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CONSTITUTION-MAKING IN TRANSITION: A COMPARATIVE STUDY OF THE 2012 EGYPTIAN AND 2014 TUNISIAN CONSTITUTIONS

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By

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CONSTITUTION-MAKING IN TRANSITION: A COMPARATIVE STUDY OF
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ABSTRACT

This project examines constitution-making in transition by analyzing both the 2012 Egyptian and the 2014 Tunisian constitutions as case studies. The processes of the two constitutions took place in quite similar post-uprising contexts in which Islamists were the majority and yet resulted in different outcomes. The project aims to identify and analyze the variables that influenced constitution-making processes in both countries and hence the outcomes as indicated in the analysis of a selected number of civil and political rights in both constitutions. The project answers three questions: Why did Islamists in Egypt gain a qualified majority at the constituent assembly, while Ennahda Islamists in Tunisia gained only a simple majority? How did these majorities impact the constitution-making process in each country, and how did the process shape the constitutional outcome? The conceptual framework of the project sets a number of factors (independent variables) that were at stake during transition and influenced the constitution-making process (intermediate variable), which, in turn, shaped the outcome (dependent variable). The project concludes that the selected articles of civil and political rights in the Tunisian constitution come closer to the international norms of the ICCPR as an attempt at reaching a compromise with the vision of the non-Islamist groups, whereas the articles in the 2012 Egyptian constitution drifted from the ICCPR, and the vision/agenda of the Islamist majority was predominant in the constitutional text. The project presents conclusions and lessons learned that could provide directions for future research on constitution-making.

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INTRODUCTION TO THE PROJECT

Background

The wave of uprisings that swept the Middle East and North Africa (MENA) region by the end of 2010 raised the expectations of a new dawn that would pave the way towards democracy-building in the region. Accordingly, it has been referred to as the "Arab spring" that would eventually replace the authoritarian regimes in the Arab world with a form of democratic and inclusive governance that reinforces people's sovereignty and protects human rights. The spring, however, has turned to a severe winter in some countries, such as Syria and Libya, where civil uprisings have become armed conflicts resulting in hundreds of thousands of fatalities and refugees. Even in countries that have managed to topple their authoritarian regimes in less violent ways, such as Tunisia and Egypt, the transition process in shaping a new regime faced myriad challenges. A central challenge was constitution-making, which would lead to the establishment of a new social contract that would formalize the future political arrangements of these countries, and fulfill the people's aspirations for freedom, dignity, and equality.

Egypt and Tunisia both embarked on transitions in quite similar contexts, characterized by the emergence of a plethora of new political and social actors, the rise of Islamists[1] to power, Muslims brotherhood in Egypt and Ennahda Islamists in Tunisia, and rising economic and security challenges, in addition to extreme

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[1] The word "Islamist" is used here to refer to those who view Islam as a comprehensive way of life for personal conduct, conduct of state, and society (Said & Funk, 2001). They call for the revival of the ideals of Islam as a means of confronting the westernization of Arab and Muslim-majority countries. They call for an Islamic state ruled in accordance with sharia, Islamic laws. And finally, they embrace the concept of *ijtehad*, reinterpretation, of the Quran and Islamic traditions to apply them to today's world (Knudsen, 2003).

polarization between the Islamists and non-Islamist groups[2]. At the center of the transitional processes in both countries was constitution-making, for which both countries took divergent paths. In Egypt, immediately after the ouster of President Mubarak, the Supreme Council of Armed Forces (SCAF) adopted a constitutional declaration of 62 articles including articles approved by a referendum. The declaration was considered a provisional constitution that governed the transition phase, organizing the parliamentary elections and the establishment of a constituent assembly. The constituent assembly, which was predominantly Islamist, adopted a draft constitution in December 2012, and a referendum was held to determine its definitive adoption. This constitution was suspended in July 2013 after the removal of the Muslim Brotherhood's regime in Egypt, and then modified in 2014.

Tunisia, on the other hand, began the constitution-making process with the election of a constituent assembly in October 2011 in which Ennahda Islamists gained a simple majority[3]. The members of the assembly voted to elect a provisional president and prime minister for the country. Although the constituent assembly was supposed to end its work within a year, the new constitution was not adopted by the constituent assembly until January 2014, after more than two years of disagreements, arguments, violence, assassinations, and finally, concession and compromises. The

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[2] The term *non-Islamist groups* is used here to refer loosely to all other political and social groups besides the Islamists, with their different ideological orientations. The term refers to those political parties that are united by their defense of the principles of separation of political and religious spaces and the protection of the rights of association, expression, and belief, equality and non-discrimination, and free elections (Awad, 2013).

[3] Three types of majority are referred to in this project: (1) Simple majority: is obtained when there is more valid votes in favor then against, while not constituting an absolute majority; (2) Absolute Majority (50 + 1 vote): is obtained when in favor votes represent more than 50% of all valid votes; and (3) Qualified majority or 2/3 majority: is obtained when in favor votes represent two-thirds of all valid votes (Juridical Commission, 2015; Dictionary of Politics and Government, 2004).

adoption of the new constitution was followed by parliamentary and presidential elections in 2014.

Problem Statement and Research Questions

A central challenge for the transition of both the Tunisia and Egypt post-Arab uprising was constitution-making. The constitution-making processes in both countries took place in similar contexts and had the same risk of being abused by the unilateral exercise of power of the Islamist-majority at both constituent assemblies to either impose their own agendas on the constitution or consolidate power. Another challenge for the process was the conflict and extreme polarization between Islamist and not-Islamist actors over the outlook of the new regime, including the question of the status of religion in the new constitution; its role in the state's affairs, the shape of the new political system, and rights and freedoms, particularly civil, political, and women's rights. The two constitution-making processes resulted in different outcomes: Tunisia managed to overcome a breakdown of the process, proudly producing a progressive, rights-maintaining and compromise constitution, whereas in Egyptian case, the vision/agenda of the Islamist majority was predominant in the constitutional text.

This master's project analyzes both the 2012 Egyptian and the 2014 Tunisian constitution-making processes within a conceptual framework based on the recently developed constitution-making literature, which lacks a theory of constitution-making, yet presents a number of propositions about the challenges and the risks involved in the constitution-making process. The project aims within this framework to identify and analyze the variables that had influenced both constitution-making processes that led to different outcomes.

In order to examine the impact of the different variables on constitutional outcomes, the project presents a comparative analysis of a selected number of civil and political rights in both constitutions namely, freedom of thought, conscience, and religion; freedom of expression; and the right to non-discrimination, which were subject of dispute throughout the constitution-making processes, measured against the International Covenant on Civil and Political Rights (ICCPR). The researcher assumes that the non-Islamists were aiming at reaching a constitution that would have been as close as possible to the ICCPR, in order to guarantee the minimum protection of rights, while the Islamists were trying to impose their ideological views. The researcher assumes that this analysis shows how the different variables mentioned above shaped the outcome in terms of producing constitutional documents that represent either a compromise with the non-Islamist opposition's vision or a breakaway.

The researcher poises the following three questions: Why did Islamists in Egypt, represented by the Muslim Brotherhood and the Salafists, gain a qualified majority at the constituent assembly, while Ennahda Islamists in Tunisia gained only a simple majority? How did having a qualified majority in Egypt as opposed to a simple majority in Tunisia impact the proceedings of constitution-making process in each country? Finally, how did the design of the constitution-making process impact the constitutional outcome?

Research Objectives

The objectives of the master's project are the following: (1) to examine the constitution-making processes in both Egypt and Tunisia since these processes had a central role in shaping the transition processes in both countries, (2) make use of the constitution-making literature to develop a conceptual framework that explains the

variables that enabled Islamists in Egypt to have a predominant majority at the constituent assembly, while Ennahda Islamists gained only a simple majority, (3) examine how these different majorities impacted the proceedings of the constitution-making in both countries; (4) examine how the design of the constitution-making process shaped the outcome, and (5) present recommendations and lessons learned from the experience of both countries, which could provide directions for future research on constitution-making.

Importance of the Research and Client Description

This master's project is significant as it deals with the constitution-making process as a political project that reflected the powers and interests of the social and political actors involved and that also helped in shaping the character of the new regime in both countries. There is a little attention on constitution-making process in the recent literature covering the transitions in the MENA region (Lang, 2013). Accordingly, it was important to analyze the constitution-making processes in both countries to define the variables that impacted both processes and led to different outcomes.

The master's project could provide insights for scholars, researchers, or policy makers who are interested in analyzing what is referred to as the "Arab Spring" transitions. It suggests a conceptual framework to understand the variables that influence the process of constitution-making and outcome. The project also presents conclusions and lessons learned that could be used as a basis for a constitution-making theory or model.

Methodology and Case Selection

Methodology

Method

The master's project adopts a comparative research method by presenting a comparative description of the different phases of constitution-making processes in Egypt and Tunisia, starting with the stage prior to the drafting of the constitution (setting the agenda stage), continuing with the actual process of constitution-making (the proceedings), and finally comparing a selected number of civil and political rights in both constitutions to the ICCPR, which is used as a yardstick case. The project develops a conceptual framework to identify the relevant variables of the constitution-making process.

Data Collection

The primary sources of data are the texts of the 2012 Egyptian and the 2014 Tunisians constitutions and the ICCPR. Secondary sources of data are the literature about the constitution-making processes in the two countries. This literature includes the following: (1) reports that document the constitution-making processes in both countries (2) early drafts of both constitutions, which are available online; (3) reports that document the constitution-making processes in both countries; and (4) the available media statements and available interviews previously done with prominent members of the constituent assemblies.

Case Selection

The project focuses on the 2012 Egyptian and the 2014 Tunisian constitution-making processes which produced the first two constitutions that emerged from the Arab uprising. They are two exemplary cases, which are worth examining, of two constitution-making processes that took place in quite similar contexts and faced the

same risks, yet one process went wrong and the other managed to overcome the risks and avoid transition breakdown.

The ICCPR will be used as a baseline in analyzing the constitutional outcomes for the following reasons: (1) It is a binding treaty that is part of the International Bill of Human Rights along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR). (2) It is an international legal frame of reference of the fundamental civil and political rights. (3) It is considered as "the most comprehensive and well-established UN treaty on civil and political rights" (Joseph, Schultz, & Castan, 2000). (4) The majority of the UN state members are parties to the covenant, including Egypt and Tunisia.

Organizational Structure

The organizational structure of the thesis is as follows: Chapter 1 reviews the literature on constitution-making in transition and presents a conceptual framework that indentifies the relevant variables of the constitution-making process. Each of the three subsequent chapters answers one of the research questions of the thesis project. Chapter 2 addresses the first question by examining the independent variables that were at stake at the first phase of the constitution-making process in both countries, namely the background factors, and the rules and mechanisms set for the constitution-making process and led to different majorities of Islamists at both constituent assemblies. Chapter 3 tackles the second question and explains how the Islamist majorities interacted with other political and social actors within the rules set for the process and which impacted the proceedings of the constitution-making process (intermediate variable), which in turned shaped the constitutional outcome. The constitutional outcomes are analyzed in Chapter 4 as mentioned previously. Finally,

Chapter 5 provides research results, learned lessons, and possible directions for future research.

CHAPTER 1

REVIEW OF THE LITERATURE AND CONCEPTUAL FRAMEWORK

Introduction

This chapter reviews the literature on constitution-making in transition. In the first section, the concept of transition is defined and the development of the concept in the literature is traced. The researcher sheds light on the traditional paradigm of constitution-making and the gaps in the transition scholarship. In the second section, the concepts of constitution and constitutionalism are defined. Other items are also examined including the development of constitution-making literature since its foundation as distinctive field, the design of the constitution-making process, and finally the gaps in the constitution-making literature. The second part of this chapter outlines the conceptual framework of the master's project which is developed from the constitution-making scholarship, as well as the hypothesis of the project.

Transition from Authoritarian Rule and Importance of Constitution-Making

Definition and Development of Transition

In the last quarter of the 20th century, the concept of transition as used to refer to a change in political regime was central in scholarship with the fall of authoritarian regimes[4] in South America, Central America, followed by the fall of the Berlin Wall, the subsequent collapse of the Soviet bloc, and the end of the Cold War (Huntington, as cited in El-Wahishi, 2013, p. 6). The concept of transition was first introduced by Dankwart Rustow in his 1970 article "Transitions towards a Dynamic Model". Rustow defines transition as a process towards democracy. He challenged the political

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[4] The term *authoritarian* is used to refer loosely to "all non-democratic systems, including one-party systems, totalitarian systems, personal dictatorships, military regimes, and the like" (Huntington, 1991, p. 13).

scientists of his time who had focused on what he referred to as the functional questions of democracy: "What conditions make democracy possible and what conditions make it thrive?" Such questions, Rustow argued, are of little help for scholars studying developing regions, such as the Middle East and Southern Asia. Rustow instead shifted the focus to what he had referred to as "the genetic question" and presented his model of how a democracy comes into existence (Rustow, 1970, pp. 337-340; Rustow as cited in Diamond, Fukuyama, Horowitz, & Plattner, 2014).

This concept of transition was further developed in the four-volume work *Transitions from Authoritarian Rule* edited by Guillermo O'Donnell, Philippe Schmitter, and Laurence Whitehead and published in 1986. They define transition quite broadly as "the interval between one political regime and another" (O'Donnell & Schmitter, 1986, p. 7). In the last volume, *Transitions from Authoritarian Rule*: *Uncertain Conclusions*, authored by O'Donnell and Schmitter, the authors argued that "transition could be from certain authoritarian regimes toward an uncertain something else" (p. 3). Transition could lead to "the installation of some form of democracy, the return to some form of authoritarian rule, or the emergence of a revolutionary alternative" (p. 7). Their model focused on only one particular path for transitions, which is neither violent nor revolutionary but "proceeds through negotiation between the outgoing authoritarian regime and its democratic opposition, and often relies upon formal or informal pacts or agreements that provide security guarantees to both sides" (Diamond et al., 2014, p. 87). The template of transition elaborated by O'Donnell and Schmitter, on the basis of the southern European and Latin American transitions, postulates that a "transfer of power" or a "surrender of power", where those who hold control of the state negotiate the transition with some faction of their supporters or some of their non-maximalist opponents, seems more likely to attain and consolidate

political democracy than transition as an "overthrow of power" by implacable antagonists (O'Donnell & Schmitter, 1986, p. 7). The authors argued that the parameters that cause transitions from authoritarian rule are in flux and that the rules of the political game during transition are not defined; actors struggle and contest not only to satisfy their immediate interests and the interests of those whom they represent but also define the rules and procedures that would likely determine the winners and losers in the future (pp. 4-6). They also highlighted that democracy does not necessarily require a fixed set of economic or cultural prerequisites and that the elite's interactions are key during transition.

The scholarship of transition and democratization was further developed in the seminal work of Samuel Huntington's *Democracy's Third Wave: Democratization in the Late Twentieth Century* (1991). Huntington referred to the wave of transition, which began in 1974 with the Portuguese revolution, including the democratic transitions in Latin America in the 1980s, Asia Pacific countries, and Eastern Europe after the collapse of the Soviet Union, as democracy's third wave (Huntington, 1991). For Huntington, transition to a democratic political system can be defined based on "the extent that [this system] most powerful collective decision-makers are selected through fair, honest and periodic elections in which candidates clearly compete for votes and in which virtually all the adult population is eligible to vote" (Huntington, 1991, pp. 6-7). Huntington believed in the importance of individual agents in the transition to democracy: "democracies are created not by causes but by causers" (Huntington 1991, p. 107). Transition was based on elites' choices, perceptions, beliefs, and actions, while subsequent consolidation was based on elite pacts and consensus. For democracies to come into being, "future political elites", who are the

main actors in the transition into democracy, "will have to believe, at a minimum, that democracy is the least bad form" (Huntington, 1991, p. 34).

Ineffectiveness of Traditional Transition Paradigm

A number of scholars refuted Huntington's third wave democratization theory and the traditional transition paradigm, calling for developing new frameworks, new debates, and maybe eventually a new paradigm that helps us understand the transitions that are underway (Schmitter, 2010; Carothers, 2002; Munck, 2011). In his "Twenty-Five Years, Fifteen Findings" (2010), Schmitter reflected on the model presented in the four-volume work, *Transitions from Authoritarian Rule*. He stated that the model does not seem to work well everywhere and that democracy is an unfinished product; therefore, democratization will always remain the research agenda of political scientists (p. 28). Thomas Carothers (2002) also called for an end to the transition paradigm in his seminal work, "The End of the Transition Paradigm", as it is increasingly clear that reality is no longer conforming to the model (Carothers, 2002, pp. 5-6). Carothers challenged the core assumptions upon which the traditional transition paradigm was based. He argued that not just any country moving away from dictatorial rule can be considered a country in transition toward democracy. The clear majority of the third-wave countries, however, have not even achieved a relatively well-functioning democracy. Most of these transitional countries have entered what Carothers referred to as a gray zone; they are "neither dictatorial nor clearly headed toward democracy" (p. 9). It is the time for the democracy-promotion community to get rid of the transition paradigm since it was the product of a certain time and adopt instead an approach that focuses on the key political patterns of each country.

Another weakness in transition scholarship is that the focus is mainly on transitions from autocracy to democracy, although since World War II, "only about

45% of more than half of regime changes were transitions from one autocracy to another" (Geddes, Wright, Frantz, 2012, p. 3). There are three possible outcomes when a dictator is ousted: regime survival under new leadership, democratization, and replacement by a new autocratic regime (Geddes, Wright, and Frantz, 2012). There is a need, therefore, for advancing the literature on transition to understand how transition happens and addressing the question raised by the Arab Spring: "in what circumstances is the ouster of a dictator likely to lead to democratization rather than renewed autocracy or chaos?" (Stradiotto and Guo, 2010, p. 4).

Landau (2012) argued that the key question in the literature of transition should not be how an old regime was overthrown but rather how a new one can be constructed, which is a gap in the transition scholarship. The collapse of the old regime generally results in the chaotic emergence of political parties and civil society groups, whose interactions determine the construction of the new regime's governing institutions. The traditional theory of revolution holds that "revolution occurs precisely when there is a decisive legal break with the old constitutional or legal order. Once such a break has occurred, the state is in a kind of legal no-man's land until the new constitutional order has been constructed" (Kelsen, as cited in Landau 2012, p. 612). In these situations of uncertainty, constitution-making is likely to be key means of shaping the character of the new regime at the hand of the political and social groups who hold power (Landau, 2012, pp. 611-614).

Constitution-Making Process

Constitution and Constitutionalism

Historically, human societies had a form of written rules or practices that regulate the relations between its members (Saunders, 2012). The modern notion of the constitution, as a single document of constitutional rules regarded as a supreme or

fundamental law, overriding all other law and government action, began in the late 18th century following the adoption of written constitutions, between 1780 and 1791, for the United States, Poland, and France (Saunders, 2012; Elster, 2995).

There is a lack of consensus on defining the concepts of "constitution" and "constitutionalism". Several definitions are derived from social sciences and others positivist legal theory (Sweet, 2009, p. 623-624). Eslter (1995) defined it as a supreme system of rules that regulate fundamental matter, and amendments to it are legally more difficult to secure than ordinary legislation. Sweet (2009) defined it "a body of meta-norms, those higher-order legal rules and principles that specify how all other lower-order legal norms are to be produced, applied, enforced, and interpreted" (p. 626). A number of scholars, such as Hardin (2003), Eslster (2000), and Hart Ely (1980) (as cited in Vermeule, 2014, p. 9), offer several answers to what constitutions do: constitutions create and empower government; constitutions tie the hands of majorities in ways that protect majorities from their own predictable excesses; constitutions protect the rights of discrete and insular minorities; constitutions further moral principles of equality, freedom, and human dignity; and, most generally, constitutions design democracy. Defining the concept of constitutionalism also varies, it is defined as "the commitment on the part of any given political community to be governed by constitutional rules and principles" (Sweet, 2009, p. 628); Sweet (2009) cited Neil Walker's definition of constitutionalism as "the set of beliefs associated with the idea of constitutional government.", and Koen Lenaerts' as "limited government operating under the rule of law."

Although there appears to be no single accepted definition of constitutionalism, there is a common agreement that "modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law,

and the protection of fundamental rights. Accordingly, there is an interrelation between the concepts of constitution and constitutionalism.

Elster (1995) postulates that the development of constitutions occur in seven waves, with the first wave beginning in the 18th century, and the seventh wave ending with a number of former Communist countries in Eastern and Central Europe adopting new constitutions after the fall of communism in 1989 (pp. 368-369). For Elester (1995), constitution-waves are related to the causes of drafting new constitutions, which are almost always written in the wake of a crisis or exceptional circumstance of some sort: social-economic crisis, revolution, regime collapse, fear of regime collapse, defeat in war, reconstruction after war, or creation of a new state (p. 370-371). There are a number of distinctive features distinguishing contemporary constitutions that evolved in the latter part of the 20th century, including universal acceptance that the authority for a constitution must derive from the people of the state concerned; most constitutions are now made for multi-cultural societies, some of which are, or have been, in conflict; the involvement of the international community, or segments of it; and the emphasis on process as opposed to the content of the constitution (Saunders, 2012, p. 3-4)

Constitution-Making Scholarship

The literature that deals with the process of constitution-making has been part of a larger substantive body of writings on constitutionalism, comparative constitutional law, and constitutional politics. The modern concept of constitution-making as a distinctive field of analysis can be traced back to Elster (1995) who noted that there is no body of literature that deals with constitution making in "its full generality, as a distinctive object of positive analysis" (Elster, 1995, p. 364). In the last fifteen years, there has been outpouring of case studies and empirical analyses of

constitution-making episodes, particularly in countries in transition and in post-conflict (Landau, 2013, p. 925).

Elster (1995) founded the distinctive body of literature of constitution-making by outlining the paradoxes and dilemmas inherited in the constitution-making process. The first paradox is that the need for a new constitution generally arises in circumstances that are likely to work against good constitution-making. The process of constitution-making requires the procedures to be rational and impartial. New constitutions are written for the future generations; the constitution makers should have a wide horizon and look beyond their own interests. However, the turbulent circumstances in which constitution-making usually arises invite procedures based on "threat-based bargaining". The extra-political resources of threats, including foreign powers, military powers, terrorism, pressure of the public and electoral prospects, play a prominent role in the constitutional bargain.

The second paradox is that it is only under dramatic external circumstances that people have the will to get the constitution-making done. This paradox also stems from the theory of bargaining: "if it did not matter when people agreed, it would not matter whether or not they agreed at all" (Cross, 1965, as cited in Elster, p. 394). These paradoxes were evident in the Tunisian and Egyptian constitution-making cases, where the need for a new constitution arouse in the aftermath of the removal of the ruling regimes and under the pressure of the traumatic events that surrounded the constitution-making processes as explained in the following chapters. In short, Elster highlights how complex and challenging the constitution-making process is, which requires development of a model or paradigm for structuring the constitution-making processes.

