the perception of official corruption, the presence of the new non-institutional actors, such as women and youth claiming for their rights, high rate of unemployment and the widespread use of modern communication technologies.<sup>801</sup>

According to another explanation of the breakdown of regimes in Tunisia and Egypt, the authoritarian collapse is less related to the grievances, tactics or organization of popular protests and more to the top-down drawbacks of regimes themselves. In other words, the major driving force behind the Arab Spring lies in the pre-existent structural deficiencies

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<sup>798</sup> F. Ajami, 'Demise of Dictators', *Newsweek*, (2011, February 14), pp. 14–21; B. Dehghanpisheh, C. Dickey & M. Giglio, 'Rage Against the Regime', *Newsweek*, (2011, February 14), pp. 19–25.

<sup>799</sup> B. Hounshell, 'Dark crystal: Why didn't anyone predict the Arab revolutions?', *Foreign Policy*, (2011), [http://www.foreignpolicy.com/articles/2011/06/20/dark\\_crystal](http://www.foreignpolicy.com/articles/2011/06/20/dark_crystal).

<sup>800</sup> V. Durac, 'Protest Movements and Political Change: An Analysis of the 'Arab Uprisings of 2011'', *Journal of Contemporary African Studies*, (2013).

<sup>801</sup> *Ibidem*.

of the regimes themselves. Both the regimes of Tunisia and Egypt were gradually being eroded by their personalism and lack of effective institutional instruments for maintaining long- term internal cohesion among elites and power over populations. Scholars as Brownlee,<sup>802</sup> King,<sup>803</sup> Lust<sup>804</sup> and Blaydes<sup>805</sup> determined political institutions in Tunisia and Egypt (i.e. hegemonic party systems, legislatures and elections) as dangerous regime backings that helped authoritarians in managing state internal divisions and isolating potential challengers. Egypt and Tunisia are instructive examples in a sense that the fragility of these seemingly durable autocracies only became evident after they were challenged by coordinated, national-level opposition movements.

## **7.4 Framework for advancing Constitutional Legitimacy in Transition states**

In the late XX and XXI centuries, countries switching from conflict to stability have often made-up new constitutions as part of their political transition. Throughout the Arab Spring revolts, societies of all the MENA region protested against their rulers because of long-lasting economic and political discontent and anger over state abuse and pervasive corruption. Demonstrators pursued the removal of authoritarian rulers and the formation of new constitutions as part of the political transition.

In January 2014, three years after the beginning of the Arab Spring, Tunisia and Egypt adopted new constitutions. Throughout their constitution-making processes, Tunisia and Egypt combatted with a common problem- how to balance the interests of secular and left-oriented parties that had historically exercised control over the government and its

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<sup>802</sup> Ibidem.

<sup>803</sup> S. King, 'Sustaining Authoritarianism in the Middle East and North Africa', *Political Science Quarterly*, (2007), p. 433-439.

<sup>804</sup> E. Lust, 'Competitive Clientelism in the Middle East', *Journal of Democracy*, (2009), 20(3): pp. 122–135.

<sup>805</sup> L. Blaydes, 'Elections and Distributive Politics in Mubarak's Egypt', New York: Cambridge University Press, (2011), pp. 2-5.

institutions. Although having faced the common challenge, the constitution-drafting processes evolved quite differently in Tunisia and Egypt.

According to Gluck and Brandt,<sup>806</sup> there are three markers of the constitutional legitimacy present in the analytical framework of comparative constitutional theory.<sup>807</sup> The first one is called processual legitimacy, an inclusive drafting and ratification process; the second is substantive legitimacy through the incorporation of international human rights law principles; the third sort of legitimacy is the applicatory one, ensured through the inclusion of institutional apparatuses for the fair and complete implementation of constitutional protections.<sup>808</sup>

In terms of processual legitimacy, which represents an inclusive and broadly participatory constitution-drafting, Tunisia, while not without a conflict, succeeded in creating a consensus document that was supported by a large number of citizens. On the contrary, Egypt's constitution-drafting was not broadly participatory and only polarized already existing divisions in Egyptian society.

In terms of substantive legitimacy presented through the incorporation of international human rights law principles, both Tunisia's and Egypt's constitutional provisions have been examined in relation to international human rights law norms. The incorporation of these norms is a key indicium of the substantive legitimacy of new Tunisia's and Egypt's constitutions, as the Mubarak and Ben Ali regimes' authoritarian abuses and repression delegitimized the constitutional systems that existed before the Arab Spring revolutions in Tunisia and Egypt. In fact, both Tunisian and Egyptian actual constitutions provide for

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<sup>806</sup> Jason Gluck is a senior political affairs officer and constitutional focal point for the United Nations Department of Political Affairs. Michele Brandt is the founder and director of Inter-Peace's Constitution-Making for Peace Programme.

<sup>807</sup> J. Gluck, M. Brandt, 'Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring', United States Institute of Peace, (2015).

