Constitutions and Democratic Consolidation: Comparing Egypt and Tunisia

By David Lunde
Center for Middle East Studies Best Student Paper Award

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At the end of every academic year we will recognize a student who has written an outstanding paper or thesis in the area of Middle East Studies. The recipient will receive a cash award of $200 and his/her paper will be published on our center’s website. Faculty and staff are encouraged to nominate students who have done outstanding work in the area of Middle East Studies. Nominations should be sent to CMES Associate Director Danny Postel at dpostel@du.edu at least one month before spring graduation.

The 2014-2015 recipient of the CMES Best Student Paper Award is David Lunde, a senior undergraduate student at the University of Denver with a double major in International Studies and French. David will graduate in June with honors. He wrote this thesis for departmental distinction in international studies. It is an incisive and highly illuminating examination of a key dimension of the Arab Spring, a comparative study of the democratic transitions in Tunisia and Egypt with a focus on the constitution-writing processes in the two countries.

David wildly exceeded expectations for a B.A. honors thesis. He has written an outstanding, first-rate piece of work that deserves special recognition and distinction. In many ways David’s thesis inspired the creation of this award. Judged in terms of thoroughness of research, methodological and analytical rigor, and quality of writing, I would rank this thesis among the very finest pieces of work by a student—undergraduate or graduate, for that matter—that I have read in many years.

David has set the bar very high for future award recipients. On behalf of the Center for Middle East Studies, I congratulate him on this distinction and wish him the very best in his future endeavors.

Nader Hashemi
Director of the Center for Middle East Studies
Associate Professor of Middle East and Islamic Politics
Josef Korbel School of International Studies, University of Denver
Constitutions and Democratic Consolidation:
Comparing Egypt and Tunisia

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By
David Lunde
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Advisor: Professor Nader Hashemi
Abstract

In the aftermath of their uprisings in 2011, Egypt and Tunisia initiated a constitutional process that soon became critical to their democratic transitions. The different outcomes of Egypt and Tunisia’s transitions invite a comparison between these two cases of constitution making. This work focuses on the interactions of the Egyptian Muslim Brotherhood and Ennahda with non-Islamist groups to answer the question why the transition failed in Egypt and succeeded in Tunisia. This comparative approach identifies the key sources of agreement and disagreement concerning constitution making between the two sides and analyzes their impact on the outcome of the transition. This work uncovers how Islamists and non-Islamists dealt with key issues of the constitutional process including the constitutional design, the formation of constituent assemblies, and a period of crisis. It also analyzes how these actors formulated constitutional content with an emphasis on the status of sharia, women’s rights, and freedom of belief. Based on its analysis, this work finds that sufficient agreement was reached in both Egypt and Tunisia concerning constitutional content. However, the nature of the constitutional process differentiates the cases of Egypt and Tunisia. The influence of cooperative and committed Islamists and non-Islamists in Tunisia contributed to a successful democratic transition whereas the influence of intransigent Islamists and non-Islamists in Egypt proved fatal for their transition.
Acknowledgements

I am deeply grateful to my advisor Nader Hashemi for his support and guidance during this project and throughout my time at the University of Denver. Nader originally sparked my academic interest in Islamism, democracy, and the Middle East during a course sophomore year, and since then, he has consistently challenged me to think critically about these subjects. Nader has been a formative influence on me, and I’m appreciative for his willingness to always make time for me. I am also sincerely thankful to the University of Denver Honors Program for providing the funds to attend a conference in New York on Tunisia’s transition in comparative perspective. The knowledge I gained from incredible opportunity greatly strengthened the conclusions of this thesis. I would also like to extend my gratitude to Dan Mollenkamp who provided invaluable feedback at a crucial time and who has always been willing to engage with my ideas. Holden Lewis also deserves special mention for his contribution that made this thesis possible. Lastly, I must offer my thanks to the numerous friends and colleagues who encouraged me in the completion of this lengthy project.
Abbreviations

CCA  Constitutional Constituent Assembly
CPR  Congress for the Republic
FJP  Freedom and Justice Party
MP   Members of Parliament
MTI  Movement of the Islamic Tendency
NCA  National Constituent Assembly
PA   People’s Assembly
SAC  Supreme Administrative Court
SC   Shura Council
SCAF Supreme Council of the Armed Forces
SCC  Supreme Constitutional Court
UGTT Tunisian General Labour Union
Chapter One: Introduction

Beginning in December 2010 in a small town in Tunisia, an unprecedented scale of protests broke out against the authoritarian regimes in the Middle East and North Africa. The people, long denied civil and political rights, demanded political freedom, dignity, and social justice. In less than two months, Tunisians and Egyptians had forced out dictators who had ruled for more than two decades. Many hoped that these revolutions would lead to a just democratic order and fulfill the people’s aspirations. A desire to draft new constitutions, in order to eliminate the old order and create new systems of governance, soon emerged.

When viewed within a historical context, the belief that a new constitution could serve as foundation for the transition is somewhat curious. As Nathan Brown observes, “Indeed, the past experiences with constitutions might have led to popular repudiation of the very idea of a written document as a tool of political reconstruction. Constitutions had been issued in the name of the people but political manipulation produced a ventriloquist effect in which the people always loyally expressed the ruler’s will.”\(^1\) Even so, Egyptians and Tunisians pressed for a new constitution to move their countries toward a democratic future. Consequently, constitution making assumed central importance in Egypt and Tunisia’s transitions. The precedent to be set by these constitutions mattered not only for their domestic contexts, but also for the entire region and the question of whether democracy could develop in the Middle East.

Religion was not the primary motivating factor for most protestors, and Islamist movements in Tunisia and Egypt did not play leading roles in the uprisings’ early days. Nonetheless, it was two Islamist movements, the Egyptian Muslim Brotherhood and Tunisia’s

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\(^1\) Brown, “Egypt’s Constitutional Catastrophe,” Unpublished Chapter.
Ennahda, who emerged as the most powerful political actors during these countries’ transitional periods. The superior organizing and mobilizing capabilities of these movements enabled them to secure the most seats in their respective constituent assemblies, which were created during this time.

With the exception of Iran, there are no other cases in which Islamist movements have had the privilege to govern and write a constitution, thereby establishing the legal foundations of the new political system. For decades, Islamist movements in the region were locked out of the political sphere, and demonized by regional governments as violent and destabilizing threats. The Arab uprisings gave the Muslim Brotherhood and Ennahda the opportunity to meaningfully participate in politics for the first time. Their inclusion in the transition process offered the opportunity to challenge skepticism about their democratic credentials. Their leadership in crafting their respective constitutions offered the opportunity to assess the question whether democracy and Islamism were mutually exclusive. This prominent role meant that the Brotherhood and Ennahda would be irrevocably entwined with the outcome of Egypt and Tunisia’s transitions.

The vastly different outcomes of Egypt and Tunisia’s transitions invite a comparison between the two cases. We know that constitution making contributed to the termination of Egypt’s democratic experiment. In contrast, constitution making contributed to the growth of democracy in Tunisia. In Egypt, consensus formed during the uprising quickly disintegrated after the fall of Mubarak, which hampered efforts to navigate the inherent instability of democratic transitions. In Tunisia, the revolutionary opposition maintained their consensus during the early months following Ben Ali’s departure, which assisted efforts to mitigate the political instability.
This thesis seeks to contribute to the literature on constitution making and democratization by addressing the cases of Egypt and Tunisia’s transitions. It puts constitution making in Egypt and Tunisia in historical perspective and explains how precedents set in past constitution making periods directly relate to the issues debated in the present constitution making period. The thesis hopes to explain in what ways constitution making affected the outcome of democratization in each country.

To study constitution making in Egypt and Tunisia after the 2011 uprisings, this thesis will focus on interactions between the Muslim Brotherhood and Ennahda with non-Islamist groups during their transitions. In this case, non-Islamist groups will refer to secularist and liberal groups. As the main political actors who crafted the constitutions, these groups played a pivotal role in the outcome of the transitions. Adopting this comparative approach will allow us to identify the key sources of agreement and disagreement between the two sides and analyze their impact on the outcome of the transition. In Egypt, the inability of the Brotherhood and non-Islamists to rebuild the consensus created during the revolution and move forward together undermined constitution making and fatally changed the course of democratization. In Tunisia, Ennahda and non-Islamists preserved the revolutionary consensus and continued to engage in dialogue, negotiation, and compromise, which sustained the development of democracy. Their willingness to reach agreements on several important issues is the key variable that distinguishes the different outcome of Egypt and Tunisia’s transitions.

To proceed with this analysis, the thesis will be organized as follows: Chapter 2 surveys the theories of constitution making and its relationship to democratization. Chapter 3 recounts the history of constitution making in Egypt and Tunisia to put the efforts to write a new constitution in historical perspective. To provide clarity in its comparative approach, the thesis
will always address the case of Egypt first, then Tunisia. Chapter 4 familiarizes the reader with the concept of Islamism and provides a brief history of the Egyptian Muslim Brotherhood and Ennahda. Chapter 5 traces the constitutional processes in Egypt and Tunisia that began in the days following the fall of Mubarak and Ben Ali and ended with each constitution’s ratification. Chapter 6 shifts to the content of the Egyptian Constitution of 2012 and the Tunisian Constitution of 2014 with a particular focus on the status of sharia, or Islamic law, women’s rights, and freedom of belief. Chapter 7 offers reflections on the key variables distinguishing Egypt’s transition from Tunisia’s that contributed to the failure and success of these constitutions and transitions. The thesis concludes by identifying ways that constitutional content in Egypt and Tunisia were operationalized and norms set in the constitutional process continued after ratification.

On a final note, many analysts rightly point to the Egyptian military’s involvement in politics as a key factor that determined the outcome of the transition. The involvement of the military is certainly an important variable separating the cases of Egypt and Tunisia. However, it will not be the focus of this thesis.
Chapter Two: Ways of Constitution Making

This chapter examines the core concepts that are fundamental to this thesis. This chapter will cover some theories concerning democracy, democratization, and constitution making. The purpose is to explain the key terms used in this thesis and to familiarize the reader with the main elements of constitution making. In this way, this chapter prepares the way for analysis of the past and present constitution making efforts presented in the following chapters.

Democracy, Democratization, and Constitution Making

It is important to discuss terminology before the literature on constitution making to better understand the First, democracy is a form of government in which the people rule. Scholars describe democracy in a number of ways. At the procedural end of the spectrum, Joseph Schumpeter’s conception of democracy is simply the ability to choose between politicians through elections. In his view, “The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the people’s vote.”² This definition simplifies the process of identifying democratic states. However, it falls short because it encompasses an excessively large range of states and tells us little about the quality of democracy. Under this definition, both Norway and Algeria are democracies; yet, lumping the two together would strike most people as overlooking some crucial aspects of democracy.

At the normative range of the spectrum, David Held extends democracy beyond the political system into the economic and social sphere. In his theoretical framework for democracy, he argues:

Persons should enjoy equal rights, and accordingly equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in processes of deliberation about the conditions of their own lives and in the determination of these conditions, so long as they do not deploy this framework to negate the rights of others.³

This conception of democracy helps to identify the system towards which state and society should aspire. However, it too falls short because it does not incorporate enough states. Indeed, no state today fulfills every element of Held’s democracy. Thus, it is unhelpful to help us understand how democracy currently operates in the real world.

For the purpose of better understanding the transition in Egypt and Tunisia, we need more precise mechanisms and elements that can help us identify the degree to which countries are politically democratic. Robert Dahl considers the responsiveness of a government to the wishes of its citizens to be the essential element of political democracy. In theory, for the government to be adequately responsive, citizens must have opportunities to formulate their preferences, to signify them to their fellow citizens and government, and to have them weighed equally in the conduct of government. In practice, these three opportunities require the following institutional guarantees: (1) elected officials, (2) free and fair elections, (3) inclusive suffrage, (4) the right to run for office, (5) freedom of expression, (6) alternative information, and (7) associational autonomy.⁴ The presence or absence of these seven conditions indicates the degree of political democracy. With this in mind, we turn to Larry Diamond, Juan Linz, and Seymour

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Lipset’s indicators of a functioning democracy. In their view, a particular of system of government can be considered a political democracy to the extent that there is:

1. Meaningful and extensive competition among individuals and organized groups for all effective positions of government power, at regular intervals, and excluding the use of force.
2. A highly inclusive level of political participation in the selection of leaders and policies, at least through regular and fair elections, such that no major social group is excluded.
3. A level of civil and political liberties—freedom of expression, freedom of the press, freedom to form and join organizations—sufficient to ensure the integrity of political competition and participation.\(^5\)

This view of democracy as encompassing competition, participation, and liberties offers us useful mechanisms and elements to assess the development of democracy in Egypt and Tunisia.

Democratization refers to the process of change from authoritarian rule toward more democratic forms of rule.\(^6\) Scholars typically break down democratization into a democratic transition stage and a democratic consolidation stage. Democratic transition involves the breakdown of the authoritarian regime and emergence of democratic institutions and practices.

At some point, democratization shifts from a transitional stage to a consolidation stage. Juan Linz and Alfred Stepan propose that a transition is deemed complete at the moment when political actors agree upon the procedures for the new system of governments and a free and fair election yields an independent government with the authority to enact new policies.\(^7\) For this to transpire, it is logical to reason that the creation or restoration of a constitutional framework that establishes the distribution of power and rules of procedure must first take place in order for democracy to establish itself. From this reasoning, a democratic transition usually finishes after the completion a constitutional process.

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\(^5\) Larry Diamond, Juan Linz, and Seymour Martin Lipset, eds. *Democracy in Developing Countries* (Boulder, CO: Lynne Reinner, 1988), xvi.


Once democratic transition has been completed, democratization proceeds to consolidation, the third and final phase. Consolidation involves the internationalization of democratic practices. Linz and Stepan argue that this process involves critical behavioral, attitudinal, and constitutional evolutions in state and society. Behaviorally, no significant actors spend significant resources advancing their interests via violent nondemocratic practices. Attitudinally, society must believe that democratic procedures and institutions are the most appropriate way to govern state and society. Constitutionally, all governmental and nongovernmental actors accept the resolution of conflict through laws, procedures, and institutions authorized by the new democratic order and can be held accountable by these elements. In short, a democracy is consolidated when democratic practices become “the only game in town.”

