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A Theory of Critical Junctures for Democratization: A Comparative Examination of Constitution-Making in Egypt and Tunisia

Abstract: Most studies on constitution-making emphasize how cultural and institutional characteristics independently impact successful democratic transitions. This article proposes a new approach to theorizing this process, positing that the character of institutional and cultural elements and the relationships between them give rise to a unique temporal and political context called a critical juncture, with qualities and characteristics that place some states on trajectories toward success and others toward failure. By analyzing and comparing the events surrounding the Egyptian and Tunisian transitions, we demonstrate how the placement of these institutional and cultural elements put Tunisia on the path to democratization and led Egypt inevitably toward autocracy. The findings show that, where these junctures fail to instill civic ideals and avenues for all parties' participation, the political environment becomes uninhabitable for successful transition.

Keywords: critical juncture, constitution-making, democratization, Arab Spring

Introduction

There is much to be examined in the Arab Spring from a range of theoretical and comparative perspectives. The causes of the upheavals and the inability of new regimes to maintain power raised many questions about state-society relationships and persistent authoritarianism in the Arab world. Many paradigms have been revisited in light of these events – modernization theory,[1]

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1 Michael Hoffman & Amaney Jamal, *The Youth and the Arab Spring: Cohort Differences and Similarities*, 4 M. E.L. & Governance 168 (2012); Randall Kuhn, *On the Role of Human Development*

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Arab/Muslim exceptionalism,[2] and transitions theory,[3] to name a few. Within these paradigms, a number of elements have been isolated for causality in regime change – economic factors;[4] military;[5] the role of social media;[6] and socio-psychological factors, such as deprivation.[7] The causes behind the success or failure of transition from the perspective of democratization have also been addressed, bringing about some of the most prominent theoretical examinations surrounding the Arab Spring; however, few of these posit a comprehensive, enduring, or truly innovative explanation as to its outcomes. The failures of these timeworn theories to predict the onset of the Arab Spring have not proven to be any more explanatory of their outcomes in hindsight. This is evidenced principally by the fact that many conclusions were drawn almost immediately following the protests, dooming states to failure before the dust had even settled. Five years later, one country, Tunisia, has managed to weather the storm and produce a fledgling democracy, and we continue to ask ourselves, why?

This article answers this question by examining two states that completed the democratization process – Tunisia and Egypt. The comparison between the states' trajectories presents itself as an ideal framework through which we can reevaluate some of the most dominant theoretical paradigms in the field of Arab politics and democratization theory today. Egypt and Tunisia's contextual similarities complement this framework and create a kind of living laboratory, enabling scholars to test many theories that have been touted for decades, including the influence of Arab culture,[8] persistent authoritarianism,[9]

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in the Arab Spring, 38 (4) Pop. & Dev. Rev. 649 (2012); Tarek Masoud, *Has the Door Closed on Arab Democracy?* 26 (1) J. Dem. 74 (2015).

2 Larry Diamond, *Why are There no Arab Democracies?* 21 (1) J. Dem. 93 (2010).

3 Daniel Brumberg, *Theories of Transition*, in The Arab Uprisings Explained: New Contentious Politics in the Middle East 29 (Marc Lynch ed., 2014).

4 Gilbert Achcar, The People Want (2013). Hoffman & Jamal, *supra* note 1; Kuhn, *supra* note 1; Masoud, *supra* note 1; F. Gregory Gause III, *Why Middle East Studies Missed the Arab Spring: The Myth of Authoritarian Stability*, 90 (4) For. Aff. 81 (2011).

5 Zoltan Barany, *The Role of the Military*, 22 (4) J. Dem. 24 (2011).

6 Jon Alterman, *The Revolution Will Not Be Tweeted*, 34 (4) Wash. Q. 103 (2011).

7 Micheline Ishay, *The Spring of Arab Nations? Paths toward Democratic Transition*, 39 Phil. & Soc. Criticism 373 (2013).

8 Diamond, *supra* note 2, at 94–96.

9 Frederic Volpi, *Explaining (and Re-Explaining) Political Change in the Middle East during the Arab Spring: Trajectories of Democratization and of Authoritarianism in the Maghreb*, 20 (6) Democratization 969 (2013); Eva Bellin, *Reconsidering the Robustness of Authoritarianism in the Middle East: Lessons from the Arab Spring*, 44 (2) Comp. Pol. 127 (2012).

the compatibility of Islam and democracy,[10] sultanism,[11] and others. Both Islamic-Arab states can be characterized by harsh dictatorial and colonial histories with fierce political systems and highly divisive societies. However, Tunisia's relatively smooth transition, stable and conciliatory institutions, and for all intents and purposes, democracy, differs greatly from Egypt's return to authoritarianism. This distinction suggests that there are key differences between Tunisia's and Egypt's democratization processes that have yet to be theorized.

Therefore, the following analysis makes several key contributions to the literature on democratization and the Arab Spring. First, we depart from the most prominent theories on the Arab Spring and more generally, the Arab region, which "close the door" on Arab democratization based on pre-existing state structures, history, culture, and institutions.[12] Second, we differentiate between Egypt and Tunisia in the context of democratization processes which go beyond the protests. Thus far, these two states have occupied the same categories of most of these analyses, despite their divergent outcomes.[13] While the most prominent scholarship on the Arab Spring posit rigid, categorical variables as predictors of long-term, viable democratization, many cautious scholars have examined the social, economic, and political movements and dynamics that instigated these changes in the first place.[14] We follow in the footsteps of the latter group, exercising cautious, context-sensitive, and non-deterministic explanations for the two cases' divergent outcomes, based on the processes that emerged.

