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The Arab Spring constitutions *For whose benefit?*

Zaid Al-Ali

Who decides what a constitution's purpose should be?

A UNIVERSAL TEST

Scholars and practitioners have long struggled to identify what qualities make a constitution successful. The question is incredibly complex, not least because there is very little consensus on what constitutions should look like, or on the areas that constitutions should deal with. In an effort to resolve this issue, there is a natural tendency amongst many scholars to favor a “universal test,” that is, a single set of criteria that can be applied universally to measure the performance of all constitutions. While such an approach is certainly tempting, not least of all because of its simplicity, there are at least two sets of reasons that we should question its applicability in all cases.

The first is related to the fact that any attempt to establish external criteria will necessarily have to remain as general as possible. Constitutions are enacted in countries with widely varying starting points and are also subject to be influenced by a multiplicity of factors. A constitution can be enacted for the purpose of ending violent conflict (e.g. Bosnia), alleviating poverty (e.g. Ecuador) or transforming a previously discriminatory society into a more egalitarian one (e.g. South Africa), while others are designed merely to streamline government in what is already an effectively administered state (e.g. Switzerland). Some constitutions are well constructed but are applied in states that barely survive in unstable regions and that are subject to overbearing and negative foreign influence (e.g. Yemen), while others still are applied in countries that exist within a broader state of peace and economic development (e.g. Spain).

In that context, the only way to measure constitutional performance through the use of a universal test would be to ignore each country's nuances

and idiosyncrasies and to remain focused on general objectives. The alternative would simply be unworkable: If we were to apply a narrow set of criteria to evaluate constitutions, the result would be that many of those individual tests would simply be inapplicable to a large number of contexts. For example, a universal test that measures constitutions' success in promoting racial equality would be inapplicable in Tunisia, which is racially homogeneous. A test that measures a constitution's capacity to end violent conflict would also not be particularly valuable in Switzerland, given the absence of any significant strife in that country to speak of.

As a result, the result is that a universal test could only be practically possible if it included criteria that are broad enough to be applied to all countries. The result of that generality is that (i) however the test is conceived, its relevance will be subject to question in a host of countries, and (ii) the proponents of the test will not be able to establish causation for success or failure in a large number (and possibly even a majority) of cases.

On the issue of relevance, the difficulty is that whoever conceives a universal test will necessarily be doing so based on a particular set of values. To take but one (obvious) example, Western academics and international institutions are very likely to be inspired by liberal democratic values in determining the content of a universal test, and their version of the test would likely revolve around a constitution's ability to bring about two main elements, namely peace and economic development. There is little questioning that these aspirations are shared by most if not all peoples around the world; what is subject to question is whether those aspirations alone constitute the "minimum core" for most countries.

Thus, for example, many states include amongst their list of priorities the desire to promote religious values (e.g. Iran, Afghanistan and El Salvador). Others consider economic development on its own to be unsatisfying, and prioritize the war against inequality (e.g. Columbia, Ecuador, etc.). If a universal test based on broad liberal values is applied in either of those cases, the result may be that the relevant constitutions are judged to be successes or failures by outsiders, but national actors may be totally indifferent to the analysis given that the criteria do not reflect their own set of values.

Conversely, in some cases and based on rare circumstances, a people's minimum core of aspirations may be even narrower than those encompassed by standard liberal values. By way of example, the clear priority for Bosnia in the mid-1990s was to end to the conflict, and on that basis the 1996 constitution has been enormously successful. On the other hand, the constitution has clearly not contributed to economic development or national integration. Simply judging the Bosnian constitution to have been a failure on that basis

does not adequately convey the challenges that the country was facing at the time when the constitution entered into force. A better summation of Bosnia's position would be to say that the 1996 constitution was successful in achieving the overarching goal of ending a violent conflict, but that now the constitution should be either replaced or amended to satisfy a different set of goals. On the issue of causation, broad universal criteria will also be unsatisfying in many causes simply because it will be close to impossible to establish a causal link between the constitution and the very broad criteria that a universal test would include. For example, determining whether a constitution has contributed to peace and stability would not be a particularly interesting exercise in Switzerland, given that its situation depends on factors that extend far beyond the constitution. Also, crediting the 1978 constitution for Spain's relative economic prosperity would not be satisfying, considering that Spain has been a major recipient of financial assistance from the European Union for decades. The same would be true in Qatar, Kuwait and the United Arab Emirates, in which a universal test might find that the constitutions of those three countries to be roaring successes, while it is obviously the incredible abundance of natural resources and the absence of major popular centers that is the main factor there.

On the other hand, where a constitution establishes a very clear and narrow goal for itself, such as to reduce inequality, then the country's success or failure in doing so may be far easier to trace. A genuine attempt to reduce inequality would include specific mechanisms to do so (e.g. the tutela under the Colombian constitution) and it would be possible in many cases to determine whether those specific mechanisms have had any impact in achieving the constitution's objectives.

A final, and perhaps more important, objection to the idea of a universal test is that many constitutions clearly establish a series of context-specific objectives of their own. Many constitutions will often include clear declarations of intent in their preambles or elsewhere in the text, which will also be matched by public statements by drafters, political elites and by members of the general public. The 2014 Tunisian constitution, for example, is clear in its intent to establish "social justice" as a matter of priority, which clearly matches the demands of the popular and spontaneous revolution that commenced in December 2010 (details follow). The Tunisian people and political elites appear to have reached a consensus on what their constitution is supposed to achieve; so it is unclear why anyone would seek to measure that text according to a different standard. It says something about own instincts if we consider that we should be evaluating a constitution's performance according to universal and external criteria if the constitution in question and the people

who live in the country in question are already clear on what they are trying to achieve.¹

THE TEXTS THEMSELVES

In the absence of a universal test, the only alternative is to measure constitutions against criteria that are determined on a case-by-case basis. The challenge is therefore to determine a methodology for deciding how that criteria can be identified, and the obvious place to start is to interpret the text of a constitution itself. The difficulty here is that whatever methodology is adopted will depend on the legal traditions that are in place in the jurisdiction that is under scrutiny. Indeed, it would not make much sense to use US legal interpretative rules to interpret the Egyptian constitution, given that that constitution is heavily imbued in Egypt's own legal traditions, which assume a different set of interpretative rules. As a result, the discussion that follows is based on an application of legal interpretative rules as they are generally applied in the Arab region.

It is a standard rule of legal interpretation that when examining a text, we must first give the words that are used in the constitution their li meaning. On the question of constitutional purpose, preambles (where they exist) are the natural place to start given that they often seek to encapsulate the text's general objective and describe what type of state is being established. In the Arab region, preambles are often drafted and agreed upon before the rest of the text is completed, and various iterations are normally published in national media, provoking significant discussion.²

Standard rules of interpretation also provide that we must move beyond the general and seek to understand the nature of a constitutional text from the remainder of its substantive content. A constitution can expose its objective in the body of the text, either expressly in a statement of purpose or by establishing mechanisms that prioritize the pursuit of certain objectives over others. Importantly, when analyzing a text for this purpose, the reader must adopt a holistic approach, particularly as provisions from opposite parts of

¹ Nevertheless, one might imagine at least two situations in which external criteria may be applied to evaluate a constitution: (i) where a clear objective based on national interests is not easily identifiable; (ii) where a constitution's stated objectives are too narrow and do not respond in any clear manner to the material needs of any segment of the population.