Consolidation is a fluid stage. Success with democratic transitions does not necessarily lead to a consolidation of democracy. States may become increasingly unstable over time and revert back to authoritarian practices. Here, constitution making during the transition stage can play an important role in the outcome of a country’s consolidation. Linz argues that constitution making during the transition is crucial because the degree of consensus formed in this period can serve as an important source of stability or instability in the future politics of the country.

The concept of constitution making, also referred to as constitution craft in this thesis, involves two interrelated components: constitutional content and constitutional process. “Constitutional content” refers to the provisions laid out in the constitution. John Liolos breaks a constitution into functional and aspirational elements. The functional elements have an important legal purpose: they generally organize political power in the state, establish government

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8 Ibid, 3-15.
institutions, and set pragmatic rules of governance. The form of government chosen can influence the transition to democracy and consolidation. Linz reasons presidential systems can fosters instability by turning the politics of the transition into a zero-sum game, which tends to encourage polarization. In contrast, he contends parliamentary systems are more conducive to transition because they allow for greater flexibility in accommodating political differences and promotes greater opportunities for cooperation and consensus building.

The aspirational elements of a constitution have a normative purpose: they generally articulate the country’s commitment to achieving principles, freedoms, and rights. In a democratic state, these aspirational elements “provide the true north for the nation’s compass and determine policies the functional provisions should implement to achieve the legitimacy of the laws.” The functional and aspirational elements of a constitution should work in harmony. If they do not, this friction can lead to destabilizing conditions in which the constitution or government may be dissolved.

Over the past two decades, scholars of constitutions have shifted their attention from constitutional content to constitutional process. While constitutional articles and their operationalization still have an effect on democratization, scholars have begun to recognize the importance that the nature of constitutional process can have on the resulting system. Jon Elster generalizes that the more democratic the process, the more democratic the content of the constitution.

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“Constitutional process” refers to the all the steps taken by actors to create a design for the drafting process, to proceed with the drafting itself, and to approve a constitution. As the definition suggests, the process involves more than merely the drafting of a constitution. In all cases of constitution craft, actors must address the same principal questions of organization before drafting can begin. These core questions include: who is to be involved, when and how that involvement will occur, and how those involved are to proceed in crafting, debating, and approving a final document. The design of the process can greatly influence how the subsequent drafting and adopting process unfolds.

Now that we have sufficiently established the key terms of this thesis, we can turn to the theories on constitution making. This review will offer an overview of the literature concerning the practice of constitution craft by exploring the context in which it may emerge and unfold before moving along to its various stages and the primary actors involved. Then, the review shifts to the aspect of public participation in constitution craft and various ways this can take place. Lastly, the review concludes with a brief reflection on the relationship between constitutions and democracy.

Before proceeding, we must note that the following discussion of constitution making is limited to democratic constitutions. There are many constitutions that are enacted and amended by authoritarian regimes, but such constitutions are not considered here.

**Creation from Crisis: The Development of Constitution Making**

The push to initiate constitution making usually emerges in the midst of turbulent circumstances. Social and economic crisis, revolution, regime collapse, fear of regime collapse, defeat in war, reconstruction after war, and the creation of a new state are all circumstances that
can prompt a country to begin drafting of new constitution. As Elster points out, these destabilizing events generate an inherent paradox in constitution craft. He observes,

> Being written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions. Also, the intrinsic importance of constitution-making requires that procedures be based on rational, impartial argument. It is part of [the constitution-makers] task to look beyond their own horizon and their own interests. Yet, the call for a new constitution usually arises in turbulent circumstances, which tend to foster passion rather than reason. Also, the external circumstances of constitution-making invite procedures based on threat-based bargaining.¹⁴

Thus, it appears that constitution making generally arises in conditions that are likely to discourage good constitution craft.

The context by which constitutions are retained or created during democratic transitions can vary considerably. The context provides conditions that can constrain or encourage constitution making, which will in turn affect the chances for democratization. Linz and Stepan identify six relevant contexts: (1) the retention of a constitution created by a nondemocratic regime with difficult amendment procedures, (2) the retention of a “paper” constitution whose elaborate rules and procedures complicate matters when put into practice, (3) the creation by a provisional government of a constitution with some de jure nondemocratic powers, (4) the use of constitution created under highly constraining circumstances reflecting the de facto power of nondemocratic institutions and forces, (5) the restoration of a previous democratic constitution, and finally, (6) free and consensual constitution making.¹⁵ This last context in which elected representatives convene to freely negotiate the structures of the new system offers the greatest likelihood for consensus to be reached and democracy to be consolidated.

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Constitution Making Stages

Constitution craft takes place in stages. Jennifer Widner identifies five stages of the constitutional process starting with the negotiation of ground rules, then the development of interim documents or immutable principles, proceeding to the preparation of an initial text, followed by the deliberation and adoption of a final draft, and finally, public ratification. Keith Banting and Richard Simeon describe an earlier stage, which they term the “idea-generating stage,” during which actors advance their interests and determine the design of the process. These stages can be quick or more drawn out. Ideally, the next stage will begin only after a degree of consensus has been reached. This brief discussion of stages implies the presence of various actors making consequential decisions during the crafting of a constitution.

Primary Players in Constitution Making

Of course, the actors who take part in constitution craft are a critical variable. Widner points out expert commissions, legislative bodies or committees, the executive, the judiciary, national conferences, elite roundtables, transitional legislatures, specially elected constituent assemblies, interest groups, nongovernmental organizations, foreign advisors, and the public itself as various actors who can all be involved at various stages and play an influential role in constitution craft. In order for the process—and thus outcome—to be the most democratic, Elster advises that constitutions be written by directly elected constituent assemblies. Regardless of what body drafts the constitution, Jason Gluck recommends that the body be

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inclusive in the sense that its members should represent a wide range of society’s interests and be representative in the sense that no one party should dominate the body.\(^{20}\)

There is an assumption in the literature about the constitution making actors that Zachary Elkins, Tom Ginsberg, and Justin Blount point out. They notice that nearly all normative work about constitution making proceeds from the assumption that constitutional politics should differ from ordinary politics. In short, politics concerning what the rules will be should differ from politics within already established rules. Since former scenario involves these choices about the fundamental character of the state, actors should move forward only when a certain degree of consensus is reached. Most of the literature assumes since constitutional drafters work without certain knowledge of their position in governance after ratification, they will take public welfare into greater account than self-interest. Also, since some sort of failure or crisis typically initiates constitutions, the drafters will aspire to create a more stable system and thus will focus more on public welfare than special interests.\(^{21}\)

The drafters pursue their goals with different motivations. Elster believes that the members of these assemblies will act according to three motivations: interest, passion, and reason. He separates interest into motives derived from the personal welfare of drafters and motives connected to broader groups or institutions of which the drafters are a part. He divides passion into impulsive desires and permanent passions like religious or ethnic antagonisms. He describes reasons as impartial principles concerned with the public’s welfare.\(^{22}\) These assumed motivations are considered to be crucial to understanding the process and outcome.

These motivations are often influenced by the constraints imposed on the drafters. Elster theorizes that the actors in these assemblies will be affected by two different constraints, which he terms upstream and downstream. The actors setting up the constituent assembly enact upstream constraints, whereas downstream constraints arise from the anticipation of ratification. Presumably, these constraints—especially downstream constraints—will promote consensus because drafters know that the constitution will not be passed if significant disagreement exists. These downstream constraints on drafters imply the influence of an external variable in constitution craft: the public.

The Growing Importance of Public Participation

Consideration of the society’s participation in constitution making has increased in recent years. There is a growing norm that people have a right to participate in constitution making. Organizations, like the United States Institute of Peace, and scholars, like Devra Moehler and Eleanor Marchant strongly encourage public participation. In short, they believe that citizens should have an opportunity to directly express their interests to drafters who are genuinely committed to incorporating those views into the final text.

Much of the recent literature on constitution craft attempts to correlate the degree of public participation to different outcomes of transitions. The legitimacy that public participation

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23 Ibid, 373-375.
24 Vivien Hart, “Democratic Constitution Making,” Special Report no. 107, (Washington, DC: United States Institute of Peace, 2003). Hart argues, “A democratic constitution is no longer simply one that establishes democratic governance. It is also a constitution that is made in a democratic process. There is thus a moral claim to participation, according to the norms of democracy. A claim of necessity for participation is based on the belief that without the general sense of “ownership” that comes from sharing authorship, today’s public will not understand, respect, support, and live within the constraints of constitutional government.”
can confer on a constitution is usually cited as the primary benefit of public participation. The underlying principle is that if people have participated in the crafting of a constitution, they are more likely to be committed to the survival of that constitution. A case study of twelve constitutional processes and their outcomes conducted by the International Institute for Democracy and Electoral Assistance in 2005 found that a participatory or representative constitutional process was more likely to: facilitate negotiation and compromise of contested issues; provide stronger and more inclusive rights; and be perceived as legitimate by citizens.

Other scholars argue that more inclusive processes will create more democratic institutions. Elkins, Ginsburg, and Blount argue that “higher levels of participation are presumed to function like supermajority rules, restricting the adoption of undesirable institutions and protecting prospective minorities in the democratic processes that are established. Participation thus legitimates and constrains, substituting process for consent to make effective government possible.” Stefan Voigt classifies different levels of participation and connects them to the creation of more independent institutions. Thus, there seems to be a correlation between some degree of public participation and the formation of democratic institutions.

The methods of public participation vary. A referendum to approve the constitution and an election for a constituent assembly are the two most basic ways that the public can participate. This type of public involvement can greatly increase the endurance of a constitution. Elkins, Ginsburg, and James Melton found that public participation, as defined in an

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election for constituent assembly and a referendum to approve the constitution, was positively correlated with constitutional lifespan in democracies. While these methods of public participation involve the largest mobilization of society, they only have an impact on the drafters at the beginning and end of the constitutional process.

A more substantive mode of public participation now takes place during the drafting stage itself. This participation seeks to engage drafters with the public or representative groups at various stages. In its review of constitution making in South Africa, Democracy Reporting International identified a number of practices that involved more people in constitution making, which can serve as examples for other countries. First, officials launched an extensive civic education campaign to inform the public about constitutional issues being debated and their right to participate. Newspaper, radio, and television were also employed to serve this goal. In addition, officials organized town hall meetings that gave members of the constituent assembly the opportunity to share their work and allowed participants to give input and feedback. Meetings were held on specific subjects, such as the bill of rights or the judiciary. After a draft of the constitution was published, citizens were again invited to participate and give feedback to constituent assembly members. From her review of several cases in the 1990s, Vivien Hart identities several additional ways the public can engage in constitution making including an assembly newspaper or website, public opinion surveys, and public hearings.

A highly participatory process does have drawbacks. Too many actors may cause textual incoherence by pushing for articles that contradict each other. Although the loss of consistency

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32 It’s important to note despite this high degree of participation, there is still ongoing debate about the effectiveness of South Africa's constitution. “Lessons Learned From Constitution-making: Processes with Broad Based Public Participation,” Democracy Reporting International, Briefing Paper no. 20, November 2011.
may be offset by gains in legitimacy, Donald Horowitz warns that it may also make the system ineffectual.\textsuperscript{34} Yash Ghai and Guido Galli also note that as more actors are involved, it can become increasingly difficult to build consensus because of the diversity of demands expressed.\textsuperscript{35} Brown observes that the involvement of the public can also cause grandstanding to become more prevalent as political leaders seek to mobilize their own supporters.\textsuperscript{36} Thus, an appropriate level of public participation must be achieved.

**Determining Success**

Judging a constitution’s “success” can be problematic. Different actors expect the constitution to fulfill different aspirations. Widner identifies different dimensions that can help us evaluate the “success” of a constitution. First, we can measure the durability of the constitution. Constitutions that have survived for a long period of time are often deemed successful. However, we must not consider this dimension in isolation. Dictators can rule a country for decades after writing a constitution. Second, we can assess the degree to which constitution making can channel conflict resolution through institutions. This dimension is extremely relevant for post-conflict societies. Third, we can appraise the protection of individual and civil rights and freedoms outlined in the constitution. Fourth, we can evaluate the degree to which constitutions become self-enforcing.\textsuperscript{37} In his opinion, Gluck deems the constitutional process a success when it generates greater public awareness of understanding of the basic principles that support the country and greater engagement with political institutions.\textsuperscript{38}

\textsuperscript{35} Ghai and Galli, “Constitution-building Processes and Democratization,” 243.
\textsuperscript{36} Nathan J. Brown, “Reason, interest, and passion in constitution drafting,” *Perspective Politics* 6 no. 4 (2008), 675-689.
\textsuperscript{38} Gluck, “Constitutional Reform in Transitional States.”
**Relationship between Democracy and Constitutions**

Today, constitutions are expected to form the foundation upon which a democracy stands. They are documents that articulate the country’s fundamental principles, organize political power, establish institutional arrangements, and guarantee the rights and duties of citizens. Thus, constitutions have an important legal and ideological role to play. Constitution making determines the precise nature of these legal and ideological roles, and can influence the outcome of democratic transitions. A constitution that emerges after a process of negotiation and compromise encourages the stability of the system and an internalization of democratic principles. In contrast, a constitution that emerges after a process in which a victorious majority dictates its interests over the heated objections of minorities can destabilize the system and push opponents to revert to nondemocratic measures to advance their interests.

In conclusion, constitution making ideally establishes a degree of constitutionalism, or the principle that government is limited by a fundamental set of laws. However, it is important to note that presence of constitutionalism does not necessarily correlate with the presence of democracy. A state can rule according the legal role established by the constitution without providing sufficient competition and participation and protection of liberties needed required in a democratic system. In fact, this is the case for nearly all of Egypt and Tunisia’s constitutional histories.
Chapter Three: Constitutionalism without Democracy

Tunisia and Egypt possess the two oldest constitutional histories in the Arab world. This chapter traces the history of their constitutions since 1861. It seeks to address key questions surrounding why these constitutions were written, how were they written, and what provisions they contained. The precedents set during these past constitution making periods would shape the issues each country faced during the present constitution making period. The intent of this chapter is not only to put the current constitutional processes in Egypt and Tunisia in historical perspective, but also to demonstrate how each country’s past experience with constitution craft is connected to its present experience.