<sup>808</sup> Ibidem.



the protection of civil and political rights in accordance with international human rights law norms.

In terms of the final marker of constitutional legitimacy, called the ‘applicatory’ one, the legitimacy is ensured through the inclusion of institutional apparatuses for the fair and complete implementation of constitutional protections. In the pre-Arab Spring period, both Tunisia and Egypt faced challenges regarding the independent enforcement of constitutional protections. However, after the Arab Spring, Tunisia’s 2014 Constitution formed new institutions, thus creating the potential for it to be fully and fairly implemented. On the contrary, Egypt’s 2014 Constitution does not create any meaningful new institutional mechanisms or procedural safeguards that will restrict safe abuse, and, in fact, the new constitution only strengthens security institutions that historically have been involved in state abuse.

### *Tunisia*

Following Ben Ali’s flight from Tunisia, his successor Mohamed Ghannouchi appointed an interim commission involving lawyers and judges, while the revolutionaries established a parallel transition body.<sup>809</sup> On 18 February 2011, the two commissions agreed to merge, setting up the Commission for the Fulfillment of Revolutionary Goals, Political Reform and Democratic Transition (HCFRG).<sup>810</sup> In October 2011, the HCFRG held elections to a constituent assembly and disbanded.<sup>811</sup> In the result, a coalition government was formed, including the three largest parties elected to the constituent assembly. The leading role in the coalition was acquired by the moderate Islamist party Ennahda that ruled alongside the left-liberal, non-Islamist Congress for the Republic and social-democratic Ettakatol.<sup>812</sup>

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<sup>809</sup> M. Ottaway, ‘Democratic Transitions and the Problem of Power’, Wilsoncenter.org, (2014), pp. 4-5.

<sup>810</sup> J. Brownlee and others, ‘Tracking the "Arab Spring": Why the Modest Harvest?’, *Journal of Democracy*, (2013), p. 97.

<sup>811</sup> *Ibidem*.

<sup>812</sup> *Ivi*, p. 165.

In 2013, the assassinations of two liberal political leaders, Chokri Belaid and Mohamed Brahmi, and a series of demonstrations against the Ennahda-led government temporarily disrupted the drafting process.<sup>813</sup> However, the long-lasting political deadlock between Islamists and secularists was resolved by the means of mediation from four civil society organizations known as the Quartet: the General Union of Tunisian Workers, the Human Rights League, the bar association, and the employers' union.<sup>814</sup> The outcome was a new government formed largely of nonpartisan technocrats.<sup>815</sup> During the constitution-drafting process Ennahda insisted on a parliamentary system, while other parties suggested a presidential one in order to constrain future parliamentary coalitions headed by Ennahda.<sup>816</sup> Finally, both camps agreed on a semi-presidential constitution with a weak president.

On 26 January 2014, the constituent assembly adopted a new constitution with two hundred twenty voting for, twelve against and four abstaining.<sup>817</sup> The constitution was not a subject to a public referendum, as the vote exceeded a two-thirds majority.<sup>818</sup> The new constitution came into force immediately, and parliamentary and presidential elections were held in October and November 2014 accordingly.<sup>819</sup>

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<sup>813</sup> A. El-Sayed, 'Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Egypt and Tunisia', 2 Electronic Journal: Islamic and Middle Eastern Law, (2014), p. 45.

<sup>814</sup> R.H. Haugbølle, A. Ghali and others, *supra* note 258; M. Yahya, 'Beyond Tunisia's Constitution: The Devil in the Details', Carnegie Endowment, Middle East Center, (28 April 2014), <http://carnegie-mec.org/2014/04/28/beyond-tunisia-s-constitution-devil-in-details-pub-55398>.

<sup>815</sup> *Ibidem*.

<sup>816</sup> D. Pickard, 'The Current Status of Constitution Making in Tunisia', Carnegie Endowment for International Law Peace, (2012), <http://carnegieendowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia>.

<sup>817</sup> R. Grote, 'The New 2014 Tunisian Constitution', Oxford University Press, (2018).

<sup>818</sup> *Ibidem*.

<sup>819</sup> *Ibidem*.

The 2014 Tunisian Constitution established a semi-presidential system, with the President of the Republic and the government headed by the Prime minister sharing the exercise of executive power.<sup>820</sup> The President is directly elected by the people for a maximum of two five-year terms.<sup>821</sup> The Head of State is the commander in chief of the armed forces, chairs the national security council, and may declare war upon the approval by a majority of three-fifths of the Parliament members.<sup>822</sup> The President may dissolve Parliament in circumstances specified in the constitution.<sup>823</sup> The Parliament, in its turn, can impeach the President in case of grave violations of the constitution by a two-thirds majority vote of its members, which must be confirmed by two-thirds of the new constitutional court.<sup>824</sup>

The Prime Minister is responsible for the proper functioning of government ministries and ensures the enforcement of laws.<sup>825</sup> He, as well, determines, together with the President, general policies on domestic matters<sup>826</sup>. The Prime Minister has to consult with the President issues concerning defense, foreign policy and national security.<sup>827</sup> If the government that enjoys the support of the Parliament cannot be formed, the President has the right to dissolve the Parliament and call for a general election after four months.<sup>828</sup> The Parliament may remove the Prime Minister with a vote of no-confidence, if an absolute majority presents an alternative candidate to the Head of Government.<sup>829</sup>

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<sup>820</sup> Constitution of the Republic of Tunisia, (26 January 2014), Article 71.

