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FIVE YEARS OF ARAB CONSTITUTIONAL REFORM

Balancing process requirements with the
demands of fragile democratic traditions

Zaid Al-Ali

Introduction

The Arab uprising that started in Tunisia in December 2010 was remarkably successful in its initial period:¹ long-standing dictators were toppled, and state foundations that were thought to be rock solid were rendered asunder within a few weeks by the pressure of millions of courageous protesters.² As soon as that achievement was secured, those public figures and institutions who survived the initial purges had to face a number of challenges, the first of which was to structure the coming transition process. The enormity of the challenge was lost on most, if not all actors and observers: from 2011 to 2015, ten separate countries in the Arab region either replaced, reformed, or reconsidered their constitutional frameworks, the highest concentration of countries to do so in the world at the time, and the most significant amount of activity on constitutional reform in the region since the start of the post-independence period.

Each country that has since engaged in a transition process since 2011 has responded to these problems in its own way, and in response to their own individual circumstances on the ground. That experience has taught us a number of important lessons on how transition processes in post-totalitarian societies are to be managed, and an attempt will be made here to synthesize some (and not all) of the lessons that that experience offers. This contribution will commence with an attempt to identify the basic elements of modern constitution making in post-totalitarian societies, with a focus on the particularities of the Arab region, and will end with a discussion of a number of case studies, each of which adopted its own approach to democratic transition, with varying degrees of success.

In particular, this chapter seeks to highlight one of the major challenges that the region faced following the 2011 uprisings, which was to design a constitution-negotiation process that would prevent conflict while at the same time allowing for

significant progress on substantive issues. Considering the circumstances, including a fractured and inexperienced political class, that exercise translated into involving a sufficient number of actors, while recognizing each actor's relative weight and the importance and limitations of elections in democratic transitions. This chapter also seeks to underline the need for flexibility in transitions, particularly given how much circumstances can fluctuate in short periods of time. Each of the case studies that are set out here illustrates different methods of proceeding in relation to these issues, and also the dangers that are inherent in miscalculating process design issues.

Iraq's constitution was drafted under foreign occupation in 2005, which sets it apart from the rest of our case studies, but it still provides useful lessons for our purposes. In particular, the original design of the process provided that the result of the constitutional negotiations would be directly tied to the outcome of parliamentary elections that had taken place a few months earlier. However, the United States embassy in Baghdad eventually decided to prop up specific political parties while eliminating others from the discussions, while deliberately creating the false impression that the final draft constitution represented a wide consensus of views within the country. The final result was ultimately rejected by the country's main political actors, many of whom refused to apply its substantive provisions following its entry into force.

In Egypt, a hastily drafted and poorly conceived interim constitution also determined that electoral results would be the sole factor in determining the dynamics during the constitutional negotiations. The electoral results created an immense sense of hubris amongst Islamist parties, particularly the Muslim Brotherhood. The result was that the Muslim Brotherhood significantly overplayed its hand during the drafting process, ignoring first the weight and importance of other actors, while at the same time failing to appreciate how quickly circumstances were changing in the country, including how fast public opinion was turning against it. The end result was a constitutional text that was not supported by anywhere near a consensus of opinion, and which was eventually overturned by the Brotherhood's political rivals.

Tunisia followed the same pattern as Egypt, including the establishment of a process that gave preeminent importance to electoral results. Ennahda's relative success in those elections (in which it obtained a plurality of seats in the constituent assembly but not a majority), as well as the perception that Islamist parties were on the ascendency across the region, encouraged it to adopt a majoritarian approach despite the fact that it did not have a majority of support. Over time, national developments (including a number of political assassinations and the formation of a large umbrella group of opposition parties) as well as the outbreak of major violence in Egypt exposed Ennahda's own vulnerability, which encouraged it to abandon the formal process in favour of alternative mechanisms to reach a final agreement. That flexibility allowed for Tunisia to be the only country in the region to successfully transition to a democratic regime without any major violence.

Finally, in Yemen, the ruling authorities in collaboration with the United Nations established a National Dialogue Conference (NDC) as the preeminent decision-making body relating to the state's future. All decisions within the NDC

were to be taken on the basis of consensus, which was designed to level the playing field between established political parties (such as the General People's Congress) and newer political groupings (including youth, revolutionary, and women's movements). The design of the process did not provide for any elections until after the new constitution's entry into force, which set it completely apart from the processes that were followed in the rest of the region. Nevertheless, Yemen faced a number of challenges stemming from those choices, including that dialogue conferences are often not an appropriate format to decide key issues (such as the federal system of government). In addition, the process design did not allow for sufficient flexibility in the event specific actors (particularly those that were associated with militias) rejected key aspects of the final agreement. In the end, the final draft constitution was one of the main factors that led to the commencement of the current civil war.

Some have noted that the Arab Spring's harvest has been 'modest',³ while others have argued that it has only just begun.⁴ There is little question however that much of what is discussed in this contribution remains tentative, given that circumstances are still evolving on the ground in a number of countries (most notably in Yemen and Libya). As such, whatever conclusion may be reached at this stage remains preliminary and will no doubt benefit from significant revision in a few years' time when events have taken their full course.

The basic elements of modern constitution making in post-totalitarian societies

Defining the objectives of a reform process

If process is the vehicle through which substantive objectives are satisfied, the act of identifying the exact objectives that are being pursued is paramount. Depending on the circumstances, such an exercise can either be relatively straightforward or impossible to narrow down.

Circumstances can sometimes impose on constitutional negotiators a set of objectives. As societies liberate themselves from the control of minority, undemocratic, and oppressive regimes, they sometimes (but not always) set upon negotiating a new constitution for the purpose of redefining the state's ideology, for example, by making it more attentive to the needs of the poor and vulnerable segments of society, or a segment of society that was previously marginalized (e.g. South Africa in 1996). In multi-confessional or ethnic societies that set upon constitutional reform as a means to defuse tensions or even conflict, the general objective of the negotiation process can often be to establish a new social contract between diverse communities as a means to promote civil peace and stability (e.g. Bosnia in 1996 or Lebanon in 1991). Finally, the luckiest of societies are those that engage in constitutional reform absent any particular crisis and for the purpose of improving the state's overall performance by rebuilding or redesigning state institutions (e.g. Switzerland in 2014).⁵

Unsurprisingly, in most democratic environments and in transition countries, it is often impossible for negotiators to identify even a single overarching objective. Each political party that is involved in constitutional negotiations will often have significant difficulty reconciling its members with each other, and some party members may find that their objectives are in total contradiction with those of their counterparts from other parties. For example, some individuals and parties may favour revolutionary change while others may seek to preserve as much of the preceding system as possible. Where tensions of this nature exist, the consequences can sometimes be violent (e.g. Iraq in 2005; Yemen from 2011 to 2015; or Egypt from 2011 to 2013), and in others can lead to a form of compromise that leaves all the participating parties only partially satisfied (e.g. Tunisia in 2014).⁶

In transition countries, there is an added complication which is that regardless of how constitutional negotiations commence, priorities can shift as circumstances evolve. Particular objectives may cease to be achievable, while others which were not considered to be important at the outset might become a priority towards the end. A constitutional drafting process can have as its initial objective establishing a new social contract within a divided society, but in the event security deteriorates during the process, the parties can utilize the constitutional negotiations as a violence-reduction mechanism (e.g. Libya 2014–16). Priorities can also shift when a reform process lasts long enough for drafting bodies to be captured by political forces that were previously dormant or less dominant (e.g. Egypt in 2013). Transitions that are sparked by an unplanned set of circumstances (such as a popular uprising) can add their own levels of complication, given that in such circumstances some or even most actors may not have specific objectives in mind or at least may have difficulty articulating them (see below).

Linking objectives to procedural rules

Regardless of whether a single or even several objectives are identified, at some point early on, a road map and procedural rules will have to decide a number of crucial questions, including whether a single or several bodies should be involved in the drafting of the constitution. In the event the rules provide that several bodies should be involved, they should also indicate how these bodies should interact with each other, including how and when each will be in control of the draft, how specific ideas should be included in the draft, and what to do in the event a disagreement arises. The rules should also indicate how long the process should last, bearing in mind that some countries have drafted entire constitutions in a matter of weeks, while in others the process lasted several years. The rules can also provide for institutional oversight on the drafting process, including the possibility of allowing a constitutional court to review the final text and measure it against a set of principles. Finally, some indication can be given as to whether international institutions and advisers should have any role in the process.⁷

One of the most crucial issues for any constitution-making process is how the general population should be allowed to influence the process. A number of issues

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have to be considered including when elections should take place, which a specific electoral system should be adopted, and how the electoral results should impact the drafting process. There is a broad understanding amongst just about all actors today that without some form of public involvement, a constitution cannot hope to be legitimate at its inception.⁸ The difficulty is that democracy is imperfect in any circumstance but is particularly so in transition countries. Where elections are organized following the collapse of a ruthless dictatorship, they are typically marked by a near total vacuum of democratic traditions and credible institutions. The result can be a political field that is dominated by one set of actors who are only representative of a minority of the population but whose main attribute is the absence of a credible organized political opposition.⁹ There are however many ways to involve the public, and the general population's capacity to influence the drafting process will in large part depend on which model is adopted. There are a number of possibilities, including:

1. Directly electing a constituent assembly to draft the constitution.
2. Electing a parliament, which will have as one of its responsibilities to select a constitutional drafting body.
3. Consulting the public during the drafting process.
4. Organizing national dialogue conferences during the drafting process to debate a number of critical issues.
5. Giving the people the final word on a draft constitution, in the form of a referendum.

The manner in which popular involvement is organized carries with it benefits and risks for each party and so the decision must be weighed carefully. Parties that enjoy significant popular support will typically favour heavy involvement by the public at the start of the process, usually through direct election of a constituent assembly (e.g. Tunisia) or through the election of a legislature which will then be responsible for selecting the drafting committee (e.g. Egypt in 2012, Iraq). Those same parties may not necessarily seek strong public participation during the drafting phase, particularly if they consider that the reforms that they are seeking to implement do not match public expectations. Conversely, parties who are genuinely interested in introducing far-reaching reforms that are designed to improve standards of living and to advance social justice will likely favour continuous and ongoing consultations through the process, to allow for greater citizen feedback and support for specific initiatives (e.g. Yemen).¹⁰ Finally, parties and individuals who do not enjoy significant popular support (or at least who are not confident in their ability to attract a significant amount of votes) are far more likely to favour a tightly controlled process in which the people are only consulted at the very last stage, whether through a referendum or possibly even indirectly via parliamentary approval (e.g. Morocco, Jordan, Algeria, Syria). They may also decide to empower an appointed and politically independent committee of experts either to prevent any specific political force from exercising undue influence on the drafting process

or as a means to undermine an existing political class and introduce a specific set of ideas. Depending on how the experts are chosen, progressive (e.g. Kenya in 2010¹¹) or regressive (e.g. the Egyptian committee of experts in 2013¹²) ideas can play a determinant role in constitutional negotiations.

The length of the process is also a key consideration. Drafting a new constitution in any part of the world necessarily involves an effort to properly understand the workings of the respective country's institutional framework. Even constitutions that are born in the throes of a popular revolution cannot hope to start a completely fresh page. A large number of existing institutions will be preserved, and their reporting lines, working methods, and other traditions will impact the new constitution's workings. As a result, constitutional drafters can and should work to understand which institutions are the most efficient and which are dysfunctional, in order to decide how the new constitution can improve on the existing framework. In addition, changes to the country's overall governance structure can impact the way in which specific institutions operate, even if those same institutions are not mentioned in the constitution itself. In the absence of sufficient foresight on these issues, any changes are likely to lead to unforeseen results, which can never be a good thing. Also, in any constitution-drafting process, negotiating parties need significant time to grow accustomed to each other and to reach agreement on their vital interests. The mere act of negotiating with counterparts from other parties is a skill that takes time to learn, particularly in a post-totalitarian environment which prohibited free speech for decades. Where constitutional drafters are given only a few months to work it can prevent any radical reordering of state institutions, or prevent particular parties or groups from organizing themselves and playing a meaningful role in the negotiations.

These factors were well understood by a number of regimes throughout the Arab region in early 2011. Ruling authorities in a number of countries moved quickly to launch reform processes before specific procedural demands could be made. At the first sign of trouble, Morocco, Jordan, Syria, and Algeria each promised a series of reforms, including new or amended constitutions which guaranteed increased political and human rights. Morocco appointed a royal commission which drafted its new constitution in a matter of weeks and put the new draft to a referendum that was approved by a crushing majority of the people in July 2011.¹³ In Jordan, a royal commission amended the 1952 constitution, and the new text was approved by parliament in September 2011.¹⁴ Both of these processes were rushed through, based on the expectation that very few specific proposals for reform would be made by anyone and that there would be very little resistance amongst the general population. In Syria, a presidential committee drafted a new constitution in a matter of weeks, and submitted the new text to a popular referendum in 2012.¹⁵ Although Algeria originally commenced discussions on amending its constitution back in 2011 because of a number of circumstances including a particularly lethargic regime, it finally completed the process in early 2016, with only minimum public consultation.¹⁶ All of these constitutions and amendments were essentially drafted behind closed doors, although officials made sure to

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formally invite civil society to submit proposals safe in the knowledge that no one was in a position to suggest major reforms and that there was no obligation to incorporate any specific recommendations. What each of the new texts has in common is that although they formally introduce a number of reforms, none are likely to change the fundamentals of the relationship between the state and the individual.