Egypt’s Constitutional History

In 1882, Egypt faced severe domestic turmoil that had intensified in recent years. The state’s expensive and mismanaged modernization campaign had resulted in severe fiscal problems and allowed European infiltration of the country’s economy and politics. From 1876, state finances were placed under joint French and British control. Frustrated at state incompetence and bitter at foreign domination, an Egyptian nationalist movement had emerged. In 1878, Ahmed ‘Urabi, an army officer, started an uprising against Isma’il, the khedive or hereditary governor of Egypt. By 1882, mounting anti-European hostility, military dissatisfaction, rising nationalism had created an explosive situation, and civil war seemed likely.

Egypt’s only legislative power, the Consultative Council of Delegates, had also become increasingly resentful of European financial control and the political power it accorded to the
The members of the Council began to press Tawfiq, Isma’il’s successor, to issue a constitution as a means to challenge European influence and reform political power. Alexander Scholch describes the members’ motivations as such: “They wanted to control that half of the budget which was at their disposal, to subject fiscal policy to their will, and to shut the door on further economic and political progress by the Europeans in Egypt.” This pressure combined with demonstrations by the Egyptian military obliged Tawfiq to initiate the drafting of a constitution.

The resulting constitution, which was largely written by the prime minister, shifted more power away from the khedive—who was easily swayed by the British and French—, and toward the Council of Delegates. Forty-nine of the fifty-two articles involved matters relating to the Council. These provisions detailed the rules for the Council’s election, increased the Council’s role in legislation and in oversight of public finances, and made cabinet ministers accountable to the Council. At the same time, the constitution also placed a few limited checks on the authority of Tawfiq.

The constitution failed to appease the nationalist movement who continued to challenge the weak government. The threat of a more assertive Egyptian nationalism and the constitution’s reformulation of domestic power greatly alarmed the British. Four months after the constitution was issued, Britain formally established an occupation of Egypt, assumed political and economic control of the country, and disregarded the constitution.

The next constitution making moment in Egypt was initiated during the last years of the British protectorate. Again, the desire to challenge British influence was the primary motivation for drafting a constitution. Building upon the Egyptian nationalism of the late 1800s, another popular nationalist movement emerged in the aftermath of World War II and began to demand more autonomy over domestic affairs. This nationalist movement evolved into a political party, the *Wafd*, who gained mass support amongst Egyptians for demanding independence. In 1922, Britain formally ended the protectorate, but retained de facto control over the country until 1952.

Formal independence from Britain created a need for Egypt to define its political system. Writing a constitution offered an opportunity for the country to assert its independence and establish a measure of parliamentarianism.\(^{43}\) *Wafd* called for a constitution to be written by a popularly elected constituent assembly. However, the king ignored this demand and appointed a committee to draft a constitution, thus excluding the largest and most popular movement at the time from the drafting process.\(^{44}\) This political snub resulted in enormous controversy and discontent. Thus, like its 1882 predecessor, this constitution was drafted in a period of significant social and political unrest.

In 1923, the committee issued a new constitution. It established a constitutional monarchy with a bicameral parliament that held greater power.\(^{45}\) In theory, the king was to rule through ministers who were accountable to the parliament. In practice, the parliament struggled to enforce any substantive accountability on the king, who was still supported by the British. The

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\(^{43}\) Brown, *Constitutions in a Nonconstitutional World*, 38.

\(^{44}\) For an excellent analysis political context in which constitution was drafted and an account of the committee’s work, see Elie Kourie, “The Genesis of the Egyptian Constitution of 1923,” in *Political and Social Change in Modern Egypt*, ed. P.M. Holt (London: Oxford University Press, 1968), 351.

effect of British influence loomed large throughout the 1920s until the 1952 Revolution, because the British consistently undermined efforts to establish constitutionalism in Egypt.

In terms of content, the 1923 constitution introduced some democratic elements. For example, it proclaimed that all power was derived from the nation, which could be read as presenting a basis for the principle of popular sovereignty for the first time. The constitution also stated that all Egyptians were equal before the law and that freedom of expression and belief, and the rights to education, privacy, and assembly was guaranteed or to be defined by law for the first time. However, these rights were rarely protected in practice, and, under British pressure, the king and government would violate the constitution on three occasions before 1930.

The 1923 constitution is also notable for formally establishing the role of Islam vis-à-vis the state. Article 1 stated, “Islam is the religion of the state; Arabic is the official language.” This precedent is important because future constitutions would follow this example in devising the relationship between Islam and the state.

In 1930, a new government abolished the 1923 constitution and enacted a new one. This constitution was largely the same except in the domain of the monarchy where it restored royal powers concerning the appointment of ministers and financial matters. The constitution also gave all adult males the right to vote. This constitution only lasted five years until King Fu’ad reinstated the 1923 constitution, which remained in force until the 1952 Revolution.

The 1952 Revolution ended the era of British influence and the monarchical system and began the era of the Egyptian republic. Over the next twenty years, four constitutions served the

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46 “Ibid.
47 Brown, *Constitutions in a Nonconstitutional World*, 39-40: In 1925, after elections were held to replace a Wafdist parliament, the new parliament was again dissolved because of another Wafdist victory. In 1929, the king dismissed the Wafdist government and gave the right to form a government to Muhammad Mahmud who announced the suspension of the parliamentary system. In 1930, Isma’il Sidqi, the prime minister, abolished the constitution.
48 “Constitution du 19 avril 1923.”
50 “Constitutional history of Egypt,” *ConstitutionNet*. 
country. The first constitution, drafted by a committee of leading jurists and political elite chosen by the armed forces, was issued in 1956. The involvement of the Egyptian military in this constitution was important because it set the precedent that the military should play a role in constitution making and politics. The next three constitutions would also be drafted under the watchful eye of the military. Indeed, this pattern of behavior may explain why the Egyptian military asserted itself so forcefully in constitution craft after the January 25 uprising.

The 1956 constitution established a republican system dominated by the president. The president acquired the executive powers formerly belonging to the king and gained legislative prerogatives by the right to issue decrees with the force of law. With the system dominated by the presidency, constitutional freedoms, which were mostly to be defined or regulated by law, held little weight.51

In 1958, Egypt and Syria united to form the United Arab Republic. This union was governed by a quickly written constitution that replicated many of the provisions in the 1956 constitution. When this pan-Arab experiment ended in 1961, the third constitution of the era was drafted. Intended to be temporary, the 1964 constitution was unique in that a popularly elected assembly drafted the document. However, Egypt was still controlled by Nasser, so little changed in principle and practice from the 1956 constitution. Kevin Boyle and Adel Omar Sherif affirm, “The 1964 Constitution reinforced the executive powers of the President [who] retained the power to appoint and dismiss ministers and to lay down the general policy of the state in and supervise its implementation. Moreover, in practice the President would exercise far more powers than the Assembly and civil rights were not always adequately protected.”52

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51 Brown, Constitutions in a Nonconstitutional World, 78-79.
Nasser’s death in 1970 prompted the drafting of a new constitution, which would remain in operation until 2011. In 1971, the fourth constitution was issued. It established a multi-party semi-presidential system with a strong executive branch partially offset with a relatively autonomous judiciary and popularly elected parliament. However, Sadat and Mubarak would place heavy constraints on political activity and limited the power of the parliament. A reading of the constitution reveals an attempt to set a foundation for a socialist democratic state. Popular sovereignty and rule of law are emphasized in the preamble, which affirms that “political and social progress of all peoples can only be realized through the freedom of these peoples and their independent will.” Civil and political rights including equality before the law, freedom of belief and expression, and freedom of the press are detailed in the first two chapters. However, the constitution was drafted under the watchful of Sadat who harbored no illusions regarding what type of rule he intended to enforce.

The 1971 constitution is unique in that it defined a role for Islam in state affairs. It built on the 1923 constitution’s provision that Islam was the religion of the state. Article 2 stated that “Islam is the religion of the state, Arabic is its official language, and the principles of Islamic Sharia are a primary source of legislation.” In an attempt to appease Islamists, Sadat amended this article in 1980 to elevate the status of the principles of sharia to be the main source of legislation. In exchange, Sadat added two amendments that removed term limits and allowed him to appoint one third of the Consultative Assembly. After the assassination of Sadat in 1981, Hosni Mubarak assumed the presidency and continued the legacy of authoritarian rule,

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56 Brown, Constitutions in a Nonconstitutional World, 85.
exploiting constitutional articles and ignoring others to govern Egypt. At the beginning of 2011, it appeared that Mubarak would remain in office until his death.

**Tunisia’s Constitutional History**

In 1861, Tunisia faced similar destabilizing circumstances as Egypt. The state’s modernization campaigns over the previous decades had drained the state’s finances and allowed European investors to intervene more directly in the state’s fiscal policies. To secure their interests in the country, Britain pushed Muhammad al-Sadiq, the *bey*, or the hereditary governor of Tunisia, to adopt a constitution.

The Tunisian Constitution of 1861 was the first written constitution in an Arab Muslim country. The constitution, drafted by government officials in a closed process, formally established a constitutional monarchy whose ministers were accountable to a Grand Council composed of sixty members selected by al-Sadiq. Because of the significant fiscal problems facing the state, the document mostly aimed to streamline administration of the country. Fifty-three of the one hundred fourteen constitution’s articles were devoted to setting up accountable fiscal practices and clearly defined administrative hierarchies, responsibilities, and procedures.

The constitution introduced several rights, including the protection of the right to security of person, honor, and fortune, which reflects the extent to which constitutions of the era protected rights. These rights are more remarkable because they applied to everyone in the kingdom, “‘whatever their religion.” Although these provisions were not fully enforced, Stepan

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60 “Constitution du 26 avril 1861.”
61 At the period in history, United States Constitution did not guarantee economic or civil rights. The 13th amendment outlawing slavery was passed three years after the Tunisian Constitution. France was the only country that had tried to establish a constitution with a full range of rights.
argues that they “introduced into Tunisian discourse the idea that people from all religious backgrounds should enjoy equal rights.”\footnote{Alfred Stepan, “Tunisia’s Transition and the Twin Tolerations,” Journal of Democracy 23 no. 2 (April 2012): 98.}

The extent of rights enshrined in the constitution makes sense because the primary purpose of the constitution was functional and procedural. It aimed to make political authority more accountable and effective to strengthen the authority of the state.\footnote{Brown, Constitutions in a Nonconstitutional World, 19.}

The 1861 constitution was lasted longer than Egypt’s first constitution. After only three years, al-Sadiq suspended the constitution after facing significant pressure from internal rebellious tribes and French officials, both of which demanded the revocation of the constitution.\footnote{Perkins, A History of Modern Tunisia, 34-35.} Nonetheless, the constitution introduced the concept of constitutionalism to the country for the first time by placing its ruler under the limits of a constitution.

Over the next twenty years, France gradually entrenched itself in Tunisia’s economy and politics. In 1882, France formally occupied the country and established a protectorate.

Most Tunisians despised the French protectorate. The first organized anti-French political movement in Tunisia emerged in the 1920s, demanding a constitution with an elected parliament as its principal goal.\footnote{Ibid, 85.} In fact, the group became known simply as Doustur, Arabic for constitution. An offshoot of that original group, Neo-Doustur, led by Habib Bourguiba, would play a central role in Tunisia’s next constitution making moment.

The process of ending the French protectorate presented the opportunity to establish a new political system in Tunisia. Free elections for a Constituent Assembly were held in 1956 with Neo-Doustur, the party with the most popular legitimacy because they opposed the French,
capturing all ninety-eight seats in the Constituent Assembly.\textsuperscript{66} France terminated the protectorate shortly afterward, and Tunisia became an independent state. The following year, the Assembly ousted the bey and declared Tunisia a republic.\textsuperscript{67}

In 1959, the Assembly, directed by Bourguiba, issued a new constitution, explicitly claimed to establish a democracy.\textsuperscript{68} The constitution created a strong presidential system with a nearly unrestrained executive allowed to appoint and remove ministers and given the power to initiate laws, ratify treaties, and put any bill to a referendum.\textsuperscript{69} An elected parliament was also preserved, but it held only limited control over the executive. The constitution introduced several new democratic principles, notably popular sovereignty and equality. The constitution also guaranteed several civil rights for the first time including freedom of expression, freedom of the press, and the right to freely assemble. Lastly, the constitution formulated the relationship between religion and state in its opening article, stating “Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic and its type of government is the Republic.”\textsuperscript{70}

In 1957, Bourguiba was elected president. Over the next thirty years, Bourguiba gradually imposed an authoritarian one-party state in which many of the rights articulated in the 1956 constitution were routinely ignored. Moreover, Bourguiba exploited constitutional articles and used the security forces to consolidate power. In 1974, Bourguiba engineered a referendum to amend the constitution to make himself president for life, which removed the need to hold elections.\textsuperscript{71}

\textsuperscript{67} Ibid.
\textsuperscript{70} Ibid.
\textsuperscript{71} “Constitutional history of Tunisia,” \textit{ConstitutionNet}. 
The transfer of power from Bourguiba to Zine El-Abidine Ben Ali was quick, peaceful, and arguably constitutional. Citing Article 57, Ben Ali seized the presidency in November 1987 after a team of doctors evaluated Bourguiba and pronounced him unfit to remain in office. During his two decade long reign, Ben Ali continued the authoritarian legacy of Bourguiba. He frequently used the threat of political Islam and terrorism to routinely violate the rights guaranteed in the constitution. In 2002, Ben Ali organized a referendum to approve a constitutional amendment allowing him to serve additional terms in office. At the time the revolution broke out in 2010, Ben Ali had completed the first year of his fifth term.