In this regard, we posit a new theory of democratic change – critical junctures for democratization (CJD). This third contribution, based on the theory of critical historical juncture,[15] employs states' unique combination of cultural and institutional conditions existing at the time of the transition process that

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10 Ellen Lust, *Missing the Third Wave: Islam, Institutions, and Democracy in the Middle East*, 46 STUD. COMP. INT'L DEV.163 (2011); Olivier Roy, *The Transformation of the Arab World*, 23 (3) J. DEM. 5 (2012).

11 Jack A. Goldstone, *Understanding the Revolutions of 2011: Weakness and Resilience in Middle Eastern Autocracies*, 90 FOR. AFF. 8 (2011).

12 Masoud, *supra* note 1.

13 Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences between Tunisia, Egypt, and Libya*, 90 FOR. AFF. 2 (2011); Bellin, *supra* note 9; Masoud, *supra* note 1.

14 Filipe R. Campante & Davin Chor, *Why Was the Arab World Poised for Revolution? Schooling, Economic Opportunities, and the Arab Spring*, 26 (2) J. ECO. PERSPECTIVES 167 (2012); Kurt Weyland, *The Arab Spring: Why the Surprising Similarities with the Revolutionary Wave of 1848?*, 10 (4) PERSPECTIVES POL. 917 (2012).

15 Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341 (2007).

either "opens" or "closes" the door to democratization. These conditions are not necessarily constant across different states and transitional processes; however, they do contribute to an overall measure of their level of compromise – whether intended or enforced under given circumstances–which we believe is the main casual variable for democratization arising from the critical juncture. In other words, the extent to which the unique cultural and institutional contexts of each state lend themselves to compromise is positively related to its potential for democratization. We do not seek to illustrate a concrete "rule" with rigid indicators across the region; rather, we propose a new framework for analysis. In this manner, we circumvent the overly-deterministic and simplistic nature of previous theories, whose findings are either unique to the Arab region and thus have been disproven by Tunisia's success or global theories that fail to capture the contextual nuances of Arab politics.

Each state's unique political culture, both in society and in its institutions, possesses certain elements which, when combined at the right time with favorable institutional elements, produce a critical juncture that is conducive to democratization. These elements may differ across contexts. For example, religiosity is a relative term that varies across the Muslim and Western worlds. Its intersection with the public sphere is also context-specific, incorporating a range of other environmental factors. As such, Ennahda in Tunisia is not the same as the Muslim Brotherhood (MB) in Egypt; nor is it necessarily comparable to other formulations outside of these contexts. Therefore, in contrast to widespread notions that view religion, especially Islam, as immune to democratization,[16] we argue that it is not religion, but rather the orientation of religious parties and their respective locations in the institutional structure that provide a more comprehensive explanation as to chances of democratization, based on their level of compromise. These orientations, along with other social or historical influences close off alternative trajectories and open others. More broadly, we posit that the extent to which political culture – inclusive of religion and other socio-historical variables – produces state institutions that are *compromising* results in either a democratic or non-democratic critical juncture or trajectory.

Institutional elements, which in this analysis are confined to the constitution-making process, include the constitutional assembly, political players, their dynamics within state structures and the constitution itself. Again, these elements do not individually lend themselves to simplistic, comparativist examinations; however, they are amenable to comparisons based on their level of compromise and CJD. The actions and characterization of the military, the

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16 Charles K. Rowley & Nathaniel Smith, *Islam's Democracy Paradox: Muslims Claim to Like Democracy, So Why do They Have so Little?*, 139 (3) Pub. Choice 273 (2009).

constitutional assembly, and the resulting documents themselves presented marked barriers to democratization when combined with the political culture of Egypt; the opposite can be said of Tunisia.

The following application of CJD is conducted within the transition or formation process, specifically the formation of each state's constitutional assembly and the drafting of each their constitutions. Constitution-making is an ideal mechanism for this analysis. It is viewed in the literature as a microcosm of broader political processes, in which political players seek to guarantee their power and reflect their worldviews and values.[17] Thus, constitution-making carries the potential to regenerate social solidarity based on inclusive deliberation between all stakeholders if it employs conciliatory approaches regarding fundamental procedural, if not substantive principles.[18]

It is important to note that while constitution-making can lead to democratic empowerment and nation-building, if it reflects a broad consensus on the terms of common life,[19] it could also set the stage for institutionalizing exclusion.[20] Many scholars posit that inclusivity and public deliberation in the form of referenda can potentially lead to non-democratic institutions. These scholars argue that a secret constitution-making processes can lead to *additional* compromise – since veto-players must negotiate provisions amenable to opposition, something which could be bypassed in referenda with a clear majority.[21] Others disagree, finding that constitutions by referenda contained provisions that lend themselves to a longer constitutional lifespan in democracies.[22] Empirical examinations of the constitution-making process and their resulting democracies are similarly split. Widner[23] found no support for "process mattering" (as it pertains to public consultation) while Ginsburg et al.[24] found the opposite to be true, resulting in provisions for virtually every category of right. Despite the type of

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17 Ran Hirschl, Towards Juristocracy: The Origins and Consequences of New Constitutionalism 286 (2004).

18 Jamal Benomar, *Constitution-Making After Conflict: Lessons for Iraq*, 15 (2) J. Dem. 81 (2004); Saïd Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 (1) Int'l Soc. 7 (2003).

19 Benomar, *supra* note 18.

20 Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, *in* The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy 15 (Andrew Reynolds ed., 2002).

21 George Tsebelis, *Elite Interaction and Constitution-Building in Consociational Democracies*, 2 (1) J. Theoretical Pol. 5 (1990); Horowitz, *supra* note 20.

