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The Tunisian Judicial Sector: Analysis and Recommendations

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Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

This Working Paper Series, "Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia", stems from the constitution building processes in Egypt and Tunisia in the wake of the Arab Spring. As one of the primary international institutions supporting constitution building in both countries, **International IDEA** commissioned leading international experts to produce research papers on specific issues of constitutional design on the agenda of the constitutional assemblies of Tunisia and Egypt.

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"The Tunisian Judicial Sector: Analysis and Recommendations"

Abstract

The success of a constitutional transition in a post-authoritarian context depends to a great degree on whether the courts can safeguard the principles of democracy embedded in a new constitution. The goal of judicial system design in democratic societies is to have a judiciary that is independent, accountable and competent. Furthermore, the courts must also be perceived as such by citizens. As Tunisia continues to consolidate constitutional democracy after the Arab Spring, the architects of the new Tunisian Constitution must pay careful attention to these imperatives. This paper brings to bear some of the recent comparative research on judicial independence, the design of the judicial system, and constitutional reform, and notes that while Tunisia's 22 April 2013 draft Constitution begins the process of building a new democratic judiciary, further detail is required. The institutional choices made in constitution-making will shape the judiciary for some time to come. The paper ends with recommendations for how remaining concerns could be addressed.

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The Tunisian Judicial Sector: Analysis and Recommendations

Tom Ginsburg

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1. Introduction

This paper was prepared at the request of International IDEA for the purpose of informing discussions of judicial reform in Tunisia. It brings to bear some of the recent comparative research on judicial independence, the design of the judicial system, and constitutional reform. In preparing the paper, I have had the privilege to review the document prepared by Judge Ahmed Ouerfelli, entitled "Judicial Reform in Tunisia: Constitutional Principles Relevant to the Judiciary".[1] This very thoughtful report provides a deep analysis of the major choices facing Tunisia in this area. I have also reviewed the International IDEA translation of the draft Constitutions of 14 August 2012, 14 December 2012, and 22 April 2013.[2] My comments throughout refer to the April 2013 draft Constitution, unless otherwise noted.

At the outset, I should state that I appreciate the general approach to constitution-making in Tunisia. The drafters seem to be thinking about the big issues and avoiding pressures to produce a rushed draft. Judge Ouerfelli's report reflects this general approach by asking deep conceptual questions about the nature of the judiciary that Tunisia should have. Because I agree with many of his conclusions and recommendations, I will not comment on every one, but rather make some comparative comments that may help provide further detail and information for Tunisian decision-makers.

The goal of judicial system design in democratic societies is to have a judiciary that is *independent, accountable* and *competent*. Furthermore, as described below, the courts must also be *perceived as such* by the citizens. There are tradeoffs among these goals: a judiciary that is completely independent, without accountability, might become corrupt or issue judgments that are poorly received by the people. A judiciary that is completely accountable for every decision may lack independence. Thus the problem is one of *optimizing* among several different goals, and *calibrating* the appropriate levels of independence and accountability.

Judge Ouerfelli's critique touches on many aspects of modern government that have been lamented in other countries. He notes that in modern government the executive is dominant but also criticizes Tunisian magistrates for being "slaves of written legislation" (para. 11). What is needed, he suggests, is a strong and competent judiciary, which would be a new feature in modern Tunisian history. But getting there is a challenge. Indeed, he insightfully notes that politicians are unlikely to demand it (para. 20).

Furthermore in any new democracy there is likely to be distrust of the judiciary that served under the previous regime. There is a risk that uncoordinated or careless purges of the judiciary can undermine it just at the moment that it needs to play a stronger role in society. This is the problem of judicial transformation: even if everyone agrees that Tunisia would like a strong, competent, independent and accountable judiciary, how do we get there? The next section of this paper will discuss these issues at a general level. Then I will move to discuss specific institutions.

