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Constitutional Reform
in Young Arab Democracies

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>> Across the Arab world, emerging democracies are set to re-write the fundamental rules of their political order. Revolutionary Tunisia, Egypt and Libya are about to embark on drafting new constitutions as a clean break with their authoritarian past. A look at both successful and failed transition experiences from around the world provides useful evidence of the main pitfalls of constitutional reform.

How to sequence constitutional reform with elections will involve a trade-off between the stability and legitimacy offered by early elections, and the political and legal vacuum arising from establishing a new political order without the foundation of a basic legal consensus.

Legitimacy is the cornerstone of the broad national consensus any constitution must represent. Non-elected interim governments in Tunisia, Libya and Egypt have been faced with varying degrees of public discontent and protests in response to the lack of participation, transparency and inclusion in the drafting process of the respective constitutions.

An insufficient inclusion of ethnic and/or religious minorities in the new order, and in particular the exclusion of former regime loyalists, fosters a social polarisation which can endanger the whole transition process. The deliberate integration of the 'losers' of the revolution into the new political order, although facing considerable resistance, will in the long run be better for national cohesion.

Constitutional reforms in emerging Arab democracies will need to achieve a de-concentration of power by decentralising decision-making

HIGHLIGHTS

• Revolutionary Tunisia, Egypt and Libya are about to embark on drafting new constitutions as a clean break with their authoritarian past.

• Challenges include sequencing constitutional reform with elections; ensuring broad legitimacy; preventing polarisation via inclusion; and the de-concentration of political and economic powers.

• A look at constitutional reform experiences from around the world sheds light on how similar challenges were confronted.

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»»»» and resources, instituting a strict separation of powers with checks and balances, and establishing effective safeguards to protect human rights and civil liberties.

CONSTITUTIONAL RUPTURE IN TUNISIA, EGYPT AND LIBYA

Unlike in Egypt and Libya, the Tunisian interim government has bowed to popular demand to prioritise the drafting of a new constitution over early elections. A Political Reform Committee composed of legal and political experts, representatives of civil society, and political parties from across the spectrum has been entrusted with drafting transitional laws and steering the transition process. The newly elected constituent assembly will draft a new constitution, which will then be put to public referendum. Unlike the transitional roadmaps in Egypt and Libya, the Tunisian document sets no time limit for the drafting.

The integration of Islamists in the political process and, more specifically, the place Islamic principles will take in the new constitution, will be a particularly demanding challenge for Tunisia's secular system which outlawed and oppressed Islamists for decades. For the first time in the country's history, legal Islamist parties will contest elections, with the role of religion in the nation's new political setup sure to be controversial. The Islamist-secularist division under the Ben Ali regime has left its mark on the political culture. The withdrawal of Tunisia's most popular Islamist party, en-Nahda, from the Political Reform Commission in protest at the postponement of elections until October could be a sign of a dangerous polarisation. The participation of all relevant political movements in the constitutional drafting process will be crucial for the new constitution's legitimacy and success.

Boosting voter education and awareness will have to be done quickly. Registration and voting procedures are not clear, particularly in rural areas. A recent poll showed that, while 95 per cent of Tunisians planned to vote in the 23 October elections, over half of them had no or only a vague idea of what they were actually voting for, with some expecting to elect a new president and others expressing hope that the constituent assembly would take over government tasks.

In Egypt, the sequencing dilemma was illustrated by the public controversy over whether 'Constitution First' or 'Elections First' was the best way to lead the revolution toward democratic order. The ruling Supreme Council of the Armed Forces (SCAF) has outlined the course of the transition period in an unequivocal sequence: parliamentary elections starting on 28 November, followed by the election of a constituent committee (consisting of and chosen by members of both houses of parliament) which will have six months to draft a new constitution before it is put to referendum.