The impact of being caught unprepared

In an ideal world, parties would negotiate the details of the drafting process in a way that would allow for each to meet their objectives to a satisfactory extent. The most organized and strategic of parties will not only have identified their main overarching objectives well beforehand; they will also have a clear idea of what procedural arrangements are most likely to help them satisfy their goals. In the Arab region following the 2011 uprisings, little attention was given to procedural issues in most cases until it was too late, which led to a repetition of mistakes made in the recent past (e.g. Iraq). Instead, parties generally failed to link their prospects of achieving specific objectives with the design of the constitutional reform process. For example, parties that should have favoured longer drafting processes argued in favour of shorter timeframes, or at least did not object when they were first decided upon (e.g. Libya, Egypt), and parties that ought to have favoured more independent oversight on the drafting process actively pushed for a process that provided for none (e.g. Egypt in 2011). Finally, instead of establishing clear mandates for drafting committees, governing rules were almost always left vague, causing predictable and significant difficulties for all parties concerned (e.g. Egypt in 2012, Tunisia). In some cases, there was such a lack of attention to procedural rules that parties hardly concerned themselves with who was responsible for designing the rules in the first place (e.g. Egypt in 2011, Libya).

The lack of attention to these critical process-design questions in the Arab region was due to a number of factors, most of which related to the fact that broad sections of the population were generally unprepared for the reform process that started in late 2010. One of the determinant characteristics of the Arab Spring was how unexpected it was. An important distinction can be drawn between those countries in which the end of undemocratic rule can be foreseen (and therefore prepared for) and those where it cannot. In both Iraq and South Africa, various groups began the process of constitutional negotiation even before their respective transitions formally began. Both of these countries underwent what can be referred to as an 'incubation' period, during which various parties and interest groups were able to anticipate some of the difficulties that were likely to occur during the formal transition process and attempt to resolve them before they occurred. In Iraq, by mid-2002, many opposition parties were convinced that an invasion was imminent and so therefore engaged in internal discussions on what a new constitution should look like; many even published draft constitutions of their own that articulated their own best-case scenarios.¹⁷ In South Africa, trade union

movements and an active opposition front against apartheid led to intense negotiations that were codified in agreements; that process allowed for many actors to develop negotiation and drafting skills and to improve their understanding of key issues that served them well during the drafting of the final constitution in the mid-1990s.

Tunisia, Libya, Egypt, and Yemen largely did not have the benefit of an incubation period because of the speed at which their respective dictators were deposed and because of how unexpected the entire transition process was. Although it is easy to forget, until the end of 2010, many of these countries were regarded as a model of stability, despite widespread corruption, poverty, and the desperate lack of democracy.¹⁸ There was little understood at that point that these countries were on the cusp of a massive popular uprising of the likes that had never been seen in an Arab country.

There was also the added complication that Arab dictatorships were often particularly ruthless in repressing speech.¹⁹ Thus, in January 2011, aside from their considerable exile communities, the peoples of these four countries were in large part limited to what the former ruling parties allowed them to discuss. Relatively minor reforms, including initiatives that were designed to prevent petty corruption in the state's bureaucracy, were tolerated and sometimes even encouraged, but any discussion of more obvious and pressing problems (including the absence of presidential term limits and the executive's dominance over all branches of government) was strictly forbidden. Even in those countries where some forms of expression were either permissible or tolerated by the ruling regimes, debate on constitutional reform was nevertheless still limited as a result of the fact that academic and intellectual circles were co-opted by the ruling regimes themselves.

Law and political science faculties as well as research institutes were largely dominated by conservative individuals who insisted on maintaining the same rigid methods and research interests that had been developed decades earlier, which left little to no room to focus on experiences that were similar to those that were being lived in the Arab region. Interest in international developments hardly extended past France and the United States, which brought with it precious few benefits. Firstly, as with everything else, an honest appreciation by Arab intellectual elites of the virtues of French democratic traditions and their possible application in Arab countries was again impossible as a result of the limitations on free speech. Secondly, France as a model does not offer many solutions to the types of problems that Arab countries suffer from. Today's oldest democracies, including France, have over a period of decades developed democratic traditions that inform their constitutional frameworks. These traditions were sometimes established through legislative and regulatory reform, institutional operating procedures, and also through unwritten customary rules. They were also often developed in response to painful circumstances, including severe political, economic, and security crises that have sometimes caused these same traditions to be etched in the collective consciousness of particular countries without the need to formally establish them as explicit constitutional principles. It is the combination and semi-permanence of all these

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rules and traditions that allow for countries like France to remain democratic despite constitutional texts that are lacking in significant detail on the functioning of specific institutions. Any attempt to replicate those rules in a wholly different historical and cultural context is bound to be highly problematic and precarious.

This is even the case for countries such as Tunisia that are intricately linked to well-established democracies. Because of the inequity of its modern history, Tunisia found itself in 2011 in a situation that was far removed from the advances that have been made in France and suffered from a number of important problems that were practically non-existent in many democracies. These include widespread torture and other forms of abuse by security forces, the virtual absence of democratic traditions (including peaceful transfers of power, freedom of expression, free and fair elections, long-standing political parties, etc.), and pervasive corruption at the highest levels of government. Although no country is completely free from these phenomena, countries in the Arab region were defined by them to the extent that they require wholesale remedies of the type that countries such as France have no experience with in modern times.

Conversely, by 2011, Latin American, Asian, and African countries had developed significant experience that was directly relevant to the Arab region. Over the preceding two decades, many countries in Africa, Asia, and Latin America had overcome difficult conditions to emerge as vibrant democracies. Many of those countries had previously suffered from some of the problems that Arab countries had suffered from and so therefore had important lessons to share. Many had devised mechanisms to prevent overbearing executives to capture other institutions of state and had transformed previously oppressive security forces into public services that were more responsive to the public's needs. The fight against high-level corruption featured prominently in these countries as well, and so therefore there was much to learn from those reforms that had succeeded and those that had failed. Also, these countries were also actively learning from each other and building on each other's experiences; decades of experience in countries such as Germany, Canada, and the United States were absorbed and assimilated by the South African constitutional drafters. Much of that country's experience was then transferred to countries across the continent, including in Kenya and many Latin American countries.

However, because of the dynamics set out above, academic and intellectual circles in the Arab region remained firmly disconnected from whatever lessons learned that might have been developed in those parts of the world. The experiences of countries such as South Africa, Kenya, Ecuador, and South Korea virtually never featured in debates on legal or constitutional reform in Arab countries prior to 2011, and if they did, any serious analysis of these countries' most important achievements was effectively impossible. Even worse, because intellectual circles throughout the Arab region had been forced to teach and discuss existing constitutional frameworks uncritically for decades, very little if any thought ever went into studying those texts and understanding what specifically went wrong. Many blamed the decades of repression and stagnation on cultural and historical factors;

others blamed the ruthless dictators for every ill that had befallen their countries; others still considered that the principle factor was foreign involvement and conspiracy. What was desperately needed however was for academics, experts, civil society organizations, etc. to carry out detailed autopsies of the defunct constitutional frameworks to understand what exactly went wrong, and what needed to change. Instead, some of the region's most prominent constitutional law scholars spent much of 2011 drafting their own proposals (which often took the form of complete drafts) for their country's future constitutions, almost all of which were practically identical to the documents that they were supposed to replace. Despite state breakdown and a society up in arms, there were very few innovative ideas on the table.²⁰ At the start of 2011, many of the region's leading jurists maintained an idealized vision of their own constitutional history and reforms that were etched in the past.²¹

The absence of basic freedoms meant that there was almost no meaningful political party activity to speak of in any of the four countries. As soon as the transitions began, former ruling parties were almost all banned; the only parties that remained had either been co-opted by the defunct regimes which meant that they were virtually indistinguishable from them, or had been formed immediately after the uprisings as a result of which they were hardly in a position to participate in a multi-party negotiation on the constitution anyway.²² Newly formed parties would first need to adopt positions of their own on key constitutional issues, which would require significant internal debate. As already mentioned, academic and research institutes had been co-opted; civil society activity had been heavily circumscribed; and trade unions had been largely tamed throughout the region.²³

Most importantly for the purposes of this contribution, the lack of preparedness extended to process issues as well. Very few if any individuals or parties in Tunisia, Libya, Egypt, or Yemen had any convincing ideas about how their transition processes should be managed; not only were there no plans, or any comprehensive roadmaps to speak of, but there was also no one at hand with any degree of authority or experience who could convincingly prepare such a plan at short notice.²⁴ The consequence of all of the above was that the individuals, bodies, and institutions that were at the forefront of the transition process were notably unprepared for the job. Whoever was left at the helm of each of these countries was put in an impossible position: they were essentially forced to improvise a plan within as short a time as possible, and be confident enough in its potential for success to inspire the people and political forces to fall in line.

Very little thought had been given to how long the transitions should last, who should be responsible for drafting the constitution, how difficult the drafting process would be, what type of state should be established, and what would follow thereafter.²⁵ The lack of debate on these issues prior to the uprisings was so pervasive that in early 2011 some of the most progressive and hardened revolutionaries could often be heard in various capitals arguing that constitutions were purely technical documents that could be drafted by academics and legal experts in weeks if not days.²⁶ It would be years before intellectuals understood what a modern

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democratic constitutional process should look like, but that additional knowledge came too late either because the processes had been mismanaged to such an extent that they caused serious if not irretrievable damage to the relevant country's democratic prospects (e.g. Egypt and Libya) or because the disconnect between expectations and delivery was so great that the new political elites no longer enjoyed the public's trust (as in Tunisia).

The lack of preparedness also created a specific set of dynamics that were to negatively impact the constitutional negotiations for years. In particular, most political parties were incapable of articulating their objectives because of an absence of adequate leadership (e.g. in Iraq, Sunni and secular parties suffered acutely from this problem in 2005, as did revolutionary forces in Egypt from 2011 to 2013). Secondly, the parties could not anticipate how specific process rules would impact the results of their negotiation process, which is why insufficient attention was paid to crucial design issues by those parties that were the most interested in achieving real change (e.g. Tunisia, Libya, Egypt, etc.). This was sometimes to the extent that negotiating parties allowed for a single actor to elaborate the drafting process, and were oblivious to the possibility that that actor might have made process choices specifically to prevent particular objectives from being achieved (e.g. Egypt in 2011).²⁷

Case studies

The purpose of this current section is to measure a number of recent constitutional reform processes in the region against the basic principles set out above. We will identify the primary and secondary objectives that dominant political forces had set themselves, explore how procedural arrangements were conceived (and amended) in response to those objectives, and determine whether those arrangements allowed for the objectives to be satisfied.

We will discuss the four Arab Spring countries that engaged in relatively complex constitutional reform processes, including Egypt, Tunisia, Yemen, and Libya. We will not be discussing in any significant detail the reform processes that took place in Morocco, Algeria, Syria, and Jordan, given that they were all too dominated by a single actor (existing ruling authorities) to provide any useful lessons about constitutional negotiations in complex, multi-party environments. In addition, although Iraq's 2005 constitution was drafted pursuant to a foreign military invasion rather than a popular uprising, its experience with constitutional drafting was, until 2011, the most recent and modern setting in which the factors and considerations set out above coincided and played a major part in determining process and content.²⁸ It is therefore worth discussing here whether the same dynamics exist, and whether anything was learned from the Iraqi experience in the rest of the region.

Iraq

Iraq's 2005 constitution-negotiation process took place in unique circumstances. Prior to 2003, the country was perhaps the most totalitarian in the entire region.

Free speech was completely prohibited, particularly on issues concerning democratic reforms. The constitutional negotiation process itself only commenced pursuant to a military invasion and subsequent occupation by the United States and the United Kingdom in 2003. From 2003 to 2004, the US and a number of Iraqi parties (with the United Nations playing a peripheral role) negotiated the roadmap that should be applied to draft the country's final constitution. That text itself was finally negotiated and drafted in 2005.

As the dominant political and military force on the ground at the time, the United States government (as represented in Baghdad by the Coalition Provisional Authority (CPA)) was obviously the main party that was responsible for establishing how the transition process would play out.²⁹ As a result of a number of circumstances, most Iraqi political and social forces were not in a position to impose any conditions or even to negotiate any specific terms at the time. Nevertheless, the US did have to contend with a small number of groups that did not depend on the occupation for their own survival and legitimacy within the country. Nominally, all these parties sought to satisfy the same objectives, including the establishment of a new political order in which access to political power should be determined by electoral outcomes, and to maintain some form of national unity within the context of existing international borders. There was however a number of important differences between the parties that were to have a major impact on the design of the transition process and on its outcome:

1. The US had a number of interests, many of which were in contradiction with each other but all of which were based on its own self-interest.³⁰ It was particularly interested in establishing a mechanism through which political power would be rebalanced in favour of its most reliable allies. It had a long-term interest in building a relatively stable state, but also intended for the transition process to be as short as possible. In particular, the US hoped that if the constitution was completed early enough, that achievement could be used to impact the US domestic elections that were scheduled for late 2006. Needless to say, the pursuit of stability was not necessarily helped by a desire to rush the constitutional negotiation and drafting process.
2. Ayatollah al-Sistani, the most senior spiritual leader of Iraq's Shias (who constitute a majority of Iraq's population), played a key role in designing the process as well.³¹ His community has long been repressed by successive ruling regimes in Iraq and sought to use the opportunities created by the 2003 war to remedy that situation. He therefore worked to ensure that whatever political system emerged from the 2003 war would enshrine a system of majoritarian rule, based on the assumption that the Shia community would vote and form policies on a unified basis. Al-Sistani's secondary objective was to allow for a fully sovereign Iraqi government that represented the will of the majority of the people to take control over the state as soon as possible.
3. Iraq's two main Kurdish parties (who together eventually came to be known as the 'Kurdistan Alliance') had carved out their own territorial enclave in

northern Iraq since 1991 and had enjoyed *de facto* independence since that time.³² The Kurdistan Alliance was clear in its intention to maintain as much of its autonomy as possible under the new constitutional arrangement, and to prevent Baghdad from reasserting any control on the Kurdistan region's internal affairs.³³

That the various parties to a constitutional negotiation should have contradictory objectives is not unusual nor is it undesirable in a democratic setting. What was regrettable in the Iraqi context, however, was that the single-minded focus on a narrow set of political objectives (1) left many procedural questions unanswered and (2) left many other major objectives unattended to. The fact that none of the dominant parties prioritized state and institution building as a primary or even secondary objective meant that all procedural matters were totally subordinate to the purely political (and subjective) objectives that the dominant parties had identified for themselves. The constitutional process was conceived of only as a necessary step towards 'normalisation' (which it was hoped would eventually allow the US to draw down its military presence) rather than as an opportunity to rebuild state institutions and create a genuine social contract. In that context, the shorter a constitutional process and the less thought that goes into its design and substance the better. That ordering of priorities set in motion a series of decisions and events that eventually led to the state's near collapse in 2014.

