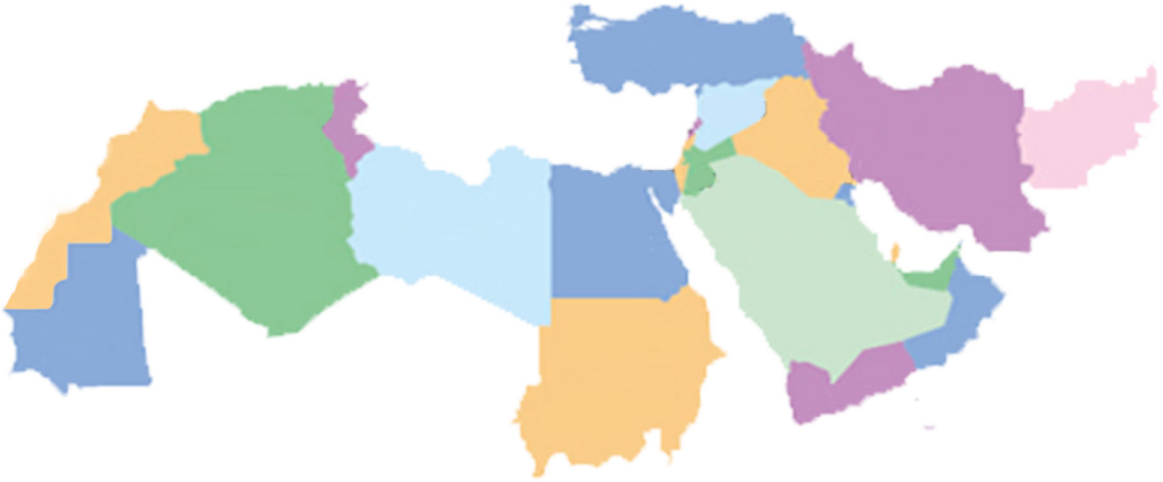
Journal of Constitutional Law in the Middle East and North Africa



Issue 03

October 2023

www.JCL-MENA.org

The Arab Association of Constitutional Law
المنظمة العربية للقانون الدستوري

HARVARD LAW SCHOOL

PROGRAM ON LAW & SOCIETY IN THE MUSLIM WORLD

The Arab Association of Constitutional Law (AACL) is the first regional network of constitutional experts in the Arab region. Founded in 2013, it aims to contribute to good governance and democratic transformation by encouraging networking and the exchange of expertise among the countries of the region. It aspires to provide objective and progressive analyses of Arab constitutional frameworks and to support constitutional and legal reform efforts in the Middle East and North Africa region.

AACL brings together leading legal scholars, judges, lawyers, parliamentarians, and civil society activists specialized in constitutional law, electoral systems, peacebuilding processes and human rights. A great number of AACL members are prominent experts in constitution-building and have participated in the negotiations or drafting of constitutions in the Arab region, including in Morocco, Algeria, Tunisia, Libya, Egypt, Iraq and Yemen.

AACL organizes and participates in a large number of activities including regional and international conferences as well as dialogue sessions in collaboration with renowned experts, decision-makers, and prominent universities and think tanks. Furthermore, AACL issues a range of publications on constitutional developments including books, policy papers, research papers and articles.

AACL endeavors to strengthen the capacities of constitutional researchers in the region through its annual Constitutional Law Academy (since 2015) and its specialized high-level working groups that bring together senior researchers, policy makers and specialists to discuss specific constitutional issues in countries that are undergoing constitutional transitions and to collaborate on joint research projects.

To learn more about AACL's activities and projects, please visit its website: aacl-mena.org and follow its social media accounts on various platforms including Facebook, LinkedIn, Twitter and Academia.edu.

HARVARD LAW SCHOOL | PROGRAM ON LAW & SOCIETY IN THE MUSLIM WORLD

The Program on Law and Society in the Muslim World (PLSMW) is a research program at Harvard Law School with a mission to support rigorous and cutting-edge scholarship that addresses the complex relationships between law and society in Muslim majority and minority contexts around the world. Recognizing the complex legal, historical, socioeconomic, and political dimensions that characterize Muslim-majority and Muslim-minority contexts, we promote contextualized approaches to the study of law. We use the term "Muslim world" to indicate our interests in the many diverse contexts in which Islamic law plays a role in the legal system, whether formally or informally.

The Program on Law and Society in the Muslim World offers Visiting Fellowships for scholars and practitioners in the field of law and society and supports student research through travel grants and mentorship. It strives to foster relationships among scholars, practitioners, and research centers across different disciplines and to engage Harvard Law School students and the wider community in current developments and debates through organizing events, lectures, and workshops on campus.

Program faculty and fellows share a common interest in the place of law in political, economic, social and cultural life and their scholarship covers a diverse range of thematic areas that include minority rights, gender justice, migration, children's rights, animal welfare, human rights, criminal law, and family law reform.

To learn more about the Program please visit its website: plsmw.law.harvard.edu.

Table of Contents

Note by the Editors *3*

The 2022 Constitutional Referendum in Tunisia: Reviving the Democratic Transition or a Severe Democratic Setback?
Jinan Limam *5*

Limited Presidential Power under the 2005 Iraqi Constitution: Appointing the Head of the Council of Ministers
Kazem Sleihib Obaid Al-Jubouri *28*

The Tug-of-war between the Spirit of the Constitution and the Requirements of Society and Politics in Morocco
Elhabib Stati Zineddine *47*

The Interaction Between Transitional Justice and Constitution-Making in a Conflict Setting: Reconciliation in Libya
Judith Heimbach *68*

Note by the Editors

We are very pleased to present the third online issue of the *Journal of Constitutional Law in the Middle East and North Africa* (JCL-MENA). JCL-MENA is a double-blind peer-reviewed bilingual journal managed and edited by the Arab Association of Constitutional Law (AACL). This third edition of the Journal is published jointly with the Program on Law and Society in the Muslim World (PLSMW) at Harvard Law School.

Over the past three years, the Journal has offered a platform for the publication of academic scholarship and critical analysis of constitutional and legal developments in the Middle East and North Africa. Featuring contributions by emerging and established scholars and practitioners, the Journal seeks to contribute to the dissemination of constitutional law knowledge and exchange of expertise and to foster open and thoughtful debate. We hope that our joint partnership in producing this third edition serves to foster cross-disciplinary engagement and collaboration with a diverse and global community of scholars and students of the region.

This edition continues to feature analyses of current regional developments in constitutional law and constitutionalism. In "The 2022 Constitutional Referendum in Tunisia: Reviving the Democratic Transition or a Severe Democratic Setback?," Jinan Limam examines the 2022 constitution-making process and the substantive outcomes of drafting a constitution in Tunisia under a state of emergency. The article analyzes the Tunisian Constitution of 2022 and argues that the new constitution, characterized by an exceptional concentration of executive power in the hands of the President of the Republic, while doing away with important checks on presidential powers, represents a serious setback to Tunisia's democratic transition, laying the ground for an unfortunate return to hyper-presidentialism.

In the second article, entitled "Limited Presidential Power under the 2005 Iraqi Constitution: Appointing the Head of the Council of Ministers," Kazem Al-Jubouri examines the scope of the President's powers under Iraq's 2005 Constitution in relation to the selection of the Prime Minister, analyzing the textual formulation in the constitution and the divergence between constitutional text and political practice. The author argues that the recent political crisis of 2019 is illustrative of the 2005 Constitution's failure to regulate political actors adequately and proposes constitutional amendments to clarify the contours of the Prime Minister selection process and the delineation of powers of the President and the Prime Minister.

In the third article, "The Tug-of-war between the Spirit of the Constitution and the Requirements of Society and Politics in Morocco," Elhabib Stati Zineddine probes the effectiveness of Morocco's 2011 constitutional reforms in democratizing political practice. The author concludes that these amendments' success was limited by the realities of a political culture that is characterized by the domination of traditional sources of power and of political consensus and compromise over constitutional principles.

In the fourth article on "The Interaction Between Transitional Justice and Constitution-Making in a Conflict Setting: Reconciliation in Libya," Judith Heimbach explores the interconnectedness of the constitution-making and transitional justice processes in Libya, amidst ongoing conflict and instability. Upon demonstrating how poor, negative developments in both the constitution-making and transitional justice processes spiraled and aggravated divisions in an unstable and divided Libya, the article ponders whether holding back on transitional justice measures and constitution-making may, in the midst of a civil war, be more appropriate than adopting measures that fuel conflict.

Taken together, these four contributions offer contextualized and thoughtful analyses of constitutional developments in the region and a discussion of some of the persisting challenges of political transformation and democratic transition in the cases under study in this issue. In the months ahead, we aspire to continue to serve as a resource for timely analysis and to continue to engage our readers in thematic explorations of constitutional developments across the Middle East and North Africa region.

Salma Waheedi, *Lecturer on Law and Executive Director of the Program on Law and Society in the Muslim World (PLSMW) at Harvard Law School*

Tamara El Khoury, *Lecturer on Constitutional Law and Executive Director of the Arab Association of Constitutional Law*

October 2023

The 2022 Constitutional Referendum in Tunisia: Reviving the Democratic Transition or a Severe Democratic Setback?

Jinan Limam *

ABSTRACT

Tunisia is undergoing a renewed period of transition that has seismically broken with the political system that resulted from the previous Constitution of January 27, 2014, laying the foundations for a third republic whose features gradually emerged in the new constitution following the referendum on July 25, 2022. A constitutional referendum can allow for the direct expression of the democratic popular will, conditional upon several democratic guarantees at various stages of the referendum to prevent politicization, whilst ensuring a pluralistic public debate on the contents of the constitution. The constitutional referendum in Tunisia took place under extraordinary circumstances, which raises questions about its democratic character. The two stages of the constituent process, namely the preparation of the draft constitution and then its ratification, were both implemented during a 'state of exception' declared by presidential decree on July 25, 2021. The state of exception granted the President extensive discretion and expanded powers, with brief and limited consultation with a select group of experts whose advice was purely advisory.

The content of the new constitution reflected this lack of deliberation and independent political oversight, with the institutional design revealing a clear emphasis on the centralization of power. The horizontal distribution of powers between the executive and legislative branches consecrated a form of hyper-presidentialism, whereas the vertical distribution of power between the central and local authorities forcefully renounced the powers of the latter, breaking from the 2014 Constitution's efforts towards decentralization. At the same time, the official political discourse and the new electoral law are designed to curtail the role of intermediary civic and political bodies, especially political parties, which inevitably weakens the institutions that promote an active political life and further deepens the imbalance of power.

These choices are sorely reminiscent of Tunisia's constitutional experiences prior to the 2011 revolution. Similar to the pre-2011 period, the adoption of Presidential Decree No. 117 of September 22, 2021, on exceptional measures, placed the President of the Republic at the epicenter of the political system, removed effective oversight and accountability mechanisms, and failed to limit the duration of the "state of exception" to a specific time period.

* Jinan Limam is a university professor and researcher in public law at the Faculty of Legal, Political and Social Sciences in Tunis.

This article was finalized in September 2022.

Although this move towards centralization was initially temporary, the constituent process was implemented during this state of exception, which meant that it was non-participatory. This led to several irreversible repercussions and severely tested the resilience and experience of democratic transition in Tunisia.

Keywords: *Democratic transition, state of exception, constitution, constitutional referendum, Independent High Authority for Elections, hyper-presidentialism, President of the Republic, political parties, Constitutional Court, legislative authority, local authorities, decentralization.*

CONTENTS

INTRODUCTION 8

I. THE CONSTITUTIONAL REFERENDUM: BETWEEN THE HAMMER OF LEGALITY AND THE ANVIL OF EXCEPTION 12

A. The Constitutional Referendum: A Presidential Choice 13

B. A Constituent Process under the Grip of the President of the Republic 17

II. THE CENTRALIZATION OF POWER: FROM A SPECIFICITY OF THE STATE OF EXCEPTION TO A PERMANENT CHOICE UNDER THE NEW CONSTITUTION 19

A. The Horizontal Centralization of Power 20

B. The Vertical Centralization of Power 22

C. The Weak Structures of Political Life 24

CONCLUSION 26

BIBLIOGRAPHY 27

Introduction

Tunisia is experiencing a renewed period of transition.[1] As it breaks with the system established by the January 27, 2014 Constitution, it lays the foundations for a third republic,[2] gradually taking shape following the ratification of a new constitution adopted as a result of the July 25, 2022 referendum.[3] It is important to understand the general context in which this new 2022 Constitution was drafted, following the declaration of the "state of exception" by the President of the Republic on July 25, 2021, pursuant to a broad interpretation of Article 80 of the 2014 Constitution.[4] In the 2014 Constitution, the state of exception is a specific legal regime that can be invoked in extraordinary circumstances, "in the event of imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state."[5] Under the state of exception, powers are concentrated in the hands of the President of the Republic, who can take measures to address the danger and restore the situation to normalcy. In other words, the ordinary distribution of powers set out in the constitution is subject to an exception. The balance of power tilts in favor of the President of the Republic, placing the President at the epicenter of the decision-making process and enabling them to exercise the absolute powers conferred upon them, at their own discretion. As such, it deviates from the ordinary constitutional system organized according to the principle of separation of powers, mutual control, and guarantees related to rights and freedoms.

---

1 There are many definitions that have attempted to encompass the concept of democratic transition, which can be defined as the phase between one political system and another, during which the new system is consolidated, and which ends with the completion of its establishment. This means that the transitional period is a period of time that is defined at each end by the existence of a supposed stable political system, and a process during which the new rules of the political game are produced and accepted before they can establish a new political system. For more see: Nicolas Guilhot and Philippe C. Schmitter, "De la transition à la consolidation. Une lecture rétrospective des *democratization studies*," *Revue française de Science politique* 50, no. 4-5 (2000).

2 The first republic was established according to the proclamation of the Republic on July 25, 1957, and the Constitution of June 1, 1959, and it continued until the constitution was abolished by virtue of Constituent Law No. 6 of December 16, 2011, on the temporary organization of public authorities. In turn, the second republic began with the Constitution of January 27, 2014, and ended with its replacement in 2022.

3 Presidential Decree No. 691 of August 17, 2022, on the sealing and promulgation of the Constitution of the Republic of Tunisia, available in French at https://legislation-securite.tn/law/105339.

4 Article 80: "In the event of imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state, the President of the Republic may take any measures necessitated by the exceptional circumstances, after consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People and informing the President of the Constitutional Court. The President shall announce the measures in a statement to the people. The measures shall guarantee, as soon as possible, a return to the normal functioning of state institutions and services. The Assembly of the Representatives of the People shall be deemed to be in a state of continuous session throughout such a period. In this situation, the President of the Republic cannot dissolve the Assembly of the Representatives of the People and a motion of censure against the government cannot be presented. Thirty days after the entry into force of these measures, and at any time thereafter, the Speaker of the Assembly of the Representatives of the People or thirty of the members thereof shall be entitled to apply to the Constitutional Court with a view to verifying whether or not the circumstances remain exceptional. The Court shall rule upon and publicly issue its decision within a period not exceeding fifteen days. These measures cease to be in force as soon as the circumstances justifying their implementation no longer apply. The President of the Republic shall address a message to the people to this effect."

5 Constitution of Tunisia (2014), Article 80.

However, the choice between an ordinary system and a state of exception should not necessarily lead to a collision between effective crisis-management and the rule of law, nor should it lead to a conflict between the duty to maintain security on the one hand and the obligation to protect fundamental rights and freedoms on the other. Due to the seriousness of declaring a state of exception and its legal consequences related to the resulting imbalance of power and the restriction or suspension of fundamental rights and freedoms, democratic constitutions provide several conditions to mitigate the potential for abuse.

In Tunisia, the President's declaration of the state of exception constituted a breach in both form and substance.[6] Furthermore, in contradiction with express safeguards stipulated in the text of the constitution, the President dismissed the government[7] and unilaterally appointed a new one in its place.[8] After having dismissed the government, he suspended the work of the Assembly of the Representatives of the People[9] and then dissolved it completely on March 30, 2022, announcing that early legislative elections would be held on December 17, 2022, based on a new electoral law to be issued by presidential decree.

Presidential Decree No. 117 of September 22, 2021, on exceptional measures, was an important step in breaking with the 2014 Constitution. It expressly stated that the constitution was suspended, except for the Preamble, Chapter I on General Principles, and Chapter II on Rights and Freedoms. It also provided a blanket clause to the effect that other constitutional articles consistent with Decree No. 117 would remain unaffected, leaving it unclear which ones were being referred to. The decree not only violated the supremacy of the constitution and the hierarchy of legal norms, but it also enacted a temporary organization of powers under the state of exception, where the President of the Republic aggregated all powers to himself without any mechanisms for accountability or scrutiny.

Importantly, while the choice to centralize power was initially justified by the temporary measures allowed under the state of exception, its permanent adoption in the new constitution following the constitutional referendum on July 25, 2022, shows that this was the original intent behind the temporary measures. This usurpation and centralization of power and the absence of scrutiny and accountability is the nucleus of Tunisia's democratic transition being put to the test.

According to official narratives, these moves were necessary to save the Tunisian state and its political system from a multi-level crisis affecting most sectors. Not only were these claimed to be entirely lawful — using the cover of the state of exception for legitimacy — this was an incarnation of the popular will expressed in the protest movements

---

6 Wahid Ferchichi, "The Declaration of July 25, 2021: Has the Constitution of January 27, 2014 Been Buried?," *Legal Agenda*, August 3, 2021.

7 Presidential Decree No. 69-2021 of July 26, 2021, ending the duties of the Prime Minister and the members of the Government, available in French at https://legislation-securite.tn/law/105034.

8 Presidential Decree No. 138-2021 of October 11, 2021, naming members of the government, available in Arabic at https://legislation-securite.tn/ar/law/105070.

9 Presidential Decree No. 80-2021 of July 29, 2021, suspending the competences of the Assembly of the Representatives of the People, available in Arabic at https://legislation-securite.tn/ar/law/105038.
Presidential Decree No. 109-2021 of August 24, 2021, on the extension of exceptional measures relating to the suspension of the competences of the Assembly of the Representatives of the People, available in Arabic at https://legislation-securite.tn/ar/law/105043.

against the government, parliament, and Ennahda Party, which preceded the state of exception. Comprehensive reform required dismantling the "2014 Constitution" and drafting a new constitution establishing an alternative political system able to respond to the people's demands and to rule the country efficiently.

According to this narrative, the 2014 Constitution was responsible for creating a tense, dysfunctional, and deadlocked political system tailored to benefit the Ennahda movement, which held a majority in the National Constituent Assembly. The constitution was considered an ineffective outcome of a hybrid political consensus formed during the transitional period (2011-2014). As such, partial amendments to the constitution were deemed insufficient given the extensive reforms required for large section of its chapters and articles. Drafting a new constitution was thus necessary to adapt to changes in the political environment. Notably, criticism of the constitution and calls for amending it did not emerge at the July 25, 2021, juncture, but rather preceded it. Many believed that the 2014 Constitution was responsible for the political crisis that followed the 2014 parliamentary elections, the inefficacy of the parliamentary majority, and governmental instability.

Opponents of the President had conflicting positions. Some radically opposed the entire course of political maneuvers, from the declaration of the state of exception to the referendum, on grounds that the steps taken lacked democratic legitimacy and threatened to uproot the democratic gains achieved during the last decade. Others initially supported the declaration of the state of exception, but then opposed the subsequent steps, its extension without consultation with the relevant bodies (including parties, associations, and trade unions), the roadmap to end the state of exception, and the preparation of new legal texts that fundamentally and unilaterally changed the constitutional structure. For the President's opponents, this reflected a clear will to return to the pre-2011 era, recreating authoritarian hyper-presidentialism. Some also expressed their fears about the end goals of the President's political project and the danger of turning the country into a testing ground for establishing a 'grassroots democracy'. This was largely a result of the ambiguity surrounding the President's project and its similarities with the grassroots-government adopted in Libya under the rule of the late President Muammar al-Gaddafi.

The political and legal consequences of the positions held at the July 25, 2021, juncture cannot be analyzed in isolation from the factors that led to that critical point. While the constitutional and legislative reforms adopted between 2011 and 2021 enabled some elements of a democratic system to take root, including the peaceful transfer of power through free elections and room for expanded political expression, many of these reforms were only reflected in the text of the constitution and remained unfulfilled in actuality. It is therefore paradoxical that the constitution was held responsible for the political crisis, while its implementation and enforcement through constitutional institutions were neglected and incomplete. Indeed, several crucial institutions for strengthening the balance of power and respect for human rights were not established, including the Constitutional Court and several independent constitutional bodies, such as the Elections Commission[10] or the Good Governance and Anti-Corruption Commission.[11]

[10] Constitution of Tunisia (2014), Article 126.
[11] Constitution of Tunisia (2014), Article 130.

Moreover, these reforms did not lead to stability nor efficiency. Concurrent political crises and severe economic deterioration shook people's trust in the political class and, in turn, the democratic project as a whole. In fact, the demands that drove the popular uprising between December 17, 2010, and January 14, 2011, largely concerned the management and fair distribution of resources and the fight against corruption. The economic and social crisis in Tunisia revealed the extent of the state's inability to provide basic services such as healthcare — especially during the Covid-19 pandemic. Moreover, the crisis also exposed the state's inability to achieve development and a fair distribution of wealth, with diminishing opportunities for broad sectors of the population, rampant financial and administrative corruption, weak rule of law, and widespread increase in impunity.

All these factors shook public trust in political institutions and elites, contributing greatly to the July 25, 2021, impasse, and conferring a degree of legitimacy to the state of exception declared by the President.

In this context, the relationship between democracy on the one hand and development on the other requires some discussion. Some contemporary economists, notably Amartya Sen,[12] have asserted that democracy does not hinder development given that it leads to a rational management of public resources, which constitutes the most important driver. By establishing a legitimate government and encouraging the people to participate in decisions related to their own destiny, democracy increases the effectiveness of development policies and strategies.

But this suggestion remains debatable. Some countries labeled as undemocratic have been able to achieve high indicators of development, while not all democratic countries are economically developed. At the same time, statistical and scientific studies have shown that the more economically advanced a country is, the higher the chances for democracy to survive and continue; it is development that leads to democracy, not the other way around.[13] Countries experiencing democratic transition, including Tunisia, face additional challenges in this regard: political instability, weak public law enforcement agencies, and the fear of new, radical economic reforms led by the nascent authority, all aggravate the economic situation.

Democracy takes many forms that reflect the diversity of historical and cultural experiences, and it is impossible to apply a one-size-fits-all model to every country in the world.[14] But whatever form democracy takes, it must always be based on the will of the people. Originally a term of Greek origin, democracy means the rule of the people, and the word has multiple definitions generally related to a political system based on the people's participation in affairs of governance. This naturally begs the question as to how a political system can best respect and represent the will of the people.

---

12 Amartya Sen, "Development as Freedom: An India Perspective," *Indian Journal of Industrial Relations* 42, no. 2 (2006): 157-169.

13 Massimo Tommasoli (ed.), *Democracy and Development: The Role of the UN*, Discussion Paper (United Nations — International IDEA, 2013).

14 Mansour Abu Hamoud El-Chibani, *Democracy in International Law between Legitimacy and Power* (Beirut: The Centre for Arab Unity Studies, 2017), 64-71.

In this context, there are two types of democracy that do not always cohere: formal democracy and substantive democracy. A country is formally democratic when it allows citizens to choose their government through free and fair elections based on universal suffrage. In this context, democracy is measured by the occurrence of elections, regardless of the ballot results. According to this formalized notion, elected governments can be ineffective, corrupt, irresponsible, and incapable of making the necessary political decisions in the public interest, but as long as they are formally elected, though they may be unpopular, they are considered democratic.[15]

The democratic experience in many countries has proven that formal democracy cannot bring general prosperity unless it is combined with substantive democracy. Substantive democracy guarantees the establishment of the rule of law, the separation of powers, the independence of the judiciary, and respect for the rights and freedoms of individuals, including respect for pluralism and diversity, thus ensuring the rights of minorities.[16] It is therefore objectives-based, determined by the outcomes of the process, rather than focused on formal and procedural aspects.

This article provides some observations about the constitutional referendum and analyzes the extent to which it complied with the requirements of democracy, both formal and substantive. It also assesses whether drafting a new constitution is a step to correcting the path towards democratic transition, or a setback for the democratic process in Tunisia.

Generally, the new Constitution of 2022 is replete with weak legal and political guarantees for democracy. Legal guarantees protect rights and freedoms and respect the principle of the separation of powers, that is, distributing state functions among different structures to limit abuse and ensure independence and moderation. Political guarantees relate to intellectual and political pluralism, fair and peaceful competition, the alternation of power, the need to respect freedoms, and guaranteeing the rights of minorities.

This article will focus on assessing these elements in the process of drafting the new constitution (I), as well as in its substantive content (II).

I. The Constitutional Referendum: between the Hammer of Legality and the Anvil of Exception

The "referendum" is a mechanism for direct democracy whereby citizens express their voice through rejection or acceptance of a draft legal text (such as a new or amended law or constitution) or of a specific question of importance. A referendum can be optional or compulsory and can take place at the national or sub-national (regional or local) level.

15 Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma: University of Oklahoma Press, 1991), 9-10.

16 Jean Rivero, "Etat de droit, Etat du droit," *L'État de droit: mélanges en l'honneur de Guy Braibant*, ed. Jacques Chevallier (Paris: Dalloz, 1996).

Referendums also differ according to their consequences, such as a mandatory referendum whose results are legally binding on public authorities, or an advisory referendum whose results are purely indicative or advisory.

Despite the President of the Republic opting for a referendum on the new constitution — overtly indicating that democratic legitimacy is important — the democratic nature of the process is questionable for many reasons. The most important of these is the fact that the referendum was held during the state of exception, characterized by the centralization of powers in the President's hands and the total absence of a balance of powers and institutional accountability and oversight mechanisms. This cast serious doubts since the President of the Republic controlled the entire constitution-making process, from the decision to hold a referendum until the constitution was drafted and ratified, rendering the process akin to a *plebiscite* (political referendum), which has negative connotations [in the French legal tradition] in terms of the personalization of power, as discussed below. At no point did any other institution participate in the process.

A. The Constitutional Referendum: A Presidential Choice

The constitution holds a pivotal place in the legal system, as the legal basis for the existence of state institutions and laws, and the guarantor of the rights and freedoms of individuals. During transitional periods when countries emerge from authoritarian rule, the process of drafting a new constitution carries special symbolism and is expected to address many philosophical, historical, and practical concerns. In order to ensure the success of constitution-making in a transitional context that breaks with the monopoly of opinion and power, it is important that the constitution emanate from broad negotiations and participation. This can help establish a new tradition in engaging with different social and political actors and turn the constitution into a tool that unites citizens around the basic governing principles of coexistence.

During the first transitional phase preceding the elections to the National Constituent Assembly in 2011, Tunisia adopted participatory formulas to deliberate on the most important texts regulating the democratic transition. This occurred within the framework and supervision of the Higher Authority for the Realization of the Objectives of the Revolution, Political Reform and Democratic Transition,[17] a body entrusted with preparing and examining decrees on political organization and proposing reforms for implementing the democratic transition.

During the first constituent process (2011-2014), the National Constituent Assembly attempted[18] to reconcile its decision-making power on the one hand, and the participation of civil society, national figures, and

[17] See Decree No. 2011-6 of February 18, 2011, establishing the Higher Authority for the Realization of the Objectives of the Revolution, Political Reform and Democratic Transition. The authority consists of a committee of experts and a council composed of 155 members representing the political parties of the "historic" opposition, civil society actors, independent national figures, representatives of the authorities and families of the martyrs.

[18] The 217 members of the National Constituent Assembly were elected on October 23, 2011. The constituent process was completed with the publication of the text of the constitution ratified on January 26, 2014, in the Official Gazette of the Republic of Tunisia on February 10, 2014. During its existence, the National Constituent Assembly worked to carry out its primary mission represented in drafting the constitution of the Second Republic, in addition to assuming legislative and oversight powers over government action, which was required by the transitional period and the legal and institutional vacuum that resulted from the dissolution of the previous political institutions and the suspension and ensuing abolition of the Constitution of June 1, 1959. The National Constituent Assembly was unable to respect the deadline in completing the process of drafting the constitution in one year, and the process lasted twice as long as expected.

experts on the other.[19] However, this path was strewn with conflicts and crises as debates intensified between conflicting visions, especially in relation to the role of Islam in the political and legal systems; the system of government — parliamentary or presidential; and the constitutional guarantees of rights and freedoms.

A first tendency that emerged, led by the majority Islamist Ennahda movement and its allies, attempted to monopolize political choices and opinions through a logic of majoritarian dominance. The opposition blocs within the Assembly challenged this by demanding that the latter adopt a participatory approach to bestow greater legitimacy on the constitution, so that it would not be restricted to one or a handful of parties, but rather belong to all Tunisian men and women and truly reflect the diverse currents and sensitivities within Tunisian society.

The political assassination of the leftist leader, Chokri Belaid, in February 2013, and of the member of the National Constituent Assembly, Mohamed Brahmi, on July 25, 2013, greatly affected the atmosphere in the Assembly, causing it to suspend its work. It resumed only after the mediation of the quartet sponsoring the national dialogue — the Tunisian General Labor Union, the Federation of Industry; Trade and Traditional Industries, the National Association of Lawyers, and the Tunisian League for the Defense of Human Rights. In the fall of 2013, various political parties participated in the national dialogue and played an important role in resolving the political crisis. Controversial points in the draft constitution were also settled, largely due to the work of the Consensus Committee. The Assembly subsequently ratified the constitution in January 2014 by a near-unanimous vote (200 out of 217 votes).

The political context required the adoption of a consensual approach. While consensus was necessary to overcome the controversial issues and crises surrounding the constituent process, the implementation of the constitution soon unmasked the limits of this approach, as the contradictions and shortcomings inherent in the text, complicated by the necessity of finding consensus, quickly surfaced. These complications had wide-ranging and long-lasting effects, creating deadlocks in parliament.

As such, the President's decision in 2021 to opt for a referendum to adopt a new constitution is overwhelmingly considered an attempt to break with previous constituent experiences based on widespread consensus and consultation, by going directly to the sovereign people.