² Tunisia's final constitution was adopted in January 2014, but its preamble was in its final form in June 2012; see "Final Draft of Preamble to 2012 Tunisian Constitution: English Translation by Tunisia Live," Farah Samti, Tunisia Live, published at *Jaddaliya*, 21 June 2012; "The Preamble of Tunisia's Constitution: Agreement and Discord" ("توافيق وخلاف"), Ayman Madhiab, *Al-Jazeera*, 11 June 2012.

a constitution can work together either to enhance each other or establish a clear priority of objectives. Conversely, provisions may also negate each other's impact in ways that are not obvious upon first reading.

Some preambles are very clear in the objectives that they seek to achieve, others less so. Spain's 1978 constitution is typical of liberal constitutions in that its preamble includes commitments to democracy, the rule of law and a respect for human rights and cultural traditions. The preamble also provides that the "Spanish Nation" seeks a "fair economic and social order," and a "dignified quality of life for all," which places Spain within a socio-democratic tradition of placing emphasis on socioeconomic rights, particularly through the delivery of essential services to the general population (Comella 2013).³ On its own, however, that specific wording does not clearly indicate the constitution's own order of priorities. For that, a more holistic interpretation of the constitution's substantive provisions is necessary.

The constitution provides that citizens have the right to a number of social and economic rights, including housing (article 47) and health care (article 49). In addition, article 9(2) clearly establishes that it is the government that is ultimately responsible "to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life." At the same time, however, the constitution also limits the right of ordinary citizens to directly implement any of the constitution's social and economic rights, in the absence of implementation legislation (article 53(3)), which places the government firmly in control of the state's policy. The constitution's goal of establishing a social order is therefore tempered by its desire to ensure that the government remains unfettered at the summit of the state's pyramid.

The point can be made more clearly through a comparison with the South African text. The preamble to South Africa's 1996 constitution also includes reference to democracy, fundamental human rights and quality of life.⁴ Those general principles are given more specific meaning by Chapter 2, which

³ Many other preambles share the same qualities.

⁴ Ecuador's 2008 constitution stands apart from both previous examples. It also includes reference to democratic values, to which it adds a commitment to "social liberation struggles against all forms of domination and colonialism." The preamble is followed by a list of the state's prime duties, which includes "planning national development, eliminating poverty, and promoting sustainable development and the equitable redistribution of resources and wealth to enable access to the good way of living" (article 3). The wording here is easily distinct from the liberal values set out in the Spanish and South African texts, and clearly illustrates the constitution's objectives.

provides for a right to housing, health care and education (articles 26, 27 and 29). In contrast to the Spanish text, however, the South African constitution ensures that even in the absence of a law, individuals may petition a court for relief in direct application of the constitution; the courts are specifically told that, when applying a provision of the Bill of Rights (which includes social and economic rights), they “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right” (article 8). As a result of this and other provisions, the South African constitution’s formal commitment to establishing a social democracy appears significantly stronger than the Spanish case, and can reasonably be considered to constitute one of the constitution’s main objectives (Leibenberg 2010).

In the event that different parts of a constitution point in opposite directions, an attempt must be made to reconcile them. On occasion, clear contradictions can be identified in which case the reader must reach her own reasoned view on what the constitution’s true objective is, based on an evaluation of the entirety of the circumstances. In that sense, the fact that a constitution establishes a series of political, social and economic rights without saying anything about who enjoys those rights or how they are to be enforced, that it subjects a nominally independent judiciary to legislation while at the same time allowing unelected executives to play a controlling role in the legislative process clearly indicates a clear order of priorities and a sense of the same constitution’s objectives.

By way of illustration, Iraq’s now-defunct 1970 interim constitution did not have a preamble, but included a general statement of purpose establishing Iraq as a “sovereign people’s democratic republic. Its basic objective is the realization of one Arab State and the establishment of a socialist system” (article 1).⁵ To underline its supposed commitment to the principle of democracy, the interim constitution also provided that the people are the “source of authority and its legitimacy” (article 2). The constitution’s system of government however established a different set of priorities. A “revolutionary command council” was established (article 37) and granted both full legislative and executive functions (article 42). The council was responsible for selecting its own members (who had to be drawn from the Baath party’s leadership (article 38)), who were accountable only to the council itself (article 45). The stated objective of establishing a socialist democracy was therefore clearly eclipsed by the desire to perpetuate undemocratic rule by a closed circle of individuals.

⁵ An unofficial translation of the 1970 interim constitution is available here: www.zaidalali.com/resources/constitution-of-iraq/.

It is important to note that Iraq's 1970 interim constitution was not the product of a modern and democratic constitution-building process. The text was essentially drafted by Baath party loyalists who offered few concessions if any to the country's other communities or groups. As the earlier analysis indicates, it is possible to discern what the text's objectives were; but because of the manner in which it was drafted, that analysis says close to nothing about what the general population, or indeed what anyone outside of the Baath party's circle of leaders, were hoping that the constitution might achieve for them. The question therefore is this: In what circumstances should we move beyond an analysis of the text itself and explore the role, statements and behavior of particular national actors when identifying constitutional purpose?

According to another rule of constitutional and legal interpretation, readers should only explore parties' intent through their behavior and writings in specific situations. For example, where a contradiction in the text cannot be resolved through an analysis of the provisions of their own, then we may be justified in determining what the drafter's intent was at the time when the constitution was written. In that situation, a reader may be justified in examining the archives of the constitution drafting committee (if they exist) to determine the drafters' original intent, or even the writings, statements and behavior of the political leaders who influenced the drafting process. This method of interpretation is merely an extension of the type of textual analysis set out earlier: It allows us to determine, through a different means of interpretation, what a constitution's actual objectives might be.

THE PEOPLE

Importantly, there are situations in which a reader seeking to uncover a constitution's objective may be justified in moving beyond the text's wording and even the drafters' intent. This is particularly the case when a constitution does not enjoy any form of internal legitimacy,⁶ because it: (i) is clearly undemocratic (as in the case of the Iraqi 1970 interim constitution); (ii) is out of date (because it has not kept up with social norms); or (iii) has been manipulated by specific actors (such that the manner in which the text has been applied does not encapsulate the interests of the general population).

⁶ Here, I draw a distinction between internal legitimacy (which can result from a number of factors and circumstances) and international legitimacy (which is achieved through sufficient acceptance of a country's constitutional framework in the international community of nations). International legitimacy does not necessarily depend on the constitutional framework's acceptance by the population that it is designed to govern.

In these situations, it is still possible to explore what the constitution's objectives *actually are*, but there is a separate and more important question which is what they *should be*.

Ideally, this new line of inquiry should be answered through an exploration of the needs and desires of the relevant country's general population insofar as their constitutional framework is concerned. But there are a number of challenges that must be met, the first being how to resolve divisions in public opinion. Clearly, there can never be absolute consensus between all the members of the population, so what we are looking for is a sufficient degree of acceptance expressed by community leaders, scholars, protesters as recorded in official statements, negotiated agreements or through actions of public protest. Luckily, there are a number of situations in which that level of consensus is relatively easy to identify. For example, Juan Bautista Alberdi, one of nineteenth century's leading scholars on Latin American constitutionalism, found that the struggle for independence and against economic backwardness constituted the "great dramas" of the time and that the region's constitutional frameworks should have been geared in favor of resolving those dramas (Alberdi 2015). Today, Roberto Gargarella (Alberdi's successor and a contributor to this volume) identifies "inequality" as the region's modern drama (Gargarella 2013).⁷ Since 2011, it has been possible to argue quite convincingly that large majorities of citizens in many Arab countries (although certainly not all) have prioritized social justice and the protection of basic freedoms over other potential objectives (details follow).