2. The politics of judicial empowerment and transformation

The issue of judicial empowerment is one that has been studied in various countries. My view is that judicial power *can* be in the interests of politicians, particularly in a democracy. I call this the "insurance theory" of the judiciary.[3] Imagine two political parties are writing a constitution for a new democracy, and that they do so considering their prospective position in post-constitutional elections. If one party is much stronger than the other one, it will believe that it will control the government after the elections. It will not wish to have an independent judiciary, because that will restrict its freedom of action. We will see little judicial power or independence in the constitution.

Now consider an alternative scenario in which the two parties are equally balanced. Each will be uncertain as to whether it will control the post-constitutional political order. In such a circumstance, the parties might each decide that an independent, powerful judiciary is a good thing, because it can help protect the party if it loses the elections. Powerful judges can protect human rights, exercise constitutional review, and provide a neutral forum to challenge government policies. Judicial power becomes a kind of "insurance policy" for potential losing parties. This theory suggests that more competitive democracies, where political forces are balanced, will produce more powerful judiciaries than countries in which there is a single dominant party. There is some comparative evidence in support of this proposition.

The issue of judicial transformation, discussed in paras. 20-27 of Judge Ouerfelli's report, is a slightly different one, and a major challenge. Even assuming there is the will to produce a powerful and independent judiciary, one must decide what to do with the existing judges. There is a natural impulse in a new democracy to want to "clean up" the judiciary, removing those who were either corrupt or politically too close to the old regime. But the "cleaning" must be done in a very careful way. Many old judges may be quite competent and indeed uniquely able to contribute to the development of the legal system. Judges may resist efforts to examine their record, and morale may decline. And if everyone is fired, there will be no one qualified to judge cases currently on the docket. The constitution-making process provides an opportunity to transform the judicial personnel, but if the process fails, there will not usually be a second chance.

One recent example of a successful process is currently ongoing in Kenya, where a Judges and Magistrates Vetting Board has been proceeding for nearly a year.[4] This Board was created by the Constitution of Kenya (2010) specifically to address the problem of judicial transformation. The Board consists of six Kenyans and three foreign nationals from the region, including judges from Ghana, Zambia and South Africa. (The South African is the famous dissident Albie Sachs, who survived an assassination attempt by the racist regime to become one of the first judges of the post-transition Constitutional Court.) The Board meets with *every* judge and magistrate who had served under the old regime for an interview in private (unless the judge wants it to be in public). The procedure is fairly loose: it is not a formal disciplinary hearing about misconduct, but rather an assessment of whether the judge will *likely contribute to a judiciary in which the public can have faith*. The Board must issue a written opinion explaining every dismissal. I expect that similar institutions will be adopted in other countries in years ahead. An important contributing factor to the success of judicial transformation in Kenya has been a dynamic new Chief Justice who has been able to communicate with the public about the project of institutional transformation.

In other countries, vetting processes have failed or broken down. For example, in the Maldives, the Constitution of 2008 required that every judge be assessed by the new Judicial Council. But the existing judges, who had very low educational qualifications, were so afraid of losing their jobs that they were able to capture the judicial council. As a result, not a single judge was removed from office, and public confidence in the judiciary remains very low.

3. Judicial system design and judicial reputation

As mentioned above, the problem of judicial system design involves tradeoffs between different goals. Everyone agrees that judicial independence is important but the concept is often poorly specified. Many definitions fail to articulate who the judges are supposed to be independent from, toward what end, and over what set of cases. At its core, however, judicial independence involves the ability and willingness of courts to decide cases according to the law, without undue regard to the views of other government actors.

This is important but there are other values that we might want out of a judiciary, such as consistency, accuracy, predictability, and speedy decision-making.

A related issue is that of judicial reputation. A judiciary that repeatedly decides cases in legally implausible ways, under the influence of government actors, is likely to suffer a decline in its reputation for independence and quality. Ultimately, to be effective, the judiciary needs not only to perform its work independently and well, but to be *seen* as performing the work independently and well. Reputation is a delicate thing: as a famous American, Benjamin Franklin, once said: It takes many good deeds to build a good reputation, and only one bad one to lose it.