Constitutional referendums are one of several democratic means of constitution-making. In theory, they are no less democratic than the drafting and adoption of a draft constitution by an elected constituent assembly, as they enable citizens to participate directly in political life without delegation. Referendums also help resolve deadlocks in representative democracy, as well as other controversial issues, by giving the final word to the people.

---

[19] The constituent committees held several hearing sessions to enable the various actors, including local and international law experts and representatives of political parties, associations and trade unions, to express their opinions and present their proposals. The Constituent Assembly also organized an open dialogue with civil society at its headquarters on September 14 and 15, 2012, to present observations and proposals on the draft of August 8, 2012. The December 14, 2012 draft took into account suggestions made during the open dialogue. Open dialogues on the constitution were also organized in the regions and abroad between December 2012 and March 2013. All these operations were carried out with the support of the United Nations.

Notably, several democratic countries have used this method to adopt their constitutions, including France, where an unelected team of experts developed the draft constitution of the Fifth Republic of 1958, which was approved by referendum, lending both the process and its outcome the required legitimacy.

However, referendums are not devoid of shortcomings. The main argument against them is the risk of weakening representative democracy by undermining the role and importance of elected bodies. Similarly, voters do not always have the ability or information to make informed decisions. The process can therefore lead to hasty and emotional decisions based on partial or basic knowledge of the subject, or unrelated factors such as the status of the authority that launched the referendum. This tendency worsens when the referendum addresses complex issues such as the adoption of a new constitution or constitutional amendments. Moreover, the executive authority can use the referendum to serve its own narrow political interests rather than the interests of democracy. Finally, the simplicity of a binary "yes" or "no" vote does not always reflect the true will of the voters, as it obviates nuances.

In Tunisia, the referendum occupies marginal significance in constitutional history, as the Constitution of January 27, 2014 did not substantively differ from the Constitution of June 1, 1959, since it prioritized the mechanisms of representative democracy over direct democracy, while making it possible to resort to the referendum to amend the constitution or to ratify some important laws in limited cases, subject to several procedural restrictions.[20] In practice, Tunisia held a single referendum in 2002 upon the initiative of the President to amend 39 articles of the 1959 Constitution, introducing fundamental yet contradictory amendments. On one hand, the amendments sought to reinforce the presidential grip on power (easing the restrictions on renewing the presidential term and reinforcing presidential immunity). On the other, they sought to strengthen the rule of law (guaranteeing rights and freedoms "in their universality, comprehensiveness, complementarity and interdependence"[21]). This process left a negative impression of the utility of the referendum and consequently of the manipulation of the popular will to consolidate presidential power.

The constitutional referendum held on July 25, 2022, fueled a strong debate about its democratic character, particularly in the context of deep division between supporters and opponents. The division was due to the fact that both the preparation and ratification of the draft constitution took place under the state of exception, where the President had wide discretion by decree, where consultations were limited to a short period, and where the role of a narrow group of experts was purely advisory.

---

20 The referendum was included for the first time in the Constitution of June 1, 1959, following the constitutional amendment of 1976, in both Article 2 related to treaties concluded within the framework of the Maghreb unity, and Article 47 related to laws of national importance or important issues related to the supreme interest of the country, provided that these provisions do not contradict the constitution. Following the constitutional revision of 1997, the scope was broadened to include a third type of referendum, which is the constitutional referendum (Article 76). The 2014 Constitution, in turn, included the legislative referendum in Articles 50 and 82, and the constitutional referendum in Article 144, which is related to the amendment of the constitution and requires that the draft amendment be approved by two-thirds of the members of the Assembly of the Representatives of the People before submitting it to the people.

21 Constitution of Tunisia (1959), Article 5.

The referendum was based on Article 5 of Presidential Decree No. 117 of September 22, 2021, on exceptional measures, which defines the parameters for future presidential decrees, including the "election law" and "the organization of constitutional bodies," as well as Article 22, which entrusts the President of the Republic with "preparing draft amendments related to political reforms" aimed at "establishing a true democratic system in which the people are truly sovereign and the source of powers ... and the President of the Republic submits them to a referendum for approval." This loose wording raised many questions about the scope and implementation of these amendments. It was not clear from the text whether they were related to drafting a new constitution or limited to amending the 2014 Constitution.

On December 13, 2021, the President announced a roadmap, which envisioned legislative elections on December 17, 2022, and the submission of a draft amendment to the constitution (based on a national consultation and the proposals of a committee) to a referendum on July 25, 2022. Presidential Decree No. 506, of May 25, 2022 (on calling voters to a referendum) clarified that the objective of the referendum was to draft a new constitution. On April 21, 2022, the President issued a decree regarding the Independent High Authority for Elections (ISIE).[22] The decree introduced radical changes to the legal system governing ISIE, which diminished its independence vis-à-vis the President. The matter relates, in particular, to Article 5 of the decree, which regulates the new composition of the ISIE Council, consisting of seven members appointed by presidential order.[23] It thus shifts the authority to elect the members of ISIE,[24] including its head, from the Assembly of the Representatives to the President of the Republic. Moreover, according to Article 15 as amended by the decree, the President may dismiss members of the Council upon a proposal from the head of ISIE or at least five members based on a justified opinion and after respecting the rights to defense of the relevant member, which gives the President of the Republic a new power previously held by the Assembly of the Representatives of the People.[25]

The law governing the immunity of the head of ISIE and its members in conducting their tasks was also amended. The responsibility for lifting immunity used to be with the Assembly of the Representatives of the People but now belongs to the ISIE Council. In addition, all references to the Assembly in the law were replaced with a reference to the President of the Republic. Annual reports on the activities and workplan of ISIE are no longer submitted to the Assembly,

22 Decree Law No. 2022-22 of April 21, 2022, available in French at https://legislation-securite.tn/law/105252.

23 They are chosen as follows:
- Three members chosen by the President of the Republic from among the members of the previous independent high authorities for the elections.
- A judicial judge with at least ten years of service among the three judges proposed by the Judiciary Judicial Council.
- An administrative judge with at least ten years of service among the three judges proposed by the Administrative Judicial Council.
- A financial judge with at least ten years of service among the three judges proposed by the Financial Judicial Council.
- An engineer specialized in the field of information systems and safety, with at least ten years of service, among three specialized engineers proposed by the National Media Center.

24 Organic Law 2012-23 on the Independent High Authority for Elections, Article 6.

25 According to Article 15 of Organic Law 2012-23, the request for exemption is submitted by at least half of the members of the Council. It must be presented to the plenary of the Assembly of the Representatives of the People for approval by the absolute majority of its members.

but to the President (new Article 18.3). The President approves the annual budget (new Article 20) and the annual financial account of ISIE (new Article 30). The powers of the head of ISIE were also expanded, as they now select the deputy head without seeking the Council's opinion. They also control the executive management of ISIE, as they appoint its Executive Director, who plays a decisive role in organizing the elections. This digression was not a circumstantial choice dictated by the state of exception, but rather a permanent one; the transitional provisions section of the decree did not define those provisions as temporary.

B. A Constituent Process under the Grip of the President of the Republic

The constituent process in Tunisia and the inflated powers of the President under the state of exception raise serious procedural and substantive questions about the democratic nature of the July 25, 2022, referendum. A referendum's effectiveness as an expression of popular will depends on several conditions. If these conditions are not adhered to, the popular will is open to manipulation by political actors. The referendum thus becomes a personality contest and an exercise in personality politics, as opposed to being about ideas and principles. Accordingly, the text at the core of the referendum is neglected since no substantive democratic discussion ensues.

Article 22 of Presidential Decree No. 117 of September 22, 2021, on exceptional measures, stipulates that the President of the Republic shall form a committee to assist him in drafting legal and constitutional amendments to pursue any political reforms, which shall be submitted to a referendum for approval. The President assigned Brigadier General Sadiq Belaid as the head of the advisory committee tasked with preparing the draft constitution, aided by the results of the national electronic consultation held between January 15 and March 20, 2022. The draft text was intended to focus on the future political, electoral, social, economic, and cultural sections of the constitution.[26] This was considered the preparatory stage, which set the basic principles and political context that would guide the constitution-making process.

However, adopting this consultation as a basis for preparing the draft constitution raised several problems. Despite the innovative and creative nature of electronic consultation to solicit the direct participation of citizens in public affairs, the process suffered from low participation rates. According to official statistics, 534,915 citizens participated in the consultation.[27] More importantly, the majority of the participants in the consultation clearly opted to amend the 2014 Constitution rather than replace it with a new constitution. This in itself undermines the credibility of the consultation as a framework of reference for the new constitution.

In addition to these serious factors, the work of the committee also lacked transparency and inclusiveness to such an extent that a key component of the committee — the deans of the faculties of law and business — boycotted it entirely. Moreover, the President had a hierarchical relationship with the committee and the exclusive power to make final decisions. In contrast, the committee only had an advisory role, leaving it to the final discretion of the President to amend the draft constitution presented to him by Brigadier General Sadiq Belaid.

[26] See the link to the online results of the national consultation at www.e-istichara.tn/home.
[27] With a clear gender imbalance at the participants' level, with 366,210 men compared to 168,705 women.

Organic Law No. 16 of May 26, 2014, deals with the various procedural stages related to referendums. These include, in particular, voter registration, the call for a referendum, the referendum campaign, and polling. In accordance with this law, voters were informed and called within the minimum period of two months prior to the date of the referendum, which was itself set by Presidential Decree No. 506. However, contrary to Organic Law No. 16, the Presidential Decree did not include the draft text that would be submitted to the referendum as it should have done. The publication of the draft text was postponed to the end of June, when it was published in the Official Gazette pursuant to Decree No. 34 of June 1, 2022, amending Organic Law No. 16 of May 26, 2014, on elections and referendums.

The controversy over the draft constitution, which was finally published in the Official Gazette on June 30, revolved around its substantive and formal deficiencies and the fundamental differences with the draft that was finalized and proposed by the advisory committee. This clearly indicated the President's adoption of a top-down and non-participatory approach to drafting the constitution. The mistakes in the draft were corrected and a new amended text was published a week later.[28] While the amendment corrected some formal and linguistic errors, it was evident that the amendments also responded to criticisms about its content. However, the changes to the draft constitution, the lack of time allotted to absorb the stakes of the new text, and the strong political polarization that prevailed during that stage, all had a profound impact on the referendum campaign.

The amendment of Organic Law No. 16 was considered necessary because some of its articles posed problems in light of the political developments since 2021. Primary amongst these were the dissolution of the Assembly of the Representatives of the People and the removal of any role whatsoever for parliamentary political parties, especially those at the forefront of political activity before July 25, 2021. According to the Electoral Law of 2014, participation in the referendum campaign was limited to parliamentary parties. Decree No. 34 of 2022 removed this condition, as a result of which new Article 116 of the electoral law merely requires that a declaration of intent be lodged with ISIE by the requesting party in accordance with the ISIE's procedures to participate in the referendum campaign. Considering the wording of Article 116, the ISIE Council approved an expanded list of actors for participation in the referendum campaign to include political parties and civil society actors. Participation was also opened to the opposing political and civil currents, in order to ensure equal and real competition. However, the statistical data of ISIE shows a clear imbalance among the respondents, as most of those registered supported the draft constitution, with many political parties and other eligible actors boycotting the entire process on grounds of a lack of procedural and substantive legitimacy.[29] They also criticized the extremely short notice between the publication of the draft constitution and

[28] Presidential Order No. 2022-607 of July 8, 2022, on the correction of errors that leaked into the draft constitution published pursuant to Presidential Decree No. 2022-578 of June 30, 2022, on the publication of the new draft constitution for the Republic of Tunisia, object of the referendum scheduled for Monday, July 25, 2022.

[29] According to the data provided by ISIE, the number of parties participating in the campaign that expressed opposition to the draft constitution was seven, distributed as follows: 6 parties and one association network. As for the parties whose files were accepted by ISIE, and who announced their support for the constitution presented during the campaign, they numbered 141, distributed among parties, associations, natural persons, and a coalition of parties and natural persons.

registration in the referendum campaign, alleging that this deprived the electorate of the opportunity to form deep and enlightened positions on the various constitutional issues.

According to the decision of ISIE No. 22 of August 16, 2022, on the announcement of the final results of the referendum on the new draft constitution,[30] the "yes" answer swiped the majority with 2,607,884 votes, equivalent to 94.6% of the votes cast, while the "no" answer obtained 148,723 votes, equivalent to 5.4% of votes cast, resulting in the approval of the new draft constitution. As for the participation rate, the final figures announced by ISIE amounted to 2,830,094, which represents 30.5% of the total number of registered persons, evidencing an extremely low rate of participation.[31]

The majority required to approve referendum results varies between countries. Some require a simple majority of voters (i.e., 51%). In other countries, the results of the referendum are binding only when there is a minimum level of participation in the vote. Some referendums require an absolute or qualified majority to approve the text, or a supermajority, based on a series of complex calculations taking into account the percentage of the registered voters out of the total eligible voters. In Tunisia, the electoral law fails to specify a minimum level of participation in the referendum or an enhanced majority for the results to be considered valid. This directly affects the legitimacy of fundamental reforms, especially in light of the low participation rate in the referendum and the lack of public debate during the constitution-making process. As a result, since these changes were not the outcome of the decision of the majority of the eligible population, they weaken the level of identification with, and national ownership of, those reforms.

The new constitution came into force after ISIE announced the final referendum results and the President authorized their publication in a special issue of the Official Gazette. Upon closer examination of the section on transitional provisions in the new constitution, one exception stands out: that relating to legislative authority, which remains subject to the provisions of Presidential Decree No. 117 on exceptional measures. This will continue to be the case until the Assembly of the Representatives of the People assumes its functions following the election of its members (Article 141 of the Constitution). Effectively, this ends the state of exception for all remaining constitutional matters, except for the exercise of the powers of the legislative authority.

II. The Centralization of Power: from a Specificity of the State of Exception to a Permanent Choice under the New Constitution

The Constitution of July 25, 2022, foresees an intention to restructure the political system and to centralize power in the hands of the President,[32] breaking with the hybrid system that was introduced by the 2014 Constitution.

30 Decision No. 2022-22 of 12 August 2022, available in French at: https://legislation-securite.tn/law/105337.

31 Wahid Ferchichi, "The Referendum Results: The Numbers are Irrelevant, because I am the People and the People are I... 'A historic event in the absence of more than two-thirds of male and female voters'," *Legal Agenda*, July 27, 2022.

32 See the results of the electronic national consultation, where 86.4% of the participants chose the presidential system: https://www.e-istichara.tn/home.

It should be recalled that the choice expressed in the 2014 Constitution to adopt a more decentralized system intended primarily to diverge from the pre-2011 hyper-presidential system.

The 2014 Constitution had established a political system based on the separation of powers by distributing competencies horizontally among the legislative, executive, and judicial authorities, and vertically between the central and local authorities within the framework of advanced decentralization.

In contrast, the new constitution is weak in terms of the legal and political guarantees for democratic processes, especially those related to respecting the principle of separation of powers in order to limit the monopoly and abuse of power, by ensuring that it is exercised with adequate checks and balances. The institutional design in the new constitution opts for a political system based on a hyper-presidential model, recalling pre-2011 constitutional experiences, and reproducing the experience of governing under the state of exception based on Presidential Decree No. 117 as a permanent model of governance. This tendency towards an imbalance in the distribution of power, both horizontally between the executive and legislature and vertically between central and local authorities, and its centralization in the executive is evident in the weak guarantees for institutional independence. All of this severely disables the development of a robust political system and represents a real challenge to the establishment of a democratic system in Tunisia.

A. The Horizontal Centralization of Power

The establishment of a presidential system emerges as a clear choice in the new constitution. It is a type of democratic system based on a strict separation of powers between the executive and legislative branches. The executive and legislative powers are elected separately by universal suffrage; hence, their origin and survival remain separate.

The presidential system is also characterized by the individualized nature of executive authority, entirely vested in the head of state. The president appoints and dismisses ministers. The president is neither politically accountable to the legislature, nor dependent on the support of their party to stay in office. Article 110 grants the President judicial immunity throughout their tenure, and a functional immunity for the actions they carry out when performing their duties. Moreover, the provisions related to the state of exception contained in Article 96, compared to Article 80 of the 2014 Constitution, strengthen the powers of the President, while concurrently removing essential guarantees aimed at preventing exceptional measures from detachment from their original objectives. Thus, the July 25, 2022 Constitution is bound to result in a hyper-presidential system characterized by an imbalance of powers in favor of the head of state who monopolizes executive authority.

Notably, the President must consult with the Head of Government, the Speaker of the Assembly, and the President of the National Assembly of Regions and Districts before declaring exceptional measures, and there are prohibitions against dissolving the Assembly of the Representatives of the People and the National Assembly of Regions and Districts, or submitting a motion of censure against the government during the state of exception.

Notwithstanding these safeguards, the Constitutional Court has been excluded from any independent oversight regarding the duration of exceptional measures. This disproportionately strengthens the President's authority and exercise of power, removing any possibility of challenging the President's decisions.

Additionally, while the government (cabinet of ministers) appointed by the President undertakes to implement their general policy, it finds itself accountable to two different authorities: first, to the President of the Republic in accordance with Article 112 of the 2022 Constitution and, second, to the Assembly of the Representatives of the People and the National Assembly of Regions and Districts, which may submit a motion of censure if they consider the government to be in violation of the general policy of the state and the fundamental objectives expressed in Article 115 of the Constitution. This paradox embodies a utilitarian perception of the government's function, characteristic of hyper-presidential systems, where the government both assists the head of state and is also responsible for bearing ultimate political responsibility in lieu of the president.

This approach breaks with the 2014 Constitution, which established a semi-parliamentary system in which the government, emanating from parliament, assumes the most important executive functions, and where the prime minister is the locus of executive authority. The choice of political system was a contentious issue during the drafting of the 2014 Constitution. To resolve the issue, the National Constituent Assembly adopted the basic democratic model, favoring a semi-parliamentary system based on the principle of separation of, and cooperation between, powers. This features a legislative authority concentrated in one chamber that holds broad legislative and oversight powers and a dual-headed executive authority, featuring a cabinet and a president with reduced powers, accountable to the Assembly of the Representatives of the People, with a clear reduction of the powers of the President of the Republic, in an attempt to a break with the prior hyper-presidential system. However, some aspects remained ambiguous and procedurally complex, especially those related to the powers exercised jointly by the two heads of the executive authority and which require coordination between them. This fueled frequent political deadlocks, which negatively affected political stability and the implementation of governmental policies. This institutional design was frequently blamed for the failure of the political system, especially due to poor coordination and jurisdictional conflicts between the two executive heads on the one hand, and parliament's dominance over political questions on the other hand. This was further exacerbated due to the absence of the Constitutional Court, to which the constitution assigned an arbitration role in the event of a jurisdictional conflict between the two heads of the executive. The court was never established due to maneuvering of the majority political parties in parliament regarding the quotas for appointing the members of the Constitutional Court.

Moreover, the new constitution was keen on reducing the power of the legislative authority by creating a second parliamentary chamber: the National Assembly of Regions and Districts, which shares the legislative, oversight, and representative functions with the Assembly of the Representatives of the People. In terms of electoral legitimacy, the constitution tips the scales in favor of the President, since the President is directly elected as opposed to the indirect election of the second chamber representing the regions and districts, which consists of elected deputies from the regions and districts.

The members of each regional assembly elect three members from among themselves to represent their region in the National Assembly of Regions and Districts, whereas the elected members of the district councils elect one member from among themselves to represent the district in the National Assembly of Regions and Districts.

As for the electoral legitimacy of the Assembly of the Representatives of the People, the first draft of the constitution published in the Official Gazette on June 30, 2022, did not address the principle of direct voting. This omission was interpreted as a move towards approving the indirect election of the first chamber. This controversy was put to an end in the second version of the draft constitution published in the Official Gazette a week later, which clearly provided for "*the election of the members of the Assembly of the Representatives of the People in a general, free, direct, and secret ballot for a period of five years*." The constitution sought to expand semi-direct democracy at the expense of representative democracy by introducing a mechanism for the removal of office of representatives (Article 61) and expanding the scope of the legislative referendum, whilst rendering the procedure more flexible (Article 97). Although this trend enhances citizen involvement in political affairs, it is likely that these mechanisms will be abused to tighten the pressure and oversight on the legislative authority.

The new constitution also limited the role of the Constitutional Court, confining its competence to the review of laws, treaties, and constitutional amendments.[33] Under the 2014 Constitution, the court had the duty to ensure the proper functioning of public authorities, in addition to overseeing the constitutionality of legislation. Consequently, the court could regulate and pronounce on exceptional measures,[34] acknowledge the temporary or permanent vacancy of the office of the President,[35] promulgate a motion to remove the President from office,[36] and settle disputes related to the respective powers of the President of the Republic and the Prime Minister, at the request of either.[37]

B. The Vertical Centralization of Power

The new constitution contains a single article on local authorities. Article 133 limits itself to succinctly addressing local and regional authorities — the municipal councils, the regional councils, the district councils, and the structures that are granted by law the status of local authority — and their role in pursuing local and regional interests.

While the new constitution follows the same tripartite division of local authorities introduced by the 2014 Constitution, namely municipalities, regions, and districts, there is doubt as to its commitment to the independence of local authorities. Another uncertainty is the electoral regime that will be adopted to form these authorities, keeping in mind that their impact extends to the national level. Indeed, these authorities will be represented in the National Assembly of Regions and Districts, which gives them a political role as one of the components comprising the legislative authority.

33 Constitution of Tunisia (2022), Article 127.
34 Constitution of Tunisia (2014), Article 80.
35 Constitution of Tunisia (2014), Articles 84, 85.
36 Constitution of Tunisia (2014), Article 88.
37 Constitution of Tunisia (2014), Article 101.

Furthermore, the new constitution leaves the details to be regulated by law, which brings us back to the Constitution of June 1, 1959, in which there was no reference to decentralization nor the independence of local authorities and the election of their assemblies. This is another radical break with the decentralizing posture of the 2014 Constitution. The Local Authorities Portal and the municipal elections in 2018 constituted two important steps in implementing Chapter VII of the Constitution of January 27, 2014, on Local Government, and embarking on large-scale structural reforms related to a new, decentralization vision for managing local affairs. The distribution of power between local authorities and the central authority underwent a radical change, placing the local interest at the heart of the competencies of local authorities, including facility management, service provision, local development, and urban planning. Indeed, the principle of administrative autonomy is one of the constitutional guarantees of the independence of local authorities.

The political discourse regarding decentralization is dominated by polarization between its supporters and critics, a controversy that was not adequately addressed during the preparatory phases of the 2014 and 2022 Constitutions. In the eyes of some, decentralization represents a threat to the fragile entity of the state, or just a utopian project doomed to fail from the start, or a weakness that will enable the Islamist Ennahda movement to infiltrate and control the state and society within the framework of "soft Islamization."

The defenders of decentralization consider that this option is a solution to the aforementioned problems and not a complication, provided the conditions for its success are met. This constitutes an essential element of democratic reform and local governance because it enhances the vertical distribution of powers between the center and the local levels. Moreover, it enables the broader participation of citizens in managing local affairs with effective accountability for elected councils, facilitating development and the improvement of local services and facilities.

The fact that the new constitution backtracked on giving greater autonomy to local authorities is a reaction to the difficulties and obstacles that marred this path. Establishing local authorities was not an easy process; it required a gradual and progressive approach due to the extent of the radical changes, the cost of these reforms, and the transfer of powers. Municipal councils were also called upon to immediately resolve problems that had accumulated over the past decade, including the deep lack of trust in governmental institutions at the national and local levels, the inadequate local services and infrastructure, deteriorating living conditions, limited financial and human resources of municipalities, and uneven development across regions, in addition to a blurry government vision with respect to decentralization given the absence of regulatory text. At the same time, problems persisted with the inadequate implementation of municipal decisions due to the lack of cooperation of security services.[38]

Additionally, the regional councils were not elected, which meant that the legal provisions preceding the 2014 Constitution remained applicable. The recurrent crises complicated the situation within several municipal councils,

[38] See, for example, the statement of the Municipal Council in La Marsa issued on January 21, 2019, regarding the assault of a security officer against the head of the Riyadh Marina Department and his temporary suspension, in order to prevent him from performing his duties in resisting the chaotic organization of the weekly market in La Marsa.

which led to their dissolution and the organization of partial elections, in addition to the issuance of conflicting decisions by some mayors that represented a challenge to the unity of the state's legal system.[39]

C. The Weak Structures of Political Life

The political crisis in Tunisia is inextricably linked to the weakness of the political party system that emerged since 2011, as most political parties are newly established and therefore characterized by fragility, including in their limited membership and financial resources, and their extremely weak presence in the regions. Political party funding has many shortcomings, including access to private funding, the absence of public funding, and a lack of effective control over party financing outside the electoral period.

The same problems affect parliamentary blocs too. This situation has led to a clear imbalance between the components of the party system, as there are serious suspicions about some influential parties' exploitation of these loopholes, to take advantage of illegal sources of financing and establish clientelism. As a result, broad segments of society feel that their interests are not taken seriously by the parties and that these are basically channels to achieve individual benefit.

Parties are further characterized by the weak influence of citizens/voters on party decisions due to the absence of internal democracy, as they do not hold internal elections to choose their candidates for the national and local elections. The channels of communication between the parties' supporters, their leaders, and their representatives in the Assembly of the Representatives of the People are not institutionalized, weakening their representative function. Parties were often unable to produce new political elites with competence and integrity. Additionally, increasingly volatile "political tourism" between parties translated into unstable parliamentary blocs. Following the legislative elections of 2014, the Assembly of the Representatives of the People was controlled by a large parliamentary majority — the Nidaa Tounes bloc — closely linked to the Executive. The majority could easily pass any bill submitted by the government. However, the conflicts within Nidaa Tounes and the ensuing split weakened political support for the ruling coalition. Each party contented itself with supporting its ministers and criticizing ministers from other parties.

During the current parliamentary mandate (2019-2024), the Assembly of the Representatives of the People faced sharp political divisions and unremitting confrontation between the Free Constitutional Party on the one hand, and the Ennahda movement and the Dignity Coalition on the other hand, resulting in verbal and physical violence in parliament. The conflicting parliamentary blocs prioritize their narrow political objectives and scoring against their opponents over the efficiency of parliament. In addition, the effectiveness of the Assembly of the Representatives of the People is limited due to the lack of human and material resources and the absence of representatives during plenary

[39] On the decision of the Mayor of Al-Karm to create a Zakat Fund, see https://www.babnet.net/cadredetail-203605.asp. On the municipality of Karm requiring a certificate of the husband's conversion to Islam in case of a marriage contract between a Muslim Tunisian and a non-Muslim foreign husband, despite the annulment of the circular including such requirement, see https://www.babnet.net/cadredetail-206731.asp.

sessions and permanent committee meetings. Statistical data indicates that the Assembly of the Representatives of the People approved 53 laws in 2015, 78 in 2016, 66 in 2017, and 49 in 2018. During the 2019-2020 parliamentary session, parliament approved 42 laws, most of which were related to loans and international financial agreements.

Taken together, the factors described above had a severe negative impact on public trust in the Assembly and deepened the crisis of confidence in political parties, as reflected the low rates of participation in partisan activities and the boycotting of elections. The 2018 municipal elections[40] and the 2019 legislative and presidential elections further reveal the importance of independent candidates, especially with Kais Saied elected as President without the backing of a political party to support him. These are all indications of the desire by citizens and civil society towards finding alternative channels for public debate and direct participation in political decision making. This trend has persisted since July 25, 2021, where the diminution of intermediate bodies, including parties, associations, and unions, is one of the most important points that President Kais Saied is betting on for his political project. His focus is on the deviation of parties and their threat to democracy, with an emphasis on the need to enable the people to express their demands directly. Whilst enhancing aspects of direct democracy, this is also considered a prime example of populist political discourse.

In this context, supporters of President Kais Saied formed "coordination committees" that played a key role during the 2019 presidential elections and during the 2022 referendum campaign. They are also expected to participate in the legislative elections scheduled for December 17, 2022. These entities differ from political parties in that they are not structured along political mandates. Rather, their support is for the President instead of his political project, which remains either unknown or too broad to clearly identify. However, these newly created entities raise a number of problems concerning their ability to provide a stable and permanent political base for the President on one hand, and the extent to which they respect the legal frameworks for political activity and funding on the other hand. The new electoral law, especially the approved voting system, is likely to further weaken political parties through mechanisms such as a system of voting for individuals rather than lists, the breakdown of existing electoral districts into small electoral districts, and the possibility of excluding some or all of the political parties from the electoral process. These choices will continue to marginalize existing political parties, which would further weaken the ability of political actors to participate in public debate, political competition, and the peaceful transfer of power. The disruption of these means of participation in political life foments the emergence of unstructured and unorganized political actors with the possibility of pre-national loyalties and affiliations resurfacing, based on tribal, regional, and religious affiliations.

40 For the municipal elections, 2173 lists ran, including 177 coalition lists, 897 independent lists, and 1099 party lists. The results of the elections on May 6, 2018, highlighted the depth of the crisis of the political parties, as the independent lists won the majority of seats.

Conclusion

While the entry into force of the Constitution of July 25, 2022, seemed like a first step away from the logic of exception and toward resuming democratic life, the haphazard replacement of the 2014 Constitution in reality sowed the seeds of hyper-presidentialism. It is clear that drafting a new constitution under the state of exception and amidst an exacerbated economic and social crisis was not a good option, restricting the public debate necessary for a democratic constituent process and the adoption of a new social and legal contract. It would have been possible to simply introduce amendments to the 2014 Constitution, especially with regard to the legislative and executive powers, to ensure greater efficiency, or to carry out a similar process under ordinary circumstances outside the state of exception. The political focus on constitutional reforms while the country experiences a stifling economic crisis is an attempt to relegate, until further notice, the public debate on the measures necessary to confront the crisis. The performance and credibility of political actors, whether in government or opposition, will play a decisive role in the battle to defend democracy in Tunisia. Upcoming political reforms must also be based on a participatory and pluralistic dynamics aimed at enhancing the effectiveness of the political system while preserving democratic gains. Any ruling political authority must derive its legitimacy not only from the electoral process, but also from its ability to confront economic and social challenges, thereby earning substantive legitimacy. Such legitimacy is considered one of the most durable legitimacies against the backdrop of a deepening economic crisis, and one that can give solid credibility and protection to the democratic choice.