In late 2003, US officials immediately set out to skew the transition in favour of its main allies by suggesting that the constitution should be drafted through a caucus-based system, in which selected groups of individuals in each province would gather and indirectly elect representatives to serve as members of the body that would eventually draft the constitution. The American plan was anathema to a large proportion of Iraqis given that it was almost identical to the way in which the 1925 constitution was drafted under British occupation. Clearly, in a country that had not had anything resembling democratic system of government in living memory, it was difficult if not impossible to resist the call for elections and for a constitution that was the result of a democratic process. The plan was also in complete contravention to Ayatollah al-Sistani's interest in establishing a majoritarian system. He made that clear when he published an opinion on the matter in which he described the American plan as 'unacceptable'. The US was forced to abandon its plan as a result.³⁴

Eventually, the CPA and its Iraqi counterparts negotiated and finalized what was termed the 'November Agreement' which purported to establish a timetable 'for the restoration of full Iraqi sovereignty, the creation of a permanent constitution, and the holding of free, national elections'. On the constitutional process, the Agreement merely provided that 'direct one-man, one-vote elections will be held for a constitutional convention. This convention will meet to write a permanent constitution, to be approved by the Iraqi people in a referendum'. Those elections would eventually take place in January 2005. The Agreement also indirectly suggested that the constitution should be drafted in no more than a few months.³⁵

Although these provisions were a clear concession in favour of the desire to establish majoritarianism, the November Agreement was in fact so lacking in detail that it contained the seeds of its own failure. Amongst other things, the Agreement was silent on how exactly the constitution was to be drafted. Clearly, considering the whole text was to be drafted in just a few months, it would be impossible for the entire membership of an elected body to participate in the drafting process itself. How then would the drafters be chosen? Would they be chosen from amongst the elected assembly's members? Would qualifications be a relevant consideration, or would political blocs within the elected assembly have complete discretion to choose their representatives in the drafting body? How would decisions within the drafting body be taken? If the drafting was to be delegated to another body, how would the elected body monitor progress? All of these issues were left to be decided after the election, therefore eating away at the already short period that had been set aside to negotiate and draft the final text.

The next step of the process took place in late 2003 and early 2004, when the Law of Administration for the State of Iraq for the Transitional Period (Iraq's interim constitution, also referred to as the Transitional Administrative Law (TAL)).³⁶ Here, the Kurdistan Alliance's objective to protect its special status combined with the US interest to protect its closest political allies shaped a large part of that text. Firstly, the TAL defined Iraq for the first time as a federal country, and granted only very weak powers to the central government, which was firmly in line with the Kurdistan Alliance's interests.³⁷ Secondly, the meeting of minds between US and Kurdistan officials resulted in a last-minute change to the procedures through which the final constitution should be adopted. Article 61(C) of the TAL provided that: 'The general referendum will be successful and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it'. Because the Kurdistan Alliance enjoyed a virtual totality of support in exactly three governorates, Article 61 (C) was rightly interpreted as providing the Alliance with a veto over the final constitutional text. The provision clashed violently with the drive towards majoritarianism that Ayatollah al-Sistani had been supporting, leading to significantly increased tensions between the various camps which were left unresolved.³⁸ It also clearly illustrated to the negotiating parties the benefits of operating outside the accepted standards of good faith: by relying on its special relationship with the US, and by introducing a major change at the last minute when none was expected, the Kurdistan Alliance achieved for itself what it would not have been able to otherwise. That manner of proceeding continued throughout the negotiations, eventually contributing to the breakdown of the process in August 2005.

Just as damaging perhaps was the fact that the negotiating parties did not prioritize state and institutional building as they designed the constitutional process. That much was made clear by the fact that the deadline for completing the final draft was 15 August 2005, which left the drafters a few months to resolve a whole host of procedural questions, key substantive issues, and also to learn to negotiate with each other.

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Despite the considerable attention that was dedicated to these issues, the rules that were being devised to govern the January 2005 elections garnered almost no attention. A simple proportional representation system, with a single country-wide constituency was devised, with no restrictions on finances whatsoever. Considering that the elections were being organized less than two years after one of the world's most totalitarian regimes had fallen, some attention might have been given as to whether the rules were likely to produce a skewed result that favoured some parties that enjoyed temporary and unsustainable political and financial advantages. Electoral rules might have been designed to reduce the impact of foreign funding, or at least some effort might have been made to find a way to mitigate a lopsided electoral outcome. The Supreme Council for the Islamic Revolution in Iraq (SCIRI) was a case in point. For decades prior to 2005, it had been afforded material, logistical, and political support by the Iranian state, while many of its rival Islamist parties were left without any meaningful support to speak of. As a result, in the absence of any meaningful competition, SCIRI performed well in the January 2005 elections and successfully managed to project an image of power and dominance that allowed it to dominate the 2005 constitutional drafting process. One of its leading members became the chairman of the drafting committee, while another was in charge of the public outreach unit. SCIRI took advantage of its situation to push a number of controversial proposals, skewing the constitution in favour of particular outcomes. At the time, most analysts who were tracking the constitutional process considered SCIRI's dominance to be the natural result of what was assumed to be its immense popularity in the country. Since then, however, that same party has performed relatively poorly in every election that has taken place since 2005; it consistently earned the favour of between 6 percent and 8 percent of voters, well below a number of other parties and movements.³⁹

A series of other problems eventually emerged following the January 2005 elections. It took months to decide that the newly elected members should delegate the task of drafting the constitution to a smaller group of members and non-elected representatives. The committee eventually started work in May, leaving only three months to negotiate and draft the text. The time that remained was not used to best effect, given the drafters' inexperience, a lack of trust, and security concerns.⁴⁰ As the deadline approached, the drafters found that they needed more time and that much work still needed to be done on the design of the federal system of government and the management of natural resources, amongst others. Instead of granting them that additional time, a small number of parties (perhaps as few as three, including the Kurdistan Alliance and SCIRI) worked closely with the US embassy to close down the official drafting process and replace it with an informal one which produced the final draft. A series of invitation-only meetings were organized (first at the US embassy, and then elsewhere) in which a large proportion of the parliament-appointed drafting committee found itself excluded. Those parties that most heavily influenced the content of the final constitution represented less than 20 percent of the population. Indeed, the parliament that had originally been elected to prepare the draft constitution was not allowed to vote on

the final draft, or even to debate it. Although Ayatollah al-Sistani's main interest of ensuring majoritarianism was clearly being satisfied, he continued to support the process, perhaps because he was not fully aware of the details of what was taking place (few people were), but mainly because his secondary interest of ensuring a swift transfer of power to a new government was gaining importance (mainly as a result of increased violence throughout the capital). Despite its original concession in favour of majoritarianism, the US imposed its will and satisfied its own interests, by sacrificing the legitimate, agreed-upon process and the rule of law.

Unsurprisingly, the final draft was far from representative of the views of the individuals who had been elected to draft the constitution in the first place and closely matched the TAL. Indeed, in the first few months after it had entered into force, a large number of senior politicians denounced its provisions (mainly the system of government) and promised never to apply them. In addition, the final constitution is desperately lacking in detail on a number of issues, including the country's federal system of government, the framework for the implementation of rights, the functioning of a number of key independent institutions, the country's anti-corruption framework, the workings of the judicial system and the manner in which judicial independence should be protected, amongst many others. The lack of agreement on some of the most important issues of state and the lack of clear rules on the workings of government led to a desperate state of affairs: corruption skyrocketed reaching all levels of government (including, crucially, the security sector). When the Islamic State in Iraq and Syria (ISIS, ISIL, or Daesh) pushed into Iraq from Syria in June 2014, the Iraqi state proved incapable of responding, almost collapsing in the process. At the time of writing, it is still struggling to recover.

The lesson here is clear: in a post-totalitarian environment, all parties should prioritize state building and significant time should be given to negotiators to understand what should be preserved from the previous constitutional order, what should be remedied, and what should be discarded. A second lesson relates to the decision to abruptly reverse the agreement on process. Flexibility during constitutional negotiations can be positive (see below on Tunisia) but only when the decision to take a course is taken through consensus. In Iraq, the US and its small group of allies undermined the value of written agreements and therefore of the rule of law in a manner that remains underappreciated. Through its actions, the US sent a message that previous agreements and even electoral results can be overturned at any point, through the use of physical force and intimidation. Iraq's constitution-drafting process proved near fatal, and it was hoped that Arab Spring countries would not repeat the experience in 2011.⁴¹

Egypt

Egypt's transition was initiated by a popular rebellion which had as its short-term objective to depose an unpopular, undemocratic, and ageing president. Following weeks of massive popular unrest, Hosni Mubarak was made to leave office on 11 February 2011 by a military body known as the Supreme Council for the Armed

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Forces (SCAF). Contrary to Iraq, Egyptians were very much taken by surprise by the uprising and by the opportunities that it created. In the weeks that followed, observers and parties dedicated much of their efforts to identifying and understanding who the main players were and how the balance of power between them was determined.

Although the SCAF claimed to be acting on the people's behalf, there was no question that it had a number of personal interests that it sought to preserve.⁴² Although the Egyptian republic was initially established pursuant to an army-led revolution, and although all three of Egypt's presidents were drawn from the army, there was a sense of anxiety within the military in the years prior to 2011 that its position within the state was being undermined by a number of civilians and businessmen who were associated with Mubarak's son Gamal. The military therefore understood the revolution as an opportunity to reassert its institutional prestige within the state. What this meant was protecting its autonomy from the civilian government, while maintaining and possibly even enhancing its mandate and prerogatives.

The Muslim Brotherhood was the country's most organized political force. Its grass-roots operations initially translated into significant popularity amongst large segments of the population, but did not translate into a convincing mechanism for policy formation, mainly as a result of its undemocratic internal structures. The Brotherhood's main interest was to secure the establishment of a democratic system of government that would grant them access to state power. In the leadership's view, and based on the expectation that the Brotherhood itself would dominate all elections in the foreseeable future, policies should mainly if not entirely be determined by electoral outcomes. From a practical perspective this entailed securing constitutional and political guarantees that would allow for the Brotherhood to operate freely and openly, and without fear of repression. Finally, the organization intended on using its electoral appeal and whatever access it could obtain to state power to gradually Islamize Egyptian law and societal values.⁴³

A loose coalition of revolutionary forces was also active during the transition. This included a small number of radical political parties, activists, independent trade unions, academics, journalists, intellectuals, lawyers and judges, and even organized football fans known as 'Ultras'.⁴⁴ Much of their involvement took place outside the formal negotiation process, which often meant that their impact was limited. Their objectives included (1) the establishment of democratic system of government that empowers ordinary Egyptians; (2) the establishment of a progressive ruling order that would provide sustenance and dignity to ordinary citizens (often articulated as a call for 'social justice'); (3) eradicating corruption; (4) prohibiting individuals affiliated with the former ruling party from occupying any political position; and (5) justice for the victims of the former regime's oppressive measures.

Egypt's revolutionaries were counterbalanced with what has sometimes been termed as the 'deep state', an even looser grouping of conservative forces within the state which worked against any form of radical change, whether promoted by the Brotherhood's Islamists or the revolutionaries. Prior to 2011, this group of forces had largely been represented by the National Democratic Party, the

country's former ruling party. However, not only was its headquarters in central Cairo set on fire during the uprising, but it was also formally dissolved shortly thereafter. Despite these setbacks, the deep state remained a potent political force throughout the transition. It consisted of a number of groups and institutions, the more prominent of which were the police, the intelligence sector, the courts, and parts of the state bureaucracy. Their involvement throughout the transition was principally motivated by a desire to secure their own survival, and to protect the rights and privileges that they had accrued within the existing state structure.⁴⁵

Finally, a small grouping of liberal and secular parties, who were mainly characterized by their general commitment to democratic norms and to establishing constitutional guarantees that would prevent the Islamization of state and society, remained active in the process despite their general lack of popular appeal.

The transition roadmap that followed Mubarak's downfall was characterized by the manner in which the parties determined their interests and how they acted upon them. As can be determined from the above, the majority of the parties that played an important role in the constitutional process prioritized their survival over everything else. That dramatically increased the stakes for most parties and also explains the levels of distrust that existed between them. One of the consequences of this state of affairs is that the parties to the transition incessantly formed and broke off alliances with each other, always with a view to increasing their own chances of surviving the transition. On its own, that factor might not have been particularly damaging, but it was compounded by the parties' lack of negotiating and political experience. The result was a number of unnecessary procedural concessions that were entered into unknowingly, which itself caused many of the parties to try to force through last-minute changes to agreed-upon procedure, often through the use of violence.