Elster (1995) explains the inner forces involved in the constitution-making process or the challenges that face the constitution-makers. The first challenge is the relation between the body that is entrusted with drafting the constitution and the actor(s) who endowed this body with authority. Elster highlighted the possible tension that could take place between the body responsible for writing and its convener who may seek to put constrains on the drafting-body, either during the drafting process of the ratification process (Elster, 1995, p. 373-375). The second challenge is decision-making throughout the process of drafting the constitution, that is, how the constitution drafters make decisions. In general, smaller groups tend to claim equal voting power in the constitution-making body, whereas the larger or majority groups insist on a voting system that reflects the numerical strength of their constituencies (Elster 1995, pp. 377-381). Another challenge is the interests of individuals or groups participating in the constitution-making process, whether political parties or formal governmental institutions participating in the drafting process. Groups are likely to work to inject their collective interests into the constitutional document (Elster 1995, pp. 378-380). Finally, Elster highlighted the dilemma of public versus private constitution-writing proceedings. The greater the amount of participation in the constitution-making process, the greater is the legitimacy of the resulting outcome. However, publicity encourages the "delegates to adopt will resort to open logrolling and horsetrading" (Elster, 1995, p. 394).

Elster proposed a number of recommendations to overcome such challenges involved in the constitution-making process: (1) The establishment of a specialized constituent committee apart from the ordinary legislative bodies—legislators should not be given central role in the ratification to reduce the space of institutional interests; (2) The work of the constituent assembly should maintain a balance

between publicity and secrecy, since secrecy gives room for bargaining difficult issues and helps avoiding rhetorical overbidding, while publicity ensures that constitution-makers are abiding by public interests; (3) Elections to the constituent assembly should follow the proportional system rather than the majority system in order to have a broadly representative committee; (4) the legislator's role should be kept to the minimum, as sometimes ambiguous formulations, which legislators resist, are needed to reach consensus; and (5) the constituent assembly work within a defined, reasonable time limit to avoid delaying techniques and at the same time to reduce short-term and partisan motives (p. 396). Although Elster did not provide s a robust model of constitution-making, his recommendations became the basis for scholarship on constitution-making (Ginsburg, Elkins, Blount, 2009). Elster's recommendations have been developed in the constitution-making literature into hypotheses that are being tested by studying individual cases.

Several studies have been developed that tackle the process of constitution-making distinctively. Widner (2007) identified the different phases of constitution-making as drafting, consultation, deliberation, adoption, and ratification. Banting and Simeon (1985) introduced an earlier stage focusing on mobilization of interests (and counter interests) prior to the preparation of a text, which they call the "idea-generating stage". Saunders (2012) divided the constitution-making process into three stages: the period during which a range of critical preliminary decisions about a constitution-making process are made, which she refers to as the setting an "agenda"; the various processes for design, drafting, agreement and approval; and the final phase of constitutional implementation.

The agenda setting phase is the stage before the actual start of the constitution-making itself, during which a number of decisions should be taken about

the process itself. These decisions include whether to make a new constitution or to amend the existing one, the nature of the constitution-making body and whether elections are required for this body, strategies for public participation, how the state is to be governed during the constitution-making period, and procedures for approval and ratification of the final draft constitution (Saunders, 2012, pp. 4-5). The stage is challenging since constitutions are usually written in turbulent circumstances, yet is essential as it shapes the subsequent phases.

The second stage involves the drafting process, agreement on the draft as a whole, and procedures for bringing the constitution into effect. The drafting process could be undertaken by a body of experts, elected body which could be a regular legislature or a specially constituted constitutional assembly, or a referendum (Saunders, 2012, pp. 4-5).

The final phase of a constitution-making process is implementation. This phase extends for an indefinite period from the time the constitution is passed. A wide range of actions needs to be taken to give any constitution effect (Saunders, 2012, pp. 4-5). This master's project focuses on the first and second stages of constitution-making.

Recent studies have given special attention to the relation between the constitutional design process and the outcomes (Widner, 2007; Ginsburg et al., 2009). Scholars have argued that "there are as many variables that are present throughout the process as there are constitutions" (Ginsburg et al., 2009, p. 4). The most common cited variables are the involvement of various actors (constituent assemblies, executives, ordinary legislatures, and public participation) along the different phases of constitution-making, international actors, inclusive versus participatory constitution making, the intensity and continuity of an internal crisis while the

constitution is being made, and the timeframe (Samuels, 2006; Moehler, 2008; Ginsburg et al., 2009; Moehler & Marchant, 2012). The relations, however, between each of these variables and the constitutional outcomes are still only assumptions or hypotheses that are not yet tested against enough evidence (Ginsburg et al., 2009).

There is a consensus in the literature that the constitution-making process is an integral part of the outcomes which govern the political transition. However, there is hardly any systemic understanding of the impact of the different variables of the constitutional processes on the outcomes since constitutions are written in highly charged, divided, and often violent environments (Samuels, 2006, p.20). Ginsburg et al. (2009) highlight that a key normative question is whether aspects of process can be manipulated to reduce the probability of failures, a question that requires more work on the complex relationships among process, content, and outcomes (219). Widner and her collaborators in 2007 started a project to analyze all cases of constitution-making from 1975 to 2007 aiming at "formulating systematic measures of the influence of the design of constitution-drafting processes on a variety of outcomes" (Widner, 2008). Widner grouped the outcomes of the constitution-making process into: (1) "behavioral outcomes" which include the ability of drafters to take long views and compromise, discuss and deliberate instead of horse-trading; (2) outcomes related to the clarity of the text and the ability to handle future challenges; (3) "attitudinal outcomes", which include legitimate matters and how people think of the constitution, and (4) "broader outcomes" that include endurance and efficacy (Widner, 2008).

Landau's "Risk-Averse" Model

The literature of constitution-making is loaded with propositions and hypotheses that still need to be developed into a solid theory or hypothesis. Landau

(2013) highlighted that a major challenge of constitution-making is that both constitutional theory and international law and politics have stayed silent about constitution-making processes, and have both deemphasized the constitution-making process itself as an object of study, allowing it to occur in a vacuum without any real restraints on these processes (p. 611). In addition, the recent scholarship of constitution-making does not give enough attention to the main risk of constitution-making: powerful individuals or political parties use either real or manufactured majorities to impose constitutions on the rest of their societies (p. 613). Constitution-making establishes the legitimacy of the new regime across a broad spectrum of social groups. But constitution-making is equally risky; the constitution-making process is commonly abused by actors who seized to impose their agendas or try to consolidate power, which will lead to establishing poorly functioning and unstable states (p. 613). Thus, an important, yet challenging task for scholars is to construct models that constrain the abuse of the constitution. Landau argued that policy makers and scholars should not focus solely on designing constitution-making in an attempt to reach some idealized end state, but rather on developing a "risk averse" model of constitutionalism, where the major goal is to prevent democratic breakdown (Landau, 2013, p. 613).

Landau (2012) criticized the existing literature on constitution-making, which is derived mainly from Elster's conception of constitution-making as a deliberative process where the role of group and institutional interests is deemphasized (p. 923). Elster's recommendations, thus, were designed to force drafters to consider the long-term interests of the country rather than their immediate short-term political goals. These recommendations include, as mentioned previously, establishing special chambers such as constitutional assemblies rather than ordinary legislatures, and not

allowing delegates to run for office immediately after serving in the assembly (p.631). However, Elster's framework does not address the major risk of the majority's abuse of the constitution-making process. The central challenge to constitution-making is how to constrain unilateral exercise of power. If political forces represented in the assemblies are left unconstrained or poorly constrained, they can reshape the whole transitional process to create a quasi-authoritarian regime or impose their own constitutions on a minority which in turn would led to constitutional breakdown (Landau, 2012, p. 923).

Landau (2012) postulated that the key problem in developing a risk-averse model is to find credible and effective constraints that may deter the majority's abuse of the constitution-making process. Different forms of control of constitution-making processes may have different levels of efficacy, and they are context specific to a large extent. Landau based his model on a number of points that should be considered in the designing of the constitution-making process. (1) External constraints over the constitution-making process (either from the executive government or the judiciary for example) can be problematic and must be carefully designed in order to prove effective. External constraints are problematic in any form. It is probably better to prioritize measures that ensure that the assembly is internally diverse, so that no single faction can act unilaterally (p. 962). (2) Assemblies that are internally diverse, and where single parties or factions do not achieve clear majorities, tend to induce broad pacting between political groupings. It is important for designers of constitution-making processes to prioritize electoral rules and other instruments that will help to achieve diversity. Among the measures of achieving diversity in the constituent assembly is the electoral law. Proportional electoral systems helped to ensure that no a single political actor would gain a predominant majority, unlike the majoritarian
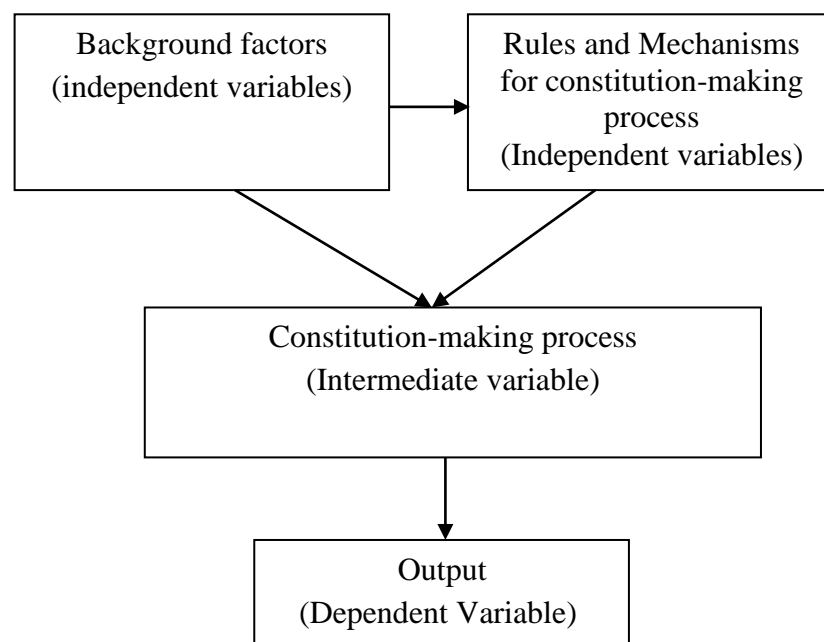
system (p. 963). (3) Timing also plays a role is preventing one faction from dominating the constitution-making process. Constitution-making usually occurs during turbulent times. However, accelerating the election of the constituent assembly immediately after the fall of the old regime may result in the domination of the more organized fraction in the assembly. This suggests that timing can sometimes make a big difference in determining how an assembly is composed and thus what constitutional program it enacts (pp. 963-964). (4) The forum of the constitution-making should also be considered: whether constitution-making is better carried out in ordinary legislatures or instead in specialized constitutional assemblies. Landau argued that it depends more on how the forum is composed and controlled than on what kind of forum it is. (5) Landau (2012) discussed the role of public participation as a constraint in the constitution-making process. The efficacy of this variable is not certain, since in some cases public participation may cause what Elster called "threat-based bargaining", as opposing factions may attempt to mobilize portions of the masses in order to pressure the other side into a favorable deal. The trouble is once the masses on each side are mobilized and ideologically charged, the range of possible agreement may be narrowed, perhaps even causing it to disappear entirely (p. 969). Public participation could be helpful in some circumstances; however, in poorly institutionalized environments, mass participation can actually help contribute to a democratic breakdown (p. 970).

In conclusion, a number of contemporary studies criticize the traditional transition paradigm that had developed in the 1980s for failing to account for the recent transitional modes that have been taking place or for failing to present a generalized model that could structure the various parameters that are at stake during transition, which could lead to the establishment of a democratic and inclusive

governance. During the uncertainty of transition, constitution-making has emerged as a key process for shaping the character of the new regime. However, the literature lacks any theory of constitution-making or a model or a paradigm that helps structure the process. There is also a need to develop a theory that provides systemic understanding of the impact of the different variants of the constitutional processes on the outcomes.

Conceptual Framework a**nd Hypothesis**

Figure 1

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┌─────────────────────────┐        ┌─────────────────────────┐
│   Background factors     │───────▶│   Rules and Mechanisms   │
│  (independent variables) │        │  for constitution-making │
│                          │        │         process          │
│                          │        │  (Independent variables) │
└─────────────────────────┘        └─────────────────────────┘
              │                                  │
              └──────────────┐    ┌──────────────┘
                             ▼    ▼
              ┌─────────────────────────────────┐
              │   Constitution-making process    │
              │     (Intermediate variable)      │
              └─────────────────────────────────┘
                             │
                             ▼
                  ┌───────────────────────┐
                  │        Output          │
                  │  (Dependent Variable)  │
                  └───────────────────────┘
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The conceptual framework of the master's project can be summarized in Figure (1) that works as a map that sets the project direction. Based on the scholarship of constitution-making, the researcher has developed a conceptual framework that identifies a number of factors (independent variables) that influenced the constitution-making process (intermediate variable), which, in turn, shaped the outcome (dependent variable).

These variables are among the factors pointed out by Elster (1995) and Landau (2013) that should be considered in the constitution-making process including

the following: (1) the establishment of a specialized constituent committee apart from the ordinary legislative bodies. (2) The role of legislators and institutional interests in the constitution-making process. (3) Electoral system for establishing the constituent assembly. (4) The decision-making rules throughout the process of drafting the constitution, i.e. how the constitution drafters take decisions. In general, smaller groups tend to claim equal voting power in the constitution-making body; whereas the larger or majority groups insist on a voting system that reflects the numerical strength of their constituencies, which is a central challenge in the constitution-making processes in both Tunisian and Egypt. (5) The risk of having a majority that manipulates and abuses the constitution-making process, and (6) The time limit and delaying technique of the constitution-making process.

The framework begins by outlining the independent variables that led to different Islamists' majorities at the constituent assemblies. First, there are background factors or the "usable past" (Stepan, 2012), that is, the social and political milieu of both countries. These factors either directly or indirectly determined the weight and the role of the social and political actors who were part of the constitution-making process. In Tunisia, on the one hand, Bourguiba's modernization project laid down the foundation of a progressive and urban state with a high literacy rate and vibrant civil society, where religion ceased to exist in the public sphere, and religious institutions and education were monitored by the state. Egypt, on the other hand, went through different stages since 1952 revolution that resulted in dramatic political and social transformations, which led to lack of a strong opposition movement, lack of a vibrant civil society, significantly increased religiosity and conservatism in the Egyptian society since the 1970s, and the rise of Islamists groups with wide public support.

The second independent variables are mechanisms and rules that were set for managing the constitution-making process, referred to in this master's project as setting the agenda phase, including the management of the transition processes in both countries, establishing the electorate bodies, and the electoral laws for the constituent assemblies in both countries. The electoral law for the assembly in Tunisia was drafted by a representative committee, whereas in Egypt the electoral law for the parliament was enacted by the SCAF. The electoral law in Tunisia was intentionally designed to avoid the domination of one particular group, while that was not the case in Egypt when the predominant-Islamist parliament elected the constituent assembly. Accordingly, the researcher assumes that these independent variables led to a more representative constituent assembly in Tunisia, unlike Egypt where the assembly was predominately Islamist.

The different Islamist majorities interacting with other political and social actors within the rules, which had been set for the process, impacted the proceedings of the constitution-making process (intermediate variable), which in turned shaped the constitutional outcome. The intermediate variable is the actual process of negotiating the constitutional texts in both countries, and adopting the texts either within the constituent assemblies or in a public referendum. In Tunisia, Ennahda Islamists, who only gained a simple majority at the constituent assembly, were forced to form a coalition with other two secular parties, which still did not give the Islamists a two-thirds majority that would have enabled it to pass a constitution alone as per the assembly bylaws. Accordingly, reaching consensus appeared to be the only option to avoid submitting the constitution for a national referendum. The situation in Egypt was quite different. Having a qualified majority, the Islamists were not obliged to

reach a consensus, which was evident during the actual process of negotiating the constitutional texts.

Finally, the different variables mentioned above shaped the constitutional outcomes (dependent variables). In examining the constitutional outcomes, the project presents a comparative analysis of a selected number of civil and political rights in both constitutions, namely freedom of thought, conscience, and religion; freedom of expression; and the right to non-discrimination, measured against the ICCPR, the international legal frame of reference of the fundamental civil and political rights. The researcher has chosen these articles as they represent the central underpinnings of inclusive and democratic governance, and they were among the central areas of disagreement between the Islamist and non-Islamist actors.

Hypothesis

The background variables and the rules and mechanisms set for managing the constitution-making process, influence the intermediate variables, which in turn determine the outcome of the process. In other words, the economic, social and cultural aspects in each country, on the one hand, and policies of the political regimes towards Islamist and non-Islamist political forces, on the other hand, determine the weights of these forces in the constitution-making process and the rules governing this process. These rules, in turn, determine the outcomes of constitution-making. This project is concerned with the articles on freedom of thought, conscience, and religion; freedom of expression; and the right to non-discrimination as outcomes of the process. The lighter the weight of the Islamist forces, the closest the outcomes will be to the standards set by the International Covenant on Civil and Political Rights (ICCPR).

CHAPTER 2

SETTING THE AGENDA PHASE

Introduction

This chapter addresses the first question of the master's project: Why did Islamists manage to gain a qualified majority in Egypt, while the Ennahda Islamist party in Tunisia only achieved a simple majority? The chapter examines the factors which the researcher has identified as independent variables: the background factors that had, either directly or indirectly, influenced the whole transitional process, resulting in adopting different mechanisms, and the rules and mechanisms adopted in both countries which led to different Islamic majorities in the constituent assemblies. The chapter is divided into two parts; each part tackles an independent variable in addition to a concluding section.

Background Factors

A number of analysts have argued that the deeper structural components of the Egyptian and Tunisian societies are among the main factors that should be considered in analyzing the transitional processes in both countries (Masoud, 2014; Brownlee, Masoud, & Reynolds, 2013; Barhouma, 2014; Zakria, 2014). The broader historical, social, economic, and cultural factors, which made Tunisia more urban, literate, and globalized with a diverse and strong civil society, as compared to Egypt should be underlined. These factors shaped the milieu within which the whole constitution-making process took place and determined the weight of different social and political actors who managed the transition.

Social Change in Tunisia Since 1956

Since Tunisia gained independence in 1956, the Neo-Dustur party leaders, Habib Bourguiba and his associates, who led the Tunisian independence struggle, started a social change program which aimed at instilling the values of modernity and progress (Perkins, 1986). The secular western-educated leaders prompted changes that laid the ground-work for societal transformation in a number of areas, most notably in the nature and the role of education, the judiciary system, and the status of women. These reforms created a more liberal, open, and progressive atmosphere than existed in other Arab countries (Perkins, 1986, p. 117 -130).

Bourguiba introduced Islam as the official religion of the country in the Independent Tunisian constitution in 1959, yet the constitution guaranteed freedom of worship to the followers of the other faiths. He established a unified judiciary system and abolished both the Islamic Sharia courts and the French tribunals established during the French protectorate, paving the way for the introduction of a Personal Status Code[5], which provided a progressive legal framework for women's rights (Perkins, 1986, pp. 117-130). In his framework of modernization, Bourguiba placed great importance on the need for a unified and centralized education system, under which the state could monitor all the schools including the religious ones, starting from the Children's Qura'nic schools to the Zaituna Mosque-University, the most important Islamic institution in the country (Perkins, 1986, p. 121). Bourguiba also established a public education system patterned on the French model (Perkins, 1986, p. 123). His efforts towards expanding Tunisians' educational opportunities for boys

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[5] The Code was a daring undertaking, which could be considered a revolution against the traditional interpretation of Islam. The Code panned polygamy, required women's consent to marriage, set a minimum age for marriage, and raised women's shares in inheritance (Perkins, 1986, p. 125). It is also worth mentioning that Bourguiba started a public campaign against the women's veil and traditional forms of dress (Perkins, 1986).

and girls raised the national literacy to over 60%[6], one of the highest in the Arab World (Perkins, 1986, p. 123). Education was regarded as the best means of producing a national atmosphere conducive to social change and modernization. In short, Bourguiba's framework of modernization aimed at achieving economic developments but also progressive societal changes through reforming the education system and the legislations. Bourguiba's project had a secular outlook; he held firm control over traditional Islamic institutions and practices. He had founded the modern, liberal, and urban state of Tunisia.

Political Milieu

Bourguiba's project, however, did not build political pluralism. Bourguiba dominated the politics of Tunisia from independence until 1987; it was not until the early 1980s that opposition political parties were legalized. The dominant and centralized role of the state and the ruling party, Neo-Dustur, renamed in 1964 as the Socialist Dustorian Party (PSD), hindered the development of a strong opposition movement (Alexander, 1997). Tunisia, however, had a vibrant civil society and strong labor and students unions that generated pressure on the state in the 1970s and early 1980s (Alexander, 1997). With the rising economic discontent and mounting opposition, Bourguiba cracked down hard on the labor union, leftist student organizations, and the rising Islamist movement in 1984-1985 (Alexander, 1997). After the ouster of Bourguiba in 1987, Zine El Abidine Ben Ali began a honeymoon, which did not last long, between the new regime and the opposition (Halliday, 1990). He promised to start political reforms and called for political pluralism and respect for human rights. He revamped Bourguiba's Party Socialist Destourien (PSD) into the

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[6] The current literacy rate in Tunisia according to UNCIF statistics (2008-2012) is 79.1%.

Democratic Constitutional Rally (RCD), and issued a new legislation that made it easier to form associations and parties (Halliday, 1990). He opened a dialogue with the opposition forces, socialist and Islamist, and amnestied hundreds of political prisoners and allowed thousands of exiled opposition to return home. The media also reflected a more open atmosphere (Halliday, 1990). The country, however, shortly after slid into deeper authoritarianism, when Ben Ali's RCD won every seat in the 1989 legislative elections. Ben Ali stepped up a campaign to quash any form of opposition; he manipulated the press, unions, and other students and human rights organizations. He also dramatically expanded Tunisia's internal security apparatus, in addition to persecuting workers, human rights activists, opposition figures, and university professors (Alexander, 1997). Such repressive strategy culminated in Ben Ali's ouster in the 2010 uprising.

The Islamist Movement in Tunisia

The Islamist movement in Tunisia started in the late 1960s, at the tremulous time when the Arab defeat in the 1967 war generated criticism of the "secular nationalism" dominant in many Arab countries at that time (Alexander, 2012). Like their counterparts in other Arab countries, the Tunisian Islamists blamed the Arab defeat on the Arab rulers, who had abandoned their religious and cultural roots (Alexander, 2012). Within Tunisia, the political and economic problems afflicting the country in 1970s and 1980s contributed to the appeal of Islamist movement that promulgated the view that forsaking Islamic principles had caused and aggravated these problems (Perkins, 1986, p. 120). The Islamist movement presented itself as a countervailing effort of Bourgiba's modernization efforts, which according to them, undermined religious values and imposed on the society alien values outside their culture in the name of modernization (Perkins, 1986). The Islamist movement

attracted many Tunisians, particularly university and secondary-school students, since it was one of the few available means of opposing the regime rather than out of sympathy with their ideology. Also, for others, joining the Islamist movement was a means of expressing the distress over the alien cultural values which had penetrated the Tunisian society (Perkins, 1986, p. 120).