Egypt and Tunisia’s experiences with constitution making shaped the course of their countries’ history in more ways than one. First, the 1956 and 1959 constitutions set up the systems that Egypt and Tunisia’s authoritarian rulers abused. It was these systems and rulers that the 2011 uprisings sought to destroy and remove. Second, the nature of past constitution craft influenced the demands of the revolutionaries in 2011. The early constitution making efforts were elite affairs isolated from the public sphere both in process and content. They were initiated by rulers, drafted by political elite and drew their legitimacy from the support of the ruler or political elite rather than from the people. Following the fall of Mubarak and Ben Ali, Egyptians and Tunisians were determined not to allow this process to repeat itself. They demanded that the constitutional process being inclusive, representative, and transparent. Only then would they accept a new constitution. Third, the introduction of certain constitutional rights starting back as early as 1861 in Tunisia and 1923 in Egypt and expansion in scope in the following constitutions created the idea that the protection of individual rights was an essential element of constitutions.

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74 “Constitutional history of Tunisia,” *ConstitutionNet*. 
This idea along with Mubarak and Ben Ali’s disregard for constitutionally guaranteed rights led many to press for the inclusion and enforcement of civil and political rights in the new constitutions. Fourth, the precedents set by the earlier constitutions concerning Islam and the state influenced on the constitutional debates surrounding religious articles in the Egyptian Constitution of 2012 and the Tunisian Constitution of 2014.

Lastly, the European influence on previous constitution making efforts must be mentioned. Britain and France played a primary role in undermining and dissolving Egypt and Tunisia’s early constitutions to further their economic and political interests. Furthermore, the fresh memory of colonialism in Egypt in 1956 and in Tunisia in 1959 created the conditions in which charismatic leaders like Nasser and Bourguiba could consolidate power and gradually establish authoritarian rule in Egypt and Tunisia. Thus, when the moment of constitution craft arrived in Egypt and Tunisia, the people sought to undo the authoritarian regimes that had first emerged in the aftermath of colonial rule.
Chapter Four: The Revival of Islam

This chapter explores the concept of Islamism and the history of the Egyptian Muslim Brotherhood and Ennahda. It identifies the primary characteristics of Islamist movements and their relationship to sharia. It also distinguishes the key elements of the Brotherhood and Ennahda’s message. The purpose of doing this is to better understand the nature of each party’s engagement in the constitutional process and their aspirations for constitutional content.

Islamism

Broadly speaking, Islamism refers to the “reassertion of Islam in both the public and private life.”75 Roxanne Euben and Muhammad Zama characterize Islamist movements:

…contemporary movements that attempt to return to the scriptural foundations of the Muslim community, excavating them and reinterpreting them for application to the present-day social and political world, [which will heal] the moral bankruptcy inaugurated by Western cultural dominance from abroad, aided and abetted by corrupt Muslim rulers from within the umma (Islamic community).76

The diversity of Islamism demands such a broad definition because it encompasses range of thought. Islamists range from the Wahhabi clerics of Saudi Arabia to the AKP party in Turkey. Despite this heterogeneity, several other broad characteristics can apply to most Islamist movements. First, Islamists are intentionally and explicitly political.77 Second, Islamists usually seek to appeal to a wide, popular audience rather than societal elites.78 Third, Islamists generally

75 Mahmood Monshipouri, Islamism, Secularism, and Human Rights in the Middle East (Boulder, Colorado: Lynne Rienner, 1998), 2
77 Ibid.
78 Euben, Princeton Readings in Islamist Thought, 20
aspire to implement *sharia* in the state and society.79 The reason behind this aspiration is the authority and appeal of *sharia* that possesses in Muslim societies.

*Sharia* has held considerable symbolic power that bonded diverse Muslim populations throughout history. Khaled Abou El-Fadl observes that *sharia* has served as a transcendent symbol of unity for Muslims across the world. He asserts, “*Shari’a*—as a symbol to the Divine path and as the representative of the collective effort of Muslims at understanding what God wants from human beings—functioned like the symbolic glue that held the diverse Muslim nation together.”80 For this reason, Islamists understand *sharia* and Islam to be largely synonymous because both prescribe a holistic way of living. Islamists agree that *sharia* is drawn from the Islam’s most holy sources, the *Koran* and the *Sunna*—the sayings, practices, and teachings of the Prophet Mohammed. Accordingly, *sharia* possesses the legitimacy to guide all aspects of a Muslim’s life. However, interpretation over the implementation of *sharia* divides Islamists. The precise implementation of *sharia* has historically required interpretation by trained jurists because *sharia* contains relatively few explicit and unambiguous commands.

Some Islamists, who have a purist background, disregard the historical Islamic jurisprudence and take a narrow, literal interpretation of *sharia* because they consider the scriptures to the only pure and legitimate source that can directly apply their world. In their understanding, *sharia* can directly serve as a legal code to govern state and society. However, this code can also justify cruel punishments and restrict rights and freedoms. This conception of *sharia* inevitably creates tensions with modern standards of minority and women’s rights, freedom of belief and expression, and the secular state.

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79 Ibid, 11
Other Islamists movements, who come from a moderate background, take a broader reading of sharia. They attempt to ascertain sharia’s goals for society. In doing so, they find a general set of ethics including justice, consultation, equality and freedom that guides the political order. Therefore, by either interpretation, most Islamists agree that sharia should explicitly or implicitly inform legislation. This idea assumes greater importance when Islamists engage in the political area because it creates conflict with actors who believe that sharia is incompatible with democracy.

The Egyptian Muslim Brotherhood

The Egyptian Muslim Brotherhood is the oldest and most influential Islamist movement in the world. Since its founding in 1928 by Hasan al-Banna, the Brotherhood has extended beyond Egypt with branches in Syria, Jordan, and Kuwait. It also has inspired hundreds of movements across the Muslim world, including Ennahda in Tunisia.

The Muslim Brotherhood began as a small social and religious group that aimed to free Egypt from the invasion of Western cultural values and to reorient society towards the principles of Islam. Sharia has formed the core element of the Brotherhood’s message since its inception. In his letter to the Egyptian king, al-Banna wrote, “The Noble Qur’an is full of passages descriptive of this particular aspect [institutions, principles, and objectives of the state] and contains numerous exemplary parables concerning it in general or in detail--while it deals with these aspects clearly and precisely.” Later, al-Banna urges that all acts of the government be

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83 Ibid, 22
weighed in the “scales of Islamic wisdom and doctrine.” Therefore, since the beginning, the Brotherhood has stressed need and applicability of sharia in its political vision.

After al-Banna’s death in 1949, the Muslim Brotherhood did not articulate a specific political program beyond calling for the application of sharia. Under Nasser, Sadat, and Mubarak, the Brotherhood experienced brief periods of political openness and longer periods of severe repression. Beginning in the 1980s, the Brotherhood re-entered the political arena. Though Mubarak’s rules forced the movement to field its candidates as independents, the Brotherhood began to appeal to the norms of democracy and human rights as a means to challenge their legal exclusion. Carrie Wickham observed that the movement shaped its support for democratic elections as “deriving from the Islamic principle of shura, consultation….which presumed the existence of a state that governed in accordance with Shari’a law.” By the eve of the uprisings in 2011, the Brotherhood’s view of sharia had evolved. While the movement still emphasized a need for sharia in the state, the Brotherhood articulated a more expansive interpretation that stressed the principles of sharia, which aimed to achieve freedom, justice, and fairness in state and society.

When it became clear that Mubarak’s rule was no longer tenable, the Brotherhood quickly affirmed its commitment to a democratic system of governance to replace Mubarak’s regime. The day before Mubarak’s fall, Guidance Bureau official Essam Al-Arian affirmed, “Moving forward, we envision the establishment of a democratic, civil state that draws on universal measures of freedom and justice which are central Islamic values. We must embrace

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85 Ibid, 75
86 Wickham, The Muslim Brotherhood, 46.
87 Ibid, 58.
democracy…as a set of principles and objectives that are inherently compatible with and reinforce Islamic tenets.”

In the early months following the January 25 uprising, the Muslim Brotherhood established its own political party, the Freedom and Justice Party (FJP). Prior to the parliamentary elections later that year, the party published an electoral program in which the party reaffirmed its dedication to found a state with the principles of sharia as its frame of reference. The program also stressed that the Brotherhood would follow the principles of liberty, equality, and equal opportunities for all Egyptians. In particular, the party promised to “ensure women's access to all their rights, consistent with the values of Islamic law, maintaining the balance between their duties and rights…. safeguard, for every Egyptian, fundamental rights and freedoms…as well as political and social freedoms,” and asserted that “freedom of belief and worship are rights guaranteed by the Constitution and the law, and by Sharia (Islamic law) even before them.” Thus, the Brotherhood sought to portray itself as a legitimate actor who could be entrusted to play a leading role in the establishment of an Egyptian democracy.

**Ennahda**

The Muslim Brotherhood played an influential role in the creation of Ennahda. During the 1970s, Rachid Ghannouchi and Abdel Fattah Mourou, the co-founders of Ennahda, read the writings of al-Banna and were inspired to start a similar Islamist movement in Tunisia. While the two movements are still often conflated today, their relationship can be described as more of an

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“emotional connection” based on a shared heritage and history of repression rather than a coordinated relationship intent on implementing the same goals, argues Lilia Blaise.91

During the 1970s, Ghannouchi created a movement that aspired to establish a state in which a more literal and exclusive interpretation of sharia would be imposed.92 Tunisia’s secularist president, Habib Bourguiba’s repression of all opposition in the late 1970s and early 1980s led the movement to take a political stance against authoritarianism and adopt a democratic Islamic thought.93 During this time, Ghannouchi began to rethink his conception of sharia to focus on its broader principles and aims. Ghannouchi and his Movement of the Islamic Tendency (MTI), the original name of Ennahda’s political party, moved beyond the narrow demand for sharia and started to stress democracy, freedom, human rights, pluralism, and gender equality as the key elements of its program.94 Jameleddine Ben Abdeljelil observes Ennahda has based its interpretation of sharia on the maqasid principle, which considers the "higher aims" of sharia and takes into account historic changes in the sociopolitical context.95 Due to its Islamist identity, MTI was outlawed and its members, including Ghannouchi, were targeted and imprisoned by Bourguiba.

Following Ben Ali’s ascension to power in 1987, the new president created a political opening to garner legitimacy for his rule.96 In exchange for removing the religious reference in its name, the newly christened Ennahda party was allowed to compete in the 1989 elections. Ennahda won more than thirty percent of the vote. However, Ben Ali perceived this result as a

92 To read an account of Ennahda’s evolution, see Fransesco Cavatorta and Fabio Merone, "Moderation through Exclusion? The Journey of the Tunisian Ennahda from Fundamentalist to Conservative Party," Democratization 20 no. 5 (2013): 860.
93 Ennahdha, Une histoire tunisienne, DVD, directed by Christophe Cotteret (France: Veilleur de Nuit Production and Arte Geie, 2014).
threat to his power and quickly cracked down on the movement. Thousands of members were jailed; Ghannouchi fled to London; and the movement was outlawed until 2011.

While in exile, Ghannouchi had the opportunity to establish his thought concerning the nature of sharia in greater detail. He defined sharia as “a set of broad guidelines as opposed to a body of laws,...[one that is]entirely fair and merciful, having been revealed by God for the purpose of serving and guarding the interests of humanity.”97 Furthermore, he stressed that freedom of belief and expression, gender equality, and minority rights are not only protected, but also mandated under sharia.98 Monica Marks affirms that Ghannouchi has long argued in favor of a “fluid interpretation of sharia, one that did not necessitate the imposition of rigid legal codes and focused instead on more expansive notions of Islamic ethics, including social justice, equality between persons, and the like.”99

In the early days following the Revolution, Ghannouchi was quick to assert that his party’s understanding of Islam was compatible with democracy. In late January, he insisted:

Democracy is crucial to dealing with and reconciling different and even conflicting interests in society. Islam has a strong democratic spirit inasmuch as it respects religious, social and political differences. Throughout their history Muslims have objected to the imposition of a single all-powerful interpretation of Islam. Any attempt to impose a single interpretation has always proven inherently unstable and temporary...We stand for Islamic democratic thought, Islamic democracy if you will.100

Two months after the revolution, Ennahda become a legal movement after being outlawed for more than twenty years. The movement quickly re-established its political wing, formally naming itself the Party of the Ennahda Movement. Prior to the fall election for a constituent assembly, Ennahda published its electoral platform, which reflected the party’s past rhetoric

98 Ibid, 89-90.
minimizing the implementation of *sharia* and advocating principles of equality, justice, freedom, and pluralism. The term *sharia* is never even mentioned in the entire program. There is however, an entire section devoted to Ennahda’s position towards women’s rights. Notably, the program pledged to give women full citizenship rights, to combat all discrimination and violence against women, and to protect women’s freedom and to encourage participation in the political, societal, and economic spheres. The program also addressed minority rights and freedom of expression. The program promised to “[ensure] equality of all citizens before the law, to [guarantee] human rights, public and individual freedoms, and freedom of the press and of association, and to [protect] the right to freedom of faith and conscience and the rights of religious minorities.”

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Chapter Five: Rebuilding the Ship while at Sea

This chapter narrates the constitutional processes in Egypt and Tunisia. It is separated into four sections. The first section traces the key events after the uprisings up to the formation of the Constitutional Constituent Assembly (CCA) in Egypt. The second section shifts to Tunisia and similarly outlines the important events after the uprisings up to the election of the National Constituent Assembly (NCA). The third section focuses on a critical period in the constitutional process when consensus broke down in Egypt and examines how the Muslim Brotherhood and non-Islamists reacted to this situation. The fourth section identifies a similar period in Tunisia when constitution making was severely tested and examines how Ennahda and non-Islamists responded to the crisis. The purpose of this chapter is to uncover the ways in which agreements and disagreements affected the constitutional process.

From Revolution to Constituent Assembly: The Egyptian Transition Design

The desire for constitutional change emerged early in Egypt’s uprisings. Said Arjomand observed that popular slogans written on posters made by protestors at Tahrir Square included “Constitution First!” and “No principles above the constitution.” However, design of the constitutional process would be crafted under the scrutiny of the Egyptian military.