The interim constitution

On 14 February 2011, the SCAF appointed a committee that was tasked with proposing changes to Egypt's 1971 constitution as well as a roadmap for the drafting of a new constitution. The committee's composition constituted irrefutable evidence that the SCAF was seeking to ally itself with the Muslim Brotherhood. The committee consisted of eight men, almost all of whom were considered to be senior members of state institutions that were broadly aligned with controlling elites' entrenched interests. They included Tariq al-Bishri (a former senior judge who had Islamist leanings), Hassan el-Badrawi (vice president of the Supreme Constitutional Court), Mohamed Hassanein Abdel Al (former dean of Cairo University's law school), and Subhi Saleh (a lawyer, former member of parliament and a member of the Muslim Brotherhood). What was most notable about these individuals is that Egypt's various revolutionary movements were not represented in any way, and also that two members out of the eight were linked to the Muslim Brotherhood. The SCAF had clearly calculated that its best chance of satisfying its own interests was to ally itself with another hierarchical political actor, and for both

to guarantee each other's interests throughout the process.⁴⁶ Despite the fact that they were at the height of their power and influence, Egypt's revolutionary forces reacted favourably to the committee's composition.⁴⁷ No objections were raised as to its possible political leanings, and there did not seem to be any understanding at the time of the possible alternatives that existed at the time.

The SCAF requested of the committee that it complete its work as soon as possible without providing any detailed instructions on the type of changes that it should introduce. One committee member said that the SCAF's only request was that the committee should not be particularly adventurous, which itself was clearly indicative that the SCAF was already leaning in favour of a conservative (as opposed to a revolutionary) outcome.⁴⁸ The committee completed its work in ten days without any meaningful consultation process. Its draft provided for the following process:

The members of the first People's Assembly and Shura Council (except the appointed members) [respectively, the lower and upper chambers of parliament] will meet in a joint session following an invitation from the Supreme Council of the Armed Forces within 6 months of their election to elect a provisional assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum.⁴⁹

This provision was eventually incorporated as Article 60 in the interim constitution, and immediately raised a number of concerns. Amongst other things, it was eerily similar to its counterpart provision from the Iraqi process. They both called for parliamentary elections and provided very little detail on how the drafters would be selected or how the constitution would be drafted, and also both imposed a six-month deadline for completion. Both transition roadmaps also placed their full trust in electoral results, and did not provide for any other formal avenues to influence the drafting process. In fact, incredibly, the two countries' respective roadmaps for transition were so similar that they were both provided for in Article 60 of their respective texts. It is almost as if the drafters of Egypt's interim constitution directly inspired themselves from the TAL, which would be frightening if true, particularly given the consequences of the Iraqi process.

In an Egyptian context, that arrangement was remarkable for a number of reasons. Firstly, it appeared to have been designed exclusively to satisfy the Muslim Brotherhood's interests. It provided for legislative elections, for the new parliament to elect a drafting body, and for the final text to be submitted for approval in a referendum within six and a half months. The committee's proposed process did not allow for any group other than the country's political majority to influence the outcome. That type of arrangement automatically favours political movements with strong electoral appeal, and given the fact that the Muslim Brotherhood was

the only organized political force in the country at the time, it was entirely predictable that the committee's proposition would be Islamist-dominated. It was therefore unsurprising that the Muslim Brotherhood campaigned heavily in favour of the proposed roadmap, to the extent that it argued that it was every Muslim's duty to vote in favour of the text.⁵⁰ On the other hand, the SCAF may have been a potent political force, but it did not have a party that could compete in the coming elections and represent its interests in parliament, which in turn meant that it would not be represented in the constitution-drafting body.

This leads us to Article 60's second most remarkable feature, which is the fact that the SCAF did not reject it outright. The committee that drafted Article 60 was entirely of the SCAF's making, and the SCAF was not under any obligation to accept its draft. It could very easily have requested changes, or at least have insisted that the committee incorporate additional detail to the plan with a view to broadening the number of parties that could make their voices heard. That the SCAF did not do so means that it shut itself out of the coming constitutional process, which would likely mean that its interests would not be prioritized. The question was whether the SCAF's approach was merely clumsy and short-sighted in so far as its own interests were concerned or whether it had actually considered all possible options and had decided that the interim constitution was in its own best interests. Although an answer could not be surmised at the time, subsequent events suggested that the former scenario was the far more likely of the two to be true (see below). Thirdly, and just as importantly, while some revolutionary forces complained bitterly about the interim constitution's content and campaigned against its adoption in the referendum, they failed to follow through and impact the process in any meaningful way.⁵¹

The committee's amendments to the 1971 constitution and its proposed roadmap were put to a referendum on 19 March 2011, which is to say, three weeks after the committee completed its work, leaving close to no time for Egyptians to reflect on the matter. Unsurprisingly given the context, it was approved by a wide margin.⁵² Remarkably, however, the text that was finally published and adopted on 30 March 2011 was different to the one that the people voted for. It included far more changes to the 1971 constitution, to the extent that the final published text amounted to an entirely new interim constitution.⁵³ No explanation was provided but it was obvious to most observers that the SCAF had reconsidered some of the proposed changes and allowed itself an additional 11 days to prepare a far more extensive list of changes. This was the first and by no means the last instance of major political actors in Egypt's transition unilaterally reconsidering major process questions after the fact, and without considering the long-term implications of consulting the public in a national plebiscite merely to ignore the popular will shortly thereafter.

The 'supra-constitutional principles' document

Having failed to prevent the interim constitution from being adopted, many of the country's secular, liberal, and revolutionary parties agreed that the process should

be revised. They understood that Article 60 provided the Muslim Brotherhood with an enormous advantage and sought to introduce a mechanism that would limit its opportunity to Islamize Egyptian society. Several suggestions were made, the first of which was to upend the process such that the constitution should be drafted before the coming parliamentary elections.⁵⁴ That suggestion faced significant resistance, particularly because it would have required reversing and abandoning Article 60 in its entirety weeks after its entry into force. Ultimately, a lighter version of that proposal was pursued. It consisted of negotiating, drafting, and agreeing on a set of 'Fundamental Principles' (sometimes also referred to as 'supra- constitutional principles') prior to the elections. According to the initiative's proponents, most of which were liberal and secular groups, the principles would consist of a number of broad principles that would reconfirm some of the constants of Egyptian constitutional tradition. The intention was for the principles to bind the future constitution-drafting committee on some of the most contentious issues, including the relationship between religion and state, mainly with a view to preventing an Islamist dominated assembly from drastically Islamizing Egyptian society. As such, the second initiative intended to qualify and supplement the process that was provided for in Article 60 rather than completely upending it. The initiative was formally adopted by the Deputy Prime Minister, who organized a significant amount of outreach on the issue and who circulated a number of drafts, some of which were published in local newspapers. Also, it later became clear that the SCAF itself was involved in the drafting process (see below).

Naturally, the Muslim Brotherhood and other Islamist parties were completely opposed to the idea that anything could bind the future drafting committee. The Brotherhood saw the effort to draw up the Fundamental Principles as an unprincipled afterthought that was purely designed to circumvent the popular will, and which essentially violated the terms of a roadmap that had already been agreed upon, and that was set out in Article 60 of the interim constitution. The Brotherhood boycotted the process altogether and indicated that it would ignore whatever was agreed upon by the liberal and secular camps. Other Islamic groups, including Al-Jama'ah al-Islamiyyah (the Islamic Group), totally rejected the initiative, moving even to organize a major protest in Tahrir Square on 29 July 2011 to express their opposition.⁵⁵

Several drafts of the Fundamental Principles document were published and provide a very good indication of what the drafters' intent was at the time.⁵⁶ The principles included a number of procedural rules relating to the coming constitutional drafting process and also included a list of substantive provisions that would theoretically be binding on the future constitutional drafting committee.⁵⁷ In terms of procedural rules, Article Third (1) of the final version to have been published sought to determine the manner in which the constituent assembly would be composed after the parliamentary elections. Article Third (2) sought to limit the constituent assembly's mandate by allowing the SCAF to object to the coming draft constitution if it found that 'one or more provisions are contrary to the basic tenets of the state and of Egyptian society'. Finally, the same article provided that

the supreme constitutional court would have the final say if the constitutional drafters refused to amend their draft pursuant to the SCAF's objection. Although a more complex and multi-stage constitutional drafting process than what was suggested in Article 60 of the interim constitution would have been welcome, the fact that these suggestions were made after a referendum had been organized and the interim constitution had already entered into force made them highly problematic. Also, the fact that the SCAF was granting itself a role in the proposed new process was clearly problematic both in the absolute and for many of the country's major political actors.

The drafts' substantive provisions were far more problematic. Although much of the final version consisted of a bland retelling of some basic political and civil rights,⁵⁸ others were explicitly designed to protect the military's many privileges. By way of example, Article First (9) provided that the armed forces 'have as their mission to protect the country, the integrity, security and unity of its land, and to defend constitutional legitimacy', without providing any indication as to what was meant by constitutional legitimacy or what measures the military could use to protect it. This lack of detail and clarity raised the possibility that, if the November draft were adopted, Egypt's military would have been clearly permitted to intervene in the political process at the time and in the manner that it chose.⁵⁹ Article First (9)'s second paragraph was even more problematic. It provided that:

The Supreme Council of the Armed Forces is solely responsible for all matters concerning the armed forces, and for discussing its budget, which should be incorporated as a single figure in the annual state budget. The Supreme Council of the Armed Forces is also exclusively competent to approve all bills relating to the armed forces before they come into effect.

A number of Egyptians rightly saw this draft provision as evidence of the SCAF's intentions to isolate it from any form of civilian oversight.

As a result of all of these as well as other factors, significant violence broke out in mid-November mainly between revolutionary forces and the police. Several hundred protesters were killed and wounded and the effort to draft the Fundamental Principles was subsequently abandoned.⁶⁰

The effort to draft the Fundamental Principles underlined a number of trends that had already been identified during the drafting and adoption of the interim constitution. It clearly indicated that the Muslim Brotherhood had understood not only what its own interests were, but what type of process needed to be followed to allow for those interests to be satisfied. It also indicated that whereas liberal and secular opinion had not properly formed and crystallized by March 2011, it had developed significantly by the summer of 2011 in favour of introducing mechanisms to control and limit majoritarian politics during the constitutional drafting process. This strategy suggests that if the drafting of the Interim Constitution had taken place over a longer period of time, and if it had involved more public consultation, then Article 60 might well have looked very different.

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Most importantly, perhaps, the final draft of the Fundamental Principles indicated what type of substantive interests the SCAF sought to achieve. It also showed that the SCAF had changed its mind about the interim constitution, and that it agreed that Article 60 should be changed. The entire episode revealed significant clumsiness on its part and a lack of appreciation of how other political groups would perceive its actions. Finally, the protests and violence that followed publication of the final draft revealed the depth of opposition to the notion of revolutionary privilege, which clearly eclipsed its fear of an Islamic takeover following the coming elections. The revolutionaries' capacity to mobilize and sustain significant street protests proved once again to be a vital mechanism to influence the constitutional process. However, their success in mobilizing against the draft Fundamental Principles in November 2011 only served to illustrate their failure to appreciate what was being proposed in March 2011 when the interim constitution was adopted.

The 2012 constitution

Parliamentary elections were organized in late 2011 and early 2012 and, as expected, the results returned important majorities for the Muslim Brotherhood's Freedom and Justice Party (FJP) and its allies. Altogether, all the various strands of Islamist parties, ranging from puritanical to moderate, obtained 391 seats out of 508, while the remaining of the 116 seats went to a disparate group of liberals, secularists, left-wing revolutionary parties, and remnants of the previous regime. One of the first tasks that the new parliament had to complete was to appoint a constitutional drafting committee (CDC) in accordance with Article 60 of the Interim Constitution. After a few hiccups, the CDC was finally appointed and managed to get to work in June 2012. There was significant controversy in how those 100 individuals were selected: the Muslim Brotherhood-affiliated FJP naturally considered that its electoral success allowed it to dominate the assembly, whereas the opposition stressed that because parliamentary majorities were transitory, the assembly's makeup should reflect all components of Egyptian society.

In the end, a poor compromise was reached: the FJP accepted that the Islamists' crushing majority within parliament should be reduced within the CDC to allow liberals and other non-Islamists more scope to participate in the negotiations, but ensured that concessions would have close to no impact by virtue of the CDC's rules of procedure. Article 5 of those rules provided that:

The CDC adopts draft provisions one by one and through consensus. If consensus cannot be reached, the draft provision is sent to a joint committee composed of the CDC's chair and the relevant specialised committee in order to review the provision's wording in accordance with the objections that will have been made. The provision's new version will be presented to the CDC in a subsequent meeting, and will require the support of 67 members at least to be adopted. If that level of support is not achieved, the provision is voted on again in a subsequent meeting and may be adopted with the support of 57 members.⁶¹

The mechanism was clearly designed to allow for the FJP and its allies to push through any wording that it chose regardless of objections that might have been made. The rules contained no other mechanism to overcome disagreements or to protect individual rights.