<sup>821</sup> *Ivi*, Article 75.

<sup>822</sup> *Ivi*, Article 77.

<sup>823</sup> *Ibidem*.

<sup>824</sup> *Ivi*, Article 88.

<sup>825</sup> *Ivi*, Article 92.

<sup>826</sup> *Ivi*, Article 91.

<sup>827</sup> *Ivi*, Article 77, Article 93.

<sup>828</sup> *Ivi*, Article 89.

<sup>829</sup> *Ivi*, Article 97.

The 2014 Tunisian Constitution upholds many significant civil, political, social, economic, and cultural rights.<sup>830</sup> These rights refer to citizenship, to creation of political parties, to bodily integrity and freedom of movement, opinion, expression, assembly, and association.<sup>831</sup> The constitution also guarantees a right not to be detained arbitrarily and fair trial guarantees.<sup>832</sup> According to the new constitution, torture or any statute of limitations on prosecuting torture are prohibited.<sup>833</sup> The document, as well, guarantees the right to political asylum.<sup>834</sup> The Tunisian Constitution also provides key committee positions for opposition party representatives and grants them the right to establish and head a committee of enquiry annually.<sup>835</sup> The new document includes stronger protection for women's rights, including Article 46, which stipulates that, 'The state commits to protect women's established rights and works to strengthen and develop those rights,' and guarantees 'equality of opportunities between women and men to have access to all levels of responsibility and in all domains'.<sup>836</sup> In addition the 2014 Constitution protects the rights to health, education and work.<sup>837</sup> The Tunisian government should adopt specific measures to achieve progressively the full realization of these rights to the maximum of the country's available resources, in accordance with the standards of the ICCPR, which Tunisia has ratified.<sup>838</sup>

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<sup>830</sup>Joint Public Statement by Al Bawsala, 'Tunisia: Let Constitution Herald Human Rights Era Judges Should Base Interpretation on International Standards', Amnesty International and Human Rights Watch, (31 January 2014), <https://www.hrw.org/news/2014/02/01/tunisia-let-constitution-herald-human-rights-era>.

<sup>831</sup> Ibidem.

<sup>832</sup> Constitution of the Republic of Tunisia, *supra* note 460, Article 27.

<sup>833</sup> Ivi, Article 23.

<sup>834</sup> Ivi, Article 26.

<sup>835</sup> Ivi, Article 60.

<sup>836</sup> Ivi, Article 46.

<sup>837</sup> Ivi, Article 38, Article 39, Article 40.

<sup>838</sup> Joint Public Statement by Al Bawsala, *supra* note 65.

The section on judicial authority contains significant guarantees for the independence of the judiciary. For instance, Article 102 stipulates that ‘[t]he judiciary is an independent authority that ensures the administration of justice, the supremacy of the constitution, the sovereignty of the law, and the protection of rights and freedoms’.<sup>839</sup> In accordance with the new Constitution, judges remain accountable solely to the constitution and the law in the performance of their duties. The following Article 109 prohibits any outside interference in the functioning of the judiciary.<sup>840</sup> In addition, the constituent assembly amended the provisions on the High Judicial Council, the independent supervisory body for the judiciary.<sup>841</sup> Earlier constitution drafts provided that half of the members of the body would be judges and half would be not, but with the new constitution, the number of judges in the Supreme Judicial Council has increased from one half to two-thirds.<sup>842</sup> Moreover, the Supreme Judicial Council is tasked, among other issues, with proposing reforms, reviewing draft laws related to the judiciary, and managing the conduct and disciplinary measures for judges.<sup>843</sup>

The new Constitution provides for the creation of a constitutional court that will have the power to strike down laws that are not in harmony with the constitution and will be composed of twelve members.<sup>844</sup> It also calls for the establishment of several new independent constitutional commissions, such as a national Human Rights commission, an Electoral Commission, and a Good Governance and Anticorruption Commission that will oversee enforcement of constitutional rights and investigate respective right violations.<sup>845</sup>

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<sup>839</sup> Ivi, Article 102.

<sup>840</sup> Ivi, Article 109.

<sup>841</sup> Joint Public Statement by Al Bawsala, *supra* note 65.

<sup>842</sup> Constitution of the Republic of Tunisia, (27 January 2014), Article 113.