BIBLIOGRAPHY

- El-Chibani, Mansour Abu Hamoud. *Democracy in International Law between Legitimacy and Power*. Beirut: The Centre for Arab Unity Studies, 2017.
- Ferchichi, Wahid. "The Declaration of July 25, 2021: Has the Constitution of January 27, 2014 Been Buried?." *Legal Agenda*, August 3, 2021.
- ———. "The Referendum Results: The Numbers are Irrelevant, because I am the People and the People are I... 'A historic event in the absence of more than two-thirds of male and female voters'." *Legal Agenda*, July 27, 2022.
- Guilhot, Nicolas and Philippe C. Schmitter. "De la transition à la consolidation. Une lecture rétrospective des *democratization studies*." *Revue française de Science politique* 50, no. 4-5 (2000): 615-632.
- Huntington, Samuel. *The Third Wave: Democratization in the Late Twentieth Century*. Oklahoma: University of Oklahoma Press, 1991.
- Rivero, Jean. "Etat de droit, Etat du droit." In *L'État de droit: mélanges en l'honneur de Guy Braibant* edited by Chevallier, Jacques. Paris: Dalloz, 1996.
- Sen, Amartya. "Development as Freedom: An India Perspective." *Indian Journal of Industrial Relations* 42, no. 2 (2006): 157-169.
- Tommasoli, Massimo, ed. *Democracy and Development: The Role of the UN*. Discussion Paper. United Nations — International IDEA, 2013.

Limited Presidential Power under the 2005 Iraqi Constitution: Appointing the Head of the Council of Ministers

Kazem Sleihib Obaid Al-Jubouri *

ABSTRACT

The President of the Republic is the head of the Iraqi state and the symbol of the nation's unity. The President's powers are specified in the constitution, as are the responsibilities of the Council of Ministers, which is held to account by the Parliament. The 2005 Iraqi Constitution assigns most of the executive powers to the Council of Ministers and its head, the Prime Minister. The President of the Republic is ostensibly rendered an honorary head of the executive branch, given that the real power belongs to the people, as represented by the electorate. The role of the executive authority is thus to administer the affairs of the state as directed by the people. One of the core principles of this democratic system is the recognition of the peaceful transfer of power, which requires respect for changing political programs and governing systems, not just a rotation of the people at the helm of the political system. Nonetheless, the current ruling regime remains marred by confusion and instability as a result of myriad external pressures and internal conflicts. This article reviews the legal mechanisms for choosing a Prime Minister and assesses the conformity of these mechanisms to constitutional principles, their effectiveness, and the legal limits of the President's powers in designating a candidate.

Keywords: *Constitution of the Republic of Iraq, executive powers, powers of the President of the Republic, selection of the Prime Minister, designation of the candidate, resignation, the legislative authority.*

* Kazem Sleihib Obaid Al-Jubouri holds a master's degree in public law, with an emphasis on constitutional law, from the College of Law at Al-Qadisiyah University, Iraq.

This article was finalized in September 2022.

CONTENTS

INTRODUCTION 30

I. THE PRESIDENT OF THE REPUBLIC'S POWER TO DESIGNATE A CANDIDATE TO HEAD THE COUNCIL OF MINISTERS 30

A. The Powers of the President of the Republic in the 2005 Iraqi Constitution 31

B. The President of the Republic's Power to Appoint a Candidate to Head the Council of Ministers 33

II. MECHANISMS FOR THE SELECTION OF THE PRIME MINISTER 36

A. Required Conditions for Nomination to the Position of Prime Minister 36

B. Circumstances Surrounding the Designation of the Prime Minister 37

III. JUDICIAL OVERSIGHT OF THE LEGALITY OF DESIGNATING A CANDIDATE FOR THE POST OF PRIME MINISTER 40

CONCLUSION 43

BIBLIOGRAPHY 45

Introduction

The President's power to nominate the country's Prime Minister — a position that commands strong executive powers and broad control over the state's domestic and external policies — is a delicate issue in constitutional law. Recent and ongoing political developments in Iraq raise questions concerning the extent to which the Iraqi legislator has adequately addressed the President's powers for nominating the head of the Council of Ministers. This article examines the powers of the President under the 2005 Iraqi Constitution, with a particular focus on these powers in relation to the appointment of the Prime Minister and the extent to which the appointment mechanisms enshrined in the constitution meet their intended objectives and conform to principles of constitutional law. It analyzes the President's constitutional right to designate a Prime Minister when Parliament fails — for whatever reason — to agree on naming a candidate within the timeframe specified in the constitution, contextualizing it within broader constitutional law debates around the President's powers in relation to Parliament and the balance of powers between the legislative and executive branches.

The article begins by analyzing the President's powers, both in general and in relation to the designation of the head of the Council of Ministers (I). It then moves to identify the mechanisms for selecting the Prime Minister, discusses the conditions that must be satisfied by the candidate and the circumstances surrounding the designation (II), as well as judicial oversight throughout this process (III). The analysis covers both relevant provisions of the Iraqi Constitution of 2005 and relevant legislation.

I. The President of the Republic's Power to Designate a Candidate to Head the Council of Ministers

Chapter Two of the 2005 Constitution of the Republic of Iraq clarifies the nature and powers of the executive authority and its two primary figures, the President of the Republic and the Prime Minister. It provides:

> The President of the Republic is the head of the state and a symbol of the unity of the country and represents the sovereignty of the country. He shall guarantee the commitment to the constitution and the preservation of Iraq's independence, sovereignty, unity, and the safety of its territories, in accordance with the provisions of the constitution.[1]

Through this provision, the drafters of the 2005 Iraqi Constitution sought to prevent the concentration of powers in the hands of one person — the President. The constitution attempted to embrace a democratic approach and to thus pivot from previous Iraqi constitutions, in which power generally rested in the hands of a single authority.[2]

1 Constitution of the Republic of Iraq (2005), Article 67.

2 Adnan Ajil Obaid, *Constitutional Law, General Theory and the Constitutional System in Iraq*, 2nd ed. (Najaf Al-Ashraf: Al-Nibras for Printing, Publishing and Distribution, 2013), 279.

As a result, the 2005 Constitution conferred mostly ceremonial powers upon the President of the Republic, whereas substantive powers are shared with other authorities or branches of power,[3] as described below.

A. The Powers of the President of the Republic in the 2005 Iraqi Constitution

The 2005 Iraqi Constitution followed a different approach from that of previous constitutions,[4] in that the powers of the President are now shared with other constitutional authorities. These include, for example, the power of the President and the Council of Ministers to present draft laws.[5] At the same time, while the constitution grants the President the power to submit draft laws, including those relating to financial matters, the Council of Ministers holds exclusive power over the state budget and final accounts, which it must submit to Parliament for approval.[6]

The constitution similarly grants the President the power to ratify and promulgate laws. The relevant constitutional text is rather confusing, as it stipulates that the President of the Republic may "ratify and issue the laws enacted by the Council of Representatives. Such laws are considered ratified after fifteen days as of the date of receipt by the President."[7] Arguably, this means that the President's power to ratify laws is a mere formality and does not amount to an actual or exclusive power, since the constitution also deems legislation to be *de facto* ratified if the President fails to ratify it within fifteen days from the date of its referral to the President.[8]

The President may exercise powers of a legislative nature in exceptional circumstances. The constitution authorizes the President, jointly with the Prime Minister, to declare a temporary state of emergency in exceptional circumstances.[9] During a state of emergency, an exceptional legal system is applied, usually based on an emergency law, in order to protect national interests.[10] The constitution requires that the declaration of a state of emergency fulfil several conditions; for example, it requires that the President and Prime Minister jointly submit a written request to Parliament to declare a state of emergency, and requires a two-thirds Parliament majority for approval.[11] The President, therefore, does not have the unilateral power to declare a state of emergency.[12]

---

3 Ali Yousef Al-Shukri, *The End of the President's Term in Arab Constitutions*, 1st ed. (Amman: Dar Safa for Publishing and Distribution, 2012), 23.

4 Sajid Mohammad Al-Zamili, *Constitutional Law and the Constitutional System in Iraq*, 1st ed. (Diwaniyah: Dar Nippur for Printing and Publishing, 2014), 432.

5 Constitution of the Republic of Iraq (2005), Article 60 (1).

6 Constitution of the Republic of Iraq (2005), Article 62 (1). See also, Leila Hantoush Naji Al-Khalidi, "Parliament's Influence on the Head of State in Some Political Systems" (master's thesis, University of Babylon, 2009), 114.

7 Constitution of the Republic of Iraq (2005), Article 73 (3).

8 Dana Abdel Karim Saeid, *The Role of Parliament in Contemporary Parliamentary Systems: Parliament's Weak Legislative and Oversight Performance and the Dominance of the Executive Authority*, 1st ed. (Beirut: Al-Halabi Human Rights Publications, 2013), 103.

9 Constitution of the Republic of Iraq (2005), Article 61 (9).

10 Malik Mansi Al-Husseini, Mossadeq Ali Talib, "The Constitutional and Legal Organization of the Declaration of the State of War and Emergency in Iraq," *Journal of Law of Al-Mustansiriya University* 3, nos. 8 and 9 (2010).

11 Constitution of the Republic of Iraq (2005), Article 61 (9).

12 Jafar Abdul Baheer Al-Darraji, "The Relationship between the President and the House of Representatives in the Constitution of the Republic of Iraq for the Year 2005," *Al- Mouhaqiq Al Hilly Journal for Legal and Political Science* 8, no. 4 (2016): 469.

The President does, however, enjoy certain substantive powers and duties, some of which the President exercises exclusively, while others are exercised jointly with the Council of Ministers. Examples of the former include the duty to call the elected Parliament to convene for an ordinary session by a presidential decree within fifteen days from the date of ratification of the general election results.[13] The President may also unilaterally call Parliament to convene for an extraordinary session when an issue arises that requires holding such a session.[14] The President has the right to request the extension of the Parliament's legislative session unilaterally. In addition, while the duration of each legislative session is four months,[15] the President may request an extension of that session if some tasks are not completed within deadlines specified in the constitution.[16]

The President may also dissolve Parliament subject to the request of the Prime Minister — as a formality — since dissolution cannot be initiated by the President.[17] Some perceive this to be a substantive power, since the President effectively makes the final decision on whether or not to dissolve Parliament. If the President rejects the Prime Minister's request, the Parliament continues to meet and discharge its duties.[18] The constitution also obliges the President to call for general elections in the event that Parliament is dissolved, within a period not exceeding sixty days from the date of its dissolution.[19] The President may also propose constitutional amendments, which is a power that is shared with the Council of Ministers, subject to specific conditions stipulated in the constitution.[20]

The constitution gives the President the authority to ratify treaties. It states.

> The President of the Republic shall assume the following powers […] To ratify international treaties and agreements after the approval by the Council of Representatives. Such international treaties and agreements are considered ratified after fifteen days from the date of receipt by the President.[21]

The ratification of treaties is subject to approval by a two-thirds majority of Parliament members, after which the treaty is submitted to the President for ratification.[22] This renders the presidential power to ratify treaties a mere formality, since any failure by the President to ratify a treaty within fifteen days of the date of receipt would render the treaty ratified automatically.[23]

---

13 Constitution of the Republic of Iraq (2005), Article 54. See also, Ahmed Jassim Kazem Al-Shammari, "The Legal System for Convening the Iraqi Parliament according to the 2005 Constitution: A Comparative Study" (master's thesis, Al-Alamein Institute, 2019), 58.

14 Constitution of the Republic of Iraq (2005), Article 58 (1). See also, Al-Shammari, "Convening the Iraqi Parliament," 82.

15 Constitution of the Republic of Iraq (2005), Article 57.

16 Atheel Khazaal Abdul Hamid, "The Legal Status of the Head of State in the Parliamentary System" (master's thesis, Al-Mustansiriya University, 2010), 113.

17 Constitution of the Republic of Iraq (2005), Article 64 (1).

18 Zeina Sahib Kuzan Abdul Abbas, "The Constitutional Status of the Head of State under the Iraqi Constitution of 2005" (master's thesis, University of Kufa, 2010), 184.

19 Constitution of the Republic of Iraq (2005), Article 58 (2).

20 Constitution of the Republic of Iraq (2005), Article 126.

21 Constitution of the Republic of Iraq (2005), Article 73 (2).

22 Constitution of the Republic of Iraq (2005), Article 61 (4).

23 Constitution of the Republic of Iraq (2005), Article 73 (2).

Other presidential powers include approving the appointment of ambassadors and issuing decrees for their appointment, following their nomination by the Council of Ministers,[24] and the constitution further states that the official accreditation of ambassadors is directly within the formal mandate of the President.[25]

Importantly, the constitution states that the President performs the duties of the High Command of the armed forces, "for ceremonial and honorary purposes,"[26] whereas the Prime Minister is named as the actual commander-in-chief of the armed forces.[27] Effectively, this formulation prevents the President from unilaterally controlling the armed forces.[28]

Another ceremonial power conferred upon the President is to award medals and decorations on recommendation of the Prime Minister.[29]

The Iraqi Constitution confers several other powers to the President of the Republic, including the power to nominate Vice President(s). Article 69 (2) of the constitution states: "The provisions for nomination to the office of one or more Vice Presidents of the Republic shall be regulated by law." Consequently, Law No. 1 of 2011 on the appointment of Vice Presidents of the Republic was promulgated, which states, "The President of the Republic, when assuming his constitutional duties, chooses one or more Vice Presidents and up to three, and submits this nomination to the House of Representatives for approval by an absolute majority."[30] This seems an appropriate approach, given the President's familiarity with the tasks and duties required of a Vice President. Meanwhile, the required approval by Parliament shows the constitutional drafters' intent to preserve balance and cooperation, and is aimed at preventing the President from making unilateral choices.

B. The President of the Republic's Power to Appoint a Candidate to Head the Council of Ministers

Article 76 (1) of the Iraqi Constitution states:

> The President of the Republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic.

It is evident in this article that the candidate for the position of Prime Minister is nominated by the largest parliamentary bloc, and that the role of the President in this context is a mere formality. The convictions and personal choices of the President have little to do with designating the candidate for Prime Minister, as the President is obliged and restricted by the constitution to designate the nominated candidate as Prime Minister.[31]

---

24 Constitution of the Republic of Iraq (2005), Articles 61 (5) (B) and 80 (5).
25 Constitution of the Republic of Iraq (2005), Article 73 (6).
26 Constitution of the Republic of Iraq (2005), Article 73 (9).
27 Constitution of the Republic of Iraq (2005), Article 78.
28 Al-Darraji, "Relationship between the President and the House of Representatives," 466.
29 Constitution of the Republic of Iraq (2005), Article 73 (5).
30 Law No. 1 (2011), Article 1.
31 Ali Yousef Al-Shukri, *The Iraqi Council of Ministers from Occupation to Independence* (Beirut: Zain Legal Publications, 2018), 173.

In practice however, since the promulgation of the 2005 Constitution, choosing a Prime Minister has always been subject to political negotiations leading to the consensus of different political blocs in Parliament.[32] In this case the President of the Republic or the parliamentary bloc of the President can — and historically did — play a decisive role in accepting or rejecting the candidate of the largest parliamentary bloc. This was evident in the experience of the first parliamentary session, when the President and his political bloc refused to designate the nominated candidate, Dr. Ibrahim Al-Jaafari, of the largest parliamentary bloc (the United Iraqi Alliance bloc), resulting in the withdrawal of his nomination and selection of another candidate.[33]

In the fourth parliamentary session at the end of 2019, against the backdrop of the resignation of the Prime Minister, Mr. Adel Abdul-Mahdi, the President announced his rejection of the designation of Mr. Asaad Abdul Amir Al-Idani, the candidate of the largest parliamentary bloc (Al-Binaa Alliance) and threatened to resign as, according to him, confirming this nomination risked breaching Article 76 (1). This shook the core of the entire political process in Iraq.[34] In fact, this legal dispute arose from the multiplicity of interpretations regarding the concept of the largest bloc, the absence of a commonly agreed upon definition derived from the constitution or the laws in Iraq, and the existence of a trend whereby the role of the largest parliamentary bloc is considered to have ended when it fails to nominate a candidate for the head of the Council of Ministers when its candidate does not gain the required confidence, or in the event of the resignation of its candidate, as happened during the government of Mr. Adel Abdul-Mahdi.[35] In all of these cases, the President of the Republic, according to some, has the right to designate a candidate of their choosing, irrespective of the choice of the largest bloc, as inferred from the provisions of Article 76 (3) and 76 (5) of the constitution.[36]

Following the promulgation of the 2005 Constitution the political process has, since its inception, taken on a factional or sectarian character as senior positions were distributed across electoral, sectarian, and nationalist lists. Some have opined that there is no need to specify in a legal text that the Prime Minister must be nominated by the largest parliamentary bloc, as the nomination process will *de facto* be predetermined by the support of the majority in Parliament.[37]

---

32 Ahmed Ali Aboud Al-Khafaji, "The Duality of Executive Power in the Iraqi Constitution for the Year 2005," *Al-Qadisiyah Journal of Law and Political Science* 8, no. 2 (2017): 234.

33 Sajid Mohammed Al-Zamili, Ali Yousef Al-Shukri, "The Head of State's Power to Name the Prime Minister and the Position of the States' Constitutions on Such Power," *Kufa Journal of Legal and Political Sciences* 1, no. 4 (2010): 55.

34 "President Barham Saleh Has Reservations about Al-Eidani's Nomination as Prime Minister, Threatens to Resign," *France 24*, December 26, 2019.

35 "Saleh May Appoint a Prime Minister from Outside the Largest Bloc," *Al Arabiya*, December 12, 2019.

36 Article 76 of the 2005 Constitution of the Republic of Iraq reads as follows: "Third: If the Prime Minister-designate fails to form the Council of Ministers during the period specified in clause 'Second,' the President of the Republic shall charge a new nominee for the post of Prime Minister within fifteen days. […] Fifth: The President of the Republic shall charge another nominee to form the Council of Ministers within fifteen days in case the Council of Ministers did not win the vote of confidence."

37 Al-Darraji, "Relationship between the President and the House of Representatives," 465.

Meanwhile, others stress the need to amend the text of Article 76 (1) to explicitly indicate that the candidate to the position must be chosen by an agreement between the different parliamentary blocs, whereby the three largest blocs would choose a candidate for the position of each of the President, Prime Minister and Head of Parliament. Such an amendment would bring the legal text in line with the political reality and dynamics on the ground,[38] in addition to being explicit and clear, which would prevent the misinterpretation of the text.

However, the present constitutional text, which has not been amended, must be applied as it is currently. This means that the President must name the candidate of the largest parliamentary bloc as Prime Minister, which is generally a reasonable restriction on Presidential powers. In theory, the President may exercise his personal powers in influencing the choice of Prime Minister, but this choice continues to be restricted to the candidate supported by the majority in Parliament. In order to assume his post and continue to discharge his duties as the head of the Cabinet of Ministers, the Prime Minister must gain the confidence of Parliament; otherwise, Parliament is able to file a motion to withdraw confidence from the Prime Minister in the first session it convenes.[39]

When exercising the power of naming a Prime Minister, the President of the Republic must issue a presidential decree to this effect within fifteen days from the date of assuming the presidency.[40] Some assert that the President has other related duties, such as providing guidance to the Prime Minister-designate in choosing cabinet ministers, which the Prime Minister must do within a maximum of thirty days from the date of appointment by the President.[41] According to Article 76 of the constitution:

> [t]he Prime Minister-designate shall present the names of his members of the Council of Ministers and the ministerial program to the Council of Representatives. He is deemed to have gained its confidence upon the approval, by an absolute majority of the Council of Representatives, of the individual Ministers and the ministerial program ….[42]

In sum, the Constitution of Iraq stipulates that the largest parliamentary bloc selects a candidate for the position of the Prime Minister, after which the President formally appoints this candidate to the position within fifteen days by way of a presidential decree. The Prime Minister is then required to issue an order forming the Cabinet of Ministers and submit it to a vote in Parliament. Once Parliament approves the Cabinet selection and the ministerial program by an absolute majority, the Cabinet is said to have been granted confidence and assumes its duties.

38 Al-Khafaji, "Duality of Executive Power," 234.
39 Iqbal Abdullah Amin Al-Jilawi, "The Mechanism for the Appointment of the Prime Minister and his Powers under the Iraqi Constitution of 2005," *International and Political Journal* 33, no. 33 (2016): 241.
40 Article 76 of the 2005 Constitution of the Republic of Iraq.
41 Leqaa Mahdi Salman, "The Poles of Government: A Comparative Study of Mandates and Power – Iraq and Lebanon as Case Studies," *Basic Education College for Educational and Humanities Sciences Journal* 41 (2018): 2353.
42 Constitution of the Republic of Iraq (2005), Article 76 (4).

II. Mechanisms for the Selection of the Prime Minister

The design of constitutional mechanisms to appoint a Prime Minister, and the manner in which they are applied, are dependent upon a country's internal political dynamics and context. In Iraq, the orientation of the influential and active political parliamentary blocs[43] directly affects the choice of Prime Minister. The Constitution of Iraq obliges the President to designate the nominee of the largest parliamentary bloc as Prime Minister, in a manner that seeks to strengthen the principle of cooperation and balance of powers between the legislature and the executive branches. This section addresses the conditions that must be fulfilled by a candidate in order to assume the post of Prime Minister and the circumstances surrounding their appointment.

A. Required Conditions for Nomination to the Position of Prime Minister

The Iraqi Constitution describes the details regarding the executive authority in its second chapter. Article 77 (1) provides that "[t]he conditions for assuming the post of the Prime Minister shall be the same as those for the President of the Republic, provided that he has a college degree or its equivalent and is over thirty-five years of age."[44] In conjunction with Article 68 of the Iraqi Constitution, a nominee to the position of Prime Minister must satisfy the following conditions:

(i) Nationality: The Iraqi Constitution stipulates that the candidate for Prime Minister should be "an Iraqi by birth, born to Iraqi parents…" that is, the candidate should be born an Iraqi, and his parents must both be Iraqi nationals either by birth or through acquiring an Iraqi nationality, in accordance with the (repealed) Iraqi Nationality Law No. 43 of 1963.[45] A naturalized Iraqi does not have the right to be considered for the position of Prime Minister, indicating a presumption that an Iraqi by birth would demonstrate greater loyalty and hold a stronger attachment to the country.[46] This condition may have the well-intentioned objective of seeking to protect the interests of the nation.

(ii) Age: A candidate for the post of Prime Minister must be at least thirty-five years of age.[47] By imposing this minimum age requirement, the constitution draws a clear distinction between the age of a candidate for Prime Minister and that of a candidate for President; the latter according to the same constitution must be at least forty years of age.[48] It can be argued that the difference in the minimum age requirement for each position is somewhat superfluous since the post of Prime Minister is at least as significant as that of the President, if not more, with the former serving as the de facto head of executive authority.[49]

---

43 Sabih Wahwah Al-Atwani, "The Prime Minister in Iraq under the 2005 Constitution: A Comparative Study" (master's thesis, University of Kufa, 2010), 103.
44 Constitution of the Republic of Iraq (2005), Article 77.
45 Nationality Law No. 26 (2006), Article 2.
46 Ola Abdul Aziz, "The Role of the Head of State in Choosing the Prime Minister and Terminating His Term in the Iraqi Constitution of 2005: A Comparative Analytical Study," *Kufa Journal of Legal and Political Sciences* 1, no. 19 (2014): 248.
47 Constitution of the Republic of Iraq (2005), Article 77 (1).
48 Constitution of the Republic of Iraq (2005), Article 68 (2).
49 Ali Yousef Al-Shukri, "The Prime Minister in Iraq, Head in a Parliamentary or Mixed System," *Journal of Human Sciences of the Faculty of Education for Women* 1 (2007): 95.

(iii) Good reputation and political experience: Article 77 (1-2) and Article 68 (3) of the constitution, when read together, stipulate that the candidate for Prime Minister should be "of good reputation and political experience, known for his integrity, uprightness, fairness, and loyalty to the homeland."[50] This provision is vague and fails to specify the meaning of "good reputation." Similarly, the constitution fails to define or specify the parameters or nature of the required "political experience."[51] The same article further states that the candidate must be known for his integrity, uprightness, fairness, and loyalty to the homeland. In other words, the constitution lists a set of subjective and broad virtues, rather than defining clear and specific criteria, thus leaving assessment of a candidate's eligibility to subjective determinations or otherwise to the discretion of the judiciary in the case of a court challenge against any candidate.[52]

(iv) Lack of a conviction of any crime involving moral turpitude: The constitution prohibits the nomination of a person who has been convicted by a court of certain types of crimes that infringe on another person's rights and interests;[53] these include theft, breach of trust, fraud, forgery, abuse of public office, such as bribery and embezzlement, or a violation of public morals, such as crimes of indecent assault, as defined in the Iraqi Penal Code No. 111 of 1969.[54] This is generally considered an absolute prohibition in light of the significant powers of the office of the Prime Minister, and arguably, this condition offers clearer and more helpful guidance to the nomination process, in comparison to the aforementioned condition of "good reputation and behavior."[55]

(v) Academic qualifications: The constitution requires that the candidate for the post of Prime Minister hold a university degree or its equivalent.[56]

A final condition that must be met by the candidate is that they must have quit the dissolved Ba'ath Party ten years prior to its fall, in case they were a member of it,[57] must not have participated in the suppression of the 1991 and Al-Anfal uprisings, and must not have committed a crime against the Iraqi people.[58] These conditions must be satisfied by the candidate and any breach would be deemed a clear and explicit violation of the constitutional requirements for appointment as Prime Minister.

B. Circumstances Surrounding the Designation of the Prime Minister

The Iraqi Constitution foresees several possible scenarios in which the process for the designation of the Prime Minister could be obstructed. This could result from a failure to nominate the candidate or from the Prime Minister-designate's

50 Constitution of the Republic of Iraq (2005), Article 68.
51 Al-Shukri, "Head in a Parliamentary or Mixed System," 96.
52 Al-Atwani, "The Prime Minister in Iraq," 98.
53 Constitution of the Republic of Iraq (2005), Article 68 (4).
54 Penal Code No. 111 of Iraq (1969), Article 6 (21).
55 Al-Jilawi, "Appointment of the Prime Minister and his Powers," 245.
56 Constitution of the Republic of Iraq (2005), Article 77 (1).
57 Constitution of the Republic of Iraq (2005), Article 138 (3).
58 Constitution of the Republic of Iraq (2005), Article 138 (3).

failure to form a government after the lapse of the thirty-day period from the date of their designation. It could also be that the candidate renounces the designation or the Prime Minister-designate submits their resignation. This is extensively addressed in Article 76 (3), which specifies that "if the Prime Minister-designate fails to form the Council of Ministers during the period specified in the second clause, the President of the Republic shall charge a new nominee for the post of Prime Minister within fifteen days." Based on this provision, the President is the competent authority to designate a new candidate in such a scenario, within the prescribed time-limits. The dispute that arises in this case concerns the requirement of nomination of the candidate to the post of Prime Minister by the largest parliamentary bloc,[59] as this scenario is not explicitly referred to in the constitutional text. However, some argue that this requirement is necessarily implied, since the failure in such a case would be attributable to the candidate themselves and not their parliamentary bloc, as they would have failed to obtain the approval of the other parliamentary blocs.[60]

Article 76 (5) of the Iraqi Constitution includes another possible scenario in which the President exercises their power to designate a new candidate, namely that in which the cabinet fails to obtain the confidence of Parliament. In such a case, it specifies that "the President of the Republic shall charge another nominee to form the Council of Ministers within fifteen days in case the Council of Ministers did not win the vote of confidence."[61]

The text of this provision seems to be clearly addressing the inability of the designated candidate to obtain the confidence of the Parliament, whether in relation to their ministerial program or the selection of the members of their cabinet. In such a case, the constitution gives the President of the Republic additional time for designating a different candidate, within fifteen days. Article 76 (5) does not give the largest bloc the right to choose another candidate. In fact, the failure to win the vote of confidence is a clear sign of the lack of agreement among the key influential blocs, or of the candidate's failure to secure Parliament's approval.[62] Some believe that the President of the Republic may choose another candidate from outside Parliament if the political blocs agree to consider this candidate as a compromise candidate. They argue that the power of the President of the Republic in this case is not restricted,[63] contrary to the case provided for under Article 76 (1). However, this notion has been criticized for subjecting the cabinet's work to the control of the aforementioned political blocs, which has the potential to obstruct its work.[64]

According to alternative readings of the text, the candidate's failure to obtain parliamentary confidence should lead to the application of the original rule related to the designation of the candidate, which is to appoint the candidate of the largest bloc to the post of Prime Minister.[65] This means that the President of the Republic's power under the third and fifth sub-provisions would be restricted to the selection of the largest bloc's candidate.

59 Al-Shukri, "Head in a Parliamentary or Mixed System," 9.
60 Al-Khafaji, "Duality of Executive Power," 234.
61 Constitution of the Republic of Iraq (2005), Article 76 (5).
62 Al-Darraji, "Relationship between the President and the House of Representatives," 465.
63 Al-Khafaji, "Duality of Executive Power," 234.
64 Salman, "Poles of Government," 2354.
65 Hussein Shaalan Hamad, "The Power of the President to Designate the Candidate to Form the Council of Ministers," *NAS News*, March 18, 2020.

This constitutional conundrum, which can be traced back to the first session of the Iraqi Parliament, dominated the political process during its fourth session, especially after the Prime Minister submitted their resignation on November 29, 2011, to the Speaker of the Iraqi Council of Representatives, following protests in the country in October of 2019.[66] This set a new precedent in the political process whereby the government submitted its resignation before the end of Parliament's elected term for the first time since the formation of the first Iraqi parliamentary government in 2006.