Several factors conspired to create irrecoverable cleavages in the CDC, thereby ensuring that the FJP and its allies would indeed be forced to rely on Article 5 to have the final draft constitution passed. Firstly, the FJP entered into a series of agreements with Egypt's security establishment and with Salafi movements, while leaving just about every liberal, left-wing, and secular CDC member out in the cold. The FJP decided early on to use the 1971 constitution as a starting point for its discussions, specifically to reassure members of Egypt's establishment (including in the security sector) that the CDC would not be engaging in any significant rehaul of the country's institutional framework. Thus, for example, wording from the 1971 constitution according to which women had obligations towards their family and society (problematic given that men were not under any such obligation themselves) was maintained in the FJP-drafted constitution. This had the immediate effect of alienating pro-democracy activists, and forced the FJP to spend much of its few months in power justifying wording that it was in fact not directly responsible for.⁶²

The FJP went further by modifying the 1971 constitution to grant the military all the privileges that it had tried and failed to grant itself during the drafting of the supra-constitutional principles document. Amongst other things, the final constitution provided for the first time that the minister of defence had to be drawn from the officer class, that the military's budget had to appear as a single figure in the annual state budget law, that a special council that was dominated by the security services was solely responsible for debating the military's budget, and also established the principle that civilians could be tried before military courts. Furthermore, the new constitution failed to resolve the framework for decentralization: the 1971 constitution was silent on the issue, and the legislation that was in force at the time provided that governors were directly appointed by the central government in Cairo, and did not establish any specific mechanisms to hold governors accountable for their actions. The FJP-dominated assembly did not change this and it was largely considered to be another favour towards the military, given that a large proportion of governors have traditionally been drawn from the officer class under the unproven assumption that they are capable administrators. In fact, the FJP was so embarrassed by these provisions that it simply denied that they existed, and sometimes argued that they were contradicted by other provisions, which they were never able to clearly point to.⁶³

The FJP-dominated CDC also had to make a determination about which end of the political spectrum it would lean towards on religious issues. The Muslim Brotherhood is a famously secretive organization, which has never been particularly clear on where it stands on a number of fundamental issues, such as how far freedom of belief extends. This caused many liberals and secularists significant consternation, and they worried that the CDC's makeup combined with its rules of

procedure could lead to an increased and more restrictive role for religion in the state and in the public sphere. Early on during the CDC's work, some of the FJP's more senior officials committed to leaving the 1971 constitution's Article 2 (according to which the 'principles of Islamic Sharia' were the principle source of legislation) untouched, which set many nerves at ease.⁶⁴ Later on, however, it emerged that the FJP was working closely with the CDC's Salafi (ultra-orthodox) members to draft new provisions on the role of religion. This included provisions according to which: the personal status of Christians and Jews would be regulated by their own religious rules (Article 3); al-Azhar would be responsible for interpreting the principles of Islamic Sharia (Article 4); and the term 'principles of Islamic Sharia' (which was previously interpreted as being fairly limited in scope) was redefined in very broad terms to include the entire range of Islamic rules dating back centuries (Article 219). This was not only regarded by liberals, revolutionaries, and secularists as a betrayal by the FJP, but also clearly illustrated a preference by the FJP in favour of accommodating Islamic fundamentalists rather than pro-democracy movements.

The second factor that forced deep divisions within the CDC was the FJP negotiation methods, which included erratic and unpredictable behaviour as well as making false promises. Aside from the promise not to amend Article 2, which was clearly unmet, the FJP's senior leadership made a series of promises to members of the liberal, revolutionary, and secular opposition that the constitution would not be passed over their objections. In particular, promises were made that the constitutional process would continue for as long as necessary until an agreement on all outstanding issues was reached, and for that purpose President Morsi passed a 'constitutional declaration' on 22 November 2012 which extended the deadline for completion by an additional two months.⁶⁵ Despite these and other commitments, the FJP suddenly and without prior notice moved to complete the constitution in a remarkable 24-hour session which took place before the original six-month deadline had even expired. The entire process was so unusual and questionable that just about every non-Islamist member boycotted the session, robbing the new constitution of the type of inclusivity that it so desperately needed.⁶⁶ Although the final draft constitution was approved in a referendum that took place in December 2012, turnout was particularly low (around 33 percent) with 36.2 percent of voters rejecting the text.⁶⁷

The Muslim Brotherhood's approach, which was both majoritarian and also in conformity with the process that had been set out in Article 60 of the interim constitution, was deeply problematic for a number of reasons. Firstly, it ignored the fact that political majorities were almost always temporary, and that majorities can evaporate very quickly, particularly during periods of transition. Secondly, a majoritarian approach can cause political rivals to unite in opposition in ways that might not otherwise have been possible. The result for the Muslim Brotherhood was that, as a result of its approach, it had successfully managed to alienate the vast majority of Egypt's institutions and political groups, as well as large segments of the international community, which eventually combined forces to end the

Brotherhood's rule. A different approach had always been available to the Brotherhood: it had indicated on a large number of occasions that it intended for the constitution to represent a consensus of opinion, but it decided not to follow through. It also chose to ally itself with the same forces that it feared the most, namely the military, rather than with more progressive and democratic forces.⁶⁸ By choosing to ride the tiger, it took the risk of being devoured, which is what ended up happening.

The 2014 constitution

In the end, the 2012 constitution remained in force only for six months. From January to June 2013, the tensions that had been created by the flawed constitutional process were worsened by President Morsi's questionable leadership, which led to his ultimate dethroning by the military as well as significant violence during the months that followed.⁶⁹ The FJP, which was previously considered to be the dominant political force in Egypt's post-2011 environment, was driven underground by a resurgent security state. A new constitutional declaration dated 8 July 2013 suspended the 2012 constitution and called for it to be amended through a multi-stage process.⁷⁰ In particular, it provided that:

1. a ten-member committee of experts (the C10) would have one month to suggest changes to the 2012 constitution;
2. a new 50-member constitutional drafting committee (the C50) would have two months to prepare a final draft; and
3. a referendum was to be organized within one month of the draft's completion.

What was most remarkable about this chosen method of proceeding was that it did not include any direct involvement of the people, whether through elections or otherwise. Both the C10 and the C50 were to be directly appointed by the interim president (who was a member of the supreme constitutional court and therefore deeply entrenched in the state's legal traditions and institutions). Clearly, the drafters of the July 2013 constitutional declaration had attributed the failure of the 2012 constitution to the role that electoral results were allowed to play. The difficulty now that elections were rejected was finding an adequate mechanism for ensuring that the C10 and the C50 would be both representative and capable of drafting a text that would satisfy the needs of the general population. The context was generally unfavourable: not only did the new ruling authorities decide that the people could not be trusted to choose adequate representatives, but the pre-2011 ruling regime had essentially decimated Egypt's political parties, rendering them mostly empty and elite-driven shells that were detached from the general population.⁷¹ In addition, much of the academic elite had long been co-opted and forced to acquiesce in favour of the 1971 constitution; their discourse and ideas included almost no clear ideas on how to resolve the very deep problems that the state had been encountering for the past few decades.

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There was therefore a clear and important challenge to be met, but sadly the chosen method of proceeding merely repeated the flaws of the 2012 process but from a different side of the political spectrum. A few days after the July 2013 constitutional declaration was issued, six judges and four academics, three of whom were retired, were brought together to form the C10.⁷² These individuals were selected not necessarily on the basis of their expert knowledge, but more for their loyalty to a conservative vision of Egyptian state and society. Their suggested changes to the 2012 constitution essentially proposed to shift constitutional practice back in favour of the 1971 constitution in many respects (including by removing the few clear improvements that the 2012 constitution had introduced). One of the only clear innovations that the C10 proposed in its draft was to grant the judiciary far more independence than it had ever enjoyed in the past. Given the C10's membership, it was the clearest manifestation of self-interest that the transition had yet experienced.⁷³

More importantly, perhaps, Article 29 of the constitutional declaration purported to explain how the C50 should be composed. It provided that the committee was to be made up of 50 members, who were supposed to represent all components of Egyptian society. The article provided some examples of which organizations were entitled to be represented in the Assembly (political parties, trade unions, religious institutions, etc.), but it did not state how these organizations would select their representatives, or how many representatives each would be entitled to. Finally, the article also stated that youth and women should make up at least ten out of 50 members, which was very similar to the proportion that they had been allocated under the previous constituent assembly. Remarkably, Article 29 was almost identical to Article 3 of the supra-constitutional principles document, which was originally intended to guide how the CDC would be composed.

When the C50 was finally appointed, many observers were rightly satisfied that representatives from the Church, al-Azhar, and other recognized institutions were included; the difficulty, however, was that the large majority of those members were only involved in a very narrow set of special interests. Representatives of religious institutions have an interest in religion and national identity; representatives from Egypt's agricultural community are equally only interested in agricultural issues and in their own representation in parliament, etc. Outside of those special interests, these representatives essentially remained disinterested throughout the discussions or contributed close to nothing that was of value. The C50 did include around six or seven individuals who were interested in broader issues, and who were capable of formulating a vision for reforming the state. However, those individuals were not in control of the drafting process; they were not asked in any way to present an alternative vision to the current constitutional framework. If and when they sought to introduce something entirely new, their ideas would sometimes be entertained, sometimes ignored or rejected, and in the end they were mostly outvoted by the rest of the C50's membership. In that sense, it should not come as a surprise that the constitution that they ended up drafting (the '2014 constitution') is little more than a reformulation of the 2012 constitution based on the negotiations that took place between special interests, and that it does not offer a new vision for the state or for the protection of the weak and vulnerable.

The 2014 constitution maintains, and on occasion worsens, many of the negative characteristics that have plagued Egypt's constitutional practice for decades. Despite the changes that it introduces, the 2014 constitution simply does not represent the radical shift that its authors maintain. The tribe-like mentality through which state institutions are granted impressive amounts of independence and privileges despite the fact that they do not deliver adequate services to the people has been reinforced, diminishing the potential for democratic accountability and pressure for improvement.⁷⁴ The main beneficiary of this method of proceeding was the military, which managed to secure all the benefits and privileges that it sought to grant itself through the 'supra-constitutional principles' document.

Ultimately, the process that led to the 2014 constitution can be traced back to Article 60 of the interim constitution. Article 60 set the country on a majoritarian path, encouraging one party with a temporary and fragile political majority to dominate the process while alienating the remainder of the population. That not only had the effect of undermining the resulting constitution's legitimacy, but it also undermined the elites' faith in elections (which was fragile enough to begin with). The authors of Article 60 have much to answer for, as do all the parties who failed to rectify its worst elements from 2011 to the end of 2013.

Tunisia

Following the downfall of Zine el Abidine Ben Ali in January 2011, his political party was quickly dissolved, paving the way for exiled politicians to return and for new parties and coalitions to be established. Virtually all of Tunisia's post-uprising political forces agreed that the former president's corruption, oppressive policies, and ineptitude had become a liability even to many of his original supporters, and that some form of democracy should be established in the country. But that is where the agreement ended.

Tunisia's principle Islamist party, Ennahda, which had suffered the brunt of the previous regime's oppressive policies, was intent on establishing constitutional guarantees that would allow it and its members to survive free from oppression in the country.⁷⁵ Also, as an Islamist party, it shared with its counterparts in Egypt the ambition to gradually Islamize Tunisian society partially through a series of constitutional reforms.⁷⁶

The remainder of Tunisia's post-uprising political spectrum was diffused in a large number of small liberal, secular, conservative, and left-wing parties, virtually all of which were joined together in a common distrust for Ennahda and Islamist trends, generally speaking. Although the former president's political party had been dissolved, much of the state's bureaucracy and institutions shared his party's anti-Islamist ideology and with time coalesced in a new political grouping (Nidaa Tounis).⁷⁷ That entire bloc of parties and coalitions had as its major interests to prevent the Islamization of Tunisia's constitution, and to ensure its own survival in the new political order. Also, the more conservative elements within that same bloc were clearly desirous to prevent any major restructuring of state institutions.

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Two secular, social democratic parties were an important exception to that trend. The Congress for the Republic and Ettakatol accepted to form a coalition government with Ennahda. Both parties were in an ambiguous position for while they were deeply involved in setting the government's agenda, they were both also opposed to any initiative to Islamize Tunisian society. Their interest was therefore in maintaining government control over the process, while at the same time exercising enough control on government policy to protect their own individual interests. Given that those interests overlapped to a certain extent with the parliamentary opposition, these two parties were afforded significant opportunity to pivot between the two sides of the political divide, if they could overcome the issue of distrust.

The final major actor in Tunisia's process was its civil society activists and organizations, much of which prioritized cross-border learning and state building.

Contrary to other countries in the region, Tunisia's political spectrum was relatively balanced between religious and secular parties. Another distinction was the willingness of some parties to reach out to rivals, which has earned the country a reputation for compromise in a region broadly defined by obstinacy and violence.⁷⁸ However, Tunisia's pre-2011 history of oppression, as well as the marked ideological cleavage between the two main sides of the political spectrum, led to deep distrust between Ennahda and its many rivals. Some of Tunisia's main political actors understood the danger that that dynamic created and engaged in a large number of trust-building initiatives prior to the uprising.⁷⁹ However, the levels of distrust were so great that many of those parties or individuals who engaged in compromise were ostracized by their own camp.⁸⁰

Establishing the process

Immediately after Ben Ali fled the country, various groups within Tunisia scrambled to pick up the pieces and elaborate a transition roadmap. In conformity with the 1959 constitution, the former speaker of parliament assumed the role of interim president, and immediately issued a number of decisions that would set the country on its path. On 18 February 2011, a 'High Commission to achieve the goals of the revolution, on political reforms and democratic transition' (popularly referred to as the 'Ben Achour Commission', after its president Professor Yadh Ben Achour) was established to act as a type of interim parliament whose main objective was to draft and adopt the rules that would govern the interim period, including the electoral law. The existing parliament, which was elected in 2009 and dominated by the former ruling party, was formally dissolved on 23 March 2011.

The Ben Achour Commission was composed of public intellectuals, leading academics, respected and independent officials, and political party representatives. Its president, one of the country's leading authorities on public law, played a major role in selecting the Commission's membership, much of which echoed his views on republicanism and secularism. The Commission eventually caused some controversy when it discussed rules governing campaign finance and a list of fundamental principles (as in Egypt during the same period). Ennahda, which had

representatives in the Commission, eventually withdrew, complaining of bias and that the process lacked legitimacy.⁸¹ In some sense, that experience was an important precursor for the difficulties that were to shape the constitutional drafting process during the following two years.