The problem of judicial reputation has some distinctive features. Economists would call it a problem of *team production*.[5] This means that the reputation of each individual judge is partly a result of his or her individual effort, but not entirely. The reputation of each individual also depends on the effort of the judiciary as a whole. The design of the judicial system gives judges incentives to invest energy in their individual reputations or those of the judiciary as a whole; and both kind of investments are necessary. A system that relies exclusively on individual reputation may have a poor collective reputation; conversely a system that relies on mechanisms that promote collective reputation will not incentivize individuals to work hard enough, because they personally will not get the full credit for their effort.

Consider the analogy to a sports team. Sometimes, an individual football player may put too much effort into their own reputation at the expense of the team: for example, trying to score difficult goals instead of passing to team-mates who have an easier chance at a goal. This behavior will lead to worse performance of the team as a whole, even if the individual player scores more goals in a season. On the other hand, if all players share equally without earning individual credit, each may give less than 100% effort, and this can lead the team to lose the game.

Some judicial system designs emphasize the individual and others emphasize the collective. Broadly speaking, we have two different kinds of judiciaries. Sometimes these are called the “career” and “recognition” models. In the career model (found in many civil law countries), judges will enter the judiciary at a young age. They will spend their whole career in the judiciary, climbing a hierarchy, until eventually reaching a court of appeals or supreme court. The model is like the civil service and the judge is like a faceless bureaucrat, with relatively low social status and reputation. The judicial opinions will be anonymous, in keeping with the ideology that it is the “law” speaking, rather than the judge. Cases can be appealed *de novo* (heard again in their entirety at the appellate level). This is the logic of bureaucracy and has the advantage of helping to ensure that decisions are consistently decided, even if different judges make the decisions.

In a recognition model (found in many common law countries) judges are appointed relatively late in life, after successful careers as lawyers, prosecutors, or professors. They are appointed “in recognition of” their achievements, because they have already proved their competence and skill. They are well-paid and highly respected. Their opinions are long and reflect the views and writing style of the individual authors. Judges can dissent if they disagree with the majority. Appeals are limited, for example to errors of law, and *de novo* appeal is quite rare. This means there may be more inconsistency. In this system, we recognize that judges have some discretion, and must thus be accountable before the public. Because the society is confident in their skill, it is comfortable giving them power.

The career and recognition models emphasize, respectively, collective and individual reputation. In the career model, individual judges will be less willing to invest energy in developing the law, and the legal system as a whole may be less creative and responsive. In the recognition model, individual judges may invest too much energy in their individual reputation, leading them to pay too little attention to their work. For example, some American judges spend a lot of time writing books and giving speeches.

Furthermore, judges who appear in the media frequently might ultimately harm the collective reputation of the judiciary. The Spanish investigating magistrate Baltasar Garzón became internationally famous for prosecuting famous people, but himself seems to have paid insufficient attention to formal legal requirements. In short, there are tradeoffs and no single correct way to design a judiciary to maximize reputation.

As Judge Ouerfelli notes (paras. 52-55, 61) Tunisia, like France, has traditionally leaned toward a career model, but many countries are now shifting to a kind of hybrid model, with elements of the career model and elements of the recognition model. The reasons for this shift are unclear, but may have something to do with the role of the media. Judge Ouerfelli's recommendations reflect this kind of approach, with a move toward a "recognition" judiciary. For example, he suggests that judges be above the age of 40 (para. 101); that judicial proceedings occur in public, with media access (paras. 46-55); and that the scope of appeal be reduced (para. 96). The April 2013 draft Constitution's protection of individual judges from sanction, for example against transfers without consent, and dismissal, suspension or disciplinary punishment except in accordance with law and a decision of the Supreme Judicial Council (Art. 101), tends to emphasize individual judicial reputation rather than collective.