Resignation in general refers to when "the employee expresses a desire to permanently leave their job."[67] The right to resign is recognized for anyone who occupies a public office or job. However, the Iraqi Constitution does not indicate the mechanism for the resignation of the Prime Minister, the authority to whom the notice of resignation must be submitted, nor the authority that is competent to decide or confirm such resignation. The constitution also does not mention a time-limit between the submission of the resignation and the issuance of a decision on it, after the lapse of which the resignation could be deemed automatically effective, and what could constitute a sufficient period for reconsidering or renouncing the resignation. This stands in contrast to Article 75, which regulates the resignation of the President. However, the legislator circumvented this omission in the constitutional text by enacting Law No. 2 of 2019 on the internal regulations of the Council of Ministers, which stipulates that the request to be relieved from duty must be submitted to the President of the Republic. This approach can be considered adequate, given that the President is the authority that entrusts the Prime Minister with presiding over the cabinet, and therefore it is assumed that any request to be relieved from this post must be submitted to them also.[68]

Alternatively, some hold that "the most appropriate [approach] would be for the request for resignation to be submitted to Parliament, since the Prime Minister's post is primarily a political position that is assumed by earning Parliament's confidence, and that logically the entity that granted its confidence would be the entity entitled to withdraw it or to accept the resignation. The relationship between the President and the Prime Minister cannot be compared to the relationship between an employee and an administrative authority, since the Prime Minister and the President represent the two parts of the executive authority."[69]

A related question is whether the acceptance of the resignation must be voted on in Parliament or not. In this regard, some opine that the resignation of the Prime Minister does not need to be positively accepted or agreed upon, but merely recognized, or receipt of it confirmed, and therefore there is no need for a vote in Parliament. This conforms to Article 75 of the constitution that regulates the resignation of the President, which confirms that resignation is deemed effective seven days after the date of its mere submission to Parliament.[70]

---

66 Ali Mahdi, "The Prime Minister's Resignation and its Impact," *Annabaa Information Network*, January 1, 2022.

67 Hassan Abdullah Younis Al-Taie, *The Termination of the Functional Link and Judicial Oversight on the Decisions Issued in this Respect: A Comparative Study*, 1st ed. (Giza: Arab Studies Center for Publishing and Distribution, 2017), 280.

68 Sajid Mohammed Al-Zamili, "The Resignation of the Prime Minister in the French and Iraqi Constitutions," *Al-Qadisiyah Journal of Law and Political Science* 6, no. 1 (2015): 61.

69 Maysoon Taha Al-Zuhairi, "The Resignation of the Prime Minister from a Constitutional Perspective," *Annabaa Information Network*, December 10, 2019.

70 Hassan al-Yasiri, "The Final Say in the Constitution on the Resignation of the Prime Minister," *Alsabaah*, December 4, 2019.

A contrary view proposes that requiring a parliamentary vote on whether to accept the Prime Minister's resignation, or not, gives Parliament the right to refuse said resignation due to the pivotal role of this post, which may necessitate such a refusal. It is further argued that considering the resignation effective upon its mere submission to Parliament would prevent the completion of the questioning process.[71] This opinion is perhaps the soundest position from our point of view, given that it achieves the popular will expressed by the people's representatives in Parliament and allows the Parliament to remain capable of holding the Prime Minister accountable for his actions.

III. Judicial Oversight of the Legality of Designating a Candidate for the Post of Prime Minister

The Iraqi Constitution enshrines an important component of the democratic system, namely the multiplicity of authorities sharing power and their mutually exclusive independence. It stipulates that the authorities "shall exercise their competencies and tasks on the basis of the principle of separation of powers."[72] Chapter Three of the constitution regulates the functioning of the judiciary, creating a standalone judicial system that is financially and administratively independent of the other authorities. The constitution states that judges shall be independent and that there shall be no authority over them except that of the law. It further outlines the structure and formation of the judicial authority by stating that "the federal judicial power is comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, and other federal courts […]." It seems clear that the aim behind this was to construe the system hierarchically, placing the Federal Supreme Court at the top of the pyramid and the other federal courts at its base.[73]

The powers specified in the constitution empowered the Federal Supreme Court to exercise oversight over the legality of designating a candidate for the post of Prime Minister. This oversight is primarily focused on resolving disputes that occur between the three branches of power and for interpreting the constitutional text, in addition to other powers stipulated in Article 93.

The Federal Supreme Court exercised its competence to interpret the provisions of the constitution when it interpreted Article 76 to define the concept of the largest bloc, on March 25, 2010. The court issued its interpretive opinion under Decision No. 25/Federal/2010 in which it interpreted the expression "largest parliamentary bloc" that is used in Article 76. The opinion held that "the expression of 'largest parliamentary bloc' means: the bloc formed after the elections through a single electoral list, which has participated in the elections with a specific name and number and won most seats, or the bloc that was formed by two or more electoral lists that participated in the elections with different names and numbers and then gathered in one single-entity bloc in parliament, whichever is more numerous."[74]

---

71 Al-Zuhairi, "The Resignation of the Prime Minister".

72 Constitution of the Republic of Iraq (2005), Article 47.

73 Salah Khalaf Abd, "The Federal Supreme Court in Iraq: Its Establishment and Terms of Reference" (master's thesis, Al-Nahrain University, 2011), 32.

74 Qassem Hassan Al-Aboudi, "A Reading of the Federal Court's Decision regarding the Interpretation of Article 76 of the Iraqi Constitution," *Alnoor*, July 3, 2010.

It appears from this interpretation that the Federal Supreme Court requires the President of the Republic to designate the candidate nominated by the largest bloc in order for the designation to be legal. It also appears that the largest bloc is the bloc registered explicitly as such in the first parliamentary session (after the elections). This was done by parliament in its fourth session, when the Speaker sent a letter to the President, announcing the largest bloc and its candidate to the post of Prime Minister.[75]

According to Article 94 of the constitution, this interpretive opinion of the Federal Supreme Court is final and binding for all and, in case of any violation, the designation is deemed unlawful and subject to challenge before the same court.[76] It should be noted that the Iraqi Constitution, despite its detailed explanation of the power of the Federal Supreme Court, did not indicate the entity entitled to submit an interpretation request to the court, leaving this matter to be decided by ordinary legislation. The matter was implicitly deduced from the text of Article 47 of the constitution, which stipulates that the federal authorities shall consist of the legislative, executive, and judicial authorities, and according to Article 15 of the Federal Supreme Court Law No. 30 of 2005, these authorities are the entities that have the right to request the interpretation of the constitution. Moreover, the court may not proceed to interpret the constitution on its own initiative because this violates the rule according to which a judge cannot take on a dispute *ex officio*. The court can only proceed to interpret the constitutional text if there is a real dispute, as had occurred when it was called upon to interpret the meaning of the "largest bloc."

The Federal Supreme Court held a hearing to examine a request submitted by the President on defining the meaning of the "largest bloc." It issued its decision on December 22, 2019, stating:

> The above-mentioned request was subject to scrutiny and deliberation by the Federal Supreme Court in its hearing held on December 22, 2019. After deliberation and scrutiny and after referring to its interpretation of Article 76 of the 2005 Iraqi Constitution according to its decision issued on March 25, 2010, No. 25/Federal/2010, confirmed by virtue of its decision issued on August 11, 2014, [The Supreme Federal Court] concluded that the 'expression of "largest parliamentary bloc" mentioned in the article of the constitution means either the bloc which, after the elections, is formed by one electoral list, *or* the bloc which, after the elections, is formed by two or more lists and which, after entering parliament and taking the constitutional oath in the first session, would have the largest number of seats compared to the rest of the blocs.[77]

Former President of the Republic, Barham Salih, also submitted a request to the Federal Supreme Court to interpret Article 76 and the legality of their power to designate a Prime Minister of their choice without having to refer to the largest parliamentary bloc.[78] The court ruled:

---

75 Letter of the Speaker of the Iraqi Parliament No. 2535 dated October 10, 2018, regarding the designation of a candidate to the post of Prime Minister.

76 Abd, "The Federal Supreme Court in Iraq," 128.

77 Statement of the Federal Supreme Court. Emphasis added.

78 Letter of the Presidency of the Republic No. 799, dated March 16, 2020, on the designation of a candidate to the post of Prime Minister.

> After the stage following the designated candidate's renunciation to form a Council of Ministers according to Article 76 of the constitution, the President of the Republic has the exclusive right according to Article 76 (3) of the constitution, to designate a new candidate within fifteen days as of the date of the previous candidate's renunciation, in accordance with their constitutional responsibility, so that the new candidate assumes their responsibility to form a cabinet and present it to the parliament within a maximum period of thirty days.[79]

This ruling triggered a political crisis, which spiraled into another legal problem on the grounds that the court panel that was formed to issue the above decision included a retired judge.[80] Some have argued that the court's interpretive decision allowing for the designation of a new candidate from outside the largest bloc is invalid and lacks any constitutional value,[81] since a member of the court panel formed to issue the decision had applied to the court to be relieved from their duty and placed back in retirement. In response, the Federal Supreme Court issued Decision No. 22 on March 16, 2020, approving the issuance of a decision to cancel Presidential Decree No. 4 of 2020 which appointed the judge in question as an original member of the court panel, based on a letter issued by the Presidency of the Republic on withdrawing the above appointment decision (No. 1/42/1112 dated March 16, 2020).

Accordingly, the interpretive decision was nullified given that the approval to send the judge back into retirement was given on the same date the decision in question was issued. Thus, the continued membership of a retired judge as a member of the court panel invalidated the court's decisions. This was confirmed by the judgment rendered by Al-Karkh Court of First Instance in its ruling No. 568/2020 on February 9, 2020 in the case filed by the Supreme Judicial Council against the Federal Supreme Court and the Presidency of the Republic. This judgment was in turn confirmed by the decision of the General Panel of the Federal Court of Cassation No. 5/4/General Panel/2020 dated March 17, 2020, which ruled that the judgment issued by Al-Karkh Court of First Instance was correct and in accordance with the law and accordingly ratified it. Consequently, the decision to appoint the judge was withdrawn.[82]

The direct cause of this legal problem was the Federal Supreme Court's revocation of Article 3 of Federal Supreme Court Law No. (30) of 2005. This was invoked by the Supreme Judicial Council, whose statement attributed the constitutional omission to the Federal Supreme Court's decision to repeal the above-mentioned Article governing the appointment of the members of the court panel. It urged parliament to promptly enact a text to replace the abolished text and to fill the constitutional void created by the absence of a court panel with a full quorum that was competent to adjudicate constitutional disputes.[83] Accordingly, the Federal Supreme Court Law was amended by Law No. 25 of 2021.[84]

---

79 Federal Supreme Court Decision No. 29 / Federal/2020, dated March 16, 2020.
80 Federal Supreme Court Decision No. 29.
81 "The Decision to Designate Al-Zarfi is Null and Void and Has No Constitutional Value," *Alsumariya News*, April 4, 2020.
82 Federal Supreme Court Letter No. 22, dated March 16, 2020, on the withdrawal of a presidential decree.
83 Statement of the Supreme Judicial Council.
84 Official Gazette of Iraq, no. 4635, June 7, 2021.

The question regarding the Federal Supreme Court's interpretive decision that remains to be answered concerns the legality of the President of the Republic's designation of a candidate of their choice without referring to the largest parliamentary bloc. The plaintiff did not directly challenge the jurisdiction of the court in ruling on the interpretive decision — the Federal Supreme Court is the competent court and the appropriate forum for this — but instead challenged the competence of the members constituting the court panel to issue the interpretive decision and its legality from a constitutional point of view, in light of the absence of the full quorum for a court panel. We can conclude that the President would have had the power to designate the candidate of their choice to assume the post of Prime Minister in accordance with Article 76 (3) and (5) of the Iraqi Constitution. Consequently, the nomination of the designated candidate was in accordance with the law and was not vitiated by any breach. This argument is corroborated by the opinion that the interpretive decision issued by the court panel on the question of the President's right to designate any candidate, is a valid decision, free from any illegality, since the judge cannot be blamed for an error between the parties to the dispute. Therefore, the decisions issued during the period when they were a member of the court panel would be correct and unquestionable. Moreover, the withdrawal of the presidential decree was in response to the judge's request to be relieved from duty, which should not affect the validity of the decisions issued by the Federal Supreme Court.[85]

It is noteworthy that this judicial duel ended when political consensus was reached, leading to the renunciation of the candidate designated by the former President, Barham Salih, and the designation of a replacement candidate based on consensus.[86] It can be concluded, therefore, that the President's power to designate a candidate to assume the post of Prime Minister is not absolute, and must be exercised in line with the constitution, else it can be subject to challenge at the Federal Supreme Court.

Conclusion

We have analyzed the limited powers of the President to designate a candidate for Prime Minister to head the Council of Ministers under the 2005 Iraqi Constitution by reviewing the mechanisms for their selection and analyzing research data and historical precedents in a scientific and contextual way. In this article, we present the key findings of the research and offer proposals that we hope will contribute to the promotion of democracy and the consolidation of the peaceful transfer of power. It appears that the 2005 Iraqi Constitution is mainly characterized by a quest to prevent the concentration of powers within one authority (the President of the Republic) and to restrict their powers to a large extent, although this leads to a contradiction between the President's actual position and the description of their position provided in the constitution.

---

85 Ziyad Khalaf Odeh, "The State's Responsibility in Compensating for Judges' Mistakes," *Larq Journal of Philosophy, Linguistics and Social Sciences* 3, no. 31 (2018): 522.

86 Presidential Decree No. 12 of April 9, 2020, on designating a candidate to head the Council of Ministers.

As such, we suggest that the text on the definition of the President of the Republic be amended to avoid such contradiction, by providing a more comprehensive definition.

Related to this, it is clear that the Iraqi Constitution did not provide a specific definition of the concept of the largest parliamentary bloc, which exposed it to several judicial, jurisprudential and politically influenced interpretations. It is clear that the political process has a direct impact on the legal situation in the country, and this naturally includes the formation of the government and the selection of the Prime Minister, which is in-turn affected by the orientation of influential and active political blocs in Parliament. This results in slowing down the process of the peaceful transfer of power. Accordingly, we draw the attention of the Iraqi constitutional legislator to the need to amend the text of Article 76 (1) of the 2005 Iraqi Constitution to explicitly indicate the method for selecting candidates for senior positions and to identify a specific and clear definition of the concept of the largest parliamentary bloc to avoid misinterpretation. Moreover, merely amending the text to bring it in line with the current political reality is not sufficient, since practical experiences to date have proven the inability of the political blocs to choose a candidate who successfully satisfies all the qualifications to assume the position of Prime Minister.

Our analysis has shown that the President's power to designate a candidate to assume the post of Prime Minister is not exclusive, and must be in line with the constitution, otherwise it can be subjected to judicial oversight. Moreover, the Iraqi legislator has failed to establish a specific mechanism for the resignation of the Prime Minister, by failing to clearly determine the authority to which the resignation request must be submitted, the authority competent to decide on it, or the time-limit between submitting the resignation and deciding on it after which it would be deemed effective. It would probably be wise — in case of an amendment to the 2005 Iraqi Constitution — to stipulate specific mechanisms for the resignation of the Prime Minister, the authority to which the request for resignation must be submitted, and the authority competent to decide on it, as well as the time-limit between submitting the resignation and deciding on it. Political experiences have shown that these are eventualities that are likely to occur and, therefore, stipulating this in the constitution, as is the case with the President, is vital and necessary for clarity and to prevent political conflict.

Bibliography

- Abd, Salah Khalaf. "The Federal Supreme Court in Iraq, its Formation and Terms of Reference." Master's Thesis, Faculty of Law, Al-Nahrain University, 2011.
- Abdul Abbas, Zeina Sahib Kuzan. "The Constitutional Status of the Head of State under the Iraqi Constitution of 2005." Master's Thesis. University of Kufa, 2010.
- Abdul Hamid, Atheel Khazaal. "The Legal Status of the Head of State in the Parliamentary System." Master's Thesis. Al-Mustansiriya University, 2010.
- Al-Atwani, Sabih Wahuh. "The Prime Minister in Iraq under the 2005 Constitution: A Comparative Study." Master's Thesis. University of Kufa, 2010.
- Al-Darraji, Jafar Abdul Baheer. "The Relationship between the President and the House of Representatives in the Constitution of the Republic of Iraq for the Year 2005." *Al- Mouhaqiq Al Hilly Journal for Legal and Political Science* 8, no. 4 (2016): 448-487.
- Al-Husseini, Malik Mansi, and Mossadeq Ali Talib. "The Constitutional and Legal Organization of the Declaration of the State of War and Emergency in Iraq." *Journal of Law of Al-Mustansiriya University* 3, nos. 8 and 9 (2010): 431-451.
- Al-Jilawi, Iqbal Abdullah Amin. "The Mechanism for the Appointment of the Prime Minister and his Powers under the Iraqi Constitution of 2005." *International and Political Journal 33*, no. 33 (2016): 239-260.
- Al-Khafaji, Ahmed Ali Aboud. "The Duality of Executive Power in the Iraqi Constitution for the Year 2005." *Al-Qadisiyah Journal of Law and Political Science* 8, no. 2 (2017): 229-263.
- Al-Khalidi, Leila Hantoush Naji, "Parliament's Influence on the Head of State in Some Political Systems." Master's Thesis. University of Babylon, 2009.
- Al-Shammari, Ahmed Jassim Kazem. "The Legal System for Convening the Iraqi Parliament according to the 2005 Constitution: A Comparative Study." Master's Thesis. Al-Alamein Institute, 2019.
- Al-Shukri, Ali Yousef. *The Iraqi Council of Ministers from Occupation to Independence*. Beirut: Zain Legal Publications, 2018.
- ———. *The End of the President's Term in Arab Constitutions*. 1st ed. Amman: Dar Safa for Publishing and Distribution, 2012.
- ———. "The Prime Minister in Iraq, Head in a Parliamentary or Mixed System." *Journal of Human Sciences of the Faculty of Education for Women* 1 (2007): 83-111.

- Al-Taie, Hassan Abdullah Younis. *The Termination of the Functional Link and Judicial Oversight on the Decisions Issued in this Respect: A Comparative Study*. 1st ed. Giza: Arab Studies Center for Publishing and Distribution, 2017.
- Al-Zamili, Sajid Mohammad. *Constitutional Law and the Constitutional System in Iraq*. 1st ed. Diwaniyah: Dar Nippur for Printing and Publishing, 2014.
- ———. "The Resignation of the Prime Minister in the French and Iraqi Constitutions." *Al-Qadisiyah Journal of Law and Political Science* 6, no. 1 (2015): 57-78.
- ———., and Ali Yousef Al-Shukri. "The Head of State's Power to Name the Prime Minister and the Position of the States' Constitutions on Such Power." *Kufa Journal of Legal and Political Sciences* 1, no. 4 (2010): 55-101.
- Aziz, Ola Abdul. "The Role of the Head of State in Choosing the Prime Minister and Terminating His Term in the Iraqi Constitution of 2005: A Comparative Analytical Study." *Kufa Journal of Legal and Political Sciences* 1, no. 19 (2014): 244-285.
- Obaid, Adnan Ajil. *Constitutional Law, General Theory and the Constitutional System in Iraq*. 2nd ed. Najaf Al-Ashraf: Al-Nibras for Printing, Publishing and Distribution, 2013.
- Odeh, Ziyad Khalaf. "The State's Responsibility in Compensating for Judges' Mistakes." *Larq Journal of Philosophy, Linguistics and Social Sciences* 3, no. 31 (2018): 515-535.
- Saeid, Dana Abdel Karim. *The Role of Parliament in Contemporary Parliamentary Systems: Parliament's Weak Legislative and Oversight Performance and the Dominance of the Executive Authority*. 1st ed. Beirut: Al-Halabi Legal Publications, 2013.
- Salman, Leqaa Mahdi. "The Poles of Government: A Comparative Study of Mandates and Power – Iraq and Lebanon as Case Studies." *Basic Education College for Educational and Humanities Sciences Journal* 41 (2018): 2345-2387.

The Tug-of-war between the Spirit of the Constitution and the Requirements of Society and Politics in Morocco

Elhabib Stati Zineddine *

ABSTRACT

This article discusses the compatibility of the "aspirations generated" by Morocco's constitutional text with democratic practices over ten years after its entry into force. It begins with the hypothesis that while a constitution carries in its early stages the seeds for the development of political life and empowerment of its actors, the operationalization of new constitutional concepts and breaking with narrow past readings and populist discourses can only be achieved through practice. The article argues that attributing the 2011 Moroccan constitutional reforms exclusively to one particular actor is a mistaken narrow characterization that must be challenged, as multiple political powers, both official and unofficial and exercising varying degrees of influence within the broad balance of powers in the country, contributed to shaping the constitutional initiatives that were announced. Tangible indicators show that undertaking constitutional reform engages three interlinked dimensions: accretion, anticipation, and consensus. In other words, the fate of democracy is not only determined by historical and structural forces, but is rather a product of national struggles, resilience, negotiation, and choices that must be adhered to by the different actors. As experience indicates, early excitement over constitutional changes had to soon be tampered by the difficulties of enacting change within structurally fragile state institutions and mechanisms.

Keywords: *Moroccan Constitution, constitutional reforms, context, democracy, power, practice*

* Elhabib Stati Zineddine is a Professor of Political Science at Cadi Ayyad University in Marrakesh, Morocco.

This article was finalized in September 2022.

CONTENTS

INTRODUCTION 49

I. THE CONTEXT OF THE RISE OF THE NON-TRADITIONAL OPPOSITION STRATEGY IN THE PUBLIC SPHERE 51

A. The February 20 Movement and the Demand for Democracy 51

B. The Broader Regional Context 52

C. The Local Context in Morocco 53

II. THE STRATEGY OF THE POLITICAL REGIME IN MANAGING EXTRA-INSTITUTIONAL OPPOSITION 55

A. The Decision to Revise the Constitution 55

B. Institutional and Social Initiatives 58

C. The "Neutralization" Approach to Isolate the Movement 59

III. ASSESSING THE FLAW: IS IT IN THE CONSTITUTIONAL TEXT, PRACTICE, OR INTERPRETATION? 60

A. The Legislative Authority 62

B. The Executive Authority 62

CONCLUSION 63

BIBLIOGRAPHY 64

Introduction

Every community or social group has complex patterns of behavior and strategies that its members follow in response to set scenarios.[1] Political science, according to Ian Shapiro, must answer questions related to the nature of these strategies and their impact on individuals and institutions and must find solutions, beyond simply producing new theories.[2] Shapiro argues that the development of political science as a discipline is conditioned on the quest to explain current phenomena and realities, rather than a preoccupation with developing theories or research hypotheses and categorizations.[3]

This also applies to constitutional law, where there is increasing awareness that abstract ideas should not be read in isolation from the context in which they emerge, given that political power is only one component of the overall social order,[4] and it only bears analytical significance in relation to that order and its specificities. The result is a growing tendency to approach matters sociologically and to consider the political and historical context that shaped and informed a country's particular political dynamics. [5]

Within this framework, this article focuses on "the tug of war" between the spirit of the constitution and the requirements of society and politics, and systematically investigates the context and actors involved in the 2011 Moroccan constitutional reform. Acknowledging that the February 20 Youth Movement did not directly draft the constitution[6] — a document that undoubtedly will become the focus of future historians[7] — and that the dynamics of its engagement were essentially reduced to a mere protest movement, whether on the streets or on Facebook,[8] this article also argues that the youth movement transcends the simple conception of "opposition against His Majesty the King"[9] — an opposition that in the Moroccan context is empowered from above in exchange for loyalty and thereby reproduces the political system and consolidates its hegemony.[10] In other words, it is important in the Moroccan case to cognize multiple forms of mobilization, conflict, and street protests as

1 Maurice Duverger, *Political Institutions and Constitutional Law: Major Political Systems*, trans. George Saad (Beirut: University Institute for Studies, Publishing and Distribution, 1992), 8.
2 Martin J. Smith, "Preface: Innovation and Dialogue in Contemporary Political Science," *Political Studies* 58, no. 2 (2010): 235.
3 Khalil Al-Anani, "The Political Science Predicament: Between Ideology and Knowledge," *Siyasat Arabiya* no. 41 (2019): 24.
4 Michel Mayai, *The State of Law: An Introduction to the Criticism of Constitutional Law*, 2nd ed. (Beirut: University Institute for Studies, Publishing and Distribution, 1982), 18.
5 Anne Amiel, "Hannah Arendt lectrice de Montesquieu," *Revue Montesquieu*, no. 2 (1998): 120.
6 In a conversation in French conducted by Mustapha Bouaziz, Maati Monjib, and Slimane Bencheikh, with Abdallah Laroui, on the monarchy, political Islam, the February 20 Movement, and the Great Maghreb. *Zaman Magazine*, no. 18 (2012): 69.
7 Laroui argues that while the historians of the French Revolution stress the role of the crowd (*la foule*) and of neighborhood gatherings, they focus more on the impact of the constitution, for it left many documents, while the crowd spoke and its words disappeared into the winds of history.
8 An interview conducted by Mounir Aboulmaali with Abdullah Saaf, on the occasion of the fourth anniversary of the February 20 Movement, *Akhbar Al-Youm*, February 20, 2015.
9 Myriam Catusse, "Au-delà de 'l'opposition à sa Majesté': mobilisations, contestations et conflits politiques au Maroc," *Pouvoirs* 2, no. 145 (2013): 2-3.
10 Catusse, "Au-delà de 'l'opposition à sa Majesté'.

different expressions of opposition, within a political field where the authorities co-opted opposition parties to work within state institutions.[11] The February 20 Movement turned "the street" into a space for communication, protest and public political expression, independently of traditional institutions and organizations, whether those stemmed from the National Movement, or were intended to confront it.

The article hypothesizes that the political authorities' haste to push through constitutional reforms responded to a desire to transform the social and political demands of the protesters into the state's strategy. In other words, they sought to funnel all reforms through traditional political channels to ensure that the monarchy continued to absorb or neutralize opposition. Beyond discussing the role of the February 20 Movement in triggering the adoption of constitutional reforms, this article demonstrates that the ability of the monarchy to contain the movement was motivated by the hypothesis that failure meet to such demands could lead to social unrest and create an existential risk to the political system, whereas moving quickly to contain those demands represented a defensive strategy of neutralizing other political actors and incorporating them into the system.

Given the complexity of the Moroccan case, this article adopts an interdisciplinary approach that examines carefully the context and history that shaped constitutional reforms and developments, and incorporates a background review that allows us to reconstruct social processes that link past events with the present. This article then systematically examines whether the "aspirations generated" by the Moroccan constitution are compatible with practice and the realities of the stakes involved in transitioning to democracy, and considers the power dynamics and interrelations between multiples actors, both official and unofficial, with their varying degrees of influence.

The article addresses two temporal levels or dimensions that characterized the Moroccan Constitution of July 29, 2011. The first is the immediate context within which it was produced; the article first examines the rise of the "soft" power of the street and its strategy to demand change (I),[12] and, second, it analyzes the political regime's strategy in managing extra-institutional opposition through "containment" and "neutralization" (II). The second dimension of analysis concerns the implementation of new constitutional ideals and their integration into political practice, with the purpose of determining the extent of decisiveness and clarity, or hesitation and ambiguity, that characterizes the relationship between the constitutional text and transition to democracy, through looking at indicators of political practice and sound implementation of the constitutional provisions in reality (III).

11 Mounia Bennani-Chraibi et Mohamed Jeghllaly, "La dynamique protestataire du mouvement du 20 février à Casablanca," *Revue française de science politique* 62, no. 5-6 (2012): 870.

12 Frédéric Vairel, *Politique et mouvements sociaux au Maroc* (Paris: Presses de Sciences Po, 2014), 20.

I. The Context of the Rise of the Non-Traditional Opposition Strategy in the Public Sphere

A. The February 20 Movement and the Demand for Democracy

The February 20 Movement can be described along three overlapping dimensions.[13] The first is a conflict dimension, which refers to the positioning of the February 20 Movement in opposition to the state in terms of power and meaning;[14] the second concerns the desire for change, driven by dissatisfaction of the protesters and supporters of the movement with the conditions of corruption and tyranny and their demands for democracy and social justice; and the third refers to the movement's ability to bring together distinct components of society:[15] unaffiliated youth, the Association for the Taxation of Financial Transactions and Aid of Citizens (ATTAC), the Moroccan Association for Human Rights, the National Union of Moroccan Students, Amazigh movements, and political activists belonging to the non-governmental left, such as the Unified Socialist Left, the Socialist Democratic Vanguard Party, but also the Islamist youth belonging to the Justice and Charity Party, the Civilizational Alternative Party, and the Movement for the Nation,[16] in addition to the youth of the Socialist Union of Popular Forces and the Islamist Justice and Development Party.

Using the perspective of "Olson's Paradox," it can be said that small groups are generally more likely to mobilize than larger groups, thanks to the mobilization possibilities offered by "selective incentives," as well as the "closed shop" technique, which attenuates the free rider problem.[17] The February 20 Movement overcame "Olson's Paradox," having brought together diverse social groups of different ideologies and generations that mobilized in around a hundred cities throughout 2011, united only in their opposition to authoritarian rule.[18] Although the demonstrators demanded social justice and the rights to health and education, most of the movement's demands focused on political rights, including demands for a more democratic constitution based on the sovereignty of the people, independence of the judiciary, and the separation of powers.[19]

Although the February 20 movement differed from its counterpart movements in the Arab world in that it did not call for "toppling" the regime, it nevertheless demanded the transformation of the Moroccan monarchy

13 Lilian Mathieu, *L'Espace des mouvements sociaux* (Bellecombe-en-Bauges: Éditions du Croquant, 2012), 12.
14 Mohamed Naimi, "The Limits of Rational Choice in the Sociology of Social Movements: The 20 February Movement and the Rif Movement in Morocco", *Omran* 8, no. 31 (2020): 102.
15 Mohamed Basak Manar, *The 2011 Constitution in Morocco: What Context? For What Content?* (Doha: The Arab Center for Research and Policy Studies, 2014), 3.
16 Thierry Desrues, "Le mouvement du 20 février et le régime marocain: contestation, révision constitutionnelle et élections," *L'Année du Maghreb*, VIII (2012): 381.
17 Olson, Mancur, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1965).
18 Naimi, "The Limits of Rational Choice," 101; Abd al-Ilah Setti, "Parliamentary Monarchy in the New Moroccan Constitution," *Siyasat Arabiya*, no. 20 (2016): 35.
19 Mohamed Madani et al., *The 2011 Moroccan Constitution: A Critical Analysis* (Stockholm: International IDEA, 2012), 10.

from a ruling executive monarchy to a democratic parliamentary monarchy. Such transformation would entail a redistribution of power away from the monarchy, while simultaneously strengthening parliament, granting it the necessary powers to effectively implement public policies with accountability.[20]

These demands were not new to the Moroccan context.[21] However, the difference in 2011 was that the movement for reform was no longer monopolized by political parties, which had been replete with compromises with the monarchy, but was rather associated with informal popular actors.[22] This accelerated the pace of reform significantly, with the February 20 Movement achieving, in the span of just a few weeks, what parliament had struggled to achieve for years.[23]

B. The Broader Regional Context

The 2011 Moroccan protest movement came in the context of broader mobilization across the Arab world. Although the starting points and immediate triggers of these protests that swept Arab countries at the time were different, the driving factors behind these protests share significant commonalities.[24] Since gaining independence, citizens of the majority of Arab states have lived under authoritarian political regimes, many of whose policies negatively affected the mobility, productivity, and competitiveness of these countries' economies and deepened social disparities.[25] Facing significant development challenges, many of these countries opted for customized models of limited democratic transformations in order to address economic challenges and challenges of population growth, demographic shifts, youth unemployment, accelerated urbanization, changes in social values and relations, and the emergence of stronger forms of popular dissent and individualistic self-expressions.[26]

In Morocco, the youth took to the streets calling for a different Morocco, a redistribution of wealth and power, more accountable institutions, different media, different education, and more.[27] Similar to other regional experiences, the mobilization of 2011 in Morocco revealed that the form, content, and scope of the protest movements, as well as those participating in them, had evolved to a degree that the reform path followed in previous years was no longer sufficient to meet popular demands.

