

CONSTITUTIONAL REBIRTH

Tunisia  
and Egypt  
Reconstruct  
Themselves



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# CONSTITUTIONAL REBIRTH TUNISIA AND EGYPT RECONSTRUCT THEMSELVES

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In early 2011, after dramatic national uprisings, Tunisia and Egypt each embarked on a process of reconstructing their political systems. Tunisia and Egypt have distinctive political features, and the paths they have followed have not been identical. But there are still some striking common elements in the transition process for both countries: the basic political structures of the state have remained intact despite political upheaval; the transition process is fairly rapid; the political scene is rapidly becoming populated with a wide variety of political forces; those forces have gravitated between a consensual approach and sharp competition; a political gulf between Islamist and non-Islamist forces has emerged; and the process, for all its problems and occasional bouts of violence, has remained relatively peaceful.

And there is another remarkable commonality as well: in both countries the centerpiece of the transition has been the process of writing a new constitution. Indeed, the centrality of writing a new constitution has been a striking feature of political life since the old regimes tottered, so much so that it is now taken for granted—while there is vigorous debate about all questions connected with the constitution (how it should be written; who should write it; when it should be written; what should go in it), there is virtually no dissent from the view that constitutional redesign is among the most critical political tasks for both nations. This is surprising for three reasons.

First, both countries have a rich experience with constitution drafting and constitutional texts—going back to the nineteenth century—but for more than half a century, the constitution has been a tool of authoritarian rulers seeking to institutionalize and justify their regimes. Yet rather than concluding that constitutional texts are discredited documents or merely flimsy paper platitudes, Tunisians and Egyptians have embraced them as essential to creating a just and responsive political order. Tunisia's discredited and disbanded ruling party had "constitution" in its name; the fallen Egyptian regime recently shoved through constitutional amendments designed to solidify its position, but in neither country did "constitution" become a dirty word.

Second, neither country had a clear mechanism for writing a new constitution. The pre-existing constitutions crumbled under the weight of the political crisis that brought down the old regimes; not only were the texts seen as so thoroughly corrupted by authoritarianism as to be beyond redemption, but even the succession and amendment mechanisms they contained seemed booby-trapped to prevent the sort of reforms that were desired. It is true that both countries can reach farther back in their histories to can find instances in which constitutions were written anew (Tunisians, for instance, routinely cite their experience of the late 1950s when a constituent assembly wrote the basis for the country's current constitution), but many of the procedures used earlier would be seen as exclusionary and undemocratic today.

Third, comparable international experiences do not necessarily suggest that a constitution needs to come first or early. Some countries have postponed constitutional redrafting for a considerable period; others treated it as an afterthought; and still others made do with interim documents. Tunisia and Egypt have been operating in something of a constitutional interregnum since their presidents were deposed earlier this year. While strong arguments for and against could have been made, the issue in both countries has been decided: both have placed constitution writing very early in the transitional process.

But while the decisions to focus on writing a constitution and to begin work soon were not inevitable, they now seems irreversible. Various aspects of the process are still contested—indeed, the sharpness of the debate has increased in both countries over the past few months. And that is in itself a critical reminder of an often overlooked reality in analysis of constitutional design. We frequently understand the process of writing a constitution to be a kind of pre-political activity: it is not so much about making political choices but about writing the rules by which political choices are made. Thus, much analysis of constitutional processes is often very abstract, focusing on what sorts of systems would be best for the society as a whole, what people in a specific political community should strive to achieve, and so on. Abstract reasoning, disinterested analysis, and an emphasis on the public good over partisan interest dominate much of the writings on constitutions.

But writing a constitution is generally much better seen not as a pre-political or politically-neutral enterprise but instead as a supremely political process. It is bitterly contested because the stakes are high; it is often of tremendous symbolic and emotional as well as legal and practical importance.

Societies make fundamental decisions about how they are to be governed when they write a constitution and it is unrealistic to expect members of a society to leave their preferences, values, and ideas completely aside when arguing and bargaining about what to put into a document.

This is not a totally pessimistic observation. A constitutional process that goes right can not only set up a good working political system but also establish patterns of healthy democratic contestation. In other words, writing a constitution can teach the art of compromise and discovery of common ground, especially when wide agreement is a requirement for ratification. But finding such agreement is not always easy. Indeed, it can be particularly difficult to do when the rules of that contestation have not been written. A society writing a constitution from scratch is, in that sense, working to lift itself by its own bootstraps, or, to use a metaphor coined for eastern Europe, “rebuilding the ship at sea.” And indeed, Egyptians have begun to speak of their current situation as one in which they are “fixing the car while it is moving.” But it means that there are no such things as one correct practice or one set of international standards or lessons. And even if they were, countries would likely be more responsive to internal politics than external lessons. But if there are no hard rules, there is much to be learned (both what to emulate and what to avoid) from the past experience of both Egypt and Tunisia as well as the vast range of internal experiences.

In this report, we will probe the constitutional process in Egypt and Tunisia, seeking to understand:

- Are there any international lessons for the two countries on the process of writing a new constitution?
- What is the process that has emerged in the two countries and how is it likely to develop?
- What lessons are Tunisians and Egyptians likely to draw from their own histories?
- What problems and controversies have arisen?
- Can international actors offer any assistance to ensure a smooth process?

## Constitutional Design and Political Reconstruction: International Lessons

Writing a constitution is a supremely introspective moment for most societies. Occasionally (such as in Iraq) the process will be imposed by external intervention, but more often the process will be one in which domestic politics predominate. Yet societies are also generally aware that they are not reinventing the wheel; there are past experiences and international examples that can help guide the path. This is true both with regard to the substance and the process of writing a constitution.

### *Substance*

While constitutions are made with most eyes on domestic politics, they often resemble each other. Language, precise provisions, and institutions are freely borrowed. In the nineteenth century, most borrowing focused on the role and prerogatives of the parliament as well as those of the head of state; there was also some borrowing of provisions for basic rights and freedoms.