The Islamist movement started with the establishment of the Association for the Safeguard of the Qur'an (*Jamyet Al-Mohafza 3la al-Qura'n*) in 1970, which the government established to counter the left opposition (Alexander, 2012). Young Islamists who started to gather at this association, such as Rachid al Ghannouchi and Abdelfattah Mourou, grew up in religious families of modest means and received traditional religious education. They were at odds with the culture and values of Tunisia's secular, francophone elite. Some Islamists also spent time in Syria and Egypt, including Ghannouchi himself, where they were influenced by the teachings of the Muslim Brotherhood in 1960s (Alexander, 2012). At the beginning, the Islamist group focused primarily on religious and cultural issues; they worked on educating Tunisians about Islamic religious and cultural values through lectures and writing. In the 1970s, Bourguiba's crackdown on the labor movement and the leftist student organizations created a political void that the Islamists stepped to fill. They began recruiting in secondary school and university campuses. They also took steps to create a stronger organizational structure, and in 1979, a group of young Islamists headed by Al-Ghannouchi established a new organization called the Islamic Group (*AL Jama' Al-Islamyia*) (Tamimi, 2014). Ghannouchi's thought and development of his movement were influenced during this period by a series of major developments: the emergence of the liberal democratic current following the 1978 violent confrontation between the trade unions and the government, and on the regional level, the Iranian

Revolution and the sociopolitical thought of the Islamist movement in Sudan under the leadership of Hasan al-Turabi (Tamimi, 2014). In 1981, the Islamic Group changed its name to the Islamic Tendency Movement (MTI) and published its manifesto which expressed the movement's commitment to democratic process and affirmed that the electoral process was the source of legitimacy (Tamimi, 2014). Bourguiba rejected the movement's bid for legal recognition, as he regarded it as a threat to his modernization project, launching the first of several crackdowns that jailed thousands of Islamists in 1981. The regime's repression helped the movement to develop by forging ties with the human rights league, the labor movement, and other opposition parties. Regardless of the ideological differences, all of these groups shared a common desire to replace Bourguiba with a pluralistic political system that respected human rights. Accordingly, the discourse that the movement adopted reflected these goals (Tamimi, 2014).

During the first phase of Ben-Ali's regime, a large number of Islamist prisoners were amnestied. When Ben-Ali relaxed some controls on political life, the MTI leaders changed the party's name to the Ennahda (Renaissance) Party in order to comply with a new law that forbade party names to contain religious references. Encouraged by Ben Ali's attempts to democratize the regime, Ghannouchi announced that his movement accepted the Personal Status Code (Tamimi, 2014). Ennahda, however, was not granted legal status, and the Islamists ran in 1989 elections as independents. Ben Ali's honeymoon with Ennahda ended shortly after the elections, and the period between 1989 and 1992 witnessed increased arbitrary arrests, which led Ghannouchi to flee Tunisia (Alexander, 2012). The 1990s could be described as the darkest chapter in Ennahda political life, when the Tunisian government intensified its campaign against Ennahda. While based in London, Ghannouchi

maintained contact with supporters in Europe and the Arab world. However, Ben Ali's repression destroyed much of Ennahda's organization. A rebuilding phase started by the 2000s, when the remnants of Ennahda activists, many of whom had been in jail since the 1980s and 1990s, began to rebuild the party's organization. Ennahda and several other opposition groups built a joint platform of demands in 2005, where Ennahda committed itself to a multiparty democracy and to the progressive rights that Tunisian women were granted (Alexander, 2012).

The Ennahda party is relatively well-organized, compared to Tunisia's other political parties. It has a clear internal organizational structure, with regular party conferences- unlike Muslim Brotherhood in Egypt, strong organizational ties between grassroots supporters and party leaders, and a governing Shura Council that determines major party decisions via a one-person, one-vote scheme (Marks, 2014, p.1). Ghannouchi emerged as an Islamic thinker and activist distinguished by his endeavors to introduce new dimensions in contemporary Islamic thought. He advocated for an Islamic model of democracy that is based on the tools and procedures of the Western democracy and the Islamic code of ethics and values (Tamimi, 2014, pp. 218-219). In a recent statement addressed at the United States Institute of Peace (Ghannouchi: Middle East at Crossroads, 29 September, 2014), Ghanouchi took pride in being "the first Islamic movement to adopt democracy in 1981, and announce explicitly that it is a civic party that believes in democracy, citizenship and civic values. It is a conviction which did not change even after the savage wave of repression in the 1990s to which we were subjected to by Ben Ali's regime. Ennahdha remained a peaceful movement struggling against dictatorship through democratic methods and rejecting violence and extremism".

To conclude, this section has shed light on the social and political background in Tunisia, which had directly or indirectly affected the whole transitional process in general and, the constitution-making process in particular. The following points should be underlined: (1) Bourguiba's modernization project laid down the foundation of a progressive and urban state with a high literacy rate and vibrant civil society. Religion ceased to exist in the public sphere, and religious institutions and education were monitored by the state. (2) Tunisia had a solid labor movement and strong civil society which constituted a strong opposition front under Bourguiba and Ben-Ali. (3) The authoritarian regimes of both Ben-Ali and Bourguiba did not allow political pluralism; hence, the development of a strong opposition movement was hindered. (4) The Islamist movement in Tunisia represented by the Ennahda Islamist party committed itself to multi-party democracy and political pluralism and to the progressive rights that women were granted. It also forged ties with the human rights league, the labor movement, and other opposition parties against the regime's repression regardless of the ideological differences. The following section addresses the background factors in Egypt.

Political and Social Transformation: From Nasser to Mubarak

Egypt went through dramatic social and political changes since the British-influenced monarchical regime was overthrown in 1952 by the Free Officers, a group of junior military officers. Egypt was declared as a republic and the Revolutionary Command Council (RCC) led by Gamal Abdl Nasser, one of the Free Officers, took charge of the country's affairs (Osman, 2011). Under President Nasser, who assumed the Presidency in 1956 till 1970, Egypt was radically transformed on the social, economic and political levels. Nasser's regime ended the liberal political experiment from 1920s to 1940s, at the center of which was the liberal Wafd party, which was

replaced by strongly socialist doctrine (Osman, 2011). Nasser weakened all political parties and established a new system based on a centralized powerful presidency and an executive government (Osman, 2011). Political opposition was not tolerated; all political parties except for Nasser's own Arab Socialist Union were declared illegal. On the economic level, the Nasser's comprehensive developmental reforms which were based on a hugely ambitious industrialization program, the land-reform program, major advances in agriculture and cultivation, and establishing a strong public sector managed to transfer Egypt form a poor and lethargic economy into a developmental case study (Osman, 2011, pp. 50-56). These economic reforms were accompanied by large-scale social transformations, since approximately 75% of Egypt's gross domestic product (GDP) was transferred from the hands of the country's elites to either the state or to millions of workers and laborers (Osman, 2011, p. 53). The creation of a dominating public sector flattened the social curve; overall public school enrollments more than doubled, and Egyptian middle and lower classes had unprecedented access to housing, education, jobs, and health services (Osman, 2011).

When Nasser passed away in 1970, Anwar Sadat, a member of the free officers, assumed power until his assassination at the hands of Islamist fundamentalists in 1981. Sadat did not share Nasser's socialistic leanings and he took the country along the path of liberalization (*infitah*) (Nagarajan, 2013). On the political level, he released the political prisoners, allowed the formation of multiple party platforms along with the Arab Socialist Union, and then eventually he dissolved Nasser's party to create the National Democratic Party (NDP) (Nassef, 2012). However, the end of Sadat's era witnessed a crackdown on the opposition who were against the Camp David Accord. On the economic level, Sadat's economic liberalization (*infitah*) policies involved attracting foreign capital and technology,

financial institutions, and freeing up the labor markets and public sector (Nagarajan, 2013). Such policies led to rapid changes in the class structure and wealth distribution in favor of those who were already at the top of the economic ladder. The middle class was struggling with stagnating income and rising prices, and the lower class sunk even further into poverty (Nagarajan, 2013). The economic and political policies led to a social shift; in less than a decade, "the civic nature of the Egyptian state of the 1950s and 1960s was replaced by a quasi-Islamic one and a liberal public atmosphere and discourse became predominantly religious and conservative" (Osman, 2011, p. 92). Egypt witnessed increasing religiosity and conservatism during the 1970s; this social transformation was due to the transfer of the Saudi Wahhabi doctrine when more than 3 million Egyptian families (most of them from the lower and middle class) migrated between 1974 and 1985 to the Gulf. In addition, the politics of the 1970s led to this social shift, when President Sadat unleashed Egypt Islamic forces to confront the Nasserite and socialist forces (Osman, 2011, pp. 90-92). Thousands of Muslim Brotherhood members were released from jail after years of imprisonment and prosecution under Nasser, and the Muslim Brothers' old newspaper *Da'awa*, was allowed to be reissued. Sadat was also keen on presenting himself as a pious president. He authorized a major increase in the budget of al-Azhar and an expansion of its parallel educational system, opened the door for religious figures to dominate the state controlled media, and introduced apostasy laws in Egypt after years of a highly liberal intellectual atmosphere (Osman, 2011, pp. 90-92). President Sadat introduced Sharia into the Egyptian constitution (previous constitutions had only stated that Islam was the state religion). Article 2 of the 1971 constitution declared that "the principles of the Sharia are a principal source of legislation", and in 1980, he

amended the Article further to make Sharia the principal source of legislation (Shehata, 2012).

After Sadat, Hosny Mubarak, who was the vice-President at that time, assumed power. Mubarak did not undertake drastic economic and political changes; his policies were not a breakaway from his predecessor. He was keen, at the beginning, to take several steps towards making economic and political reforms. He released thousands of political prisoners, and relaxed the press censorship. Many civic society organizations were allowed to function (Nagarajan, 2013). Although the NDP retained its solid grip on the government and the Parliament, the opposition ran parliamentary elections. The liberal Wafd party, absent from the public realm since 1952, re-emerged, and its members built a parliamentary coalition in 1984 with members of the Muslim Brotherhood, a banned group at that time, who ran as independents (Nagarajan, 2013). Mubarak relaxed the media censorship and also allowed political opposition groups to publish their own newspapers, a sharp turn from the closed media under Sadat and Nasser (Nassef, 2012). Unlike Sadat, Mubarak was not interested in making major political transformations. He instead focused on making economic improvements and building the country's infrastructure (Osman, 2011). However, the last decade of Mubarak's era witnessed the ascent of the capitalist elite of the then ruling National Democratic Party (NDP). The regime's capitalists asserted their power over major economic sectors and dominated the political scene through the NDP and dominating the Parliament through flawed elections (Osman, 2011). Such policies along with the widespread government corruption, suppression of opposition, and the grotesque abuses of the regime's security apparatus paved the way to the fall of Mubarak's regime.

The Islamist Movement

Egypt was the cradle of the Islamist movement. It started with the foundation of the Muslim Brotherhood as a social and religious club at the hands of the charismatic school teacher, Hassan Al-Banna, in 1928 in Islamlyia, where there were the headquarter of the Suez Canal company and a sizeable foreign community. Al-Banna founded his *Da'awa* (call to religion) on preaching against the dangers of emulating the European lifestyle that was imposed on the Egyptian society (Moussalli, 2014). Al-Banna believed that the Muslim societies were weak because they abandoned their faith, and that it was only through reviving Islam and the role of religion in everyday life and politics, including application of Sharia, or Islamic law (Shehata, 2012). His holistic conception[7] of Islam as a holistic and all-embracing system was recurrent in his writings and messages to his followers. Being a charismatic leader, Al-Banna inspired, at the beginning, a large number of lower-middle class workers with his project to regenerate society through Islam. The movement won quick and remarkable appeal, and it subsequently became a country-wide political movement with a large number of branches throughout Egypt, in addition to branches in Sudan, Syria, and Iraq (Moussalli, 2014). The growth of the movement was dramatic; it became "the grandfather of more than eighty-five other Islamist groups in dozens of countries well beyond the Arab world" (Shehata, 2012).

The Brotherhood in Egypt evolved considerably in different phases over the eight decades after its establishment, until it came to power in 2011/2012. The movement developed from a social welfare society devoted to Islamic revival, social reform, and charity work to become increasingly involved in politics in the 1930s.

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[7] Al-Banna's holistic Islam is summarized in his message to his followers at the *Fifth General Conference of Muslim Brotherhood*, when he said: "for us [Muslim Brothers] Islam is both a belief (aquida), and worship (ibada); a homeland (watan), and a national identity (jinsiyya), a religion (din), and a state (dawla), a holy book (mushaf), and a sword."

The group had strong positions on domestic and regional affairs, which led to confrontation with the political powers of that time, the palace and the government. Al-Banna, who became the first General Guide of the Muslim Brotherhood, established in 1940s an armed militia, known as "the Special Apparatus". The government dissolved the Brotherhood, confiscating its assets and arresting many members by 1948, the conformation culminated in Al-Banna's assassination in 1949. Under Nasser's regime, the government and the Brotherhood moved into open conflict. After a failed attempt at assassinating Nasser in 1954 for which the Muslim Brothers and its secret apparatus were accused, thousands of Muslim Brothers were arrested; others went into exile. The crackdown continued until after Nasser's death in 1970 (Shehata, 2012). The movement then went through a radicalized phase in the 1950s and 1960s under the influence of Sayyed Qutub, whose ideas later influenced extremist movements, from Islamic Jihad and the Islamic Group (al Gamaa al Islamiyya) in Egypt to al Qaeda. After a series of internal debates, the Brotherhood renounced violence as a method of political change. The turning point was marked by the 1969 publication of *Preachers, Not Judges* by Hassan al Hodeiby, the general guide of the movement. Hodeiby rejected *takfir*, the idea of declaring others as infidels, and rejected violence as a method of political change (Shehata, 2012).

In the 1970s, a number of Islamist movements and radical Islamist cells emerged in Egypt as well as in other Arab countries. Under Sadat, although the Muslim Brotherhood was still not legal, it was permitted to operate on university campuses. Islamists swept student union elections between 1975 and 1979, until the government dissolved the student unions. Religious publications were significantly increased, and two newspapers associated with the Brotherhood began circulation in 1976. In the 1970s and the 1980s, the Brotherhood managed to build a solid social

base through its services infrastructure (Osman, 2011). The Brotherhood developed a matrix of social services, including healthcare, food distribution centers, accommodation and services for the out-of–town students, welfare services, all of which helped them present themselves to a large number of the Egyptians as "the provider" (Osman, 2011). During the 1970s, in addition to Muslim Brothers, other Islamists group began to take ground. The Salalfi trend, whose followers are committed to ways of the Salaf – the early forefathers of Islam, witnessed a considerable expansion (Dorpmueller & Shehata, 2012). One of the largest Salafi movements in Egypt, the Salafi *Da'wa* (*al- Da'wa Al-Salafyia*), originated in Alexandria in the 1970s. Unlike the Muslim Brotherhood, the Salafi were not involved in politics until 2011; they were only focused on *Da'wa*. Their work includes mosque lessons, lectures, in addition to charity work (Dorpmueller & Shehata, 2012). Salafi in Egypt have a large social base, particularly among the lower class and the lower-middle class, yet they do not have an organizational structure or a hierarchal movement like the Brotherhood (Dorpmueller & Shehata, 2012).

Under Mubarak's 30-year rule, alongside with their social services, the Brotherhood began participating in the formal political process, including elections for parliament, professional syndicates or unions, student councils, and faculty associations. The Brotherhood repeatedly won the elections of the Doctors', the Engineers', the lawyers', and the pharmacists' Syndicates (Shehata, 2012). The Brotherhood used to run for the Parliamentary elections since the mid-1980s; they used to run under the cover of other parties or independents as they were outlawed. In 2005, the Muslim Brotherhood took 88 seats in the People's Assembly, the largest number that any opposition group had ever won; such a victory that was followed by

a crackdown on the group by imprisoning the deputy guide and other leaders (Shehata, 2012).

Participating in the political process profoundly influenced the Muslim Brotherhood movement. It forced the group to develop and articulate its attitude toward critical issues including the rights and freedoms that are the focus of the thesis. The development of its attitude was clear in its electoral programs and public statements.

In conclusion, in this brief presentation of the background factors, several differences should be underlined: (1) The army became a main player in the Egyptian politics since 1952. (2) Egypt went through different stages that resulted in dramatic political and social transformations, which led to a lack of a strong opposition movement, lack of a vibrant civil society, significantly increased religiosity and conservatism in the Egyptian society since the 1970s, and the rising of Islamists groups with a wide public support. (3) Egypt was the cradle of the Islamist movement, where the Muslim Brotherhood movement was founded along with other Islamist groups.

Having presented the different background factors in both countries, it could be fairly concluded that the different social and political milieu in both countries resulted in different weights and outlooks of social and political actors, which in turn influenced the rules and mechanisms set for the constitution-making process as will be discussed in the next section.

Rules and Mechanisms of Constitution-Making

The management of the early days of the transitional processes in both countries, and the events that took place shortly after the fall of the old regimes laid down the rules for the unfolding of the whole transitional processes that would follow

including the constitution-making processes. The following section tackles the rules and mechanisms adopted to establish transitional governments and electoral administrations in both countries, which were central to forming the constituent assemblies and to the distribution of power at the assemblies.

Establishing National Constituent Assembly in Tunisia

When President Ben Ali fled the country on 14 January 2014, the Constitutional Court affirmed former Speaker of the Parliament (Chamber of Deputies), Fouad Mobazaa, as acting President under Article 57 of the 1959 constitution on January 15, 2011 to counter the legal void (Zemni, p. 5, 2014). From that date till the resignation of the extant Prime Minister Mohamed Ghannouchi in late February, political instability plagued the country due to the tension between the legal government at that time and the revolutionary legitimacy that oppositional groups were clinging to (Zemni, p. 5, 2014).

Ghannouchi's first post-Ben Ali government made a gesture of trying to achieve national unity and reconciliation. The cabinet included figures from Ben Ali's regime, senior leaders from the Constitutional Democratic Rally (RCD), the former ruling party, as well as 11 leading opposition and civil society figures. It was only one day later when several opposition figures resigned from the government including three members of the *Union Ge'ne´rale des Travailleurs Tunisiens* or the Tunisian General Labor Union (UGTT) and the opposition leader Mustafa Ben Jaafar due to pressure from the protesters who did not trust Ghannouchi's government and regarded it as a continuation of Ben-Ali's regime (Zemni, 2014). Ghannouchi government's transitional plan was to hold Presidential elections within six months in accordance with Article 57 of the 1959 constitution. The transitional government, therefore, mandated a new Commission, named the Commission for Political Reform headed by

Yadh Ben Achour, a respected legal scholar in Tunisia, to reform the electoral system for the Presidential election. Had this plan been implemented, it would have resulted in the election of a president with full legislative and executive powers in the absence of an elected legislative council (Proctor & Moussa, 2012).

A coalition of revolutionary and oppositional groups including the labor union and civil society members joined forces to create the Front of January 14th who opposed the government's transitional plan. All these political forces agreed that the six-month time frame was too short to organize fair elections and that the election of a new president would not guarantee any significant break with the former regime while remaining within the boundaries of the existing constitution and institutions (Murphy, 2012). The front, therefore, demanded that the government dissolve the RCD, the two houses of the Parliament (the Chamber of Deputies and the Chamber of Advisors), in addition to holding the election for a Constituent Assembly within a year. As the pressure on the government was mounting, Ghannouchi gave in to some of the popular demands by resigning from the RCD, reshuffling the government and removing the RCD members, and agreeing to postpone the elections and dissolve the two chambers (Murphy, 2012).

For the revolutionary opposition, the concessions made by the government were not far-reaching enough. Another coalition, named the National Council for the Protection of the Revolution (the NCPR), was established including the Front of January 14th, human rights organizations, the UGTT, the Islamists of Ennahdha as well as the Lawyers Bar Association, among other groups. The coalition's escalating pressure reinforced by continuous street protests in Tunis and other cities in Tunisia led the second cabinet and the Prime Minister to resign by the end of February 2011 (Nouira, 2012). The interim President, Fouad Mobazaa, was obliged to suspend the

1959 constitution and issue decree-law no. 14 relative to the provisional organization of public authorities. This document replaced the 1959 constitution and would be in effect until the elected Assembly adopted a new one. The decree-law dissolved all the representative councils and organized the executive, legislative, and judiciary powers (Nouira, 2012).

The third transitional government under the leadership of Prime Minister Beji Caid el Sebsi put Tunisia on the course toward elections for the National Constituent Assembly (NCA), the 218-member body that would draft the new constitution. Initially, the election was planned for July 2011 under the electoral law that existed at the time; however, it was eventually postponed by decree (dated June 8, 2011) until October 2011, allowing sufficient time for the new electoral authority to prepare for the elections and for revising the electoral law (McCurdy, 2011). The High Commission for the Fulfillment of Revolutionary Goals, Political Reform, and Democratic Transition (The High Commission) was established by a Presidential decree on 18 February 2011. It was mandated by Decree no. 6 to draw up a new electoral law, and to give opinions regarding the performance of the government. The 150-members of the High Commission were a fusion of the Commission for Political Reform, established previously by Ghannouchi, and the opposition NCPR. The High Commission, also known as the Ben Achour Commission after its chair Yadh Ben Achour, drafted several decrees that provided the legal framework for the elections of the NCA. The High Commission also established the 16-member Instance Supérieure Indépendante pour les Élections (ISIE) to manage the NCA elections. The ISIE set a precedent in a country where the Ministry of Interior had had the sole authority to organize and supervise elections. Although the 150 members of the Ben Achour Commission, together with the ISIE members, were not elected, they derived their

legitimacy from their wide representation including representatives from 12 political parties, 18 civil society organizations, comprising trade unions, professional associations, and human rights non-governmental organizations, and prominent national figures (International Foundation for Electoral Systems, 2011; McCurdy, 2011).

NCA Electoral Law

One of the major achievements of the High Commission was drafting the law organizing the election of the Constituent Assembly after only one month of its establishment. The process of making this law was equally important as much as the outcome itself. It is interesting to highlight that the main discussions and debates among the Commission members revealed the concern over the dominance of one political actor, specifically the Islamist formation of Ennahdha, the most organized political force after Ben Ali's regime (Bras, 2012; Gobe, 2012, as cited in Zemni, 2014). The Commission opted for proportional representation electoral system[8] with the intention of preventing one party from controlling the Constituent Assembly to ensure that the body would be representative of all political formations within the country. The members of the High Commission voted on three different sections of the law, reflecting the discussions within its workings, namely the electoral system, the issue of parity between male and female candidates, and the ineligibility of former RCD members; finally, they voted on the whole law (Zemni, 2014).