---

20 Ahmad Maliki, "A Reading of the Overall Architecture of the New Moroccan Constitution," *Tabayyun*, no. 4 (2013): 92.

21 Elhabib Stati Zineddine, *Protest Movements in Morocco and the Dynamics of Change within Continuity*, 1st ed. (Doha/Beirut: The Arab Center for Research and Policy Studies, 2019).

22 Samir Belmalih, "The Moroccan Monarchy and the Challenges of the Arab Movement," *Masalik*, nos. 21-22 (2012): 36.

23 Muhammad Shuqair, "The February 20 Movement between Confronting Tyranny and Overthrowing Corruption," *Wojhat Nazar*, no. 51 (2012): 25; see also, Said Yaktin, "Democracy in the Waiting Room: The Constraints of Moroccan Social Transformation," *Sharafat Series*, no. 47 (2014): 17.

24 Zaid Al-Ali, Mahmoud Hamad, Yussef Auf, eds., *Yearbook of the Arab Association of Constitutional Law, 2015-2016* (AACL and IDEA International, 2017), 10.

25 Assiya Belkhair, "The Arab World and Confronting Poverty: From the Colonial Legacy to the Challenges of Economic Globalization," *Al-Mustaqbal Al-Arabi*, no. 439 (2015): 43.

26 Muhammad Noureddine Avaya, "The Political and Social Actors in the Current Arab Transformations," *Social Transformations in the Arab World, Comparative Experiences*, 1st ed. (Casablanca: Al-Baydawi Press, 2012), 15.

27 Mourad Diani, "February 20, or the Dilemma of the 'Endless' Democratic Transition in Morocco", *February 20 and the Consequences of Democratic Transition in Morocco*, 1st ed. (Beirut: Arab Center for Research and Policy Studies, 2018), 17.

C. The Local Context in Morocco

Over the past two decades, Morocco has achieved tangible progress in terms of constitutional and democratic reforms, as highlighted by multiple institutional actors in the course of consultations with the Special Commission on the Development Model (CSMD); nonetheless, it has also been noted that multiple challenges persisted in relation to "the discrepancy between the spirit of the constitution and the promises it holds, on the one hand, and the reality of the exercise of power, freedoms, and prerogatives, on the other. This mismatch prevents constitutional institutions and regulators from performing their full role."[28] The Commission's General Report, additionally noted "the lack of clarity in decision-making procedures," which "leads to an uncertain political environment and fuels the growing mistrust of citizens towards institutions, as evidenced by the rate of participation in legislative or regional elections."[29]

While the Moroccan national movement has, since the Kingdom's independence in 1956, consistently stressed that sharing responsibilities requires power-sharing, the monarchy chose another logic for itself.[30] In the words of the late King Hassan II in his book, *The Memory of a King*:

> There were not two forces, but rather two currents. The first was patient and represented by my father, who believed that time is the best way to achieve good results. While the other current was impatient ... their demands were proportionate to their level of awareness of things, they had a natural tendency to accord great importance to details, they were interested in secondary matters at the expense of fundamental ones and, at times, dialogue carried no understanding, for we flew at different heights. It was truly a tragedy for Morocco.[31]

It is no coincidence, then, that the need arose for formulating new relations between the state and society, which manifested itself in the inclusion of "yesterday's rivals" within the framework of rotational government. However, although the declared goal of consensual rotation was to facilitate competition between political forces, their appointment in governmental positions did not translate into decision-making powers,[32] given the constitutionally enshrined primacy of the King in decision-making processes.[33] This explains the failure of political compromises to achieve pluralism and the incapability of elections to produce harmonious coalition governments.[34]

---

28 Special Commission on the Development Model of the Kingdom of Morocco, "The New Development Model (General Report)" (2021), 25.

29 Special Commission, "The New Development Model."

30 Special Commission.

31 Éric Laurent, *Hassan II, King of Morocco: The Memory of a King, Interviews Conducted by Éric Laurent*, 2nd ed. (Riyadh: Saudi Research and Publishing Company, 1992), 24.

32 Abd Al-Ahad Al-Sabti, "The Arab Peoples and the Return of the Event," eds. Abd al-Hay Mouden, Abd al-Ahad al-Sabti and Idris Ksiks, *Questions on the Start of the Arab Spring* (Rabat: Publications of the Faculty of Arts and Humanities, 2012), 49-50.

33 See, for example: *Constitutional History of Morocco* (ConstitutionNet — IDEA International).

34 Abdullah Saaf, "How are Decisions Made in Arab Regimes: The Moroccan Case," ed. Nivin Masaad, *How Are Decisions Made in Arab Regimes, A Case Study: Jordan-Algeria-Saudi Arabia-Sudan-Syria-Iraq-Kuwait-Lebanon-Egypt-Morocco-Yemen*, 1st ed. (Beirut: Center for Arab Unity Studies, 2010), 528.

Before 2011, there was an interest in addressing social problems and creating greater spaces for democratic forces to bring forth political and social demands. However, it appeared that the reforms did not aim to substantially transform the foundational structure of the constitution, despite the flexibility demonstrated by the political regime in addressing the gross violations of human rights committed in the previous era, shaping new definitions of authority, responding to women's demands by reforming the Family Code (*Moudawana*), and initiating broad discussions on economic development prospects.

In parallel to the above, it should be noted that Morocco is currently at a historical turning point. On the one hand, there is a demographic shift towards a predominantly young population, and on the other hand, there is a clear generational divide between one (earlier) generation that was associated with the national movement and the struggle of liberation and state-building, and another that is now associated with the reign of King Mohammed VI and his circle of "classmates" who became known as the *Mawlawi* monarchial elites.[35] The death or end of the first generation can now be safely declared.[36]

These social transformations, combined with poverty, illiteracy, lack of adequate housing, and mistrust of state institutions and policies, have led to various forms of protests.[37] In the words of Rémy Leveau:

> After independence, we used to hear parties and trade unions claiming to exercise power in the name of the masses who had limited representation, yet the monarchy removed these parties and trade unions without much difficulty, thanks to the support of rural populations and the armed forces.[38] [The monarchy] refused to ally itself with any specific political bloc and instead continued to work to secure a type of "pluralism" that encompassed those who express full loyalty to the royal institution and to the King himself,[39] thus easily dominating all frameworks of everyday life.[40]

This model reinforced an inverted relationship between political mediation and popular representation, whereby the legitimacy of "mediators" and "representatives" derived from the top, rather than from society. Historically, there were three pioneering political parties in Morocco: the Shura and Independence Party, the Istiqlal Party, and the Moroccan Communist Party. Currently, there are about thirty-six different parties. It is unclear whether this fragmentation of political parties was a result of the success of the monarchy in controlling the institutional hierarchy of Moroccan politics, whereby parties are left with the mere role of "marketing" specific political choices,[41] or whether the parties are

35 Abdelkader Boutaleb, "Youth and Politics: The Decline of Party Membership in Moroccan Society," *Siyasat Arabiya*, no. 38 (2019): 66.
36 Jacques Palazzoli, "La mort lente du mouvement national au Maroc," *Annuaire de l'Afrique du Nord* 11 (1972): 233-234.
37 Economic, Social and Environmental Council of the Kingdom of Morocco, *Annual Report* (2011), 68.
38 Rémy Leveau, *Le fellah marocain défenseur du trône*, trans. Muhammad bin Al-Sheikh (Rabat: Wojhat Nazar Publications, 2011), 281.
39 Leveau, *Le fellah marocain*, 291.
40 Leveau, 281.
41 Abd Al-Rahim Al-Ammari, "On the Need to Criticize the Dual State: The September 7, 2007 Elections in Morocco and Reality in the General Political Settlement in Morocco," *Moroccan Journal of Public Policies*, no. 4 (2009): 239.

fragmented due to their own partisan competition and internal struggles.[42] At this time of accelerating social change, political parties are increasingly pressured to renew their discourses, introspections, and approach to political engagement in order to maintain their relevance and a minimal level of political influence. Few political parties in Morocco today command even minimal levels of support within the broader society and few have demonstrated any ability to engage with public policy planning or hold public institutions accountable. Many of these parties are themselves in deep need of internal reform. According to the Moroccan Institute for Policy Analysis, around 69% of Moroccans do not trust political parties, only 25% trust trade unions, and about 23% trust the government.[43]

In the context of the imbalance of powers between the monarchy and political parties, it is no surprise that existing forms of formal political organization are unable to represent or mobilize their constituencies or exercise any form of power.[44] As a result, a younger generation in Morocco has begun to seek to independently shape its engagement with national politics and formulate its own rules and objectives. Here, the question is whether those who participated in the February 20 Movement were successful in forming the epicenter of political pressure and mobilization that was left void by established political parties.

II. The Strategy of the Political Regime in Managing Extra-institutional Opposition

Since the outset of the February 20 Movement in Morocco, the monarchy continued to monopolize political decision-making, while acting swiftly to contain and respond to protests and expressions of dissent.[45] The sections below discuss the monarchy's multifaceted response to the protest movement.

A. The Decision to Revise the Constitution

The most important strategic decision taken by the political authority in Morocco was to resort to Article 103 of the 1996 Constitution[46] to enact constitutional amendments. The rapid response to the demands of the February 20 Movement aimed to transform the list of social and political demands, which were put forth by the protesters on the street, into the state's strategy. In doing so, the regime was seeking a return to the traditional political channels that were put in place since 1962 and following the start of institutional modernization in Morocco, whereby political processes are managed within a unified framework under centralized control by the monarchy.[47] After having succeeded in diffusing violence on the streets, the monarchy presented itself as the exclusive and

42 Abdul Latif Aknoush, "The Death Throes of the National Movement Parties," *Anfas Press*, October 22, 2016.
43 Moroccan Institute for Policy Analysis, "Index of Confidence and Quality of Institutions: Preliminary Results".
44 Constitution of Morocco (2011), Article 7.
45 Mohamed Al-Akhsassi, "Reforms in Morocco: Outcomes and the Future," *Al-Mustaqbal Al-Arabi*, no. 444 (2016): 26.
46 Article 103 of the 1996 Constitution gives both the monarch and parliament the right to initiate constitutional amendments.
47 Muhammad al-Tuzi, *Monarchy and Political Islam in Morocco*, trans. Muhammad Hatami and Muhammad Al-Shakrawi (Casablanca: Al Fanak Publishing, 2001), 70-95.

principal shaper of political strategy and public policy.[48] As such, the King quickly contained the movement's demands[49] and redirected them through official institutional channels.[50]

In a clear attempt to absorb the initial waves of escalating public anger and to circumvent the involvement of new actors, the constitutional reform approach announced by the King in his speech on March 9, 2011, was rather pragmatic. It constituted a direct approach that combined communication and engagement, in contrast to the written memoranda approach,[51] which the parties of the National Movement had resorted to in the nineties.[52] By evoking the multiple perspectives and different interpretations of constitutional experts in terms of caring for "the form or content of the constitution," my approach interrogates the impact of protest, as represented by the movement on constitutional reforms, both at the level of discourse and text. To understand that impact and interpret its dimensions, I will focus on the constitution-drafting process as defined in official royal discourse, as well as on the contents of the constitution, and how they relate to the dialectic between the "royal" constant and the "protest" variable.

Some have argued that the public debate on constitutional amendments has moved from the traditional parties/state[53] equation, to the "institutionalization of dialogue and consultation" on constitutional features that usher the monarchy into a new constitutional era that combines legal and popular legitimacy. This is a new equation, with new stakeholders, represented on the ground by the youth and societal movements that Morocco is experiencing. At the same time, one must note that the parties on the left have demanded a "parliamentary monarchy" for decades.[54]

The March 9, 2011, speech by the King can be presented in practical terms as a starting point and a minimal response to the demands expressed by the Democratic Bloc between 1991 and 2009, with the demands of the February 20 Movement as its ceiling. The proposed commission on constitutional amendment was criticized for being an unelected, non-political, and technical body, with a composition dominated by a generation of traditionalists who formed the constitutional norms of the seventies and eighties era, raising concerns that the commission would inevitably fall short of the monarchy's reform ambitions.[55] These criticisms later subsided upon the appointment

48 Abdallah Hamoudi, *Exiting Authoritarianism: Morocco is Looking for a Way Out, in: The Cultural Bet and the Delusion of Breaking* (Casablanca: Dar Toubkal for Publishing and the Faculty of Arts and Human Sciences of Mohammed V University, 2011), 169-187.

49 Vincent Geisser, "Les protestations populaires à l'assaut des régimes autoritaires: une révolution pour les sciences sociales?," *L'Année du Maghreb*, VII (2012): 23.

50 Michel Crozier et Erhard Friedberg, *L'acteur et le système, les contraintes de l'action collective?* (Paris: Seuil, 1977), 79.

51 Muhammad Al-Marini, *The Bloc and Constitutional Reform* (Casablanca: Moroccan Publishing House, 1999), 104.

52 Mohamed Colferni, "The Dynamics of the February 20 Movement's Opposition in Morocco to the 2011 Constitution," *Siyasat Arabiya*, no. 17 (2015): 83.

53 Hassan Tariq, "A Return to the History of the Debate on the Procedure for Drafting the Constitution", *The 2011 Constitution between Authoritarianism and Democracy*, eds., Hassan Tariq and Abdul Ali Hamidin, 1st ed. (Rabat: Public Dialogue Series Publications, 2011), 77.

54 Hassan Tariq, "Constitutional Review between the Constitution of the Democratic Bloc and the February Constitution," *The 2011 Constitution*, 109.

55 Chafik Boukrine, "Political Reform and Democratic Transition in Morocco in Light of the 2011 Constitution," *Moroccan Journal of Local Administration and Development*, no. 116 (2014): 176.

of trusted academic and constitutional expert Mr. Abd al-Latif al-Mnouni as chair of the commission and the inclusion of women and leftist, reform-oriented Moroccan constitutionalists. The commission also took a consultative approach and held dialogues with diverse political actors, including parties and associations, which generally prevented politically motivated attacks on the draft amended constitution.[56]

On the other side, there were those who remained skeptical of the declared "new approach" to constitutional drafting and the monarchy's efforts to increase diversity in the process, pointing to unilateral announcements in the monarch's speech on the constitutional reform initiative,[57] as well as the roadmap for the drafting and implementation of the new constitution.[58] What researchers have termed "the phase of the institutionalization of dialogue and consultations" requires further scrutiny, as, despite declarations to the contrary, spaces for meaningful conversations, disagreement, and expression of diverse points of view remained restricted.[59]

Firstly, the royal initiative, in terms of the process of constitution-making, did not depart significantly from the established practices of the past.[60] The King announced the constitutional review process,[61] as has been the case since the first constitutional amendment process in Morocco in 1970, and parliament was ignored from the outset.[62] The manner in which the monarchy responded to the street protest movement did not address the demands of the February 20 Movement,[63] which called for "a democratic constitution in form and content," referring to the need to elect a constituent assembly to draft the constitution, as was the case in Tunisia and Egypt.[64] The official response was limited to appointing an advisory commission to draft a new constitution (or rather amend the 1996 Constitution).[65] The commission lacked decision-making power and its mandate was limited to the technical aspects of constitutional reform — mainly drafting proposed amendments.[66] Secondly, the commission was unable to integrate the February 20 Movement or the political currents that supported it, such as the legally-banned Justice Group, the United Left, and the Democratic Vanguard Party.[67] Thirdly, the royal discourse itself avoided any mention of a direct link between the constitutional reform initiative and national protest movements or protest movements in the

56 Boukrine, "Political Reform and Democratic Transition," 176.
57 Manar, *The 2011 Constitution*, 8-9.
58 Mohamed Madani, "The New Constitution: Concentration of Power and Weak Guarantees," *The New Constitution and the Illusion of Change*, ed., Omar Bendourou (Rabat: Wojhat Nazar Publications, 2011).
59 Manar, *The 2011 Constitution*, 12.
60 Abdul Latif Hosni, "The February 20 Movement in Morocco: Roots-Path-Horizons," *Wojhat Nazar*, no. 50 (2011): 6.
61 Ruqaia Al-Mossadeq, "A Subsidiary Constituent Authority or an Overriding Original Constituent Authority", *The New Moroccan Constitution in Practice*, eds., Omar Bendourou, Ruqaia El Mossadeq, and Mohamed Madani (Rabat: Multaka el Torok Publications, 2014), 11.
62 Madani, *The New Constitution*, 86.
63 Hosni, "The February 20 Movement," 6.
64 Hosni, 6.
65 Abdul Rahim al-Alam, *The Monarchy and its Surroundings in the Amended Moroccan Constitution* (Rabat: Wojhat Nazr Publications, 2015), 8.
66 Mohamed Koulverni, "The Logic of Constitutional Reform in Morocco between the Emirate of the Faithful and the Parliamentary Monarchy," *Nawafez*, nos. 52-51 (2012): 176.
67 Madani, *The New Constitution*, 87.

Arab region, so as not to concede that the initiative came in the context of meeting any demand for comprehensive or deep reform of state powers and institutions.[68] In the speech of March 9, as well as subsequent royal speeches, the King linked the constitutional review process to expanded "regionalization," and considered this a natural development in the country's path toward democracy and development. He also did not explicitly refer to the demands of the February 20 Movement or other Moroccan political forces.[69] However, one cannot ignore the implicit recognition of the impact of internal political mobilization and the acceleration of external events on the decision to reform the constitution.

The King's March 9 speech positioned the constitutional reforms in the context of continued "major national gains" that were achieved "thanks to the establishment of a renewed power structure, deep political and development-oriented reforms, and historical reconciliation that led to strengthening political engagement within the existing constitutional framework."[70] Nonetheless, the correlation between the announcement of the constitutional review process, the escalation of the protests, and the development of the demonstrators' slogans, is strong and valid. The date and timing of the speech, as well as the decision to announce constitutional revisions, were exceptional and sudden, indicating a sense of urgency to address demands that could no longer be ignored. In other words, the amendments to the constitution can be seen as a preemptory step to pull the rug out from under the February 20 Movement and prevent the further escalation of demands.[71]

B. Institutional and Social Initiatives

Parallel to the constitutional amendments, the Government of Morocco signed the April 2011 Agreement with the General Union of Moroccan Workers, which signaled the government's commitment to meet key demands of the union in relation to labor reforms. This move, and the adoption of new measures concerning workers' rights and social protection measures,[72] generally led to a decline in popular engagement with social movements at the time, including the youth movement of the Justice and Development Party, the Socialist Union of Popular Forces, the Moroccan Labor Union, the Democratic Confederation of Labor, and the Democratic Federation of Labor.[73] The regime also adopted measures oriented towards human rights protection; it formed an Interministerial Delegation for Human Rights,[74] elevated the status of the advisory National Human Rights Council,[75]

68 Belmalih, "The Moroccan Monarchy," 13.
69 Manar, ***The 2011 Constitution***, 8.
70 Excerpt from the Royal Speech of March 9, 2011.
71 Manar, ***The 2011 Constitution***, 16.
72 Abdullah Saaf, *The Left in Morocco, Necessity and Tensions* (Rabat: Dafater Seyasiya Publications, 2015), 101.
73 Abdul Latif Hosni, "On Sabotaging Trade Union Organizations, the Position of the Moroccan Labor Movement regarding the February 20 Movement", *Wojhat Nazar*, no. 59 (2014), 35.
74 For more information, see the website of the Interministerial Delegation for Human Rights, https://didh.gov.ma.
75 See website of the National Human Rights Council, https://www.cndh.ma.

and established the Institution of the Mediator of the Kingdom.[76] It also enacted several laws to combat corruption and released 190 detainees, including five political leaders who were arrested in 2009 and charged with terrorism offenses in connection with what had been called the Belliraj case.[77]

One additional and rather surprising move by the government was to integrate a number of unemployed citizens into the public sector through direct employment mechanisms, and to make significant funding commitments to the Compensation Fund,[78] both of which contradict the prevalent government discourse that focused on the economic crisis, employment challenges, and the need to ease the burden on the state budget. In response to the demands of trade unions, the government further pledged to raise wages, mainly with the purpose of maintaining social peace, even though these measures eventually led to increasing the budget deficit to 6.1%, an unsustainable burden in the long term.[79] It became apparent that the government at that time did not seriously consider the risks or repercussions of these measures on state finances, as much as it focused on their political utility. As summarized by the late Idris Benali, and echoing what the French refer to as "*pilotage à vue*,"[80] when the uprising reached Morocco and people took to the streets to demand an end to corruption, the government simply raised wages and hired those unemployed as a quick measure to restore calm.

C. The "Neutralization" Approach to Isolate the Movement

In addition to taking specific economic and social measures to alleviate popular anger and frustration, the political regime sought to "neutralize" the February 20 Movement by isolating it from other parties and actors that could align themselves with the movement.[81] And while it is rather understandable that certain segments of the population would withdraw from the protests after having achieved some material gains, such as employment or salary increases, the dynamics behind the subsequent silence of certain organized political forces are more complex. The Justice and Development Party, for example, struggled with internal conflicts in formulating its approach to the call for protests on February 20, leading to the resignation of three party leaders from the party's general secretariat. It was revealed that while one wing of the party favored taking to the streets to support reform demands within the framework of a parliamentary monarchy, another wing rejected direct participation in the protests in favor of a mere expression of support, in fear that the protesters might escalate their demands in a manner that might threaten the country's stability and national security.[82]

---

76 The Institution replaced the former *Diwan al-Mazalim*, which had the mandate of redressing citizens' grievances, particularly in relation to government institutions' exercise of their authority. See website of the Institution of Mediation, https://www.mediateur.ma/ar.

77 Manar, "The Outcome of Current Actions."

78 For more information, see the website of the Compensation Fund, https://www.cdc.gov.ma.

79 Economic, Social and Environmental Council Kingdom of Morocco, *Summary Annual Report* (2011), 8.

80 Jill Press interview with the late Driss Benali, October 6, 2011, available at: https://cutt.us/iGAsG.

81 Desrues, "Le mouvement du 20 février," 387.

82 An interview conducted by Al-Mokhtar Benabdlawi with Abdel-Ali Hami Eddine on "The Reality of the Current Moroccan Political Stampede," *Rihanat*, no. 24 (2012): 36.

The above illustrates an example of the dynamics within political parties at the time, which generally led to most parties taking a cautious approach to the protest movement, often remaining silent and distant, while later overwhelmingly supporting the monarchy's constitutional reform initiative despite its lack of clarity.[83] Party leaders thus appeared to have broadly settled on a view of politics as a means to manage their relationships with the state, behaving like an isolated group of elites who look for any opportunity to get closer to the state.[84] This approach by political leaders is apparent in the various communiqués and statements issued by political parties.[85] It is also reflected in the silence of the rest of parties, whether those traditionally associated with the government or opposition, and their general lack of engagement with the protests movement. Nonetheless, while political parties did not exert any pressure on the government at the time, they continued to retain some political relevance and influence during the phase of the constitutional referendum. What is more, the engagement of parties such as the Islamist Justice and Development Party and the conservative-traditionalist Istiqlal Party, for example, subjected certain outcomes of constitutional drafting to bargaining, especially in relation to provisions on Islam and the strengthening of national identity.[86]

III. Assessing the Flaw: Is it in the Constitutional Text, Practice, or Interpretation?

Over a decade following the issuance of Morocco's amended Constitution of 2011, questions remain in relation to the degree of its success in changing political realities and translating its aspirations into effective democratic transformation. In addressing these questions, one must acknowledge that whereas the text of a constitution is an expression of an intention to transform and develop political structures and practices,[87] constitutional analysis is only practically relevant in relation to actual practices, both in terms of constitutional interpretation and the ability and willingness of state institutions and entrenched political traditions to transform themselves accordingly.

Chapter 19 of the earlier 1996 Constitution, in relation to the powers of the monarch,[88] was technically disposed of in the 2011 Constitution. This article — which was initially of symbolic value but was later transformed into a source of

83 Al-Mosaddeq, "A Subsidiary Constituent Authority," 25.
84 Hassan Tariq, "The Post-February 20 Phase," *The 2011 Constitution*, 53.
85 For more information on the organizations that support the February 20 Movement and the reactions of social and political actors, see Desrues, "Le mouvement du 20 février,", 363-364.
86 Al-Mosaddeq, "A Subsidiary Constituent Authority," 26.
87 Mohammed Atrakin, *Issues in Moroccan Constitutional Jurisprudence*, 1st ed. (Contemporary Publishing House, 2020), 353.
88 Article 19 of the Constitution of 1996 provides, "The King, '*Amir al-Mu'minin*' (Commander of the Faithful), shall be the supreme representative of the nation and the symbol of its unity. He shall be the guarantor of the perpetuation and continuity of the State. As defender of the faith, he shall ensure respect for the Constitution, He shall be the protector of the rights and liberties of citizens, social groups, and organizations. The King shall be the guarantor of the independence of the nation and the territorial integrity of the Kingdom and its rightful boundaries."

considerable constitutionally enshrined powers and religious authority of the King, akin to that of an Islamic "Caliph"[89] — is a prime example of a dynamic constitutional text with evolving interpretation and application by the monarchy. There are two possible and divergent readings of the architecture of the monarch's powers in the 2011 Constitution.

According to the first, the absence of a clear and explicit transition of the conception of the role of the King from the religious realm (the King as a Caliph) to the political realm (the King as the head of state) suggests that the religious realm continues to dominate the approach to the powers of the monarch,[90] especially in light of Article 41 of the 2011 Constitution, which refers to the King as *Amir al-Mu'minin* (Commander of the Faithful). The King continues to exercise his powers through the *Dahirs* (Royal Decrees), which allow him to exercise broad powers as Commander of the Faithful, in accordance with Article 41 of the new constitution, alongside his functions of the head of state, enshrined in Article 42. But this distinction does not imply a difference in their nature or effects.[91] The King, whether in his capacity as "Commander of the Faithful" or "head of state," retains broad powers that allow him to remain in effective control of the political system.[92]

The second reading, by contrast, argues that the 2011 Constitution introduced a shift in the manner by which the King can discharge his powers. As Commander of the Faithful, the King, according to this reading, must respect the whole constitution, including the framework of parliamentary powers. That is, he may not command his religious powers to regular matters of civil life, even as Articles 41 and 42 of the new constitution effectively replace Article 19 of the 1996 Constitution. According to this reading, what is currently problematic is that established political actors have not yet disposed of their own past reading of the King's role and continue to exercise "self-control" in their political practices, thus giving the impression that the pre-2011 constitutional dynamics continue to prevail. [93]

Regardless of the difference between the two readings, they converge at a common axis: political practice reflects the prevailing political culture, which subjects parties to unwritten constitutional norms that are manifested in the yielding of power by traditional political forces and the prevalence of the discourse of consensus and compromise. Changes in the text remain unable to alter the structures of power effectively, especially as the monarchy continues to interfere in parliamentary elections to reserve major strategic cabinet positions — such as interior, defense, endowments and Islamic affairs, and foreign affairs — to candidates known for political non-affiliation and their loyalty to the royal establishment.[94]

In the following sections, I will discuss some examples of discrepancies between the text of the 2011 Constitution and the subsequent resulting practice.

---

89 Atrakin, *Issues in Moroccan Constitutional Jurisprudence*, 13.

90 Mohamed Al-Ghali, "The Constitution of the Kingdom of Morocco for the Year 2011 in Light of the Arab Spring: The Dialectic between the Constant and the Variable," *Tabayyun*, no. 4 (2013), 118.

91 Mohamed Madani et al, *The 2011 Moroccan Constitution: A Critical Analysis* (Stockholm: International IDEA, 2012). p. 25.

92 Ahmed Bouz, "The Democratic Choice in the New Moroccan Constitution," *The New Moroccan Constitution*, 11.

93 Abdellatif Aknouch, "The Constitutional Practice of the Monarchy and the Political Class in Morocco", available at: https://cutt.us/kINZc.

94 Al-Ghali, "The Constitution of the Kingdom of Morocco," 116.

A. The Legislative Authority

According to Article 70 of the 2011 Constitution, parliament "exercises legislative authority." The parliament votes on laws, monitors government action, and evaluates public policies. It could be said that in the 2011 Constitution, the parliament gained some expanded powers in relation to the government, but not in relation to the King. The latter retained almost all the powers he had in relation to parliament, with the exception of the transfer of the status of "representative of the nation" from the King to parliament.[95] By extrapolating the texts of the constitution, specifically Chapter 3 on the monarchy, there is absolutely nothing to prevent the King from legislating, notably by issuing unilateral and binding *Dahirs*. Moreover, although the constitution expanded the legislative scope of the laws passed by parliament, political practice tends to narrow it, especially since many political actors exploit political conveniences to derogate from the text of the constitution and disavow the "supreme nature of its provisions."