In the first three quarters of the twentieth century, constitutions often served as much as ideological as much as legal documents: they grew far longer over time and often stressed various themes (nationalism, socialism, or liberalism); societies that had some ideological affinity often borrowed freely from each others' provisions. For instance, the nature of rights often reflected the basic ideological orientation of the political system.

In the late twentieth century, the connection between constitutions and democratic practice became more firmly established. Prior to this period, not all constitutions even pretended to be fully democratic. But few countries openly disavow democracy when writing their constitutions today. And there has been far greater attention as a result to democratic aspects of constitution drafting. As a result, there is far more attention to precise drafting and enforcement, ensuring not simply that fundamental freedoms and basic democratic procedures are promised but that they are enforced.

### *Procedure*

But the real focus of international attention has shifted in the past few decades away from substantive provisions and toward the process of drafting a constitution. When South Africa and formerly communist



states sought to build new democratic systems, international interest was extremely high. Other countries, such as Indonesia and Afghanistan, have emerged as leading influential examples. But unlike the past, when the international attention that did come focused largely on substantive issues, in recent years, there has been much greater focus on how a constitution is written. This is partly a product of the increasing identification of constitution writing and democracy: it would seem inappropriate to lay the basis for democratic governance in an undemocratic manner. While constitutional drafting often sometimes had a ritualistic participatory element in the past (such as election of a constituent assembly or approval in a referendum), much of the drafting was seen as technical, the responsibility of existing political elites, or of little public interest.

But now, if there is anything resembling international best practice with constitution writing, it would be that constitutions should be written in a manner that includes all significant political forces, be truly participatory at various stages, and have a significant public element. Even if some of the task remains technical and private, a constitution that is not drafted in a democratic manner would not seem to lay the appropriate basis for subsequent democratic practice. There is some academic support for this position, though cross-national empirical research on the connection between constitutional drafting procedures and political outcomes is not all that extensive. Intensive studies of specific experiences lend stronger support at times to the calls for democratic drafting, but there may be a bias toward studying what seem like successful cases.

Yet whatever academic wisdom eventually emerges may not matter. The political logic behind a democratic constitution drafting process is very well entrenched internationally. In most domestic settings, when the demand for a new constitution is internally generated (and especially in post-revolutionary Tunisia and Egypt), it is very hard to make an argument for anything other than a democratic process. And a democratic process, whether it makes for a better constitution or not, can also have the unintended consequence of preparing members of the public and key political actors for democratic politics; writing a constitution can be (at its best) a very educational enterprise for an entire society.

### *Inclusive, Participatory, and Public: But How?*

Yet if emerging international best practice, often coupled with a powerful domestic set of pressures, militate for inclusive, participatory, and public drafting, what specific mechanisms exist? Here countries attempting to

reinvent their political systems will find less clear guidance and simply a lengthy menu of choices. For instance, are constitutions to be drafted by specialized constituent assemblies or by parliamentary bodies? When should a new document be written and how should a country be governed in the interim? Should the process be a simple one in which a document is drafted and then presented to the people? Or should there be an opportunity to revise a draft after it has been completed (giving an opportunity for something other than a yes-or-no vote). Or should the process be even more complex, with basic principles negotiated and approved before an actual text is drafted? If so, who (other than the people) can best ensure that the principles are observed? What should be the role of existing organized political forces—are they likely to work to ensure their own partisan interests or are they natural and inevitable leaders of the process? How large should the drafting body be and what sort of people should populate it (politicians, legal experts, civil society activists)? Which parts of the drafting and bargaining are better hammered out in private settings and what deliberation is more appropriate to hold in public? How will minority groups be given a voice in a majoritarian process? What will be the ratification rules for approving the final document—will some sort of special majority be needed?

There is no standard answer to these questions beyond the general invocation of the principles of inclusion, participation, and publicity. And indeed there probably cannot be. Not only are particular political circumstances quite varied, but there are clear tradeoffs in whatever arrangements are devised:

- **Inclusion vs. speed and coherence:** A constitution that is drafted in an inclusive process, with many different authors and many who can block adoption is one that is likely to take longer to write and be less internally coherent (as key groups all lobby for specific provisions that meet their needs or conceptions of a just order).
- **Specificity and rigidity vs. brevity and flexibility:** A constitution cannot address all contentious issues; indeed, the purpose of a constitution is to facilitate regular political life so that contentious issues can be routinely debated and decided. But as a constitution becomes inclusively and publicly drafted, it also tends to become more specific and various actors attempt to insert guarantees for their particular understandings of the proper political order. Such a constitution can attract consensus support but it can also become rigid. Any constitution that survives for more than a few years encounters unanticipated circumstances and

specific language can sometimes be as much an encumbrance rather than a facilitator for political life.

- **Publicity and grandstanding:** Constitutional experts have noted that drafting a constitution in public has definite effects, but they have sometimes differed on precisely what those effects are. It may make agreement and compromise a bit more difficult because leaders are very aware of the watchful eyes of their constituents. Sometimes it seems to privilege more publicly-interested arguments as drafters are too embarrassed to put forward self-interested demands. But sometimes it can have the precise opposite effect as the drafters insist on showing their fortitude and defense of their followers' interests and demands.
- **Enlisting or bypassing politicians:** A inclusive and participatory process implies that key political constituencies need to arrive at a consensus before a constitution is promulgated. But who speaks for those constituencies? Turning to existing political leaders make it easier to develop a text that can be implemented, but it also risks entrenching already powerful existing elites. Bringing in new leaders can ensure broader representation and new possibilities, but also inexperienced actors.

