

# STATE POWERS AND CONSTITUTION DRAFTING PROCESSES IN POST-REVOLUTIONARY TRANSITIONS IN NORTH AFRICA

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The 2011 uprisings in the Arab World have triggered a wave of constitution writing. Some states amended their Constitution while others decided to put a new one in place. In North Africa, Egypt and Tunisia both adopted new Constitutions in January 2014 after the removal of their presidents. Libya is still struggling to adopt its own basic law amid a deteriorating security situation. Morocco took a different path and prudently preferred to begin a process of reform to defuse the risks of political rupture. In Algeria, in 2011 the president undertook to introduce amendments to the Constitution to strengthen democracy. He set up a constitutional commission in April 2013 in charge of making proposals. The commission submitted its conclusions in September 2013 but there was no follow-up. In May 2014, the newly re-elected president again proposed amending the Constitution, but most political parties considered his proposals as an attempt to co-opt them rather than a move toward real reform.<sup>1</sup> In June 2015, the president stated again that the constitution will be revised, without giving an agenda or a deadline. Constitutions have a multifaceted role and can serve different purposes. They establish the nature and identity of the political system, organize the power and the rules of the political game, and determine the fundamental principles by which the state will

be governed. Traditionally, a constitution is also described as a social contract between the people that binds all sectors of society together.

Thus, in its essence a constitution is an agreement among citizens of a country on how to govern themselves and which principles to uphold. Product of a negotiation that reflects the interests and powers of the different actors around the shape a given society should take, it should be based on a compromise between all parties and unite rather than divide. Political theory, however, views constitutions as political documents reflecting the distribution of power among the most important actors in the country at the time of drafting. According to this more realistic theory, a constitution is not only a normative or aspirational document but also a map of power relations in each country. Constitutional writing engages different political actors in a contest over power and influence.

Constitutions are typically drafted or modified in the wake of a crisis. Their adoption is considered as a central element to construct national consensus and to help a country undergoing a difficult political transition along its path to national reconciliation. They provide a break with the old regime, create a common vision of the future of the state and act as the foundation of the new political order.

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1. For current discussions on constitutional reform proposals, see Goui, B. (2015). Algerian Angst: Can it Agree on Constitutional Arab Reform Initiative. *Arab Reform Initiative*. Retrieved from <http://www.arab-reform.net/sites/default/files/Algerian%20angst%2C%20can%20it%20agree%20on%20constitutional%20change.pdf>

The process of constitution-making has started to become an object of analysis as important as the content of the final document. It is inextricably linked to the substance of the constitution and the question of who writes the basic law may be the most crucial determinant of what it will say. The legitimacy of the document will also be affected by its drafting process of creation, which can be limited to the elite or open to popular participation. An established trend requires drafting to build and develop a national consensus through a participatory and inclusive process that integrates all social and political forces. However, constitution building is often conceived as a short-term victory that involves only the dominant groups.

### The legitimacy of the Constitution depends on its drafting process, which can be either elite-driven or open to public participation.

Each state may follow a different path in the modes of appointment of the members of its drafting body. The constitution-building processes in North Africa, all of them with their own specificities, had to accommodate powerful actors. Some countries decided to elect the members of their constituent body, while others opted for their appointment by the executive power. In Egypt, the army and the judiciary played a central role in the transition process and took part in the struggle for power.

#### DIVERSITY OF CONSTITUTION-MAKING BODIES

##### Elected Constituent Assemblies

Tunisia followed the most democratic process, since its 2014 Constitution was drafted by a constituent assembly directly elected by the people. This body, composed of 217 members, was elected in October 2011 through a proportional representation system. In recognition of the important role youth played during the revolution, the law required at least one person

under the age of 30 to be included in all party lists. Parties were also required to alternate between male and female candidates on their lists, leading to a fourth of the seats being won by women. Candidates who had served in the government or in the former ruling Constitutional Democratic Rally were banned from standing in the election. The assembly also worked as a parliament, enjoying both legislative and constitutional powers. A consensus committee of 22 members was established within the constituent assembly in which various political blocs were given equal weight, regardless of their results in the 2012 elections. This committee examined controversial provisions in order to reach deals before they were passed to the plenary. It played a central role in reaching consensus and compromise between different factions: "Successful negotiation of a new constitution demands that all stakeholders be willing to seek common ground and consider alternatives to their own preferred positions and the possibility of trade-offs along the way. The result achieved in Tunisia on 26 January 2014 would not have been possible without the mediation of civil society organizations and – procedurally – the creation of a special committee that was tasked specifically with the facilitation of compromise and gave all parties equal representation regardless of electoral support" (European Parliament, 2014).