22 Zachary Elkins et al., The Endurance of National Constitutions 1–11 (2009).

23 Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 (4) W & M L. Rev. 1513 (2008).

24 Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?* 5 Annul Rev. L. Soc. Sci. 201 (2009).

process supported in the literature, all scholars seem to support the contention that normative constitution-making and successful democracies include some level of compromise in both content and process. For this reason, we conclude that the dialectics of process and content in constitution-making mirror the manner democratic transitions succeed or fail, Thus, we present our analysis of CJD in the context of the constitution-drafting process and its manifestations of compromise.

We begin this analysis by first laying the theoretical grounding to facilitate the discussion on the two countries, explicating the links between institutional and cultural factors in CJD. We then move to discuss each of the cases based on the parameters developed in the theoretical framework, drawing the necessary theoretical and empirical conclusions.

Constitution Making and the Institutional and Cultural Imperatives

Theories of Democratization

A number of theoretical explanations as to the trajectories of Arab Spring countries have been posed. The most salient among these are markedly pessimistic. The limitations of such theories, in light of the comparison between Egypt and Tunisia, help to inform the development of CJD, as the success of one state and the failure of the other illustrate that neither pessimistic nor optimistic interpretations of events fully explain the outcomes in each state.

Modernization theory posits that economic characteristics of the state and its institutions are the most predictive indicators of successful democratization.[25] The influence of the military industrial complex,[26] the level of oil exports,[27] and the overall socio-economic status of society and its leadership[28] are said to influence regimes' capacities to facilitate a democratic power-sharing dynamic. Despite the popularity of this theory, scholars have identified a number of flaws.

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25 Elsje Fourie, *A Future for the Theory of Multiple Modernities: Insights from the New Modernization Theory*, 51 (1) Soc. Science Info. 52 (2012).
26 Jason Brownlee et al., *Why the Modest Harvest?*, 24 (4) J. Dem. 29 (2013); Jason Brownlee et al., The Arab Spring: Pathways of Repression and Reform (2015).
27 *Id.*
28 *Id.*

As Mufti[29] and the authors themselves point out, the assertion that underlying economic indicators effectively "closed the door" on democratic transition in the Arab Spring was made far too early and was unduly pessimistic. While we have witnessed the return to authoritarianism in Egypt and false starts in other states, we know from the Tunisian example that this assertion is simply untrue. However, in many analyses, Egypt and Tunisia were assigned similar trajectories based on these characteristics.[30] As these theories were posited before the outcomes of the transitions were known, they may have seemed valid at the time, when seeking to explain why upheavals took place in certain Arab states and not others. However, we know that despite the fact that both Egypt and Tunisia are middle class, non-oil exporting countries with non-hereditary regimes, they experienced markedly different outcomes. In Masoud's later analysis, *Why Breakdowns Did Not Always Produce Transitions*,[31] the theory of modernization was expounded upon to include the fiscal influence of the military industrial complex in shaping the actions of the military in Egypt, leading to the coup and ultimately, its return to authoritarianism. By this logic, the actions of institutions and civil society were entirely involuntary and doomed to failure from the start. The simplification of such complex processes under one deterministic explanatory model is not only reductive, but also presumptuous.

If modernization theory is said to "close the door" to democracy, transitions theory can be best characterized by opening them. Transitions theory rejects notions of any pre-requisite to democratization and posits that transitions arise naturally, as a product of ongoing conflict.[32] Based on rational choice theory, political players recognize the costs and risks associated with continual power-grabs and form a "pact" as the second best alternative. Supporters of this theory come to refute competing theories such as Brownlee and Masoud's modernization explanation, as mere "symptoms" of the broader political processes that result in such a pact.[33] While outside of the Arab Spring these pacts included economic agreements between the power elite and their opposition, Brumberg believes that in the Arab Spring, these agreements differed–since in identity politics, prevalent in the Middle East, require a different set of terms.[34]

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29 Malik Mufti, *Democratizing Potential of the 'Arab Spring': Some Early Observations*, 50 (3) Gov't & Opposition 394 (2015).
30 Brownlee et al., *supra* note 26.
31 Brownlee et al., *supra* note 26.
32 Brumberg, *supra* note 3.
33 *Id.*
34 *Id.*

One critical flaw of this theory is that it is not used to predict the success of such pacts, but rather their occurrence.[35] We take this analysis a step further, finding that while the variables and conditions of pacts vary case-by-case, the level of compromise that governs these pacts and the extent to which a political culture of compromise exists beyond it enable us to predict its success. We assert that the formation of this pact – the constitution-making process – is the critical juncture that determines the success of democratization. The institutions that arise from such a pact or juncture are effectively enshrined into law through the constitution, locking in its power dynamics and placing it on the path toward future failure or success.

CJD in Constitution-Making

Like transitions theory, CJD departs from one-size-fits-all models that are replete in comparative law and politics. The unique contextual factors of the Arab Spring necessitate a more relational approach, which takes into account the overall interaction of each transitions' nuances and histories.[36] Such a holistic approach recognizes that isolating individual "variables" or indicators as the reasoning behind one country's success and another's failure does not capture the dynamics that arise between such variables, which we assert determines success and failure. Thus, the paroxysm of these elements produces the dynamic that governs success. In our analysis, we isolate two categories of elements, institutional and cultural, that produce a dynamic of compromise.

Institutional Elements

Institutional design is central to constitution-making in times of regime change, serving as a framework for the relationship between state and society.[37] It is crucial for the emergence of democratic procedures and new institutions' formal and informal rules, which both constrain and support

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35 *Id.*

36 Mark R. Beissinger et al., Who Participated in the Arab Spring? A Comparison of Egyptian and Tunisian Revolutions, (2012) (unpublished Ph.D. dissertation).