If international experience suggests that there are tradeoffs more than hard lessons on the broadest questions facing drafters, there are some very specific lessons that would likely benefit most countries, including Tunisia and Egypt, regardless of how they design the basic outline of the process:

- **Keep careful records of the process.** When drafts and suggestions are constantly floated and shifted among members and committees, it is very important that an authoritative record of the process be kept. This is not likely to be a problem for Tunisia and Egypt, because they have deep experience with legal and bureaucratic procedures, but it will need attention from the beginning. And good record keeping can help later in deciphering what the drafters intended to do.
- **Pay very close attention to the committee structure.** Typically, this is where a lot of the detailed drafting gets done. That means that most major groups and orientations should be represented on committees, decision making rules might favor consensual approaches, committee chairmanship might be rotated, and adequate staff, administrative, and technical support must be given. If any work is carried out outside of public view, it is probably most appropriate here.

- In plenary sessions, keep the number of votes small (because they tend to hold up proceedings and can polarize positions) but make a clear decision about voting rules (what kind of majority or supermajority is required from the beginning).
- Draw on outside technical expertise liberally—and the most helpful is usually provided by those outside experts who are engaged regularly and are therefore familiar with the procedures and priorities of the drafters.
- When difficult issues arise on which no consensus is readily apparent, there is no easy formula that international experience suggests, but there are a few techniques. First, a procedural technique is to bring in outside actors if there are any that have earned widespread confidence—like a constitutional court or a conclave of major political leaders. In such cases, the technique should not be used to defeat or exclude one party but to find a solution acceptable to most actors. A second textual solution is to use phase-in or sunset provisions so that provisions do not go into effect immediately or expire over time (such a device can defer a problem, lower the stakes, or make compromise easier).

But matters become even a bit more complicated when it is recalled—as was discussed in the earlier section—that countries do not design their processes in a calm atmosphere or make decisions only with an eye to lofty abstract principles. Instead processes are the outcomes themselves of intensive political struggles, often occurring at times when the rules of the political game have become uncertain or illegitimate.

In Tunisia and Egypt, there has been no single actor able to design a constitutional process that all actors see as fair—from the beginning there has been intense jockeying in both countries over how a constitution was to be drafted, who would do it, and when. And in both countries, the political atmosphere in which these decisions have been made has sometimes been quite polarized—initially between falling regimes and broad but inchoate opposition coalitions; later on between Islamist and non-Islamist political forces.

What choices have emerged from this jockeying?

## The Constitutional Process in Tunisia and Egypt

How are Tunisians and Egyptians wrestling with the choices in front of them regarding constitutional design? The domestic precedents they have to guide them are a bit weak: there has been some lip service paid in the past to democratic procedures in constitutional drafting (Tunisia's first post-independence constitution was drafted by an elected constituent assembly and subsequent documents have been ratified in referenda; Egypt's 1971 constitution and subsequent amendments were all approved in referenda). But effectively past documents have been authored by existing regimes and relatively coherent political elites; a truly contentious, public, and pluralist process (as seems to be taking shape in both countries right now) has little echo in either country's constitutional history.

### *Similar problems...*

Thus, in the midst of revolutionary turbulence and bitter political contests, both countries have seen their processes emerge in difficult struggles. There are some common elements in the process that emerged. In both countries, the old regime collapsed, leaving behind interim rulers with some ties to the discredited regimes but also vague and uncertain mandates to oversee a transition to a democratic system.

In both countries, the collapsing regime made some effort to cling to the constitutional text but ultimately constitutional life was partially suspended for an interregnum. In Tunisia, the old constitution remains theoretically in force (though a series of decrees makes clear that critical parts are inoperative and those decrees have in a sense formed a new, transitional constitutional order). An acting president serves, but that president rules by decree and critical structures (most notably the parliament) have been shunted aside. A new ad hoc inclusive body has emerged, the "Supreme Organization to Realize the Goals of the Revolution, Political Reform and Democratic Transition" (SORGR) to guide the transition process. That body has designed a transition process that begins with elections to a constituent assembly, but most other details about the process remain vague. In Egypt, by contrast, the Supreme Council of the Armed Forces (SCAF), a pre-existing body that was formerly chaired by the president, has overseen the process. It has consistently rebuffed calls to establish any formal consultative body; instead, the SCAF has ruled by decree but also issued a constitutional declaration—with an impromptu and confusing mixture of its own

authority and popular referendum—to guide the transition process. And in both countries, various political forces have emerged in the newly liberalized atmosphere, but there are no clear structures yet for them to press their programs other than demonstrations and public debate. Only when elections are held will their actual popular support become clear, and only when a new constitution is written will the rules for political life become clear. In the mean time, the political atmosphere in both countries is not only lively but also increasingly polarized as the initial wave of revolutionary consensus has given way to a degree of partisan politics.

Both countries also face some common issues and debates: over the sequence of elections and constitution writing, the level of public participation and inclusiveness, the best guarantees of fair and effective electoral administration, the demands of providing security while undertaking security reform, and transitional justice.

### *...But a Different Process (and Why That Has Mattered Less Over Time)*

But from the beginning there seemed to be a fundamental difference in the two processes. In Tunisia, there was an effort from the beginning to be consensual and inclusive. The formation of the SORGR allowed many significant political players—even some long excluded from political life—to have a voice in the transition. In Egypt, by contrast, the SCAF has failed to form a similar body, carries out consultations in either a ritualistic or an opaque manner, and simply issues decisions on its own authority. In a sense, the Tunisian leadership was working to follow an open and democratic process in the absence of democratic institutions; the Egyptian leadership was postponing democratic practice until democratic procedures could be agreed upon. The Egyptian path did have some serious costs associated with it, especially as controversies mounted and various constituencies felt excluded and without any means other than demonstrations to make their voices heard.