After a lengthy process that took more than two years and witnessed tensions and clashes, the Constitution was adopted in January 2014 by a majority of 200 members with 12 members voting against and four abstentions. The Constitution required two thirds of the members to vote in favour in order to be adopted without submission to a referendum. In Libya, the Constitutional Declaration adopted by the National Transitional Council in August 2011 entrusted a constituent assembly appointed by the General National Congress with the drafting of a Constitution. Under pressure from the opposition, however, it was decided shortly before the elections in July 2012 to amend the Declaration in order to provide for direct election of the constituent assembly. The electoral law guar-

anted an equal representation of the three regions, Tripolitania, Cyrenaica and Fezzan, irrespective of population size. Six out of 60 seats were to be allocated for women and six other seats for ethnic minorities. The Amazigh community, however, decided to boycott the elections to contest their being allocated only two seats. The elections took place in February 2014, with a very low turnout. For security reasons, voting could not take place in about 80 polling stations and 13 seats remained vacant. The constituent assembly was given four months to draft the Constitution and it was to be submitted to a referendum. The deadline, however, could not be met and a draft Constitution was released in December 2014.<sup>2</sup> In the midst of increasing instability in the country, the draft constitution could not be submitted to a referendum. In Egypt, the 2012 Constitution was the first one to be drafted by an elected body. Previous basic laws had all been written by unrepresentative committees appointed by the executive power. The March 2011 Constitutional Declaration adopted by the Supreme Council of the Armed Forces (SCAF) stipulated that the new Constitution would be drafted by 100 members chosen by the parliament. The newly-elected parliament, dominated by Islamists, nominated the members of the constituent assembly in March 2012. One month later, however, in April 2012, the constituent assembly was declared unconstitutional by the State Council because half its members had been chosen within the legislative assembly. A second assembly was elected in June, after threat from SCAF to appoint a body on its own if the parliament did not succeed in electing a new one. This new constituent assembly was assigned seats according to political quotas and to the composition of the society and retained a majority of around 60% Islamists. Seven women were part of that body, of whom five were members of the Brotherhood. Most non-Islamist members withdrew from the Assembly, to complain against the way preparatory works were conducted,

claiming that some articles had been changed after consensus had been reached or that they were handed a new draft almost every day. The Constitution was adopted by referendum in December 2012 by a 63.8% majority but with a low turnout of 32.9%. The law organizing that 2nd Constituent Assembly was declared unconstitutional by the Supreme Constitutional Court (SCC) in June 2013, meaning six months after the adoption of the Constitution. However, the Court declared that the validity of the Constitution would not be challenged, due to its approval by the people in the referendum.

In both Egypt and Tunisia, it was the first time Islamist parties were offered the opportunity to participate in the drafting of a constitutional text and to set down their vision of society. Their acceptance of the supremacy of a higher state norm binding on all legal and political bodies should be underlined, since classical Islamic law does not know the concept of constitution. Indeed, in this model, law can only be the expression of the will of God and the norms are established in mosques by religious scholars and not in parliaments by elected representatives of the people. The mere fact that Islamist groups agreed to become political parties and run in elections to sit in an elected legislative/constitutional assembly demonstrates their readiness to make concessions and at least accept the rules of the game of democracy. The 2012 Egyptian Constitution did include provisions referring to Islam and religion. However, it granted sovereignty to the people (Article 5): "Sovereignty belongs to the people who practice and protect it, preserve its national unity and is the source of authority as stipulated in the Constitution." It grounded the political system on the principles of democracy and consultation (Article 6): "The political system is based on the principles of democracy, consultation, citizenship that confers to all citizens the same public rights and duties, political pluralism and a multi-party system, peaceful transfer of power, separation of powers