For example, most of the "nation's representatives" were more than willing to go along with an illegal reading of the constitution and the by-laws of parliament regarding proxy voting. However, Article 60 of the constitution explicitly stipulates that members of parliament derive their representation from the nation, and that "their right to vote is personal and may not be delegated."[96] Likewise, consultations between the Minister of Interior with political parties regarding the laws governing the 2021 elections further illustrated the lack of willingness of many members of parliament to wield their constitutional power in relation to the government.

More broadly, these recurring dynamics confirm that it is not enough to have a more progressive constitutional text to guarantee the path toward democracy, in the absence of meaningful restructuring of political power dynamics and without guarantees of transparent and competitive elections to ensure effective popular representation.

B. The Executive Authority

In accordance with constitutional theory, the Constitution of 2011 charges the government (cabinet of ministers) with the primary responsibility of formulating and implementing public policies. Under Chapter 5 of the 2011 Constitution, which outlines the obligations of the executive authority, Article 89 stipulates that the government "exercises executive power; it works under the authority of its president to implement the government program and to ensure the implementation of laws. The administration is placed at the government's disposal, and it also exercises supervision and guardianship over public institutions and contracting."

In practice, however, it is not entirely clear whether the government is in fact empowered to shape public policy and the framework of governance of the Kingdom. As discussed above, some political forces have dismissed the constitutional reform on the grounds that the government does not really govern and that the monarchy continues

95 Bouz, "The Democratic Choice,"116.
96 Constitution of Morocco (2011), Article 60.

to exercise several forms of formal and informal dominance over the various constitutional institutions. While other political forces, including the Justice and Development Party, appear to see untapped potential that could be optimally used to shift public policies meaningfully to meet the expectations of the February 20 Movement,[97] a close reading of the 2011 Constitution does not support the conclusion that a proper parliamentary monarchy was established. The monarchy, in accordance with Chapter 3 of the Constitution, remains outside the horizontal separation/distribution of powers and is not subject to any other authority.[98] The King continues to exercise discretion and considerable influence in enacting major public policies, which have broadly remained outside of the orbit of the executive authority. During the Covid pandemic, for example, response measures and decisions to manage the pandemic were issued by institutional bodies under the direct chairmanship of the monarch. As in matters relating to national security or "strategic" interests of the Kingdom, decisions are often directed by the King or his "assistants" directly, irrespective of their constitutional capacity or mandate to carry out such functions.

Conclusion

In order to fully assess Morocco's constitutional reforms of 2011, it is necessary to examine the political context and application of the resulting constitution. This article argues that the constitutional reforms in Morocco did not alter the deep structures regulating the distribution of power within the Kingdom, but rather favored ostensible change within a framework of continuity, meaning that the constitution was prepared and approved only to ensure the continuity of the monarchy. The goal to co-opt the February 20 Movement into the "traditional" opposition operating within existing state institutions was broadly achieved through two main strategies. The first was to reduce most of the political and social demands of the movement into a constitutional reform issue, and the second was to weaken the movement and exploit ideological differences between its various components, especially after the emergence of the struggle for political leadership. The monarchy managed to ensure its security and stability through pushing all political actors, including opposition parties, to operate within the rules it preset. While the constitutional reforms of 2011 merit recognition as a significant step towards achieving greater political participation and progress, the outcomes of the reforms demonstrated the limits of the constitutional text in altering political practice. Political actors continued to uphold the culture and traditions of Morocco's unwritten constitution and to exercise informal political powers. One can then conclude that the constitutional contract cannot be an end of its own, but rather is only one entry point towards altering authoritarian practice and achieving hopes of an effective and lasting democratic transition.

---

97 Mohamed Basak Manar, "The Governmental Experience Led by the Justice and Development Party in Morocco: Context, Initial Outcome, and Possible Consequences," *Siyasat Arabiya*, no. 3 (2013): 76.

98 Maliki, "A Reading of the Overall Architecture of the New Moroccan Constitution," 100.

BIBLIOGRAPHY

- Al-Akhsassi, Mohamed. "Reforms in Morocco: Outcomes and the Future." *Al-Mustaqbal Al-Arabi*, no. 444 (2016): 21-65.
- Al-Alam, Abd al-Rahim. *The Monarchy and its Surroundings in the Amended Moroccan Constitution*. Rabat: Wojhat Nazr Publications, 2015.
- Al-Ali, Zaid, Mahmoud Hamad and Yussef Auf, eds. *Yearbook of the Arab Association of Constitutional Law, 2015-2016*. AACL and IDEA International, 2017.
- Al-Ammari, Abd Al-Rahim. "On the Need to Criticize the Dual State: The September 7, 2007 Elections in Morocco and Reality in the General Political Settlement in Morocco." *Moroccan Journal of Public Policies*, no. 4. (2009).
- Al-Anani, Khalil. "The Political Science Predicament: Between Ideology and Knowledge." *Siyasat Arabiya* no. 41 (2019): 22-35.
- Al-Ghali, Mohamed. "The Constitution of the Kingdom of Morocco for the Year 2011 in Light of the Arab Spring: The Dialectic between the Constant and the Variable." *Tabayyun*, no. 4 (2013).
- Al-Marini, Muhammad. *The Bloc and Constitutional Reform*. Casablanca: Moroccan Publishing House, 1999.
- Al-Sabti, Abd Al-Ahad. "The Arab Peoples and the Return of the Event." In *Questions on the Start of the Arab Spring* edited by Mouden, Abd al-Hay, Abd al-Ahad al-Sabti and Idris Ksiks. Rabat: Publications of the Faculty of Arts and Humanities, 2012.
- Al-Tuzi, Muhammad. *Monarchy and Political Islam in Morocco*. Trans. Muhammad Hatami and Muhammad Al-Shakrawi. Casablanca: Al Fanak Publishing, 2001.
- Amiel, Anne. "Hannah Arendt lectrice de Montesquieu." *Revue Montesquieu*, no. 2 (1998): 119-138.
- Atrakin, Mohammed. *Issues in Moroccan Constitutional Jurisprudence*. 1st ed. Contemporary Publishing House, 2020.
- Avaya, Muhammad Noureddine. "The Political and Social Actors in the Current Arab Transformations." In *Social Transformations in the Arab World, Comparative Experiences*. 1st ed. Casablanca: Al-Baydawi Press, 2012.
- Basak Manar, Mohamed. "The 2011 Constitution in Morocco: What Context? For What Content?." Doha: The Arab Center for Research and Policy Studies, 2014.
- ———. *The Governmental Experience Led by the Justice and Development Party in Morocco: Context, Initial Outcome, and Possible Consequences*. *Siyasat Arabiya*, no. 3 (2013): 73-82.
- Belkhair, Assiya. "The Arab World and Confronting Poverty: From the Colonial Legacy to the Challenges of Economic Globalization." *Al-Mustaqbal Al-Arabi*, no. 439 (2015): 38-51.

- Belmalih, Samir. "The Moroccan Monarchy and the Challenges of the Arab Movement." *Masalik*, nos. 21-22 (2012).
- Bendourou, Omar, Ruqaia Al-Mossadeq, and Mohamed Madani, eds. *The New Moroccan Constitution in Practice*. Rabat: Multaka el Torok Publications, 2014.
- Bennani-Chraibi, Mounia and Mohamed Jeghllaly. "La dynamique protestataire du mouvement du 20 février à Casablanca." *Revue française de science politique* 62, no. 5-6 (2012): 867-894.
- Boukrine, Chafik. "Political Reform and Democratic Transition in Morocco in Light of the 2011 Constitution." *Moroccan Journal of Local Administration and Development*, no. 116 (2014).
- Boutaleb, Abdelkader. "Youth and Politics: The Decline of Party Membership in Moroccan Society." *Siyasat Arabiya*, no. 38 (2019): 63-74.
- Catusse, Myriam. "Au-delà de 'l'opposition à sa Majesté': mobilisations, contestations et conflits politiques au Maroc." *Pouvoirs* 2, no. 145 (2013): 31-46.
- Colferni, Mohamed. "The Dynamics of the February 20 Movement's Opposition in Morocco to the 2011 Constitution." *Siyasat Arabiya*, no. 17 (2015): 80-90.
- Crozier, Michel, and Erhard Friedberg. *L'acteur et le système, les contraintes de l'action collective?*. Paris: Seuil, 1977.
- Desrues, Thierry. "Le mouvement du 20 février et le régime marocain: contestation, révision constitutionnelle et élections." *L'Année du Maghreb*, VIII (2012): 359-389.
- Diani, Mourad, ed. *February 20 and the Consequences of Democratic Transition in Morocco*. 1st ed. Beirut: Arab Center for Research and Policy Studies, 2018.
- Duverger, Maurice. *Political Institutions and Constitutional Law: Major Political Systems*. Trans. George Saad. Beirut: University Institute for Studies, Publishing and Distribution, 1992.
- Geisser, Vincent. "Les protestations populaires à l'assaut des régimes autoritaires: une révolution pour les sciences sociales?." *L'Année du Maghreb*, VII (2012): 7-26.
- Hamoudi, Abdallah. *Exiting Authoritarianism: Morocco is Looking for a Way Out, in: The Cultural Bet and the Delusion of Breaking*. Casablanca: Dar Toubkal for Publishing and the Faculty of Arts and Human Sciences of Mohammed V University, 2011.
- Hosni, Abdul Latif. "On Sabotaging Trade Union Organizations, the Position of the Moroccan Labor Movement regarding the February 20 Movement." *Wojhat Nazar*, no. 59 (2014).
- Kingdom of Morocco, Special Commission on the Development Model. "The New Development Model (General Report)." Rabat: 2021.

- Koulverni, Mohamed. "The Logic of Constitutional Reform in Morocco between the Emirate of the Faithful and the Parliamentary Monarchy." *Nawafez*, nos. 52-51 (2012): 173-186.
- Laurent, Éric. *Hassan II, King of Morocco: The Memory of a King, Interviews Conducted by Éric Laurent*. 2nd ed. Riyadh: Saudi Research and Publishing Company, 1992.
- Leveau, Rémy. *Le fellah marocain défenseur du trône*. Trans. Muhammad bin Al-Sheikh. Rabat: Wojhat Nazar Publications, 2011.
- Madani, Mohamed et al. *The 2011 Moroccan Constitution: A Critical Analysis*. Stockholm: International IDEA, 2012.
- ———. "The New Constitution: Concentration of Power and Weak Guarantees." In *The New Constitution and the Illusion of Change edited by Bendourou*, Omar. Rabat: Wojhat Nazar Publications, 2011.
- Maliki, Ahmad. "A Reading of the Overall Architecture of the New Moroccan Constitution." *Tabayyun*, no. 4 (2013): 85-109.
- Mancur, Olson. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press, 1965.
- Masaad, Nivin, ed. *How are Decisions Made in Arab Regimes, A Case Study: Jordan-Algeria-Saudi Arabia-Sudan-Syria-Iraq-Kuwait-Lebanon-Egypt-Morocco-Yemen*. 1st ed. Beirut: Center for Arab Unity Studies, 2010.
- Mathieu, Lilian. *L'Espace des mouvements sociaux*. Bellecombe-en-Bauges: Éditions du Croquant, 2012.
- Mayai, Michel. *The State of Law: An Introduction to the Criticism of Constitutional Law*. 2nd ed. Beirut: University Institute for Studies, Publishing and Distribution, 1982.
- Naimi, Mohamed. "The Limits of Rational Choice in the Sociology of Social Movements: The 20 February Movement and the Rif Movement in Morocco." *Omran* 8, no. 31 (2020): 89-114.
- Palazzoli, Jacques. "La mort lente du mouvement national au Maroc." *Annuaire de l'Afrique du Nord* 11 (1972): 233-234.
- Saaf, Abdullah. *The Left in Morocco, Necessity and Tensions*. Rabat: Dafater Seyasiya Publications, 2015.
- Setti, Abd al-Ilah. "Parliamentary Monarchy in the New Moroccan Constitution." *Siyasat Arabiya*, no. 20 (2016): 34-45.
- Shuqair, Muhammad. "The February 20 Movement between Confronting Tyranny and Overthrowing Corruption." *Wojhat Nazar*, no. 51 (2012).
- Smith, Martin J. "Preface: Innovation and Dialogue in Contemporary Political Science." *Political Studies* 58, no. 2 (2010): 235-237.
- Stati Zineddine, Elhabib. *Protest Movements in Morocco and the Dynamics of Change within Continuity*. 1st ed. Doha/

Beirut: The Arab Center for Research and Policy Studies, 2019.

- Tariq, Hassan, and Abdul Ali Hamidin, eds. *The 2011 Constitution between Authoritarianism and Democracy*. 1st ed. Rabat: Public Dialogue Series Publications, 2011.
- Vairel, Frédéric. *Politique et mouvements sociaux au Maroc*. Paris: Presses de Sciences Po, 2014.
- Yaktin, Said: "Democracy in the Waiting Room: The Constraints of Moroccan Social Transformation." *Sharafat Series*, no. 47 (2014).

The Interaction Between Transitional Justice and Constitution-Making in a Conflict Setting: Reconciliation in Libya

Judith Heimbach *

ABSTRACT

When studying constitution-making and transitional justice and assessing their success, scholars have generally separated these two processes from each other and analyzed them individually. I believe that this obscures how complementary constitution-making and transitional justice processes are: they unfold in the same context (fragile, and conflict-affected), are part of the same transitional process, and share similar agendas. If their synergy is optimized, they may work in tandem towards conflict resolution and reconciliation. At the same time, their interconnection also means that negative developments in one are likely to have negative consequences on the other. This article explores the impact of constitution-making and transitional justice on reconciliation in Libya by looking at the interaction between the two processes amidst an ongoing civil war and in the absence of stable and unified governmental structures. Upon demonstrating how poor, negative developments in both the constitution-making and transitional justice processes spiraled and aggravated divisions in an unstable and divided Libya, this article ponders whether holding back on transitional justice measures and constitution-making may, in the midst of a civil war, be more appropriate than adopting measures that fuel conflict.

Keywords: *Constitution-making, transitional justice, context, reconciliation, interaction, synergy, legitimacy, divisions.*

* Judith Heimbach holds a master's degree in International Relations and Conflict Resolution from Sciences Po Toulouse as well as a master's degree in Middle East Politics from SOAS, University of London.

This article was finalized in September 2022.

CONTENTS

INTRODUCTION 70

I. BASES FOR AN ANALYSIS: THEORETICAL FRAMEWORK AND CONTEXT 72

II. INTERACTIONS BETWEEN CONSTITUTION-MAKING AND TRANSITIONAL JUSTICE: AN ANALYSIS 74

A. Beautiful transformation, where are you? 74

B. A spoke in the four wheels of transitional justice 77

1. Weakened transitional justice 78

2. Selective transitional justice 79

C. When it backfires: from selective justice to selective constitution-making 82

III. ON DIVISION 84

A. Institutional relationships: from the old to the new … or the old renewed? 84

B. Socio-political and interpersonal divides 86

1. Socio-political divides 86

2. Spillover to society: fragile national cohesion and sense of belonging 88

IV. BAD TIMING? 90

CONCLUSION 92

BIBLIOGRAPHY 93

Introduction

Years after Muammar Gaddafi was overthrown, many Libyans have continued to be the victims of widespread, systematic, and gross human rights violations, and to this day, still demand justice and the establishment of the rule of law. After suffering under Gaddafi's rule, Libyans came together in an uprising in February 2011 and liberated Libya. This, however, came at a cost: many were victims of abuses during the revolution and at the hands of militias over the past 12 years. The sense of national unity that was felt during the uprising revealed itself to be fragile and temporary. Despite successive attempts at building peace post-2011, tensions continued to grow among the population and in the political arena, up to the point that Libya's government split into two opposing parliaments and associated governments, in 2014: the General National Congress (GNC) and the House of Representatives (HoR). Open-armed confrontation took place between the two entities and their affiliated armed forces until a ceasefire was reached in 2015, when representatives of both entities and of civil society met in Skhirat, Morocco, to engage in peace talks. The talks resulted in the 2015 Libyan Political Agreement (LPA), which set a roadmap for peacebuilding and created the Presidency Council, tasked with building a united Libyan "Government of National Accord (GNA)."[1] Due to deep regional, social, and political divisions, the newly created GNA proved unable to consolidate its authority and implement the LPA. In parallel, the HoR struggled to approve a final constitution and failed to submit it to a popular referendum, effectively freezing the constitution-making process.[2] Libya's authorities were then divided into three governments, "none of which [was] able to govern."[3] Fighting resumed shortly after the LPA was signed, along with human rights violations. In November 2020, when Libya entered the Libyan Political Dialogue Forum (LPDF), hopes were high for the then 9 year-long, on-and-off civil war to come to an end. In March 2021, the Government of National Unity (GNU) was created, again meant to unify Libya's governmental forces and attempt to build national cohesion. However, a year later, Libya was "once again stuck in a standoff between two rival executives" with "conflicting roadmaps for finding a way out of the crisis."[4] In this tense, divided climate and apparent political deadlock, few measures are being taken at the national level to move forward with the peacebuilding process, particularly concerning constitution-making (CM) and transitional justice (TJ), leaving Libyans with unresolved grievances, a deteriorating human rights situation,[5] and a divided state.

This article looks into the interaction between Libya's CM and TJ processes and its impact on reconciliation, amidst ongoing conflict and institutional instability. CM is a forward-looking process at the core of political reconstructions, whereby a society substantively revises its constitution or drafts a new one to establish a new structure for a stable state,

1 *Towards National Reconciliation in Libya*, IRF Project Report (New York: UN Peacebuilding Support Office, 2016), 3.
2 Nedra Cherif, "Libya's Constitution: between Conflict and Compromise," Middle East Directions 2 (Fiesole: Robert Schuman Centre for Advanced Studies, European University Institute, 2021), 1.
3 Richard Hall, "Libya now has three governments, none of which can actually govern," *The World*, March 31, 2016.
4 *Reuniting Libya, Divided Once More*, Watch List 2022 – Spring Update (Brussels: Crisis Group, 2022).
5 *Reuniting Libya*.

based on good governance and the rule of law, "[reflecting] fears from the past to be repeated."[6] In Libya, which existed without a constitution under Gaddafi, CM has been paralyzed for the past five years, as the final draft constitution developed by the Constitution Drafting Assembly (CDA) in 2017 was never adopted. In the past few years, and following the momentum created by the LPDF, CM has returned to the center of politicians' and scholars' attention.[7] Another element of the peacebuilding process that has been pursued in Libya post-2011 is TJ. According to Kofi Annan, UN Secretary-General in 2004, TJ is a range of "processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[8] TJ is primarily a backward-looking process addressing and aimed at making up for wrongs committed in the past through truth, accountability, reparation and non-recurrence. In Libya, TJ has taken different forms over the years and has generally been criticized by scholars[9] as seemingly detrimental to national reconciliation. By reconciliation, I mean the "[management of] individual and collective identities to remove the negation of the other as a central component of one's own identity," following Kelman's definition.[10]

Libya today remains divided on three levels: the institutional, the socio-political, and the interpersonal. This article analyzes the impact of TJ and CM, as a tandem, on national reconciliation in Libya. To date, only a few scholars have studied the interaction between TJ and CM, in general. Johnson argues that TJ must be prioritized in a reconciliation process, as it is "critical to ensuring broad-based societal support for the emerging constitutional system."[11] On the other hand, Hamad, amongst others, has argued that in order to optimize TJ, it should be implemented in a comprehensive way, taking into account obstacles to justice such as, amongst others, weak institutional and constitutional structures.[12] Overall, however, studies on CM and TJ have focused on one process at a time, obscuring the fact that they very much interact and shape one another.

The interaction between TJ and CM in Libya has also been overlooked or only briefly looked at.[13] This article explores the level of synergy between these two processes in Libya and questions the timeliness of their interaction

6 Claude Klein and András Sajó, "Constitution-Making: Process and Substance," *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012).

7 See for instance Darin E.W. Johnson, "Conflict Constitution-Making in Libya and Yemen," *University of Pennsylvania Journal of International Law* 39, no. 2 (2018): 293-354; Zaid Al-Ali, *Libya's Final Draft Constitution: A Contextual Analysis* (Stockholm: International IDEA, 2020); Simona Ross, "Lost in Transition: Constitutional Legitimacy in Libya," *JCL MENA* 2 (2022): 4-27.

8 UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (New York: United Nations, 2004), 8.

9 Roman David and Houda Mzioudet, *Personnel Change or Personal Change? Rethinking Libya's Political Isolation Law*, Paper Series 4 (Doha: Brookings Doha Center, 2014); Mahmoud Hamad, "A Law of Diminishing Returns: Transitional Justice in Post-Revolutionary Libya," *Arab Centre for Research and Policy Studies* 3, no. 1 (2020): 23-37.

10 Herbert Kelman, "Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Groups," *Landscapes of Violence* 1, no. 4 (2001).

11 Johnson, "Conflict Constitution-Making," 350.

12 Hamad, "A Law of Diminishing Returns," 30.

13 With the exception of Pietro Sullo, "Transitional Justice in the Libyan Constitutional Transition," *Diritti umani e diritto internazionale* 3 (2020): 709-731.

in a context of ongoing national conflict. Neither process has been considered successful in reconciling Libyans so far. Could one make sense of these failures by drawing a link between them and analyzing the impact they have had on one another? How did the context in which they have unfolded impact their common trajectory? To what extent could their interaction positively impact national reconciliation in a context where there is ongoing conflict, little semblance of reconciliation and several competing governments in Libya?

In this article, I argue that, in a context of deep divisions and instability, CM and TJ were mutually harnessed by self-interested actors wishing to further their power in post-Gaddafi Libya, which consequentially played against justice and reconciliation. To do so, after setting out a brief theoretical framework (I), I analyze the different ways in which TJ and CM have interacted and impacted one another in Libya (II) and discuss how these interactions have impacted national reconciliation in the country (III). I then weigh this analysis against the context in which CM and TJ have been implemented, and question their timeliness in a conflict-ridden, multifaceted environment (IV). I conclude by arguing that CM and TJ measures, if better adapted to the current Libyan setting, may fare better in fostering reconciliation.

I. Bases for an Analysis: Theoretical Framework and Context

Within fragile and conflict affected states (FCAS), social cohesion, that is, convergence across groups, tends to be weak. According to Alexandre et al., social cohesion is indeed often weakened by perceptions of injustice (unfair treatment in the past or present).[14] These create 'us-vs-them' mentalities, which harden identity boundaries, prompting groups to coalesce inward, in turn making it difficult for certain groups to trust each other and/or the state.[15] In turn, when groups "see their interests mesh with those of others, they become more connected to other groups and ultimately have more incentive to collaborate."[16] This convergence across groups needs to last in the long-term: short-term cohesion like that observed during revolutions is unlikely to last.[17] This suggests that, in FCAS, conflict resolution should include processes aimed at "addressing the factors that have fed conflict in the past,"[18] at providing justice and re-establishing the rule of law and a culture of human rights. TJ and CM have both been identified as such processes, capable of fostering long-term trust, within society and in good governance.[19]

In this article, both TJ and CM are understood as located within a broader process of conflict transformation, rather than as isolated practical legal endeavors. They are part of a political transition process "which [attempts] to (re)construct

14 Sullo, "Transitional Justice," 67.
15 Sullo, 4.
16 Marc Alexandre et. al., *Societal Dynamics and Fragility: Engaging Societies in Responding to Fragile Situations*, New Frontiers of Social Policy 74272 (Washington DC: World Bank, 2013).
17 Alexandre et. al., *Societal Dynamics and Fragility*, 4.
18 Lakhdar Brahimi, "Foreword", *Constitution-Making and Reform: Options for the Process*, eds., Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan (Interpeace, 2011).
19 See for instance Brandt et. al., *Constitution-Making and Reform*, 2.

the state to reconfigure how power is held and exercised so as to include previously excluded actors and groups"[20] and foster national reconciliation. In this context, both TJ and CM should be thought of as deeply political processes; their success is thus contextual. Locating CM within a specific political context allows for an understanding of how similar parameters in the design of CM processes may lead to different outcomes in each country they are implemented in.[21] The directions CM processes take depend on "contextual nuances of politics"[22]: power struggles, institutional relationships, external actors' actions, and international norms. This holds too for TJ. Indeed, CM and TJ do not take place in a vacuum: they may be politicized, or, as Hart argues in reference to CM, they can be understood as "a forum for negotiation or a continuing conversation amid conflict and division."[23] TJ and CM are part of the same context, and in a way, they are each other's context: they are, in other words, co-dependent. This has been theorized by a handful of authors, including Halmai, Skapska, Cats-Baril and Teitel among others.[24] According to Cats-Baril, "transitional justice and constitution-building may provide the legal and political underpinnings for one another. ... [Each] can provide protection and momentum for the other but, again, this is more likely to occur if these potentialities are understood and planned for."[25] As such, depending on who leads CM and TJ and on how coordinated they are, they can either reinforce or undermine one another and, ultimately, allow for or imperil long-term institutional reforms and reconciliation. This will largely depend on the context in which they are implemented.

According to Calhoun, who developed a "democratic transitions typology," the way a newborn state deals with its past, and therefore how CM and TJ unfold and interact, depends on how a transition happens and on the distribution of power during said transition.[26] Following this typology, Libya can be said to have entered a "rupture transition" in 2011. Gaddafi's authoritarian regime was suddenly and violently challenged to the point it was not only weakened but it completely collapsed, allowing the opposition to take complete power over the state. In rupture transitions, as the old regime does not negotiate or keep a degree of control over the transition, there is an opportunity for complete reconstruction of the state based on accountability and transformation of the type of governance.[27] However, the clear victory of the opposition opens the door to potential abuse of power: interim authorities may for instance implement

---

20 Amanda Cats-Baril, *Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building*, International IDEA Policy Paper 22 (Stockholm: International IDEA, 2019), 18.

21 See for instance Amal Jamal and Anna Kensicki, "A Theory of Critical Junctures for Democratization: A Comparative Examination of Constitution-Making in Egypt and Tunisia," *The Law & Ethics of Human Rights* 10, no. 1 (2016): 186-187.

22 Jamal and Kensicki, "A Theory of Critical Junctures," 188.

23 Vivien Hart, "Constitution-making and the Transformation of Conflict," *Peace Change* 26, no. 2 (2011): 153 (2001).

24 Gábor Halmai, "Transitional Justice, Transitional Constitutionalism and Constitutional Culture," *Comparative Constitutional Theory*, eds. Gary Jacobsohn and Miguel Schor (Cheltenham: Edward Elgar Publishing, 2017), 372-392; Gábor Halmai, "The Role of Constitutionalism in Transitional Justice Processes in Central Europe" (2019); Cats-Baril, *Moving Beyond Transitions*, 20; Grazyna Skapska, "Institutional Innovations and Moral Foundations of Constitutionalism in East Central Europe: Coping with the Past Human Rights Violations," *Constitutionalism and Political Reconstruction*, ed. Saïd Amir Arjomand (Leiden: Brill Academic Pub, 2007), 237-259; Ruti G. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014), 181-208.

25 Cats-Baril, *Moving Beyond Transitions*, 12.

26 Halmai, *The Role of Constitutionalism in Transitional Justice Processes*, 4.

27 Halmai, 3.

revenge and selective justice in view of shielding the new socio-political elite. CM and TJ in deeply divided societies experiencing a rupture transition may therefore prove challenging and might aggravate polarization instead of reducing it.

Having said this, the context in which Libya found itself immediately after the revolution and over the past 12 years is more complex than that of a rupture transition as experienced by fairly unitary states, such as Tunisia for example. Indeed, Libya is deeply divided: amongst geographical lines (East, West, South), within society (tribes), and across ideological lines (e.g.: federalists, Islamists). These divides quickly materialized post-revolution, when two, nay three opposing governments formed (GNC, HoR, GNA), militias refused to disarm, and minorities boycotted national politics. Divides amplified along the years and have played against national unity. Today, Libya is still divided, down to its institutions, and can barely be said to operate as a state (at least not a unitary one). In this context, how have CM and TJ, in interaction with one another, concretely impacted socio-political and interpersonal reconciliation? Developments in TJ can create ideal conditions for the success of a CM process, and the constitutionalization of TJ measures can reinforce TJ goals. Have developments in TJ and CM in Libya facilitated one another's work and fostered trust between Libyans? Or, instead, have the dynamics in which TJ and CM unfolded negatively shaped these two processes, which have, in turn, through their interactions, reinforced tensions? Given the current political context in Libya, can one realistically expect a level of coordination between TJ and CM allowing for widespread reconciliation to be achieved?

II. Interactions between Constitution-making and Transitional Justice: an Analysis

In this section, I analyze the degree of synergy between CM and TJ in Libya. I demonstrate that, in a conflictual setting (a country ridden with divisions and instabilities), CM and TJ's potential positive impact on one another was impeded by poor developments in both processes, which were the product of divisions and conflict-politics.

A. Beautiful transformation, where are you?

Following the overthrowing of Gaddafi, Libya found itself in "an environment where there was no political settlement, very little public trust, the absence of any form of constitutional democracy on which to build, and ongoing violent conflict."[28] As Libya entered a rupture transition, the National Transitional Council (NTC), a self-appointed interim government formed in Eastern Libya during the revolution, had the opportunity to rectify past mistakes and embark on a path to democracy and good governance, strengthening the rule of law to reassert the credibility of the state.[29] One way for a state to transform and become democratic, as well as be perceived as such and legitimize itself,

[28] Charmaine Rodrigues, "Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-cooker of Transitions in Conflict-affected States?," *Global Constitutionalism* 6, no. 1 (2017): 33, 58.