The April 2013 draft Constitution does not, however, yet include age requirements, other than a requirement that judges of the Constitutional Court have no less than ten years of legal experience (Art. 112; this has been reduced from 20 years in the December 2012 draft). Nor does the Constitution stipulate any other qualifications other than the requirement that judges be "competent" (Art. 98), and that "a majority" of the judges of the Constitutional Court "must be legal specialists". If a high-status judiciary is desired, there should be provision that judges be persons of integrity and education, for example. I note, furthermore, that the willingness of the public to accept a recognition system will depend on the successful completion of the project of judicial transformation.

There are other things that the judiciary can do to enhance its reputation. The Supreme Court might develop a media strategy, with a spokesman to interact with the media. It can publish decisions in a timely manner, and encourage transparent decision-making. And it can welcome the project of transforming the judiciary, which will respond to public demand.

A radical suggestion that might be considered is involving laypersons in decision-making. This can help enhance judicial reputation and ensure judicial accountability. This need not involve a full jury system, as found in common law countries, but might instead utilize a "mixed-system" as has been adopted by many civil law countries in recent years. Japan, Russia, Spain, Germany and Korea are all countries that had a traditionally professional model of procedure but have now included the public in serious criminal cases. Decisions are made by joint panels of judges and citizens sitting together. Voting rules differ from country to country. This might be a good device to restore public faith in the Tunisian judicial process.

4. The effect of constitutional provisions

Constitutions around the world offer a variety of provisions to guarantee judicial independence. Typical provisions include a statement of judicial independence (as had been formally included in the Tunisian Constitution of 1959); a guarantee of judicial tenure; an appointment mechanism insulated from political control; a removal mechanism insulated from political control, and only to be used under certain limited conditions; and protection of judicial salaries from being reduced.

What is the effect of these provisions in practice? The relationship between formal (*de jure*) and actual (*de facto*) judicial independence is much debated in the scholarly literature. Some studies find no relationship between the formal rules governing the structure of the judiciary and its level of actual

independence. Other studies find a significant correlation between the two, with one study arguing that formal judicial independence is the most powerful predictor of actual judicial independence.[6] My own statistical work on the subject suggests that rules governing the selection and removal of judges are the two most important *de jure* protections that actually enhance judicial independence in practice.[7]

The key thing according to our research is to have protection for *both* appointment and removal. The reason is easy to understand. Suppose judges are appointed through a very careful and insulated mechanism, but the president can remove them at will. Such judges will likely be quite dependent on the president and follow his preferences in their decisions. Conversely, if the president can appoint judges unilaterally, it will hardly matter that they are protected from removal because he will appoint his friends and loyalists. Only when *both* removal and appointment are insulated is judicial independence enhanced.

Chapter Five of the April 2013 draft Constitution contains provisions for judicial independence. It first states the baseline principal that a judiciary as a whole is to be independent, as well as the individual judges (Art. 97). Any "non-legal" interference with the judiciary is prohibited (Art. 103; the December 2012 draft provided that "any interference in the judiciary shall be deemed a crime punishable by law"). Individual judges get further protection from transfers without their consent (Art. 101). While this enhances individual autonomy and is consistent with a "recognition model", it can lead to problems if individual judges serve to block important initiatives for the team as a whole.

Judge Ouerfelli (para. 29) states that the Constitution ought to specify the cases when a magistrate can be dismissed. I agree with this. But I note that Art. 101 does not yet list the criteria. It is imperative to specify limited criteria for removing judges in the Constitution. These typically include incapacity or grave misconduct, but are not so broad as "any shortcomings" (Art. 98). The point is that the Constitution *must* provide more detail on judicial removal. (Perhaps it is a translation issue, but Judge Ouerfelli's report refers to a two-thirds legislative vote for a magistrate's dismissal. This might be a good idea *only if* this was simply to confirm decisions of the Supreme Judicial Council. It should not be an alternative to the Supreme Judicial Council.)

The April 2013 draft Constitution does not say anything about the tenure of judges. In many constitutions it will state that a judge serves for life or until a particular age. (The U.S. is exceptional in that we have no retirement age at all for judges. One of our famous Supreme Court Justices retired last year at the age of 89.) Consideration should be given to defining a judicial term, or a mandatory retirement age.