Yet the difference between the two approaches has faded over time for two reasons. First, as soon as both leaderships moved toward early elections (both eventually settling on the fall of 2011), those actors that anticipated making a strong electoral showing had fewer incentives to follow a consensual approach. As they saw it, there was no justification to accord a strong voice and even a veto over decision making to leaders with small popular followings. This should not have been a surprise. Where broad

inclusive approaches have succeeded in other countries (such as in South Africa or in some of the “round table talks” of Eastern Europe), the consultations came when the transition itself was in doubt and being negotiated by the old regime. The likely effectiveness of such practices as elections near decreases greatly.

Second, for all its attempts at more inclusive and consensual politics, the Tunisian leadership has not been able to answer very critical questions. Even the date for elections was the subject of bitter (and partisan debate). A consensual approach can work as long as there is a consensus, but by leaving so many critical matters open (as will be seen), Tunisia has left many decisions open to rivalries and contention.

The decreasing significance of the distinction between the two approaches can be seen through attempts in both Tunisia and Egypt to negotiate a set of constitutional principles to guide the final drafting. In both countries there have been efforts by many political actors to arrive at a clear set of constitutional principles that attract consensus support from the entire society. The benefits of such an approach are clear: it increases trust among political actors that the constitution will not be written at their expense; it accustoms leaders to constitutional deliberation and bargaining; it facilitates and guides the subsequent drafting work; and it attracts public interest and involvement. Such a device has been used productively in other settings, most famously in South Africa where key political actors hammered out a set of principles and allowed the country’s newly-formed Constitutional Court to measure the final document against the declared principles (and in fact the Court did require some changes).

But attempts to adopt such a device in Tunisia and Egypt have foundered. The reasons are not hard to discover. In South Africa, the agreement on principles was necessary for the process to proceed; in Tunisia and Egypt the process has proceeded without such agreement. And with the scheduling of elections, a set of constitutional principles is not politically neutral: it has most frequently been used as a device to contain Islamists—and is therefore seen by them as an attempt to tie their hands before the voters have had their say. Rather than facilitating democratic politics, the attempts can be portrayed (sometimes fairly, sometimes not) as an attempt to circumscribe democracy. And, unlike South Africa, there is no clear enforcement mechanism for any general principles in either Tunisia or Egypt. If constitutional principles are negotiated at this point, they are likely to either fail to include all actors or be so vague as to be useless.

### *The Two Sequences: Settled Procedures and Unsettled Questions*

The Tunisian process has been spelled out in a series of decisions by the country's interim rulers. In Tunisia, interim affairs are in the hands of an acting president, a cabinet, and the SORGR. But this fall, Tunisians are expecting to be summoned to the polls to elect a constituent assembly. That constituent assembly has been assigned no other task, but it has been explicitly granted the right to develop new interim structures and processes to govern the country while it carries out its task. Tunisians will elect its members by voting for lists (with seats assigned in accordance with a proportional representation system) according to rules that seem carefully designed to prevent any single force from obtaining a majority.

The process does have important democratic and inclusive elements--the people's representatives are to be writing the text, and the proportional representation system will encourage the formation of a group representing the full diversity of Tunisian society. But perhaps more remarkable is the procedural issues that have not yet been defined--and that will have to be sorted out in a more contentious political environment. First, how will the constituent assembly operate: will it do much of its work in public, consult with experts, break up into committees, and consult with international expertise? Second, will it set up formal mechanisms for popular participation in the process or consider its election sufficient public guidance? Third, how long will it take to do its work and how will Tunisia be governed in the mean time? At this point, Tunisia is governed by interim structures and a state of emergency; it lacks a parliament or any legitimate elected authorities. Perhaps that situation can continue, though the longer the constitution takes to draft, the more strain will be placed on temporary procedures. As already mentioned, the constituent assembly is authorized to devise a new set of interim procedures. There is no explicit requirement that the constituent assembly act as an interim parliament, but it seems likely that it will take on such a role--both because of the precedent of the country's first assembly (operating in the late 1950s) and because there is no other body that could claim legitimacy to legislate in the name of the people. Other countries have sometimes combined constitution drafting and parliamentary tasks in a single body. Fourth, and perhaps most important, what will happen to the draft that the constituent assembly produces? Will it simply be presented to the people for ratification or will there be some ways for the text to be amended first? What happens if a referendum fails to approve the constitution? Will it be returned to the old body or will a new one be elected--or will an entirely new procedure be designed?



It is not surprising that these questions have not been answered in Tunisia; given the recency of the revolution and its unexpected nature, producing authoritative answers is difficult. But the questions will have to be answered soon, and there is probably no alternative to burdening the newly elected assembly with overseeing governance. No other structures—the presidency, the cabinet, or the SORGR, even if they are allowed to continue—can possess democratic legitimacy. Already a key political actor (the Islamist al-Nahda party) has left the SORGR.

In terms of the tradeoffs mentioned in the previous section, it is difficult to say with precision what choices will be made in Tunisia until the process has been more clearly defined, but at this point it still seems likely that:

- The process will be inclusive because of the proportional representation system—and as a result may be a more of a sprawling document;
- The level of mistrust among leading political forces may induce them to seek specificity and rigidity where they can, but deep divisions also lead to drafters finding themselves forced to cover disagreements with vague phrasing;
- The publicity of the process and the divided nature of the society will make bargaining a bit more difficult; and
- The reliance on proportional representation and thus on the party system will likely find existing political parties working very hard to pursue their interests in the final drafting.

In Egypt, the procedure has been less carefully and inclusively designed, and various parties have attempted to renegotiate its contents. For all its flaws, however, it is more specific. First, Egyptians were asked to approve a series of constitutional amendments in March (which they did). Shortly before the voting, the SCAF suggested that it would issue a constitutional declaration rather than use the amendments to revive the suspended 1971 constitution more fully; it did so but appeared to have consulted very narrowly on the final document. Egypt's constitutional declaration calls for parliamentary elections to begin in September (though it is now clear that actual voting will continue in three stages over the rest of the year). Within six months, the parliament will name 100 members to a committee to draft a constitution; that committee will be allowed another six months to draw up a document. That document will then be presented to the people in a referendum. While that process is taking place, presidential elections will be held (the date has not been fixed, and signals from the SCAF have been vague). The interim constitutional declaration now governing the country

is largely an abbreviated form of the 1971 constitution that allows some measure of constitutional life to resume while the drafting of a permanent replacement is completed.