[29] Karim Mezran and Duncan Pickard, *Negotiating Libya's Constitution*, Issue Brief (Washington, DC: Atlantic Council, 2014), 1.

is to adopt constitutional documents informed by, acknowledging, and providing responses to its undemocratic past. In a way, as Sullo contends, a post-conflict constitution is an "autobiography of the state," which "may keep alive the memory of a violent past while providing a bridge to overcome the legacy of the violence experienced."[30] Some have thus argued that CM can only be transformative and bring about stability and good governance if there exists a political will to deal with an undemocratic past. This may be measured in governments' initiatives to constitutionalize TJ measures that contribute to non-recurrence: "one way of building a new order is to draw a boundary between the old and the new, and to declare various aspects of the old regime illegitimate, and of the new regime legitimate."[31] Post-conflict justice shapes the state and becomes a "precondition for a constitutional project" based on a "normative future"[32] and a solid "human rights culture."[33] Indeed, as Teitel argues, "dealing with a State's past grievances reflects on its democratic potential for the future."[34] In Libya, a state with no constitution under Gaddafi's rule, the overthrowing of the authoritarian leader's regime offered an opportunity to create a constitutional framework. According to the International Commission of Jurists (ICJ), by "using clear and unambiguous language and providing for strong protections for [human rights and freedoms]," a new Libyan Constitution had "the potential to contribute significantly to a fair and just accountability process for past violations"[35] and legitimize the newborn state. Including TJ instruments in Libya's conflict resolution process would indeed be "an appropriate strategy to reach political reconciliation and build public confidence in the new political regimes."[36] In a context of rupture transition and ongoing conflict where building trust in a new government is challenging, have Libya's interim governments been able to implement a strong constitutional framework for dealing with the past, and eschew Libya's past culture of human rights violations?

In August 2011, the NTC adopted a Constitutional Declaration (CD), which stood as the interim constitutional document ruling the transition until a permanent constitution would be drafted by a special body: the CDA.[37] The CD begins by looking back at the revolution of the February 17, 2011, and recognizes that wrongs have been committed in the past.[38] It notably calls for "stability, tranquility and justice" and the creation of a society where "injustice, tyranny, despotism, exploitation or dictatorship" have no place.[39] The document thus seemingly advocates for the establishment of a system based on values and principles that were not upheld in the past.

30 Sullo, "Transitional Justice," 729.
31 Skapska, "Institutional Innovations and Moral Foundations of Constitutionalism," 243.
32 Teitel, *Globalizing Transitional Justice*, 69.
33 Winluck Wahiu, "Building a Culture of Human Rights," *A Practical Guide to Constitution Building*, eds. Markus Böckenförde, Nora Hedling, and Winluck Wahiu (Stockholm: International IDEA, 2011), 11.
34 Teitel, *Globalizing Transitional Justice*, 70.
35 *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya* (Geneva: ICJ, 2020). 78.
36 Moataz El Fegiery, *Truth and Reconciliation? Transitional Justice in Egypt, Libya and Tunisia*, Policy Brief 177 (Madrid: FRIDE, 2014), 1.
37 Mezran and Pickard, *Negotiating Libya's Constitution*, 2.
38 Constitutional Declaration of Libya, August 3, 2011, Preamble.
39 Constitutional Declaration of Libya, Preamble.

However, the remainder of the CD fails to provide a comprehensive framework for dealing with the past. Firstly, whilst the preamble refers to the Gaddafi era and announces that the new government condemns the actions of the authoritarian leader and his regime, it at the same time fails to mention the crimes committed by revolutionaries: the past it is willing to address seems to only involve a certain period (this will be analyzed further below). Moreover, the term "transitional justice" was absent from the CD. Although some articles mention citizens' rights and judicial guarantees, no specific mentions are made of past abuses, of potential reparations, accountability, or extended guarantees of non-recurrence. Additionally, articles on human rights are succinct and vague (see Articles 6, 7, 8, 11),[40] leaving room for potential manipulation. Human rights in the CD are either only briefly mentioned or limited by ordinary legislation. Limitation clauses are not in themselves rare; they exist in almost all constitutions,[41] but they must both "(i) [allow] specific limitations on rights; and (ii) [place] limits on such limitations, thereby protecting the right against excessive restrictions."[42] The CD, however, limits certain rights quite loosely (e.g.: Article 15 provides for freedom of association and the right to form political parties, unless they are "in conflict with *public order* or *public morals* or *threatening in other ways the state or the integrity of the national territory*"[43]), which constitutes an abuse of limitation, in the words of Ahmed and Bulmer.[44] Finally, the Libyan CD fails to declare certain rights as non-derogable, which leaves room for governments to potentially violate them in the future.

Issues with the CD were therefore multiple. However, in the context in which it was created, it stood little chances to be consensual and legitimize a new government. In fact, from its inception, the document was questioned by many: it was drafted and adopted without proper consultation of the population, whilst conflict was raging, under pressure from diverse groups, divided and motivated by self-interest (e.g.: federalists, Islamists), by a self-appointed government whose leaders mainly came from the East of Libya, and in a territorially divided state. As such, despite the argument that "interim constitutions ... can foster legitimacy [and] can have a mutually reinforcing relationship with transitional justice mechanisms,"[45] one could hardly expect, in this context, the CD to fulfil these goals.

Foreign states (notably during Libya's 2015 UNHRC Universal Periodic Review (UPR)) did call on Libyan authorities to revise their constitutional framework for dealing with the past and incorporate constitutional provisions for human rights and guarantees of non-recurrence. Nevertheless, subsequent interim constitutional documents were just as limited, due to persisting instabilities in Libya. Significant improvements in the provisions on TJ did appear in the 2014 Constitutional Proposals (CP), drafted by the CDA, with a promising Chapter 5 dedicated to transitional measures, addressing in rather comprehensive ways all four pillars of TJ.

40 Constitutional Declaration of Libya, Articles 6, 7, 8, and 11.
41 Dawood Ahmed and Elliot Bulmer, *Limitation Clauses*, Constitution-Building Primer 11 (Stockholm: International IDEA, 2014), 5.
42 Ahmed and Bulmer, *Limitation Clauses*, 2.
43 Constitutional Declaration of Libya, Article 15. Emphasis added.
44 Ahmed and Bulmer, *Limitation Clauses*, 7.
45 Caitlin Goss, "Interim Constitutions and the Invisible Constitution," eds. Rosalind Dixon and Adrienne Stone, *The Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press, 2018), 167.

Chapter 6 of the CP further provided a detailed list of guarantees of non-recurrence.[46] In 2015, UPR member-states recommended Libya to continue in this direction and end impunity through drawing up an agenda for TJ,[47] strengthening accountability mechanisms,[48] investigating crimes and bringing perpetrators to justice,[49] revealing the fate of those forcibly disappeared,[50] providing redress and reparations to victims (of all crimes, including torture and sexual and gender-based violence), as well as expanding on its human rights framework and aligning with international standards of international human rights and humanitarian law.[51] Nevertheless, Chapter 5 disappeared from the 2017 final draft constitution, as well as all guarantees of non-recurrence and rights guaranteed in the CP, such as the rights to knowledge or compensation. These were replaced by an expeditious Article 180 on Transitional Provisions which merely states that "the state shall apply TJ measures,"[52] contains succinct mentions of truth, accountability, and compensation, and delegates the implementation of TJ and a reconciliation body to ordinary legislation.

The conditions in which the CP were drafted were, again, far from conducive to the crafting of consensual constitutional material, aligned with international standards. Indeed, the GNC, which replaced the NTC, progressively lost legitimacy. After the GNC refused to step down following the election of the HoR (which it oversaw), the creation of a second government led by the HoR further divided Libya along geographical and ideological lines. In this context, the CDA was to operate as a non-political body of independent figures, but ended up reflecting tribal and regional affiliations, which contributed to undermine its own legitimacy too.[53]

Libyan interim governments have thus failed to strengthen Libya's constitutional framework for TJ in constitutional drafts, while disregarding the recommendations they received on the international stage. In the conditions in which they had to operate, however, this does not come as a complete surprise. As I demonstrate in Section II, this had negative consequences on institutional reconciliation.

B. A SPOKE IN THE FOUR WHEELS OF TRANSITIONAL JUSTICE

These developments also had rippling effects on TJ. According to ICJ, "the Constitution could ... play a key role in the TJ process by enshrining a duty on the state to implement appropriate measures that are in line with international standards on the right to truth, justice, reparations and guarantees of non-recurrence."[54] In Libya,

46 See CDA 2014 Committee Proposals on constitution chapters, Chapter 5: Transitional Measures Roadmap; Chapter 6: Rights and Liberties, translation provided by DCAF Libya.
47 See UN Human Rights Council, Rep. of the Working Group on the UPR: Libya on its Thirstiest Session, UN Doc. A/HRC/30/16, §137.169 [Netherlands] (2015).
48 E.g., Id. §137.154 [Germany].
49 E.g., Id. §137.160 [Czech Republic]; §137.125 [Latvia]; §137.126 [Ireland]; §137.151 [UK], §137.159 [Estonia]; §137.71 [Niger].
50 E.g., Id. §137.120 [Lebanon]; §137.17 [Chile].
51 E.g., Id. §137.68-72 or §137.165-169.
52 Proposal of a Consolidated Draft Constitution (Final Draft), 2017, Article 180 (Libya).
53 Cherif, "Libya's Constitution," 2.
54 *Impunity No More*.

in contrast, the limited constitutionalization of TJ stood as an obstacle to the implementation of a fair and effective TJ process: it rather gave way to a weak TJ, prone to being manipulated.

1. Weakened transitional justice

Firstly, constitutionalizing TJ could have removed barriers to the implementation of accountability in Libya, as a first step towards ending impunity. As Cats-Baril demonstrates, for instance, the 2014 Tunisian Constitution removed legal obstacles to pursuing justice post-revolution. Article 148.9 reads that "the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of res judicata and the prescription of a crime or a punishment are considered inadmissible."[55] This article was intended to make it possible for Tunisians to seek accountability for crimes and violations they suffered in the past. In contrast, Libyan interim constitutional documents make no mention of either previous amnesties or potential future amnesties and how the retroactivity of laws would be justified to deal with crimes perpetrated in the past.

The limited constitutionalization of TJ also affected truth-seeking efforts in Libya. As Cats-Baril argues, "[c]onstitution-building can further the realization of the right to truth in two ways: (a) it can provide constitutional status and protection to the independence of truth-seeking bodies, including by establishing those bodies and/or expanding the mandate of existing bodies; and (b) it can give recognition to a narrative of the past."[56] Truth-seeking bodies work towards both the truth and the non-recurrence objectives of TJ and facilitate reparations and accountability by uncovering information about the past. They are believed to be an "appropriate strategy to reach political reconciliation."[57] Similarly to Cats-Baril, Waldorf argues that "[w]ithout being tied to a broader constitutional structure, truth commissions are vulnerable to institutional drift, where they remain formally in place but their impact lessens — intentionally or unintentionally — over time."[58] Some countries also constitutionalized TJ mechanisms oriented specifically towards non-recurrence, such as permanent human rights commissions (e.g. South African Human Rights Commission),[59] giving them legitimacy, protection and indisputable power.

In contrast, Libya's CD makes no mention to either commission. Instead, ordinary laws No. 5/2011 and No. 29/2013 (TJL) respectively established a National Council for Civil Liberties and Human Rights (NCCLHR)[60] and a Fact-Finding and Reconciliation Commission (FFRC).[61] There is no publicly available information on the internet about the NCCLHR reports, nor any mention of the council in the media, suggesting it is either no longer active or not deemed relevant.

55 Cats-Baril, *Moving Beyond Transitions*, 78.
56 Cats-Baril, 23.
57 El Fegiery, *Truth and Reconciliation?*, 1.
58 Cats-Baril, *Moving Beyond Transitions*, 23.
59 Constitution of South Africa (1996), Article 184.
60 Submitted to the UPR of Libya, State of Libya, Twenty-Second Session, 1 (2015). National Council for Civil Liberties and Human Rights.
61 Law No. 29 of 2013 (Libyan Transitional Justice Law), unofficial translation provided by UNSMIL, Chap. 2.

The FFRC was meant to be appointed directly by the GNC to investigate crimes perpetrated during the Gaddafi era and beyond,[62] but the TJL gave no deadline for the setting up of the commission, which was stillborn. The LPA addressed this issue, stating that members of the board of the commission should be appointed within 90 days of the signing of the agreement. This, however, never happened. As such, the failure to enshrine these two institutions in constitutional documents greatly affected their functioning: it did not provide a strong enough framework for the implementation of these entities' mandates. In times of conflict and instabilities, obstacles to their work became more numerous and they were deprioritized. In subsequent draft constitutions, the CDA included articles on setting the mandate for a Human Rights National Council. However, these provisions were vague, failed to align with international law,[63] and delegated the creation and mandate of these bodies to ordinary legislation, setting them once again to be weaker, potentially manipulated, or even never created.

These shortcomings reverberated on reparation, another pillar of TJ. Uncovering the truth about the past can indeed prompt public apologies from new governments, as symbolic reparation. Based on their findings, truth commissions may also recommend reparations programs to right the wrongs of the past.[64] In Libya, CM generally failed to support reparation: reparations were not mentioned in the CD, and only twice, briefly, in the final draft (Article 64 on Deprivation of Freedom, and Article 180 on TJ). Thereby, interim governments did not offer constitutional recognition and symbolic reparation to victims. As a result, most victims of the previous regime, of the Revolution, and of the past 12 years of conflict are still awaiting any kind of remedy for their sufferings. Reparations programs in Libya have taken the form of various ordinary laws whose interaction has not been regulated, and which have overall been insufficient[65] and discriminatory, have lacked transparency and public participation,[66] and have focused excessively on financial reparations.[67]

2. Selective transitional justice

The above analysis indicates that, if not anchored in a constitution, or in the absence of a profound "constitutional culture," TJ is likely to fail:[68] it is left vulnerable and susceptible to suffer the ebbs and flows of conflict and politics.

---

62 Id. at Chap. 2, art. 8, §4.

63 Such as, for instance, with the Principles Relating to the Status of National Institutions (Paris Principles), G.A. Res. 48/134 (Dec. 20, 1993).

64 *Transitional Justice in Post-conflict and Fragile Settings: Progress and Challenges for Reparations, Truth-Telling, and Children* (New York: ICTJ) 72.

65 *Impunity No More*, 24.

66 Mohamed Elmessiry and Sonya Merkova, *'Justice is the Only Way Forward': Perceptions of Justice in Libya Ten Years On* (London: Lawyers for Justice in Libya, 2022).

67 According to ICJ, *Impunity No More*, 25, "Law No. 10 of 2012 provided for the disbursement of a sum of money to each Libyan family, or to unmarried family members, on the first anniversary of the 17 February Revolution. Law No. 50 of 2012 provided a compensation scheme for political opponents detained under the Gadhafi regime. Law No. 4 of 2013 provided for the disbursement of a monthly allowance to persons with permanent disability injured (i) while fighting during the 2011 armed conflict against the Gadhafi regime or (ii) as civilian victims of the regime's attacks. Law No. 31 of 2013 provided benefits to families of persons killed in the Abu Salim prison massacre. Law No. 1 of 2014 provided for a monthly allowance for families of persons that died or went missing in connection to the 17 February Revolution and the ensuing conflict. "

68 Halmai, "Transitional Justice," 24.

Indeed, in Libya's context of deep divisions, different groups seeking to advance their self-interests seized this opportunity and applied pressure on interim governments to implement revenge justice. In fact, constitutionalizing TJ may indeed be a double-edged sword: in certain contexts, it may be used to offer constitutional protection and legitimacy to TJ instruments geared towards selective justice as lawfare, which is what happened in Libya.

Amid continued bloodshed, TJ in Libya had to deal with "ambiguous lines of responsibility, where victims have sometimes also become perpetrators,"[69] and figure out how martyrs and ex-Gaddafi sympathizers should be held accountable. In interim constitutional documents, this dilemma was ignored, and the NTC instead embedded an approach to justice that created a strict separation between "martyrs" and the former regime. The CD indeed pledges its "faithfulness to the martyrs of this blessed revolution who sacrificed their lives to enjoy freedom, live with dignity on the nation's soil and retrieve all the rights looted by Gaddafi and his collapsed regime."[70] Such a sharp distinction between alleged victims and perpetrators does not reflect the situation in Libya, as the line separating victims from perpetrators is more porous: human rights violations have been perpetrated by all sides alike, during, but also after the revolution.[71] Furthermore, some within Gaddafi's regime rebelled against the authoritarian leader during the uprising. This type of narrative has been observed before, such as in the amended version of the Rwandan Constitution.[72] According to Cats-Baril, post-conflict constitutions may thus "politically manipulate the TJ discourse," which may deepen divisions rather than open up the space for long-term reconciliation and conflict resolution.[73] In Libya, this victors' narrative facilitated *selective* TJ, which benefitted revolutionaries and specific groups, such as Islamists.

Two TJ laws enacted in 2012 (Law No. 38/2012 and Law No. 17/2012) were built on this politically fabricated perpetrator/victim, former regime/revolutionaries dichotomy. After these two laws generated a backlash, the GNC issued the TJL, which has a broader temporary frame (1969 until the end of the transitional period). The first chapter of the TJL states that it applies to crimes committed during the revolution, notably "1. Positions and acts that led to a breach in the social fabric; 2. Acts which were necessary to reinforce the revolution, and which were accompanied by some behavior that did not adhere to its principles." However, the wording of the TJL is vague and suggests it still aims at providing justice for crimes committed under the former regime, or "under the guise of the state," "during the former era."[74] For example, the TJL states that Libya should "[i]ssue laws and constitutional texts revealing the just character of the 17 February Revolution and the injustice of the former regime" (Article 5).[75] However, there are no explicit references to crimes committed by others.

69 Sullo, "Transitional Justice," 176.
70 Constitutional Declaration of Libya, Preamble.
71 See Rep. Independent Fact-Finding Mission on Libya, Human Rights Council Forty-Ninth session, UN Doc. A/HRC/49/4 (2022).
72 Cats-Baril, *Moving Beyond Transitions*, 26; Constitution of Rwanda (2003, rev. 2015), Preamble.
73 Cats-Baril, 65.
74 See Law No. 29, for example Chap. 1, art. 1, art. 4; Chap. 4, art. 26.
75 Id. Chap. 1, art. 5.

Law No. 6/2015[76] reinforced this victors' justice system, granting "general amnesty to all Libyans for crimes committed from 15 February 2011 until 7 September 2015."[77] It opened the door to abuses and blanket amnesties, as Saif Al-Islam Gaddafi's case demonstrated.[78] Although amnesty provisions may be "explicitly tied to a greater interest in national unity and reconciliation" (e.g. South Africa's 1993 interim constitution),[79] amnesties in Libya have been associated with the shielding from accountability of some human rights abusers. The way in which the CD was written allowed for such an amnesty law to exist. Law No.13/2013, named the Political Isolation Law (PIL), is another "victors' justice law," adopted by the parliament under pressure from militias.[80] It enabled the vetting of ex-members of Gaddafi's administration from public administration for 10 years. The PIL received ad hoc constitutional legitimacy through constitutional amendment No. 5/2013, which modified Article 6 (equality before the law) of the CD and specified that "[t]he isolation of some persons and banning ... from sovereign offices and leadership posts in the state's higher departments for a temporary period of time pursuant to a law issued to such effect, and which does not prejudice the right of the persons concerned to appeal, shall not be deemed a violation of the provisions of this declaration."[81] The screening of public administration post-conflict and exclusion of perpetrators of serious human rights violations from key roles within a new regime is often necessary and can be legitimate. However, in Libya, this vague amendment has been used to pursue a revenge type of justice.[82] The PIL affected other TJ instruments, such as the (stillborn) FFRC, as it limited who could be part of its board.

Finally, TJ legislation on reparations reflects the selective justice narrative contained in the CD. Most of these laws glorify the revolution and only provide for reparations for victims of Gaddafi's ex-regime or for losses generated by the armed conflict against it. As ICJ noted,[83] Law No. 10/2012 provided financial compensation to Libyan families or unmarried family members on the first anniversary of the *17 February Revolution*. Law No. 50/2012 set a compensation scheme for political opponents detained *under the Gaddafi regime*, which sparked controversy as some believed it was intended to financially strengthen political Islamism.[84] Law No. 4/2013 provided for the disbursement of a monthly allowance to persons with permanent disability injured (i) *while fighting during the 2011 armed conflict against the Gaddafi regime* or (ii) as civilian victims of *the regime's attacks*. Law No. 1/2014 provided for a monthly allowance for *families of martyrs* or people who went missing in connection to the *17 February Revolution* and the ensuing conflict.[85]

---

76 Law No. 6 of 2015 (Libyan General Amnesty Law).
77 *Libya: Alleged Perpetrators of Crimes under International Law Must Play No Part in Elections* (Brussels: ICJ, 2021).
78 See *Libya: Alleged Perpetrators of Crimes*; *Libya: Surrender Saif al-Islam Gaddafi to ICC* (Beirut: HRW, 2017).
79 Cats-Baril, *Moving Beyond Transitions*, 72.
80 David and Mzioudet, *Personnel Change or Personal Change?*, 1.
81 See Constitutional Declaration of Libya, Article 6 (as amended in September 2013).
82 David and Mzioudet, *Personnel Change or Personal Change?*, 9.
83 *Impunity No More*, 25.
84 Jazia Gebril and Mohammed El-Tobuli, "Compensation for Unlawful Detention under Gaddafi's Regime," *Searching for Justice in Post-Gaddafi Libya*, eds. Jan Michel Otto, Jessica Carlisle, and Suliman Ibrahim (Leiden: Van Vollenhoven Institute, Leiden University, 2013), 138.
85 *Impunity No More*, 25. Emphasis added.

Article 2 of this law excluded "any person who is proven to have opposed the 17 February Revolution at any time and in any form,"[86] which renders it subject to interpretation and abuse.

As such, in Libya, the constitutionalization of a non-neutral narrative on justice has seemingly facilitated and legitimized the establishment of a *selective* TJ system. Because of instabilities in the country immediately after the revolution, justice was constitutionalized with biased intentions, which negatively impacted TJ.

C. When it backfires: from selective justice to selective constitution-making

Finally, these developments in TJ have backfired on the CM process. Firstly, according to Cats-Baril, "where a truth-seeking process as part of TJ precedes constitution-building, it can help to identify past wrongdoing and sets an agenda for change, including identifying recommendations for institutional reforms to be implemented during constitutional reform."[87] In fact, uncovering the truth about past violations may be critical in the writing of a new constitution, as TJ bodies can "form blueprints for institutional reform … [diagnosing] institutional failures and [prescribing] institutional reforms"[88] in view of guaranteeing non-recurrence. Unveiling the truth may help identify victims too, along with potentially serving as a basis for criminal prosecutions, facilitating reparations and restoring their rights. It is thus critical that CM bodies and truth commissions operate together. In Libya, interim governments' inability to set up a truth commission or a strategy dedicated to truth-seeking has meant that there were no findings to inform and support constitutional reforms. It took the international community's initiative to implement a fact-finding mission (FFM, UN Security Council Resolution 43/39) in 2020 to begin the truth-seeking process and document human rights violations that have taken place in Libya since 2016. In the three reports it has published so far, the FFM has highlighted widespread and systematic violations of human rights in Libya, which have hampered Libya's transition to the rule of law.[89] However, the impact of the FFM on the CM process has so far been limited.[90] In its recommendations, the FFM has not clearly stated it suggests constitutional or institutional reforms. According to civil society, the FFM has also altogether not been given enough resources or time to conduct a comprehensive investigation on human rights violations in Libya. In a dangerous, unstable context where it is already difficult for fact-finding missions to function smoothly and succeed, the non- constitutionalization of such mechanisms constitutes yet another obstacle to truth-seeking initiatives in Libya, which may in the future negatively impact the CM process.

86 Law No. 1 of 2014 (Assistance to Families of February 17 Revolution Martyrs and Missing Persons).
87 Cats-Baril, *Moving Beyond Transitions*, 8.
88 Cats-Baril, 22.
89 *Reports of the Independent Fact-Finding Mission on Libya* (UN Human Rights Council Independent Fact-Finding Mission on Libya), available at: https://www.ohchr.org/en/hr-bodies/hrc/libya/index.
90 *Report of the Independent Fact-Finding Mission on Libya* (UN Human Rights Council Independent Fact-Finding Mission on Libya, 2021).

Selective TJ also had an impact on the original design of the CM process. The CDA was established in 2014 in an unstable environment, after the splitting of Libya's authorities into two competing entities.[91] On top of having to operate amidst civil conflict and polarization, in part triggered by post-conflict victors' policies, the composition and work of the CDA were directly impacted by TJ legislation. Although it was revoked in 2015 by the HoR,[92] the PIL impacted the composition of the CDA (elected in February 2014). According to Cherif, due to the PIL, 8 candidates for the CDA elections were originally banned from running, even when they had not been convicted for human rights violations. After they appealed, three of them remained banned.[93] More generally, selective and polarizing TJ perpetuated tensions and created an even more antagonizing environment, unfit for constructive debate and reaching a consensus over a final, satisfying constitutional draft.

Additionally, as established above, the framework on human rights and minorities' rights was limited in the CD and similarly deprioritized in subsequent TJ legislation, which repeatedly failing to clearly establish minorities as victims of human rights violations and discrimination and guarantee that their rights would be recovered. This had negative consequences on the workings of the CDA. The Tebu, Amazigh and Tuareg minorities initially boycotted the CM process, refusing to run for CDA elections as they believed they were both given too few seats and too little assurance that their voices would count in decision-making. Tebu and Tuareg representatives eventually filled their seats after an amendment of the CD.[94] However, the Amazigh minority maintained its boycott of the process, as they considered the amended provision unsatisfactory.[95] As constitutional drafts were written without the direct[96] participation of Libya's largest minority group (the Amazigh represent over 10% of Libya's overall population), there is a likelihood that Amazigh Libyans might reject the constitution in the future. Back in 2014, Khairi Hamisi, a member of the Amazigh Supreme Council (ASC), the body that led the Amazigh boycott of the CDA elections, threatened that if Amazigh rights and culture were not officially recognized in the draft constitution, the Amazigh community would consider boycotting parliamentary elections and a constitutional referendum.[97] According to Hafez Ben Sassi, Mayor of Zuwara, a Libyan city principally populated by Amazigh,[98] "[the] constitution is the most important problem. [Amazigh] recognition is crucial."[99] In June 2021, the ASC reiterated its rejection of Libya's final draft constitution and of a constitutional referendum and declared it would reject

91 Cherif, "Libya's Constitution," 2.
92 See "Libya's Tobruk Parliament Revokes Law Banning Gaddafi-era Officials," *Middle East Eye*, February 13, 2015.
93 Cherif, "Libya's Constitution," 2.
94 Libya Constitutional Declaration, 7th amendment, enact. by GNC (March 11, 2014), available at: https://constitutionnet.org/sites/default/files/constitutional_declaration_amendment-no-7-2014.20140311.eng_.pdf.
95 Johnson, "Conflict Constitution-Making," 309.
96 Amazigh representatives, organized in the Amazigh Supreme Council (directly elected by Amazigh Libyans), were indirectly involved in the work of the CDA as they were consulted throughout the constitution-making process, see Johnson, 7.
97 Jamie Prentis, "Amazigh Awakening: Libya's Largest Minority Wants Recognition," *Al-Monitor*, March 1, 2018.
98 Zuwara is a coastal city of Libya, whose population is mostly Amazigh. The Amazigh minority in Libya is mainly located in the West of Libya, from Zuwara to the Nafusa Mountains.
99 Prentis, "Amazigh Awakening," 97.

"any constitutional rule" that has not been agreed upon by all ethnic components of Libya.[100] It emerges that the lack of TJ measures geared towards providing justice and guarantees of non-recurrence to minorities has therefore so far hindered the CM process.

In this section I have sought to demonstrate that CM and TJ are interwoven with one another and dependent on the context. I have sought to show that, in a conflictual setting, TJ and CM in Libya were highly influenced by power politics and instabilities (they are political processes), and because they are so connected, they facilitated one another's negative developments. While the non-conciliatory nature of CM and TJ in Libya has largely been due to the context in which they were implemented, it has been accentuated and facilitated by their co-dependency.

III. On Division

This final section explores how the interactions between TJ and CM discussed above have concretely impacted reconciliation in a conflict-ridden Libya. I conclude by stressing that it is because divisions and instabilities were so high when TJ and CM were implemented that these processes conjointly and incrementally contributed to deepening divisions in Libya, thereby highlighting the challenges of pursuing CM and TJ in contexts of ongoing conflict.

A. Institutional relationships: from the old to the new … or the old renewed?

In the lead-up to the February 2011 uprising and over the past 12 years, Libyans have used multiple channels to voice their rejection of past methods of governance and spell out what they want for Libya's future when it comes to justice, human rights and respect for the rule of law. For instance, at a conference titled "Truth and Reconciliation: the Way Forward," which was held in Tripoli in 2012, civil society representatives stressed the importance of addressing the root causes of the conflict and of addressing "why the old regime was allowed to function in a way that violated the fundamental human rights of the people."[101] They called for the reconciliation process to be "victim-centered" and to be based on truth-seeking, focusing on three distinct phases: the Gaddafi era, the Revolution to liberation, and post-liberation. Similarly, in 2018, Altai Consulting carried out a survey on national reconciliation in Libya that showed that, when asked about what should occur to construct the future of Libya, 76% of the respondents chose "Establishing the truth about crimes committed after the revolution," 63% chose "Establishing the truth about crimes committed before the revolution," and 60% chose "Ending impunity of militias."[102] This further indicates that a majority of Libyans value accountability for all human rights crimes.

[100] Sami Zaptia, "Amazigh Throw Spanner in Consensual, Constitutionally Based 24 December Elections," *Libya Herald*, June 18, 2021.

[101] "Recommendations of the Conference on 'Truth and Reconciliation'" (The Conference on Truth and Reconciliation: The Way Forward, UNSMIL, Tripoli, December 12, 2012).

[102] *National Reconciliation in Libya: A Baseline Survey* (Altai Consulting for UNDP, 2018), 25.

Libyans have also expressed that, for reconciliation initiatives to be legitimate, there needs to be, amongst other things, a focus on reparations. As such, "justice had a holistic meaning" for respondents, who called for a remedy for human rights abuses, for the ending of discriminations and impunity, the adoption of a constitution guaranteeing the rights and freedoms of all, restoring the rule of law and upholding human rights.