As a result of a number of factors, including the massive popular mobilization during the uprising against the previous regime and the legacy of fraudulent elections, a decision was taken early on that the new constitution would be drafted by a directly elected constituent assembly. This was in contrast to Iraq and Egypt, where elected bodies appointed drafting bodies from within or without its membership. Elections were eventually organized in October 2011, and the results replicated many but not all of the dynamics that existed in Egypt. A clear cleavage emerged between the Islamist Ennahda party (which obtained 37 percent of the popular vote, the best result by far), and the remainder of political forces. However, whereas the FJP and its Islamist allies were able to dominate the Egyptian parliament and the CDC by virtue of their overwhelming success in the elections, Ennahda was left virtually without any other Islamist allies in the Tunisian constituent assembly, which meant that although it was the largest bloc, it did not have anything near a majority.

As a result, Ennahda would be forced to enter into agreements with non-Islamist forces to successfully negotiate a final constitution, which was not the case in Egypt. In November 2011, Ennahda announced that it had formed a coalition with Ettakatol and the *Congrès pour la République* (two secular and left-leaning parties), allowing it to form the first post-revolutionary government. The new coalition, often referred to as the ‘Troika’, had a comfortable majority in parliament, which during the early stages of the process allowed for the three parties to impose its own agenda without significant difficulty. In addition, many Ennahda members considered that their electoral success should entitle them to determine government policy and the permanent constitution’s makeup, despite the fact that it controlled just over a third of the constituent assembly’s seats. As such, Tunisia was distinct from Egypt in that it lived through a period of majoritarianism, without the majority.

The first step was to pass key legislation that established Tunisia as a parliamentary system of government during the interim period. The second was to establish the constituent assembly’s rules of procedure, which provided that members should be part of ordinary legislative committees as well as constitution-drafting committees.⁸² Six thematic committees were established, covering areas such as fundamental rights, decentralization, system of government, etc. Most importantly, perhaps, the rules established a Joint Committee for Cooperation and Drafting, which was theoretically responsible for coordinating the work of all the other drafting committees and for preparing the constitution’s final draft:

Rule 103

In parallel with the general Constitutional Committees, the National Constituent Assembly shall establish a Joint Committee for Coordination and Drafting consisting of:

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- the President of the Constituent Assembly, who shall be ex officio Chairman,
 - the Constitution general rapporteur, who shall be ex officio Deputy Chairman,
 - the first and second assistants to the constitution general rapporteur, and
 - the chairmen and rapporteurs of the general Constitutional Committees.
- The constitution general rapporteur and his assistants are elected pursuant to Rule 5 of these Rules.

Rule 104

The Joint Committee for Coordination and Drafting shall be responsible for:

- the ongoing coordination of work between the general constitutional committees,
- the preparation of the general report on the draft constitution before its presentation to the plenary Assembly, and
- the preparation of the final draft of the constitution in accordance with the decisions of the Assembly.

Together, these two provisions established a committee that would be at the apex of the constitution-drafting process, without providing the requisite amount of detail to guide its functioning. By virtue of Rule 103, it was clear that the majority of the Joint Committee's members would be drawn from the Troïka through the Committee's *ad officio* members. In addition, Rule 60 provided that all committee decisions (which included the Joint Committee) should take its decisions by 'majority vote'. Rule 104 did very little to clarify the relationship between the Joint Committee on the one hand and the thematic committees. Hence, where a particular thematic committee included a majority of secular members who were not drawn from the Troïka, and reached an agreement on substantive issues that was not to Ennahda's liking, would the Joint Committee (which would be under the Troïka's control) be within its right to make substantive modifications? Also, where two different substantive committees reach contradictory decisions relating to the same issue, how should the Joint Committee react? Rule 104 was so devoid of detail that it opened the door to different interpretations, each of which were bound to bring with it significant challenges. Remarkably, there is no record of any of the Constituent Assembly's members making any reservations about these two provisions, despite the obvious possibilities that they afforded to Ennahda.

The drafting and negotiation process

Significant problems emerged early on during the drafting process. The first related to work ethic. More than a year after the constitutional process started, no serious attempt was made to resolve issues of fundamental importance.⁸³ None of the first three drafts of the constitution that were circulated (the third of which was completed in April 2013) provided any clarity on what system of government would be

adopted.⁸⁴ Secondly, all parties were guilty of using poor negotiation tactics, including trickery and obfuscation, all of which undermined the process and caused unnecessary delays. Thirdly, the process suffered from the fact that no official role was granted to Tunisia's many experts in constitutional law or to civil society. Thus, although hundreds of conferences, seminars, and other meetings were organized and allowed for civil society to discuss constitutional issues with Assembly members, the latter were never under any obligation to actually take anything that was being said to them into account.

In addition, Ennahda's insistence on behaving as if it controlled a majority of the Constituent Assembly caused deadlock. This started early on, as a result of the fact that Ennahda dominated the Joint Committee, which caused its remaining members to consistently complain that their views were being ignored and preventing the Committee from making any progress on a number of fundamental issues.⁸⁵ Eventually, however, disagreements relating to the relationship between religion and state caused for the process to break down altogether. Although Ennahda announced on a number of occasions that it would not seek to include Sharia as a source of legislation,⁸⁶ the issue did not die as Islamist members continued to try to pepper the text with religious references and mechanisms through which religious principles could be reintroduced into Tunisian positive law. This approach worsened the crisis of confidence between both sides, which eventually reached fever pitch after two secular members of the Constituent Assembly were assassinated by unknown assailants.⁸⁷

Following accusations that the Joint Committee's rapporteur made a number of important changes to the draft constitution without consulting the relevant drafting committees, and after a series of initiatives failed to resolve outstanding points of contention, the Constituent Assembly's sessions were suspended in August 2013. The tension within Tunisia's political class was significantly amplified by regional dynamics, including the fact that, weeks before, Egypt's Islamist president had been deposed by the military, leading some Tunisians to call for similar action in their country.⁸⁸ Protests and counter-protests were organized with worrying frequency during this period, with rhetoric on both sides deteriorating significantly, bringing the country dangerously close to the precipice.

Although many of the parties that were represented in the Constituent Assembly had already been engaging in dialogue sessions outside the Assembly's formal sessions, it was only after sessions were suspended that these initiatives were taken seriously. The first element of success was the resolution of the relationship between religion and state in August 2013 through what was referred to as the 'consensus committee'.⁸⁹ More importantly, a series of dialogue sessions was organized by a group of civil society organizations (collectively referred to as the 'Quartet') to resolve outstanding points of contention in both the constitution and the transition process. The sessions were not traditional mediation sessions, however, particularly given that Quartet members were leading protagonists in the discussions with their own interests (which were often not in line with Ennahda's own positions). Ennahda eventually conceded in favour of the majority of the

demands that were made, unsurprisingly in retrospect given that it never had a majority of support in the country, given its waning popularity throughout the Constituent Assembly's life, given the threat that the political crisis posed, and given how heavily regional dynamics were stacked against it. A few weeks after the final agreement was entered into, the constitution was finalized and formally adopted by the constituent assembly by a large majority of its members.⁹⁰

There is significant debate on the factors that allowed for the deadlock to be broken, with some attributing Tunisia's relative success in comparison to Egypt to Ennahda's capacity and willingness to compromise on some of the key elements of its platform,⁹¹ while others note more structural factors, such as the absence of oil wealth or a hereditary system of government.⁹² Ultimately, Tunisia's transition process owed much of its success to two factors: (1) by the end of the negotiation process, Ennahda found itself without any meaningful allies to speak of, and was increasingly isolated, with stark examples from across the region as to what further obstinacy could lead to; (2) political elites took a collective decision to abandon many of the rules that were established at the start of the process in favour of a negotiated, consensus-based arrangement that was non-democratic in its form. Ennahda made the most concessions by far under this arrangement, but considering the circumstances it was also left with no other reasonable alternative.

Yemen

In comparison with the other case studies that are set out in this chapter, the Yemeni constitutional process is unique. It has been characterized by a number of factors including an unfavourable security and economic context, and from a number of social cleavages and security threats over the past few decades, including increased activity by militant organizations in various parts of the country. On the other hand, since 2011, the country benefited from a number of factors including a deeply fractured political landscape which ensured that no party, alliance, body, or institution could impose its own transition plan on the population (as in Iraq and Egypt) and also that the country would not be wedged between two rival camps (as in Tunisia).

Yemen's transition also had one other major distinguishing factor which was that it was a negotiated process. Thus, the former president's ruling party, the GPC, remained an active force throughout. In particular, the GPC participated in all the discussions and negotiation sessions with a view to ensuring its own long-term survival and to preserve as much of its power and prestige as possible. A constellation of southern parties and movements had a large number of grievances and objectives that they pursued, including an expansion of southern autonomy through the establishment of a federal system, reparations for past injustices, and guarantees against a return of oppression (including by reserving the possibility of secession). The Houthi movement's position evolved drastically from 2011 onwards; by the start of 2015, it had grown to become the country's preeminent paramilitary force and even appeared to have taken over the presidential palace

altogether. Throughout the transition, their participation appeared to be designed to expand their political power in proportion to their military strength. As in other cases, Yemen's opposition parties remained concerned by a desire to expand the political space that they could operate in while civil society remained mainly concerned with the modernization of state institutions and transitional justice issues.

Yemen is also set apart from its peers in the region by the assistance that was provided by regional and international actors on both process and substantive issues. This was made possible by the political context and by the succession of events during 2011. Shortly after Yemen's uprising began in early 2011, then president Ali Abdallah Saleh refused to step down, causing a split in security services, which pushed the country to the brink of civil war.⁹³ In an attempt to defuse tensions and avoid a full-blown conflict on their doorstep, the Gulf Cooperation Council (GCC) proposed in May 2011 an initiative (the GCC Initiative) to resolve the dispute through a negotiated settlement. Although only one-page long, the Initiative provided that a government of national unity should be formed, that the president should resign in favour of the vice president, that presidential elections should be called within 60 days, and that a constitutional reform process should be carried out, followed by a referendum and fresh elections. The Initiative was eventually endorsed by the United Nations Security Council in October 2011 by virtue of its Resolution 2014 (2011) and by almost all major Yemeni political forces.

During the months that followed, significant effort was made to negotiate the mechanism through which the GCC Initiative was to be implemented. The negotiations were facilitated by the United Nations, in particular through the offices of Jamal Benomar, who had been appointed Special Adviser to the Secretary General of the United Nations on the Yemeni crisis. The final version of the document was entitled the 'Agreement on the Implementation Mechanism for the Transition Process in Yemen in accordance with the Initiative of the Gulf Cooperation Council' (the Implementation Mechanism), and was signed in Riyadh, Saudi Arabia on 23 November 2011.⁹⁴ The Implementation Mechanism provided significant detail on how the transition period would be organized. It provided that it would consist of two phases: (a) the first phase, which was to commence with the signing of the Mechanism and which would end with early presidential elections; (b) the second phase which would essentially consist of the process through which the new constitution would be drafted.

In so far as the constitutional process was concerned, the Implementation Mechanism provided that, rather than hold parliamentary or constituent assembly elections, a national dialogue conference should be convened to bring together 'all forces and political actors, including youth, the Southern Movement, the Houthis, other political parties, civil society representatives and women'. It also set out a list of all the issues that should be discussed by the NDC, including the process through which the constitution should be drafted, the state's structure and political system, reform of the civil service, the judiciary and local governance, national reconciliation and transitional justice, human rights, the protection of vulnerable

groups, etc. The Implementation Mechanism provided that the substance of the NDC's discussions should be captured in a series of interim and final reports that would be published online and circulated to the public. It also stated that, after the NDC were to complete its work, a constitutional drafting committee should be composed to translate the substance of what the NDC will have agreed into a concrete proposal for a new constitution. Importantly, the Mechanism also indicated that all decisions should be taken by the committee through consensus. Parliamentary elections would only be organized after the new constitution were completed and entered into force.

The NDC's internal rules and its makeup were carefully negotiated over a one-year period, once again with significant assistance from the United Nations. In the end, the NDC included 565 members, all of whom were chosen based on consensus between the country's main political forces. The NDC had members from the country's main political groups, women's associations, and youth representatives. The NDC split into nine working groups covering a wide range of issues. Although the NDC worked past its original deadline of September 2013, it managed to reach detailed agreements on many issues, including the improvement of oversight and anti-corruption mechanisms, the enforcement of political and human rights, and the improvement of representation for women.

All of the NDC's agreements (referred to as 'outcomes') were captured in a series of reports that were made publicly available in both Arabic and English.⁹⁵ The final published versions included close to 2,000 outcomes, all of which were theoretically binding on the state and would have to form the basis of the new constitutional arrangement. The outcomes were difficult to navigate and were sometimes even contradictory, but they also included a significant amount of detail relating to a large number of issues that were poised to set Yemen on a very different path in comparison to its recent past. At the same time, although a general agreement to re-establish Yemen as a federation was reached, the NDC was unable to make much progress on how that federation would be structured, or what powers each level of government would have. A new presidential committee was established to decide the issue, and announced in February 2014 that the country should have six regions. The announcement was immediately rejected by the Houthi movement, on the basis that it 'divides Yemen into poor and wealthy regions', as well as by a number of political parties.⁹⁶ Nevertheless, the transition process continued without even acknowledging that the proposed federal arrangement had been rejected by some of the country's principle political actors.⁹⁷

The constitutional drafting committee was formed in March 2014 and was initially given a period of a few months to prepare a draft constitution that would have to be based on the outcomes. The committee eventually completed its work in January 2015, far later than originally expected.⁹⁸ By that time, security had deteriorated significantly in the country. In particular, gunmen loyal to the powerful Houthi movement had by then taken control over large parts of the country, including the capital; on 20 January 2015, they occupied the presidential palace, and demanded amongst other things that the draft constitution be amended to

reflect their position on federalism.⁹⁹ Since then, the country has been engulfed in a full-blown regional war.