Yet for all its greater specificity, there are still important gaps in the process as spelled out in the constitutional declaration. First, it is not clear if the SCAF has any clear legal role after the presidential elections (perhaps explaining why the SCAF has yet to schedule those elections). Second, the mechanisms for parliamentary oversight of the cabinet have been largely removed from the constitutional declaration. There will, of course, be a cabinet overseeing governance of the country on a daily basis, but the text gives no indication that the parliament will be accountable to any authority other than that of the elected president. Such a situation would be odd considering the extent to which the strong presidency was a target of Egyptian revolutionaries. And politically the president may find himself hemmed in by a military still anxious to preserve its autonomy and a parliament that has its own strong political claims to popular legitimacy. A third ambiguity involves the nature of the drafting body. While its members will be selected by the parliament, there is no guidance given to that body (and precious little precedent) on whom to turn to—party leaders, technical experts, intellectuals, activists, or public figures? Fourth, much of the shape of the parliament will be determined by the electoral law, and key legal provisions are still being written. Finally, what happens if the constitution is rejected?

Recently, the SCAF has hinted that it may need to issue a second constitutional declaration in order to clear up some of these ambiguities and gaps. But what such a move would deliver in specificity it might remove in terms of legitimacy: as they have become increasingly criticized for opaque and ad hoc decision making, the members of the SCAF may find a much less malleable political environment than they did last spring.

And indeed, the SCAF has not merely reserved most authority to design the process to itself, but it has also left gaps in terms of the participatory and inclusive nature of the constitution drafting process. The drafting assembly, for instance, is not directly elected, and there are no institutional mechanisms in sight for it to encourage popular involvement in its work. And, when it has concluded its draft, there is no indication that the Egyptian population will be given anything other than an up-or-down vote on the document.

In terms of the trade-offs discussed in the previous section, the Egyptian process will likely share some common features with the Tunisian but also have its own distinctive elements:

- It may be inclusive if the parliament decides to make it so—but with the selection criteria to be used by the parliament utterly unclear, it may be far too soon to venture any predictions about the inclusiveness of the body. What does seem clear, however, is that the number of members will be smaller than in Tunisia and that it will not be restricted to those who were sent by a specific party or constituency. That may mean for a less inclusive process but it might also allow for a more coherent draft.
- There are also no early indications about the draft's specificity, but given the lengthy nature of past Egyptian constitutions and the strong feeling that they still were full of gaps and loopholes, it would be a surprise if the document were other than long and detailed.
- The smaller body and its ability to share the spotlight with other elected officials (in the parliament and the presidency) may lessen a bit of the public focus on its work and allow some to be carried out more quietly. Unlike the Tunisian constituent assembly, the Egyptian body will not be overseeing the governance of the country but only drafting a document. Still, given the extreme focus on constitutional issues in the Egyptian revolutionary process thus far, it would be a surprise if there were not great interest in the constitution and that drafters did not feel intense public scrutiny.
- The composition of the body may allow for inclusion of non-partisan figures, but it will certainly not require it.

The different nature of the drafting body in the two countries does provoke one concrete recommendation—or rather a split one—regarding public participation and involvement.

In Tunisia, the fact that the body will be directly elected and likely exercising full parliamentary as well as drafting functions suggests that the members will be naturally inclined to reach out to their constituents. The task will be to have them do so in a way that helps foster consensus and is not merely ritualistic. And there will be another issue as well: the electoral process in Tunisia will make it more likely that there are a smaller number of political parties than in Egypt (where, by contrast, independents are likely to play a larger role) and those drafting the constitution will have been placed in the drafting body precisely because of their partisan affiliation. That will make it more difficult to solicit input that is not seen simply as rallying the partisan bases. For these reasons, they might schedule town meetings by district rather than by party or political inclination so that all members from

the assembly from a certain area present the work and solicit suggestions and questions as a group.

In Egypt, the fact that the body will be indirectly selected, smaller, and more specialized suggests that it may have less of a natural inclination to reach out to the population during the process. The party system will also likely be a bit more inchoate, with large numbers of independents and perhaps a larger number of smaller parties elected to the body that names the drafting body. That body should therefore be encouraged to think early and carefully about how to solicit popular input in a way that is helpful to its work. Large, untargeted, blanket solicitations of suggestions produce enormous amounts of words but very little else beyond the illusion of popular input. Targeted meetings—again, in which members of the assembly toured the country in small, heterogeneous groups—might make the most sense, especially if it was done early in the drafting process to hear popular concerns and then again at the end to gauge the spectrum of reactions to their work.

While popular interest in the process is likely to be high, a marked feature of debate in both countries thus far—even among political elites—is its very general nature. Very few detailed proposals have been floated. There have been efforts, discussed above, to draft constitutional principles but those do not seem to have gained traction across the political spectrum. There is also general debate in both countries about the religious and civil nature of the state, but that has also remained on an extremely general level. A strong consensus has emerged among non-Islamist forces in Egypt, for instance, on the need for a “civil state” but that term is so vaguely defined that many Islamist forces can agree to it without hesitation.

In neither country should the absence of detailed debate be confused with lack of interest. The jockeying over constitutional process already begun before many concrete proposals have been developed (a few specialists are at work in both countries, often on their own initiative, but their work has remained largely outside of public view) and well before any final text has been written.

Let us now turn our attention to the domestic lessons that constitutional drafters in Tunisia and Egypt might be likely to learn.