The April 2013 draft Constitution does not say anything about salary insulation. It is usually assumed that judges will be more independent if their salaries are protected from reduction, and roughly 28 per cent of all constitutions include such a provision.[8] The logic is that political actors might seek to punish judges by reducing their salaries in response to adverse decisions. Many constitutions thus prohibit reductions in salary, and we suspect that this prohibition creates more independent judiciaries. Consideration should be given to such a provision in Tunisia, as per para. 30 of Judge Ouerfelli's report.

5. Supreme Judicial Council

According to the April 2013 draft Constitution, the Supreme Judicial Council is the key institution for safeguarding judicial quality and independence. It can, it seems, decide to transfer a judge in the interest of the overall work plan (Art. 101). It has exclusive responsibility for judicial discipline (Art. 101).

As a drafting matter, I would suggest that Art. 103 clearly distinguish activities of the Supreme Judicial Council, which should not be seen as interference with the judiciary, from the activities of other official institutions or private parties. One would not want, for example, the non-judicial members of the Judicial

Council to be subjected to potential punishments because of their activities. The addition of the phrase "any *non-legal* interference" into Art. 103 since the December 2012 draft goes some way to distinguishing the activities of the Judicial Council from the activities of other bodies, but the article could be more explicit still.

The Supreme Judicial Council is to be composed of four councils: the Judiciary Council, the Administrative Judicial Council, the Financial Judicial Council, and the Judicial Councils Organization (Art. 106). The membership of each council will be composed half of judges and half of individuals other than judges. The majority of member judges must be elected, while the remainder are to be "appointed by capacity" (Art. 106). The Supreme Judicial Council will elect its own Head from among its member judges (Art. 106).

Judge Ouerfelli recommends that the Supreme Judicial Council *not* be headed by someone from either the executive or legislative branch (paras. 63-65) but rather headed on a rotational basis by someone "elected by the court" (para. 65). My view is that the Head of the Council should be elected by the Council. In practice, however, there may be a tendency to elect whoever is the highest-ranking judge that happens to be sitting on the Council.

The drafters face two major decisions: how much detail about the Supreme Judicial Council to include in the Constitution, and what the composition should be if it is to be decided now. At a minimum, the number of members should be stated, so there is not pressure later on to expand the membership for political reasons. In addition, the decision rule on the Supreme Judicial Council could be stated in the Constitution, as it is helpful in thinking about the optimal composition to know whether decisions will be made by simple majority, two-thirds majority, or some other rule.

The April 2013 draft Constitution has resolved the issue as to whether half or two-thirds of the Council should be judges in favor of the former position (Art. 106). In principle, one might desire for judges to be the majority so as to enhance judicial independence, but judicial councils are *also* devices to protect judicial accountability. To be effective, they should not be exclusively controlled by judges. There are relatively few academic studies as to the effect of a judicial majority in the judicial council. In one study I co-authored, we found no statistical relationship between the number of judges and the level of judicial independence in the country.[9] In some countries, judges have been able to have a lot of influence on the judicial council even when they are a minority.

We did, however, find that in some countries there may be a relationship between the *competences* of the judicial council and independence. Councils that were involved in appointment, transfer, and discipline of judges were better at securing judicial independence than those that had only some of those functions, or were limited to purely administrative functions. We also found a slight relationship between constitutionalized judicial councils (i.e. the Council is specifically mentioned in the constitution and not left to ordinary statute) and levels of judicial independence. The April 2013 draft Constitution of Tunisia wisely gives the Supreme Judicial Council many competences and a good deal of constitutional protection.

Some constitutions will specifically indicate that the judges on the council are to come from different levels of the judiciary. Judge Ouerfelli recommends this (Recommendation III.B). For example the Constitution might state that two judges come from the trial courts, two from the appeals courts and two from the Court of Cassation, each elected by their colleagues at that level of the judiciary. (This is consistent with Option Four in Art. 5.14 of the August 2012 draft Constitution.) Some countries prohibit the Chief Justice from serving as Head of the Council, as this tends to concentrate a good deal of power in one person.