The NCA electoral law was issued in April 2011; it received praise in particular for encouraging plurality and promoting inclusivity (National Democratic

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[8] The rationale underpinning all proportional representation (PR) systems is the conscious translation of a party's share of the votes into a corresponding proportion of seats in the legislature. PR systems are a common choice in many new democracies, as they facilitate minority parties' access to representation and fulfils the principle of inclusion. In many respects, the strongest arguments for PR derive from the way in which the system avoids the anomalous results of plurality/majority systems and is better able to produce a representative legislature (IDEA, 2010).

Institute, 2011; Nouira, 2012). It was a closed-list proportional representation system with the largest remainder method[9]. The distribution of seats was based on the principle of one (1) representative for every 60,000 residents, with the addition of one (1) or two (2) seats, for governorates with low populations, to ensure fairer representation for the country's inner regions (National Democratic Institute, 2011). Nouira (2012) postulates that this electoral system allows electoral justice to be reconciled with greater representation for the candidates' lists and at the same time prevents the strongest candidate from acquiring an absolute majority. It is also important to mark the endeavor in the law to achieve appropriate representation for women and young people within the NCA by requiring that half the list comprise women, who alternated on the list with male candidates in the 27 domestic constituencies and four (4) out-of-country constituencies, and that one (1) candidate on each list be under 30 years of age. According to a study conducted on the implications of applying the NCA electoral law, Traboulsy (2012) concludes, among other points, that (1) The electoral law led to quite diverse constituent assembly in terms of the ideological and the party distribution, since 18 party and coalitions lists managed to get seats, in addition to 9 independents-lists. (2) The closed-list proportional representations system did not encourage parties to build coalitions before the elections, but rather they confined themselves to building their own lists. (3) The electoral law prevented any party from gaining an absolute majority, which forced parties to build coalitions at the NCA. (4) The parity system did not lead to the

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[9] The largest remainder method is defined as the total valid vote divided by the number of seats to be filled in the electoral district. It is a principle for converting votes into seats in list PR systems. After parties and groupings have been allocated seats in an electoral district, some seats will be unfilled, and some votes remain for each party. The remaining seats are then awarded to parties and groupings in order of the number of left-over votes they possess. The largest remainder method tends to be more favorable to smaller parties (IDEA, 2010).

hoped-for representation[10] as it did not guarantee putting women on top of the lists; the same for young candidates. (5) The largest remainder method allowed the smaller parties to gain more seats and representation at the Parliament.

It is also worth noting the environment in which the election was held. Despite the attempts to design an inclusive electoral law and build a representative Constituent Assembly, there were feelings of marginalization of other groups that were not represented at the NCA and distrust of political elites and their ability to address the country's pressing problems that Tunisians voiced, in addition to the strikes and demonstrations that were common throughout the transition period and the security concerns (National Democratic Institute, 2011). Moreover, the polarized debate about the role of religion in society dominated the discussion in Tunisia during the election of the NCA members and the constitution-writing process as well (El-Issawi, 2012; Nouira, 2012; Stepan, 2012). The election discourse was largely reduced to the question of Islam's place in Tunisia's future, and the debate around the suspicion of secularists that Ennahda government would impose a new form of authoritarianism, and transform Tunisia into a theocracy (Murphy, 2012), claims to which Ennahda responded by reiterating its commitment to pluralism, to democracy and to maintaining the established rights of women under the Personal Status Code (Murphy 2012). It also reiterated commitments to this effect in its campaign manifesto (Ennahda 2011). Amid this atmosphere of distrust and in an attempt to reassure voters that whatever the outcome of the elections to the constituent assembly, the winners would not be able to abuse the mission for constitutional reform, the main parties,

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[10] The electoral law allowed about 30.8% representation of women, or 67 members, 41 of whom were from Ennahda. The actual outcome of the electoral law, however, did not produce the hoped-for parity, since most parties, with the notable exception of Ennahda, failed to place women first on the lists (Stepan, 2012, p. 102).

including Ennahda, agreed and signed a document[11] in mid-September which affirmed that the assembly would be limited to a term of just one year (Zemni, 2014).

The election of the NCA, comprising 217 representatives, was held in October 2011, almost 9 months after the ousting of Ben Ali. The election was described as free and fair as per the report of a number of observers (National Democratic Institute, 2011; International Foundation for Electoral Systems, 2011; The Carter Center, 2011). With a turnout of around 70% of registered voters, only 27 party, independent, and coalition lists won seats in the NCA out of more than 80 lists. Although Ennahda did not win an absolute majority (50% + 1), the party emerged as the strongest political force in the country, receiving more votes than the next eight parties combined and gaining a simple majority of 41.7% (89 of 217 seats) in the NCA. According to the ISIE, Ennahdha had obtained the highest number of seats in the Constituent Assembly, with a total of 89 seats, while the liberal Congress of the Republic (CPR), led by Moncef Marzouki, received 29 seats, and Al Aridha Al Chaabia (Popular Petition) received 26 seats. Ettakatol received a total of 20 seats, and the center-left Democratic Progressive Party (PDP) received 16 seats (The Carter Center, 2011). Had Tunisia chosen a majoritarian or plurality voting system, Stepan (2012) estimated that Ennahda might have swept almost nine out of every ten seats, instead of the slightly more than four in ten that it was able to win under proportional representation (Stepan, 2012).

To conclude this section, although the first stage of the Tunisian transition was characterized by political instability, ongoing tension between political actors, distrust

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[11]A total of 11 of the 12 political parties represented on the High Commission signed a "Declaration on the Transitional Process" on Sept. 15, the only exception was the Congress of the Republic Party (CPR). Although not legally binding, this document aimed to establish a road map to define the operating rules of the NCA and to limit its mandate to no more than one year (Carter Center, 2012, p. 16).

of the political elites, and concerns about security and the economic situation, it is worth noting the persistent attempts to prevent one actor, being the legal de-facto government at that time or a particular political party, from manipulating the transitional process. The following points should be considered while comparing the situation in Egypt in the following section: (1) the management of the early phase was not controlled from above; different political and social actors managed to put pressure to change the course of the transition by holding the NCA election first; (2) the High Commission that drafted the NCA electoral law and supervised the work of the government was representative of most social, political actors and civil society; and (3) Being aware of the risks involved in having one political party dominating the NCA, the law was intentionally designed to prevent any candidate-list from gaining absolute majority and allowing more representation of women and youth.

The following section examines the phase prior to the actual drafting of the constitution in Egypt.

Early Phase of the Transition in Egypt

The situation in Egypt was quite different. The Supreme Council of Armed Forces (SCAF) was handed over power when President Mubarak declared that he was stepping down on February 11, 2011. This was despite the fact that according to the 1971 constitution--then still in effect- the Speaker of the People's Assembly, or if the People's Assembly had already dissolved, the president of the Supreme Constitutional Court, should have taken over (Article 84). However, most actors and the people who felt that the army had supported them during the 18 days of the uprising welcomed the SCAF's rise to power at that time, and therefore a popular chant in the streets was "The army and the people are one hand."

The constitution-making process in Egypt went through different stages after Mubarak's ouster in February 2011. The first stage began with the Constitutional Declaration that the SCAF issued immediately after assuming power on February 13, 2011. The Declaration dissolved the Parliament with its two chambers (the People's Assembly and Shura Assembly) and suspending the 1971 constitution, which were among the popular demands of the demonstrators throughout the 18 days of the uprising (Farouk, 2013). According to the Declaration, the SCAF would hold power for six (6) months or until the elections of the People's Assembly (Lower Chamber), Shura Council (Upper Chamber), and Presidential election were held. The SCAF would also establish a committee to amend some of the articles of the 1971 constitution and call for a popular referendum on the amendments. This declaration provoked criticism for its failure to specify a timeframe for holding the elections. It also marked the beginning of polarized debates among the political elites about the sequence of the transition events: whether elections or writing a new constitution should come first. Brown (2013) argued that these debates missed two important points about transition: there should have been a "broad agreement among elites on the rules of the transition, and a procedure that allowed people to express their will early without having all matters settled by backroom deals" (p. 46).

The SCAF appointed a small committee of eight members to introduce amendments to the suspended 1971 constitution. The committee members included Tareq El-Bishry, an Egyptian public figure and an Islamist, who served as the chair of the committee; Sobhi Saleh, a lawyer and a member of the Muslim Brotherhood; three judges from the Supreme Constitutional Court; and three law professors. The committee was neither representative nor pluralistic. It was supposed to be a council of technocrats; nevertheless, there has never been a public declaration of the reason

for selecting these particular figures, including the appointment of an Islamist figure to the chair and a member of the Muslim Brotherhood who was not a public figure or a lawyer with a well-established reputation in the Egyptian society (Serôdio, 2013, pp. 16–18). The committee was given ten (10) days and was mandated with the task of amending the articles in the 1971 constitution related to the regulations of the legislative and Presidential elections so as to ensure fair and democratic elections as stated in the decree law for establishing this committee. The suggested amendments put forward by the committee mapped the sequence of transitional process starting with the legislative elections first, followed by the presidential elections. Parallel to the Presidential elections, the elected Parliament with its two chambers would elect 100 members to form a constituent assembly that would be assigned with that task of drafting a new constitution within six months.

Tension arose among the political elites over the constitutional amendments, polarized Egyptian society. The strongest supporters of the constitutional amendments were the Islamists, particularly the Muslim Brotherhood, and the Salafists, who claimed that approving these amendments was the fastest means of achieving stability and restoring civilian rule through democratic elections. The Islamists relied heavily on the religious discourse during their "yes" campaign. They presented to their base supporters the political conflict between Islamist and non-Islamist camps as if it were about the Islamic identity of Egypt, and the Second Article of the 1971 constitution, that is Sharia as the primary source of legislation, which was not among the articles that were amended to start with. They were even pushing for participating in the referendum and approving the amendments as a religious duty (Ahram Online, 2011, March 16). The non-Islamist forces, on the other hand, were fiercely campaigning for a "No" vote on the referendum. They criticized the constitutional amendments for

lacking a reliable system of checks and balances, and for being ambiguous on various points, leaving too much space for a range of interpretations. Furthermore, the non-Islamist forces were concerned about a rush to elections that did not afford opportunities for the newly emerged political movements. The amendments that the committee introduced were then put to a popular referendum on March 19, 2011 (i.e., about a month after Mubarak stepped down). With voter turnout of about 41%, 77.3% of the votes were for, and 22.7% were against the amendments to the provisional constitutional declaration. The Islamists celebrated the results of the referendum as a reflection of their weight, whereas the non-Islamists regarded the results as a mere reflection of the Egyptians' desire to restore stability (Serôdio, 2013, pp. 16–18).

The amendments[12] that the vote declared them, along with other articles reintroduced from the 1971 constitution was issued as a Provisional Constitutional Declaration by the SCAF. The declaration comprised 63 articles: it had Article I and II from the 1971constitution, which are concerned with the identity of the country and Sharia as the main source of legislation, in addition to fundamental rights and freedoms articles and other articles that are concerned with the management of the transitional process including the authority of the SCAF to hold both the legislative and executive powers until the newly elected councils and the President assume power. The Declaration set the sequence of the transitional process, starting with the elections for the People's Assembly and the Shura Council under the supervision of the judiciary. The elected members of the two councils would then have the task of electing, within six months, 100 members for the Constituent Assembly that would be in charge of drafting a new constitution. Presidential elections would follow the

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[12] Not all the approved amendments in the 19 March Referendum were included in the subsequent Declaration.

parliamentary elections, and a committee known as the High Committee for Presidential Elections, which had judges among its members, would form to organize and supervise the presidential elections.

Establishing Constituent Assemblies

The second stage of the constitution-making process was establishing the Constituent Assembly. It was not until September 2011 that the SCAF announced the schedule for the People's Assembly and the Shura Council elections, under pressure of continuous street demonstrations. The SCAF issued the electoral law stating that candidates within a party list system would contest two thirds of the seats on the People's Assembly, while independents would contest the remaining one third. Conflicts erupted over the electoral law, with the non-Islamists claiming that the electoral law would allow the Islamists to dominate independent parliamentary seats and would not allow new parties to be represented (Serôdio, 2013). The Islamists, represented by the Muslim Brotherhood's party, Freedom and Justice Party (FJP), and the Salafist Al-Nour party together with other Islamist parties such as Al-Jama'a al-Islamiya, a former jihadist group who renounced violence, represented by the Construction and Development Party (CDP), won 70% of the seats in People's Assembly[13] and more than 85% of the seats on the Shura Council (Ragab, 2012).

In accordance with the March Constitutional Declaration, the Islamist-led parliament would elect 100 members for the Constituent Assembly to draft the new constitution. The main issue of the debate regarding the criteria of establishing the assembly was Article 60 of the Constitutional Declaration, which did not clearly state whether the People's Assembly and Shura Council were to select members from

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[13] According to the official result published on Ahram Online (2012, Janaury, 22), the Islamists gained about 70% of the People's Assembly: The Muslim Brotherhood's Freedom and Justice Party secured almost 43.7%; the Salafi Al-Nour Party came second and gained around 24%; and the more centrist Islamist party al-Wasat obtained 11 (3.7%).

within their own houses or from the electorate (Casper, 2013a). In addition, there was not any reference in the Constitutional Declaration to the criteria of electing the members of the Constituent Assembly, so it was for the Islamist-led Parliament with its two chambers to decide on the criteria. Accordingly, after long debates, the legislative body decided that 50% of the Constituent Assembly members (50 members) would be from within the People's Assembly and Shura Council, and the rest from outside. On the day of electing the Constituent Assembly members, the FJP and the Al-Noor party presented a ready-made list of candidates for the Parliament members to elect from, an issue which was extremely provocative for the non-Islamists and led to withdrawal of a number of them (Abd El-Maguid, 2012). Reflecting the majority in Parliament with its two chambers, the Constituent Assembly had an Islamist majority of 66 out of a total of 100 members and only 6 women and 5 citizens of the Coptic religion (Abd El-Maguid, 2012). The Assembly was supposed to present a final draft within 6 months that would then be put to a popular referendum within 15 days of its submission. The non-Islamist forces objected the formation of the Constituent Assembly, and many from the liberal and leftist parties boycotted the Constituent Assembly, either by not showing up or by resigning after a few sessions. In addition, Al-Azhar withdrew, objecting due to its representation by only one member and the two representatives of the Egyptian Orthodox church withdrew due to the dominance of the Islamists and their weak representation, especially since the Egyptian Catholic and Anglican Churches were not represented to start with (Serôdio, 2013; Abd El-Maguid, 2012). The crisis of the members who withdrew, which clearly undermined the legitimacy of the Consistent Assembly, continued until the Assembly was dissolved when the Supreme Constitutional Court rendered it unconstitutional in April 2012, on the grounds of

Article 60 of the Constitutional Declaration (Casper, 2013a; Abd El-Maguid, 2012).

The rationale of the court's decision was that the members of the two houses were

entitled the authority to elect members to sit on the Constituent Assembly but not to

elect themselves to the Constituent Assembly (Awad, 2014).

The 2012 Constituent Assembly

There were several attempts by a number of political figures and the SCAF to

mediate between the Islamists and the non-Islamist political actors who had

withdrawn from the first Constituent Assembly to reach a consensus on new

mechanisms for establishing the next Constituent Assembly, which could guarantee

the representation of all political parties and social groups. The formation of the

constituent assembly, however, remained at a stalemate until June 5, 2012, when

SCAF invited all political parties to meet and issued an ultimatum about completing

the structure of membership. After rounds of negotiation, all political parties managed

to reach a consensus on new criteria for establishing the constituent assembly based

on the principle of parity between Islamists and non-Islamists and the rules of

adopting the articles of the constitution, which would require a majority of 67% to

pass an article, or 57% if the pervious percentage failed to be reached. Several

Islamist and non-Islamist actors praised the agreement, and the FJP issued a statement

that it was keen on putting Egypt's interests above its own, reach a consensus, and

resolve any disagreement (Ahram Online, 2012, June 7). Disagreements then arose

over the implementation of the parity principle, since representatives of the state

institutions, judiciary and Al-Azhar, and the churches in addition to Al-Wasat Islamist

Party, Al-Gamaa Al-Islamiya Party's CDP were considered from the non-Islamists'

share (Abdel-Maguid, 2012; Hamzawy, 2012). The Islamists, on the other hand,

claimed that the assembly representing the Egyptian society and the Egyptian voters

would have the final say in the referendum, accusing the liberals and leftists of manipulation for political ends. In an interview with the *Arab West Report* (Serôdio, 2013c), Amr Darrag, a leading member of the Muslim Brotherhood and chairman of the Committee for Foreign Affairs of the FJP, and Secretary-General of the 2012 Constituent Assembly, stated that dividing members into the categories of Islamists and non-Islamists had undermined the work of the assembly. There was no absolute definition of an Islamist. He said that he "considers himself an Islamist, but also holds views many would categorize as liberal" (Serôdio, 2013c, p. 43).

Amid this political crisis, the Islamist led-Parliament issued Law no. 79 on the composition of the second Constituent Assembly on June 11, 2012, which was quite general in terms of stating that "the Assembly's composition shall represent—as much as possible—all sectors of the Egyptian society." In light of these events, a number of members subsequently withdrew from the assembly at different points throughout the constitution-making process ended in an overwhelmingly Islamist-majority assembly with 64 members out of the 85 in attendance (75%) Islamist, while the rest were independent (Casper, 2013b; Farouk, 2013). Of the 85 members, there was not a single representative of Egypt's religious minorities, and there were only four women (Casper, 2013b). It is worth mentioning that both the Islamists and non-Islamists admitted the inefficiency of the process. In the previously referred to interview, Darrag said that "the political fights between Islamists and non-Islamists have resulted in a constitution that was rushed in the last weeks it was functioning and a support base for the constitution that was much less than if parties would have worked towards a consensus" (Serôdio, 2013, p. 14). On the other hand, Wahid Abdel-Maguid, a political scientist and a non-Islamist politician, who had been the spokesperson for the constituent assembly before withdrawing in September 2012,

explained, as an eyewitness to all the events, in his book *The 2012 Constitution Crisis…Documentation and Analysis* (2013) that the constitution-making process had turned into a political battle among different actors since Mubarak's ouster. Further, this political battle destroyed the hopes of producing a constitutional document that exhibited consensus and hence could be considered a social contract between the state and the people.

Finally, the crisis of the constitution-making process in Egypt started with the SCAF's Declaration in February 2011 that led to the non-transparent establishment of a non-representative committee to introduce amendments to the suspended 1971 constitution, and then the March Constitutional Referendum, which was rushed and paved the way for the consolidation of the Islamist-majority dominance in the parliament with its two chambers. The deficiencies of the mechanisms that governed the constitution-making process, which did not ensure equal participation of all stakeholders, resulted in the political battle over the constitution from February 2011 to December 2012, and shattered the hope for a compromise on the constitutional text (Farouk, 2013).

To conclude, this chapter has brought evidence to the following: (1) there were a number of background factors, including the political and social milieu of both countries, which had directly or indirectly influenced the constitution-making process. In Tunisia, Bourguiba's modernization project laid down the foundation of a progressive and urban state with a high literacy rate and vibrant civil society, where religion ceased to exist in the public sphere, and religious institutions and education were monitored by the state. The Islamist movement in Tunisia represented by the Ennahda Islamist party committed itself to multi-party democracy and political pluralism and to the progressive rights that women were granted. It also forged ties

with the human rights league, the labor movement, and other opposition parties against the regime's repression regardless of the ideological differences. In Egypt, the situation was quite different. Egypt went through different stages that resulted in dramatic political and social transformations, which led to lack of a strong opposition movement, lack of a vibrant civil society, significantly increased religiosity and conservatism in the Egyptian society since the 1970s, and the rise of Islamists groups with wide public support. Egypt was the cradle of the Islamist movement, where the Muslim Brotherhood and other Islamist groups were founded. (2) The second independent variable is the measures and mechanisms of constitution-making. In Tunisia, the High Commission that drafted the NCA electoral law and supervised the work of the government was representative of most social, political actors and civil society, and the electoral law was intentionally designed to prevent any candidate-list from gaining absolute majority and allowing more representation of women and youth. By contrast, the crisis of the constitution-making process in Egypt started with the SCAF's Declaration in February 2011 that led to the non-transparent establishment of a non-representative committee to introduce amendments to the suspended 1971 constitution, and then the March Constitutional Referendum, which was rushed and paved the way for the consolidation of the Islamist-majority dominance in the parliament with its two chambers. The deficiencies of the mechanisms that governed the constitution-making process and the electoral law of the Constituent Assembly did not ensure the equal participation of all stakeholders. This chapter attempted at answer why Islamists in both countries gained different majorities. The following chapter will examine how these different majorities affected the process of constitution-making itself.

CHAPTER 3

THE CONSTITUTION-MAKING PROCESSES

Introduction

This chapter addresses the constitution-making processes in Egypt and Tunisia. It examines how the independent variables that were discussed in the previous chapter affected the constitution-making process, the intermediate variable, which in turn influenced the constitutional outcome, the dependent variable. The chapter addresses the second question of the master's project: How did having a qualified majority of Islamists in Egypt as opposed to having a relative majority in Tunisia impact the process of constitution-making in each country? To answer this question, this chapter examines the proceedings of constitution-making process in both countries, the bylaws of the constituent assemblies and how they were enacted, and the role of the Islamists and other political and social actors in the process of the constitution-making.

The chapter is divided into two parts. The first part is devoted to the constitution-making process in Tunisia. The bylaws of the constituent-assembly will be analyzed, in addition to the role of different political and social actors at the NCA, their initial position, and the final outcome. The second part addresses the constitution-making process in Egypt and the influence of the qualified majority of Islamists on the process of constitution-making.

The Constitution-Making Process in Tunisia

The National Constituent Assembly (NCA) Bylaws

The elected NCA first met in November 2011; however, it was not until the end of January 2012 that the NCA adopted its rules of procedure, also known as the

Assembly's by-laws, or *règlements* (Proctor & Moussa, 2012). The elected NCA adopted by majority (141 members agreed, 37 voted against, and 39 abstained) the bylaws of the Assembly, also considered a provisional constitution, which suspended by default the March 2011 provisional constitution, organized the authority among the three offices, and set the laws governing the country during its transition (Proctor & Moussa, 2012). In addition to drafting a new constitution for the country, the Assembly possessed legislative authority and had the tasks of electing the NCA Speaker and the interim President, who would appoint the Prime Minister, the candidate of the party with the majority at the NCA (Text of the Bylaws, 2011).

The Assembly received severe criticism for taking longer than expected to complete its rules of procedure, due to several internal tensions among the members. Developing a set of rules of procedures that could not be abused by the majority-coalition was a difficult task, since "there is probably not a single set of rules of procedure in any parliamentary assembly in the world that is completely safe from abuse either by a minority or (a much greater risk) by a majority determined to exploit its preponderance of votes" (Proctor & Moussa, 2012, p.39). The situation in Tunisia was quite complicated, since the Assembly had a dual task and its bylaws served as the provisional constitution. According to a report that International IDEA issued in 2012, the bylaws suffered from the major, broad weakness of ambiguity: "too much is left to chance, to unspoken rules and to informal interparty deals" (Proctor & Moussa, 2012, p. 6). It did not, for instance, establish a timeline detailing the work of the NCA. Although all political parties represented in the High Commission, except for the Congress for the Republic (CPR), signed a non-binding declaration limiting the timeframe of the NCA activities to one year, the NCA bylaws made no mention of a timeframe (The Carter Center, 2012).