37 Robert A. Dahl & Bruce Stinebrickner, Modern Political Analysis (6th ed., 2003) (1970); Steven Levitsky & María Victoria Murillo, *Variation in Institutional Strength*, 12 Ann. Rev. Pol. Sci. 115 (2009); Andrew MacIntyre, The Power of Institutions: Political Architecture and Governance (2003).

political behavior.[38] Hence the broad influence institutions play on the dynamics of state and society make it an enabler and a facilitator of society, as well as a source of control and redistribution.[39]

In our analysis of CJD in constitution-making, we measure the level of compromise in institutions, those that arise from the process and those which serve to facilitate it. A number of parameters can be used for the evaluation of such institutions. Sustainable democratic governments are said to persist because their institutions afford all citizens the ability to assert their preferences in the public sphere, or "deliberative capacity."[40] Indicators of deliberative capacity include freedom of expression, collective action or demonstration,[41] and electoral behavior.[42] The extent to which institutions are responsive to public opinion is thus considered a measure of a state's democracy.[43] In absence of this responsiveness, gaps between public opinion and democratic regimes create a crisis of legitimacy that negatively impacts the sustainability of democratic regimes.[44] This is where the paroxysm between culture and institutions become important in CJD. Two of the main obstructions to deliberative capacity and a cause for this disparity are said to include religious fundamentalism and ideological conformity.[45] We posit that institutions' level of compromise serves as a proxy for comparison of these elements across institutions. These elements are clearly evident in institutional development in politically charged and divisive societies such as Egypt or Tunisia and play a significant role in the shaping of power dynamics and chances for democratization, which we show in the following pages.

Non-democratic or non-compromising institutions can thus also be studied from the perspective of historical institutionalism. Historical institutionalism is one

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38 Paul A. David, *Why Are Institutions the 'Carriers of History'?: Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 (2) STRUCTURAL CHANGE & ECO. DYNAMICS 205 (1994).

39 ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (2d ed. 2005).

40 John S. Dryzek, *Democratization as Deliberative Capacity Building*, 42 (11) COMP. POL. STUD. 1379 (2009).

41 Stefanie Ann Lenway & Kathleen Rehbein, *Leaders, Followers, and Free Riders: An Empirical Test of Variation in Corporate Political Involvement*, 34 (4) ACAD. MGMT. J. 398 (1991).

42 Timothy Feddersen & Alvaro Sandroni, *A Theory of Participation in Elections*, 96 (4) AM. ECON. REV.1271 (2006).

43 Larry Diamond & Leonardo Morlino, *The Quality of Democracy – An Overview*, 15 (4) J. DEM. 21 (2004).

44 ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971).

45 *Id.*

of the most comprehensive methods for analyzing the gap between institutional persistence and public preferences, or non-democratic regimes. It examines broader contexts of transitions, namely the confluence of events or political flux that comprise critical historical "junctures."[46] Decisions made or actions taken during these junctures have a lasting effect on the trajectory of the institution and ultimately, its success or failure. In this context, constitution-making reflects such critical historical juncture or CJD, as institutional designs emerge and are placed on the path to successful or unsuccessful democratization.

Cultural Elements

The relationship between political culture and democracy has also been heavily debated in the literature.[47] Scholars of this field assert that the public's beliefs, values, and attitudes have a significant impact on the nature of political systems.[48] Durable cultural orientations are conceived to possess major political and economic consequences, thereby determining the nature of political regimes. Such a rigid view supports the argument that certain religions are immune to democratization and that they are incompatible with democratic values.[49] It has been argued that religion has the potential to "entrench a set of extra-legal values ... [and] can have a tremendous impact on constitutional politics because they make possible [the] potentially powerful alignment of social forces behind religion as the higher law against legality."[50]

However, recent scholarship on political culture and religiosity demonstrates that they cannot, and should not, be viewed in one-dimensional terms.[51] It is argued that whereas certain types of religiosity lead to authoritarianism and the suppression of freedoms, other religious forms view themselves

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46 Paul Pierson, Politics in Time: History, Institutions, and Social Analysis (2004).

47 Larry Diamond, Political Culture and Democracy in Developing Countries (1993).

48 Roland Inglehart, *The Renaissance of Political Culture*, 82 (4) Am. Pol. Sci. Rev.1203 (1988).

49 Anthony F. Lang, Jr., *From Revolutions to Constitutions: The Case of Egypt*, 89 (2) Int'l Aff. 345 (2013); Arjomand, *supra* note 18; Mirjam Künkler, *Religion-State Relations and Democracy in Egypt and Tunisia: Models from the Democratizing Muslim World – and Their Limits*, 18 (1) Swiss Pol. Sci. Rev.114 (2012); Alfred Stepan & Graeme B. Robertson, *Arab, Not Muslim, Exceptionalism*, 15 (4) J. Dem. 140 (2004); Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 (1) Indiana J. Global Leg. Stud. 101 (2009).

50 Arjomand, *supra* note 18, at 15.

51 Diamond, *supra* note 2.

as an element of democratic competition over the values and support of the public.[52] Philpott argues that the relationship between religious and political authority depends on differentiation and political theology.[53] Whereas the former describes how religious and political authorities are related, the latter addresses shared ideas about legitimate political authority in religious bodies. It is argued that the interaction between these factors explains whether religion supports democratization or violence.[54] Based on this interaction, Philpott develops four models of the relationship between religious and political authority with varying levels of compromise and tolerance. This typology, which introduces variances within each religion, including Islam, helps inform our analysis of the transitional process and demonstrate how the differences in the political theology of two Islamic movements – Ennahda in Tunisia and the Muslim Brotherhood in Egypt – influence chances of democratization.