On February 11, the Supreme Council of the Armed Forces (SCAF) forced Mubarak to resign and assumed control of the transition. Two days later, the SCAF dismissed the parliament and began the rocky process towards constitutional change. To satisfy the demands of the revolutionaries and ensure a quick restoration of order, the SCAF suspended the 1971 constitution.

constitution and created an eight-member committee of legal scholars that was instructed to draft amendments to the 1971 constitution.¹⁰³

Two weeks later, the committee released its proposed amendments. In addition to recommending the organization of presidential and parliamentary elections before drafting a new constitution, the committee also decided that the first parliament would appoint a 100-member constituent assembly.¹⁰⁴ The proposed amendments also gave the authority to supervise elections to the judiciary and removed the suspension of human rights in terrorism cases.¹⁰⁵ These proposals were then to be put forth in a national referendum three weeks later.

The transition design set out by the reference was the first major source of disagreement between the Muslim Brotherhood and non-Islamists. The referendum pitted the revolutionary forces against each other. On one side, the Muslim Brotherhood supported the referendum because it believed it was the quickest way to bring stability, establish civilian rule, and gain an influential position at the drafting table.¹⁰⁶ Liberals, secularists, and revolutionary youth opposed the referendum because they argued it did not provide a sufficient check against the military. Furthermore, they feared holding elections for a parliament first would allow the Brotherhood to use its superior organizing and mobilizing capacities to control the transition process.¹⁰⁷ This disagreement marked the beginning of the polarization between Islamists and non-Islamists that existed throughout the transition.

¹⁰⁴ ICG, “Lost in Translation.”
On March 19, the first popular vote of the transition took place. The referendum passed by a substantial margin with 77.2%.\textsuperscript{108} It appeared that 1971 constitution would stand at least for the near future. Two weeks later, the process suddenly changed course with a unilateral declaration by the military. This decision would cause complications when it came time to form a constituent assembly and approve the constitution.

On March 30, the SCAF, which quickly recognized that this constitution provided no legitimacy for the continuation of their rule, issued a constitutional declaration composed of sixty-three articles. Combined with the March 19 referendum, the March 30 declaration laid out the basic framework for the transition. First, parliamentary elections for a lower and upper house would take place. The MPs from both houses would then elect the CCA within six months. From there, the constituent assembly had six months to draft a new constitution. Finally, the draft constitution would be presented to the people, and a referendum would be held in fifteen days.\textsuperscript{109}

The declaration was problematic for several reasons. First, the public did not even know who wrote the document; the SCAF did not formally consult anyone else. Second, the referendum had suggested that the people held sole legitimate means to remove an article. However, the SCAF ignored this precedent by unilaterally abolishing many articles and retaining only the articles that suited its interests. Third, the SCAF dropped some of the amendments approved in the referendum, changed the wording of others, and added new ones. Fourth, the declaration included unclear language about several key aspects of the transition. Article 60 was perhaps the most problematic because did not set clear criteria for selecting members for the constituent assembly, which would undermine efforts to create a unified assembly.\textsuperscript{110}

\textsuperscript{108} Ibid.
The other important consequence of the March 30 declaration and the March 19 referendum is that they preserved the presidential system of governance. As noted earlier, presidential systems can make democratic transitions more difficult because it allows less space for consensual politics. It grants an individual leader a greater degree of power and limits the ability of minority parties to influence the political process after elections in a way that strengthens the transition. In short, “presidentialism is likely to foster a process of polarization in a divided society and often requires a coalition of the moderates with those taking more extreme positions.” In Egypt, no such coalition was formed, and the actions of the elected President Mohamed Morsi indeed polarized Egyptian society during the transition.

The transition then shifted to the electoral process. Suspicions grew between the Brotherhood and non-Islamist groups when the Egyptian security forces resorted to violent repression against protestors and put them on trial in military courts. Each side blamed the other group for betraying the revolution and fracturing the revolutionary unity. The Brotherhood maintained that elections were the best course of action because it would support the development of civilian rule and stabilize the political scene. On the other hand, the non-Islamist groups accused the Brotherhood of pursuing short-term partisan interests. On the eve of the first parliamentary elections, neither side trusted the intentions of the other.

Between December 2011 and February 2012, elections were held for the People’s Assembly (PA), the lower house of parliament, and the Shura Council (SC), the upper house. Islamist parties won a resounding majority. The Muslim Brotherhood earned the largest number of seats in both houses with a forty-three percent share in the PA and fifty-eight percent in the SC. The Salafi party, Al-Nour, came in second with twenty-two percent of the seats in the

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People’s Assembly and twenty-five percent in the Shura Council. Thus, these two Islamist parties controlled at least sixty-four percent in each house. Egypt’s liberal and secularist parties earned less than fifteen percent of the seats combined.\(^{113}\)

According to Article 60 of the March 30 Declaration, the members of the PA and the SC then proceeded to select members of the CCA. However, the article was unclear whether members of parliament (MPs) could also serve on the CCA or whether the body should be entirely composed of members drawn from society. This question again divided Islamists and non-Islamists.

The composition of the CCA was the second major disagreement between the Muslim Brotherhood and non-Islamists. The non-Islamist parties argued that MPs should not serve in the CCA because they would promote their partisan interests. Furthermore, they claimed that including MPs would turn the constituent assembly into a politicized body rather than one that sought an inclusive and consensus-driven constitution.

The Muslim Brotherhood argued for the inclusion of MPs because they had received a clear mandate in the most free and fair elections in Egyptian history to lead the constitution making efforts.\(^{114}\) The compromise reached was that fifty members could come from parliament and the other fifty would come from society. However, the issue of the CCA’s representativeness was never fully resolved and continued to be a source of conflict between the two sides.

On March 25, 2012, the two houses elected members for the constituent assembly. Twenty-four FJP MPs and eleven Al-Nour MPs out of the fifty drawn from parliament were named to the CCA. The fifty members from the electorate included constitutional law professors,


prominent public figures, chairmen of political parties, and Islamic and Coptic clerics.¹¹⁵ Combined with the independent candidates who were associated with Islamism, sixty-five seats in the CCA were held by Islamists.¹¹⁶ Several liberal and secular parties immediately objected to this composition, arguing that such a composition did not sufficiently represent the interests of minorities, youth, and women. Thus, they claimed the body was unrepresentative of the Egyptian people and would forsake genuine public participation and consensus-building.

The Egyptian Supreme Administrative Court (SAC) was sympathetic to this argument. On April 10, the SAC ordered the dissolution of the CCA based on the grounds that its inclusion of 50 MPs was a violation of the March 30 Declaration.¹¹⁷ The Muslim Brotherhood disputed this decision and claimed that Article 60 gave parliament the authority to form the CCA.¹¹⁸

Negotiations soon began between the SCAF and political parties to form a new constituent assembly. After intense deliberations, the parties agreed to a more equitable distribution of seats on June 10th. In contrast to the sixty-five seat Islamist majority in the first CCA, the parties decided that the second CCA would include fifty Islamists and fifty non-Islamists. It was also agreed that judges would have fifteen seats; Al-Azhar would have five; the Coptic Church would have four members. Ten public figures, ten revolutionary youth, seven members of the workers and farmers unions, and seven members of professional organizations would also serve in the CCA.¹¹⁹ However, just one day later, consensus broke down again. Several small liberal and secular parties withdrew from the assembly, accusing the Islamist parties of intending to violate the deal and monopolize the drafting.

¹¹⁷ “Egypt’s Supreme Administrative Court suspends embattled Constituent Assembly,” Ahram Online, April 10, 2012.
¹¹⁸ Gamal Essam El-Din, “Islamist MPs challenge SCAF and Al-Azhar on constituent assembly,” Ahram Online, April 19, 2012.
¹¹⁹ “Broad satisfaction over Egypt’s Constituent Assembly deal,” Ahram Online, June 10, 2012.
On June 12th, the PA and SC selected members for the second CCA. The membership of the second CCA again included some MPs, which raised the possibility of another dissolution by the courts. Nonetheless, the second CCA was more representative than the first. In an analysis of each member’s affiliation, Jayson Casper found that there were twenty FJP members, fifteen Al-Nour members, and between eleven and eighteen independents with Islamist sympathies in the second CCA. These numbers represent a substantial decrease from the proportion of Islamists in the houses of parliament. Although the make-up of the first CCA was overtly Islamist, one may thus find claims that the original composition of the second CCA was dominated by Islamists to be debatable.

The CCA established four committees to split the drafting responsibilities. Each committee was assigned a particular subject for the constitution. The four committees were: Basic Principles of the State, Rights and Freedoms, System of Government, and the Oversight and Regulatory Bodies Committee. Two additional committees were also created; one charged to initiate public dialogue and outreach and relay the people’s demands back to the four committees, the other composed of legal experts to review drafts to reduce any repetition or contradictions. Members were permitted to sit on up to two committees of their own choosing so long as each committee had fifteen members.

Lastly, according to the deal reached before its formation, the members of the CCA agreed to the rules of ratification. They expressed the desire that each article be approved by consensus. If consensus could not be reached, an article needed sixty-seven votes to pass. If this number could not be reached, the voting was to be delayed for 48 hours at which point the article

could be passed with fifty-seven votes. On June 18th, the CCA convened its first session and began its work.

**From Revolution to Constituent Assembly: The Tunisian Transition Design**

Following the Ben Ali’s departure on January 14, the leaders of his political party formed an interim government to rule during the transition. Acknowledging the calls for constitutional change, Mohamed Ghannouchi, the prime minister, created the High Commission for Political Reform, which was charged to carry out a constitutional reform process while maintaining the existing 1959 constitution. This commission was composed of prominent legal scholars and led by Yahd Ben Achour, a respected scholar of law and Islam.

Protestors soon grew frustrated with the interim government for the slow pace of reform and inclusion of former regime officials. Fearing that the nothing would come of the revolution, thousands of citizens organized a sit-in at the prime minister’s office. They demanded the resignation of the interim government and parliament, the suspension of the 1959 constitution, and the creation of a constituent assembly to write a new constitution. “Electing a new assembly to write a democratic constitution will get us out from this current situation. We have to stop working with the old constitution, because it was made by a dictator,” said Fakhreddine Madini, a protestor.

On February 27, Ghannouchi resigned and his government resigned. Fouad Mebazaa, the president, named Beji Caid Essebsi, a retired minister who had served under Bourguiba and Ben Ali, as prime minister. The High Commission for Political Reform retained its mandate. Yet,

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actors from civil society, professional organizations, and political parties continued to press the interim government for some degree of control over the transition. Thus, they formed the Committee to Safeguard the Revolution to create a more unified voice to negotiate with the government over the transition’s direction. The Committee brought together groups from a wide swathe of society, including the Tunisian General Labour Union (UGTT), Congress for the Republic (CPR), Tunisian Workers’ Communist Party, and Ennahda. Despite their ideological differences, the Committee pledged to take action only via consensus.126 This committee is the first key agreement between Ennahda and non-Islamists after the uprisings.

On March 3, the interim government responded to their demands. In a prepared statement, President Mebazaa announced elections for a constituent assembly, setting in motion the process of writing a new constitution in Tunisia.127 On March 15, the interim government merged the High Commission for Political Reform with the Committee to Safeguard the Revolution. This body—renamed the High Commission for the Realization of the Goals of the Revolution, Political Reform, and Democratic Transition—would be responsible for establishing a design for the transition.128

The Ben Achour commission, as it became known, assumed control over the transition. Stepan has described it as “one of the most effective consensus-building bodies in the history of ‘crafted’ democratic transitions.”129 The representativeness of the commission was a key aspect of its effectiveness. The commission was comprised of intellectuals, business leaders, lawyers, and representatives from twelve political parties, eighteen civil society organizations, including

129 Stepan, “Tunisia’s Transition and the Twin Tolerations,” 92.
trade unions, professional associations, and human rights organizations.\footnote{Daphne McCurdy, “A Guide to the Tunisian Elections,” POMED, October 2011.} This representation brought together multiple voices to collectively decide the design for the transition, which gave legitimacy to the resulting design of the constitutional process.

On April 11, the Ben Achour commission passed a set of measures outlining the framework for elections and establishing the formal basis for the democratic transition. All but four members voted affirmatively. These measures would prove crucial for ensuring an inclusive, representative, and legitimate constituent assembly. First, the commission decided that the first popular election of the transition would elect members of the NCA. This ensured that the constituent assembly would be directly elected by the people and be given a clear mandate to write the new constitution. Second, the commission decided not to organize an early direct election for a president. This meant that Tunisia would have a parliamentary system during its transition. This is important because parliamentary systems create opportunities for greater cooperation between more parties, allow more space for agreement and disagreement, and encourage moderation instead extremism, all of which are crucial during democratic transitions.\footnote{Linz, “Transitions to Democracy,” 154-155.} Third, the commission decided that a pure proportional representation system would determine the composition of the constituent assembly. Thus, the NCA would more likely represent a wider range of societal interests. Fourth, the commission ruled that all candidate lists must include alternating male and female candidates to ensure the active involvement of women in drafting the new constitution. Fifth, the commission set a clear limit and deadline on its authority. It decided to only focus on passing measures that were required to create a democratic government with the legitimacy to guide the transition. After the election, the commission would
disband, and the NCA would be the sole body with the authority to carry out the transition. These decisions make it clear why Stepan considered this body to be crucial to the success of Tunisia’s transition.

The first free and fair election in Tunisian history was held on October 23, 2011. Ennahda emerged as the clear winner, capturing forty percent of the vote and earning eighty-nine seats in the 217-member NCA. The fact that Ennahda won a plurality rather than a majority obliged the party to search for partners with whom to govern.

Following the election, Ennahda formed a coalition with CPR and Ettakatol, two secular center-left parties that had earned twenty-nine and twenty, respectively. The new government, which would come to be known as the “Troika,” represents another key agreement between Ennahda and non-Islamist parties. The stability of this alliance would be tested throughout the constitution making period, but leaders of all three parties remained committed to each other and to a democratic outcome. The strength of this alliance would prove crucial for the future of Tunisia’s transition.