2. For an unofficial translation of the draft Constitution see <http://www.constitutionnet.org/vl/item/libya-initial-draft-constitution-2014-english>

and the balance between them, the rule of law, and respect for human rights and freedoms; all as elaborated in the Constitution." In Tunisia, Ennahda ended up making important concessions regarding the status of sharia and Islam and the Constitution was adopted on the basis of a wide national consensus. "The Ennahda-led government made concessions concerning key demands of the opposition, such as the protection of women's rights and freedom of expression and religion – key values for urban middle class Tunisians who see Islamists endangering their lifestyle and convictions. Although fearful of seeing Islam reduced to a mere cultural accessory (and of a return of the oppression they suffered previously), Ennahda nonetheless compromised on these key issues" (Mersch, 2014). Participation of Islamic parties in democratic processes, therefore, could end in moderating their ideologies and behaviour.

### **Committees Appointed by the Executive Power**

In Morocco, the King succeeded in avoiding the escalation of protest to revolution by passing reforms while retaining control of the entire revision process. Shortly after the onset of demonstrations in March 2011, he took the initiative of revising the Constitution. He appointed the members of a reform commission in charge of preparing a draft in less than four months on the basis of seven key elements he established. The 18 members of the Consultative Commission on Constitutional Reform were for the most part university professors and human rights activists (Tourabi, 2011). They ensured the participatory dimension of the process by consulting with different groups of the society, political parties, unions and associations. A referendum was held on July 2011 and was approved with 98% of those who voted. The reform diminished the powers of the king to the benefit of the government and the parliament. Yet the core of the king's

powers was not affected and he remains the true holder of power. He succeeded, though, in defusing the protests movement by following an alternative route towards democratic transition.

In Egypt, after the suspension of the 2012 Constitution in July 2013 following the removal of Mohamed Morsi by the army, a very innovative but not successful two-step process was established to draft a new Constitution. A committee of ten legal experts was nominated by Interim President Adly Mansour and was given a month-long period to prepare amendments to the 2012 Constitution and then pass them on to a committee of fifty members, the Committee of 50. These ten experts were six judges and four constitutional law professors from Egyptian universities. In practice, the Committee of 50 did not show any deference to the work of the ten experts and disregarded their recommendations. The Committee of 50, in charge of preparing the final draft amendments, was to reflect the major components of society.<sup>3</sup> In practice, the members were selected by the interim president on the basis of opaque criteria and more than two thirds of the seats were allocated to representatives of various institutions within the state apparatus – the army, the police, al-Azhar, national councils – or were close to the state. All these bodies had been in direct confrontation with the Muslim Brotherhood. Leftist and Nasserist groups were represented by 11 members and only two seats were allocated to political Islam: one for a Salafist from the Nour party and the other for a former member of the Muslim Brotherhood who had resigned from the group the year before. The prejudice against the representation of the Islamic trend in that Committee echoed the bias against secularists, liberals and leftists from the drafting process of the 2012 Constitution: "Just as secularists were sidelined from the 2012 Constitution-drafting process, Islamists were almost entirely excluded from the Committee of 50.

3. Political parties, intellectuals, workers, farmers, unions and syndicates, national councils, al-Azhar, the churches, armed forces and the police, youth, etc.

The drafting process thus served to deepen political divides among Egyptians rather than as a means to achieve consensus" (Carter Center, 2014). Five women were appointed to that committee.

The Committee of 50 was given only 60 days to prepare the final draft. The members managed to extend the deadline by considering that the 60-day limit meant 60 working days, and did not include official holidays. However, such a short deadline meant that the constitution had to be written in a rush without time to engage in discussion and debate. The six month timeframe imposed by the March 2011 constitutional declaration for the drafting of the 2012 Constitution had already been considered as too short. The Committee of 50 decided to meet in closed-door sessions, limited to the core members only. Even alternate members and the ten experts were not allowed to attend. Members were banned from giving public statements to the press and only the official spokesperson was giving information about the debates in daily press conferences. In the absence of media coverage, the majority of Egyptians lost interest and no longer followed the Constitution drafting process. By comparison, the debates in the 2012 Constituent Assembly had been widely publicized and published in the media and most plenary sessions of the assembly had been broadcasted on television. Civil society and youth groups had launched constitution writing and awareness raising campaigns (Farouk, 2013).