While the relationship between Islam and democracy has figured highly in recent scholarship on democratization, some attribute the failure of democratization to the nature of Arab society.[55] Characteristics associated with Arab society, such as the "fierce" Arab state, patrimonial politics and illiberal Islam have all been used to explain the failure of democratic regimes.[56] Several scholars have isolated Arab authoritarianism as a political institution in and of itself, viewing Arab authoritarianism as an exception, establishing it as its own, separate phenomenon.[57] In contrast, some scholars support the contention that religious characteristics and other elements of Arab society can be made amenable and even supportive of democratic transition so long as the pervasiveness of ideology is contained.[58] By this logic, religion and other cultural elements can be made amenable to democracy in *either* Arab or non-Arab contexts.[59] As a precondition, however, religious regimes must be inclusive of, and cooperative with, all parties. Stepan and Linz characterize these conditions as "the twin

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52 WORLD RELIGIONS AND DEMOCRACY (Larry Diamond et al. eds., 2005); JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA AND POST-COMMUNIST EUROPE (1996).

53 Daniel Philpott, *Explaining the Political Ambivalence of Religion*, 101 (3) AM. POL. SCI. REV. 505 (2007).

54 *Id.*

55 Sanford Lakoff, *The Reality of Muslim Exceptionalism*, 15 (4) J. DEM. 133 (2004).

56 Nazih N. Ayubi, *Withered Socialism or Whether Socialism? The Radical Arab States as Populist Corporatist Regimes*, 13 (1) THIRD WORLD Q. 89 (1992).

57 Daniel Brumberg, *The Trap of Liberalized Autocracy*, 13 J. DEM. 56 (2002).

58 Bryan T. McGraw, *Religious Parties and the Problem of Democratic Political Legitimacy*, 17 (3) CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 289 (2014); Diamond, *supra* note 2.

59 *Id.*

tolerations," which include toleration of religious citizens; the provision of public space for religious activism; and respect for secular, civic rights.[60]

Despite individual scholars' and studies' orientations to Arab culture or religion, there is one main mitigating characteristic that emerges from each examination: the extent to which these individual elements create an environment of parity, compromise, or toleration. We have already witnessed at least one relatively successful case of democratization – Tunisia – to know that one aspect or element of Arab culture does not determine the success of fledgling democracies. We also know that the inclusion of religion, Islam or Islamist political parties prima facie does not determine the success or failure of democratization. The unique combination of states' histories, traditions, and in some cases, religion is what comprises its culture, level of compromise, and, therefore, potential for success.

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The above discussion demonstrates that institutional design, which includes formal and informal dimensions, and political culture and facilitates the nature of communication between players and sets favorable values in the political system, plays a major role in the success of democratic transitions. The dialectics between institution and culture determine the nature of the interaction between political players during the constitution-making process, facilitating or obstructing deliberation and compromise, which enable or disable democratization. Institutional design implicates the trajectory of transitioning governments because it forms the framework of institutions, such as the military, executive or party system, and implements the constitution. Cultural factors on the other hand, such as ideological disposition, intersect with constitutional design and also help to facilitate conditions which are ripe for change. When the appropriate cultural and institutional contexts merge with the timing of the new constitution, the quality of the critical juncture will determine whether or not the transition fails. The relationship between process and content complements this argument. Elements inherent in each – institutional design and cultural context- together form the CJD by which scholars evaluate the level of compromise in each state's transformation; and, thus, its potential for democratization. The following examination of the cases of Egypt and Tunisia is our attempt to do so.

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60 Alfred Stepan, *Tunisia's Transition and the Twin Tolerations*, 23 (2) J. Dem. 89 (2012); Alfred Stepan & Juan J. Linz, *Democratization Theory and the 'Arab Spring'*, 24 (2) J. Dem. 15 (2013).

Egypt

Egypt's revolution started as a populist movement. Inspired by the events of Tunisia's Jasmine Revolution, protestors of all walks of life met in Tahrir Square on January 25, 2011, the national Police Holiday, to protest decades-long corruption under President Hosni Mubarak.[61] After 18 days and with the blessing of the army, Mubarak and the National Democratic Party were removed from office.[62] Thereafter, the Supreme Council for the Armed Forces (SCAF) and General Tantawi dissolved the parliament and the Egyptian constitution.[63]

Since the toppling of the Mubarak regime paved the ground for democratization, the core of our analysis begins with the events that followed Morsi's election to president. On February 15, 2011 the MB declared its intention to form a political party amid continued protests.[64] In March, Egyptian voters overwhelmingly approved amendments to the constitution, developing criteria for presidency, the electoral commission and the transition process, including elections.[65] SCAF's orchestration of the transition resulted in a number of appointments and constitutional declarations which thwarted the democratization process: dissolving the National Democratic Assembly (NDA), criminalizing protests and strikes, and replacing Prime Minister Essam Sharaf with Mubarak's former prime minister, Kamal El-Ganzouri.[66]

Between January 3–4, 2012 parliamentary elections concluded, and the MB and the Islamist Al-Nour party won over 70 % of seats in the People's Assembly.[67] In June, the Supreme Constitutional Court declared that a third of

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61 Sarah Childress, *Timeline: What's Happened Since Egypt's Revolution?* Frontline, Sept. 17, 2013, available at http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/egypt-in-crisis/timeline-whats-happened-since-egypts-revolution/.

62 *Id.*

63 Ali Houissa, *Arab Spring: A Research & Study Guide Egypt*, Cornell University Library, July 13, 2015, available at http://guides.library.cornell.edu/c.php?g=31688&p=200748.