The NCA rules of procedure established three types of committees (rule 41): constitutional standing committees, legislative standing committees and special committees. Each committee is headed by a bureau composed of a chairman, a deputy chairman, a rapporteur, and two assistant rapporteurs (rules 49 and 50); the membership of these bureaus reflected the political composition of the NCA. Thus, the overwhelming majority of chairmanships or even all the members of the bureaus belonged to the majority ruling coalition (Proctor & Moussa, 2012, pp. 34-36). The task of drafting the new constitution was entrusted to six constitutional standing committees, each of which is charged with studying and then writing a draft for the articles that fall within its area of specialization (Zoglin, 2013). The president of the NCA and the chairs of the six drafting commissions formed a Joint Committee for Coordinating and Drafting (JCCD) that was responsible for reconciling the commission drafts. It is worth mentioning that Ennahda wanted one of its members to chair this commission due to its importance; however, the Ettakatol party, which belongs to the Troika coalition, insisted that the president of the NCA be the chair of this committee. Finally, the vote ended the debate for Ettakatol (Proctor & Moussa, 2012, p. 33).

The bylaws of the Assembly set forth the rules for the ratification process as follows: the full NCA must vote on individual articles and provisions; each article must be approved by absolute majority (50% + 1 vote) to pass; and a two-thirds majority or qualified majority would be required to approve the entire constitution. If that failed, the JCCD could offer revisions and re-submit the constitution to the NCA. If two-thirds of the NCA members did not vote in support of the constitution a second time, it would be submitted to the people for a national referendum (Zoglin, 2013).

To conclude this section, it should be underlined that the NCA was granted expansive powers, in addition to drafting a constitution; it was entrusted with the legislative power, and the authority to run the country throughout the phase of transition. The NCA had the authority to enact its own bylaws that became a provisional constitution for the country during the transition and its rules of procedures, in addition to fully-fledged parliamentary functions without any clear timeframe for the NCA to end its work (El-Sayed, 2014). The membership of all the assembly committees reflected the political composition of the NCA, with most of the chairpersons of particularly the six drafting constitutional committees belonging to the majority-coalition. Accordingly, the drafting of the constitution was based on political weight. However, the adoption procedures—two-thirds for the whole constitution or else to go to a public referendum—constrained the manufactured majority or the majority-coalition from manipulating the constitution-making process. The Open Democracy's report analyzing the constitution-making process in Tunisia mentioned that the effect of this voting rule was that no single party or political bloc could hope to unilaterally impose a constitution on the country as happened in Egypt, and forced them to find a compromise that would be acceptable to a large part of the assembly (Meyer-Resende & Weichselbaum, 2014).

Political and Social Actors at the NCA

The Troika Governing Coalition

Although Ennahda came in first with 89 seats (41%), it was far from obtaining an outright majority (50 + 1) to rule. This was necessary for obtaining the needed majority and for avoiding the scenario of "a vote of no confidence that could lead to the accession of a new ruling majority in the NCA" (Stepan, 2012, p. 91). It is worth mentioning here, that unlike the Egyptian case, there were no Salafists or other

Islamists factions represented at the NCA. Accordingly, the Ennahda party, compromising ideological differences, formed a coalition with two secular parties: the Congress for the Republic (CPR), which won 29 seats, and the Democratic Forum for Labor and Liberties (Ettakatol), which won 20 seats. The three-party coalition together represented a majority of 139 seats, which was still less than a two-third majority of the NCA (El-Sayed, 2014). This coalition, also known as the Troika, was formed after long negotiations and after other party representatives in the Assembly refused to take part in Ennahda-led government (Stepan, 2012). The Troika coalition divided what is referred to as "the three presidencies" among themselves: the head of the CPR, Moncef Marzouki, was elected as the interim President of the Republic; the head of Ettakatol, Mustapha Ben Jaafar, was elected as the Speaker of the NCA; and the interim President assigned the position of Prime Minister to the Secretary-General of Ennahda, Hamadi Jebali. The coalition also formed the government, where Ennahda had a clear majority of positions (Feuer, 2012; Nouria, 2012).

Within Ennahda itself, there was the challenge of achieving the balance between the religious voices constituting the core of its constituency and the demands of the secular parties in both the government coalition and the opposition (Brody-Barre, 2012). In an interview, Larayedh, the chief of Ennahda's political bureau, said that he considered the coalition a great success, and proof that Ennahda's words about embracing democratic practices and promoting pluralism were not just empty promises (Brody-Barre, 2012). According to Larayedh, it was "the first party in the Arab world—Islamist or otherwise—to facilitate a transformation from ideological competition or antagonism to cooperation" (Brody-Barre, 2012, p. 217). On the other hand, other members of the opposition and disenchanted members of the CPR and Ettakatol criticized the coalition for being based on superficial and fragile linkages,

rather than ideological affinity (Brody-Barre, 2012). They regarded the coalition as largely inefficient due to internal divisions, and considered that the other two parties were losing their autonomy and risking their integrity by participating in the coalition (Brody-Barre, 2012, p. 217).

The CPR is a secular party with a socialist-leaning approach. Human rights activist Moncef Marzouki founded the party in 2001, yet the party did not gain legal status until March 2011. It holds a human rights agenda, based on the sovereignty of the people and the dignity of the citizens (Gamha, 2011). It was not the first time for the CPR to form an alliance with Ennahda, since the two parties had established an opposition alliance together with the Progressive Democratic Party (PDP), to challenge Ben-Ali's regime (Haugbølle & Cavatorta, 2011). Given its weight in the Assembly (29 seats) and its historical willingness to align with Ennahda, the CPR's participation in the governing coalition and Marzouki's post as president did not surprise observers (Brody-Barre, 2012, p. 218). However, after almost a year after the formation of the government, the CPR split into two camps: one supporting the party's position in the government and one advocating a return to the party's founding principles (Dami 2012, as cited in Brody-Barre, 2012).

The third partner in the governing coalition is the Ettakatol party, which gained about 9% of the vote, giving it the fourth most seats in the Assembly. Mustapha Ben Jafaar established Ettakatol in 1994, but it did not gain legal status until 2002. The party represents the center-left and has emerged as the PDP's main competitor. It ran for the first time in the 2011 elections, and its campaign emphasized its stances on transparency and gender equality. Yet, as with the CPR, being part of the governing coalition posed challenges for Ettakatol and threatened its inner

organization. Consequently, a number of high-ranking officials and members of the Constituent Assembly resigned in late 2011 and early 2012 (Brody-Barre, 2012).

After roughly a year-and-a-half of rule under the Troika, many Tunisians were growing increasingly unhappy. The instability continued unabated and terrorist acts became increasingly frequent. Common accusations were that the Troika tended toward reproducing Ben Ali's system of government and was attempting to monopolize power (Kerrou, 2014).

The Opposition Coalition

Tunisia's political spectrum contained a range of diverse non-Islamist groups that occupied the majority of the seats in the NCA. They included dozens of fractured secularist, leftist, communist, and old regime parties that failed to overcome the tradition of mistrust, discord, and personal interests inherited from Ben Ali's regime, and presented a united front against the Ennahda-led ruling coalition (Haugbølle & Cavatorta, 2011). The result of the NCA elections, which diminished the weight of each of these parties individually in relation to Ennahda, forced the leadership of the fragmented parties to attempt to form an opposition coalition (or coalitions) soon after the government took office (Samti, 2011; Bedoui, 2012; Ben Romdhane, 2012; Hnaien, 2012; Khalfoaoui, 2012, as cited in Brody-Barre, 2012). There were several attempts to initiate a coalition, such as Al-Massar (Social Democratic Path) and Al-Jumhuri (Republican Party [PR]). These initiatives were attempts to gather the substantial opposition parties in the Constituent Assembly in one front. Other groups intended to form coalitions, even with parties that had not managed to secure representation in the NCA, in order to create a single united coalition for the next elections (Brody-Barre, 2012, p. 221). However, due to internal fighting and

ideological fragmentation, these initiatives failed to form a strong front to counter Ennahda-led coalition.

In the aftermath of the assassination of prominent secular politician Chokri Belaid and opposition figure Mohamed Brahmi, there was an increasing dissatisfaction towards Ennahda-led coalition, and many Tunisians held them accountable for the increase in religiously-motivated violence in the country (Brody-Barre, 2012). Former Prime Minister and veteran politician Beji Caid Essebsi established the Nidaa Tounes party seizing the momentum of increasing anger against the Troika and lifting the hopes of many Tunisians about the possibility of coordinating secular groups under a unified coalition (Wolf, 2013). Nidaa Tounes managed to unite much of Tunisia's opposition that was eager to counterbalance Ennahda. It attracted members representing a wide political spectrum, ranging from Tunisia's non-Islamist left to the right (Wolf, 2013).

The Salafists

Although Salafists in Tunisia were not represented at the NCA, they influenced the constitution-making process in different ways. According to Alexander (2013b), the Tunisian Salafists are a diverse group. Among its members are militant Salafists, particularly Ansar Al-Sharia, which emerged as the principal militant group in Tunisia after Ben Ali's ouster and was accused of the violent acts that took place during the transition, such as the attacks on art galleries, bars, and trade union offices, and the 2013 assassinations of the leftist opposition Chokri Belaid and Mohamed Brahmi. Such violent acts escalated the dissatisfaction of many Tunisians with the Ennahda-led government that they accused of taking lenient positions with respect to stopping the political violence. The rising fear of Islamist militancy also motivated the

secular parties and civil society organizations to join forces to counter this force (Wolf, 2013).

Other Salafist groups in Tunisia are not jihadist and do not advocate violence. They support a state based on Islamic law, and they were thus at odds with Ennahda, which they accused of compromising Islamic values. Some of these Salafist groups have chosen to participate in the political process. A Salafist political party, Jabhat al Islah (The Reform Front), received legal status in March 2012, yet it was not represented in the NCA. Alexander (2013b) postulated that the Islamists in Tunisia cannot be easily categorized, as sometimes there is no clear dichotomy between the support base of the Salafists and that of Ennahda, which was more conservative than the leaders. The Salafists also influenced the internal politics of Ennahda and its Shura Council, which has to remain sensitive to Salafi interests to avoid losing support from the Salafists at the grassroots level (Alexander, 2013b).

The Quartet

As highlighted in the previous chapter, Tunisia had robust civil society organizations and muscular labor unions, which had a historical role in the fight for independence and in the building of the modern state. Civil society organizations played an influential role in the Tunisian transition, serving as watchdogs supervising the work of the government and the NCA and facilitating national dialogue. It is worth mentioning that immediately after Ben Ali's ouster in January 2011, the powerful Tunisian General Labor Union (UGTT) initiated a campaign to force then Prime Minister Mohamed Ghannouchi to steer the transition in the right direction.

Four of the most powerful civil society organizations in Tunisia, the Quartet, were key players in the constitution-making process: the powerful Tunisian General Labor Union (UGTT), together with the Tunisian employers' union (UTICA: l'Union

tunisienne de l'industrie, du commerce et de l'artisanat), the bar association, and the Tunisian League for Human Rights (LTDH). The UGTT derives its strength from its history and organizational structure. It was founded in 1946 in the aftermath of WWII and joined forces with the national movement in the fight for independence. Since 1956, when Tunisia attained independence, the UGTT has been a non-partisan body that was open to all professions. It unites all of the different segments of the society, and it has become a platform for the opposition to voice its opinions and demand its rights (Kerrou, 2014). The Tunisian employers' union (UTICA) gave economic clout and weight to the Quartet. It was exceptional for the workers to join forces with the UGTT, which had not happened since independence (Chayes, 2014). In addition, the Tunisian Bar Association, the oldest member of the four institutions founded in 1887, which has been known historically for being an activist organization, joined forces with the LTDH, which is the first independent human rights association in the Arab world (Chayes, 2014). The weight and independence of these organizations, offering a relative advantage over most of their counterparts in other Arab countries, including Egypt, qualified them to counterbalance the Ennahda-led government and to play the decisive role in brokering Tunisia's historic compromise and revived dialogue (Kerrou, 2014; Fakir, 2014).

This alliance was an influential counterbalance to the Troika government that managed to revive the national dialogue and narrow the differences between the government, on the one hand, and the secular opposition represented by Nidaa Tounes and the Popular Front, on the other hand (Kerrou, 2014). Details of the Quartet's role will be discussed in the following section.

Challenges, Mediation and Breakthrough

Throughout the process of constitution-making which took two years and four drafts to reach the final product, the NCA faced a number of key challenges and impediments that threatened the completion of the process itself. Many difficulties that emerged were linked to the context in which the constitutional process took place. The two-year long constitution-making process was marked by polarizing debates, mass street protests, two political assassinations, and rising terrorist acts (Mersch, 2014). The first anniversary of the constituent assembly witnessed polarized political debates over the legitimacy of the constituent assembly itself, after the one-year mandate of the constituent assembly expired in October 2012 (Zaiter, 2013). For the opposition, the constituent assembly was no longer legitimate as it failed to meet its promise and to bring about real accomplishments. The opposition forces were asking for consensual legitimacy[14], a broader agreement over the key issues within the road map of the transitional stage, and a more representative government (Zaiter, 2013). Ennahda and the Troika, one the other hand, were arguing that the NCA was the only legitimate authority, and its legitimacy could only end with adopting a new constitution (Aljazeera Net, September 2012). Their argument was that the year-long mandate that all the political parties including Ennahda signed was only a moral obligation and not a legal one (Zaiter, 2013).

The assassination of Chokri Belaid on February, 6, 2013 was a turning point in the transition. Belaid was a secular influential politician, a lawyer and human rights activist, who was one of Tunisia's most prominent secular political figures opposed to

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[14] The idea of consensual legitimacy was central in the constitution-making processes in both Egypt and Tunisia. The non-Islamist oppositions were calling for consensual legitimacy, i.e. reaching consensus among most of the political and social actors on the divisive points, whereas Islamists were clinging to the electoral legitimacy.

Ennahda and an outspoken critic of the Troika government (BBC, 6 February 2013). The assassination triggered mass street protests against Ennahda and the government, and heightened rifts between Islamists and non-Islamists and the supporters and opponents of the regime (Zaiter, 2013). The demonstrations were directed against the government's unwillingness to take action against the increasing political violence. Protestors were also giving vent to tension that was building up for months over the lack of progress in the transitional process; people were disenchanted with the constitutional process which should have been completed within a year, in addition to the Troika government's response to the country economic problems (Ghanmi, 2013). Even the cabinet reshuffling that came in response to mass protests following Belaid's assassination in February had failed to relieve that tension (Ghanmi, 2013). The second assassination of a key opposition figure of the NCA and a vocal critic of Ennahda, Mohamed Brahmi, spurred mass demonstrations when thousands took to the streets against Ennahda led-government (Legge, 2013). In the aftermath of this incident, polarization and mistrust reached their climax; the opposition boycotted the NCA and the President of the NCA declared the work of the NCA suspended till the opposition's return (Omri, 2014).

Within the constituent assembly, the dividing lines of the discussion were mainly related to the relations between the state and religion and the question of Sharia, the issue of blasphemy, women's rights, and the distribution of executive power. The relation between the state and religion may have been the most divisive, generating highly charged debates within the NCA and among the public. The question of introducing a direct reference to Sharia in the constitution, which was raised by some of Ennahda members at the NCA, spurred a series of criticisms against Ennahda that was accused of adopting a "double discourse" or trying to impose Sharia

"through the back window," especially since the party figures promised during the NCA election campaign that they would not attempt to include Sharia or enforce a particular way of life in the constitution (Marks, 2014, p. 20). Responding to this wave of anger and criticism, Ennahda postulated that from the beginning they were not interested in adding an explicit reference to Sharia; they did not want to divide the society at that fragile stage. Their understanding of Sharia is comprehensive (*Shumuli*), and there is nothing in the constitution that conflicts with Sharia (Ibrahim Zoghlemi, Ennahda Shura Council member, as cited in Marks, 2014, p.20). The same ideas were reiterated by Ghannouchi himself in an interview in summer 2011, when he said that Islam is a philosophy not rules (Marks, 2014, p.21). Ennahda left out adding an explicit reference to Sharia in the constitution, as an attempt to compromise on the role of religion. The preamble cites the "attachment of our [Tunisian] people to the teachings of Islam," and Article 6 states that the State protects "religion and the sacred".

The relation between religion and state remained, however, as a divisive issue at the NCA. A conflict took place between two NCA members, Mongi Rahoui from the same leftist party as the Late Chokri Belaid, and Habib Ellour an Ennhda member, over Article 1, which reads as follows: "Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic its language and the republic its system." The two disagreed over whether the "it" in "Islam is its religion" referred to the state or the people, with Ellouz claiming "it" meant the state, while Rahoui said the people (Omri, 2014). This dispute led to a deadlock over the wording of Islam's place in the constitution, until a compromise was found when the NCA reconvened after the Quartet's mediation. In the final draft Article 1 was left the same; however, after contentious debates Article 6 was modified and a clause was added to prevent *takfir*

(calling some unbeliever) after Rahoui received death threats because he was referred to by a Ellouz as unbeliever (Omari, 2014). The issue of blasphemy was another challenge when it came to religion matters. Ennahda introduced language that would criminalize blasphemy in Article 3 of the first constitutional draft, which stated that "the state guarantees freedom of religious belief and practice and criminalizes all attacks on that which is sacred," "specifically defining the three Abrahamic faiths (Islam, Judaism, and Christianity) as faiths that would be protected from blasphemous attacks" (Marks, 2014, p. 24). It was only after significant lobbying on the part of local civil society groups, international NGOs, and foreign governments that Ennahda removed this language, which was regarded as a serious threat to the right of freedom of expression. As a compromise, a new phrase was added to Article 6 in the final constitution stating that "the State protects sanctities and prevents attacks on them" (Marks, 2014).

Another dividing point was protecting women's rights and the issue of gender equality. Although during its 2011 elections campaign Ennahda attempted to build confidence in its handling of women's rights, in less than a year Ennahda members added language to the second constitutional draft in Article 28 which stated that "women are men's complements." The argument of the Ennahda representatives on the Rights and Liberties Committee was that men's and women's roles are indeed equal, but that they have different biological roles and obligations, and therefore men and women "complement" one another within the family (Marks, 2014, p. 23). This Article provoked a firestorm of criticism from local and international media; it was vehemently opposed by, among others, active and powerful Tunisian women coalitions and civil society organizations (Omri, 2014). The final constitution, thanks to the lobbying of women's rights activists and civil society organizations, has Article

20, which explicitly declares male and female citizens to be "equal in rights and duties," and article 45, which states that "the government not only protects women's rights, but supports their achievements and guarantees the equality of opportunities" (Mersch, 2014). The Articles on women's rights are discussed in detail in the next chapter.

Other two problematic points were the independence of the judiciary and the parliamentary versus the presidential model. The dispute over the independence of the judiciary (Articles 102-124) was long and arduous, and it was not resolved until the very last debate of the articles in the constitution (Omri, 2014). Ennahda insisted on some sort of control or oversight by the executive over the judiciary but in the end it lost the battle. The appointment of judges in the new constitution is the "exclusive" right of the Supreme Judicial Council, which is legally and financially independent (Omri, 2014).

The model of the new political system was another point of dispute. Ennahda strongly favored a parliamentary system after its victory in the 2011 elections. Its argument was that it is important to get rid of Tunisia's tendency toward presidential authoritarianism, and to have a new political landscape where all voices are represented (Marks, 2014, p. 26). Ennahda accused the parties who wanted a presidential or semi-presidential model of abusing the constitution for their own interests because they do not have strong structured parties, while the opposition parties accused Ennahda of being self-serving and power hungry (Marks, 2014). After long debates and as an attempt at overcoming the deadlock, Ennahda ultimately compromised a great deal of ground on the future political system, moving from a parliamentary position, to a mixed system with a weak executive, and finally going

back to a stronger presidential position, which was a crucial political compromise (Marks, 2014, p. 24).

When Ennahda-led coalition unveiled a draft constitution in June 2013, the opposition massively rejected it. The latter accused the Troika-led governing coalition of manipulating the whole process of constitution-making, and abusing its majority in the Coordination and Drafting Committee by imposing its views and modifying several key points agreed upon in the NCA six constituent commissions (Abdesselem, 2014): "Compromise language we had hammered out, that Ennahda had agreed to verbally, disappeared from the draft […] It is the Troika's constitution," said one Constituent Assembly member Noomane Fehri, of the opposition Afek Tounes party (as cited in Chayes, 2014). According to Abdesselem (2014), the modifications in question were on (1) the preamble, where changes were made to include Islam in the institutional order of the State; (2) restrictions were placed on the right to strike; (3) establishing a strict parliamentary regime with a President that was partially deprived of all authority; and (4) the judiciary, whose independence was compromised. Under pressure from the opposition, a committee of consensus (CC) with responsibility to identify the contentious issues and lead negotiations was established just before the suspension of the work of the NCA upon the assassination of Brahmi. This committee, however, played a significant role following the reconvening of the NCA. The whole transition process came to a deadlock in July 2013 in the aftermath of the second political assassination. The NCA suspended its work, protestors took to the streets, and the opposition demanded the government's resignation and the dissolution of the National Constituent Assembly (Frazer, 2014). The response of the ruling majority was the mobilization of their supporters and establishing a front defending

their legitimacy, which considered dissolution of the government and NCA to be "red lines" which were non-negotiable (Redissi, 2014).

In a context charged with tensions, the UGTT created the quartet of civil society organizations to facilitate a National Dialogue. The National Dialogue would not replace the NCA; rather, its aim was to bridge the gap between the electoral legitimacy to which the government clung and the consensus legitimacy for which the opposition asked. It took two months for the Quartet to move the situation from a point of total deadlock in the summer of 2013 to reach an agreement on The Road Map (Redissi, 2014).

The Quartet led negotiations resulting in the establishment of the National Dialogue in October 2013. Under the supervision of the Quartet, the National Dialogue drew up a roadmap for three tracks on which the leaders of the Ennahda-led government and the opposition agreed: the constitution, the government, and the electoral system. The National Dialogue included 21 parties on the basis of one representative member from each party, whatever its electoral share. The Dialogue put in place a road map that had three tracks: governmental, constitutional, and electoral, with internal committees created for this end. The Dialogue's job was not easy; it stopped more than once due to disagreements among the members. After three months of marathon negotiations, a breakthrough was reached by January 2014. The Ennahda-led government resigned and a technocrat, Mehdi Jomaa, was appointed (Redessi, 2014). The Constituent Assembly reconvened, and, with the National Dialogue working in parallel, the Consensus committee resumed its work and -as explained above- succeeded in resolving the constitutional differences of the contentious points in the text such as the place of religion in political life, the issue of *takfir*, the model of the new political system, the appointment process of judges, and

the age requirements to run for presidency. The NCA completed the constitution in another month, and on January 26, 2014, the NCA overwhelmingly approved the 149-article Tunisian constitution with a total of 200 NCA members voted in favor of the final text, with 12 members voting against and only four abstentions (Chayes, 2014). Reaching consensus appeared to be the only option in an environment of extreme political polarization and political violence, and the only way-out for the Islamists to avoid submitting the constitution for a national referendum, in which the chances were that the Ennahda-led coalition would lose. It is worth mentioning that the Dialogue resumed its work to help complete the implementation of the road map, settle new differences, and support the unelected caretaker government till the parliamentary election (Redessi, 2014). Finally, the Quartet's mediation saved the transition and the constitution-making process in Tunisia, and prevented the breakdown of the process.