<sup>843</sup> Ivi, Article 114.

<sup>844</sup> Article 118.

<sup>845</sup> Ivi, Articles 125-130.

On the whole, the new Tunisian Constitution appears to provide appropriate horizontal accountability and the potential for the full and fair implementation of constitutional rights through new enforcement mechanisms drawn in the constitution.

### *Egypt*

In February 2011, Mubarak stepped down, and the transitional military government declared parliamentary elections to be held from November 2011 to January 2012.<sup>846</sup> In the elections, the Muslim Brotherhood and its allies obtained 46% of the seats and the extreme Islamist (Salafist) Alliance obtained 24% of the seats, hence ensuring a 70% supermajority for Islamic parties.<sup>847</sup> The military temporarily backed their ascent to power by identifying the Muslim Brotherhood as the single most powerful and well-organized civil institution in Egypt.<sup>848</sup> Appointed under Mubarak judiciary, survived his fall and intervened to weaken Morsi's Islamic government. Yet, enjoying their dominant position in the second and ultimately successful constituent assembly of 2012, which had been elected by parliament, the Islamic parties preferred to ignore the vocal opponents from liberal and secularist parties and impose a conservative constitution.<sup>849</sup> Throughout the year 2012, it seemed that the military forces and the ruling Muslim Brotherhood party had reached an accommodation, excluding liberals.<sup>850</sup> The level of polarization became so high that Christian, socialist, and liberal members of the two constituent assemblies established during 2012 many times left the bodies protesting against the Islamic

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<sup>846</sup> D.D. Kirkpatrick, 'In a Surprise, Calm Prevails in Egypt's Elections', New York Times, (28 November 2011), <https://www.nytimes.com/2011/11/29/world/middleeast/egyptians-vote-in-historic-election.html>.

<sup>847</sup> J. Brownlee and others, 'Tracking the "Arab Spring": Why the Modest Harvest?', Journal of Democracy, (2013), p. 29.

<sup>848</sup> Ibidem.

<sup>849</sup> H. Albrecht, 'Egypt's 2012 Constitution Devil in the Details, Not in Religion', United States Institute of Peace, Peacebrief, (25 January 2013), <https://www.usip.org/sites/default/files/PB139-Egypt's%202012%20Constitution.pdf>.

<sup>850</sup> N. J. Brown, 'Midnight for the SCAF's Cinderella Story', Foreign Policy, (19 March 2012), <https://foreignpolicy.com/2012/03/19/midnight-for-the-scafs-cinderella-story/>.

dominance.<sup>851</sup> After the Muslim Brotherhood- dominated Parliament was dissolved by court order, Morsi ensured that the assembly completed its work and that the draft constitution was proposed to citizens for a vote.<sup>852</sup>

Observers viewed the Islamist constitution as an attempt to create a ‘competitive authoritarian regime’ where elections take place, but the dominant governing party remains unchecked in its power and difficult to remove.<sup>853</sup> In fact, the actions of Morsi and his supporters only confirmed this view. The interim President undertook several measures that placed him in opposition to the judiciary and the military. Morsi took steps to place his loyalists on the Supreme Constitutional Court.<sup>854</sup> On the eve of the presidential elections, he annulled the constitutional declaration released by the military, which had stated that the decisions of the military would not be subject to the President’s authority.<sup>855</sup> Morsi, as well, replaced the Head of the SCAF Marshall Mohamed Hussein Tantawi with General Abdel Fattah el-Sisi.<sup>856</sup>

Presented to the public for a referendum, the 2012 constitution introduced Islam into the fabric of the state, strengthened the executive and institutionalized the role of the military in politics. On the whole, the 2012 struggle over the constitution of Egypt provides a

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<sup>851</sup> Ibidem.

<sup>852</sup> Ibidem.

<sup>853</sup> D. Landau, ‘Abusive Constitutionalism’, 47 The University College Dublin Law Review, (2013), p. 191.

<sup>854</sup> D.D. Kirkpatrick, M. El Sheikh, ‘Citing Deadlock, Egypt’s Leader Seizes New Power and Plans Mubarak Retrial’, New York Times, (23 November 2012), <https://cn.nytimes.com/world/20121123/c23egypt/en-us/>.