**While Tunisia followed a participatory approach and organized sessions to register public concerns, civil society in Egypt played a very limited role in the drafting processes.**

Egypt refused international aid in writing its constitutions, while several international organizations and experts supported the drafting process in Tunisia. Tunisia followed a participatory approach and organ-

ized sessions to register public concerns, while civil society in Egypt played a very limited role in the making processes.

### **'ALIEN' ACTORS IN THE DRAFTING PROCESS: THE CASE OF EGYPT**

In Egypt, both the army and the judiciary played a central role in the drafting process and succeeded in pushing through the Constitution provisions protecting their own interests (Brown & Dunne, 2013).

#### **The Army Controls the Constitution Transition Process**

The military exerted control over the whole transition process and several times altered its timeline to suit its own interests (Moustafa, 2012). While in charge of ruling the country from February 2011 to June 2012, they were to decide on sequencing the process of elections and constitution drafting, with the Muslim Brotherhood and other Islamist groups wishing to have elections first and leftist and liberals pushing hard for a new Constitution in advance of elections. In the end, the army decided to hold parliamentary elections before convening a constituent assembly, and then moved to organize the presidential elections in June 2012.

The army acted twice as direct constituent body. Two days after Mubarak's fall, SCAF suspended the 1971 Constitution, thus creating a legal vacuum. They appointed a committee tasked with amending the Constitution, at the head of which they placed an ex-vice president of the State Council known for his closeness to 'enlightened' Islamic circles. The nomination process was neither open nor participatory and the only political trend represented within the committee was the Muslim Brotherhood. The deliberations were closed and did not provide any public accountability. Less than three weeks after the completion of its work, about ten amendments to the 1971 Constitution were submitted to a referendum. They were adopted on 19 March 2011 by an overwhelming majority of 77.2% with a level of participation of 41%.

A few days later, the 1971 Constitution, suspended on 13 February and amended on 19 March, was replaced by the constitutional declaration of 30 March 2011 that was to serve as the interim Constitution. This document was drafted in secret by anonymous and unaccountable figures and was not submitted to referendum, although ten days before, the constitutional amendments had been submitted to the people. This laborious administration of the transition by SCAF gave an impression of improvisation and of the absence of an overall vision. Moreover, as later developments would demonstrate, numerous lacunae and omissions in the actual content of the constitutional declaration undermined the progress of the institutional reform process. In particular, the declaration did not make clear the order in which the successive stages of the institutional reform process were to be organized and it was ambiguous with regard to the modalities of the composition of the constituent assembly. The constitutional declaration was amended by the army in June 2012 to increase its powers before relinquishing the executive power to the newly-elected president.

After the 2012 Constitution was suspended following Morsi's removal, interim president Adly Mansour appointed by the army adopted a new constitutional declaration on 8 July 2013. This document was also drafted in secret and was not submitted to referendum.

The military establishment was also interested in shaping some provisions in the new Constitution to enshrine their autonomy. A project of inviolable supra-constitutional principles to guide the constitution writing process circulated in August 2011. A revised version proposed in November 2011 by the Deputy Prime Minister (Selmi document) stated that Egypt was a "democratic civil state", Islam its official religion and the sharia the main source of legislation. Non-Muslims were given the right to follow their own creeds in personal status and religious matters. But the supra-constitutional principles also made the army the guarantee of constitutional legitimacy and proposed to shield the budget of the military from

civilian oversight. The National Defense Council had the sole right to approve legislation pertaining to the armed forces. Moreover, the army was attributed very significant powers of intervention in the drafting process of the Constitution. They could object to any provision they deemed contradictory to the fundamental components of the Egyptian state and society or to the rights and freedoms established by previous Egyptian constitutions. In the event that the assembly refused the revision, SCAF would submit the matter to the SCC, which was to issue a binding decision within seven days. Another controversial article stated that if the constituent assembly failed to draw up a draft Constitution within six months, SCAF would have the authority to appoint a new constituent body.