Having shed light on the constitution-making process in Tunisia, the following section examines how the qualified majority of Islamists in Egypt shaped the constitution-making process.

The Constitution-Making Process in Egypt

As discussed in Chapter 2, establishing the constituent assembly was an integral part of the process of constitution-making in Egypt. Unlike Tunisia, the power struggle between the different actors had started before the actual process of drafting the constitution due to the lack of precise measures of electing the constituent assembly members. This section examines the role of the political and social actors at the Constituent Assembly, and the impact of the qualified majority of Islamists manipulated on the constitution-making process.

Political and Social Actors at the Constituent Assembly

The SCAF

The SCAF was one of the main forces in the constitution-making process, and its involvement in its different stages assumed different forms, as explained in the previous chapter. The SCAF represented what Elster (1995) referred to as an "upstream constraint" to the constitution-making process, that is, a constraint imposed by the person or institution that has the power to convene a constituent assembly or put the mechanism for establishing it (p. 373). Although the SCAF's management of the transition process was one of the main reasons that resulted in a non-representative Constituent Assembly, the SCAF attempted at tipping a balance against the Islamist's power at different stages of the transition. The role of the SCAF in transition deserves further examination, yet it is beyond the scope of the project.

The Islamists

The Islamists are not a homogenous group; indeed, there are wide variations among the political Islamic groups or Islamists. They are diverse in their political agendas and goals, and their positions have evolved over time due to their political realities (Folkeson, 2012). The Al-Ahram Center for Political and Strategic Studies (2012) mapped the Islamic political actors in Egypt, categorizing them into the following broadly defined groups: (1) the Muslim Brotherhood and their political party Freedom and Justice (FJP); (2) Conservative Islamic Salafi groups, represented by various political parties that were established during the transition, chief among them Al-Nour Party, which came out of the Salafi Da'wa in Alexandria--the mainstream Salafi movement in Egypt--in addition to other smaller groups that differ from Al-Nour in their positions, such as Al-Asla (authenticity), Al-Watan, and Al-

Fadila (the virtue); (3) The Al-Wasat Party (Central party), founded by ex-Muslim Brotherhood member Abu-Ela Madi; and (4) Al-Gama'a al-Islamiyya (The Islamic Group), a former jihadist group that renounced violence, and its political party, the Building and Development Party (Shehata & Dorpmueller, 2011; Ragab, 2012). All these Islamist groups had representation in the Parliament with its two houses (the People's Assembly and the Shura Council), and hence in the Constituent Assembly, yet the major representation was for the Muslim Brotherhood's FJP and Al-Nour Party that won 65% of the seats (Ragab, 2012).

The rivalry between these Islamist groups, due to their different positions on the question of Sharia law and women's and minorities' rights among other issues, was another challenge to the constitution-making process. The Salafists accused the Brotherhood of being too compromising, while the Muslim Brotherhood, in turn, viewed the Salafists' positions as naive and overly rigid (Al Anani, 2013). However, not all Salafists had the same position; Al-Nour Party demonstrated pragmatism occasionally, with its platform calling for establishing a "modern state that respects citizenship and coexistence between all people" (Al Anani, 2013). The Muslim Brotherhood accused the Salafists of widening the divide between the Islamists and non-Islamists or the liberal members. In an interview, Gehad el-Haddad, a FJP member, said "Salafists have in fact been the prime antagonists in passing many of the clauses by insisting on adding their own attachments to the texts […] The more they get their way, the more we lose liberal support" (Giglio, 2012).

Non-Islamist Political Parties

After the ousting of Mubarak, dozens of non-Islamists parties emerged, representing a wide range of ideologies, including socialism, liberalism, and nationalism (El-Azabawi & Hassan, 2013). This section only sheds light on the parties

which managed to get seats at the People's Assembly and those who played a prominent role during the constitution-making process. One of the most prominent liberal parties that emerged in the post-revolution era was the Free Egyptians Party or the Liberal Egyptian Party (*Almasreyeen Alahrra*). Although it was established in 2011, it secured 14 seats of the party lists and a single individual seat. The party advocates liberal economic policies, freedoms, and citizenship rights. Its agenda advocates for separating religion-related affairs and state affairs (Almasreyeen Alahrra, 2014).

Another liberal party was the Neo-Wafd Party, which was historically established by Saad Zaghloul in the 1920s and then reestablished in 1978 under the name Neo-Wafd (El-Azabawi & Hassan, 2013). Despite being one of the oldest political parties in Egypt, it managed only to secure 7% of the seats at the People's Assembly. The Egyptian Social Democratic Party, founded in July 2011, secured 15 seats. It represents a new stream in the Egyptian political sphere, advocating democracy, citizenship and human rights within the framework of a regulated capital market (Egyptian Social Democratic Party, 2014). Another newly founded liberal party is Al-Dostour Party, founded by Mohamed ElBaradei in April 2012 after the parliamentary elections, which was an attempt at uniting the opposition as well as a number of young people who considered ElBaradei as the icon of the revolution (Morsy, 2014). In addition, there are multiple leftist parties, the long-standing Al-Tagammu (National Progressive Unionist Party), the Egyptian Socialist Party, and the Socialist Popular Alliance Party. There are also the Arab Nasserite parties and the recently formed Egyptian Popular Current Movement, founded by 2014 presidential candidate Hamdeen Sbahi (El-Azabawi & Hassan, 2013). There is also the Congress Party founded by the 2012 Presidential candidate and the former General Secretariat

of the League of Arab, Amr Moussa, in addition to the Egyptian National Movement party, founded by the 2012 Presidential runner, Ahmed Shafiq (Morsy, 2014).

These political parties were known for chronic weakness and fragmentation, which was inherited from the successive authoritarian regimes since 1952. Major problems that these parties suffer from, among others, are the lack of funds, solid structural organization, and experienced leadership (El-Azabawi & Hassan, 2013). Most of these parties formed alliances and coalitions to run for the 2011/2012 Parliamentary elections. The New Liberal parties, the Free Egyptians Party (FEP), the Social Democratic Party (SDP), in addition to Tagammu formed the Egyptian Bloc, which was supposed to counter the Muslim Brotherhood-led Democratic Coalition. However, they only obtained 33 seats (8.9%) of the People's Assembly, and only 4.4% in the Shura council (Serodio, 2013). The Wafd Party ran on its own lists and secured 38 seats (9.2%), and at the end came the alliance of the leftist parties or the Revolution Continues Alliance (RCA) including the Popular Socialist Alliance Party, and Egyptian Current Party, in addition to members of the Revolutionary Youth Coalition, and the Egyptian Socialist Party, which secured only 1.57% of the seats (Serodio, 2013). All in all, the non-Islamist alliances and coalitions gained only 23% of the seats in the 2012 Parliament including the few seats that were regarded as the remnants of Mubarak's regime (Morsy, 2014). These coalitions did not last long after the parliamentary elections, and they were fragmented. The poor representation of non-Islamists in People's Assembly and the Shura Council was also mirrored in the composition of the first and second Constituent Assemblies that the Parliament elected as explained in the previous chapter. There were several unsuccessful attempts from the non-Islamist opposition to form a united front to counter-balance the Islamists (Morsy, 2014). It was only after President Morsi issued a constitutional

declaration in November 2012 giving himself far-reaching powers that the country's fractious and divided opposition from the liberal to the left united under the National Salvation Front led by the famous opposition figures Mohammed ElBaradei, Hamdeen Sbahi, and Amr Moussa (BBC, December 10, 2012). The coalition formed only a month before the Constituent Assembly submitted the draft constitution to a public referendum. The coalition did not manage to influence that constitution-making process or to mobilize the vote against the constitution, but it played a significant role afterwards, until the removal of President Morsi (Morsy, 2014).

Points of Divergence and Failed Consensus

As explained in the previous chapter, even before the actual start of the work of the second constituent assembly, five non-Islamist parliamentary members, including representatives of the three parties of the Egyptian Bloc, in addition to the Socialist Popular Alliance and the Karama Nasserite party, which was part of the Muslim Brotherhood-led Democratic Coalition, declined their membership in the assembly in the light of what they described as "the Islamist monopoly on the constitutional-drafting process" (Serodio, 2013, p. 37). Other non-Islamists, however, were persistent on being represented in attempt to weigh in and impact the discussion and hopefully the final product of the assembly. Political scientist and secularist Wahid Abdel Maguid was even designated as a spokesperson (Awad, 2014 & Abdel Maguid, 2013).

According to the March Constitutional Declaration, the Constituent Assembly had six months to finish its job. The assembly started by mid-June 2012, with the beginning of the Muslim brotherhood President's term, by enacting its own bylaws including the procedures of adopting the constitution individual articles, which required the consensus of all 100 members. Failure to reach a consensus would

indicate the need for an amendment, and the article would need the approval of 67 members. If the article again failed to pass, 57 members would need to approve after further amendments (International Commission of Jurists [ICJ], 2012). The bylaws also divided the work of the Assembly into five committees, one for each chapter: the State and Essential Foundations of the Egyptian Society; Rights, Freedoms and Public Duties; the System of Governance and Public Authorities; the Independent and Supervisory Apparatuses; and Proposals, Dialogues and Societal Communication Committee, which was supposed to communicate with the civil society organizations, hold hearing sessions and receive people's suggestions. This latter committee was chaired by the Muslim Brotherhood member Mohamed ElBeltagi, who also supervised and controlled the Assembly website. There was also a technical editing committee for the final editing and reviewing of the document (Youm Saba', 23 June 2012).

In an environment of extreme political polarization, full of internal divisions and ideological disagreements among the members, the Assembly started its work. Abdel-Maguid, the resigned spokesperson of the Assembly, detailed, in his book *The Crisis of the 2012 Constitution* (2013), the different attempts he and other non-Islamist members undertook to reach consensus with the Muslim Brotherhood and the Salafists over the points of disagreements which were mainly related to the religion's role in the state's affairs, women's rights, civil and political rights, economic and social rights, and the powers of the president and the political system. Abdel Maguid (2013) concluded it was only after three months from the beginning of the Assembly's work that the dominance of the Muslim Brotherhood over the constitution-making process became evident, and it became clear that the Islamists were maneuvering and that they were not willing to compromise.

One of the central points of divergence was Article 2 about the status of Sharia in the constitution, while most of the political factions agreed to leave Article 2 as it was in the 1971 constitution, that is the principles of Sharia were the principal source of legislation. The Salafists were pushing for omitting the word principles to make it more general and to open the door for various interpretations and hence legislations (Abdel-Maguid, 2013). In addition, there were several attempts by Salafists supported by the Muslim Brotherhood to prohibit issuing any legislation that is not compatible with the Sharia, in addition to change the article stipulating that sovereignty is for the people to sovereignty belongs only to God (Abdel-Maguid, 2013). Such suggestions were met with uproar from the non-Islamist fractions accusing the Islamists of attempting to found a theocratic state. After lengthy negotiations, the Salafists finally agreed on leaving Article 2 as it was in 1971, yet they insisted on introducing a new Article 219 which defined the principles of Sharia as "including the general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community." This definition transgressed the established interpretation by the Constitutional Court, the body that was exclusively entrusted with interpreting the principle of Islamic Sharia, which ruled before that the principles of Sharia are those provisions that contribute to the realization of its objectives: the protection of religion, life, reason, honor and property (SCC 2004, Awad, 2014). A number of non-Islamist members withdrew from the Assembly in the light of introducing this article arguing that this Article constituted a real threat to personal freedoms in Egypt and put in place the foundation of a religious state. (Ahram Online, 2012).

Another controversial point was the role of Al-Azhar, the most renowned religious institute in Egypt and the Islamic world. There were attempts at making Al-

Azhar the reference for the affairs related to Sharia-law, that is, making Al-Azhar the reference of the law-making process in Egypt. Amid the strong disagreements of the non-Islamists members and the representatives of Al-Azhar themselves, the Article was amended to give Al-Azhar's advisory role: "Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law" (Abdel-Maguid, 2013). Although the Al-Azhar's opinion was not binding, the non-Islamists forces considered that such an article placed state institutions under the authority of a religious one (Awad, 2014). Other points of disagreements were women's rights, and equality and non-discrimination.

According to Abdel-Maguid (2013), all the non-Islamist's attempts to introduce articles that guarantee women's rights and protect women against discrimination and violence were in vain. The Salafists would not consider women's rights as a point on the negotiation's agenda to start with, and the constitution was produced without a single Article on women's rights, as will be explained in the following chapter. In addition, the Islamists refused to incorporate any article prohibiting human trafficking or child marriage (Abdel-Magued, 2013, & Awad, 2014). As for non-discrimination, the reference to the grounds of discrimination on the basis of sex, origin, language, religion or belief, which was the principal guarantee of non-discrimination in the constitution and which had been figured in all previous Egyptian constitutions, were removed and the non-discrimination article only stated that "all citizens are equal in rights and obligations, with no discrimination between them" (Awad, 2014, & Abdel-Maguid, 2013). Islamists also refused to integrate the non-Islamists' proposals of prohibiting imprisonment for crimes related to the exercise of freedom of the press, and also did not prohibit the suspension, closure, or seizure of any media outlet or a newspaper without a court rule (Awad, 2014, & Abdel-Maguid,

2013). Finally, the Islamists refused to make any reference to Egypt's commitment to international treaties to which it is party, arguing that this might open the door for foreign intervention in Egypt's internal affairs, and also due to concerns that some of the treaties might contradict the principles of Sharia (El-Shobaki, 2014, & Abdel-Maguid, 2013).

The work of the Assembly became chaotic while attempting to hasten the process; draft contradictory texts were published on the Assembly website that was managed by the Muslim Brotherhood. The substantive committees accused the drafting committee of interfering in their job and leaking texts, particularly the Rights and Freedoms and the State and Society chapters, which were not endorsed by the former (Abdel Maguid, 2013 & Awad, 2014). The attempts at reaching a consensual document reached an impasse by November 2012, and a wave of withdrawals began on November 17, 2012 with the Church representatives. This was followed by the withdrawal of more than 30 non-Islamist members accusing representatives of Islamist forces of pushing towards a constitution for an Islamist state rather than for a national-unity state (Ahram Online, 2012). In a press conference at the Wafd Party, on 18 of November, the withdrawers announced that they had lost any hope that the draft constitution would gain consensus from all political forces or reflect Egypt's aspirations for building a functioning civilian democracy, and that they had reached a dead end without consultations coming to any conclusion (Ahram Online, 2012). They accused the Islamist forces and the chairman of the assembly of speeding up the process of finalizing the draft constitution without enough or serious debate of the controversial articles. Among the withdrawals were also the ten members of the Assembly's consultative/advisory committee including constitutional law expert Ahmed Kamal Abul-Magd; political analyst Hassan Nafaa; and Nasserite activist

Hamdi Qandil, who wrote to the Islamist-oriented chairman saying that they tried to offer various suggestions but "it is regrettable that they fell on deaf ears" (Ahram Online, 2012). At that point seeking consensus was not on the agenda; and instead of seeking reconciliation, the withdrawn representatives were quickly replaced by substitute members (El-Sayed, 2014).

In an attempt to fight back, the Islamists accused the opposition of being a minority that was trying to impose its positions and while disrespecting the will of the Egyptians, who had elected the former. In his *Arab West Report* (2013) interview, Amr Al-Derrag said, "When the non-Islamists realized that the success of the Constituent Assembly and the passing of the constitution would lead to parliamentary elections within the two months following its approval, they did all they could to delegitimize the new constitution in the eyes of the people […] People who withdrew were doing something completely against democracy: they wanted to impose their opinion as a minority" (Serodio, 2013, p. 51). Other members of the Constituent Assembly, including Mohammed Mahossoib, a member of Al-Wasat Party, Nadia Mustpha, independent Islamist, and Ahmed Talaat, counselor at the Supreme Court, voiced the same opinion in interviews for *Arab West Report* (Serodio, 2013a, 2013b). They said that Islamists could not be blamed for the poor electoral performance and the lack of organization of the liberals and leftists, who were now violating basic democratic premises, such as the importance of respecting elections and the will of the majority (pp. 37, 51, 64). The Assembly's chairman, Hossam El-Ghiryani, told members "they should not be bothered by the flurry of withdrawals … it is rather better to go forward completing our job until the end without listening to all the fuss about withdrawal" (Ahram Online, 2012). Younis Makhyoun, a Salafist and currently the chair of Al-Nour party, told Al-Ahram Online that "the liberal forces wanted

enshrine their secular agenda and non-religious views in Egypt's constitution…Egypt is a predominantly Muslim country and its constitution should stress this fact" (Ahram Online, 2012).

Shortly after this wave of withdrawals, on November 22, 2012, President Morsi issued a constitutional declaration in which he gave himself far-reaching powers and extended the Constituent Assembly's work for a maximum of eight months. The constituent assembly did not benefit from the extension of its mandate, and on November 29, it held a marathon 18-hour session, discussing provisions with which it had never dealt before, and ended up adopting the draft constitution (Awad, 2014). The wrong start in the formation of the Constituent Assembly led to a defective constitution that did not attain a consensus amongst the country's political forces, and deepened the polarization of the society despite the fact that the constitution received a comfortable majority of 63% of the voters (el-Shobaki, 2014).

In conclusion, this chapter has demonstrated how the different Islamist majorities impacted the constitution-making process. In Tunisia, Ennahda Islamists, who only gained a simple majority at the constituent assembly, were forced to form a coalition with other two secular parties to have the right to form a government. The ruling coalition, the Troika, although it had an absolute majority, still did not have a two-thirds majority that would have enabled it to pass a constitution alone. Accordingly, reaching consensus appeared to be the only option to avoid submitting the constitution for a national referendum, in which the chances were that the Ennahda-led coalition would lose in an environment full of political polarization and political violence for which the Troika were blamed. In Tunisia, when the process had reached an impasse and the opposition withdrew, the assembly suspended its work,

and there was a powerful nonpartisan civil society that was capable of playing the role of mediator and brokering a breakthrough.

The situation in Egypt was quite different. Islamists, the Muslim Brotherhood, and the Salafists had a qualified majority for the reasons explained in the previous chapter; such a majority was reflected in the Constituent Assembly. A major part of the political polarization and struggle had already taken place over the formation of the Constituent Assembly due to the lack of any criteria or measures that governed the establishment of the Assembly as explained previously. Having a dominant majority amid the absence of any constrains that could have guaranteed that the majority would not abuse the constitution-making process, the Islamists were not obliged to reach a consensus. On the contrary, since they gained a majority, for them the constitutional outcome should be a reflection of this majority.

CHAPTER 4

CONSTITUTIONAL OUTCOMES: COMPARATIVE ANALYSIS

Introduction

As indicated in the previous chapters of the project, a number of variables enabled Islamists in Egypt to gain a predominant majority in the constituent assembly, whereas Ennahda Islamists won only a relative majority that forced them to form a coalition with secular parties. The qualified majority of Islamists in Egypt shaped the proceedings of the constitution-making and led to a constitution that did not achieve a consensus among political actors and that increased the polarization between the Islamists' and non-Islamists' supporters, whereas in Tunisia the Islamist-led coalition was prompted to negotiate and make concessions to avoid the breakdown of the process. The main question of this chapter is the following: How did these variables impact the constitutional outcomes?

To answer this question, this chapter presents a comparative analysis of a selected number of civil and political rights[15] in both constitutions against the International Covenant on Civil and Political Rights (ICCPR). The researcher assumes—based on the analysis of the proceedings of both constituent assemblies and the points of disagreement between Islamists and non-Islamists presented in the previous chapter—that the non-Islamist groups were aiming at reaching a constitution that would have been as close as possible to the ICCPR in order to guarantee the minimum protection of these rights, whereas the Islamists were trying to impose their ideological views. This comparative analysis will help measure the constitutional

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[15] See Appendix A for the Arabic and English texts of the Articles of both constitutions that have been referred to in this chapter.

outcomes of both constitution-making processes in terms of producing constitutional documents that represent either a compromise with or a break from the non-Islamist opposition's agenda.

The researcher has chosen for two reasons a selected number of articles of civil and political rights, namely, freedom of thought, conscience, and religion; freedom of expression; and the right to non-discrimination. First, the principles of non-discrimination and protecting the freedoms of conscience, thought, and religion are among the central underpinnings of inclusive and democratic governance. Second, these articles were among the central areas of disagreement between the Islamist and non-Islamist actors.

The ICCPR will be used as a baseline in the analysis of both constitutions for the following reasons: (1) It is a binding treaty that is part of the International Bill of Human Rights along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR). (2) It is an international legal frame of reference of the fundamental civil and political rights. (3) It is considered as "the most comprehensive and well-established UN treaty on civil and political rights" (Joseph, Schultz, & Castan, 2000). (4) The majority of the UN state members are parties to the covenant, including Egypt and Tunisia.

Freedom of Thought, Conscience, and Religion

The ICCPR does not define the terms "thought," "conscience," and "religion." Partsch (1981) presented a comprehensive definition according to which "these terms together cover all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance" (as cited in Scheinin, 2010).

Article 18 of the ICCPR[16] states that everyone is entitled to the right to freedom of thought, conscience and religion. As pointed out by the Human Rights Committee (HRC) General Comment No. 22 (paragraph 1), the right to freedom of thought, conscience, and religion "is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others." Furthermore, "the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief." The HRC also stated that religion or belief includes "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief" (HRC General Comment No. 22). The Committee does not define religion, and the terms "belief" and "religion" are broadly used to include "traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions" (HRC General Comment No. 22).

The manifestation or practice of one's freedom of belief is referred to as "the active" component of one's religious freedom, as opposed to the "passive" components, which consist of mere adherence to certain beliefs (Joseph, Schultz, & Castan, 2000). Article 18 of the ICCPR distinguishes between the passive and active components of these rights. It does not permit any limitations whatsoever on freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice; these freedoms are protected unconditionally (HRC General Comment No. 22). Also, Article 19.1 of the same Convention states that it is the "right of everyone to hold opinions without interference." Restrictions are permitted on the freedom to manifest one's religion or belief only "if limitations are prescribed by law

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[16]See Annex B for the texts of all the ICCPR Articles referred to in this chapter.

and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others" (HRC General Comment No. 22).

The following section examines freedom of conscience and religion in both the Tunisian and Egyptian constitutions, while freedom of thought will be discussed in the freedom of expression section. Freedom of thought is not addressed in the same article as freedom of belief or religion and conscience in both constitutions, but rather it is mentioned in relation to freedom of opinion, expression, media, and publication.