On December 10, the NCA passed the Law on the Interim Organization of Public Powers. In addition to its basic mission to draft a constitution, the NCA organized this “mini-constitution” to establish the legislative powers of the NCA, the executive powers of the government, and the bylaws to govern how it would operate. According to an earlier document signed by most political parties in the Ben Achour commission prior to the election, it was agreed that the mandate of the NCA should not exceed one year. However, the agreement was “non-binding and many people assume[d] that it will not be honored.” The three parties of the

132 Stepan, “Tunisia’s Transition and the Twin Tolerations,” 92-93
133 “Final Tunisian Election Results Announced,” Al Jazeera English, November 14, 2011.
Troika divided the three main leadership positions; Hamadi Jebali was named prime minister, Moncef Marzouki, the leader of CPR, was named president of the country; and Mustapha Ben Jaafar, the founder of Ettakatol, was named president of the NCA.

The NCA divided the task of writing the constitution through the creation of six constitutional committees. Each constitutional committee focused on a specific subject. The six areas were the preamble, the bill of rights, legislative and executive powers, the justice system, constitutional bodies, and regional authorities. Each MP was assigned a committee and met three times a week to work on its area of the constitution. The distribution of MPs in each committee correlated in proportion to the representation of each party in the Constituent Assembly. This was important because it showed a desire to follow the standard of parliamentary systems. The leadership of each committee was similarly distributed; Ennahda MPs chaired three committees, whereas CPR, Ettakatol, and Modern Democratic Pole, a secular opposition party chaired one. These chairs also gathered on a constitutional coordinating committee to incorporate the sections received from the committees into a coherent draft.

Lastly, the NCA set up the rules for ratification. Upon the submission of the final draft, each article would be read aloud and voted on separately. Passage required a two-thirds majority vote. The NCA would then conduct a separate vote on entire draft. If the draft failed to garner a two-thirds majority, it would be referred to the coordination committee who must present a revised draft back to the assembly. If this draft also failed to earn a two-thirds majority, it would be put to voters in a referendum that would require only a simple majority. Thus, in January 2012, the NCA began its work drafting a new constitution.

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136 To see all of the NCA’s procedural guidelines, see “Tunisia: Constituent Assembly's Rules of Procedure,” trans. IDEA, December 16, 2011.
Crisis of Consensus: Egypt

At the start of the second CCA’s first meetings in mid-June, most political parties had agreed to its distribution of seats and the rules of procedure by which it was to operate. However, one month later, this agreement began to fall apart. During the first round of meetings in mid-July six members from the Egyptian Bloc, a small secularist alliance consisting of the Free Egyptians Party, the Egyptian Social Democratic Party and Al-Tagammu Party, resigned. Their stated intent was to allow greater representation for women, youth and Coptic Christians, while also protesting Islamist monopolization of the constituent assembly.139

Then in August, the CCA lost another non-Islamist voice. Manal El-Teiby, a prominent human rights activist, resigned her seat, protesting a smear campaign against her within the assembly.140 The trend to withdraw to protest the CCA’s representativeness continued in late September. On September 29, five non-Islamist and liberal parties and groups including the Egyptian signed a statement written by Mohamed El-Baradei to boycott the Assembly. The statement complained that the assembly did not have a “basic understanding of things that concern the Egyptian citizen, such as basic freedom, economic and social rights.”141

At this point, the status of the CCA was fragile, but the body could still conceivably carry out its work. Indeed, the four drafting committees continued to draft its articles and coordinate with the Editing Committee to smooth out inconsistencies and repetitions. The process appeared to be on track. On October 3, members of the CCA, Islamist and non-Islamist alike, signed a private document agreeing to most of the articles, including the controversial Article 2, Article 4,

139 “Political forces sign on ElBaradei call for Constituent Assembly boycott,” Ahram Online, September 29, 2012.
141 “Political forces sign on ElBaradei call for Constituent Assembly boycott,” Ahram Online.
and Article 219.142 Ten days later, the CCA announced it had finished a first draft and would begin plenary sessions to debate and rework the articles.143

Over the next month, the CCA deliberated over its draft. Opponents in the non-Islamist camp alleged that the CCA was operating in a nontransparent and nonconsensual way. However, Brown argued that the shortcomings of the CCA were, in fact, the opposite of this critique:

Part of the problem is that the process is actually too transparent and too consensual. The assembly has been doing most of its work by committee and in a consensual fashion; the body as a whole has not yet formally approved anything. Members leak drafts, the committee posts evolving clauses, partial drafts are released complete with notations of matters not yet resolved—and when multiple drafts pass into circulation and no votes are taken, it is difficult to tell where the text stands. Egypt’s assembly seems to be writing a wiki-constitution.144

Though this process was not ideal, the CCA seemed to be slowly progressing towards finishing a passable draft despite its critics. In early November, Farid Ismail, a Brotherhood member in the CCA, asserted that “points of consensus between all national forces are much greater than the points of contention” and that there was more than ninety percent consensus on all the articles.145

Then, the situation abruptly changed in mid-November. On November 17, the acting pope of the Coptic Church announced the withdrawal of all its members from the CCA. In his statement, Bishop Pachomios asserted, “The ongoing process within the Constituent Assembly will not guarantee a constitution that will provide national consensus or that reflects the identity of Egypt,” though he did not identify which particular articles the Church disagreed with.146 The next day, Ahmed Maher, a founding member of the April 6 Youth Movement, along with Amr

142 Diana Serôdio, “Signatures of key members of the Constituent Assembly agreeing to the text of key articles in the Constitution,” Arab West Report, April 18, 2013. The controversy concerning these articles will be discussed later.
143 “Constituent assembly announces first draft of new constitution,” Egypt Independent, October 10, 2012.
146 “Egyptian Churches Withdraw from Constituent Assembly,” Ahram Online, November 17, 2012.
Moussa, liberal politician Ayman Nour, assembly spokesmen Wahid Abdel-Meguid and thirty other members, also withdrew, expressing dissatisfaction that their demands were not being met.\textsuperscript{147} The farmers and journalist unions followed suited on November 18, mentioning the same grievances.\textsuperscript{148} This wave of defections put the assembly’s work at a standstill.

The response of the Muslim Brotherhood to this crisis is instructive in understanding the fate of the transition in Egypt, because it convinced much of Egyptian society that the Brotherhood was bent on dominating the political arena. This belief would lead many to appeal to the military to neutralize the Brotherhood.

Faced with the impending decision of the Supreme Constitutional Court (SCC) on the CCA’s legality and the six-month deadline set by the March 30 declaration, President Morsi issued a controversial constitutional declaration. It stated:

\begin{quotation}
“Previous constitutional declarations, laws, and decrees made by the president since he took office on 30 June 2012, until the constitution is approved and a new People’s Assembly is elected, are final and binding and cannot be appealed….No judicial body can dissolve the Shura Council [upper house of parliament] or the Constituent Assembly.”\textsuperscript{149}
\end{quotation}

The declaration instantly set off a media firestorm in Egypt. For critics, the declaration provided clear proof of the Brotherhood’s intent to consolidate all power. For the Muslim Brotherhood, the declaration offered the only way to break the stalemate and move forward with the transition. A more nuanced perspective by both sides would have been helpful.\textsuperscript{150} However, in this highly polarized environment, there was little room for nuance, and more Egyptians saw Morsi’s declaration as an attempt to seize more power.

\textsuperscript{147} “Revolutionary Youth Group Leader Quits Constituent Assembly,” \textit{Ahram Online}, November 18 2012.
\textsuperscript{148} “Journalists, Farmers Syndicates Withdraw from Egypt's Constituent Assembly,” \textit{Ahram Online}, November 20, 2012.
\textsuperscript{149} “English Text of Morsi’s Constitutional Declaration,” \textit{Ahram Online}, November 22, 2012.
\textsuperscript{150} On one hand, contrary to claims that Morsi was appointing himself dictator, the Muslim Brotherhood stressed that the declaration was only temporary and would be canceled as soon as the constitution was passed, which it hoped would take place within a couple weeks. On the other hand, the Muslim Brotherhood must have known that this declaration would alienate nearly everyone and should have sought other means to resolve the crisis.
President Morsi then ordered the CCA to complete the constitution as quickly as possible, which caused more members to depart and left only one non-Islamist party remaining in the CCA.\textsuperscript{151} To reach the necessary quorum of eighty-five members to pass the draft, the Islamist parties largely replaced the departed members with other Islamists. On the day of the vote, eighty-four percent of the CCA’s membership was Islamist.\textsuperscript{152} On November 30, 2013, the CCA approved the constitution in a sixteen-hour session.\textsuperscript{153}

The Brotherhood then organized a referendum to be held two weeks later in accordance with Article 60 of the March 30 declaration. Voting took place over two rounds on December 15 and 22. In total, sixty-three percent voted in favor of the constitution. However, turnout was thirty-three percent, meaning that only one in five Egyptians went to the polls to declare their support for the constitution.\textsuperscript{154}

\textbf{Crisis of Consensus: Tunisia}

In late July 2013, the assassination of Mohamed Brahmi, a leftist member in the NSC, sparked the most serious crisis to constitution making in Tunisia. One day after Brahmi’s assassination on July 25, sixty-five members of the NCA withdrew. They then called for a sit-in in front of the parliament building until the government and the NCA was dissolved and replaced with a national salvation government that would finalize the constitution, present it for referendum, and organize the next elections.\textsuperscript{155} The next day, thousands of people came to the

\textsuperscript{152} Casper, “Islamist Tendencies in the Constituent Assembly,” 43-44.
streets to demand the resignation of the government and the dissolution of the NCA due to its failure to provide adequate security.156

Massive protests and strikes organized by the National Salvation Front, a newly created coalition of opposition parties and civil society organizations, then multiplied throughout the country and in the capital.157 These protestors argued that the Troika government—Ennahda in particular—should be held accountable for the violence perpetrated under its watch. Furthermore, they claimed that the NCA no longer possessed any legitimacy because the one-year timeframe to draft the constitution had expired.158 As a result of these protests, political deadlock halted the constitutional process.

The response of the Troika government is essential for understanding the outcome of the transition in Tunisia because it allowed for consensus to be rebuilt, which led to the widespread approval of the resulting constitution. On August 7, NCA president Mustapha Ben Jaafar suspended the NCA’s work until all political parties joined in a national dialogue.159 Though this decision was extremely controversial and unpopular among protestors, the National Salvation Front, and other parties in the NCA including Ennahda, ben Jaafar and Ettakatol proved their commitment to democracy and preservation of the gains of Tunisia’s fragile transition. Early in the crisis, Habib Hamdi, a member of Ettakatol, stated, “There is openness to all proposals, including the formation of a government of national unity, but the Constituent Assembly is a red line for us.”160 In a later interview, Jaafar explained the logic behind his decision, “Putting the Assembly on recess wasn’t giving the pro-dissolution camp legitimacy,” he said. “These people

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weren’t as democratic as they said. Instead it showed that I’m sticking with rule of law, I’m sticking with this Assembly… I protected the Assembly.”

The suspension of the NCA eased some of the pressure and allowed space for a dialogue to be formed. However, the crisis persisted as the opposition continued to demand the resignation of the Ennahda-led government and the dissolution of the NCA. At the same time, Ennahda opposed dissolving the NCA. The party was also reluctant to turn over power to an unelected government of technocrats who may reintroduce the repressive policies of the former regime. A turning point came on October 6 when the Ennahda government and twenty other parties, aided by the mediation of the UGTT over the previous weeks, signed an agreement outlining a roadmap for the next steps to be taken to resolve the situation and resume work on the constitution.

The key provision of the roadmap was the resignation of Ennahda from government upon the passage of the constitution, which broke the political deadlock and allowed the transition to proceed. In agreeing to step down, Ennahda put the nation’s interest over its own partisan interests. In an interview after the constitution’s passage, Ghannouchi explained his rationale,

“We realized that although we had the right to retain power because of our electoral victory, the Tunisian people would not get a constitution without our stepping down... The opposition had withdrawn from the constitutional assembly and refused to continue drafting the constitution. We could have continued without them. But we would have produced a constitution for the Ennahda party, not the Tunisian people as a whole. So we took a difficult path towards general consensus.”

Despite its concerns, Ennahda could be satisfied that adoption of the constitution would prevent an interim government from cancelling elections and cracking down on the party.


The national dialogue between Ennahda and the opposition with the mediation of the UGTT resumed in late October and stretched into December.\textsuperscript{165} Even though the negotiations extended beyond the original deadlines set by the roadmap, the parties continued to negotiate. Finally, in mid-December, they settled on Mehdi Jomaa, a businessman, to serve as the prime minister until the next elections, which provided sufficient stability for the NCA to resume drafting the constitution and move towards voting.\textsuperscript{166} Thus, Tunisia successfully resolved its crisis of consensus. On January 3, 2014, the NCA began voting on the constitution.\textsuperscript{167} Three weeks later, after much debate and some revision to certain articles, the NCA adopted the constitution with over ninety-two percent in favor.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{165} “National dialogue begins in Tunisia,” \textit{Al-Jazeera}, October 25, 2013.
\item \textsuperscript{166} Tristan Dreisbach, “Mehdi Jomaa Chosen to Become New Prime Minister,” \textit{Tunisialive}, December 14, 2013.
\item \textsuperscript{167} Aziz El Yaakoubi, “Tunisia starts voting on new constitution,” \textit{Reuters}, January 3, 2014.
\item \textsuperscript{168} Notably, Article 6, which is discussed later. “Tunisia assembly passes new constitution,” BBC News, January 14, 2014.
\end{itemize}
Chapter Six: Constitutional Nuts and Bolts

This chapter narrows its focus to the aspirational content of the Egyptian Constitution of 2012 and the Tunisian Constitution of 2014. In particular, it prioritizes attention on the status of sharia, women’s rights, and freedom of belief, and how their construction fits within the establishment of a democratic system in Egypt and Tunisia. The reasoning behind prioritizing these areas is twofold. First, all four subjects are areas where Islamist movements face increased scrutiny and criticism by non-Islamist domestic and international groups. Second, these three areas are widely considered essential foundations for a civil democratic state. The purpose of this chapter is to assess the degree to which the framework for sharia, rights and freedoms devised by the Muslim Brotherhood and Ennahda was democratic by drawing out the specific text of relevant articles. Also, by explaining how these articles were formed, this chapter reveals the relatively high level agreement regarding constitutional content.