These provisions were rejected by Islamists, who resented the attempt by the military to impose guidelines on the coming constituent assembly and constrain its power. Liberals and leftists also objected strongly to this set of principles that were trying to perpetuate the political role of the armed forces in domestic governance by embedding fundamental constitutional provisions preserving their institutional autonomy and financial interests.

The army managed to push through the 2012 and 2014 constitutions several of these principles that had been rejected earlier in the process. If these constitutions were not written by the army, they were drafted under its close supervision. The military command was represented by two members in the 2012 Constituent Assembly and one member in the Committee of 50. For the first time in Egyptian constitutional history, both texts enshrined autonomy for the military and entrenched its power by granting them a privileged position. The 2012 Constitution gave the military a significant number of privileges that were maintained and even strengthened in the 2014 Constitution.

The army budget will not be made public and will not be under parliamentary monitoring. It will appear as a single figure in the annual state budget. In the past, the budget of the military and the economic activities of the army were already escaping democratic moni-

toring but the 2012 Constitution stated it explicitly for the first time. The 2014 Constitution maintained this secrecy of the military over its budget.

### The opaque constitution-making process in Egypt, dominated by the military, was considered “as a short-term political deal rather than a long-lasting social contract”.

The 2012 Constitution provided that civilians could be tried in military courts for crimes that “harm the Armed Forces”. This provision was criticized and, early in the drafting process, several members of the Committee of 50 had supported a complete ban on subjecting civilians to military courts. In the end, though, the 2014 Constitution kept the possibility for civilians to be brought before military courts, even though it tried to make the provision more explicit by defining the crimes that harm the armed forces as those that “represent a direct assault” against them and by restricting this jurisdiction to specific kinds of cases. However, the language is so broad that the military courts still enjoy a wide jurisdiction covering all places that belong to the armed forces, including clubs, hotels or petroleum stations.<sup>4</sup>

The 2012 Constitution stated for the first time that the minister of defence had to be drawn from the officer class. The 2014 Constitution added that for two presidential terms, meaning eight years, he would have to be approved by SCAF.

This opaque and chaotic constitution-making process, dominated by the military, could not lead to a consensual document and stable political order. It was considered “as a short-term political deal rather than a long-lasting social contract” (Farouk, 2013).

### THE JUDICIARY AS A MAIN ACTOR OF THE CONSTITUTION TRANSITION PROCESS

The judiciary has emerged as a central political player on the Egyptian scene. By taking what were considered as explicitly political decisions against Morsi, courts have been considered as one of the main actors behind his removal and accused of overstepping their authority. The State Council, alongside the SCC, ruled on very sensitive and consequential political issues, most notably the composition of Egypt's first Constituent Assembly, which it declared unconstitutional in April 2012, leading to its dissolution and to delaying the formulation of the Constitution. A year later, the SCC delivered a similar ruling, declaring the law on the organization of the second Constituent Assembly unconstitutional. The latter ruling came almost half a year after the new Constitution drafted by this assembly had already been adopted by popular referendum and entered into force.

Judges played a prominent role in the transition process too. In June 2012, two days before the completion of Egypt's first post-revolution presidential elections, the SCC ruled that the electoral law that had governed the election of the lower house of parliament in January was unconstitutional. On the basis of this ruling, SCAF immediately issued a decree to dissolve the assembly. In June 2013, the SCC delivered a similar ruling with regard to the law that had governed the election of Egypt's upper house of parliament. Although equally controversial, this ruling had a more limited political impact. The upper house was not dissolved, because the new Constitution, adopted in December 2012, had expressly made that house immune from dissolution until new elections were held for the lower house. Another highly sensitive decision delivered by the SCC concerned its ruling on the Political Isolation Law. On 14 June 2012, the same day that it delivered the ruling declaring the election of the lower house unconstitutional, the SCC ruled

4. In October 2014, the president expanded the powers of military courts by subjecting to their jurisdiction a large number of public facilities, such as roads, bridges or railways.

the Political Isolation Law unconstitutional. This law banned from participation in politics officials of a certain stature who had served the old regime and ruling party in the last ten years of the Mubarak era. The law had been challenged by Ahmed Shafiq, a presidential candidate deprived of his right to run because he had served as Mubarak's last prime minister. The Presidential Elections Commission referred the case to the SCC. The Court ruled on the challenge two days before the second round of the presidential elections and invalidated the law.