Had they considered Libyans' demands or demonstrated that they have learned or are willing to learn from the past, interim governments could have laid the foundations for institutional relationships based on trust. Indeed, as argued by Cats-Baril, initiatives taken towards the provision of accountability, reparations and truth-seeking, along with institutional reforms, are all guarantees of non-recurrence, which are "necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions."[103] Neutral and efficient TJ, supported by a strong constitutional framework, could have "[provided] concrete remedies to victims [and promoted] reconciliation."[104] Instead, in Libya, which was already in a "transitional [situation], where there is likely to be a trust deficit between the State and the people,"[105] the poor constitutionalization of TJ and the adoption of selective TJ legislation stained the "autobiography of the state" with relics of the authoritarian past, reflecting poorly on new authorities. According to Sharqieh, TJ in Libya "provides no real, objective yardstick to ensure that new public servants are upright and honest — that is, it does nothing to those who are corrupt but had no prior relationship with the regime. In other words, the PIL could just as easily result in new corrupt faces replacing old ones."[106] Libya's interim governments have thus failed to demonstrate they stand in contrast with "the arbitrariness of the authoritarian regime,"[107] undermining their legitimacy.

In fact, Libyans have expressed their mistrust towards authorities in multiple ways. Firstly, Libyans' participation in various elections has declined over the years. In 2012, nearly 3 million Libyans turned out for the GNC elections. Two years later, at the parliamentary elections set to elect members of the HoR, only 630,000 Libyans voted, representing less than a half of Libya's registered voters (1.5 million),[108] and 18% of Libya's potential voters.[109] Similarly, only slightly over 1 million Libyans registered for the CDA elections of 2014 during the two first phases of registration,[110] and only 50% of them turned out on election day.[111] This demonstrates "just how disillusioned Libyans have become with their nation's politics."[112] According to Mustafa Fetouri, indeed, "the majority of Libyans

103 Cats-Baril, *Moving Beyond Transitions*, 32.
104 Cats-Baril, 29.
105 Cats-Baril, 34.
106 Ibrahim Sharqieh, *Reconstructing Libya: Stability through National Reconciliation*, Analysis Paper 9 (Doha: Brookings Doha Center, 2013), 14.
107 Happy David Pradhan, "A Critical Analysis of Transitional Justice and Rule of Law in Post-Authoritarian Democracies," in *2019 International Conference on Law Reform* (Batu: INCLAR), 225, 228.
108 "Libya begins election amid violence," *Al-Jazeera*, June 25, 2014.
109 "Libyans mourn rights activist amid turmoil," *Al-Jazeera*, June 26, 2014.
110 *The 2014 Constitutional Drafting Assembly Elections in Libya*, Final Report (Atlanta: Carter Center, 2014) at 17.
111 *The 2014 Constitutional Drafting Assembly Elections*, 31.
112 Mohamed Fetouri, "Poor election turnout sign of Libya's despair," *Al-Monitor*, June 30, 2014.

did not see the point of voting for another transitional legislature many think will only be like its predecessor. ... [This means] a failure of the political elite as well as the government to gain the nation's trust, reflect the people's will and be truly representative of the public's interest."[113] The population's distrust in their state also manifests itself in Libyans seeking justice from other channels: a report from Altai Consulting shows that, in the "absence of viable alternatives," some victims in Libya are prone to turning to local and non-official mechanisms of justice (traditional tribal justice), "even though [they] rarely address the root causes of a conflict."[114] The lack of trust in government-administered TJ is also visible in the fact that, as found by Lawyers For Justice in Libya (LFJL), most Libyans would be more comfortable with seeing justice being delivered by hybrid courts, composed of both Libyan judges and international actors.[115]

B. Socio-political and interpersonal divides

Beyond legitimizing a newborn state and promoting institutional reconciliation, CM and TJ can promote interpersonal and socio-political reconciliation.[116] According to Abioye, Abubaker or Wallis, CM may be a great tool for the creation of a sense of oneness and social unity/community cohesion.[117] For instance, the way in which a constitution-drafting body is appointed or elected and its composition and inclusiveness may provide "an opportunity for building personal connections and trust across political divides."[118] Similarly, by addressing root causes of a conflict and past abuses, prompting appropriate actions to deal with them, redressing victims' rights and ensuring non-recurrence, TJ may lead to forgiveness, the inclusion of previously marginalized groups, and facilitate co-existence between victims and perpetrators.[119] TJ and CM may thus promote long-term, stable peace, based on bottom-up and top-down reconciliation.

1. Socio-political divides

The approach to justice that was adopted post-2011 seemingly deepened lines of division and aggravated mistrust within Libya's socio-political landscape. In fact, implementing revenge, selective justice has resulted in the creation of a governance system based on exclusion and the concentration of power in the hands of a selection of people. Such selective TJ increases perceptions of injustices among populations, hardens group boundaries and fuels grievances, leading to a breakdown in social cohesion in society.[120] According to Bartu and Wierda for instance, "[f]ar from promoting unity, the [PIL] increased tensions and deepened divisions within the

113 Fetouri, "Poor election turnout".
114 *National Reconciliation in Libya*, 58.
115 Elmessiry and Merkova, *'Justice is the Only Way Forward'*, 27.
116 Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization* (Stockholm: International IDEA, 2006), 13.
117 See Funmi Abioye, "Constitution-Making, Legitimacy and the Rule of Law: A Comparative Analysis," *The Comparative and International Law Journal of Southern Africa* 44, no. 1 (2011): 59-79; Habiba Abubaker, "Empirical Research on Constitutional Drafting Processes Following War or Internal Disturbances in Iraq, Tunisia, Kosovo and Sudan," *Max Planck Yearbook of United Nations Law Online* 23, no. 1 (2020): 314-339.
118 Tereza Jermanová, "From Mistrust to Understanding: Inclusive Constitution-Making Design and Agreement in Tunisia," *Political Research Quarterly* 74, no. 3 (2020).
119 Paul Seils, *After the Rupture: Understanding Transitional Justice and Reconciliation*, ICTJ (New York: ICTJ, 2016).
120 Alexandre et. al., *Societal Dynamics and Fragility*, see for instance 4, 66, 77.

parliament and the wider political landscape by creating a new class of disaffected citizens, thereby significantly souring the political climate in the country."[121] According to Mzioudet and David, the PIL carried a negative, rigid message about human nature, "assuming that all people somewhat associated with the Qaddafi regime are unchangeable and incapable of moral development."[122] The PIL is therefore unforgiving, excluding a group of people and labelling them as enemies, even when they perhaps never were.[123] According to Muhammad Toumi, a GNC member, "[t]here is no such thing as defection from the old regime ... it was smart reading ... they jumped from the sinking boat ... The law should not be seen as targeting individuals, but rather the way of thinking and acting under the former regime."[124] Such a discourse may derive from a place of hurt, distrust,[125] or political self-interest. In fact, the PIL led to a purging of the parliament and redistribution of power within the political arena, notably in the hands of pro-revolutionary and Islamist-leaning deputies.[126] This analysis demonstrates how, in times of conflict, TJ may be used to advance people's and groups' self-interests.

According to Mzioudet and David, interim constitutional documents and the TJ process (more specifically the PIL), have "the potential to aggravate the so-called "spoiler problem," a concept coined by Stephen Stedman."[127] After a conflict, actors who are cast away from politics may turn into spoilers of a transitional process they do not benefit from. This echoes Alexandre et al.'s theory that groups who perceive they are treated unfairly will be uncooperative and will "coalesce inwards."[128] According to Gaub, if the PIL were still in force, 500,000 people would be purged, which represents 8% of Libya's wage-earning population. As three quarters of jobs in Libya are in the public administration, those 8% of the population would most likely not be able to find a job, and, potentially, would fall into poverty.[129] Based on Gaub's analysis, Sullo argued that because Libya is "a patriarchal society where on average five persons depend on each wage-earner," 2,500,000 Libyans might be indirectly affected by such a law (one third of Libya's population).[130] The PIL could "destroy governing structures," excluding those with experience, such as, for example, almost half of Libya's former members of the judiciary.[131] Such TJ legislation gives no chance to ex-Gaddafi regime members to either take accountability for their crimes or to simply join Libya's new administration if they have not committed any crime. It furthers divisions in the political landscape through exclusion and the creation of spoilers.

---

121 Felix-Anselm Van Lier, "Constitution-Making as a Tool for State-Building? Insights from An Ethnographic Analysis of the Libyan Constitution-Making Process," Working Paper No. 192, *Max Planck Institute for Social Anthropology Working Papers* (2018): 3.

122 David and Mzioudet, *Personnel Change or Personal Change?*, 9.

123 David and Mzioudet.

124 Sharqieh, *Reconstructing Libya*, 11.

125 According to Sharqieh, *Reconstructing Libya*, 12, "revolutionaries, victims of torture, and the families of the victims of the Abu Salim prison massacre stood among the strongest advocates for the passage and enforcement of the PIL."

126 Van Lier, "Constitution-Making as a Tool for State-Building?," 9.

127 David and Mzioudet, *Personnel Change or Personal Change?*, 9.

128 Alexandre et. al., *Societal Dynamics and Fragility*, 4.

129 Sullo, "Transitional Justice," 729.

130 Sullo, 728-729.

131 Sharqieh, *Reconstructing Libya*, 13-14.

As mentioned above, CM and TJ alienated, to some extent, minorities in Libya, reinforcing institutional but also socio-political divides. The drafting process within the CDA was confined within the elite Arab majority and excluded fair representations of minorities, inevitably creating tensions. Although the CDA managed to reach consensus on a draft, "[its] debates were shaped by and deeply embedded in the country's complex political and social divisions and structures, both past and present, which prevented it from offering a viable and widely accepted vision for a future Libyan State."[132] As argued by Bannon, "[n]o constitution-drafting procedure can fully mitigate ethnic tensions. ... It is nevertheless important that the constitution-writing process avoid giving one ethnic group or coalition the ability (or the appearance of the ability) to give itself monopoly power or to disempower another ethnic group."[133] This may, again, lead to a spoiler problem and the reignition of conflict.

Interactions between CM and TJ seemingly created "cast-away communities'"and a "pool of potential spoilers" of conflict resolution rather than lead to socio-political reconciliation. According to Libyan law professor Al-Hadi Bu Hamra, TJ laws may "split the society," creating a force against the new state, similarly to de-Baathification laws in Iraq, which fueled sectarianism.[134] Although sectarianism is not a threat in Libya, divisive TJ laws could aggravate other "social fault lines."[135] Divisions within the political landscape in Libya have since significantly impacted conflict resolution, as has for example been observed with short-lasting cease-fires, and, more recently, with the postponement of national elections and the renewal of tensions between rival authorities claiming power in Libya.[136]

2. Spillover to society: fragile national cohesion and sense of belonging

As Mzioudet and David argue, a "reconciliatory tone at the macro-political level is likely to [spill-over and] reverberate at the individual level." In Libya, one could observe the opposite, as the interaction between CM and TJ i ultimately undermined interpersonal reconciliation.[137] Rather than promoting a sense of oneness and belonging within society,[138] selective and discriminatory TJ laws created new categories of disaffection, as mentioned above, and failed to address prior discriminations. Additionally, due to the authorities' inability and at times unwillingness to enforce the law and hold responsible those having committed human rights violations, many perpetrators run free. This climate of impunity and the absence of the rule of law has so far created an unsafe environment for most Libyans, whether they are part of outcast groups or not, as rebels have sometimes developed a feeling of entitlement.[139] In fact, divisive legislation created a victors/vanquished, and more generally an us/them unforgiving dichotomy, affecting Libya at the micro-level. It has notably led to some holding grievances against other communities/individuals,

132 Ross, "Lost in Transition," 18.
133 Alicia L. Bannon, "Designing a Constitution-Drafting Process: Lessons from Kenya," *The Yale Law Journal* 116, no. 8 (2007): 1854.
134 Sharqieh, *Reconstructing Libya*, 13.
135 Sharqieh.
136 *Steering Libya Past Another Perilous Crossroads*, Crisis Group Middle East and North Africa Briefing N°85 (Tripoli/Rome/Brussels: Crisis Group, 2022).
137 David and Mzioudet, *Personnel Change or Personal Change?*, 10.
138 Abioye, "Constitution-Making, Legitimacy," 78.
139 Sharqieh, *Reconstructing Libya*, 18.

or feeling anger and a desire for revenge or retaliation.[140] According to Mzioudet and David, this approach may notably lead to the social exclusion of the people labelled as "persona non grata" (as well as, by association, their family, tribe, etc.) and discrimination on the labor market.[141] In the absence of functioning TJ mechanisms in Libya, "malicious allegations that have fostered hatred towards certain groups" have led to human rights abuses against entire communities.[142] In extreme cases, revenge has led to assassination.[143] For instance, General Abdulfattah Younes, Minister of the Interior under Gaddafi, who defected a few days after the beginning of the Revolution and became one of the leaders of the rebels, is believed to have been assassinated by Jihadists in July 2011. More generally, security forces and police stations allegedly affiliated with Gaddafi's ex-regime have suffered many attacks post-revolution, likely perpetrated by ex-victims of Gaddafi's regime and/or regime loyalists who took revenge on defectors.[144] The culture of victors has led entire towns and tribes to be generally classified as *azlam* (Gaddafi cronies) and being shamed and excluded, even when only a few in these communities were Gaddafi's allies. Bani Walid, town of around 80,000 people, is blamed for the wrongdoings of Gaddafi's regime, when only a handful of people from the town fought for the ex-authoritarian leader.[145] This is therefore keeping the country divided: as a tribal leader put it, "[t]hose of us who helped Qaddafi don't represent our tribe. We're reaching out to our fellow Libyans to build a new country. But if we continue to be excluded, we'll be left with only one option: looking for those who are also excluded and building new coalitions among the marginalized. We will be forced to fight back."[146]

According to Skapska, "coping with past human rights violations — especially punishing the perpetrators and instigators — can contribute to the reinstatement of basic accepted values in society."[147] In the absence of accountability, there has been little public deterrence for human rights crimes, which has led to violent conflict frequently erupting. As one of LFJL's interviewees explained, "[i]f the law is not applied, then revenge becomes the only answer, and then blood will reach our knees. If there is justice, then peace will prevail, and the cycle of revenge will stop."[148] Alongside trials, truth commissions hold a great potential for social reconciliation and conflict resolution. Such commissions may help identify and hold perpetrators accountable, publicly acknowledge sufferings, and allow people wrongfully accused to clear their reputation. According to the Chair of an NGO and women's, youth and minority rights activist in the south of Libya, "[w]hat keeps Libya a country at war is the absence of truth …

140 Elmessiry and Merkova, *'Justice is the Only Way Forward'*, 13; Sharqieh, *Reconstructing Libya*, 10.
141 David and Mzioudet, *Personnel Change or Personal Change?*, 9.
142 Elmessiry and Merkova, *'Justice is the Only Way Forward'*, 14.
143 Sharqieh, *Reconstructing Libya*, 13.
144 Author's interview with Sufyan Omeish, civil society activist primarily in reconciliation and peacebuilding in Libya, Tripoli, January 2013, in Sharqieh, *Reconstructing Libya*, 10.
145 Sharqieh, 18.
146 Interviewee, tribal figure, Tripoli 2013, in Sharqieh, 13.
147 Skapska, "Institutional Innovations and Moral Foundations of Constitutionalism," 239.
148 A representative of families of victims discovered in mass graves in Tarhuna, in Elmessiry and Merkova, *'Justice is the Only Way Forward'*, 6.

so many crimes have been committed and people don't know the truth so we keep going around in circles."[149] The absence of truth prevents grief and moving forward, and rather leads to further "re-victimization."[150] Failing to unveil the truth and adopt a commonly agreed upon narrative about the past has generally affected Libyans' sense of unity and oneness, and, therefore, national reconciliation. Finally, in different surveys, a large majority of Libyans have stressed the importance of reparations in enhancing community reconciliation (e.g. 75.3% of Altai Consulting survey respondents thought so).[151] In LFJL's survey results, respondents cited reparations as a necessary step to provide support to victims to counter long-term harm. Non-material support (psycho-social) to victims was considered as the most urgently needed to help Libyans heal and manage their anger.[152] Indeed, according to a CSO representative, almost all Libyans are traumatized by the violence of the past 11 years.[153] Yet, TJ legislation and interim constitutional documents have failed to adopt a victim-centered approach to justice and reparation or to give Libyans psychological support to heal and move forward (i.e., learn to live in harmony, build trust and mutual respect within society and forgive).

As such, lingering grievances left unaddressed by authorities that failed to implement fair and efficient TJ and CM processes have generally led to continued conflict and difficulties in forming a social compact in Libya. More generally, this section has shown that the interaction between CM and TJ in Libya, at a time of conflict, has undermined reconciliation at the institutional, socio-political and interpersonal levels.

IV. Bad timing?

This article has shown that, in Libya, CM and TJ were designed and implemented in a way that has resulted in them having negatively affected one another's ability to foster reconciliation at all levels. However, it has also highlighted the fact that these developments have been greatly determined by the context in which TJ and CM were implemented.

In fact, over the years, a constant atmosphere of armed conflict offered little avenues for reconciliation. The environment in which TJ and CM unfolded was not conducive to agreements, compromises, or neutrality: self-interested actors and instability constantly determined the path these processes took. Expectations for these processes to foster reconciliation and support one another in this endeavor must therefore be weighed against the context in which they unfold: if the game is rigged, how can one expect the players to win? TJ and CM are not standalone, neutral legal processes: they are political processes, therefore bound to be politicized, and the way they will be depends on the context in which they are designed and implemented. Beyond TJ having been undermined

149 Elmessiry and Merkova, 12.
150 Elmessiry and Merkova, 17.
151 *National Reconciliation in Libya,* 44.
152 Elmessiry and Merkova, *'Justice is the Only Way Forward'*, 30.
153 Elmessiry and Merkova, 31.

by its limited constitutionalization, its path was conditioned by actors fueled by self-interest, an unstable context, the presence of opposing governments, conflicts, and other variables that altered its trajectory. The same goes for CM.

This begs the question: is it premature to even address reconciliation, constitution-making and transitional justice in Libya? In other words, are CM and TJ timely processes, appropriate and capable of success in today's Libyan context? I argue that although the conditions are not optimal for CM and TJ to be implemented in Libya, it does not mean they should be ruled out and deemed inappropriate or doomed to fail. Indeed, arguing so would amount to defending the idea that peace must precede justice. My argument is rather that, in contemporary Libya, TJ and CM measures may still be implemented, but expectations for what they should be as well as how much and when they will impact one another's ability to promote reconciliation should be adapted to context.

As such, when it comes to implementing TJ measures such as lustration, accountability or even reparations, in today's context, and given the analysis carried above, it seems as though an initial level of willingness to reconcile must first be reached, as these measures may in themselves be divisive. Institutional reforms and the reinforcement of the rule of law also requires there to be stable, unitary institutions and political parties in place to implement measures and reforms that are coherent, consensual, and therefore long lasting. This article suggests that constitutionalizing TJ is for instance not necessarily timely, as in contexts of conflict and deep division, it may turn out to be a double-edged sword. On the other hand, preemptive TJ measures may be implemented before peace is reached in Libya, in view of preparing the ground for subsequent initiatives, particularly by helping build trust.[154] Fact-finding missions (FFMs) and other truth-seeking/documentations efforts may not necessarily serve the CM process immediately but may do so when conditions for a CM process to be successfully implemented arise. Awareness raising, the setting up of victim and survivor support groups, reporting on TJ, research, and trainings for Libyan civil society to carry out these initiatives successfully may also all be promoted in times of conflict to benefit TJ and CM at later dates.[155]

Additionally, adopting a new interim constitution, provided it is up to date with recent socio-political developments in Libya and draws lessons from failures of the early CM process, may be appropriate today. A new, conciliatory interim constitution, incorporating a TJ narrative aimed at reconciliation (similar to that of South Africa), could indeed allow time for trust-building[156] and contribute towards creating better conditions for the pursuit of a permanent CM process and of TJ. In fact, according to IDEA, interim constitutions may be thought of as bargains, or "[bridges] between an illegitimate and a more legitimate regime." They may, as Rodrigues and Goss respectively argue, "provide space and time to undertake more comprehensive discussions regarding longer-term settlements"[157] and "can have a mutually reinforcing relationship with transitional justice mechanisms."[158]

---

154 See Christalla Yakinthou, Carolyn Buff, Lisa Clifford et al., *Advancing Transitional Justice in Conflict-Affected Contexts: A Case Study for Libya* (Washington DC: IREX, 2016).
155 Yakinthou et al., *Advancing Transitional Justice*.
156 Yakinthou et al., 40.
157 Rodrigues, "Letting off Steam," 33.
158 Goss, "Interim Constitutions," 167.

All in all, incremental and local pre-TJ and CM measures may therefore be more appropriate and realistic solutions to Libya's deadlock, holding less potential for an adverse impact on reconciliation than the large-scale governmental measures that have been implemented until now.

Conclusion

In this article, I have sought to shed light on the interconnection between CM and TJ in a context of conflict. Whilst these two processes tend to be studied and implemented separately, they evolve within the same context, share a common agenda, and are in constant interaction, which suggests that they should be approached as a duo/tandem, part and parcel of conflict or power-politics. In fact, CM and TJ may shape a conflict through fostering reconciliation, but they are also ultimately shaped by conflict and divisions, and can therefore turn into contributing factors to a conflict. They are political processes that may indeed suffer from, reflect, and ultimately amplify political instabilities. Because they are connected and shape one another, they can exponentially worsen conflict in an environment that is not conducive to reconciliation. Taking Libya as a case study for this article helped reveal that in post-revolution, conflict-affected Libya, the interaction between CM and TJ has had a negative impact on reconciliation at all levels. As noted in a Konrad Adenauer Stiftung report, "Libya's usual divides are still vivid and ... major figures on both ends of the political spectrum lack the willingness to work toward genuine national reconciliation. Those figures are still engaged in a tug-of-war that has made it near impossible for the new executive to act as an overarching authority and transcend regional divisions."[159] In fact, as continued bloodshed, delayed elections and the absence of a consensual constitutional framework attest, "Libya's past is [still] full of grudges waiting to be settled."[160] CM and TJ were implemented with biased intentions and inevitably got stuck in a negative cycle, leading to growing distrust and frustration with politics amongst Libyans and deepening divisions at the micro and macro levels. The main takeaway of this article would be that, to meaningfully assess the successes and failures of the interaction between CM and TJ in Libya, key contextual factors must be weighed in. Conducting a more informed analysis helps adopt more realistic expectations for CM, TJ and reconciliation, think of more appropriate measures, and avoid fueling conflict. CM and TJ are still timely and capable of success in Libya, but they must be conceived as highly dependent on context and on one another for their design to be appropriate and their success to be optimized.

[159] *Inside Libya*, Monthly Report No.11 (Tunis: KAS, 2021), 16.
[160] Sharqieh, *Reconstructing Libya*, 10.

Bibliography

- Abioye, F.T. "Constitution-Making, Legitimacy and the Rule of Law: A Comparative Analysis." *The Comparative and International Law Journal of Southern Africa* 44, no. 1 (2011): 59-79.
- Abubaker, Habiba. "Empirical Research on Constitutional Drafting Processes Following War or Internal Disturbances in Iraq, Tunisia, Kosovo and Sudan." *Max Planck Yearbook of United Nations Law Online* 23, no. 1 (2020): 314-339.
- Ahmed, Dawood and Elliot Bulmer. *Limitation Clauses*. Constitution-Building Primer 11. Stockholm: International IDEA, 2014.
- Al-Ali, Zaid. *Libya's Final Draft Constitution: A Contextual Analysis*. Stockholm: International IDEA, 2020.
- Alexandre, Marc et. al. *Societal Dynamics and Fragility: Engaging Societies in Responding to Fragile Situations*. New Frontiers of Social Policy 74272. Washington DC: World Bank, 2013.
- Bannon, Alicia L. "Designing a Constitution-Drafting Process: Lessons from Kenya." *The Yale Law Journal* 116, no. 8 (2007): 1824-1872.
- Brandt, Michele, Jill Cottrell, Yash Ghai, and Anthony Regan. *Constitution-Making and Reform: Options for the Process*. Interpeace, 2011.
- Caitlin Goss. "Interim Constitutions and the Invisible Constitution." In *The Invisible Constitution in Comparative Perspective* edited by Dixon, Rosalind and Adrienne Stone. Cambridge: Cambridge University Press, 2018.
- Cats-Baril, Amanda. *Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building*. International IDEA Policy Paper 22. Stockholm: International IDEA, 2019.
- Cherif, Nedra. "Libya's Constitution: between Conflict and Compromise." Middle East Directions 2. Fiesole: Robert Schuman Centre for Advanced Studies, European University Institute, 2021.
- David, Roman and Houda Mzioudet. *Personnel Change or Personal Change? Rethinking Libya's Political Isolation Law*. Paper Series 4. Doha: Brookings Doha Center, 2014.
- El Fegiery, Moataz. *Truth and Reconciliation? Transitional Justice in Egypt, Libya and Tunisia*. Policy Brief 177. Madrid: FRIDE, 2014.
- Elmessiry, Mohamed and Sonya Merkova. *'Justice is the Only Way Forward': Perceptions of Justice in Libya Ten Years On*. London: Lawyers for Justice in Libya, 2022.
- Gebril, Jazia and Mohammed El-Tobuli. "Compensation for Unlawful Detention under Gaddafi's Regime." In *Searching for Justice in Post-Gaddafi Libya* edited by Otto, Jan Michel, Jessica Carlisle, and Suliman Ibrahim. Leiden: Van Vollenhoven Institute, Leiden University, 2013.

- Ghai, Yash and Guido Galli, *Constitution Building Processes and Democratization*. Stockholm: International IDEA, 2006.
- Halmai, Gábor. "Transitional Justice, Transitional Constitutionalism and Constitutional Culture." In *Comparative Constitutional Theory* edited by Jacobsohn, Gary and Miguel Schor. Cheltenham: Edward Elgar Publishing, 2017.
- ———. "The Role of Constitutionalism in Transitional Justice Processes in Central Europe" (2019).
- Hamad, Mahmoud. "A Law of Diminishing Returns: Transitional Justice in Post-Revolutionary Libya." *Arab Centre for Research and Policy Studies* 3, no. 1 (2020): 23-37.
- Hart, Vivien. "Constitution-making and the Transformation of Conflict." *Peace Change* 26, no. 2 (2001): 153-176.
- *Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya*. Geneva: ICJ, 2020.
- *Inside Libya*. Monthly Report No.11. Tunis: KAS, 2021.
- Jamal, Amal and Anna Kensicki. "A Theory of Critical Junctures for Democratization: A Comparative Examination of Constitution-Making in Egypt and Tunisia." *The Law & Ethics of Human Rights* 10, no. 1 (2016): 186-187.
- Jermanová, Tereza. "From Mistrust to Understanding: Inclusive Constitution-Making Design and Agreement in Tunisia." *Political Research Quarterly* 74, no. 3 (2020): 1-14.
- Johnson, Darin E.W. "Conflict Constitution-Making in Libya and Yemen." *University of Pennsylvania Journal of International Law* 39, no. 2 (2018): 293-354.
- Kelman, Herbert. "Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Groups." *Landscapes of Violence* 1, no. 1 (2001).
- Klein, Claude and András Sajó. "Constitution-Making: Process and Substance." In *The Oxford Handbook of Comparative Constitutional Law* edited by Rosenfeld, Michel and András Sajó. Oxford: Oxford University Press, 2012.
- *Libya: Alleged Perpetrators of Crimes under International Law Must Play No Part in Elections*. Brussels: ICJ, 2021.
- Mezran, Karim and Duncan Pickard. *Negotiating Libya's Constitution*. Issue Brief. Washington, DC: Atlantic Council, 2014.
- *National Reconciliation in Libya: A Baseline Survey*. Altai Consulting for UNDP, 2018.
- Pradhan, Happy David. "A Critical Analysis of Transitional Justice and Rule of Law in Post-Authoritarian Democracies." In *2019 International Conference on Law Reform*. Batu: INCLAR.
- "Recommendations of the Conference on 'Truth and Reconciliation'". The Conference on Truth and Reconciliation: The Way Forward. UNSMIL, Tripoli, December 12, 2012.

- *Reuniting Libya, Divided Once More*. Watch List 2022 – Spring Update. Brussels: Crisis Group, 2022.
- Rodrigues, Charmaine. "Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-cooker of Transitions in Conflict-affected States?." *Global Constitutionalism* 6, no. 1 (2017): 33-62.
- Ross, Simona. "Lost in Transition: Constitutional Legitimacy in Libya." *JCL MENA* 2 (2022): 4-27.
- Seils, Paul. *After the Rupture: Understanding Transitional Justice and Reconciliation*. New York: ICTJ, 2016.
- Sharqieh, Ibrahim. *Reconstructing Libya: Stability through National Reconciliation*. Analysis Paper 9. Doha: Brookings Doha Center, 2013.
- Skapska, Grazyna. "Institutional Innovations and Moral Foundations of Constitutionalism in East Central Europe: Coping with the Past Human Rights Violations." In *Constitutionalism and Political Reconstruction* edited by Arjomand, Saïd Amir. Leiden: Brill Academic Pub, 2007.
- *Steering Libya Past Another Perilous Crossroads*. Crisis Group Middle East and North Africa Briefing N°85. Tripoli/Rome/Brussels: Crisis Group, 2022.
- Sullo, Pietro. Transitional Justice in the Libyan Constitutional Transition." *Diritti umani e diritto internazionale* 3 (2020): 709-731.
- *The 2014 Constitutional Drafting Assembly Elections in Libya*. Final Report. Atlanta: Carter Center, 2014.
- *Towards National Reconciliation in Libya*. IRF Project Report. New York: UN Peacebuilding Support Office, 2016.
- *Transitional Justice in Post-conflict and Fragile Settings: Progress and Challenges for Reparations, Truth-Telling, and Children*. New York: ICTJ.
- UN Secretary-General. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. UN Doc. S/2004/616. New York: United Nations, 2004.
- Van Lier, Felix-Anselm. "Constitution-Making as a Tool for State-Building? Insights from An Ethnographic Analysis of the Libyan Constitution-Making Process." Working Paper No. 192, *Max Planck Institute for Social Anthropology Working Papers* (2018).
- Yakinthou, Christalla, Carolyn Buff, Lisa Clifford et al.. *Advancing Transitional Justice in Conflict-Affected Contexts: A Case Study for Libya*. Washington DC: IREX, 2016.