Even in those cases, however, significant proportions of the population might disagree with the voice of the majority or of the most vocal elements of the population. In 2011, it would have been reasonable to assume that crushing majorities of Egypt's population supported the calls for greater freedom and social justice, but by 2012⁸ and even more so by

⁷ For more on the drama of inequality in Latin America and the impact that it has on public acceptance of existing constitutional frameworks, see "The Latinobarómetro Poll: When the Tide Goes Out," *The Economist*, 26 September 2015.

⁸ In Egypt's May–June 2012 presidential elections, 48.27% of voters opted in favor of Ahmed Shafik, losing only narrowly to Mohamed Morsi. Shafik was former dictator Hosni Mubarak's last appointed prime minister, and served as commander in chief of the Air Force from 1996 to 2002. During his election campaign, Shafik referred to Hosni Mubarak as a "role model" ("Egyptians Learn That Democracy Sometimes Produces Tough Choices," *The Post and Courier*, 29 May 2012); Shafik also promised a return to the old order if he was elected, including the reestablishment of a strong security state ("Ahmed Shafik, Mubarak's Last Prime Minister, Is the Surprise Contender in Egypt's Presidential Race," Hannah Allam, *McClatchy Newspaper*, 17 May 2012). For more on Shafik's campaign promises, see "Text of the Candidate Ahmed Shafik's Speech at the End of His Electoral Campaign" ("نص خطاب المرشح أحمد شفيق في ختام حملته الانتخابية"), *Al-Watan News*, 14 June 2012.

2013,⁹ it became obvious that significant proportions of the population prioritized law and order over other considerations. Clearly also, if large segments of Latin America's population prioritizes the struggle against inequality, then so do many seek to maintain their positions of privilege, often on the basis that the economy and the general welfare is better served under the status quo (Frank 1967). Where contradictions of this nature exist, the reader seeking to uncover a population's constitutional objective will have to make her own individual assessment of whether different visions for a country's fundamental text can be reconciled, or even whether one set of objectives should be prioritized over others. In the case of Latin America, one could convincingly argue that failing to priorities the struggle against inequality is inviting a society to breakdown as a whole, which itself would undermine one segment of the population's goal to maintain privilege. Meanwhile, in the Arab region, the result of prioritizing law and order over other considerations has already been made clear through the 2011 uprisings.

Another difficulty arises in distinguishing circumstances in which popular opinion and mobilization is manipulated by specific political actors in order to gain leverage over rivals. The 2013 protests that led to the removal by the military of President Mohamed Morsi were at first assumed to have been the result of a grassroots effort with no political leadership.¹⁰ Since then, it has been widely accepted that the protest leaders enjoyed the support of a large segment of Egypt's security establishment and of its business community.¹¹ When pursuing my proposed line of inquiry on determining what a constitution's objective should be, if we turn to popular opinion as a gauge,

⁹ By the end of June 2013, a large segment of Egypt's population grew so frustrated by President Mohamed Morsi's performance that millions participated in protests demanding that he resign, and subsequently appeared to support the military's decision to depose him. See "Protesters Across Egypt Call for Mohamed Morsi to Go," Patrick Kingsley, *The Guardian*, 30 June 2013.

¹⁰ See "Protesters Across Egypt Call for Mohamed Morsi to Go," Patrick Kingsley, *The Guardian*, 30 June 2013 (quoting Michael Hanna, a fellow at the Century Foundation, as saying that the protests were remarkable because they were "a bottom-up, grassroots effort and not directed by political opposition leaders. In a sense, they have latched on to this expanding current. While the organisers were diligent and creative, while lacking organisation and funding, this breadth of mass mobilisation could not have transpired unless the protest movement was tapping into deep and growing frustration and disenchantment with the current course of the country and its leadership").

¹¹ See for example "Sudden Improvements in Egypt Suggest a Campaign to Undermine Morsi," Ben Hubbard and David D. Kirkpatrick, *The New York Times*, 10 July 2013; "Al-Watan Reveals Full Details of the Communications between the Army and Tamarod on 3 July" ("الوطن تكشف التفاصيل الكاملة لاتصال الجيش بـتمرّد" يوم 3 يوليو"), Mohamed Ali Hasan, *Al-Watan*, 4 July 2015.

then we must find a way to distinguish between genuine and unfettered views of the general population and situations where popular opinion may be skewed by special interests. One possible mechanism is to rely on the general population's views only to the extent that those same people have no stake in government and to the extent that no one in government has any specific stake in encouraging the views that are being expressed. Applying that standard to Egypt, we can easily distinguish between the 2011 protesters who faced opposition from most of the state's bureaucracy and security institutions, and their 2013 peers who were encouraged in their actions by the police, the military, the media and others.

Other countries face the opposite problem. In many situations, it is simply not possible to consult the general population (e.g. Bosnia between 1992 and 1995), nor is it possible for ordinary people to disagree with the policies of their governments (e.g. Iraq prior to 2003). In such situations, it would be safe to assume that the general population would prefer to be free from conflict and the yolk of oppression, but it would not be possible to determine where the general population places its priorities. Where there is a lack of basic freedoms to the extent that the general population cannot engage in a discussion on constitutional priorities, the line of inquiry that is being suggested here cannot be approached in the same manner. The only possible solution, inadequate as it may be, would be to carry out an independent inquiry based on whatever data and information may be available on the circumstances of the country in question in order to determine what set of priorities might exist for its constitutional framework. Thus, if such an exercise had been carried out in Bosnia during the 1990s, we would most likely have concluded that ending the conflict was the priority and in that sense the 1996 constitution has been successful. In Iraq prior to 2003, we might have concluded that the protection of fundamental freedoms and national reconciliation (including through the establishment of an inclusive governance framework) should have been prioritized in any post-totalitarian arrangement. If that is the standard, then we can reasonably conclude that the 2005 constitution has been a failure (Al-Ali 2014).

THE PRE-2011 CONSTITUTIONS

The dynamics behind their elaboration

Prior to 2011, genuine political power in the Arab region was concentrated in the hands of small groups of kings, presidents, military officers and other senior executive officers (hereinafter “controlling elites”), none of whom were

elected (Salloukh et al. 2015).¹² These individuals were in a prime position to influence each country's constitutional culture, including what each constitution's objective would be. The controlling elites' understanding of constitutional purpose was informed by a number of factors, including their own desire to monopolize power as well as the need to placate other elite circles to guarantee the functioning of a modern bureaucratic state. Aside from the general context in which they operated, the controlling elites' sense of entitlement to exercise authority informed their view of how constitutional frameworks should be constructed. Thus, however a constitution's objectives were to be defined, the controlling elites ensured that there should be no real mechanism for measuring or analyzing their performance and for holding them accountable for their failures (Stilt 2014).

Other groups of elites were influential in their own way. These include other political elites outside of controlling circles, including other political parties (where they were allowed to be active); members of the security establishment, many of whom played a determining role in forming each specific country's educational policy and cultural identity (Simon 2012); members of the legal profession, including lawyers, academics and judges, all of whom self-identified as intellectual leaders who should necessarily be involved in determining their countries' constitutional culture. Religious elites in many countries shared much of the same expectation and, in those situations where they felt that their beliefs were not being properly considered, often formed political parties and movements that they could then use to influence constitutional processes in a more targeted fashion (particularly with a view to ensuring that personal status rights and fundamental rights were not granted in a way that contravened a very traditional understanding of religious values). Finally, broader cultural elites, including prominent journalists and authors, played important roles in channeling and promoting ideas to the national stage. In the Arab region's radical postcolonial environment, these groups of individuals played a key role in defining each country's political priorities, many of which were articulated either directly or indirectly in the constitutions that were drafted over the past one hundred years.