The 2014 Tunisian Constitution and Freedom of Conscience and Religion

The Tunisian constitution addresses freedom of religion in Article 6, one of the most controversial and long-debated articles during the constitution-making process. The Tunisian constitution, unlike the Egyptian one, commits the state in absolute terms to guarantee freedom of belief and the freedom to manifest and practice these beliefs to all. In addition, the provision guarantees freedom of conscience, which is considered a strong commitment to the state's obligations under the ICCPR (El-Jaadi, 2014).

However, this article illustrates the Tunisian Constitution's internal contradictions, which was the outcome of trying to reach a compromise constitution (Mersch, 2014). Article 6 bestows on the state the role of "the guardian of religion"; it ensures the impartiality of mosques and places of worship against their use for partisan purposes. A new paragraph was introduced in the final deliberations, which was the compromise that both the Islamists and non-Islamists reached after the mediation of the Quartet as explained in the previous chapter, to oblige the state to disseminate the values of moderation and tolerance, to protect sanctities, to prohibit the accusation of *takfir* (calling someone unbeliever) and the incitement to hatred and violence, and to confront hatred and violence (Grote, 2014). The article is ambivalent,

as the meaning of protecting religion and the sacred and the definition of sanctities are unclear. In addition, protecting sanctities contradicts freedom of conscience and poses a real threat to freedom of expression, as will be explained in the next section (Mersch, 2014). These clauses could open the door for the most repressive interpretation in the name of protecting the sacred, and the ambiguity allows lawyers, judges, and politicians to interpret the clauses as they see fit (Guellali, 2014).

Regardless of the ambiguity and contradiction, the language of Article 6, which allows freedom of belief and practices for all and freedom of conscience, is a clear commitment to international law under Article 18 of the ICCPR and United Nations Human Rights Council Resolution 16/18 (2011) that calls upon the states to take actions to "foster religious freedom and pluralism," to "criminalize incitement to imminent violence based on religion or belief," and to "promote the full respect and protection for places of worship and religious sites." Finally, although Article 6 was one of the most disputed articles in the constitution-making process, and despite the caveats in the article, the final outcomes came as close as possible to Article 18 of the ICCPR.

The 2012 Egyptian Constitution and Freedom of Conscience and Religion

Article 43 of the Egyptian constitution established the universal freedom of belief by stating that it is "a guaranteed right" (حرية الاعتقاد مصونة). Yet, in the same article, the freedom to practice religious rites and establish places of worship was only granted to the followers of Islam, Christianity, and Judaism, as regulated by law. This article distinguished freedom of religion or belief from the freedom to manifest and practice this religion or belief. It protected the former in absolute terms, while it restricted the latter to the followers of the previously identified religions. This

provision was compatible with neither the ICCPR nor the definition of the Egyptian Supreme Constitutional Court, which defined freedom of religion or belief as

> the freedom of not to be coerced to adopt, renounce or profess particular religion or belief [...] Freedom of belief cannot be separated from freedom to manifest or express one's religion or belief, both clauses are complementary. The second clause is a vehicle for expression of the first one, and both cannot be separated. No limitations whatsoever could be put on the first clause, freedom of religion or belief, while the second clause can be only restricted when necessary to protect public safety, order, morals, or the fundamental rights and freedoms of others. (SCC, Case No. 8, 1996)

Article 43 was also regarded as a step back from the previous Egyptian constitutions from 1923 to 1971, as well as in March 2011 Constitutional Declarations, which stated that the State guarantees freedom of belief and practice (Al-Asuity, 2013). Further, Article 43 discriminated against other religious minorities in Egypt beside the above identified religions, such as Baha'is. The Constitution did not have any reference to freedom of conscience, as this freedom entailed the right of individuals to be independent from the collective conscience, especially in matters related to religion and conviction (El-Jaadi, 2014). Hence, it could be argued that the Constitution did not rise-up to the ICCPR standards of the freedom to hold and manifest one's own beliefs, whether theistic, non-theistic, or atheistic.

Freedoms of Opinion and Expression

ICCPR Article 19: Freedoms of Opinion and Expression

Freedom of expression is "the right of every individual to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers … This right is important for the personal

development and dignity of every individual and is vital for the fulfillment of other human rights" (Freedom House, 2015; Amnesty International, 2015a). Freedoms of opinion and expression constitute "the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions" (HRC General Comment No. 34, paras. 2-4).

According to General Comment No. 34 (para. 9) on Article 19, "all forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature" under the first clause of Article 19. The freedom to hold an opinion is a passive action, and it is an absolute freedom. However, the absolute nature of this freedom ceases to exist when one expresses or manifests his/her opinion (Joseph, Schultz, & Castan, 2000, p. 387). Freedom of expression is closely related to freedom of the media and the right to access information (HRC General Comment No. 32). This section focuses only on freedom of expression.

Limitations on the right to freedoms of expression are permitted with regard to "respecting the rights or reputations of others or to the protection of national security or of public order or of public health or morals" (Article 19). HRC General Comment No. 32 elaborates on these limitations indicating that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself" (para. 21). General Comment No. 10 on Article 19, which was replaced in 2011 by General Comment No. 23 on Article 19, states that the interplay between the principle of freedom of expression and the limitations/restrictions imposed by the state determines the actual scope of the individual's right.

The Tunisian Constitution and Freedoms of Opinion and Expression

In the Tunisian constitution, Article 31 guarantees, in absolute terms, "freedom of opinion, thought, expression, media and publication … these freedoms shall not be subject to prior censorship." The right to access information and communication networks is also guaranteed in Article 32. The scope of freedom of opinions and expression was not clearly defined in the constitution, yet Article 49 of the Tunisian Constitution provides constitutional guarantees for the application of all the rights and freedoms in the constitution. It states that the law determines the limitations to the rights and freedoms mentioned in the constitution on the condition that it does not compromise its essence and remains compatible with a civil and democratic state. The article lists limitations that are in line with the third paragraph of Article 19 of the ICCPR, namely, "protecting the rights of others or based on the requirements of public order, national defense, public health or public morals." Article 49 has been particularly praised for respecting the "proportionality between these limitations and their motives" (Reporters without Borders, 2014).

There are concerns, however, that listing public morals as one of the limitations, together with the reference to Tunisia's Arab Islamic identity in the preamble, may allow for a conservative interpretation that violates freedom of expression (Williams & Mahmoud, 2014). Also, as mentioned in the previous section, the second paragraph of Article 6 (referred to in the freedom of religion section) which "protects sanctities and prevents attacks on them," due to its ambivalent language that fails to define sanctities or what could be considered as an attack against them could also be interpreted to curtail freedom of expression when it comes to religious matters.

The 2012 Egyptian Constitution and Freedoms of Opinion and

Expression

Article 45 of the Egyptian 2012 constitution guaranteed freedom of thought and opinion in absolute terms: "Freedom of thought and opinion shall be guaranteed." The second clause of the same Article guaranteed in absolute terms as well the right of every individual "to express an opinion and to disseminate it verbally, in writing or illustration, or by any other means of publication and expression." Other articles in the constitution, however, contradicted this provision and constitute violations of freedom of expression. Article 44 prohibited "undermining or subjecting to prejudice all messengers and prophets," and Article 31 prohibited insulting and showing contempt to any human being. The vague wordings of these articles could have led to extremely conservative interpretations that jeopardize freedom of expression, and "[provide] for defamation to remain a criminal offence" (Amnesty International, 2012). Article 44 could have restricted any kind of expression of opinions of a religious nature, and Article 31 could have been interpreted as advocating the prosecution of critics of the government (Amnesty International, 2012; Human Rights Watch, 2012; Al-Ali, 2012).

It is worth mentioning here that Article 81 defined the scope of the rights granted in the constitution as follows: "Rights and freedoms pertaining to the individual citizen shall not be subject to disruption or detraction [الحقوق والحريات اللصيقة بشخص المواطن لا تقبل تعطيلًا أو انتقاصا]. No law that regulates the practice of the rights and freedoms shall include what would constrain their essence." The third paragraph of this provision, however, contradicted the first two; it restricted the freedoms and rights mentioned in the constitution by stating that these rights and freedoms "shall be practiced in a manner not conflicting with the principles pertaining to the *State and*

Society Part of Chapter Two included in this Constitution." The part referred to in Chapter Two had articles on the state's role in "safeguarding ethics, public morality and public order, and fostering a high level of education and of religious and patriotic values" (Article 11), as well as safeguarding "the cultural and linguistic constituents of society" (Article 12). Furthermore, it established family as the cornerstone of society, "founded on religion, morality and patriotism" (Article 10). It could be argued that the ambivalent nature of Article 81 and linking it to articles included in Chapter Two could have been interpreted in a way that jeopardizes the essence of the rights and freedoms mentioned in the constitution, particularly freedom of expression (Al-Ali, 2012).

The Right to Non-Discrimination

Discrimination is defined as "the systematic denial of certain peoples' or groups' full human rights because of who they are or what they believe (Amnesty International, 2015b). The Right to Non-discrimination is

> a cross-cutting principle in international human rights law. The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. (OHCHR, 2015)

The principle prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, color and other bases. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights" (OHCHR, 2015).

There is heavy emphasis on the rights to non-discrimination in the ICCPR, since discrimination is "at the root of virtually all human rights abuses" (Joseph, Schultz, & Castan, 2000, p. 519). The ICCPR contains comprehensive prohibitions on discrimination in Articles 2(1) and 26. This is reinforced by Article 3 prohibiting discrimination on the grounds of sex, Article 4(1) prohibiting discrimination in relation to derogation, 23(4) regarding "equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution," Article 24(1) in relation to equal rights for all children, Article 25 that provides for the equal participation in public life of all citizens, and Article 20 that requires states to prohibit incitements to discrimination. Therefore, it is suggested that equality and non-discrimination is the dominant theme of the Covenant (Joseph et al., 2000, pp. 518–519).

The HRC General Comment No. 18 (para.1) on the Right to Non-Discrimination defines discrimination as

> imply[ing] any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The HRC draws the attention of the state parties to their obligation under the ICCPR to sometimes take measures to "guarantee the equality of rights of the persons concerned" and "to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."

The Tunisian 2014 Constitution and the Right to Non-discrimination

The Tunisian constitution states in Article 21 that "All citizens, male and female alike, have equal rights and duties, and are equal before the law without any discrimination. The State guarantees to citizens individual and collective rights, and provides them with the conditions to lead a dignified life." Moreover, the constitution addresses Article 3 of the ICCPR, by guaranteeing, in Article 46, "equal opportunities between men and women in the bearing of all the various responsibilities in all fields." The language of this article came as a compromise after significant lobbying exercised by civil society organizations and the non-Islamist groups to remove the suggested article that assigned women a complementary status to men, as discussed in the previous chapter. The Tunisian Constitution also commits the state to "seek[ing] to achieve equal representation for women and men in elected councils, and take the necessary measures to eliminate violence against women." It is worth mentioning here that the constitution uses the phrase "all citizens, male and female" in Article 40 in relation to the right to work and also in the preamble to emphasize the concept of equality between the sexes. In addition, the state is committed to protecting all children without discrimination (Article 47), protecting "the persons with disabilities against all forms of discrimination," and "[taking] all measures to ensure their full integration into society" (Article 48).

The wording of Article 21, however, limits the principle of equality and non-discrimination to all citizens, men and women, and not to all persons within the Tunisian territory. This does not conform to ICCPR Article 2 that obligates states to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. Furthermore, it is noteworthy that although Article 21 states that all citizens have equal rights, Article 74 contradicts this

by allowing only followers of Islam to run for the presidency (a condition that is not present in the 2012 Egyptian constitution). The HRC General Comment No. 22 on the right to non-discrimination indicates that "measures restricting eligibility for government service to members of the predominant religion […] are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under Article 26."

The 2012 Egyptian Constitution and the Right to Non-Discrimination

Article 33 of the Egyptian 2012 constitution stated that all "citizens are equal before the law. They have equal public rights and duties without discrimination." The concept of equality in public rights and duties was referred to in other articles as well: Article 6 stated that "the political system is based on the principles of democracy and *Shura* (counsel), and citizenship (under which all citizens are equal in public rights and duties)"; Article 8 stated that the "State guarantees the means to achieve justice, equality and freedom"; and Article 9 committed the State to "ensure safety, security and equal opportunities for all citizens without discrimination." Nonetheless, Article 33 did not meet Egypt's obligations under the ICCPR Covenant for the following reasons:

(1) Article (33) protected only Egyptian citizens and not all persons within the Egyptian territory, as mentioned in ICCPR Article 2(1). This article excluded refugees, asylum seekers, migrants, and all foreigners living within the Egyptian territory (Amnesty International, 2012).

(2) The constitution did not have a reference to the grounds upon which discrimination was prohibited including sex, color, religion, and other grounds. In fact, the list of the specific prohibited grounds was removed from Article 33 in the last draft as mentioned in the previous chapter. It is

worth mentioning here that all the previous Egyptian constitutions from 1923 to 1971 had a reference to the prohibited grounds of discrimination. The SCC mentioned in its definition of the right to non-discrimination that it regarded the list of prohibited grounds of discrimination that was mentioned in the 1971 constitution as non-exhaustive and that the Court considered other grounds of discrimination to ensure the principle of equality for all (SCC, 1989).

(3) The constitution did not mention equality between men and women, and there was no reference to prohibiting discrimination against women or protecting women's rights. The only reference to women was in Article 10, where "the state shall provide for special care and protection for single mothers, divorced women and widows" (Amnesty International, 2012; Human Rights Watch, 2012).

(4) The constitution did not refer to the measures that should be taken to "guarantee the equality of rights of the persons concerned" or "affirmative action in order to diminish or eliminate discrimination" as stated in the HRC General Comments.

The State and Religion

A recurrent theme is related to the rights addressed in the previous sections, and particularly the right to non-discrimination, is the role of religion in the state's affairs. Both the Egyptian and Tunisian constitutions recognize Islam as the religion of the state, yet recognizing an official religion of the state in itself is not against the international norms included in the ICCPR, as long as this does not entail infringing on the rights of the followers of other religions, according to HRC Comment No. 22 on freedom of thought, conscience and religion.

In the Tunisian constitution, Article 1 states that Islam is the religion of the state, yet Article 2 affirms that Tunisia is a civil state that is based on citizenship, the will of the people, and the supremacy of the law; neither of these articles can be amended. There are also references in the preamble, which is part of the constitution, according to Article 145, stating that the constitution is based on the people's commitment to the teachings of Islam and its open and its moderate objectives, and to adherence to the Arab/Islamic identity of Tunisia. However, there is no reference in the constitution to Islamic law as a source of legislation, which is another concession that the Islamists made under the pressure of non-Islamist groups and the civil society organizations, as mentioned in the previous chapter. The state is granted the role of protector of religion, although the clause is ambiguous; it does not specify that the state is the protector of Islam but that it is responsible for protecting all religions and the sanctities of all religions, in addition to preventing calls for *takfir* (calling others an unbeliever) and incitement to hatred and violence. The constitution also guarantees the freedom of conscience and belief and the practice of freedom of beliefs for all. It commits the state to guarantee equality to all citizens in rights and duties and for the public administration to serve the citizens in accordance with the principles of impartiality and equality (Article 15). However, Article 74 states that the president must be of the Muslim faith. The oath that members of parliament (Article 58), the president (Articles 76), and the government (Article 89) must take is religious (European Commission for Democracy through Law, 2013). Such measures are considered discriminatory under the ICCPR as explained above.

In the Egyptian constitution, Article 2 stated that Islam is the religion of the state and the principles of Sharia are the principal source of legislation. Article 3 granted the rights of only Egyptian Christians and Jews to follow the principles of

their respective religions with regards to personal status laws, religious affairs, or the selection of spiritual leaders. This article excluded other religious minorities in Egypt; this, together with confining freedom of religious practice to the followers of Islam, Christianity, and Judaism, was considered discrimination under the ICCPR. HRC General Comment No. 22 on freedom of thought, conscience and religion requires state parties to take "actions against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by Articles 18 and 27." Another problematic article was the newly introduced Article 219 that declared Islamic jurisprudence as the basis of legislation: "the principles of Islamic *Sharia* include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community." This also discriminated against Shia' Muslims, whose legal traditions differ in some ways from those of Sunni Muslims. In addition, the diversity of stances, justifications, laws, opinions, and sources in Islamic jurisprudence could have led to interpretations of legislation that vary from the ultra-conservative to the more progressive (Theodorakis, 2013). Article 219, together with the lack of references to equality between men and women and to measures that guarantee protection against discrimination for minority groups, did not meet Egypt's obligations under the ICCPR.

Conclusion

In conclusion, based on analysis of the selected number of articles in both the 2012 Egyptian and 2014 Tunisian constitutions in relation to the ICCPR, it can be argued that the articles of the Tunisian constitution came closer to the ICCPR as an attempt at reaching a compromise with the vision of the non-Islamist groups, whereas the articles in the 2012 Egyptian constitution drifted from the ICCPR, and the

vision/agenda of the Islamist majority was predominant in the constitutional texts, as indicated in the following:

(1) The Tunisian constitution, in conformity with the ICCPR, commits the state to guarantee freedom of belief and conscience and religious practices for all, whereas the Egyptian constitution confined the freedom of religious practices to the followers of Islam, Christianity, and Judaism, leaving to the law to regulate the freedom, and does not include any reference to freedom of conscience.

(2) The Tunisian constitution includes constitutional guarantees for the application of all the rights and freedoms included in the constitution and in defining the limitations to these rights and freedoms, which are to a great extent in conformity with the ICCPR, in addition to underlining the importance of respecting the proportionality between the limitations on rights and their motives. The Egyptian constitution, on the other hand, confined the application of the rights and freedoms mentioned therein to be in conformity with the principles pertaining to the *State and Society* part (Chapter Two) of the constitution that includes articles on the state's role in safeguarding ethics, public morality, and public order.

(3) The Tunisian constitution emphasizes equality between men and women, and included measures to ensure equal opportunities for both sexes and equal representation on elected councils, whereas the Egyptian constitution remained silent on this matter.

(4) The Tunisian constitution declares the civil nature of the state (in an unchangeable Article) and did not include any reference to Sharia. The Egyptian constitution, on the other hand, maintained the principles of

Sharia as the source of legislation, and introduced a new article defining the principles of *Sharia* as the large body of Sunni jurisprudence. This article could have allowed for a wide range of interpretations and thus legislation that could be discriminatory under the norms of the ICCPR.

CHAPTER 5

CONCLUSION AND LESSONS LEARNED

The objective of this master's project was to analyze the different phases of the constitution-making processes for the 2012 Egyptian and the 2014 Tunisian constitutions. Both countries embarked on the process of constitution-making in quite similar post-uprising contexts characterized by political uncertainty, the emergence of a plethora of new political and social actors, the rise of Islamists to power, security and economic challenges, and extreme polarization and political violence. Accordingly, the constitution-making processes in both countries were faced with similar challenges and risks; chief among them was the risk of the manipulation of one powerful political group of the whole process and redirecting it to serve the group's interests and consolidate its powers.

In both countries, Islamists—the Muslim Brotherhood and Salafists in Egypt and the Ennahda Islamist party—emerged as the most organized and powerful political power compared with the non-Islamist political groups, which had the potential of promptly filling in the vacuum caused by the downfall of the ruling parties in both countries. Soon after the beginning of the transitional period, the mistrust—inherited from the former authoritarian regimes—among political and social factions, loosely referred to as the Islamist and non-Islamist groups, started to emerge in addition to tension that resulted in extreme social polarization that threatened the whole transitional process. The interaction of these actors during the transition determined the construction of the new regime's governing institutions. To put it in the words of Schmitter (1986), actors struggle and contest during transition not only to satisfy their immediate interests and the interests of those whom they

represent but also to define the rules and procedures that will likely determine the winners and losers in the future. During the uncertainty of transition and legal void, constitution-making emerged as a key process for shaping the character of the new regime. The constitution-making process was the nucleus of transition, which shaped the sequence of the transitional process, in addition to establishing the new governing regime. Thus, it was important to study the first two constitution-making processes of the Arab uprisings and to examine why the 2012 Egyptian constitution process went wrong while the 2014 Tunisian constitution-making avoided the worst-case scenario.

The body of the constitution-making literature as a distinctive field of analysis can be traced back to Elster (1995), who highlighted the challenges of the process and proposed a number of recommendations of measures and mechanisms for constitution-making. Elster's recommendations have been developed in the constitution-making literature into hypotheses that are being tested by studying individual cases. The literature of constitution-making is still lacking a theory or a paradigm for structuring the constitution-making process (Landau 2012, & Lang 2013). For Landau (2013), policy makers and scholars should not focus solely on designing constitution-making in an attempt to reach some idealized end state, but rather developing a "risk averse" model of constitutionalism, where the major goal is to prevent democratic breakdown (Landau, 2013, p. 613). In Landau's model, the central challenge to constitution-making is how to constrain unilateral exercise of power. If political forces represented in the assemblies are left unconstrained or poorly constrained, they can reshape the whole transitional process to create a quasi-authoritarian regime or impose their own constitutions on a minority which in turn would lead to constitutional breakdown (Landau, 2012, p. 923). This is what happened in the Egyptian case.

The conceptual framework of the project has made use of the constitution-making scholarship in defining the different variables that affected the processes in both countries and in turn the outcomes. These variables are among the factors pointed out by Elster (1995) and Landau (2013) that should be considered in the constitution-making process including the following: (1) the establishment of a specialized constituent committee apart from the ordinary legislative bodies. (2) The role of legislators and institutional interests in the constitution-making process. (3) Electoral system for establishing the constituent assembly. (4) The decision-making rules throughout the process of drafting the constitution, i.e. how the constitution drafters take decisions. In general, smaller groups tend to claim equal voting power in the constitution-making body; whereas the larger or majority groups insist on a voting system that reflects the numerical strength of their constituencies, which was a central challenge in the constitution-making processes in both Tunisian and Egypt. (5) The risk of having a majority that manipulates and abuses the constitution-making process, and (6) the time limit and delaying technique of the constitution-making process.

The master's project poised three questions: Why did Islamists in Egypt, represented by the Muslim Brotherhood and the Salafists, succeed in gaining an absolute majority (50+1) at the constituent assembly, while Ennahda Islamist in Tunisia gained only a relative majority? How did having an absolute majority in Egypt as opposed to a relative majority in Tunisia impact the proceedings of constitution-making process in each country? How did the design of the constitution-making process impact the constitutional outcome?

In answering the first questions, the researcher has identified two independent variables. The first independent variable was the background factors. This section has

demonstrated that the different social and political milieus in both countries resulted in different weights and outlooks of social and political actors, which in turn influenced the measures and mechanisms set for the constitution-making process. In Tunisia, on the one hand, Bourguiba's modernization project laid down the foundation of a progressive and urban state with a high literacy rate and vibrant civil society, where religion ceased to exist in the public sphere, and religious institutions and education were monitored by the state. The Islamist movement in Tunisia represented by the Ennahda Islamist party committed itself to multi-party democracy and political pluralism and to the progressive rights that women were granted. It also forged ties with the human rights league, the labor movement, and other opposition parties against the regime's repression regardless of the ideological differences. In Egypt, on the other hand, the army became a main player in the Egyptian politics since 1952. Egypt went through different stages that resulted in dramatic political and social transformations, which led to lack of a strong opposition movement, lack of a vibrant civil society, significantly increased religiosity and conservatism in the Egyptian society since the 1970s, and the rise of Islamists groups with wide public support. Egypt was the cradle of the Islamist movement, where the Muslim Brotherhood and other Islamist groups were founded.