The Role of Sharia in Egypt’s Constitution

The Egyptian Constitution of 2012 retained sharia’s status from the 1971 constitution, which was established under the secular rule of President Anwar Sadat. Article 2 states, “Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principal source of legislation.”

Consensus on this article was reached rather quickly because preserving the construction of Article 2 served the interests of both the Muslim Brotherhood and their opponents among secular and liberal camps. Preservation of “the principles of sharia” in the constitution was

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crucial for the Brotherhood. The group’s party platform clearly articulated that a constitution with “enlightened principles of sharia as its frame of reference” was the only appropriate mechanism to create and regulate a democratic society based on equality, justice, and freedom.\footnote{“FJP 2011 Program on Freedoms and Political Reform.”}

At the same time, the Brotherhood found itself defending the article against Salafis who wanted to remove the word “principles.”\footnote{“Salafi-Brotherhood dispute over Article 2 of constitution escalates,” \textit{Egypt Independent}, July 25, 2012.} For secular and liberal groups, maintain the old wording of Article 2 soothed fears about the rise of an aggressively Islamist government. Since 1980, the SCC, which preserved its relatively independent status after the revolution, consistently limited the application of the article to determine the legal cases.\footnote{Abdelaal, "Religious Constitutionalism in Egypt: A Case Study," 35-51.}

Article 4 further defined sharia’s reach and power by granting consultative powers to al-Azhar, Egypt’s most influential religious institution. It states, “Al-Azhar’s Council of Senior Scholars is to be consulted in matters relating to Islamic Sharia.”\footnote{“The New Constitution of the Arab Republic of Egypt,” 3.} For some, this article was worrisome because it appeared to replace popular sovereignty with “divinely-inspired” revelation. But, at the same time, this article did not entirely favor the Muslim Brotherhood. While the Brotherhood had long called for al-Azhar’s independence, the resurrection of its Council of Senior Scholars, and a restoration of al-Azhar’s prestige, (all of which had suffered under Mubarak), Al-Azhar itself was more wary of this article, apprehensive that the Brotherhood would try to gradually place its own members on the Council.\footnote{Nathan J. Brown and Ahmed Morsy, “Al-Azhar Steps Forward,” Carnegie, November 7, 2013.} Al-Azhar, which is widely regarded as moderate, has disapproved of the politicization of religion and been historically distrustful of the modernist Salafism that informed the Brotherhood and Egypt’s
other Salafi movements.\textsuperscript{176} Thus, non-Islamists also stood to gain from this article, hoping to check the influence of Salafis and the Brotherhood.

Looking back at the text and its implications for democratic governance, Article 4 did not define the manner in which Al-Azhar was to be consulted and the weight its opinion was to carry. Zaid Al-Ali has argued that Al-Azhar was given “a role in inspiring the direction that the state should head in, without actually [being given] any hard political power.”\textsuperscript{177} Taking this point into account and Al-Azhar’s desire for moral authority, not authoritative codified political authority, one could have expected the actual role of Al-Azhar in matters of legislation to be relatively minimal.

Article 219 was unprecedented in that it explicitly defines the principles of \textit{sharia} mentioned in Article 2. Interestingly, the principles chosen were technical terms from Islamic jurisprudence seldom employed outside of scholarly circles.\textsuperscript{178} As Brown explained this article was the result of an odd compromise.\textsuperscript{179} Salafis, who were skeptical about the power of Article 2 given the SCC’s precedent, accepted a constitutional description of \textit{sharia}’s principles, even if these definitions favored Islamic legal tradition instead of a strict reading of the scriptures. Non-Islamists, who would have preferred no article at all, received assurance that even if \textit{sharia}’s principles were being defined, the Salafis would not control those definitions. The Brotherhood actually had less at stake in the article and did not push the debate one way or another. They were satisfied with Article 2, which they could claim legitimized their presence in society and implemented their vision of the state.

\textsuperscript{178} In English, they translate as general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community, but this doesn’t appropriately capture legal meaning.
These articles are important for constructing a workable relationship between religion and the state that is compatible with a democratic state. To assess this relationship, Articles 2, 4, and 219 must be looked as mutually reinforcing articles that reinforce each other rather than isolated articles that support a different vision of the system. Understood from against this backdrop, it becomes easier to realize that their construction represented a compromise agreed upon by non-Islamists, the Muslim Brotherhood and the Salafis, which sufficiently promoted each groups’ interests while curbing the threat of domination of one group. These three articles still allowed the SCC and parliament sufficient flexibility in applying or invoking *sharia*, and thereby did not prevent democratic governance to take root.

**The Role of *Sharia* in Tunisia’s Constitution**

In the Tunisian Constitution of 2014, the status of *sharia* is conspicuous for its absence. Article 1 is the only article that explicitly deals with Islam’s role vis-à-vis the state. It states, “Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic its language, and the republic its system.” In an interesting parallel to the case of Egypt, this article is also retained word-for-word from the previous constitution. Nonetheless, the omission of *sharia* from Tunisia’s constitution is particularly striking given *sharia’s* centrality to the message of nearly all other Islamist movements’ message.

Similar to Egypt’s deliberation over the status of *sharia*, consensus for the preservation of the previous constitution’s wording was reached rather quickly in a manner that served the interests of all parties. Soon after the 2011 election, the leaders of the political parties agreed to keep the first article of the previous constitution and that the term *sharia* would not be included anywhere. Ghannouchi affirmed that *sharia* was better understood as a set of moral values for

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individuals and societies rather than a strict code to be applied to a country's legal system, and noted "Egypt says sharia is the main source of its law, but that didn't prevent Mubarak from being a dictator."\(^{181}\)

In spring 2012, Ennahda began to revisit the question whether sharia needed to be included in the constitution. Though Ghannouchi and the other party leaders had previously voiced their support for its absence, this had not been an official, nationally representative position. The party then formally debated the matter in its Shura Council. As Marks notes, the question of whether to leave out reference to sharia turned out to be a non-issue. The party elites like Ghannouchi, who had long advocated a broader conception of sharia that stresses abstract principles instead of a set of specific rules, were able to create consensus within the rest of the party for not including the word.\(^{182}\)

The desire to maintain national unity was usually cited as the reason for keeping Article 1 unchanged. Ennahda decided to drop any mention of sharia from the constitution to avoid alienating liberal and secular groups in the country for whom overt reference to sharia was a non-starter. "Ennahda has decided to retain the first clause of the previous constitution without change," Amr Laarayedh told a local radio station at the time. "We want the unity of our people and we do not want divisions."\(^{183}\) Ghannouchi reinforced this opinion stating Article 1 affirms that “the Tunisian state is an Arab and a Muslim state, so it’s enough. Why add a concept that doesn’t have the same meaning to everyone? Sharia is a source of values. It’s not a set of laws.”\(^{184}\) With this construction of Article 1, the Tunisian constitution sets a valuable precedent for those seeking to reconcile Islamism and democracy in the Arab world.

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182 Marks, “Convince, Coerce, or Compromise? Ennahda's Approach to Tunisia's Constitution.”
184 Caryle Murphy, "Mr Ghannouchi Goes to Washington," The Majalla, March 5, 2014.
Women’s Rights in Egypt’s Constitution

The Egyptian Constitution of 2012 pledged equality for all its citizens, but it did not offer clear and sound commitments to gender equality and women’s rights. Article 33 states, “All citizens are equal before the law. They have equal public rights and duties. There can be no discrimination between them in that regard.” While this article’s message is arguably clear, it would have been stronger by if the grounds on which discrimination is prohibited were explicitly listed.

The wording of Article 10 regarding the involvement of the state in protecting the family created tensions with Article 33. Article 10 states, “The state and society oversee the commitment to the genuine character of the Egyptian family, its cohesion and stability, and the consolidation and protection of its moral values. The foregoing is as organized by law. The state….guarantees the reconciliation between the duties of a woman toward her family and her work.” This article could have justified an overextension of the state in the private affairs of women because gender was not explicitly named as grounds that prohibit discrimination in Article 33. However, in his analysis of the article, Zaid Al-Ali judged that copying and pasting of the article was more indicative of an assembly pressed to finish the constitution rather than trying to impose a religious state.

Less than a month before voting, MPs repealed an article from the draft constitution that would have explicitly mandated gender equality. It is not clear why they decided to drop this article, but it’s important to note that the decision was made in early November before the mass withdrawals.

Article 64 promoted equality in the workplace by stating “Work is a right, duty and honor for every citizen, guaranteed by the state on the basis of the principles of equality, justice and equal opportunities.”\(^{189}\) This left gender equality up for interpretation, instead of clearly defining its meaning and reach. Lastly, the constitution included no substantive mechanisms or commitments to empower women in the political arena.

**Women’s Rights in Tunisia’s Constitution**

By contrast, the Tunisian Constitution of 2014 explicitly and repeatedly guarantees gender equality and establishes the state’s responsibility to empower women. The constitution’s treatment of women’s rights was a particularly salient issue for Tunisian women. Since the enactment of Personal Statute Code in 1956, Tunisian women have had the right to divorce, maintain custody of their children, have enjoyed better inheritance rights compared to their counterparts in the Arab world, and received pensions as wives and divorcées. The Code also outlawed polygamy and established a minimum age for marriage.\(^{190}\) These progressive rights, unparalleled in the Arab world at the time, led Tunisian women to strongly advocate during the transition to make sure that their rights were protected in the constitution.

Following the publication of a draft constitution, a controversy broke out over part of the wording of Article 46, which appeared to discriminate against women. According to one translation, the contested part read, "The State guaranties [sic] the protection of women [sic] rights and the promotion of their gains, as a real partner of men in the mission of the homeland building, and the roles of both should complement each other within the household."\(^{191}\) Marches

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\(^{190}\) “Personal Status Code,” Islamopedia Online.

were organized across the country to protest this wording that defined women’s roles as “complementary” to men.

However, the dissatisfaction over this article may have been misinformed. Marks argues that an incorrect English translation of the draft article was to blame. She notes that the Arabic word translated into French and English as “complementary” could also mean “fulfill” or “complete one another,” which has no demeaning connotation. During the period of unrest, Ennahda also released a party statement asserting that the draft merely described the mutually complementary roles of men and women in the context of the family and that “equality of spouses” was emphasized in the very same draft. Ennahda dropped this part of Article 46, and the issue was resolved.

In its final version, the constitution contains four articles that explicitly guarantee gender equality and establish the state’s responsibility to empower women. Article 21 states, “All citizens, male and female alike, have equal rights and duties, and are equal before the law without any discrimination.” This explicit reference to women in its equality article stands in stark contrast to Egypt’s Article 33, which only implied gender equality. Article 40 unequivocally affirms gender equality in the workplace, the right to adequate working conditions, and a fair wage for both men and women.

Articles 34 and 46 charge the state to achieve gender parity in politics. The latter article declares equal representation for women and men as a priority for the state in the latter article. Article 46 also preserves Tunisian women’s progressive status in the Arab world by stating “The

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192 Marks, "Complementary Status for Tunisian Women," Foreign Policy, August 20, 2012.
194 “Constitution of the Tunisian Republic,” 7
195 Ibid, 11.
State shall commit to protecting women's achieved rights and seek to support and develop them.”

Taken together, these articles demonstrate Tunisia’s commitment to ensure a substantive role for women in society and politics, which is important in establishing the participatory dimension of a healthy democracy.

Freedom of Belief in Egypt’s Constitution

The Egyptian Constitution of 2012 guaranteed rights and freedom of expression to religious minorities, while reflecting Egyptian society’s cultural sensibilities. Building on principles of sharia, Article 3 explicitly gave Coptic Christians and Jews freedom over their religious affairs for the first time in Egypt’s history. It states, “The principles of Christian and Jewish laws are the main source of legislation for followers of Christianity and Judaism in matters pertaining to personal status, religious affairs and nomination of spiritual leaders.” In a party statement, the Brotherhood confirmed the protection of religious minorities was required by the principles of sharia, which “safeguards the rights of non-Muslims, granting them the full right to practice rites of their faith and referring to their own religious rules for their personal and private affairs.” Representatives from the Muslim Brotherhood, Al-Nour, Al-Azhar, the Coptic Church, and several liberal parties reached an agreement on this article after a meeting in early October.

Articles 43 and 45 established freedom of belief and expression in absolute terms. The former article states, “The freedom of belief is inviolable. The state guarantees the freedom to

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practice religious rites and to establish places of worship for the divine religions. This is as organized by law,” while the latter article affirms, “The freedom of thought and opinion is guaranteed.”\(^{200}\) The formulation of these articles was not disputed.

These freedoms were balanced by Article 44, which prohibited defamation of “all religious messengers and prophets.”\(^{201}\) Within Egyptian society, this article was relatively uncontroversial. Many Egyptians felt that there was a need to protect religion in the name of maintaining proper respect for religious values and preventing provocations that could incite instability. Thus, this prohibition against slandering religion represented the collective expression of a deeply religious population.

**Freedom of Belief in Tunisia’s Constitution**

Similarly to the Egyptian constitution, the Tunisian Constitution of 2014 delicately balances freedom of belief with the cultural sensibilities of a largely religious society. Article 6 guarantees freedom of belief and religious practices. Notably, however, it also calls on the state to “[spread] the values of moderation and tolerance.” The state is also supposed to fulfill this duty by “protecting sanctities and preventing attacks on them,” as well as “preventing calls of takfeer [declaring another person an apostate] and incitement to hatred and violence.”\(^{202}\)

The construction of the article developed as a compromise between Ennahda and non-Islamist groups. On the one hand, blasphemy is a deeply sensitive issue to Ennahda’s identity,

\(^{201}\) Ibid, 8 and 11. In evaluating this provision, it is important to remember that freedom of expression is not absolute in most democracies. Indeed, in Germany, it is illegal to hang a Nazi flag or deny the Holocaust, which reflect that country’s experiences during World War II.
\(^{202}\) “Constitution of the Tunisian Republic,” 4-5.
which led the party to introduce an article in the first draft that criminalized blasphemy.\textsuperscript{203} Members supported the article on the grounds it would protect public order and security, or dissuade Tunisians from sinning against God by insulting religion, or protect against future restrictions on the open practice of Islam like under the former regime.\textsuperscript{204}

Ultimately, these members yielded to the majority after long conversations with local and international experts, which made them realize that the constitution was “not the place for criminalizing legislation,” as Marks records.\textsuperscript{205} To compromise, they pushed to include a reference to the state’s responsibility to protect religion. For their opponents, the demand for protection against takfeer arose when Mongi Rahoui, a member of the NCA, received death threats after another NCA member claimed on a radio program that Rahoui was hostile towards Islam.\textsuperscript{206} The latter half of Article 6 was only added and agreed upon during the January voting. The result of these competing concerns and consultation was an article that checks fanaticism from all sides.