## Domestic Lessons: Learning from the Past

If international constitutional analysis is often based on the best positive examples (with an unfortunate tendency to forget to study failures as well), domestic analysis is often based on the reverse orientation: perceived failures draw extended attention. Constitutional drafters often look to their domestic context like generals fighting the last war: they examine what went wrong in the old order and seek to build a new one that corrects those flaws. If Tunisian and Egyptian constitutional drafters look backwards, what problems will they see?

- Procedurally, today's drafters will see a top-down process in which past constitutions were written with little public involvement. The earliest constitutions took the form of a grant from a ruler to his subjects; later constitutions (and constitutional amendments as well) spoke a more democratic language but showed no more of a democratic spirit. In essence, constitutions were less attempts by a society to establish its basic political structures and define its basic values but instead efforts by existing regimes to rearrange themselves or proclaim new policy directions.
- In both Tunisia and Egypt, drafters will see supreme presidential systems in their past. And indeed the overconcentration of authority in the hands of the executive was one of central political complaints of the revolution in both countries—the sense that power was centralized and unaccountable, that decision-making was monopolized by a small circle around the president and that the dominant group had little concern for public welfare, was completely disconnected from public opinion, and could rule without any meaningful oversight from any body. Parliaments were weak, the judiciary was undermined (especially in political cases), and human rights protections were unenforceable in the face of a determined executive.
- Those with a more specialized focus on constitutional structures will likely find that the mechanisms in place in both countries were often circular in nature. Both countries had a theoretically pluralistic party system, an elected parliament, and a host of state institutions that had some promise of autonomy. But a variety of techniques (closely managed elections, dominant parties, and key presidential appointments) rendered paper mechanisms of accountable completely circular. In Egypt, for instance, the head of the ruling party and the head of the state was the same. Specialists in constitutional design often

distinguish between “vertical accountability” (of leaders to the people they govern) and “horizontal accountability” (in which various institutions and authorities keep a watchful eye on each other). With regard to the latter, Tunisia and Egypt were characterized by systems in which horizontal accountability did not work well since the various structures did not enjoy full autonomy from the presidency.

- Parts of the state—most especially the security sector—were effectively walled off from constitutional mechanisms. This was true on an institutional level—there was no effective oversight over military, police, intelligence, and the Ministries of Interior by any constitutional institution other than the presidency. But it was also true on an individual level—through a variety of techniques (legal loopholes, failure to enforce the law, deliberately authoritarian legal frameworks), a citizen had few tools to pursue his or her rights in the face of harassment or abuse by the security services. Even where legal mechanisms seemed to offer citizens some protections, emergency measures could be used to avoid them. This was another major spark for the revolution in both countries.
- Constitutional language was extensive and fulsome but often quite vague. Critical freedoms and procedures were guaranteed only in a general way with details left to legislation—and that legislation was then written in a way to enable rather than regulate official discretion.
- There was a weakness (and sometimes an absence) of enforcement mechanisms. Egypt did have a constitutional court and Tunisia a constitutional council. The Egyptian body was able to establish a record of some independence, especially in the late 1980s and the 1990s. Administrative courts could also show some ability to enforce the law against government officials. But such occasional pockets aside, previous constitutional drafters were far better at naming freedoms than at offering real institutional guarantees for them or designing mechanisms that would halt abuses.

Tunisians and Egyptians are therefore likely to seek to correct all these flaws: they will want constitutional provisions that are more democratically drafted, less dominated by the executive, richer in mechanisms of horizontal accountability, more specific on oversight of the security structures, more specific, and more detailed on mechanisms of enforcement. The main questions are how they will seek to accomplish these goals and how much they will do so. For instance, it is fairly clear that both countries will seek to whittle down the powers of the presidency. But how far will they go? What

combination of tools will they use (term limits, parliamentary oversight over the cabinet, mechanisms to ensure the president is not above the law)?

Is there anything that Tunisians and Egyptians are likely to find positive in their past? This is less clear, but some of the ideological provisions—especially those asserting national identity, state sovereignty, and religious identity—are likely to be attractive at least to some parties. There is likely to be considerably borrowing from older documents on such matters. But this last topic—religious identity—is already proving to be a contentious one in both countries. And so it is to current controversies that we now turn.

## Emerging Issues; Possible Solutions

While the bodies that will draft Tunisia’s and Egypt’s new constitutions have not yet been formed, and thus not a single clause has been drafted in either country’s constitutional framework, debate and deliberation have already begun about the documents’ contents. What major issues and concerns are emerging? Is there anything in the experience of other countries that might help the drafters of either text turn to in order to understand their own situation and possible approaches?

### *Executive-legislative Relations*

In both Tunisia and Egypt, there is a marked determination to ensure that the presidency will not emerge as the unaccountable and domineering structure that it has been in both countries for over half a century. But if the basic determination to rein in the presidency is common to both countries, the precise constitutional mechanisms have not been fully discussed. In Tunisia, most political forces are inclined to give parliament a far stronger role—but are suspicious that their rivals want to parachute their favorite into a revived presidency. In the heady days of February, some revolutionary forces in Egypt even raised the idea of converting to a fully parliamentary system (and indeed, proposals in that regard have been occasionally heard since the abolition of the monarchy in the wake of the 1952 revolution), but since that time the focus of most activists’ attention has been on much shorter-term concerns. What seems most likely is that both countries will opt for a system that combines a popularly-elected president with a strong parliament that preserves a powerful role in legislation, oversight over the budget, and full authority to grant or withdraw confidence from the

cabinet--the sort of system that is sometimes referred to as "semi-presidential." This is an increasingly common kind of constitutional arrangement, partly because it promises at its best the strong leadership and comparative stability of a presidency with the less plebiscitary and potentially more broadly representative features of a parliament.