<sup>855</sup> <sup>855</sup> N.J. Brown, M. Dunne, ‘Egypt’s Draft Constitution Rewards the Military and Judiciary’, Carnegie Endowment for International Law Peace, (4 December 2013), <https://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary-pub-53806>

<sup>856</sup> K. Fahim, ‘In Upheaval for Egypt, Morsi Forces Out Military Chiefs’, New York Times, (12 August 2012), <https://www.nytimes.com/2012/08/13/world/middleeast/egyptian-leader-ousts-military-chiefs.html>.

tragic image of the consequences of constraining participation: the Muslim Brotherhood pushed through a document without involvement of other groups in the constituent assembly, producing a backlash of violent protests.<sup>857</sup> Remaining defiant against the protestors, the Muslim Brotherhood party alienated the military and judiciary, making them allies with the liberal and youth opposition, whose July 2013 revolts led to Morsi's ouster by the military.<sup>858</sup>

However, the Muslim Brotherhood party's fall only demonstrated that the military and judiciary retained significant influence throughout the evolution of Egypt's political transition. Professor Nathan Brown describes these two former Mubarak's affiliated actors as the 'deep state'.<sup>859</sup> The Egyptian public remained polarized towards the deep state's actions: secularists mostly viewed the deep state as protectors of the Egypt's transition from Muslim Brotherhood ascendancy, while the Islamist allies considered the deep state's actions as an illegitimate ouster of the first fairly and free elected President.<sup>860</sup>

Unfortunately, the actions undertaken by the military and judiciary after the removal of Morsi were just as polarizing as those of the Muslim Brotherhood and strengthened divisions within Egyptian society.<sup>861</sup> The new constituent assembly appointed by the SCAF and known as the "Committee of 50" was comprised of a large number of actors,

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<sup>857</sup> J. Blount, T. Ginsburg, 'Participation in Constitutional Design: Asian Exceptionalism', *Comparative Constitutional Law in Asia*, (2014), p. 23.

<sup>858</sup> Ibidem.

<sup>859</sup> N.J. Brown, 'Egypt's Wide State Reassembles Itself', *Foreign Policy*, (17 July 2013), <https://foreignpolicy.com/2013/07/17/egypts-wide-state-reassembles-itself/>.

<sup>860</sup> B. Momani, 'In Egypt, 'Deep State' vs. 'Brotherhoodization' ', *Brookings*, (21 August 2013), <https://www.brookings.edu/opinions/in-egypt-deep-state-vs-brotherhoodization/>.

<sup>861</sup> A. Hauslohner, 'Egyptians Stage Mass Protests Against Morsi Edict', *The Washington Post*, (27 November 2012), [https://www.washingtonpost.com/world/middle-east/egyptians-stage-mass-protests-against-morsi-edict/2012/11/27/166d71ca-38c4-11e2-b01f-5f55b193f58f\\_story.html?noredirect=on&utm\\_term=.182205b97545](https://www.washingtonpost.com/world/middle-east/egyptians-stage-mass-protests-against-morsi-edict/2012/11/27/166d71ca-38c4-11e2-b01f-5f55b193f58f_story.html?noredirect=on&utm_term=.182205b97545).

(There was a widespread and violent crackdown against supporters of the Muslim Brotherhood who objected to Morsi's removal. In the result, several peaceful protesters were killed).



including union representatives, prominent public figures, human rights leaders and religious groups.<sup>862</sup> Conspicuously, Muslim Brotherhood and other Islamist representatives were largely excluded from the constitution drafting process, despite enjoying support from at least half the Egyptian population.<sup>863</sup> Moreover, while the assembly removed the Islamist provisions contained in the 2012 Constitution, its process did not involve the public and did nothing to bridge the divide between Islamists and secularist. Instead, the draft constitution elaborated by the military's appointed assembly, expanded the power of 'deep state' elites.<sup>864</sup> Empowered and independent state institutions can effectively protect the state from authoritarian abuse, but in this case the empowered institutions of the deep state are the same institutions that were allied with Mubarak during his autocratic rule. The current Egyptian President and former chief of SCAF, Abdel Fattah el-Sisi, is a political independent.<sup>865</sup> The above-mentioned changes in political life of Egypt will demonstrate whether the deep state's assertion of control over political transition will lead to a renewed authoritarian regime, as existed under Mubarak, or whether the state will allow political pluralism to flourish and protect citizens' civil, political and human rights.

The newly created constitutional system in Egypt differs from the Tunisia's one in a number of aspects. As Tunisia's document, the Egyptian Constitution<sup>866</sup> also introduces a semi-presidential system, but the balance of powers between the President and the Prime Minister diverges from Tunisia's.<sup>867</sup> The president is directly elected by the people and

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<sup>862</sup> M. Ottaway, 'The Egyptian Constitution: Mapping Where Power Lies', Wilson Center, (11 December 2013), pp. 1-3, <https://www.wilsoncenter.org/publication/the-egyptian-constitution-mapping-where-power-lies>.

<sup>863</sup> Ibidem.

<sup>864</sup> Ibidem.

<sup>865</sup> J.M. Lindsay, 'Hello (Ahlan), Abdul Fattah al-Sisi: President of Egypt', Council on Foreign Relations, Waters Edge, (9 June 2014), <https://www.cfr.org/blog/hello-ahlan-abdul-fattah-al-sisi-president-egypt>.

<sup>866</sup> Constitution of the Arab Republic of Egypt, (18 January 2014), Article 139, Article 143.