Prior to 2011, in the vast majority of constitutional drafting processes, controlling elites would select a small number of individuals from other elite

¹² This applied to all countries in the region apart from Lebanon, which has held elections relatively regularly and which has survived on power-sharing arrangements for decades. Even in Lebanon, however, corruption and nepotism quickly took root, to the extent that specific political groups managed to ensure a monopoly of support from each of the country's various communities and the change in political fortunes became more a function of demographics than the relative failure or success of a specific party's policies.

circles to serve as members of drafting committees. In most cases, drafting committees would be mainly populated by jurists, but have also included individuals who did not have a legal background. Although drawn from the elite circles described earlier, constitutional drafters potentially had enormous power to influence the outcome of a constitutional-building process given that they were responsible for translating broad principles into specific constitutional rules. This was particularly true given that controlling elites were generally unfamiliar with their countries' legal traditions and were therefore unlikely to object to legal innovations that fell outside their main scope of interest. In addition, controlling elites would provide only broad direction for what should be included in the constitutional text, leaving the detail to the drafters. In Egypt, then president Anwar Sadat provided the National Assembly, which was tasked with drafting the constitution, with a "short list of specific instructions" (Stilt 2014).

Constitutional drafting processes were generally brief, which reduced opportunities to engage with drafters and influence their work. Even in those cases where the processes nominally lasted months or even years (Iraq in 1925, Tunisia in 1959, etc.), the drafting processes were themselves monopolized by small numbers of individuals (some of whom were not even nationals) who generally worked behind closed doors, further reducing opportunities for outsiders to impact the discussions (Khadduri 1951). Finally, many drafters were selected on the basis of their conservative predisposition and party loyalty and so any attempt to introduce progressive ideas to the process would have met with significant resistance.

Importantly, prior to 2011, the general population played at best a passive role in shaping constitutional discourse. Postcolonial constitutions were grounded in the popular demand for sovereignty and an improved framework for the protection of individual rights. However, controlling political elites constructed drafting processes in a way that ensured that the general population would have no input, which was reflected in the final drafts that were produced. At the time, these procedural and substantive issues attracted very little attention. It took decades for the general population to create enough space for itself to note its discontent with existing constitutional frameworks. Today, the general population has a far better understanding of its rights and has become far more adept at articulating its demands (details follow).

Their objectives

Given all of the aforementioned, I propose to limit the discussion here to determining the objective that the pre-2011 constitutions actually served (as

opposed to the objectives that they should have served). In so doing, it is inevitable that we should make reference to Nathan Brown's (remarkably on point) book in which he examines the texts of the pre-2011 Arab constitutions themselves in an attempt to understand what their objectives actually were (Brown 2012). As a starting point, Brown dismisses the proposition that Arab constitutions were deeply cynical documents that were ignored in practice. Arab constitutions have traditionally included long lists of political, social and economic rights. The standard argument that is made is that those rights were designed to placate a demanding population by creating an illusion of liberal constitutionalism. However, the rights provisions were deliberately constructed as non-binding promises that were subservient to the will of the law. Thousands of laws and regulations were passed in conformity with these constitutions, and which restricted all the rights that ordinary people incorrectly thought had been granted to them.

Brown also explores three other possibilities, which were that the constitutions were designed to (i) underscore sovereignty; (ii) signal basic ideological or policy tenets; (iii) organize or augment state authority. Brown finds the first of these possibilities unconvincing mainly because Arab countries had started drafting constitutions well before they had achieved full sovereignty. He also dismisses the second on the basis that many Arab constitutions are entirely silent on ideological issues. He correctly notes that while a growing number of constitutions included historical and political narratives in their preambles, most did not offer any specific ideological grounding. On the other hand, he finds significant evidence to support the proposition that Arab constitutions were principally designed to organize state authority. Indeed, most Arab constitutions were enacted at a time when various groups of elites were jostling against each other in a competition for political power, and so were replete with provisions that regulate the activities of state institutions.

As such, security institutions, members of the legal profession (mainly judges) and a small number of political groups were all given their own spheres of influence. The constitutional texts themselves were principally designed to regulate their behavior in a way that augmented and cemented each institution's sphere of authority, while also cementing them together.

How successful were they?

If we consider, as Brown does in his book, that the pre-2011 constitutions' objective was to organize and augment state authority, then we can consider the constitutions ultimately to have been a failure. In fact, the seeds for constitutional degradation were firmly planted when the constitutions

themselves were drafted. Most constitutional texts in the region were drafted by individuals who were handpicked by ruling authorities specifically because of their bias toward authority and control. Libya's 1951 and Iraq's 1925 constitutions were prepared by foreign officials and advisers with only minor input from locals. The king was directly involved in and controlled the drafting of all of Morocco's constitutions and Jordan's 1952 constitution. Syria's 1973 constitution and Iraq's 1970 interim constitution were both drafted under the auspices of harsh authoritarian regimes. Egypt's 1971 constitution was drafted by a committee of eighty individuals, all of whom were members of the National Assembly, which was intensely loyal to the then president (Waterbury 2014). All of these texts included detailed provisions on how parliament should operate, specifically setting out the circumstances in which sessions could not be held, how long sessions should last, how votes should be organized, etc. Meanwhile, the texts were virtually silent on the limits of executive authority.¹³ There were no provisions that indicated that governments should always operate in application of the law; states of emergency could be declared and renewed *ad infinitum*, with no clarity on their impact on rights and freedoms; the role of the executive in the legislative process was left undefined.¹⁴

The bias in favor of whoever controlled the executive branch of government, whether king, president or prime minister, ultimately created a further incentive for specific individuals or groups of individuals within executive circles to eliminate rivals and purge the halls of power. Therefore, as time progressed, executive power was eventually monopolized by ever-diminishing members of people (sometimes eventually reducing to a single individual, as in the case of Iraq from 1979 until 2003).¹⁵ As the pool of individuals and groups that were involved in designing state policy narrowed, so did the quality of decision-making. As such, although there were few if any genuine

¹³ Egypt's 1971 constitution included fifty articles (1,942 words in the Arab original) that regulated parliamentary proceedings. It only included seven articles (325 words) on how the government was supposed to function. An unofficial translation of Egypt's 1971 constitution is available here: www.constitutionnet.org/files/Egypt%20Constitution.pdf.

¹⁴ See, for example, "Endless Emergency: The Case of Egypt," Sadiq Reza, 10 *New Crim. L. R.* 532 (2007); and "Political Participation and Democratic Transition in the Arab World," Lina Khatib, 34 *U. Pa. J. Int'l L.* 315 (2013).

¹⁵ Behind the scenes purges took place as recently as September 2015 in Algeria, where Mohamed Mediene, who had been the head of Algeria's intelligence service for twenty-five years, was quietly replaced by President Abdelaziz Bouteflika. No reasons were offered. See "Algerian President Fires Intelligence Chief in a Shake-Up of Security Forces," Carlotta Gall, *The New York Times*, 14 September 2015; see also, "Bouteflika Puts an End to Head of Intelligence General Mohamed Medien's Legend" ("الاستخبارات بوتفليقة ينهي «أسطورة» الجنرال توفيق قائد"), Atef Qaqladara, *Al-Hayat*, 14 September 2015.

challenges to the existing constitutional orders throughout most of the region for a period of decades, poverty, inequality and insecurity increased steadily in practically all countries. Human development indicators and socioeconomic data all reflected an increasingly desperate situation: booming populations, growing unemployment, stubborn levels of poverty and illiteracy, staggering levels of corruption, etc.¹⁶ All of these phenomena led to unprecedented amounts of social unrest starting in Tunisia in December 2010. In the end, state authority was diminished by executive overreach that manifested itself through the desire to monopolize power for as long as possible, without paying any heed to genuine social needs.