64 Ipek Zeydani, *'Shariah in Egypt Is Enough for Us,' Muslim Brotherhood Leader Says*, Hurriyet Daily News, May 23, 2011, available at http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=8220shari8217a-law-in-egypt-is-enough-for-us8221-tells-a-muslim-brotherhood-leader-2011-05-23.

65 International Commission of Jurists: Egypt's New Constitution: A Flawed Process; Uncertain Outcomes (2012), available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/EGYPT-CONSTITUTION-REPORT-w-COVER.pdf.

66 *Id.*

67 *Egypt's Islamist Parties Win Elections to Parliament*, BBC: Middle East, Jan. 21, 2012, available at http://www.bbc.com/news/world-middle-east-16665748.

these seats were obtained unconstitutionally.[68] A day before the presidential elections, the military shut down parliament and awarded itself new powers – control over the national budget and the ability to issue laws.[69] Days later, MB candidate Mohammed Morsi won the presidential elections with nearly a 52 % majority.[70]

The Constitutional Assembly's task to rebuild Egypt's institutions was rife with conflict. Dozens of members withdrew in opposition to the overwhelming dominance of Islamic parties in parliament.[71] The judiciary's various attempts to curb the process were met with punitive and dictatorial decrees by the Morsi administration, providing greater leeway for the MB to craft the new document.[72] In August 2012, Morsi dismissed the Defense Minister and Chief of Staff, cancelled the military's complementary constitutional declaration, and attempted to strip the judiciary of its right to challenge the executive.[73] Prime Minister Hisham Qandil appointed a new cabinet, comprised of the former authoritarian government's officials, excluding secularists – who represented almost half of Egypt's constituency.[74]

On October 10, 2012 the Constituent Assembly published its draft constitution, which was met with opposition by a number of parties, including the Supreme Constitutional Court.[75] On October 22, twenty-one political parties demanded the suspension of the Constitutional Assembly until the Administrative Court determined whether or not it should be disolved.[76] At this time, Morsi decided to issue

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68 *Egypt Court Rules Entire Parliament Illegally Elected, Orders Body to Dissolve after Unconstitutional Vote*, CBS News, June 14, 2012, available at http://www.cbsnews.com/news/ egypt-court-rules-entire-parliament-illegally-elected-orders-body-to-dissolve-after-unconstitutional-vote/.

69 International Commission of Jurists, *supra* note 65.

70 H. A. Hellyer, *Mr. President: The Revolution Continues in Egypt! Or Does It?*, The Brookings Institute, Oct. 16, 2012, available at http://www.brookings.edu/research/opinions/2012/10/16-egypt-president-revolution-hellyer.

71 Nouran El-Behairy, *Timeline of Morsi and the Judiciary: One Year in Power*, Egypt Daily News, June 29, 2013, available at http://www.dailynewsegypt.com/2013/06/29/timeline-of-morsi-and-the-judiciary-one-year-in-power/.

72 *Id.*

73 *Id.*

74 *Egypt's Morsi Swears in New Cabinet*, Al-Jazeera, Aug. 2, 2012, available at http://www.aljazeera.com/news/middleeast/2012/08/201282163659410998.html; Ahmed Abd Rabou, *Egypt After Elections: Towards the Second Republic*,14 (3) Insight Turkey 15 (2012).

75 Zaid Al-Ali, *The Constitutional Court's Mark on Egypt's Elections*, Foreign Policy, Jun. 6, 2013, available at http://foreignpolicy.com/2013/06/06/the-constitutional-courts-mark-on-egypts-elections/.

76 *Egypt's Constitutional Assembly Case Referred to Supreme Court*, Al Arabiya News, Oct. 23, 2012, available at https://english.alarabiya.net/articles/2012/10/23/245476.html.

a decree expanding his power, shielding the Assembly from the judiciary, and extending the drafting for another two months.[77] Morsi also forcibly removed Generals Tantawi and Enan and appointed Al-Sisi, a closet Islamist, as Chief of Staff.[78] Despite widespread protests, the final draft was passed on December 25 with a 64 % majority.[79]

Beginning in 2013, on the two-year anniversary of Mubarak's ousting, protestors gathered in a months-long demonstration, protesting the new administration's abuse of power and corruption.[80] On July 3 with protests by millions of Egyptians in the streets of Cairo and other big cities against the government, the military removed Morsi and Interim President Adly Mansour formed a committee to help rewrite the constitution, suspending that which was drafted only a few months earlier by the MB-dominated constitutional assembly.[81]Al-Sisi then began to shut down and arrest Islamist media and over 300 MB officials.[82] Under Mansour, a new cabinet and a fifty-member Assembly, headed by Amr Mousa, former foreign minister during Mubarak's regime, was formed to draft a new constitution and the MB was banned from participating.[83] In 2013, as in 2012, Egypt's elections and appointments were ad-hoc, again reflecting the needs of those in power, rather than the populace.

Amid protests by MB supporters and unprecedented levels of arrests and death, the referendum for the new constitution was approved on December 14, 2013.[84] While it enjoyed a relatively high voter turnout and limited some of the expansiveness of the old regimes' executive, the legislation and violence that have since passed demonstrate that the work of the Assembly is far from over. Nearly two years on, members of the MB and Morsi's administration continue to

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77 INTERNATIONAL COMMISSION OF JURISTS, *supra* note 65.

78 Marc J. Sievers, *President Sisi's Worldview*, THE WASHINGTON INSTITUTE, Oct. 29, 2014, available at http://www.washingtoninstitute.org/policy-analysis/view/president-sisis-worldview.