\textsuperscript{205} Marks, “Convince, Coerce, or Compromise? Ennahda's Approach to Tunisia's Constitution,” 24-25.

Chapter Seven: Democracy Curtailed and Cultivated

The sharp divide in the outcomes of Egypt and Tunisia’s experiences with democratization begs the question why did their paths diverge. In Egypt, constitution making was unsuccessful in drawing Egyptians together to resolve their differences and to build consensus around the creation of a new Egyptian state. Instead, ill-fated constitutional process epitomized the lack of consensus that hampered Egypt’s transition. Angered by the rushed process, non-Islamists gathered support in society to appeal to the military to resolve their conflict. Egypt’s transition thus abruptly ended with the military’s coup. In Tunisia, constitution making was successful in bringing Tunisians together to work beyond their differences and build consensus on the direction of their transition. Tunisia’s transition ended with the second free and fair elections since the uprisings and a peaceful transfer of power and proceeded towards the consolidation of democracy.

In assessing the different outcomes in Egypt and Tunisia, it is important that we do not point to the presence or absence of deep ideological divides as the primary explanation. Islamists and non-Islamists alike in both countries disagreed on a number of issues and did not fully trust each other’s intentions. This is not surprising. Ben Ali and Mubarak had silenced all opposition voices, so society did not have the opportunity to freely debate and settle key issues. The regimes’ propaganda further pitted different groups against each other. Only once the regimes fell did society have an opportunity to engage in dialogue and settle those differences. So the key variable here is not the presence of ideological divides, but the willingness to engage in dialogue to resolve those differences and build consensus.
In Tunisia, political actors on both sides of the aisle were willing to work together for the country’s interest despite their differences. The key examples of agreement are the formation of the Committee to Safeguard the Revolution that merged with the Ben Achour commission, the Troika government, and the peaceful resolution of the crisis of consensus. The Ben Achour commission was a representative body that preserved the revolutionary consensus. It was essential to the success of the transition because it established a design for the transition that all actors agreed to and organized the elections that yielded an inclusive and representative NCA. The Troika government allowed Ennahda, CPR, and Ettakatol to share power over constitution making, which effectively prevented the domination of any one party. Lastly, Tunisia was able to navigate its crisis of consensus that threatened to derail the transition. Here, these parties demonstrated a commitment to a democratic transition by halting work on the constitution, engaging in dialogue and making compromises to resolve the crisis, and only moving forward once consensus had been reached. These series of actions successfully resolved the crisis. When drafting resumed, there was sufficient agreement to proceed to voting and ratification in a short time. The provisions concerning the status of *sharia*, women’s rights, and freedom of belief and expression also illustrate the agreement reached by both camps.

In Egypt, political actors on both sides of the aisle were largely not willing to work together to put the country’s interest over their own partisan interests. The constitutional content was not the cause of this discord contrary to the view of most analysts. Differences over the status of *sharia*, women’s rights, and freedom of belief and expression were worked out in the CCA and agreed upon prior to the mass withdrawals in mid-November.

However, disagreements over the constitutional process proved fatal for Egypt’s transition. The key examples of this are the March 19 referendum, the formation of the CCA, and
the absence of a broadly accepted resolution to the crisis of consensus. The March 19 referendum fractured the revolutionary consensus and amplified the mistrust between the Brotherhood and non-Islamists. It established a transitional design that caused many non-Islamists to be reluctant to engage in the process and lose faith in the transition. The formation of the first and second CCA created an enduring controversy over the degree to which it was representative of Egyptian society. The Brotherhood argued that their victory in the parliamentary elections gave them the right to assume a leading role in the CCA. Non-Islamists vehemently disagreed and withdrew from the second CCA despite the fact that it originally contained twenty FJP members. Lastly, Egypt did not successfully navigate its own crisis of consensus. The actions taken by the Brotherhood and non-Islamists during this period demonstrated a lack of consideration for the democratic nature of the transition. Though members of the CCA had reached an agreement on the construction of most articles by mid-November, non-Islamists MPs abruptly withdrew from the CA rather than engage in dialogue with the Brotherhood to resolve their disagreements over the process. For its part, the Brotherhood did not sufficiently pause to attempt to reconstruct any semblance of consensus. Instead, it moved to quickly finish and vote on the constitution, which further aggravated the already tense situation.

This discussion of the salience of cooperative political actors in Tunisia raises the question why did more such actors exist in Tunisia and not in Egypt. Marks offers a compelling argument explaining why Ennahda and non-Islamists in Tunisia collaborated during the transition. She identifies actors on both sides who were more inclined to cross-ideological consensus-building, which she terms “pluralists.” In contrast to the pluralists, she labels the more intransigent actors in both camps as “purists.” She argues that the groundwork for cooperation between the pluralists in Ennahda and non-Islamist parties during the transition was laid years
before the revolution. She points to two examples of cross-ideological cooperation that took place in the 2000s. First, in 2003, representatives from Ennahda formally met with representatives from CPR, Ettatakol, the Progressive Democratic Party (PDP, another secularly oriented party) and ten independent human rights NGOs in Aix-Marseille, France. The meeting resulted in the signing of the “Call of Tunisia,” a document that aimed to develop a “political contract establishing a democratic society.” Notably, the representatives agreed to work towards the creation of a “pluralist, tolerant society” based upon freedom of belief, gender equality, and the protection of other social and economic rights. They also called for a new constitution to establish a democratic political system based of popular sovereignty as the sole source of legitimacy and recognition of all universal human rights. The meetings succeeded in bringing the pluralists together and building cross-ideological cooperation.

In 2005, more political parties and civil society and human rights activists joined these same parties form a more unified opposition against Ben Ali. The result was the “October 18 Collective,” a movement that aimed to “achieve a common vision of a minimum democratic standard” and provide a opportunity for actors to work together. Soon after the creation of the October 18 Collective, these actors signed a document called “Defending the Rights of Society: Grounds for Common Political Work,” which outlined three principles that formed the foundation of the Collective: (1) the principle of equality (no discrimination based on social, sexual, or cultural origin; (2) the principle of national sovereignty; and (3) the principle of rejecting violence as a means to resolve political or ideological differences.

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210 Marks, “Purists vs. Pluralists.”
211 Marks, “Purists vs. Pluralists.”
The “Call of Tunis” and the “October 18 Collective” expressed a common vision for a democratic state that transcended the ideology of Islamists and non-Islamists. The assurance of a shared desire for democracy enumerated in these documents may explain why Ennahda and non-Islamist pluralists cooperated during the transition. Thus, these pluralists could trust each other enough to engage in dialogue and compromise. Indeed, it was these same actors that came together to create the Committee to Safeguard the Revolution. Ennahda reached out to CPR and Ettakatol to form a coalition government. These three parties showed a commitment to re-establishing consensus during the political crisis of 2013.

Applying Marks’ terms to Egypt, the purists in Egypt prevailed over the pluralists who did not have anything solid from which to draw upon prior to the uprisings to form a basis for cooperation. Pluralists from the Brotherhood and non-Islamist camps did succeed in creating constitutional content to which most parties gave their approval. However, this achievement was overshadowed by the major disagreements over the constitutional process. Purists in the secular camp chose to withdraw from the CCA to express their disapproval rather than engage in dialogue to resolve their disagreements. Purists in the Muslim Brotherhood chose to proceed in adopting the constitution without pausing to work out the numerous objections voiced by opponents. These actions by both groups undermined the legitimacy of the constitution, which proved fatal for the outcome of the transition.

**Conclusion**

The Egyptian Constitution of 2012 and the Tunisian Constitution of 2014 are substantial improvement on their predecessors, in terms of protecting fundamental human rights and freedoms. They also laid the foundation for a potentially unprecedented consolidation of
democracy in the Arab Muslim world. In an official statement, Ghannouchi expressed the extraordinary significance of the new constitution:

> The Constitution adopted by the National Constituent Assembly, almost unanimously, is the most elevated embodiment of what national consensus can achieve in Tunisia, ensuring protection of freedoms and defense of rights in complete harmony with Islam and its principal aims.\(^{212}\)

This quote encapsulates the essence of both documents, namely, that the creation of a democratic system of governance guaranteeing human rights is compatible with Islam. The text of these constitutions suggests that the principles of Islamism and those of democracy are not mutually exclusive. In fact, it was the Muslim Brotherhood and Ennahda’s respective understandings of *sharia* guided them to aspire to create a democratic system and write articles enshrining equality and freedom of belief in their constitutions. During the drafting stage, the Brotherhood declared in a party statement, “*Sharia* further aims to create a cooperative, supportive society based on equality, justice and mutual respect, and the establishment of good governance that focuses on serving the people, achieving justice between citizens,… and affirming human rights.”\(^{213}\)

Likewise, Ghannouchi affirmed Ennahda’s position: “I believe the essence of sharia is in our constitution - it is the way of thinking that underlines the constitution, embodying the values of freedom, justice and unity. It is there with all these representations.”\(^{214}\)

Looking back on the transitions, we can begin to see the three dimensions of democracy—competition, participation, and a level of civil and political liberties—begin to take root as a result of constitution craft. A wide range of parties participated in competitive elections

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\(^{213}\) “Muslim Brotherhood Statement on Islamic Law and National Identity.”

for the first time in Egypt and Tunisia. However, the development of healthy participation in Egypt stalled soon after the formation of the first CCA, which adversely affected the transition.

After their promulgations, the paths of each constitution diverged significantly. Revisiting Widner’s four dimensions of a constitution’s success, the Egyptian constitution of 2012 falls short in the durability and peaceful conflict resolution categories and receives an incomplete in the protection of rights and self-enforcing categories. The constitution lasted only seven months. In its brief lifespan, the constitution actually worked to limit the power of the Muslim Brotherhood in the SC and the presidency and increased tensions between Al-Azhar and the Brotherhood due to the former’s new role.215 Thus, the constitution did provide some opportunities for non-Islamist groups to participate and challenge the power of the Brotherhood through democratic means if they so chose. Despite this, tensions between the Brotherhood and its opponents escalated in the months following the passage of the constitution, and the number of opponents to the Brotherhood multiplied.

Yet, the constitution’s content itself was not to blame—although the constitutional process was contested. Brown verifies that “most of the complaints in Egypt about the document are about process—who wrote it and how—, and far less about content.”216 The intense polarization that resulted from the constitutional process prompted many Egyptians to turn to the military to neutralize the Brotherhood.

The resulting coup carried out by the SCAF in July 2013 and abrogation of the 2012 constitution meant that it would never fully realize its potential to support a consolidation of democracy. Questions of its ability to do so will remain forever unanswered. The probability that current constitution, hastily written in an exclusive process and passed in an unfree referendum,

will fulfill this role is highly doubtful. Sisi’s regime is characterized by a complete disregard for protecting any rights and freedoms. The scale of persecution of the Brotherhood is unprecedented in Egyptian history. Other groups who dare criticize the regime face similar repression.

Thus, the failure of constitution craft in 2012 to stabilize the political situation and facilitate a consolidation of democracy weighs heavily on Egypt’s future. The consequences of this tragedy extend beyond Egypt’s borders. The military’s coup legitimizes the arguments of radical Islamist movements who claim that democracy is a sham. Furthermore, it threatens to convince the Brotherhood and other more moderate Islamist movements that peaceful battles at the ballot box cannot achieve what violent battles on the street can. Finally, stabilizing impact that a democratic Egypt could have on the rest of the region is lost for the foreseeable future.

In contrast to the Egyptian Constitution of 2012, the Tunisian Constitution of 2014 is alive and well. Moreover, the constitution appears to be strengthening democracy in the country. Regarding Widner’s four dimensions of a constitution’s success, the 2014 constitution appears to be on the way to accomplishing all four. The constitution seems like it will last for the foreseeable future. Conflict resolution takes place peacefully through democratic institutions. Rights are better protected than before 2011, but work still needs to be done. Many constitutional articles guiding the creation of new laws and policies.

In the fall of 2014, parliamentary and presidential elections were held to replace the NCA. The electoral law governing the parliamentary elections required alternating female and male party lists on, operationalizing Articles 34 and 46. The free and fair nature of those elections and the peaceful transfer of power that followed are indications of the constitution’s

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stabilizing influence.\textsuperscript{219} In addition, the desire for inclusivity that characterized the constitution making period appears to have carried over into the formation of Tunisia’s government.\textsuperscript{220}

Tunisia’s consolidation of democracy is not yet assured and requires further hard work.\textsuperscript{221} The recent imprisonment of Yassine Ayari, a Tunisian blogger, for criticizing the military demonstrates the progress needed regarding freedom of expression.\textsuperscript{222} The ongoing threat of militant groups and the recent terrorist attacks at the Bardo museum have also tested the government’s ability to balance the need for security with civil liberties protections.\textsuperscript{223}

Nonetheless, Tunisia’s successful experience with constitution craft has greatly increased the likelihood that democracy will take firm root in the country. Ennahda’s ongoing role in that development suggests that Islamist movements can, in fact, positively contribute to such a system and offers an example to other Islamist groups in the region as how this can be done. While Tunisian model cannot be exactly replicated elsewhere, it serves as an inspiration for all who believe Islam and democracy are compatible in the Arab world.

\textsuperscript{222} Adeline, Bailleul, “Blogger's case tests Tunisia's tolerance for dissent,” \textit{Al-Jazeera}, February 25, 2015.
\textsuperscript{223} International Crisis Group, “Tunisia’s Borders (II): Terrorism and Regional Polarisation,” Briefing no. 41, October 21, 2014.

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For more information contact Danny Postel at dpostel@du.edu