It might also be wise to give some general guidance as to the non-judicial members. They can either be identified by their appointer (president, parliament, attorney general etc.) or nominated by another

institution. I would recommend against naming high officials like the Attorney General to actually sit on the Judicial Council. Such members often lack the time to devote to the work.

Consideration should be given to including the bar association in the membership. Comparative research emphasizes that judicial independence itself is supported by a vigorous and autonomous lawyers' association.

6. Constitutional Court

Judge Ouerfelli recommends that the power of review of laws for constitutionality be given to a designated Constitutional Court (para. 35), and Art. 114 of the April 2013 draft Constitution follows this recommendation. It seems that Judge Ouerfelli and the drafters contemplate a new model that breaks with the French model of the Constitutional Council found in Chapter IX of the of the 1959 Constitution of the Tunisian Republic. The French Fifth Republic originally restricted review of constitutionality to abstract cases before the law was promulgated. That model has now been rejected in France itself, which as of 2008 allows the Council to hear challenges to the constitutionality of legislation both before *and* after the promulgation of the law. This seems to be the direction of the April 2013 draft Constitution, and it is appropriate.

The constitutional provisions on the Constitutional Court need a bit more work. First, 12 members is not a good number for a court (see Art. 112), as it means there is a possibility of 6-6 decisions if majority rule is used. While Art. 115 addresses this by allowing the President of the Constitutional Court a deciding vote in the event of parity, I would recommend an odd number of judges. Second, the decision rule of the Constitutional Court itself is not specified and perhaps should be. Generally, the lower the decision threshold, the easier to declare legislation unconstitutional, and the more powerful the Constitutional Court.

The provisions governing the selection mechanism for the Constitutional Court are complex, perhaps overly so (Art. 112). The selection mechanism specified in the April 2013 draft Constitution is that 24 members be nominated, eight each by the President and Chair of the Chamber of Deputies, and four each by the Prime Minister and Supreme Judicial Council (these numbers are slightly changed from the December 2012 draft). The Chamber of Deputies will select 12 of these nominees by a two-thirds majority vote, one half of each of the nominees presented by the President, Prime Minister, Chamber of Deputies and Supreme Judicial Council. This is an improvement on the appointment procedures outlined in the first draft (Art. 5.18 of the August 2012 draft), where the Chamber of Deputies could have appointed all eight of the Chair of the Chamber of Deputies' nominees. If the Chamber of Deputies, for institutional reasons, had approved all of these nominees, and these nominees feel some loyalty to the Chamber, then judges who were both nominated and elected by the Chamber would have had a two-thirds majority on the Constitutional Court. Such judges may not be aggressive about finding that Chamber decisions violate the Constitution. The changes in the April 2013 draft Constitution ensure that judges nominated and appointed by the Chamber of Deputies will have no more than one third representation on the Court.

Nevertheless, some concern remains. The mechanism for abstract review in Art. 114 provides that the President may submit draft laws to the Constitutional Court before their ratification for a decision on their constitutionality. This alters the position in both the August 2012 draft and the December 2012 draft, where the Chair of the Chamber of Deputies, the Prime Minister, and a set minority of the Chamber of Deputies could submit draft laws to the Court.

The integrity of any such abstract review may be compromised, however, if certain judges are beholden to the legislative majority. Thus, if legislative approval of Constitutional Court judges is to be retained, I

would suggest ensuring that the Chamber of Deputies itself does not nominate judges. A good principle of institutional design is to separate the nominating bodies from the approving bodies for appointments. While the model provided for in Art. 112 of the April 2013 draft Constitution ensures that one third of the Constitutional Court will be nominated by each of the President, legislature and Prime Minister/Supreme Judicial Council, the Chamber of Deputies nevertheless appoints all of the judges to the Constitutional Court.