79 INTERNATIONAL COMMISSION OF JURISTS, *supra* note 65.

80 Abigail Hauslohner, *At Least 4 Dead as Egyptians Mark Second Anniversary of Uprising with Protests*, WASH. POST, Jan. 25, 2013, available at https://www.washingtonpost.com/world/middle_east/egyptians-mark-2nd-anniversary-of-uprising-with-protests-violence/2013/01/25/9d8bde76-6718-11e2-85f5-a8a9228e55e7_story.html.

81 *Egypt Profile – Timeline*, BBC: AFRICA, July 2, 2015, available at http://www.bbc.com/news/world-africa-13315719.

82 Childress, *supra* note 61.

83 Kareem Fahim, *Egypt, Dealing a Blow to the Muslim Brotherhood, Deems It a Terrorist Group*, N.Y. TIMES: MIDDLE EAST, Dec. 25, 2013, available at http://www.nytimes.com/2013/12/26/world/middleeast/egypt-calls-muslim-brotherhood-a-terrorist-group.html.

84 Lauren King & Amro Hassan, *Official Results in Egypt: 98.1% Approve Constitution*, LA TIMES, Jan. 18, 2014, available at http://articles.latimes.com/2014/jan/18/world/la-fg-egypt-election-20140119.

be sought out, arrested, charged with crimes and formally excluded from the public sphere, as secularists were in the past.[85]

Institutional Design

Unlike the democratization processes that took place in many southern European countries, in which constitutional process followed accord between authoritarian rulers and their democratizing forces, the Egyptian transition was marked by mass protests and citizen activism, through which ordinary people challenged the regime to bring about change.[86] Although the upheaval demonstrated the strength of bottom-up citizen activism, the parties that ascended to power following the protests were not the same parties that orchestrated the protests, nor were they entirely representative of the public's needs.[87] Most liberal forces and young leaders of the revolution felt and continue to feel frustrated, as they have since realized that the revolution was stolen from them.[88] This phenomenon and its subsequent results echo claims for the necessity of inclusiveness and participation – essentially, compromise – which posit that if the parties representing the constituent power of the revolution are not central to the constitutional process, it will be a still-born document, reflective of society's norms but unable to govern.[89] Thus, if democracies are measured by their responsiveness to the public or compromise between major political players, we can see today that Egypt has been moving away from these goals.

This failure and Egypt's transitional struggle during its constitution-drafting process provides an important window into Egyptian politics and political constitutionalism. The "battle for the constitution," one of the most accurate descriptions used to describe post-Mubarak Egypt, began when leading political institutions failed to define the rules that governed the constitution-making process.[90] The underlying political culture of the players, their relationships

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85 *Egypt: Year of Abuses Under Al-Sisi*, Human Rights Watch, Jun. 8, 2015, available at https://www.hrw.org/news/2015/06/08/egypt-year-abuses-under-al-sisi.

86 Alper Y. Dede, *The Egyptian Spring: Continuing Challenges a Year After the Arab Spring*, 5 USAK Yearbook 99 (2012).

87 Nathalie Bernard-Maugiron, *Egypt's Path to Transition: Democratic Challenges behind the Constitution Reform Process*, 3 M.E. L. & Governance 43 (2011).

88 *Id.*

89 Lang, *supra* note 49.

90 Yasmine Farouk, *Writing the Constitution of the Egyptian Revolution: Between Social Contract and Political Contracting*, Arab Reform Initiative (Nov. 2013), available at http://www.arab-reform.net/writing-constitution-egyptian-revolution-between-social-contract-and-political-contracting.

and their ideological obstacles came together at the timing of the transition to exploit the institutional arrangement, resulting not in CJD, but failure. As a result, the institutional and cultural dynamics under Al-Sisi reflect those of each of his predecessors.

Military

Under Mubarak's regime, a special relationship had existed between the military, political parties, and the executive. Thus, when the party lost power after the fall of Mubarak the only institution left to control the disorder and which had a stake in maintaining its influence in any future political constellation was the army.[91] We agree with scholars who view the centrality of the military as a major institutional factor in Egyptian politics that negatively impacted the outcome of Egypt's constitution-making process.[92] This impact was further worsened in the context of the institutional dynamic of the remaining institutions, whose respective interests differed so greatly that they were unable to achieve any semblance of a balance of power.

The military's intention, at least in the beginning, may have been to orchestrate reciprocity among the power elite, guaranteeing its interests in the emerging power structure. However, because its officers either lacked political experience or did not rely on any of the political parties involved, the military fell short of achieving this balance, leaving it unable to promote a stable power-sharing dynamic.[93] While the army controlled the junctures of power, it could not motivate central political players to reconcile or shift toward a new and more reconciliatory institutional design; thus it became an instrument of the most dominant political players of the moment.[94] This was evident during the MB's rise to power and the way it bolstered the exclusivist approach adopted by Morsi vis-à-vis secular political players, including those who had supported the revolution while he was still in jail. Recognizing the strength of the military, the latter appealed to

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91 Hanny Suleiman, *Civic-Military Relations and Democratic Transition in Egypt after The 25th January Revolution.* Doha: Arab Center for Research and Policy Studies, 2015; Frederico Battera, *Ruling Coalitions and Chances of Democratization in Arab Countries*, Dispes Stud. & Researches (2014).
92 Stephan Roll, *Managing Change: How Egypt's Military Leadership Shaped the Transformation*, 21 (1) Mediterranean Politics 23 (2016); Derek Lutterbeck, *Arab Uprisings, Armed Forces, and Civil-Military Relations*, 39 (1) Armed Forces & Society 28 (2012); Bellin, *supra* note 9.
93 Bellin, *supra* note 9.
94 Nathan J. Brown & Michele Dunne, *Egypt's Draft Constitution Rewards the Military and Judiciary*, Carnegie Endowment for International Peace, Dec. 4, 2013, available at http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary/gvc8.