<sup>867</sup> J. Fedtke, *supra* note 479. (The discussion of the Egyptian Constitution's provisions which set out the president's power).

serves as the head of state and head of the government.<sup>868</sup> The President presides over cabinet meetings and together with the cabinet, oversees the implementation of state policy.<sup>869</sup> He is supreme commander of the armed forces and represents the country in foreign relations.<sup>870</sup> In the 2014 Constitution, the President may issue and object to laws and the appointment of key ministers is within his- and not the Prime Minister's-mandate.<sup>871</sup> Such centralization of presidential power has always existed in the history of the Egyptian governance and is worrisome, as it weakens the prospects for an effective separation of powers-one of key demands of the 2011 Egyptian revolution. According to the new Constitution, the Head of State is vested with the right to call for referenda and appoint five percent of the Parliament members.<sup>872</sup> However, the President's authority is not absolute, he must receive the two-thirds majority of the Parliament vote to declare war.<sup>873</sup> The President can dissolve the cabinet only with Parliament majority support.<sup>874</sup> The Parliament can be dissolved only on the basis of the national referendum.<sup>875</sup> The President's declaration of a state of emergency must be approved by a majority of Parliament members.<sup>876</sup> The Parliament, in its turn, may remove the Prime Minister or the President by a no-confidence vote, but will face dissolution, if the vote fails.<sup>877</sup> Like in the Tunisian Constitution, where a strong support has been given for equality in women's political representation, the Article 11 of the Egyptian document introduces new

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<sup>868</sup> Ibidem.

<sup>869</sup> Constitution of the Arab Republic of Egypt, (18 January 2014), Articles 154-155.

<sup>870</sup> Ivi, Articles 151-152.

<sup>871</sup> Ivi, Article 123.

<sup>872</sup> Ivi, Article 102, Article 137.

<sup>873</sup> Ivi, Article 152.

<sup>874</sup> Ivi, Article 147.

<sup>875</sup> Ivi, Article 137.

<sup>876</sup> Ivi, Article 154.

<sup>877</sup> Ivi, Article 131, Article 161.

legislation protecting women from violence and calling for equality between women and men in civil, political, social, economic and cultural rights.<sup>878</sup>

Despite the existing capacity between the legislative and executive branches to exercise a certain influence over one another, the horizontal accountability results to be difficult in Egypt, as both the military and the Supreme Constitutional Court are granted the independent authority in the constitution. In the new Constitution of Egypt, the Supreme Constitutional Court has its own independent budget and enjoys the right to self-select its members.<sup>879</sup> In a country like Egypt, where a highly politicized judiciary is in a strong need of reform, the new Constitution leaves the problem unaddressed and even strengthens the autonomy of the judiciary without necessary reforms to make it independent and effective. In fact, Egypt differs quite strongly from Tunisia in relation to judicial reform. In the Tunisian Constitution, the independence of judiciary is guaranteed and the number of judges in the High Judicial Council was increased from one half to two-thirds. The Egyptian Constitution lacks details on the make-up of the Supreme Judicial Council, ‘leaving its composition and most of its duties to be codified by legislation’.

Another constitutional setback that similarly threatens the checks and balances system includes the absence of civilian or any other oversight of the military’s budget and the continued presence of the provision that allows the military to trial civilians.<sup>880</sup> The 2014 Constitution establishes no independent mechanisms for citizens to protest abuse by security forces. While Article 204 stipulates a description of circumstances under which civilians would be subjected to military trials, it remains still ambiguous and leaves military the room for the abuse of military trials for civilians.

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<sup>878</sup> Ivi, Article 11.

<sup>879</sup> Ivi, Article 191, Article 193. (The Supreme Constitutional Court, as well, is vested with the right to decide the size of its membership, as it is left undefined in the Egyptian Constitution).

<sup>880</sup> Ivi, Article 204.

Due to a large number of military trials of civilians since the Mubarak's ouster in 2011,<sup>881</sup> Article 204 appears to be particularly disturbing as it ensures- even if in a slightly restricted manner than before- the continuation of this arbitrary activity. Moreover, Article 234 of the Constitution grants the military- and not the President as was previously the case- the power to select the Defense Minister for the next two presidential terms.<sup>882</sup> According to the 2014 Constitution, it is the National Defense Council and not the Parliament who determines the military budget.<sup>883</sup>

Under Egypt's new Constitution, while the power of the President is to some extent checked by the Parliament, the military and judiciary seem to be victors, possessing an independent status in the constitution. However, the most important setback is the lack of independent enforcement mechanisms allowing Egypt's citizens claim their rights against the state. While the Tunisian Constitution contains clear provisions for the protection and enforcement of human rights, the rights provided in the Egyptian Constitution remain only theoretical without any guarantees for their implementation. For instance, the inclusion of a more comprehensive list of socio-economic rights in Egypt's 2014 Constitution is a positive development, although it will not mean a lot without effective implementation mechanisms to ensure those rights are fulfilled.