But if this is the path chosen, Tunisians and Egyptians are likely to find that there is no more difficult area for constitutional engineers to design than executive-legislative relations. There are two reasons why the operation of the constitutional machinery in practice is difficult to anticipate from simply reading any particular constitutional text. First, much of the actual functioning of the system depends on all sorts of issues that generally lie outside of the constitutional framework and that are often difficult for constitutional authors to predict or control, such as the party or electoral system. Similar constitutional provisions would work quite differently, for instance, in the presence of a fragmented party system than in one that was dominated by two strong parties. Indeed, it should be remembered that the constitutional orders that are being abandoned in both countries bore some strong semi-presidential features; these did not work in a truly semipresidential fashion partly because the president headed the party and exploited the governing machinery to enhance the party's domination of political life. Second, as much as constitutional provisions work to shape executive-legislative relations, much of the evolution of those relations in practice depends on traditions and patterns of behavior rather than on strict application of relatively fixed texts.

Tunisian and Egyptian drafters would be very well advised, therefore, to focus not simply on general principles (for instance, that the president is not above the law and that the parliament has oversight authority over the budget) and to think hard about how the mechanisms that they design will work in practice. Again, the interaction of the party system, the constitutional text, and the electoral system are sufficiently complex that a broad international focus would undoubtedly help constitutional engineers understand the likely consequence of various formulas they are considering.

### *Horizontal Accountability*

Similarly, both countries are likely to show particular interest in mechanisms of horizontal accountability--and they would be very wise to do so. As discussed above, one of the chief (if largely intentional) gaps in the old constitutional order in both Tunisia and Egypt was the weakness



in horizontal accountability. Where structures did exist (judicial councils, administrative courts, constitutional courts, human rights commissions, audit bureaus, elections commissions) they were often deprived either of jurisdiction or autonomy (or sometimes both).

Indeed, there may be no area where constitutional architects are more likely to reassemble generals fighting the last war. There is no doubt that constitution drafters in both countries will be expected to ensure that those who hold political authority are accountable to clear legal and constitutional standards. In this regard, experience elsewhere (and in Tunisia and Egypt themselves) suggests that they pay attention to three issues:

- **Jurisdiction:** Do various bodies have clear areas where they have authority to investigate and hold accountable other branches? It is inevitable that any constitutional text will have to be supplemented by more detailed legislation. Constitutional drafters will want to consider how to draft language that will ensure that implementing legislation does not vitiate the intent of the constitution. They will also want to consider what will happen before such implementing legislation is written--will existing bodies continue as operating under existing laws?
- **Autonomy:** Mechanisms of horizontal accountability have sometimes been robbed of vitality (as Tunisians and Egyptians already know) by packing their key personnel with presidential appointments with little independent political will. Again, the key will not only be to write constitutional language that provides for some autonomy but also that bars implementing legislation that removes in practice what the constitution promises in principle. This may be done by allowing various bodies and institutions the authority to name their own leaders rather than allowing an imperious presidency to stuff state organs with its loyal supporters.
- **Overcompensation:** As generals fighting the last war, constitutional drafters will likely not have to be reminded of the necessity to create more effective measures to remove bodies like judicial councils, constitutional courts, and administrative courts from presidential control. But there is the risk that they could go too far--that they will create structures that are not only autonomous from other political authorities but beyond any mechanisms of accountability whatsoever. The question of who guards the guardians—such as constitutional courts--has rarely arisen in an Arab setting because the guardians have been so weak. But the issue has arisen elsewhere. And generally those structures that use

their jurisdiction and autonomy in an overly ambitious way not only create short-term political problems, they generally also undermine their own viability in the long term. There are mechanisms that have been used elsewhere—such as requiring a multiplicity of appointment authorities or parliamentary supermajorities to approve officials who then represent a broad consensus—that ensure that the guardians do not stand outside the political order altogether but still retain considerable autonomy from any particular official actor. For example, free-standing independent electoral commissions have become a standard international instrument for ensuring the integrity of the voting process (Tunisia is experimenting with such a body, while Egypt insists—for historical reasons—on maintaining judicial supervision).

### ***Security Forces and Military***

Both Tunisia and Egypt are likely to face major decisions regarding provisions for security forces and the military. In both countries, the security forces were perceived of as acting outside any legal or constitutional framework altogether. The task will be to devise methods of real political oversight and civilian control without undermining public security. In Egypt the constitutional role for the military will also be an issue--while the SCAF has made clear its clear determination to remove itself from day-to-day governance in most areas, it has also suggested that it may seek to enshrine some role for itself in the final constitutional text.

This will be treacherous political territory for the constitutional drafters to negotiate in both countries--they will want to provide for security as well as civilian oversight. In Egypt, most political forces have opted to avoid pressing the issue of the military's budget and its autonomy, and some have even begun considering ways to write a permanent role for a military that might serve as a balance against any political force (but especially an Islamist one) from dominating the process. It is a mark of how polarized Egyptian politics has become that some have sought what seems like a very dubious (and certainly undemocratic) mechanism in order to ensure a balance among civilian political forces. To be sure, in some countries the military has played a role in domestic politics, but relying on it to guarantee the constitutional order and democracy is a very crude tool indeed--and one that most countries have eventually eschewed. The larger and more important task for Egyptian drafters is to ensure that the military does not get sucked into playing a permanent political role.

If there is any wisdom to be distilled from other countries' experiences in this regard, it is for patience. And that is what Egyptian political forces seem to realize. Trading military autonomy for a smooth transition at this point seems like a sensible bargain. The mechanisms of civilian oversight over military and security matters can evolve over time. Countries as diverse as Turkey, Spain, and Chile have found that insisting on the immediate principle of civilian oversight is less likely to be effective than steady pressure in that direction. To some extent, a new generation of military leaders, more at home in democratic politics and less likely to see themselves as the guardians of all aspects of the political order, are necessary. Thus, as opposed to other areas where constitutional drafters are likely to wish to be specific and close loopholes, this may be one area (especially in Egypt) where general formulas are the best that can be achieved for now.