Significant hope was placed in specific institutions, including Egypt's judiciary, which had exercised signs of independence in some of its rulings (Moustafa 2007) and the UGTT, Tunisia's largest trade union (Yousfi 2014). Over time, however, governments across the region used the considerable tools that they had at their disposal to control the work of those institutions, notably those that were supposed to be exercising oversight over the government, namely parliamentarians, auditors, prosecutors and judges. Their independence was limited and their senior leadership was offered privileges in exchange for acquiescence (Farouk 2008). In the few instances where state institutions resisted the monopolization of power, the executive amended the constitution and legislation to limit their authority altogether.¹⁷ Even the Egyptian judiciary had been brought under control by the executive (Moustafa 2007).

If, however, we consider that the objective of the pre-2011 constitutions was to preserve power for as long as possible, then they can be considered to have

¹⁶ Although Egypt's education sector has been in desperate need for reform for decades, the state has been incapable of addressing the basic challenges that it faces. The sector's difficulties have grown significantly worse over time. "Education in Egypt: Key Challenges," Louisa Loveluck, Chatham House Background Paper, March 2012. In 2013, Egypt ranked last out of 148 countries in the ranking of primary education quality; see "Unpacking Egypt's low education score in the Global Competitiveness Report," Egyptian Initiative for Personal Rights, 25 September 2013. The same difficulties are shared by other sectors, including the security sector; see, for example, Roger Owen, *The Rise and Fall of Arab Presidents for Life*, Harvard University Press (2014).

¹⁷ For example, in July 2015, after failing to rein in the Central Auditing Organisation (Egypt's supreme audit institution, which is formally independent in accordance with Article 215 of the 2014 constitution), President Sisi issued a decree granting himself the right to depose its head. See "Sisi Issues Law Granting President Right to Depose Heads of 4 Regulatory Agencies," *Ahram Online*, 11 July 2015; and "Controversy Surrounding the President Granting Himself the Right to Dismiss Board Members from the State's Oversight Institutions" ("جدل حول منح الرئيس نفسه سلطة إعفاء أعضاء الهيئات المستقلة والرقابية من مناصبهم"), *Youn7*, 12 July 2015. President Sisi finally acted upon the decree and dismissed the Auditing Organisation's head in March 2016. See "Egypt's Top Auditor Geneina Removed by Presidential Decree," *Mada Masr*, 28 March 2016.

been partially successful. Ruling elites in a number of countries were forcefully removed via popular revolutions (Tunisia), palace coups (Egypt), while others were so obstinate in their refusal to reform that they imposed on their countries violent and protracted conflicts (Libya, Syria, Yemen and Iraq).¹⁸ At the same time, ruling elites in other countries have managed to survive in the post-2011 environment. In some cases, ruling authorities offered a number of concessions to restless population, usually in the form of constitutional reform (Morocco, Algeria and Jordan). In many others, mainly Gulf and resource-rich autocracies (Saudi Arabia, Kuwait, Bahrain, the United Arab Emirates, Qatar and Oman), there were no serious threats to the ruling elites' survival and no tangible changes were ever enacted.

THE ARAB SPRING CONSTITUTIONS

The people's objectives

The popular uprising that took place in 2011 from Morocco to Iraq, passing through Tunisia, Libya, Egypt, Yemen, Syria, Jordan and Bahrain, was almost without precedent mainly because it forced controlling elites to take the needs and desires of their own populations seriously.¹⁹ The priority for the revolutionaries who led the protests in many countries (Tunisia, Libya, Egypt, Yemen and Syria) was to cause the downfall of long-standing dictators, but the focus and debate quickly shifted to establishing a reform agenda that included constitutional reform. The exchanges that took place during that early period eventually crystallized around a small number of issues, which were best expressed through popular slogans including

¹⁸ Note however that in all cases, the conflicts that are ongoing in these countries were never purely internal affairs. Foreign actors played a significant role in all cases.

¹⁹ The term "Arab Spring constitutions" is designed to refer to those constitutions that were drafted pursuant to the protest movement that commenced in Tunisia in December 2010. These include Morocco (2011), Tunisia (2014), Egypt (2012), Egypt (2014), Syria (2012) and Jordan (2011). As of the time of writing, Algeria, Libya and Yemen's drafting processes are still ongoing. Draft versions of the Libyan and Yemeni constitutions have been published mainly because it forced controlling elites to take the needs and desires of their own populations seriously; Algeria has as of yet not published any drafts of its proposed reform plan. As should be clear from the substance of this chapter, the designation of a constitution as an "Arab Spring constitution" is not designed to reflect any positive or negative connotations, but merely reflects temporal and causal realities. Note also that although Iraq does not qualify as an Arab Spring country (given that its constitution was drafted six years before the Arab Spring started and pursuant to a military invasion and occupation, and not in response to a popular movement), I include some discussion of the 2005 Iraqi constitution here given that the drafting process that led to its adoption matches many of the dynamics that led to the Arab Spring constitutions. Needless to say, I do not include any discussion of the Gulf monarchies' constitutions, given that they were, by and large, unaffected by the Arab Spring.

“عيش، حرية، عدالة اجتماعية” (bread, freedom and social justice), which broadly translated as a desire for the protection of fundamental rights, and the achievement of social justice.

The preambles to the Egyptian (2014),²⁰ Tunisian (2014), Moroccan (2011) and Syrian (2012) constitutions constitute strong evidence that the drafters sought to address the concerns that were being expressed by the protesters and revolutionaries.²¹ All of these preambles offer historical and political narratives, which are designed to encapsulate the state's ideology, and also to divorce the new state from previous generations of ruling authorities or at least to reinforce the importance of certain segments of the existing ruling elite. Although each of these constitutions include idiosyncrasies that reflect unique national circumstances (e.g. the role of the monarchy in Morocco, or the sense of international isolation in Syria), there are themes and principles that recur in all of the preambles. All four of the texts without exception make reference to the people's or the nation's place in the world community, sometimes through the mention of international institutions and at other times by providing an account of the nation's contributions to world history. More importantly, the texts also strongly emphasize popular sovereignty and social justice, sometimes to the extent that these principles are repeated several times within just a few lines.

The Egyptian preamble states that the purpose of the revolution is to “achieve freedom and social justice together” (an exact reflection of the popular slogan cited earlier), that the Egyptian people believe in “democracy as a path, a future, and a way of life; in political plurality; and in the peaceful transfer of power” and that all people have the right to “[f]reedom, human dignity, and social justice.” Tunisia's preamble provides that the constitution has as its objective to establish the “framework of a civil state founded on the law and on the sovereignty of the people,” and that the constitution seeks to “build on national unity that is based on citizenship, fraternity, solidarity, and social justice.” According to the Moroccan preamble, the state seeks to establish a “democratic State of Law” through “participation, of pluralism and of good governance,” and also develop a “society of solidarity where all enjoy security, liberty, equality of opportunities, of respect for their dignity and for social justice.” Finally, the Syrian preamble states that the new constitution establishes a number of principles including the “rule of the people based on

²⁰ Note that since the start of 2011, Egypt has had three separate constitutional texts: an interim constitution that entered into force in March 2011; a constitution that entered into force in 2012; and, after the civil government was deposed by the military in July 2013, a new constitution was drafted in 2013, finally entering into force in 2014. The latter two texts, and the processes that led to their elaboration, will both be referred to here.