Judges were also involved directly in the different phases of the constitution drafting process: the committee of eight experts appointed in March 2011 by SCAF to amend the 1971 Constitution included three judges; according to the November 2011 supra-constitutional principles established by SCAF, the SCC would have decided on conflicts between SCAF and the constituent assembly regarding the content of the draft Constitution; the 2012 Constituent Assembly included six judges, and six of the ten seats in the Committee of Experts appointed by Adly Mansour in July 2013 to prepare amendments to the 2012 Constitution were held by members of the judiciary.

The drafting process also saw the rise of the judiciary in politics as a body putting forward its own interests. Rather than simply acting as an arbiter for disputes between state institutions, they managed to enshrine considerable autonomy in the 2014 Constitution. The general prosecutor will be selected by the Supreme Council of the Judiciary, a body run by senior judges, and the SCC will be able to appoint its own chief justice. As before, judges will be appointed on the basis of the recommendation of the Supreme Council of the Judiciary and will not be removable. The budget of the judiciary will be incorporated into the annual state budget as a single figure, meaning they will receive their budget in a lump sum and will be able to

transfer funds from one post to another without having to require previous agreement of the parliament. The laws on the judiciary will need a majority of two thirds of the parliament to be amended.

Judges managed to win more autonomy with little accountability and with very few checks on their authority. No mechanism for controlling the judiciary has been established apart from the Supreme Council of the Judiciary and no reform of the justice system has been provided. "Some observers have argued that increasing judicial independence is a positive development. However, in a country like Egypt where courts are generally seen (with notable exceptions) as failing the people, increasing judicial independence before operating wholesale reform means that the negative practices of the past will become much more difficult to change" (Al Ali, 2013).

## CONCLUSION

It is difficult to assess the extent to which an elected assembly is better geared than an appointed committee to make a Constitution. While it is too soon to determine the outcome of the transition processes in countries such as Egypt, Tunisia and even Morocco, one can compare the current situation in the two countries that adopted a new Constitution in January 2014. Tunisia successfully held its parliamentary and presidential elections and appointed a coalition government after a peaceful transfer of power, while in Egypt there is a dramatic reverse of the gains made following the 25th January uprising, and the parliamentary elections that according to the Constitution were to take place before June 2014 have been delayed to the end of 2015.

There has been too little research to date on the outcomes of Constitution-drafting processes and on the assessment of their long-term impact on the reconciliation process and consolidation of democracy.<sup>5</sup>

5. However, Wing argues that "it is this participatory inclusiveness that fosters legitimacy among a state's populace and, ultimately, constructs democracy", Wing, S. D. (2008). *Constructing Democracy in Transitioning Societies of Africa: Constitutionalism and Deliberation in Mali* (p. 3). New York: Palgrave Macmillan. See also Ghai, Y., & Galli, G. (2006). Constitution Building Processes and Democratization: Lessons Learned. *International Institute for Democracy and Electoral Assistance (IDEA)*. Retrieved from [http://www.idea.int/publications/dchs/upload/dchs\\_vol2\\_sec6\\_2.pdf](http://www.idea.int/publications/dchs/upload/dchs_vol2_sec6_2.pdf)

However, there is a wide acceptance that inclusivity and participation in a Constitution-drafting process will confer more legitimacy and longevity to the Constitution than an elite-dominated process. There is a widely held belief that certain mechanisms may provide for more viable constitutions, negotiated rather than imposed.

There is no perfect and unique Constitution-drafting process. Constitutions drafted under the control of the legislative power (e.g. Tunisia 2014) or executive power (e.g. Morocco 2011) can be successful as long as they reflect the interests of the different actors and are considered as basic laws for all citizens. Election of representatives may be the most democratic but not necessarily the most representative process, since it may not be inclusive, as was the case in Egypt in 2012. Strengthening of national unity is difficult to achieve in the absence of inclusivity and public participation that will allow for the negotiation of solutions to contested issues.