The SCAF, initially hailed for siding with the revolutionaries against Mubarak, is now viewed by the public with a suspicion that recalls Mubarak's time. The military council's chaotic ad-hoc transition management has been marked by a lack of transparency, participation and coherence. In March, the SCAF put a number of amendments to Egypt's 1971 constitution to referendum, only to publicly issue a set of different amendments only a few weeks later. Decisions regarding the constitutional reform process were largely taken top-down by the SCAF, which has been rejecting a truly inclusive formal consultation process. A swift withdrawal of the military leadership from its current governing tasks will be a major challenge to Egypt's constitutional process. Remarks by leading generals hinting that Egypt should follow the Turkish example of establishing the military as a constitutional safeguard of democratic order are not encouraging. Recent violent clashes between Copts and the military have been interpreted by many as a SCAF plot to prolong its rule.

Libya's Transitional National Council (TNC) in July presented a draft interim constitution, which

includes a clear timetable for the rest of the transition period, leading up to the adoption of a definitive constitution. It sets a clear sequence of events and deadlines: within eight months of the fall of the Gaddafi regime elections for a National Assembly must be held, after which the TNC has to step down. An elected committee will then draft a new constitution which will be adopted by the Assembly and put to public referendum.

While the roadmap itself embraces the principles of transparency, participation and inclusion, the way the document was drafted did not. The TNC has been accused of representing only Eastern Libyan and NATO interests. Protests broke out in August against the opaque way in which the self-appointed TNC had nominated a number of former Gaddafi loyalists as members of a new government without prior consultation. The TNC's lack of transparency had previously been noted with regard to oil deals. As a self-appointed body with considerable power during the transition period, the TNC will need to ensure a more inclusive and transparent process if it wants to remain legitimate in the eyes of Libyans and international partners.

Widespread fears that Islamists may hijack the constitutional process have been used by military leaderships to justify their continuing political role

Challenges to constitutional reform in Tunisia, Egypt and Libya include how to sequence constitutional reform with elections; ensuring broad legitimacy; preventing polarisation via inclusion, and the protection of minorities; and the de-concentration of political and economic powers. A look at the experiences of constitutional reform in other regions sheds light on how similar challenges were confronted.

LESSONS FROM INTERNATIONAL EXPERIENCES

In terms of sequencing, the case of Kenya illustrates the trade-offs that any choice of sequence requires. Following the crisis of 2007-08, a government of national unity (GNU) was formed in Kenya before the drafting of a new constitution. This specific sequence adversely affected prospects for greater inclusiveness in the longer run, as political jostling and dysfunction within the GNU blocked a number of key legislations needed to implement important provisions of the 2010 constitution.

Practical actions to enhance legitimacy may include not only elections for a constituent assembly but also an inclusive, transparent drafting process, stakeholder consultations, civic education, independent electoral observation and the approval of the final text by referendum. Kenya's overall constitutional reform process received international praise for the participatory way in which the reform was approached. Far-reaching civil society stakeholder consultations were rightly seen as an important factor in the process of national reconciliation. The consensual reform agenda generated in this process fed into the new constitution, which was approved by referendum in 2010 by almost 70 per cent of the electorate.

A downside of the requirement to ensure legitimacy via transparency, participation, inclusiveness and electoral representation is that all these tend to come at the expense of time and efficiency. In Nepal, disagreement between the various actors on federalism, ethnic proportional representation and religious diversity in the constitution has led to a stalemate in the political reform process. In a similar vein, the case of South Africa illustrates the trade-offs that can arise between efforts to ensure legitimacy and greater economic inclusion. Politicians' failure to redistribute the economic pie in a more equitable way led to the emergence of new spoilers in recent years. Actualising constitutional safeguards for economically vulnerable ⟩⟩⟩⟩⟩⟩

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groups now presents the most serious challenge to South Africa's constitutional order.