²¹ The Jordanian constitution does not include a preamble. The latest versions of the drafts of Libyan and Yemeni constitutions also do not include preambles.

elections, political and party-based pluralism, [...] social justice, equality, equal opportunities, citizenship, and the rule of law.”

The wording used in the Arab Spring constitutions can be contrasted against preambles of the previous generation of constitutions. Although the latter made some reference to progressive values that are similar in nature to the desire to achieve “social justice,” these were often secondary concerns in comparison with the then ruling authorities’ political aims, including the establishment of socialism and the monopolization of power by undemocratic forces. The preamble to Morocco’s 1996 constitution made quick reference to international organizations and obligations, and to the need to establish peace and security in the world and made no mention of the needs or aspirations of ordinary people. Syria’s 1973 constitution essentially consisted of a historical narrative from the point of view of the Syrian Baath party. The need for “Arab unity” was emphasized on several occasions, as well as the “establishment of a socialist order.” The preamble also stated that “[f]reedom is a sacred right and popular democracy is the ideal formulation” but only after several references were made to the Baath party’s special role in guiding state and society. The preamble to Egypt’s 1971 constitution was clearly drafted with progressive ideals in mind. Multiple references are made to the “dignity of man,” although no clear explanation is offered as to what human dignity consists of. The preamble also committed the state to a broadly progressive agenda that was perfectly suited to the 1970s, including the “integration between science and faith, between political and social freedom, between national independence and social affiliation.” Tunisia’s 1959 constitution was the only text that would not be out of place amongst Arab Spring constitutions. It made reference to “human dignity, justice and liberty,” the “sovereignty of the people,” “respect of human rights” and “citizens’ right to work, health care and education” (roughly equivalent to the modern conception of social justice in the Arab region). The major difference between the 1959 constitution and its successor was the former’s moral conservatism, and specifically stated that the text had as one of its main objections to “protect the family.”

The evolution from the earlier generation of Arab constitutions to the Arab Spring texts could not be clearer. Constitutional drafters from 2011 to 2014 were clearly conscious of the need to respond to the demands of the people and adopted the exact same terminology that was used in demonstrations throughout the region (even in Syria). As such, the constitution’s stated aims, as expressed in their preambles, overlap to a very large extent with the popular aspirations of the people.

The constitutions' objectives

As noted earlier, however, a constitution's preamble may not accurately reflect the spirit of the remainder of the text, or even the drafters' full intent. Despite the new context and the revolutionaries' early success in imposing themselves on the regional debate, in many of the drafting processes that took place after 2011, the general population was generally unable to apply any significant pressure on drafters, who remained dependent on preexisting elite circles and who have been largely unable to break away from the Arab region's conservative and uncritical legal traditions. In Morocco (2011), Syria (2012), Egypt (2014) and Jordan (2011), drafting committees were directly appointed by presidential or royal decrees, and individual members were almost all selected on the basis of loyalty to the existing power structure.²² Although some of these drafting committees did organize public outreach efforts, popular opinion did not play an effective role in influencing discussions beyond generalities that were set out in the preambles and in a few other issues. The drafting processes were all completed in either a matter of weeks or a small number of months, effectively preventing civil society from mobilizing and analyzing whatever was being done in the drafting chamber (Madani et al. 2012). In Algeria, the process has been ongoing for four years but is so secretive and centralized within the office of the president that there is no clarity on when it will be completed or even what changes will be made.²³

Other countries adopted a different approach but often reached the same result. In Tunisia (2011) and Libya (2013), constitutional drafters were directly elected. In Egypt (2012) and in Iraq (2005), drafting bodies were appointed by parliamentary assemblies that were principally elected for that purpose. In addition, in each of those countries, a large number of public meetings were organized to debate key constitutional issues. The largest amount of interaction between drafters and the general public took place in Tunisia, which had the longest of the constitutional drafting processes by far (two years).²⁴ Uniquely in comparison with other countries in the region, the Tunisian constituent assembly published four drafts and solicited comments from the general public. In Yemen, the actual drafting of the constitution took

²² In addition, although some of the committees included a few progressive members, they were generally in a minority in comparison to the more conservative members.

²³ "Algerie: la nouvelle constitution, l'Arlésienne de Bouteflika," Farid Alilat, *Jeune Afrique*, 24 April 2015.

²⁴ Libya's constitution drafting assembly was directly elected in February 2014, and had not completed its work by April 2016. However, as a result of the conflict and general state of insecurity that has been ongoing in Libya since 2011, public meetings on constitutional reform issues have been quite rare.

place in 2014, following a full-year national dialogue conference, perhaps the freest and most comprehensive discussion of its kind ever to have taken place in the Arab region (Lackner 2016).

However, in a region with weak democratic traditions and undemocratic political parties, the difference in practice between this seemingly democratic approach and the old manner of proceeding was not particularly marked, for a variety of reasons. First, controlling elites and political party leaders play an important role in selecting the candidates who can run for election, and tend to favor loyalty and reliability over an innovative and reforming spirit. Second, political elites, many of whom are unelected, often take strategic decisions that bind elected officials, thereby undermining electoral results. Finally, controlling elites play a critical role in determining the outcome of constitutional drafting processes even before they begin through their long-term influence over the legal profession. State law schools, which should be dynamic environments for the free exchange of ideas, were instead transformed into static environments that specialize in rewarding an uncritical commitment to applying the law, regardless of its content or its provenance. The absence of a critical element to legal education and judicial training imbued the entire legal profession with a heavily conservative and authoritarian outlook that played a key role in constitutional drafting processes throughout the region. Elected officials are often bound by established traditions that are presented as being beyond questioning, including but not limited to a country's legal traditions. That impression is reinforced by, amongst others, each country's legal professionals and especially judges who typically present their methods and traditions as being above reproach (Shalakany 2012).

The effect of these factors is that the distinction between the constitutions that were produced with more public input and those that were produced with less is not particularly marked. Instead, most of the Arab Spring constitutions largely reflect the drafters' and the controlling elites' prioritization of continuity and incremental change over the desire to establish social justice and protect fundamental freedoms. A quick comparison between Egypt's 2012 and 2014 constitutions will illustrate that point.

The 2012 constitution, which was drafted by a constitutional committee that was appointed by an elected parliament, is supposed to mark a new beginning in Egyptian constitutional history.²⁵ Instead, the new text was heavily inspired by the 1971 constitution, despite the latter's many flaws. By way of illustration, the drafters claimed that they were intent on establishing a semi-presidential

²⁵ For a full analysis of the 2012 constitution, see "The New Egyptian Constitution: An Initial Assessment of Its Merits and Flaws," Zaid Al-Ali, *openDemocracy*, 26 December 2012.

system of government that could not be dominated by any particular political party in the future (Choudhry and Stacey 2014). However, the drafters were unable to break away from the traditions that had been established by the 1971 constitution. For example, the president's power to appoint members of the upper chamber of parliament was maintained (article 128), giving the president an unjust and undeserved amount of leverage over the legislative process. Given that the upper chamber was responsible for approving all of the president's appointments to the country's independent institutions (including the audit institution and the central bank), that process was skewed in the president's favor in a way that was impossible to justify.