### *Transitional Justice*

In both countries, issues of transitional justice--holding those guilty of abuses under the old regime--has emerged as a major focus. Existing legal structures have worked slowly if at all, leading to deep frustration by many political forces that guilty parties will escape punishment and may even be able to survive the transition and continue to play a leadership role.

There is some international experience in this regard, and it may generally be summed up as privileging truth over justice. In other words, most other countries have found that an emphasis on punishing a large number of abusers can backfire--it can lead to backlashes, inspire those suspected of abuses to resist more forcefully, and focus too much political energy on the past rather than constructing a better future.

But in most countries this is not fundamentally a constitutional issue. It will clearly be important to publics in both Tunisia and Egypt to have some accounting for the past, but this does not need extensive constitutional deliberation or attention--especially if the "truth" rather than "justice" element is emphasized.

### *Islam*

Finally, the most contentious issue in drafting the constitution for both countries may turn on religion, identity, and Islamic law. There are some areas of public agreement--there is little objection to declaring Islam the official religion and some role for Islam in defining national identity and in

public life more generally. (Some in both countries may agree to such provisions reluctantly, they do not advance any public arguments against them).

But matters become a bit more difficult when it comes to specifying provisions for Islamic law. The amended Egyptian constitution that has now been suspended--as well as the country's interim constitutional declaration, proclaim that "the principles of the Islamic shari`a are the main source of law." Some in Egypt place great stress on retaining that language; others wish to modify it (for instance, suggesting the principles of the Islamic shari`a merely as "a source" rather than "the source"); others wish to dilute it slightly by including clear language recognizing the validity of other religious communities following their own personal status law. In Tunisia, debates are similarly contentious, though the provisions for Islam have been less extensive than in Egypt. The debates in Tunis focus on the definition of the country's identity and perhaps the religious neutrality of the state.

Comparative experience suggests that such debates are inevitable but perhaps less consequential than immediately appear. Even the apparently ambitious phrasing used in the Egyptian case did not have many profound legal effects. The issue is of tremendous symbolic importance, but for practical implications one should look to other provisions--for instance, those specifying who would interpret such a provision could be far more important than the vague words of the provision itself. Other critical clauses to look for involve personal status law and the autonomy of religious institutions. Religious freedom provisions might also fit within those that could have real implications for heterodox individuals and communities. In practical terms, in other words, it matters much more *who* is authorized to speak in the name of religion and *how specific* that authorization is. Yet the debate is likely to continue in the general and symbolic terms because that is where very considerable public attention has already been invested. And indeed, despite deep suspicions, in fact there is a broad (but not universal) consensus in both countries that would retain most past wording on such questions.

## International Assistance: Possibilities and Limitations

Tunisians and Egyptians face many vexing questions and few easy solutions in their efforts at constitutional reconstruction. What, if anything, can various international actors do to help?

It must be stressed that there are limitations to what even the most expert and best-intentioned international efforts can achieve. While few would contest the idea that constitutional drafting is primarily a domestic process, international observers sometimes tend to elide easily between their own constitutional suggestions and preferred outcomes on the one hand and their expectations on the other, forgetting that their influence is limited. Thus it might be best to begin considering the factors that limit an international role:

- Since the basic choices in constitutional design—even those involving the process of constitution drafting—are fundamentally political in nature, domestic political actors are less likely to heed international advice. They may be willing to listen to guidance on various technical matters as well as to understand the implications of various choices, but they are less likely to follow international guidance on what their interests are or what their preferences should be.
- One of the main purposes of writing national constitutions has been to assert national sovereignty; there is therefore understandable reluctance to accept advice from outside actors. To the extent that such advice is sought, it is most likely to be multilateral in nature.
- Local discussions about issues of identity and religion are likely to be especially sensitive terrain for international advice.
- Even in cases in which international actors are successful in having specific mechanisms or provisions adopted, the operation of these still very much depends on the understandings and actions of local actors.
- External actors often hold themselves up as models; they are unlikely to be perceived with the same amount of admiration by the target society. And some external actors will sometimes have trouble understanding major constitutional issues outside of their own context (this has been the case of the United States, for instance, which sometimes understands issues of judicial review in idiosyncratic terms of its own civil rights movement or constitutional jurisprudence on abortion).

This does not mean that international actors have no role to play. Those that are able to strike a pose sympathetic to state sovereignty and willing to work multilaterally are likely to find the following ways in which their help will be accepted and occasionally even welcomed:

- In matters of procedure, where there is a strong impetus to involve public discussion in the drafting deliberations, international expertise may be able to introduce specific techniques.
- In substantive issues, the legitimacy of international human rights instruments is very high in countries where human rights protections have been lacking. At the same time, however, it must be acknowledged that international obligations on matters such as combating terrorism and money laundering have sometimes made international legal obligations seem less friendly to human rights protections; this is especially the case over the past decade.
- International advice is likely to be particularly helpful in probing the likely interaction of constitutional provisions, party system, and electoral law. Because of the complexity of the subject, drafters looking only to domestic experience are likely to find only crude guidance. International advice will not likely shape Tunisian and Egyptian priorities, but it can help drafters understand how to write provisions that meet those priorities.
- The most helpful and influential international advisors are those who stick around. Tunisia and Egypt are likely to find themselves inundated with well-meaning advice from all corners of the globe. But they are likely to be especially receptive to international experts who come not to institute their preferred solutions but to help Tunisians and Egyptians craft theirs; it takes time to build up the knowledge and trust to be able to contribute in this way. Brief visits by experts on various matters are not harmful—they often have the unintended but real benefit not of making the constitutional process better but making it better understood internationally. What really helps, however, are prolonged stays by curious and comparatively uncommitted experts.
- Finally, international advice and training is likely to be far more welcome in the operation more than the design of key institutions. The call for independent electoral administration, for instance, is likely to be domestically generated, but the personnel of the resulting system are often quite friendly to international training and assistance, more so than those involved in drafting the constitutional and legal provisions establishing the relevant bodies.