The Constitution says little about the qualifications of Constitutional Court justices. It might be stated that they should be a certain age, have integrity, and have a certain kind of education. While Art. 112 requires Constitutional Court judges to have at least ten years of "high experience" (previously "high *legal* experience"), this phrase could perhaps be more clearly defined.

Regarding Art. 114(5), consideration must be given to what should happen to ordinary court proceedings while a constitutional appeal has been launched. In the German and Italian systems, ordinary court proceedings are suspended during the direct appeal. The reason this should be stated in the Constitution is so that there is no claim that delays caused by the constitutional appeal will violate the requirement of a speedy trial.

7. Prosecution

Judge Ouerfelli recommends that the prosecution be independent (paras. 66-68). Art. 114 of the December 2012 draft Constitution provided that the public prosecution was to be "part and parcel of the judiciary". This was fairly vague, and I cannot tell if consideration was being given to separating the prosecution from the judiciary.

The April 2013 draft Constitution contains no provisions about the prosecuting authorities. This is perhaps to be welcomed since it allows the public prosecution to be independent of the judiciary, but is cause for concern since it does not guarantee the independence of the prosecuting authorities.

Many of the same issues identified above about collective versus individual reputations also apply to prosecutors. Arguably, it is better to have the prosecution organized into a single hierarchy, so as to ensure insulation from the public, than to have the judiciary organized in that fashion. One mechanism sometimes used in constitutions is to specify an office of the Prosecutor General, independent of the Minister of Justice, who oversees the prosecution authority and can promote prosecutors.

8. Conclusion

Tunisia's legal system is at a crucial juncture. To deliver on Judge Ouerfelli's vision of an empowered, independent, and competent judiciary will be a very difficult challenge. The April 2013 draft Constitution begins the process, but further detail will be required, and the institutional choices made in constitution-making will shape the judiciary for some time to come.

9. Recommendations

(a) Consider adopting a Judicial Vetting Board, possibly including foreigners to enhance credibility.

(b) Encourage the emergence of a high-status judiciary through including qualifications in the Constitution.

(c) Provide detail on removal, including limited criteria that can serve as the basis of removal.

(d) Protect judicial salaries from reduction.

(e) Clarify the appointment mechanism and decision rule for the Supreme Judicial Council.

(f) Modify the selection mechanism for the Constitutional Court to make sure the same institution does not both nominate and approve members.

(g) Provide for qualifications for Constitutional Court members.

(h) Consider designating a Prosecutor General in the Constitution.

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Notes

[1] Ahmed Ouerfelli, "Judicial Reform in Tunisia: Constitutional Principles Relevant to the Judiciary" (International IDEA, 2012), available online in the original Arabic from the International IDEA website, at www.IDEA.int (forthcoming 2013).

[2] Draft Constitution of the Republic of Tunisia, 22 April 2013, unofficial English translation prepared by International IDEA, available online at http://constitutionaltransitions.org/wp-content/uploads/2013/05/Tunisia-third-draft-Constitution-22-April-2013.pdf.

[3] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge and New York 2003).

[4] See the Board's website at www.jmvb.or.ke.

[5] Nuno M Garoupa and Tom Ginsburg, "Reputation, Information and the Organization of the Judiciary" (2011) 4 *Journal of Comparative Law* 226.

[6] Bernd Hayo and Stefan Voigt, "Explaining de Facto Judicial Independence" (2007) 27 *International Review of Law and Economics* 269; see also Hayo & Voigt, "Mapping Constitutionally Safeguarded Judicial Independence — A Global Survey" (2010), draft paper available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724696.

[7] This effect is strongest in authoritarian regimes and in contexts with checks on executive authority. James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence" (2012), draft paper available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2104512.

[8] Data from the Comparative Constitutions Project. See www.constitutionmaking.org and www.comparativeconstitutionsproject.org.

[9] Nuno M Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence" (2009) 57 *American Journal of Comparative Law* 201.

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Constitutional Transition in Egypt and Tunisia**

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