In another example, the drafters decided not to negotiate a new arrangement on decentralization. Despite huge disparities in service delivery and standards of living between the country's major urban centers and much of the rest of the country,²⁶ the 2012 constitution deferred to the preexisting legal framework on decentralization, which essentially provides that all decision-making should be maintained in the capital.²⁷ Worse still were the provisions on civil/military relations. The 2012 constitution explicitly recognized (for the first time) that civilians could be tried by military courts for crimes that "harm the armed forces" (article 198). The term was left to be defined by subsequent legislation. Also surprising is the fact that the National Defense Council (which has eight military members and seven civilians) was made responsible for discussing the military's budget (article 197). Unsurprisingly given the context, almost nothing was done to improve the framework for the improvement of rights: Although the list of socioeconomic rights was prolonged, the judiciary was not given any additional authority to ensure their proper

²⁶ Egypt Human Development Report 2004: Choosing Decentralisation for Good Governance, United Nations Development Programme, 2004, page 22 ("By examining the tables that address urban-rural gaps in human development, one can easily identify human development disparities among the major four groups of governorates and among individual governorates; this is in spite of multiple rural development programs and efforts. Available data are not yet sufficient for estimating urban/rural indices of human development neither at national nor at governorate level, but a number of available sub-HDI indicators are revealing as regards the urban/rural human development imbalance in Egypt, even though urban/rural gaps have been narrowing during the period 1990–2002. In 2001, the average urban/rural gap at the national level was 32.3% in adult literacy rate (15+), compared to 45% in 1992").

²⁷ Article 188 provided that local councils should be elected but article 190 allowed for any of their decisions to be overturned by the central government in order to prevent "damage to the public interest." Worse still, article 187 did not clearly indicate how governors were to be chosen (whether elected or selected) and made no attempt to define their powers, leaving all of these crucial matters to be decided by subsequent legislation, as has been the case for the past few decades. Finally, earlier drafts called for a financial redistribution mechanism between provinces to remedy the gross disparities that exist in the country. That provision was deleted from the final version.

application, no effort was made to improve the performance of the (woefully underperforming) judicial sector, and litigants were not given any additional rights to bring claims to court. In short, the 2012 constitution departed from its predecessor in ways that changed the balance of power within the state, but not in a way that would directly impact the rights of ordinary Egyptians.

Although Egypt's 2014 constitution was drafted by a committee of fifty individuals who were appointed by presidential decree, it also does not depart from the 1971 constitution's framework to a significant extent (Al-Ali 2015). In fact, the text maintains, and on occasion worsens, many of the negative characteristics that have plagued Egypt's constitutional practice for decades. 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.²⁸ In addition, although the list of socioeconomic rights is more detailed than in the past, they remain generally non-justiciable. Meanwhile, basic civil and political rights such as speech and association are hardly improved. The constitution also does not offer any convincing mechanism for the enforcement of rights: Apart from even more independence than before, the judicial sector remains unreformed and no additional mechanisms have been created, meaning that those additional rights that are provided for will almost certainly remain unprotected. Just as worryingly, the new constitution tilts the balance of power firmly back in the president's favor, which is not particularly reassuring given the circumstances.²⁹

On the issue of rights, the 2014 constitution includes a small number of provisions that are designed to impose the obligation on any future government to adopt a more progressive set of investment priorities. By way of example, article 18 provides that "The state commits to allocate a percentage of government expenditure that is no less than 3% of Gross Domestic Product (GDP) to health. The percentage will gradually increase to reach global rates." Article 19 also provides that "The state commits to allocating a percentage of government spending that is no less than 4% of Gross Domestic Product (GDP) for education. It will gradually increase this until it reaches global

²⁸ See, for example, article 203, which provides that the armed forces' budget should appear as a "single figure" in the state budget, and that it is for the National Defense Council (a majority of whose members are drawn from the security institutions) that is responsible for debating it, as opposed to the parliament; and article 185, which also provides that the judiciary's own budget should appear as a single figure in the state budget, with no quid pro quo on accountability and transparency measures offered in return.

²⁹ For example, although the government is formed by the prime minister, the president has the right to appoint the ministers of justice, interior and defense (article 146).

rates.” Although these provisions are designed to show that some importance was given to the improvement of living standards of the poorest segment of society, there is significant doubt as to whether they will make any difference in practice, given the innate difficulties that exist in implementing provisions of this nature.

Many of the other Arab Spring constitutions follow the same pattern of improving some of the details while maintaining the same overall structure of government. By way of example, Moroccan opposition parties were granted some new standing under the 2011 constitution,³⁰ but the king still maintains firm control over key state institutions and still has significant influence over the government (on which he can impose his will at any time)³¹ and the judiciary.³² An analysis of the 2011 amendments to the Jordanian constitution leads to the same conclusion (Sufian Obeidat. Unpublished. *The Amended Constitution of Jordan: Analysis and Recommendations Study*. International IDEA). The little information that has been made public about the planned reforms in Algeria also points in the same direction.³³

Tunisia’s 2014 constitution constitutes a partial exception to that trend (Al-Ali 2016). Importantly, many of the controlling elites who had been in power prior to the popular uprisings lost all of their influence in 2011 and so the impetus to priorities continuity over other concerns disappeared. Instead, debate during the drafting process focused almost entirely on how to bridge the divide between two sides of a deep political chasm. The priority then became to prevent backsliding toward a new authoritarianism, by ensuring that state institutions could never again be captured by a single political force. While this presented an enormous opportunity to progress on many fronts, some of the other factors mentioned earlier, including the deeply conservative

³⁰ For example, article 10 specifically provides that the parliamentary opposition has the right to freedom of expression, airtime on official media (proportional to its representation), public finance, etc. Article 82 provides that “[o]ne day per month at least is reserved for the examination of the proposals of law of which are [of] the opposition.”

³¹ Article 48 provides that the king may preside over the government’s sessions. Although the constitution is silent on the government’s rules of procedure when the king is present, given his status within the Moroccan state and society it is clear that individual ministers would not be in a position to disagree with any of the king’s initiatives or decisions issued in that context.

³² Article 107 provides that the “King is the guarantor of the independence of the judicial power.” Article 115 provides that the Superior Council of the Judicial Power is presided over by the King, and that the King has the right to appoint five “notable persons” to the Council. Article 130 provides that six of the Constitutional Court’s twelve members, as well as the Court’s president, are appointed by the king. Three of the remaining members are to be elected by the Chamber of Representatives, and the other three by the Chamber of Councilors.

³³ See “General Recommendations on the Recommendations on Constitutional Reform” (“عرض عام حول اقتراحات تتعلق بالتعديل الدستوري”), Presidency of the Republic’s official website (undated).

tendencies of legal professionals,³⁴ impeded that effort. The result is that the final Tunisian constitution is a mixed bag of what appear to be effective checks and balances, on the one hand,³⁵ and missed opportunities, on the other.³⁶ Most importantly, the people's interest of achieving social justice was not particularly well served by the constitution.³⁷

How likely are they to succeed?

It is too early to say whether these new constitutions have succeeded or failed, whether in relation to the people's objectives, the constitution's own set of priorities or any other criteria. Despite the revolutionary context, most countries in the region have opted to pursue an incremental approach to reform. So the question will be whether state institutions in countries such as Egypt, Morocco, Jordan, Algeria and Tunisia will maintain a sustainable timeframe for reform that will outpace and address demographic changes, security risks and economic challenges. However, given how existing authorities have

³⁴ I am in possession of four fully fledged proposals for constitutional reform that were prepared by different groups of leading Tunisian academics. All four proposals were circulated before the end of 2011. All four are so similar to the 1959 constitution that they were hoping to replace that they were practically indistinguishable from it. The four proposals do not appear to have been formally published and are not available online, but I have them in my possession and can make them available upon request.

³⁵ In an effort to prevent the constitutional court from being dominated by any single branch of government or any particular political force, article 118 of the Tunisian constitution provides: "The President of the Republic, the Assembly of the Representatives of the People, and the Supreme Judicial Council shall each appoint four members, three quarters of whom must be legal specialists." In addition, the constitution provides the courts with significant additional authority through article 49, according to which: "The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations."