The importance of the inclusion of all societal groups in the new arrangements has been widely emphasised in transition literature. Cases abound in which pragmatic pacts between rivals have played a key role in providing the stability that allowed for a peaceful transition. Spain is typically held up as an example of a successful pacted transition. Built on a broad consensus in spite of significant divides, including the deliberate and systematic inclusion of former Franco loyalists, the Spanish transition was a complex bargain. The pacted transition also had some drawbacks, however, such as the lack of transitional justice which continues to haunt the country almost four decades later. The 1989 constitutional reform in Chile constituted a pact between the military and the opposition in which the former retained significant autonomy and privileges in exchange for political liberalisation. The result was a successfully steered transition with an institutionalised coordination between the opposition and the right/military. While this trade-off provided stability, it also institutionalised the military's far-reaching autonomy from civilian control in the long term.

The dangers inherent in the exclusion of specific groups are clearly demonstrated in the case of Iraq. The country's history of sectarian conflict was reflected in the foreign-managed post-war 2005 constitutional reform. Although a consensus in favour of the new constitution was eventually forged, both the drafting and the referendum process were marked by sectarian tensions between the Shi'a majority and the Sunni minority as the latter felt its rights and interests were being undermined. As the war shifted power from Sunni to Shi'a, the former came to perceive the post-war order as a form of vengeance, which has perpetuated ongoing violent tensions. Iraq's example illustrates the risks of excluding the 'losers' from actively participating in the new order. An equally negative example is the government of Sri Lanka who has driven a deliberately exclusionary course toward the Tamil minority following the brutal defeat of the Tamil Tigers. Constitutional

reforms helped the government implement exclusionary policies by reinforcing the powers of the president. The systematic policy of excluding the Tamil minority from political and economic decision-making is likely to lead to more conflict in the long run, thus reducing the prospects of a peaceful transition.

The constitutional reform process in South Africa in the mid-1990s was a compromise which explicitly protected the political and economic interests of the incumbent regime and its military and security forces. The deliberate emphasis on inclusive consensus-building provided both sides with enough safeguards. Crucially, the African National Congress agreed to a period of transitional power-sharing, and a pledge to protect the jobs and incomes of civil servants, army and police. Timothy Sisk notes that the far-reaching 'concessions to potential spoilers of the pact brought these parties into the Government of National Unity at the eleventh hour and averted a bloody showdown (...)'. In Kenya, in turn, the population chose to address highly contentious issues in the new constitution over pandering to the demands of potential spoilers. As a result, obstructive politicians and powerful security figures have successfully slowed down constitutional implementation ever since.

The inclusion of religious and ethnic minorities and former regime figures will be among the main pitfalls of emerging Arab democracies' constitutional reforms, and their democratic prospects on the whole. The Libyan TNC's vow to include Gaddafi loyalists not accused of crimes against humanity into the new interim government has fostered country-wide protests. The protection of the rights of religious and ethnic minorities, namely Copts in Egypt and Berber and Sub-Saharan Africans in Libya, will be another central challenge in post-Arab Spring constitutions. The notable absence of any form of specific ethnic or racial identity in the Libyan draft interim constitution stands in stark contrast to Morocco's recent introduction of an explicit reference to Berbers, and the Tamazight language, in its constitution.

A de-concentration of power, both political and economic, via constitutional reform has proven a major challenge across the world. During and after popular revolutions in post-communist Europe constitutional amendments were used by both old and new regimes to cement their hold on power. In Ukraine, when faced with the prospect of losing power to the opposition, the authoritarian Kuchma government amended the 1996 constitution in the midst of the 2004 electoral crisis leading up to the Orange Revolution. The amendments changed Ukraine's political system from a presidential to a parliamentary system, and were widely considered a rushed, and ultimately, unsuccessful attempt by the Kuchma regime to resolve the electoral crisis in its favour.