In comparison with the rest of the region, Yemen's post-2011 transition was unique. Pursuant to a collective decision that was supported by the international community, negotiation dynamics were not influenced by electoral results in any way, given that the roadmap did not provide that any elections should be organized until well after the constitution was concluded. Instead, the NDC sought to level the playing field between all political forces by requiring that all decisions be taken through consensus. While this approach certainly prevented the transition process from being unduly influenced by electoral results, it created its own challenges, including the fact that powerful political forces which were capable of scuttling the entire process were not given sufficient consideration during substantive discussions. In addition, the NDC process was not an adequate mechanism to decide major issues that were highly technical in nature, most important of which was the precise type of federal arrangement that the country should adopt. At best, the NDC might have discussed the main principles that should underpin the federal arrangement, while leaving the details to be decided by a more expert group. Finally, the NDC's failings led to an unanticipated third problem, which was that the constitutional drafting committee had to shift from a purely technical, drafting committee into a decision-making body. Some of the new state's most important features were discussed by the committee, ignoring the fact that some of the country's most important forces (including the Houthis) had already declared themselves opposed to whatever outcome would be reached.¹⁰⁰

Conclusion

As the transition processes have progressed from 2011 to 2015, the dynamics that originally informed each national debate on how the transition should be organized have also evolved. Whereas the initial concern was the absence of a roadmap and the new elites' lack of preparedness, by 2014 the main concern appeared to be how to adequately capture the best that society had to offer in a context in which elections were considered to be leading to imperfect outcomes. The relative success and failure of each country that is impacted by the Arab Spring will depend in large part on how that dynamic is managed over the long term. While there is clearly no single solution that can be applied to each situation, several lessons clearly emerge from all of the above:

1. Before a transition roadmap is firmly established, significant thought should go into the purpose of elections and what relationship should exist between electoral outcomes and constitutional processes. Elections in a post-totalitarian environment will often be unavoidable but fresh elections in such an environment cannot be the sole determinant or possibly even the main determinant for how constitutions should be negotiated. With that in mind,

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mechanisms should be developed to protect higher objectives than the narrow interests of transitory political movements.

2. As a corollary of the point above, to the extent that this is possible in each national context, significant effort should be made between a country's major political forces to negotiate the fundamental principles that will bind the state together, prior to the actual drafting of the final constitutional text.
3. Finally, although they have very little democratic legitimacy to speak of, future constitution-making processes in the region should carve out a convincing role for progressives, mainly because they are essentially alone in presenting a convincing alternative to the status quo for each country. Various mechanisms can be established that allow for progressives to play a role, whether by forcing constitutional drafters to seriously respond to specific proposals for reform or by giving the reins to progressives along the lines of what was done in many other countries.¹⁰¹

In countries where defunct repressive regimes have damaged the very core of democratic institutions to the extent that the people have few if any convincing representatives to speak of, significant thought and innovation are required to balance the demand for immediate democratic gains with the need to pragmatically negotiate through what will inevitably be troubled political waters. Although negotiated outcomes do not always conform to the democratic ideal that most of us aspire to, they offer significant benefits from a purely practical point of view. A separate but related issue is whether negotiated outcomes can also lead to significant substantive progress for ordinary citizens, but that is a matter for another day.

Notes

- 1 I am grateful to Ayman Ayoub (former IDEA regional director in the Arab region) for his thoughtful comments in the production of this contribution, and for supporting my efforts to understand the dynamics of constitutional reform in the region from 2011 to 2015. I am also grateful to Professor Tarek Masoud and the Belfer Center for Science and International Affairs at Harvard University for allowing me to present an early version of this paper and for their invaluable feedback.
- 2 For more on the circumstances that led to the uprising, see Gilbert Achcar, *The People Want: a Radical Exploration of the Arab Uprising*, University of California Press (2013); Joel Beinin and Frédéric Vairel (eds), *Social Movements, Mobilisation, and Contestation in the Middle East and North Africa*, Stanford University Press (2013); and Tarek Osman, *Egypt on the Brink: From Nasser to Mubarak*, Yale University Press (2011).
- 3 Jason Brownlee, Tarek Masoud, and Andrew Reynolds, 'Why the Modest Harvest of the Arab Spring?', *Washington Post*, 21 October 2013.
- 4 See, for example, the comments by Federica Mogherini, High Representative of the European Union for Foreign Affairs and Security Policy, before the European Parliament on 14 January 2015, which are available here: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150114+ITEM-010+DOC+XML+V0//NL&language=NL.
- 5 At a different time and in different circumstances, identifying a constitutional objective would have been relatively straightforward. That would have been the case in the

immediate post-colonial period in many Arab countries, considering most of their constitutions were drafted by a small number of people who sought to impose an elitist, minority ideology on a passive, silent, or oppressed majority. Iraq's 1970 interim constitution was specifically designed to allow for an unelected and unaccountable leadership to impose its control of state institutions for as long as possible on the population as a whole; equally, Tunisia's 1959 constitution was itself drafted by a single political party and reflected that party's own ideology to the exclusion of all others. For more, see Nathan Brown, *Constitutions in a Nonconstitutional World: Arab Basic Law and the Prospects for Accountable Government*, State University of New York Press (2011); and Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes*, Cambridge University Press (2013).

- 6 For more on the causes and consequences of this type of tension, see Zaid Al-Ali, 'The Arab Spring Constitutions: For Whose Benefit?' in Tom Ginsburg and Aziz Huq (eds), *Assessing Constitutional Performance*, Cambridge University Press (2016).
- 7 On the possible roles that external actors can play in a sovereign or semi-sovereign constitution-making process, see Philipp Dann and Zaid Al-Ali, 'The Internationalized Pouvoir Constituant: Constitution-Making under External Influence in Iraq, Sudan and East Timor', *Max Planck Yearbook of United Nations Law*, 10, 423–63 (2006); and Zaid Al-Ali, 'Constitutional Drafting and External Influence', in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook in Comparative Constitutional Law*, Edward Elgar Publishers (2011).
- 8 An obvious exception to this rule is Germany's Basic Law, although the circumstances surrounding that text's elaboration and implementation are too exceptional to draw comparative lessons from.
- 9 See Zaid Al-Ali, 'Constitutional Legitimacy in Iraq: What Role Local Context?' in Rainer Grote and Tilmann Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Oxford University Press (2011).
- 10 In 2011 and 2012, Egyptian revolutionary groups who were not directly involved in the formal constitutional drafting process organized intensive consultations with the general population to prepare alternative drafts that reflected the will and the needs of ordinary Egyptians; see Yasmine Farouk, 'Writing the Constitution of the Egyptian Revolution: Between Social Contract and Political Contracting', *Arab Reform Initiative*, November 2013.
- 11 For more on the role that Kenya's Committee of Experts played, see Christina Murray, 'Kenya's 2010 Constitution', *61 Neue Folge Band Jahrbuch des öffentlichen Rechts*, 747–88 (2013).
- 12 Zaid Al-Ali, 'Egypt's Constitutional Morass', *Foreign Policy*, 23 August 2013.
- 13 Mohamed Madani, Driss Maghraoui, and Saloua Zerhouni, 'The 2011 Moroccan Constitution: A Critical Analysis', *International IDEA* (2012).
- 14 Sufian Obeidat, 'The Amended Constitution of Jordan: Analysis and Recommendations Study', unpublished.
- 15 An unofficial translation of the 2012 Syrian constitution is available here: www.constitutionnet.org/files/syria_-_draft_constitution_english_2012.pdf; see also Zaid Al-Ali, 'The New Syrian Constitution: An Assessment', *Constitutionnet*, 27 February 2012.
- 16 Wissam Benyettou, 'Will Algeria Start 2016 with a New Constitution? Long Awaited Constitutional Revision and the Road to Democratic Transition', *Constitutionnet*, 24 November 2015.
- 17 Ultimately, the discussions that took place before 2003 led to little tangible progress; also, almost nothing of what had been achieved found its way to the final constitution mainly as a result of the dynamics that were imposed by the US occupation. See Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Ruined Democracy*, Yale University Press (2014).
- 18 The World Bank's final country brief on Tunisia prior to the 2011 uprising offered significant praise to the then Tunisian authorities and made no mention of human rights abuses or the widespread corruption that was common knowledge amongst

- ordinary Tunisians; see 'Country Brief', *World Bank*, April 2010 (with the revolution only a few months away, the report's first sentence read: 'Tunisia has made remarkable progress on equitable growth, fighting poverty and achieving good social indicators').
- 19 On Tunisia, see for example, 'Tunisia's Repressive Laws: The Reform Agenda', *Human Rights Watch*, December 2011.
 - 20 I am in the possession of more than a dozen proposed draft constitutions that were prepared by leading authorities on constitutional law throughout the region, very few if any of which remain publicly available today, except on request.
 - 21 In Libya, this trend took on an exceptional form, with many jurists, scholars and observers arguing in favour of restoring the 1951 constitution (with some modifications). See 'Assessment of the 1951 Libyan Constitution according to International Standards', *Democracy Reporting International*, Briefing Paper 28, July 2012; Abdel Rahman Habil, 'Old Constitutional Controversy Ignited in Libya', *Almonitor*, 7 July 2013; and Adel Abdel Hafeeth Kandir, 'The 1951 Constitution in the Light of International Standards of Democracy' (دستور 1951 في ضوء المعايير الدولية للديمقراطية), *Libya al-Mustaqbal*, 18 May 2013; Bashir al-Sunni, 'Libyan Constitutional Development' (التطور الدستوري الليبي), *al-Arabiya*, 12 April 2013 (reprinted from *The Libyan Nation*). A similar tendency was very apparent in Iraq, where a number of individuals argued that, following the 2003 invasion and occupation, Iraq should adopt a modified version of the long defunct 1925 constitution. During working sessions between leading members of the Iraqi opposition in London prior to the 2003 invasion, the possibility of reintroducing the 1925 constitution was tabled as one of two possible options to govern the interim period following the invasion; see 'Final Report on the Transition to Democracy in Iraq', final version of the working document on the Conference to the Iraqi Opposition as amended by the members of the Democratic Principles Work Group, November 2002.
 - 22 The only partial exception was Yemen, in which opposition political parties were allowed a certain measure of freedom prior to 2011, even if they had almost no influence on state policy.
 - 23 Tunisian trade unions are a partial exception to this rule. For historic reasons, they managed to maintain a certain amount of independence from the ruling regime prior to 2011, as a result of which unionists were able to play a significant role in negotiating the transition; see Sarah Chayes, 'How a Leftist Labor Union Helped Force Tunisia's Political Settlement', *Carnegie Endowment for International Peace*, 27 March 2014, <http://carnegieendowment.org/2014/03/27/how-leftist-labor-union-help-ed-force-tunisia-s-political-settlement>. Prior to the 2011 revolution, trade union activity had largely been kept under control by the former ruling authorities; see Mohamed-Salah Omri, 'Trade Unions and the Construction of a Specifically Tunisian Protest Configuration', *OpenDemocracy*, 24 September 2013.
 - 24 Interview with senior United Nations officials, February 2014.
 - 25 In March 2011, a leading Tunisian civil society activist explained to me that Tunisia's new constitution could be drafted in just a few months because Tunisia was amongst the most homogeneous countries in the world. As explained below, it turned out that the constitutional negotiations were very acrimonious and lasted for two years.
 - 26 In March 2011, at a closed meeting with civil society activists and lawyers who had supported the revolution, a number told me that Egypt's new constitution should be drafted by constitutional law professors, and that the drafting process would be relatively simple.
 - 27 Zaid Al-Ali, 'What Egypt Should Learn from Iraq', *OpenDemocracy*, 21 April 2011, at www.opendemocracy.net/zaid-al-ali/what-egypt-should-learn-from-iraq.
 - 28 For a detailed history of Iraq's constitutional process, see chapter 3 of Al-Ali, *The Struggle for Iraq's Future*. See also Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*, University of Chicago Press (2013).