## 7.5 Conclusion

In conclusion, this thesis has elaborated on the recent trends in constitution making on the examples of two Middle East countries, Tunisia and Egypt, after the 2011 Arab Spring revolution. In particular, I have analyzed how the constitution-drafting processes of the two states evolved after the 2011 revolutions according to comparative constitutional theory. This thesis has also attempted to evaluate to which extent the new constitutional

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<sup>881</sup> S. Fayed, 'Egypt Activists Urge Justice for Civilians Jailed by Army Courts', Reuters, (29 August 2012), <https://www.reuters.com/article/us-egypt-military-trials/egypt-activists-urge-justice-for-civilians-jailed-by-army-courts-idUSBRE87S0NJ20120829>.

<sup>882</sup> Constitution of the Arab Republic of Egypt, (18 January 2014), Article 201, Article 234.

<sup>883</sup> Ivi, Article 203.

trends influenced constitution making in Tunisia and Egypt, furthermore to which extent the inclusive and participatory constitution drafting has been achieved in each of the countries and how it affected the legitimacy of newly adopted constitutions.

According to the main chapters of this thesis, both Tunisia and Egypt had very similar political order and socio-economic conditions in the pre-Arab Spring period. The bottom-up factors driving for protests in both countries involved new prominent civil society actors, such as unemployed youth, women and the rest of the population exhausted from abuse of the authoritarian regimes, pervasive corruption and socio-economic imbalances. Moreover, the demands of Tunisia's and Egypt's societies were similar, as well: the resignation of the regime leader, the removal of the state of emergency, the release of all political prisoners, the dissolution of parliament, the appointment of a government of independent technocrats and the drafting of a new constitution. Finally, revolutions in both Tunisia and Egypt culminated in the ouster of authoritarian regime leaders and the formation of new constitutions as part of the political transition. On the contrary, as far as the constitution-drafting process is concerned, occasionally, different paths were taken by the Tunisian and Egyptian interim political governments.

The Tunisian and Egyptian experiences in constitution-making illustrate how new constitutions can be used to serve totally opposing purposes during the fragile period of transitions. Despite both the Tunisian and Egyptian documents provide their citizens with protections consistent with international human rights law norms, they strongly diverge in how they were drafted and in their potential for free and fair implementation. Both countries faced the similar problem in reconciling Islamist and secular political interests, however, Tunisia succeeded in creating a consensus document through a consultative method and the spirit of consensus-building. In the result, the constitution has been supported by numerous constituencies and the latter stages of the process have been marked by the broad public participation. The Egyptian Constitution, instead, was drafted in a secretive manner and did not receive a broad public consensus, because of the lack of public participation and inclusiveness in the drafting process. Taking into account the manner in which it was built, Egypt's Constitution fails to ensure citizens with enforcement mechanisms to challenge state abuse, and civil and political rights violations, and lacks horizontal accountability to check the traditionally powerful judiciary and

military. Egypt represents a quite complicated case of constitution-making in a deeply polarized and volatile transition led by a de facto military government that has proved to be far from democratic during its rule.

The 2014 Constitution of Tunisia has been considered a great success and till now stands as a beacon of hope for Egypt and other countries in the region. It guarantees the freedom of belief and conscience and ensures human rights, legal and economic equality between men and women, the right to a clean environment and gender parity in elected bodies.<sup>884</sup> However, during the last years after the adoption of the constitution, it became clear that the semi-presidential political system it formed led to a deadlock.<sup>885</sup> The famous compromise between the Islamist coalition and leftists resulted in a parliamentary government and a partially weakened presidency.<sup>886</sup> While the presidency in many other parliamentary systems is largely ceremonial, in Tunisia the president is a semi-independent executive with unclearly defined powers who approves laws, decides on the foreign policy, and appoints judges and national security and diplomatic figures – all on recommendations from the government.<sup>887</sup> Precisely this system has led to a chaos, as it is at times unclear where policy is made and who carries it out: the government enjoying its fragile coalition in the parliament, does not have the independence or stability to push through necessary political, social, economic reforms, such as for instance, an overhaul of the police or the tax reform.<sup>888</sup>

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<sup>884</sup> Constitution of the Republic of Tunisia, (27 January 2014).

<sup>885</sup> M. Limam, 'Is Tunisia's 2014 Constitution already obsolete?', Middle East Monitor, (6 August 2014), <https://www.middleeastmonitor.com/20160806-is-tunisias-2014-constitution-already-obsolete/>.

<sup>886</sup> Ibidem.

<sup>887</sup> Constitution of the Republic of Tunisia, (27 January 2014).

<sup>888</sup> T. Luck, 'Tunisia's democracy: Freedom is disappointingly messy, but there's hope', The Christian Science Monitor, (17 April 2018), <https://www.csmonitor.com/World/Middle-East/2018/0417/Tunisia-s-democracy-Freedom-is-disappointingly-messy-but-there-s-hope>.