The instrumentalisation of constitutional reform to consolidate incumbent rule, however, has not been a tactic exclusive to unelected authoritarian regimes. When former Georgian Rose Revolution leader Mikheil Saakashvili approached the constitutional limits of his presidential rule in 2010, he introduced a set of amendments to reduce the powers of the president in favour of the prime minister. These have been criticised as an attempt by Saakashvili to bypass presidential term limits and – echoing the current setup in Russia – maintain his hold on power via a strengthened prime ministry. Venezuela's constitution, first promulgated in 1999 under Hugo Chávez, is another case in point. Amendments adopted in 2009 on Chávez's initiative allowed for unlimited re-election of the president and other key offices, creating conditions favourable for authoritarian rule.

By contrast, the 2010 constitution of Kyrgyzstan has been widely hailed as a successful attempt to decentralise power via a democratic constitution in a post-revolution context, this in a region where highly centralised strongman rule is still the norm. Having ousted two power-abusive presidents via revolution in five years, the Kyrgyz people approved a new constitution in July 2010, shifting Kyrgyzstan to a parliamentary system and establishing particularly far-reaching safeguards preventing a concentration of power in the hands of one person or branch of government.

CONCLUSION

In the post-revolutionary settings of Egypt, Tunisia and Libya, ensuring the right sequencing for a legitimate, inclusive constitutional process that will lead to a de-concentration of powers and a peaceful democratic transition is a complex challenge.

First, balancing public demands for electoral representation with democratic legitimacy through swift constitutional reform will remain a fragile tightrope in emerging Arab democracies. On the one hand, the holding of parliamentary elections before constitutional reform may be preferable if the interim government is weak or lacks legitimacy in the eyes of the people, as is the case in Egypt, and increasingly so in Libya. On the other hand, as the repeated postponing of polls in all three countries has shown, in a region with weak or no political parties and low electoral capacities, holding genuinely democratic elections within just a few months of a revolution is illusory. In Egypt, quick elections under a pre-revolutionary electoral framework will not only foster destabilisation, but also distort political competition in favour of well-established parties, in particular the Muslim Brotherhood and former NDP stalwarts. In contrast, Tunisia's choice of holding constituent assembly elections first is susceptible to leaving a non-elected interim leadership in charge for too long, thereby increasing the chance of the abuse of power.

Second, constitutional drafting processes in Libya, Egypt and, to a lesser degree, in Tunisia, currently lack the popular legitimacy needed for the final text to provide the basis for a fresh start towards a sustainable democratic order. As non-elected interim leaderships with substantial influence throughout the transitional period, the SCAF, the TNC and the Tunisian interim government all need to pay much closer attention to a systematic application of transparency if they wish to avoid being swept out of power by angry crowds.

Third, the inclusion of all political parties, regions, ethnic groups, tribes and religious/sectarian ⟩⟩⟩⟩⟩⟩

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〉〉〉〉〉〉 organisations in the new societal consensus will be fundamental for the stability of the ensuing transitions. In Tunisia and Egypt, where people have stood up for the new order, and even more in Libya where change has come at the price of civil war, people naturally feel a strong ownership over the legacy of their struggle. The temptation to seek revenge on former regime loyalists is great. Calls for the exclusion of former NDP figures and immediate transitional justice in Egypt have been loud. In Libya, revenge has led to acts of violent collective punishment. Numerous examples of successful and failed past transitions, however, illustrate how the polarisation of society deriving from retribution and political and economic exclusion can quickly see a return to the pre-revolution order by impeding the formation of the basic consensus that a fresh start requires.

Fourth, previous transition experiences show that constitutional reforms have often been used by governments to entrench their own rule. This is currently a very tangible danger in all three countries. Heated controversies over constitutional reform are often rooted in fears that such reforms may represent a one-time opportunity. In Egypt, the prospect of integration into the constitution of the ruling military's role as a 'safeguard' of the democratic order has become dangerously palpable. Widespread fears that Islamists may hijack the constitutional process to establish an irreversible theocratic order have been used by the military leadership to justify their continuing political role. As the polarisation between Islamists and secularists, fomented under the previous authoritarian regimes, is approaching its conclusion, however, authoritarian manipulation must not stand in the way of a truly representative constitutional process that restores power to a democratically elected civilian government.

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