Following the Jasmin Revolution of January 2011, progressive forces in Tunisia found themselves faced with a stark choice: to militate in favor of a brand new constitution, or in favor of tweaking the existing constitution, which was relatively modern, but needed some adjustment. While the latter option offers safety, the former option offer greater rewards, but at higher risks. These risks became even greater when the election of the constitutional assembly of October 2011 gave EnNahdha, the religious party, the largest number of seats, namely 89 out of 217. For progressive forces in Tunisia, the stakes could not be higher: if they prevail in the constitutional debate, Tunisia stands to emerge with a modern progressive constitution worthy of the 21st century; but if they fail, EnNahdha stands to reverse many of the gains Tunisia has achieved with the 1959 constitution and related legislative gains.

Thanks to massive mobilization within the constitutional assembly in Tunisian society at large, civil society organizations and other progressive forces were able to seize the initiative and influence the tone of the constitution. As a result, the 2014 constitution of Tunisia enshrined several progressive principles, including the separation of religion and politics, the rule of law, freedom of worship, freedom of expression, sovereignty of the people, gender equality in terms of rights and duties, individual liberties, and the right to privacy.

Against this background, the day-to-day practice of justice in Tunisia remains mired in old patterns, whereby judges still refer to religion as a source of law, and rule in ways that contradict the constitution.

In this paper, we review recent legal cases that arose after the 2014 constitution, show how the judges subvert the principles of the constitution, and how they use ambiguities in the constitution to justify referring to Sharia law in their rulings. Also, we discuss short term remedies, and discuss why we feel that this phenomenon is bound to subside as young judges arise to the bench.