- 29 L. Elaine Halchin, 'The Coalition Provisional Authority (CPA): Origin, Characteristic and Institutional Authorities', CRS Report for Congress, 29 April 2004, <http://fpc.state.gov/documents/organization/32338.pdf>.
- 30 For more on the impact of self-interest in a constitutional process, see Zaid Al-Ali, 'Constitutional Drafting and External Influence', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law*, Edward Elgar Publishing (2013).
- 31 See Ali A. Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace*, Yale University Press (2007).
- 32 See David McDowall, *A Modern History of the Kurds*, I. B. Tauris, 3rd revised edition (2004).
- 33 See L. Paul Bremer and Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope*, Simon and Schuster (2006).
- 34 See Al-Ali, *The Struggle for Iraq's Future*, pp. 76–7.
- 35 'The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq', 17 November 2003, www.usembassy.it/file2003_11/alia/a3111702.htm.
- 36 Available at www.cpa-iraq.org/government/TAL.html.
- 37 The TAL's federal arrangements were negotiated by the CPA's administrator (Paul Bremer) and the Kurdistan Alliance, with very little if any input from the rest of the country.
- 38 See Allawi, *The Occupation of Iraq*, pp. 222–3.
- 39 See Zaid Al-Ali, 'Constitutional Legitimacy in Iraq: What Role Local Context?' in Rainer Grote and Tilmann J. Röder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Oxford University Press (2012).
- 40 Months into the process, international officials were so exasperated at the drafters' incapacity to identify their own interests that they organized special negotiation workshops to help develop their negotiation skills.
- 41 Zaid Al-Ali, 'What Egypt Should Learn from Iraq', *OpenDemocracy*, 21 April 2011, at www.opendemocracy.net/zaid-al-ali/what-egypt-should-learn-from-iraq.
- 42 For more on the SCAF, see International Crisis Group, 'Lost in Transition: The World according to Egypt's SCAF', *Middle East Report*, 121, 24 April 2012; Yezid Sayigh, 'Above the State: The Officers' Republic in Egypt', *Carnegie Endowment for International Peace*, August 2012.
- 43 For more on the Muslim Brotherhood's history and ideology, see Shadi Hamid, *Temptations of Power: Islamists and Illiberal Democracy in a New Middle East*, Oxford University Press (2014).
- 44 See Sherif Tarek, 'Egypt's Ultras Go from Football to Politics', *Ahramonline*, 13 April 2011. For more on the Ultras, see Mohamed Gamal Besheer, *Kitab al-Ultras* (كتاب الالتراس), Dar Diwan (2011); for an English-language review of Besheer's book see Mahmoud el-Wardani, 'The Ultras and the Egyptian Revolution', *Ahramonline*, 4 February 2012.
- 45 For more, see Mohammed Nosseir, 'The Ugly Truth: Egypt's Deep State', *Daily News Egypt*, 16 November 2013.
- 46 Gamal M. Selim, 'Egypt under SCAF and the Muslim Brotherhood: The Triangle of Counter-Revolution', *Arab Studies Quarterly*, 37, 2, Spring (2015).
- 47 See David D. Kirkpatrick and Kareem Fahim, 'In Egypt, a Panel of Jurists Is Given the Task of Revising the Country's Composition', *New York Times*, 15 February 2011.
- 48 Senior Egyptian officials, interviews with the author, 2011 and 2012.
- 49 An unofficial English-language translation of the interim constitution is available is here: www.constitutionnet.org/vl/item/egypt-constitutional-declaration-march-2011. The Arabic original is available here: www.constitutionnet.org/vl/item/arabic-version-interim-constitution-arab-republic-egypt2011.
- 50 Heba Fahmy, 'MB Faces Internal Divisions and Isolation from Opposition Groups', *Daily News Egypt*, 28 March 2011.
- 51 Gamal Essam el-Din, 'Egypt's Constitution: A Controversial Declaration', *Ahramonline*, 30 March 2011.

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- 52 See Neil MacFarquhar, 'Egyptian Voters Approve Constitutional Changes', *New York Times*, 20 March 2011.
- 53 See Michele Dunne and Mara Revkin, 'Overview of Egypt's Constitutional Referendum', *Carnegie Endowment for International Peace*, 16 March 2011.
- 54 Proponents of this approach were often referred to as the 'constitution first' camp. See for example, Mustafa Suleiman, 'Controversy Rages in Egypt on the Constitution First Dispute ... and the Muslim Brotherhood Rejects Delaying the Elections' (الجدل الجدل في مصر حول معركة الدستور أولا. والإخوان يرفضون تأجيل الانتخابات), *Al-Arabiya*, 19 June 2011.
- 55 Muhammad Khayyal, 'Islamic Group: Egypt to Witness Biggest Ever Massive Gathering in History on Friday', *Al-Shuraq al-Jadid*, 24 July 2011.
- 56 Several drafts were produced and circulated to the press. An unofficial translation of the last draft that was produced, which was published in November 2011, is available here: www.constitutionnet.org/vl/item/egypt-draft-constitution-november-2011-english. The Arabic original is available here: www.constitutionnet.org/vl/item/egypt-draft-constitution-november-2011-arabic.
- 57 For a detailed analysis of the Fundamental Principles, see Zaid Al-Ali, 'Declaration of the Fundamental Principles for the New Egyptian State: A Commentary', *International IDEA*, 23 November 2011, at www.constitutionnet.org/news/commentary-november-draft-egypt-fundamental-principles-document.
- 58 The way in which these rights were formulated was entirely consistent with Egyptian constitutional tradition, which was not necessarily consistent with the most progressive formulation for most of these rights.
- 59 One of the only modern constitutions to adopt similar wording is the constitution of Spain, which provides that the armed forces has as one of its obligations to defend 'the constitutional order' (section 8). That provision is considered by many to have partially inspired segments of the Spanish military to carry out its failed coup d'état in February 1981.
- 60 See Heba Fahmy, 'Thousands rally in Tahrir on Friday of "Protecting Democracy"', *Daily News Egypt*, 18 November 2011. The protests led to significant violence between demonstrators and police, resulting in hundreds of dead and wounded civilians. The intensity of the violence was partially recorded in amateur videos uploaded online; see, for example: www.youtube.com/watch?v=T9JmBTotCWQ. Those events have subsequently become an iconic moment for Egypt's revolutionary movement; see for example Amira Howaidy, 'How to Mark the Battle of Mohamed Mahmoud?' *Ahram Online*, 16 November 2013.
- 61 The CDC's internal regulations are available, in Arabic, here: <http://tinyurl.com/od4p28q>.
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- 63 Senior FJP officials, interviews with the author, January and February 2013.
- 64 'Egypt's Brotherhood Closer to Announcing Their Party' (إخوان مصر يتقدمون لإعلان حزبهم), *Al-Jazeera*, 18 May 2011.
- 65 For an unofficial translation of the Constitutional Declaration, see <http://english.ahram.org.eg/NewsContent/1/64/58947/Egypt/Politics-/English-text-of-Morsis-Constitutional-Declaration-.aspx>.
- 66 'The Constituent Assembly Approves Egypt's New Constitution before It Is Put to Referendum; the Opposition Rejects the Text' (الجمعية التأسيسية تقر دستور مصر الجديد قبل عرضه على الاستفتاء والمعارضة ترفضه), *al-Hurra*, 30 November 2012.
- 67 The referendum's official results are available here: <https://referendum2012.elections.eg/results/referendum-results>.

- 68 Interview with Muslim Brotherhood officials, April 2012.
- 69 See 'All According to Plan', *Human Rights Watch*, 12 August 2014.
- 70 For an unofficial translation of the constitutional declaration, see www.constitutionnet.org/vl/item/unofficial-english-translation-constitutional-declaration-egypt-july-08-2013. For the Arabic original, see www.constitutionnet.org/sites/all/themes/const4/svg/download.svg. For an analysis of the declaration, see Zaid Al-Ali, 'Another Egyptian Constitutional Declaration', *Foreign Policy*, 9 July 2013.
- 71 See, for example, Arab Forum for Alternatives, 'Political Parties and Public Opinion in Egypt', 2014, http://afaegypt.org/English/index.php?option=com_k2&view=item&id=65:political-parties-and-public-opinion-in-egypt.
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- 73 For an unofficial translation of the C10's proposed changes to the 2012 constitution, see www.constitutionnet.org/vl/item/egypt-proposed-amendments-constitution-2012. For the Arabic original, see www.constitutionnet.org/node/11730. For an analysis of the draft, see Zaid Al-Ali, 'Egypt's Constitutional Morass', *Foreign Policy*, 23 August 2013.
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- 75 Ennahda's official website is available here: www.ennahdha.tn/.
- 76 See, for example, 'Habib Khedher: The Majority of Tunisians Want for the Koran and the Sunna to Be a Source of Legislation' (الحبيب خضر: غالبية الشعب التونسي يطمحون لأن يكون القرآن والسنة مصدرا للتشريع), *Babnet*, 23 February 2012. Ennahda has since formally abandoned its efforts to Islamize Tunisian society. See Tarek Amara, 'Tunisian Islamists Ennahda Move to Separate Politics, Religion', *Reuters*, 20 May 2016; and Yassine Nabli, 'Ennahda's Conference: Transformation or Reshaping Political Islam' (مؤتمر: حركة النهضة: تحول أم تشكل جديد للإسلام السياسي?), *Navaat*, 21 May 2016.
- 77 Nidaa Tounis' official website is available here: www.nidaatounes.org/.
- 78 See, for example, 'World Bank Group President Jim Yong Kim Remarks to the Media Following Meeting with Tunisia's President Beji Caid Essebsi', *World Bank*, 28 March 2016; and 'Deputy Secretary Burns on Democratic Transitions in Tunisia', *US State Department*, 1 February 2014.
- 79 During the many years that they spent in exile prior to 2011, future president Moncef Marzouki (a prominent secular and left-wing member of the Tunisian opposition) travelled from France to the United Kingdom on 20 occasions to meet with Rachid Ghannouchi (leader of the Islamist Ennahda party); see Al Stepan, 'Tunisia's Constitutional Debates: Inclusion or Exclusion?' presented at a conference entitled 'Whether the Arab World? Revisiting Democratic Transition Theory', Paris, 5–7 November 2014.
- 80 Following the elections in late 2011, Moncef Marzouki's secular and left-leaning Congress for the Republic, Ettakatol (another left-leaning party) and Ennahda formed a tripartite alliance which allowed them to form a government and occupy the presidency and the speaker of parliament's position. Marzouki himself was indirectly elected president in December 2011 by the Constituent Assembly. During his tenure, Marzouki's support within secular and left-wing circles declined markedly, which was attributed to his alliance with Ennahda. Marzouki's Congress for the Republic had 29 seats out of 217 in the 2011 Constituent Assembly elections. In the 2014 parliamentary elections, the Congress' share of seats declined to four out of 217.

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- 82 An unofficial English-language translation of the Assembly's rules of procedures is available here: www.constitutionnet.org/vl/item/tunisia-constituent-assemblys-rules-p-procedure. For an analysis of the rules of procedure, see Bill Proctor and Ikbal Ben Moussa, 'The Tunisian Constituent Assembly's By-laws: A Brief Analysis', *International IDEA*, 2013, at www.idea.int/publications/tunisian-constituent-assemblys-by-laws/index.cfm.
- 83 The text that the Ben Achour Commission had prepared in 2011 was never seriously considered as Ennahda did not participate in its elaboration.
- 84 All of the draft constitutions that were prepared by Tunisia's Constituent Assembly are available in both Arabic and English here: www.constitutionnet.org/country/constitutional-history-tunisia.
- 85 See Monia Ben Hamadi, 'Inquiétudes et controverses autour de la préambule de la Constitution', *Business News*, 30 October 2012.
- 86 'Tunis' Ennahda Opposed to Relying on Islamic Sharia as a Source of Legislation in the Constitution' (النهضة التونسية تعارض اعتماد الاسلام كمصدر اساسي للتشريع بالدستور), *Reuters*, 26 March 2012.
- 87 Chokri Belaïd and Mohamed Brahmi were killed on 6 February 2013 and 25 July 2013, respectively. The assassinations took place in an atmosphere that was widely perceived as permissive of militant Islamism.
- 88 A Tunisian civil disobedience campaign was launched in early July 2013, modelling itself so closely on the campaign that contributed to the then recent removal of the Egyptian constitution that it even adopted the same name ('Tamarod', which translates as 'revolt'). See, for example, Ahmed al-Nadheef, 'The Tunisian 'Tamarod' movement follows on Egypt's footsteps' (حركة تمرد التونسية تسير على خطى المصرية), *Al-Arabiya*, 3 July 2013.
- 89 All of the country's main political parties decided to form a Consensus Committee, in which each party would have one member and in which all decisions would have to be taken by consensus. Temporal electoral fortunes were suddenly rendered far less relevant, and members of the new committee had to engage on a level playing field, in which the force of argument was given much more weight. The Constituent Assembly's rules of procedure were eventually modified to allow for the Consensus Committee's decisions to be properly considered as having been taken by the Assembly as a whole. See Lilia Weslaty, 'Cinq partis de la commission des consensus s'accordent sur la suppression de l'article 141 définissant la religion de l'Etat', *Navaat*, 22 August 2013.
- 90 See Zaid Al-Ali and Donia Ben Romdhane, 'Tunisia's New Constitution: Progress and Challenges to Come', *OpenDemocracy*, 16 February 2014.
- 91 See, for example, Monika Marks, 'Convince, Coerce, or Compromise? Ennahda's Approach to Tunisia's Constitution', *Brookings Doha Center Analysis Center*, 10, February 2014.
- 92 See Jason Brownlee, Tarek Masoud, and Andrew Reynolds, 'Why the Modest Harvest?' *Journal of Democracy*, 24, 4, October 2013.
- 93 For a history of modern Yemeni politics and the circumstances that contributed to its 2011 uprising, see Stephen W. Day, *Regionalism and Rebellion in Yemen: A Troubled National Union*, Cambridge University Press (2012).
- 94 The Agreement is available here: www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/yemen/Yemen_29_Agreement_Implementation_Mechanism.pdf.
- 95 For more on the National Dialogue Conference and the Outcomes, see: www.ndc.ye/default.aspx/.
- 96 Abda Ayesh, 'Vocal Rejection of the Decision to Divide Yemen into Regions' (رفض الحوثيون: الفدرالية تقسم اليمن إلى غني), *Al-Jazeera Net*, 15 February 2014; 'The Houthis: Federalism Divides Yemen into Wealthy and Poor Areas' (الحوثيون: الفدرالية تقسم اليمن إلى غني), *Mansoura News*, 11 February 2014.

- 97 Based on my own personal observations during 2014.
- 98 The draft constitution is available in Arabic here: www.constitutionnet.org/ar/vl/item/lymn-mswd-dstwr-lymn-ljdyd-lm-2015.
- 99 See Associated Press, 'UN Security Council Calls for Lasting Ceasefire in Yemen', *New York Times*, 20 January 2015.
- 100 For more on the Yemeni process, see Helen Lackner, 'Yemen's Peaceful Transition from Saleh's Autocratic Rule: Could It Have Succeeded?' *International IDEA* (2016); and Zaid Al-Ali and Helen Lackner, 'Will Yemen's Latest Round of Negotiations Reflect Learning from Past Failures?' *Washington Post*, 18 April 2016.
- 101 See, for example, Christina Murray, 'Kenya's 2010 Constitution', *61 Neue Folge Band Jahrbuch des öffentlichen Rechts*, 747–88 (2013).