The second independent variable is the measures and mechanisms of constitution-making, or the agenda setting stage. The section demonstrated that the measures for the constitution-making process were designed specifically to prevent one actor from manipulating the transitional process. This was evident in the following points: (1) the High Commission that drafted the NCA electoral law and supervised the work of the government was representative of most social, political actors and civil society, and the electoral law was intentionally designed to prevent

any candidate-list from gaining absolute majority and allowing more representation of women and youth. By contrast, the crisis of the constitution-making process in Egypt started with the SCAF's Declaration in February 2011 that led to the non-transparent establishment of a non-representative committee to introduce amendments to the suspended 1971 constitution, and then the March Constitutional Referendum, which was rushed and paved the way for the consolidation of the Islamist-majority dominance in the parliament with its two chambers. The deficiencies of the mechanisms that governed the constitution-making process did not ensure the equal participation of all stakeholders.

In answering the second question, the proceedings of the constitution-making processes in both countries were analyzed. In Tunisia, Ennahda Islamists, who only gained a relative majority at the constituent assembly, were forced to form a coalition with two other secular parties to have the right to form a government. The ruling coalition, the Troika, although it had an absolute majority, still did not have the two-thirds majority that would have enabled it to pass a constitution alone. Accordingly, failing to reach consensus appeared to be the only option to avoid submitting the constitution for a national referendum in which the chances were that the Ennahda-led coalition would lose in an environment full of political polarization and political violence for which the Troika were blamed. In Tunisia, when the process had reached an impasse and the opposition withdrew, the assembly suspended its work, and there was a powerful nonpartisan civil society that was capable of playing the role of mediator and brokering a breakthrough.

The situation in Egypt was quite different. A major part of the political polarization and struggle had already taken place over the formation of the constituent assembly due to the lack of any criteria or measures that governed the establishment

of the assembly as explained previously. Having a predominant majority amid the absence of any constraints that could have guaranteed that the majority would not abuse the constitution-making process, the Islamists were not obliged to reach a consensus. On the contrary, since they gained a majority, the constitutional outcome should be a reflection of this majority.

The last chapter presented a comparative analysis of a selected number of civil and political rights in both constitutions against the International Covenant on Civil and Political Rights (ICCPR). The researcher assumed—based on the analysis of the proceedings of both constituent assemblies and the points of disagreements between the Islamists and non-Islamists—that the non-Islamist groups were aiming at reaching a constitution that would have been as close as possible to the ICCPR, while the Islamists were trying to impose their own ideological views. The result of the analysis was that the articles of the Tunisian constitution came closer to the ICCPR as an attempt at reaching a compromise with the vision of the non-Islamist groups, whereas the articles in the 2012 Egyptian constitution drifted from the ICCPR, and the vision/agenda of the Islamist majority was predominant in the constitutional texts.

Finally, it could be concluded that the analysis of both the Tunisian and Egyptian constitution-making processes confirmed the validity of the hypothesis of the master's project. In the Egyptian case, the Islamist majority was able to impose their own constitution and produce a constitution that did not have a consensus among political factions and did not maintain the internationally recognized rights referred to previously, and finally led to a breakdown in the transition process. In the Tunisian case, the electoral laws and bylaws, in addition to the presence of a powerful civil society that played the role of mediator, constrained the Ennahda Islamist majority,

thereby avoiding a breakdown of the process, and producing a compromise and rights-maintaining constitution.

Lessons Learned

There are a number of learned lessons that could be concluded for policy makers and researchers:

(1) Researchers and policy makers studying countries in transition should give more attention to the constitution-making process as a political project that shapes the transitional process and structures the new regime as well.

(2) Political scientists, researchers and scholars of constitutionalism, comparative constitutional law, and constitutional politics have ample areas of research in the constitution-making literature as there is a need for developing a model or paradigm for constitution-making. The need for a new constitution generally arises in circumstances that are likely to work against good constitution-making, which in turn invites procedures based on "threat-based bargaining." Thus, a model or a paradigm is needed to avoid manipulating the constitution-making process that could lead to establishing authoritarian or semi-authoritarian regime, to consolidating the power of a particular group, or to violating the rights of political, ethnic, or religious minorities.

Finally, based on analyzing these two case-studies, the researcher can draw a number of learned lessons that could give insights for researchers interested in developing a model for constitution-making:

(1) The phase of setting the agenda is extremely vital, shaping the successive phases. All actors should be represented in this phase to produce measures

and mechanisms that would result in a representative forum of constitution-making.

(2) There should be defined and transparent laws or rules for electing or selecting the members of any forum of constitution-making.

(3) The electoral laws or the rules for constituent assembly should be designed to prevent a particular group (an executive authority, a political group, or any other group) from gaining an absolute majority. The researcher thinks that in the Egyptian case, a proportional electoral law might not have prevented an Islamist majority in the assembly, as already none of the Islamist group managed to get an absolute majority in the parliamentary elections, yet together they had a qualified majority. Accordingly, one of the measures that could have been useful in the Egyptian case is a quota rule that would have guaranteed that none of the group had had an absolute majority. But the question remains how this rule could be implemented or even imposed given the context of the Egyptian transition.

(4) The elections for a constituent assembly should not be accelerated to give a chance to the less organized or smaller actors to get ready and participate in the process.

(5) The constitution-making process should be given an appropriate time frame. It should not be rushed as was the case in Egypt or left open as was the case in Tunisia.

(6) A two-thirds majority should be required to approve individual articles of the constitution or the constitution as a whole to force the different actors to make concessions and reach consensus,

(7) A crucial factor in the constitution-making process is external constraints, or what Elster (1991) referred to as "upstream constraint," although it could be argued that it is an undemocratic measure to have external constraints on a process that is supposed to guarantee transition to a democratic regime. As Landau (2012) postulates, it is part of the paradoxes of the constitution-making process. Analyzing the Egyptian and Tunisian cases has demonstrated that having a nonpartisan powerful civil society as an external actor played an extremely important role in mediating a breakthrough. In Egypt, none of the actors were qualified to play this role.

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APPENDIX A

ARTICLES OF CONSTITUTIONS

A table of the Arabic and English texts of the articles analyzed in chapter 4 organized by topic.

Topic	Egyptian 2012 Constitution	Tunisian 2014 Constitution
Freedom of thought, Conscience, and Religion	المادة (43) حرية الاعتقاد مصونة. وتكفل الدولة حرية ممارسة الشعائر الدينية وإقامة دور العبادة للأديان السماوية؛ وذلك على النحو الذي ينظمه القانون. Articles (43) Freedom of belief is an inviolable right. The State shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions, as regulated by law.	الفصل (6) الدولة راعية للدين، كافلة لحرية المعتقد والضمير وممارسة الشعائر الدينية، ضامنة لحياد المساجد ودور العبادة عن التوظيف الحزبي. تلتزم الدولة بنشر قيم الاعتدال والتسامح وبحماية المقدّسات ومنع النيل منها، كما تلتزم بمنع دعوات التكفير والتحريض على الكراهية والعنف وبالتصدي لها Article (6) The State shall protect religion, guarantee freedom of belief and conscience and religious practices, and ensure the impartiality of mosques and places of worship away from partisan instrumentalisation. The State shall commit to spreading the values of moderation and tolerance, protecting sanctities and preventing attacks of them, just as it shall commit to preventing calls for *takfeer* [calling another Muslim an unbeliever] and incitement to hatred and violence and to confronting them.
Freedom of Expression	المادة (31) الكرامة حق لكل إنسان، يكفل المجتمع والدولة احترامها وحمايتها. ولا يجوز بحال إهانة أي إنسان أو ازدراؤه. Article 31	الفصل (31) حرية الرأي والفكر والتعبير والإعلام والنشر مضمونة. لا يجوز ممارسة رقابة مسبقة على هذه الحريات. Article (31) Freedom of opinion, thought, expression, media and publication

Dignity is the right of every human being, safeguarded by the State.
Insulting or showing contempt toward any human being shall be prohibited

المادة (44)
تحظر الإساءة أو التعريض للرسل والأنبياء كافة

Article 44
Insult or abuse of all religious messengers and prophets shall be prohibited.

المادة (45)
حرية الفكر والرأي مكفولة. ولكل إنسان حق التعبير عن رأيه بالقول أو الكتابة أو التصوير أو غير ذلك من وسائل النشر والتعبير.

Article (45)
Freedom of thought and opinion shall be guaranteed. Every individual has the right to express an opinion and to disseminate it verbally, in writing or illustration, or by any other means of publication and expression.

المادة (47)
الحصول على المعلومات والبيانات والإحصاءات والوثائق، والإفصاح عنها، وتداولها، حق تكفله الدولة لكل مواطن؛ بما لا يمس حرمة الحياة الخاصة، وحقوق الآخرين، ولا يتعارض مع الأمن القومى.
وينظم القانون قواعد إيداع الوثائق العامة وحفظها، وطريقة الحصول على المعلومات، والتظلم من رفض إعطائها، وما قد يترتب على هذا الرفض من مساءلة.

Article (47)
Access to information, data, documents and statistics, and the disclosure and circulation thereof, is a right guaranteed

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shall be guaranteed.
These freedoms shall not be subject to prior censorship.

الفصل (32)
تضمن الدولة الحق في الإعلام والحق في النفاذ إلى المعلومة. تسعى الدولة إلى ضمان الحق في النفاذ إلى شبكات الاتصال.

Article (32)
The State shall guarantee the right to information and the right to access to information. The State seeks to guarantee the right to access to communication networks.

	by the state, in a manner that does not violate the sanctity of private life or the rights of others, and that does not conflict with national security. The law regulates the rules for filing and archiving public documents, the means of access to information, the means of complaint when access is refused, and the consequent accountability.	
Non-Discrimination	المادة (6) يقوم النظام السياسي على مبادئ الديمقراطية والشورى، والمواطنة التي تسوى بين جميع المواطنين في الحقوق والواجبات العامة، والتعددية السياسية والحزبية، والتداول السلمي للسلطة، والفصل بين السلطات والتوازن بينها، وسيادة القانون، واحترام حقوق الإنسان وحرياته؛ وذلك كله على النحو المبين في الدستور. ولا يجوز قيام حزب سياسي على أساس التفرقة بين المواطنين؛ بسبب الجنس أو الأصل أو الدين. Article (6) The political system is based on the principles of democracy and shura (counsel), citizenship (under which all citizens are equal in rights and duties), multi-party pluralism, peaceful transfer of power, separation of powers and the balance between them, the rule of law, and respect for human rights and freedoms; all as elaborated in the Constitution. No political party shall be formed that discriminates on the basis of gender, origin or religion. مادة (6) – الفقرة الثانية ولا يجوز قيام حزب سياسي على أساس التفرقة بين المواطنين؛ بسبب الجنس أو الأصل أو الدين. Article (6) – Para. (2) No political party shall be	الفصل (15) الإدارة العمومية في خدمة المواطن والصالح العام، ت نظّم وتعمل وفق مبادئ الحياد والمساواة واستمرارية المرفق العام، ووفق قواعد الشفافية والنزاهة والنجاعة والمساءلة. Article 15 Public administration shall serve citizens and the public interest, and shall be organized and operate in accordance with the principles of impartiality, equality, continuity of provision of public services, and the rules of transparency, integrity, efficiency and accountability الفصل (21) المواطنون والمواطنات متساوون في الحقوق والواجبات، وهم سواء أمام القانون من غير تمييز. تضمن الدولة للمواطنين والمواطنات الحقوق والحريات الفردية والعامّة، وتهيئ لهم أسباب العيش الكريم Article (21) All citizens, male and female alike, have equal rights and duties, and are equal before the law without any discrimination. The State guarantees to citizens individual and collective rights, and provides them with the conditions to lead a dignified life. الفصل (40) العمل حق لكل مواطن ومواطنة، وتتخذ الدولة التدابير الضرورية لضمانه على

	formed that discriminates on the basis of gender, origin or religion.	أساس الكفاءة والإنصاف. ولكل مواطن ومواطنة الحق في العمل في ظروف لائقة وبأجر عادل.

المادة (8)

تكفل الدولة وسائل تحقيق العدل والمساواة والحرية، وتلتزم بتيسير سبل التراحم والتكافل الاجتماعي والتضامن بين أفراد المجتمع، وتضمن حماية الأنفس والأعراض والأموال، وتعمل على تحقيق حد الكفاية لجميع المواطنين؛ وذلك كله في حدود القانون.

Article (8)
The State guarantees the means to achieve justice, equality and freedom, and is committed to facilitating the channels of social charity and solidarity between the members of society, and to ensure the protection of persons and property, and to working toward providing for all citizens; all within the context of the law.

Article (40)
Work is a right for every citizen, male and female alike. The State shall take the necessary measures to ensure the availability of work on the basis of competence and fairness.
All citizens, male and female alike, shall have the right to adequate working conditions and to a fair wage.

الفصل (46)

تلتزم الدولة بحماية الحقوق المكتسبة للمرأة وتعمل على دعمها وتطويرها.
تضمن الدولة تكافؤ الفرص بين الرجل والمرأة في تحمل مختلف المسؤوليات وفي جميع المجالات.
تسعى الدولة إلى تحقيق التناصف بين المرأة والرجل في المجالس المنتخبة.
تتخذ الدولة التدابير الكفيلة بالقضاء على العنف ضد المرأة.

المادة (9)

تلتزم الدولة بتوفير الأمن والطمأنينة وتكافؤ الفرص لجميع المواطنين، دون تمييز.

Article (9)
The State shall ensure safety, security and equal opportunities for all citizens without discrimination.

المادة (33)

المواطنون لدى القانون سواء؛ وهم متساوون في الحقوق والواجبات العامة، لا تمييز بينهم في ذلك.

Article (33)
All citizens are equal before the law. They have equal public rights and duties without discrimination.

Article (46)
The State shall commit to protecting women's achieved rights and seek to support and develop them.
The State shall guarantee equal opportunities between men and women in the bearing of all the various responsibilities in all fields.
The State shall seek to achieve equal representation for women and men in elected councils.
The State shall take the necessary measures to eliminate violence against women.

الفصل (47)

حقوق الطفل على أبويه وعلى الدولة ضمان الكرامة والصحة والرعاية والتربية والتعليم.
على الدولة توفير جميع أنواع الحماية لكلّ الأطفال دون تمييز وفق المصالح الفضلى

		للطفل.
		Article (47) Children are entitled to be guaranteed dignity, health, care, and education from their parents and the State. The State shall provide all forms of protection to all children with no discrimination, according to the best interest of the child.
		الفصل (48) تحمي الدولة الأشخاص ذوي الإعاقة من كل تمييز. لكل مواطن ذي إعاقة الحق في الانتفاع، حسب طبيعة إعاقته، بكل التدابير التي تضمن له الاندماج الكامل في المجتمع، وعلى الدولة اتخاذ جميع الإجراءات الضرورية لتحقيق ذلك.
		Article (48) The State shall protect persons with disabilities against any form of discrimination. Every disabled citizen shall have the right to benefit, based on the nature of the disability, from all of the measures guaranteeing their full integration into society. The State must take all necessary steps to ensure this.
Religion and State	المادة (2) الإسلام دين الدولة، واللغة العربية لغتها الرسمية، ومبادئ الشريعة الإسلامية المصدر الرئيسي للتشريع. Article (2) Islam is the religion of the state and Arabic its official language. Principles of Islamic Sharia are the principal source of legislation. المادة (3) مبادئ شرائع المصريين من المسيحيين واليهود المصدر الرئيسى للتشريعات المنظِّمة لأحوالهم الشخصية، وشئونهم الدينية، واختيار قياداتهم الروحية. Article (3) The canon principles of Egyptian Christians and Jews are the main	الفصل (1) تونس دولة حرّة، مستقلّة، ذات سيادة، الإسلام دينها، والعربية لغتها، والجمهورية نظامها. لا يجوز تعديل هذا الفصل. Article (1) Tunisia is a free, independent and sovereign state. Islam is its religion, Arabic its language, and the republic its system الفصل (2) تونس دولة مدنية، تقوم على المواطنة، وإرادة الشعب، وعلوية القانون. لا يجوز تعديل هذا الفصل. Article (2) Tunisia is a civil state that is based on citizenship, the will of the people, and the supremacy of

	source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders. المادة (219) مبادئ الشريعة الإسلامية تشمل أدلتها الكلية، وقواعدها الأصولية والفقهية، ومصادرها المعتبرة، في مذاهب أهل السنة والجماعة. Article (219) The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.	law. This article cannot be amended.
Other Refereed to articles	المادة (10) الأسرة أساس المجتمع، قوامها الدين والأخلاق والوطنية. وتحرص الدولة والمجتمع على الالتزام بالطابع الأصيل للأسرة المصرية، وعلى تماسكها واستقرارها، وترسيخ قيمها الأخلاقية وحمايتها؛ وذلك على النحو الذى ينظمه القانون. وتكفل الدولة خدمات الأمومة والطفولة بالمجان، والتوفيق بين واجبات المرأة نحو أسرتها وعملها العام. وتولى الدولة عناية وحماية خاصة للمرأة المُعيلة والمطلقة والأرملة. Article 10 The family is the basis of the society and is founded on religion, morality and patriotism. The State is keen to preserve the genuine character of the Egyptian family, its cohesion and stability, and to protect its moral values, all as regulated by law. The State shall ensure maternal and child health services free of charge, and enable the	الفصل (49) يحدد القانون الضوابط المتعلقة بالحقوق والحريات المضمونة بهذا الدستور وممارستها بما لا ينال من جوهرها. ولا توضع هذه الضوابط إلّا لضرورة تقتضيها دولة مدنية ديمقراطية وبهدف حماية حقوق الغير، أو لمقتضيات الأمن العام، أو الدفاع الوطني، أو الصحة العامة، أو الآداب العامة، وذلك مع احترام التناسب بين هذه الضوابط وموجباتها. وتتكفّل الهيئات القضائية ب حماية الحقوق والحريات من أي انتهاك. لا يجوز لأيِّ تعديل أن ينال من مكتسبات حقوق الإنسان وحرياته المضمونة في هذا الدستور. Article (49) The law shall determine the limitations related to the rights and freedoms that are guaranteed by this Constitution and their exercise, on the condition that it does not compromise their essence. These limitations can only be put in place where necessary in a civil democratic state, with the aim of protecting the rights of others or based on the requirements of public order, national defense, public health or public morals. Proportionality between these limitations and

reconciliation between the duties of a woman toward her family and her work.
The State shall provide special care and protection to female breadwinners, divorced women and widows.

المادة (11)

ترعى الدولة الأخلاق والآداب والنظام العام، والمستوى الرفيع للتربية والقيم الدينية والوطنية، والحقائق العلمية، والثقافة العربية، والتراث التاريخي والحضاري للشعب؛ وذلك وفقا لما ينظمه القانون.

Article 11
The State shall safeguard ethics, public morality and public order, and
foster a high level of education and of religious and patriotic values, scientific thinking, Arab culture, and the historical and cultural heritage of the people; all as shall be regulated by law.

المادة (12)

تحمى الدولة المقومات الثقافية والحضارية واللغوية للمجتمع، وتعمل على تعريب التعليم والعلوم والمعارف

Article 12
The State shall safeguard the cultural and linguistic constituents of society, and foster the Arabization of education, science and knowledge.

المادة (81)

الحقوق والحريات اللصيقة بشخص المواطن لا تقبل تعطيلا ولا انتقاصاه.
ولا يجوز لأى قانون ينظم ممارسة الحقوق والحريات أن يقيدها بما يمس أصلها وجوهرها.
وتُمارس الحقوق والحريات بما لا

their motives must be respected. Judicial authorities shall ensure that rights and freedoms are protected from all violations.
No amendment that undermines any human rights acquisitions or freedoms guaranteed in this Constitution is allowed.

الفصل (58)

يؤدي كل عضو بمجلس نواب الشعب في بداية مباشرته لمهامه اليمين التالية:
"أقسم بالله العظيم أن أخدم الوطن بإخلاص، وأن ألتزم بأحكام الدستور وبالولاء التام لتونس."

Article 58
Every member in the Chamber of the People's Deputies shall, upon assuming his or her functions, swear the following oath: "I do solemnly swear by Almighty God that I will work to serve the nation with sincerity, that I will abide by the provisions of the Constitution and maintain complete loyalty to Tunisia".

الفصل (74) – الفقرة الأولى
الترشح لمنصب رئيس الجمهورية حق لكل ناخبة أو ناخب تونسي الجنسية منذ الولادة، دينه الإسلام.

Article (74)
Running for the position of President of the Republic shall be a right for every male and female voter who holds Tunisian nationality since birth, whose religion is Islam.

الفصل (76)
يؤدي رئيس الجمهورية المنتخب أمام مجلس نواب الشعب اليمين التالية:
"أقسم بالله العظيم أن أحافظ على استقلال تونس وسلامة ترابها، وأن أحترم دستورها وتشريعها، وأن أرعى مصالحها، وأن ألتزم بالولاء لها."

Article (76)
The elected President of the Republic shall, before the Chamber of the People's

	يتعارض مع المقومات الواردة فى باب الدولة والمجتمع بهذا الدستور. Article 81 Rights and freedoms pertaining to the individual citizen shall not be subject to disruption or detraction. No law that regulates the practice of the rights and freedoms shall include what would constrain their essence.	Deputies, swear the following oath: "I do solemnly swear by Almighty God to maintain the independence of Tunisia and the safety of its territory, to respect its Constitution and legislation, to safeguard its interests, and to remain loyal to it." الفصل (89) – الفقرة الخامسة يؤدي رئيس الحكومة وأعضاؤها أمام رئيس الجمهورية اليمين التالية: "أقسم بالله العظيم أن أعمل بإخلاص لخير تونس وأن أحترم دستورها وتشريعها وأن أرعى مصالحها وأن ألتزم بالولاء لها." Article (89) – Para. 5 The Prime Minister and the members of government shall be sworn in before the President of the Republic in accordance with the following oath: "I swear by Almighty God to work sincerely for the benefit of Tunisia, to abide by its Constitution and legislation, and to promote its interests and remain loyal to it". الفصل (145) توطئة هذا الدستور جزء لا يتجزّأ منه. Article (145) This Constitution's preamble is deemed an integral part of the Constitution

ARTICLES OF ICCPR

The texts of the ICCPR articles referred to in chapter 4.

Article 18: Right to freedom of thought, conscience and religion

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19: Freedoms of opinion and expression

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Non-Discrimination and Equality

Article 2
1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

Article 3
The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4
1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 23
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Article 25
Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 20
1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.