### **An inclusive participation in a Constitution-drafting process will confer more legitimacy and longevity to the Constitution than an elite-dominated process.**

In the absence of a strong army and judiciary, Tunisia succeeded in making compromises and adopted a Constitution in a spirit of national consensus and dialogue (Grewal, 2015). "Tunisian lawmakers have negotiated, compromised, and given concessions. Despite the political disputes and profound ideological divisions that marred the country's politics after the fall of the former regime, political players realized that giving concessions is the only way to move forward and to avoid the fate of other Arab Spring countries such as Libya, Egypt, and Syria" (Al Anani, 2015). "By successfully negotiating a final agreement, the Tunisians have led the way in proving that ideological differences need not lead to conflict or stalemate and that they can survive in the context of

a modern Arab state and society. The pragmatic and result-based approach that the Tunisian negotiators adopted will serve as a positive example of successful Constitution-making and conflict resolution, not just for the Arab region but for much of the rest of the world as well" (Al Ali & Ben Romdhane, 2014). The result of these compromises, however, is a Constitution that contains contradictory provisions that will have to be implemented and interpreted by political actors under the control of the judiciary.

Egypt defined the rules of the political game but failed to build a political consensus and the processes were neither inclusive nor participatory. In both 2012 and 2014, a major faction of society was left out and the two Constitution-building processes were used by the most powerful groups to extend their advantage over their rivals and reinforce their own position in the state. Drafters were motivated by a desire to protect narrow and short-term interests rather than to establish rules to regulate the entire political system and achieve democracy in the future. "It was designed to serve the needs of a particular moment and of specific players, above all the military and the judiciary" (Ottaway, 2014). Rather than a social contract binding all sectors of society together and a means to achieve consensus, the Constitution only deepened political divides and exacerbated the political crisis by becoming an instrument of power of one dominant faction. "A revolutionary environment demanded a revolutionary Constitution. Instead, both documents were drafted in a context of widening distrust between rival political camps and were used as means for parties to reinforce political alliances and seek to extend their advantage over rivals" (Al

### **Rather than a social contract binding all sectors of society together, the Egyptian Constitution deepened political divides by becoming an instrument of power of one dominant faction.**

Ali, 2013). Consensus was lacking even among the members of the Committee of 50, who failed to agree on important issues, such as the sequencing of the parliamentary and presidential elections, and

the choice of the voting system. All these issues were referred by the Constitution to the legislature. In this absence of parliament, they were decided by the president.