The Tunisia's security services have also become the subject of scrutiny. An alarm was raised in January 2018 over the monitoring of recent economic protests, which resulted in more than 900 arrests and the harassment of journalists, as a 'return' to a police state.<sup>889</sup> However, human rights advocates reassure that concerns resulted more from the actions of individuals than from a systematic policy, trying to adapt to a new democratic era and to uphold both law and order in the country.<sup>890</sup>

In 2017, when the government proposed the administrative reconciliation law granting amnesty for officials and citizens who benefited financially from the Ben Ali regime, young activists returned to the street protests again.<sup>891</sup> The movement unified leftists, nationalists, Islamists and residents from small marginalized regions. The law being revised several times was eventually passed in September, however, young revolutionaries saw it as a triumph: they were not afraid to protest peacefully, as it had been in the past and in this they saw a change and what the Tunisian revolution was about.<sup>892</sup>

In January 2018, Human Rights Watch confirmed Tunisia's leading role on women's rights in the Arab world.<sup>893</sup> In 2017 the Parliament adopted a comprehensive law to address violence against women, which comprises provisions to prevent violence, protect victims, and prosecute abusers. The law removed from the penal code a provision that allowed a rapist to escape punishment if he married his victim.<sup>894</sup> On 14 September, the

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<sup>889</sup> Ibidem.

<sup>890</sup> Ibidem.

<sup>891</sup> Ibidem.

<sup>892</sup> Ibidem.

<sup>893</sup> 'Tunisia: Slow Reform Pace Undermines Rights', Human Rights Watch, (18 January 2018),

<https://www.hrw.org/news/2018/01/18/tunisia-slow-reform-pace-undermines-rights>.

<sup>894</sup> Ibidem.

Justice Ministry announced that it had repealed a 1973 directive prohibiting marriages of Tunisian women to non-Muslim men.<sup>895</sup>

Finally, the creation of the Tunisian Constitutional Court in accordance with the 2014 Constitution has not been accomplished yet. However, in March 2018, the appointment of Constitutional Court's members started. According to the International Commission of Jurists, this must happen through an open and transparent process and based on prescribed, objective criteria of merit, integrity, and equality before the law.<sup>896</sup>

The situation in Egypt, after the adoption of the 2014 Constitution and the election of a new President and a former head of SCAF el-Sisi, aggravated. In particular, President Abdel Fattah al-Sisi's government continued its zero-tolerance policy towards dissent, introducing in 2017 repressive legislation, notably a nongovernmental organization (NGO) law that may ban independent associations, restoring a state of emergency and continuing near-absolute impunity for abuses by security forces under the pretext of fighting 'terrorism'.<sup>897</sup> The law criminalizes the work of NGOs, providing for up to five-year prison terms for failing to adhere to its provisions such as operating or receiving funds without government approval.

Security forces' abuses towards civilians, including judges and Muslim Brotherhood supporters resulted in around 378 persons disappeared and at least 87 remained unknown over the previous 12 months.<sup>898</sup> These numbers do not include those who were found killed after having been considered missing.<sup>899</sup> The responsibility for the most flagrant

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<sup>895</sup> Ibidem.

<sup>896</sup> 'Tunisia: appointment of constitutional court members must meet international standards', International Commission of Jurists, (12 March 2018), <https://www.icj.org/tunisia-appointment-of-constitutional-court-members-must-meet-international-standards/>.

<sup>897</sup> 'Egypt: Events of 2017', Human Rights Watch, (2018), <https://www.hrw.org/worldreport/2018/country-chapters/egypt>.

<sup>898</sup> Ibidem.

<sup>899</sup> Ibidem.



abuses, including systematic use of torture to obtain confessions, was incurred by the Interior Ministry's National Security Agency (NSA) that continue to operate with near-absolute impunity.<sup>900</sup>

Sexual harassment and violence against women remained widespread in Egypt. In 2013, women police officers, part of a special unit began to struggle against violence towards women and became more visible in public places especially during holidays. However, the prosecution of perpetrators was still rare. Two years passed since the declaration of the National Strategy to Combat Violence against Women, but local groups were sceptical of the results because of the lack of monitoring mechanisms. On the whole, women continued to face discrimination under Egypt's personal status law on equal access to divorce, child custody, and inheritance.<sup>901</sup>

To conclude, both Tunisia and Egypt nowadays face challenges in implementing provisions of 2014 constitutions and providing protections to their citizens' rights. However, the enforcement mechanism existing in Tunisia's 2014 document, including the creation of independent institutional commissions for human rights protection, fair elections and anti-corruption, leads the country much forward towards democracy than the Egypt's constitution, which does not contain any mechanisms for citizens to challenge state violations of civil and political rights that constantly occur in the country.

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<sup>900</sup> Ibidem.

<sup>901</sup> Ibidem.