³⁶ The Tunisian constitution's provisions relating to the security sector are highly perplexing, particularly for a country that is still emerging from a period of autocratic rule. The constitution merely provides that the president is the commander in chief of the armed forces (article 77); that the president is responsible for appointing and dismissing senior military and security officers (article 78); and states that the president is "responsible for national security" (article 77) without providing any detail at all as to what these powers entail.

³⁷ It is worth noting that Yemen's draft constitution also proposes to introduce a large number of reforms to the country's constitutional framework. Amongst other things, the draft provides for the establishment of a real federal arrangement and significantly strengthens the framework for the protection of rights. Regrettably, the country lapsed into a new conflict immediately after the draft constitution was published in January 2015. At the time of writing, it is unclear whether the draft constitution will ever be adopted.

performed since 2011, a better question would be whether a timeframe for reform even exists.

To take Egypt as a first example, the country's ability to break out of its cycle of poverty and deep inequality will depend on its capacity for policy formation and accountability, which itself will depend on having an effective parliament in place. The country has been without a parliament since 2012 and the president has been ruling by decree in the absence of any meaningful discussion on policy since 2013. Parliamentary elections were organized in October 2015, and the new parliament is likely to sit shortly thereafter. The political environment in Egypt during 2014 and 2015 was such that the new parliament has been characterized by analysts and others as being totally loyal to the new president, which reduces the likelihood of serious discussion on policy and oversight of government performance for some time.³⁸ Nevertheless, even the remotest possibility of debate has stirred consternation amongst Egypt's controlling elites, causing them to argue against the application of the 2014 constitution's framework on the powers of parliament, which grants only slightly expanded provision on parliament.³⁹ In the meantime, the state has been punishing dissent, further reducing the likelihood of a serious discussion on policy to the extent that the president of the republic has threatened anyone who expresses any form of dissent with extreme violence (Human Rights Watch 2015).⁴⁰

In Morocco, the political opposition has been able to point to some small victories in terms of its ability to express its views and to exist within certain institutions, but none of those developments have translated into any tangible improvements in people's lives. Instead, the royal court and the remainder of the political elite have prioritized continuity and stability over all other considerations, considerably slowing the reform effort in the process (Zerhouni 2004).⁴¹ In fact, the pace of reform is so slow that it has caused consternation even within royal circles.⁴² By way of illustration, the parliament

³⁸ "Next Parliament Will Be Worst in Egypt's History: ESDP Secretary General," Mahmoud Mostafa, *Daily News Egypt*, 21 September 2015.

³⁹ "Al-Sisi: The Egyptian Constitution Was Written with Good Intentions, but States Are Not Built on Good Intentions" ("السيسي: الدستور المصري كتب بنوايا حسنة والنول لا تبنى بالنوايا الحسنة"), Mohamed al-Galy, *Youn7*, 13 September 2015.

⁴⁰ "Sisi Tells Egyptians: Don't Listen to Anyone but Me," *Aljazeera*, 24 February 2016. For more detail on President Sisi's comments, see: "Full Text of President Sisi's Speech on 'Egypt's 2030 Strategy'" ("النص الكامل للكلمة الرئيس السيسي بـ«استراتيجية مصر 2030»"), Hany Mohamed, *Akhar El-Yom*, 24 February 2016.

⁴¹ The same attitude and strategy has been in place for many decades.

⁴² On 9 October 2015, in a speech to the Moroccan parliament, the king repeatedly questioned the pace of legislation reform, stating: "The question is: Why are the laws relating to a number of institutions still waiting to be updated, four years after the adoption of the Constitution? Why

needed years to change a single provision in the criminal code that allowed for rapists to marry their victims.⁴³ Even when reform does take place, it has not always led in the direction that many Moroccans and analysts have appreciated. For example, in April 2015, a draft criminal law was published and was immediately criticized, first for being very similar to the previous law (despite the 2011 constitution), and second because of its heavily conservative and paternalistic spirit. The draft includes a series of worrying provisions, including the criminalization of “engaging in activities that weaken citizens’ allegiance to the state,” “insulting or mocking religion, God or the prophets” and “Muslims breaking the fast in public.” Meanwhile the new law de-penalizes “crimes of passion,” in that it states that an individual who murders his spouse can claim attenuating circumstances in the event he has caught her in an act of adultery.⁴⁴

In Tunisia, the country’s first peaceful transfer of power has taken place, and a reform effort is ongoing. However, significant economic and security problems will continue to serve as serious impediments to stability over the long term. Perhaps most seriously, there is significant evidence that the benefits of the revolution have not been equally shared; the south of the country, which was the source of the initial uprisings that launched the revolution, remains deeply impoverished and considers itself to be completely marginalized from the far wealthier, coastal areas.⁴⁵ The constitution’s mechanisms are struggling

are we waiting for the new institutions stipulated in the Constitution to be set up?”; “King Mohammed’s Speech before Moroccan Parliament,” *Morocco World News*, 9 October 2015.

⁴³ “The Moroccan Parliament Toughens Punishment for Rape After Repeated Tragedies” (“برلمان المغرب يحدد عقوبة الاغتصاب بعد تكرار المأساة”), Khadija Fathi, *Al-Arabiya*, 9 January 2014.

⁴⁴ See “Morocco: Facebook Campaign Against the Draft Criminal Law because of ‘Honour Crimes’ and ‘Weakening Citizens’ Loyalty to the State’” (“حملة «فيسبوكية» على مسودة القانون «على مسودة القانون»”), Taher al-Tawil, *Al-Quds al-Arabi*, 7 April 2015; and “Relations sexuelles hors mariage, rupture du jeûne en public ... Mustapha Ramid, ministre de la Justice et des libertés individuelles, ne recule pas,” *HuffPost Maroc*, 20 April 2015.

⁴⁵ The November 2014 presidential election results revealed that Tunisia is deeply polarized, with the north favoring an octogenarian establishment man who campaigned on the basis of a promised return to stability, while the south mainly supported the second post-revolution interim president who was secular but supported by the country’s main Islamist party. For more information on how deep the divisions run, see “Présidentielle: Tableau interactif des votes par circonscription, la Tunisie coupée en deux, Siliana et Sidi Bouzid se démarquent,” *HuffPost Tunisie*, 26 November 2014. Geographic divisions are manifesting themselves in increasingly worrying ways; see for example, “Tunisian Brothers Text Home: We Are in Libya and Everything’s Fine,” Eileen Byrne, *The Guardian*, 15 July 2015 (describing an incident in which thirty-three young Tunisians from a poor desert town crossed into war-torn Libya in an attempt to escape their own poverty; the article quotes a Tunisian from the same town as saying “[s]ome are just fed up with the poverty and unemployment here; the arrogance of the north [of Tunisia] towards the south”).

to relieve that pressure in the short term, particularly as the political divide between Islamists and non-Islamists continue to distract so much attention. Finally, Algeria's pace of reform was so slow that it took five years to introduce only modest changes to the draft.

Each of the countries that are in discussion here are subject to the whims of deeply entrenched interests (economic, institutional and religious) that impact their respective constitution's chances of succeeding in achieving its aims. The 2011 uprisings represented a revolutionary moment for Arab countries, but the response from most elite circles in the region was merely to tweak with existing constitutional frameworks, without changing any of the fundamentals. There was hope back in 2011 that the uprisings would create a sense of urgency across the region, but that has clearly not happened. The question now is whether rapidly changing demographic and economic circumstances will throttle elites and the constitutional institutions that they have created into action or whether they have already sown the seeds of their own failure. Time will tell.

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