## REFERENCES

- AL ALI, Z. (2013). Egypt's Missed Constitutional Moment. *Foreign Policy*. Retrieved from <http://foreignpolicy.com/2013/12/17/egypts-missed-constitutional-moment/>
- AL ALI, Z., & BEN ROMDHANE, D. (2014). Tunisia's New Constitution: Progress and Challenges to Come. *Open Democracy*. Retrieved from <https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to->
- AL ANANI, K. (2015). Tunisia's New Constitution. *Middle East Institute*. Retrieved from <http://www.mei.edu/content/tunisia%E2%80%99s-new-constitution>
- BROWN, N. J., & DUNNE, M. (2013). Egypt's Draft Constitution Rewards the Military and Judiciary. *Carnegie Endowment for International Peace*. Retrieved from <http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary>
- CARTER CENTER (2014). *Carter Center Urges Dialogue and Constitutional Change to Strengthen Democratic Governance in Egypt*. Retrieved from <http://www.cartercenter.org/resources/pdfs/news/pr/egypt-constitution-031214.pdf>
- EUROPEAN PARLIAMENT, POLICY DEPARTMENT. *Comparative Analysis between the Constitutional Processes in Egypt and Tunisia – Lessons Learnt – Overview of the Constitutional Situation in Libya*. Retrieved from [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET\\_NT%282014%29433840\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET_NT%282014%29433840_EN.pdf)
- FAROUK, Y. (2013). Writing the Constitution of the Egyptian Revolution: Between Social Contract and Political contracting (March 2011-July 2013). *Arab Reform Initiative*. Retrieved from [http://www.arab-reform.net/sites/default/files/Cons\\_Egyptian%20Constitution\\_YFarouk\\_Nov13\\_Final\\_Layout\\_En.pdf](http://www.arab-reform.net/sites/default/files/Cons_Egyptian%20Constitution_YFarouk_Nov13_Final_Layout_En.pdf)
- GREWAL, S. (2015). Why Tunisia didn't follow Egypt's path. *The Washington Post*. Retrieved from <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/04/why-egypt-didnt-follow-tunias-path/>
- MERSCH, S. (2014). Tunisia's Compromise Constitution. *Carnegie Endowment for International Peace*. Retrieved from <http://carnegieendowment.org/sada/2014/01/21/tunisia-s-compromise-constitution/gyze>
- MOUSTAFA, T. (2012). Drafting Egypt's Constitution. Can a New Legal Framework Revive a Flawed Transition? *Brooking Doha Center*, Paper Series, 1. Retrieved from <http://www.brookings.edu/~media/research/files/papers/2012/3/12%20egypt%20constitution%20moustafa/new1%20drafting%20egypts%20new%20constitutionenr03.pdf>
- OTTAWAY, M. (2014). Constitutional Models vs. Political Reality: The Making of Arab Constitutions after the Uprisings. *IEMed Yearbook 2014*. Retrieved from [http://www.iemed.org/observatori/arees-danalisi/arxiu-adjunts/anuari/anuari-2014/Ottaway\\_Constitutions\\_Arab\\_Uprising\\_Models\\_international\\_standards\\_IEMed\\_yearbook\\_2014\\_EN.pdf](http://www.iemed.org/observatori/arees-danalisi/arxiu-adjunts/anuari/anuari-2014/Ottaway_Constitutions_Arab_Uprising_Models_international_standards_IEMed_yearbook_2014_EN.pdf)
- TOURABI, A. (2011). Constitutional Reform in Morocco: Reform in times of Revolution. *Arab Reform Initiative*. Retrieved from [http://www.arab-reform.net/sites/default/files/Morocco\\_EN.pdf](http://www.arab-reform.net/sites/default/files/Morocco_EN.pdf)

# THE ARAB TRANSITIONS IN A CHANGING WORLD

## BUILDING DEMOCRACIES IN LIGHT OF INTERNATIONAL EXPERIENCES

SENÉN FLORENSA, Ed.

THE OUTBREAK OF THE ARAB UPRISINGS IN 2010 LED MOST OF US TO THINK THAT WE WERE WITNESSING THE FOURTH OR THE LATE THIRD WAVE OF DEMOCRATIZATION. HOWEVER, THE CURRENT DEVELOPMENTS IN THE SOUTHERN MEDITERRANEAN REGION CLEARLY CONTRADICT THE TRANSITION PARADIGM, WHOSE MAJOR ASSUMPTION IS THAT THE POLITICAL OPENING LEADS TO ELECTIONS, FOLLOWED BY A PERIOD OF CONSOLIDATION. CONSIDERING THE OBSTACLES THE MIDDLE EAST AND NORTH AFRICA COUNTRIES ARE FACING, IT IS ACTUALLY HARD TO FORESEE WHEN AND WHETHER THEY WILL TURN INTO DEMOCRATIC STATES.

THE VOLUME, PRESENTING VARIOUS CASES OF SUCCESSFUL TRANSFORMATIONS, WHICH HAVE OCCURRED SINCE THE MID-1970S IN EUROPE AND WORLDWIDE, PROVIDES COMPREHENSIVE REFLECTION ON THE PAST EXPERIENCES WITH TRANSITION AND VALUABLE LESSONS FOR THE TRANSFORMING STATES IN THE SOUTHERN MEDITERRANEAN REGION. IT ALSO PROVIDES REGIONAL AND INTERNATIONAL ACTORS WITH GUIDANCE, WHICH MAY ENABLE THEM TO RESTRUCTURE THEIR POLICIES AND PROGRAMS AIMED AT SUPPORTING DEMOCRATIZATION PROCESSES IN THE MIDDLE EAST AND NORTH AFRICA.

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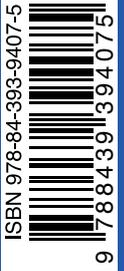
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