the army to stop what has been called "Akhwanat Al-Dawlah" (turning the state into a MB state).[95] Al-Sisi, harnessing the strength of the military and his position under Morsi, intervened in the name of millions of protesters, which eventually has led to his own rise to power. In absence of a qualified leader in the secular opposition, which was too fragmented and unable to act in concert, Al-Sisi, as the head of the armed forces and the Minister of Defense, was perceived as the only person able to save the country from drifting into civil war. It is true that the Egyptian army has always been strong and influential, but it is too deterministic to argue that its return to power was predetermined. One could argue that there had been a slight chance for democratization in Egypt had the MB not sought to "hijack the revolution" and exclude other opposition parties, had liberal political forces been able to establish a common "Salvation Front" in an earlier stage, and had these two camps communicated in an equal and mutually respectful way.[96] This fact goes to support our assertion that a combination of contextual factors and parties' agency in the CJD brought the requisite outcomes.

It is true that the position of the military first at the timing of Mubarak's ousting and again in Morsi's was not accidental. The alignment and proximity of the military under each subsequent ruler bolstered the strength of the executive, reducing the need for compromise. Indeed, only days prior to Morsi's election, on June 15, acting on the permission of the Supreme Court, the military shut down the parliament and took control over the national budget and legislative powers, emptying the incoming president of influence.[97] Nonetheless, the army exploited political circumstances that it did not create. Given the institutional settings in Egypt at the time, the behavior of political players facilitated the return of the army to an authoritarian model.

The influence of the military in building new institutions can be plainly seen in the 2012 and 2014 constitutions, portending its actions in the future administrations. Both documents did not fundamentally differ from that of Mubarak's regime. They devoted several sections to the roles of the armed forces and the police, elevating their authority over other governmental institutions and civilian oversight. For example, the 2012 constitution reestablished the National Defense Council and a National Security Council–both of which are headed by

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95 Ziad Baha'a Al-Din, ما هى «أخْوَنة» الدولة؟ .. ولماذا نخشاها؟ [What is the Akwanization of the State? And Why We Fear It?], Al-Shorouq, Sept. 11, 2012, available at http://www.shorouknews.com/columns/view.aspx?cdate=10092012&id=d8962c68-7416-4ce4-b733-672a9a1dc5e1.

96 عاجل .. البرادعي وموسى وصباحي يعلنون إنشاء جبهة إنقاذ وطني لإدارة المرحلة الحالية سياسيًا وشعبيًا [Urgent ... ElBaradei, Moussa and Sabbahi, Declare the Establishment of a National Salvation Front to Manage the Political and Popular Current Stage], Al-Ahram, Nov. 24, 2012, available at http://gate.ahram.org.eg/News/276204.aspx.

97 Childress, *supra* note 61.

the executive, maintaining the fusion between civic and military authority.[98] Furthermore, it includes a special section on military adjudication, in which members of the judiciary cannot be dismissed and enjoy many rights and duties parallel to those of the civic judicial authority.[99] The realm of ordinary civic deliberation is further impeded, as the military's budget is set not by parliament, but the NDC, closing it to public scrutiny.[100]Article 164 further entrenches the military in the executive, enabling only former military servicemen to serve in the cabinet.[101]

These provisions can be said to "close the door" to democratization, as they erased any path toward a future balance of power between Egypt's institutions and thus, compromise with opposition leaders. Compromise, which we argue is essential for democratization, especially in divided societies like Egypt's, is necessary under such institutional arrangements. Furthermore, it is impossible to obtain when such dynamics are enshrined into law. The dismantling of Islamic opposition parties, made illegal under Article 74, the broadened jurisdiction of the military court, and the loose interpretation of anti-terrorism laws carry significant penalties for challenging the power elite.[102] These consequences can be seen clearly today with now unprecedented levels of human rights abuses, violence and the arrests and jailing of MB supporters.[103]

Executive

In many ways, Morsi's and Al-Sisi's activities bore similar characteristics to those of Mubarak's regime especially with each administration's orientation toward compromise. Both leaders harnessed the executive to force opposition parties to comply. This can be seen in their actions in the building and

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98 CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Nov. 30, 2012, sec. 3, art. 197 [hereinafter CONST. 2012]. An unofficial English translation is available at http://constitutionaltransitions.org/wp-content/uploads/2013/05/Egypt-Constitution-26-December-2012.pdf.

99 *Id*. sec. 4, art. 198.

100 *Id*. sec. 3, art 197.

101 CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 2014, sec. 2, art. 164 [hereinafter CONST. 2014]. An unofficial English translation is available at https://www.constituteproject.org/constitution/Egypt_2014.pdf.

102 *Id*. sec. 3, art. 74; Stephen Kalin, *Egypt Plans Blanket Anti-Terrorism Law against 'Disrupting Order'*, REUTERS, Nov. 26, 2014, available at http://uk.reuters.com/article/2014/11/26/uk-egypt-security-idUKKCN0JA1U320141126.

103 Abdurrahman Aydin, *Egypt`s Murderous New Military Regime*, WORLD BULLETIN NEWS, May 5, 2014, available at www.worldbulletin.net/minya-death-sentences/134592/egypts-murderous-new-military-regime.

maintenance of the executive. For example, the appointment of Al-Sisi in Morsi's administration was thought a necessary step to "neutralize" the secular military's role in the transitioning democracy, thereby enabling the executive to institutionalize the MB's power in the state.[104] Al-Sisi's role as mitigator at the close of Morsi's tenure and his placement in the executive made him ripe for selection in the forthcoming elections. Both Al-Sisi's and Morsi's decision-making marked the efforts of each administration to "hijack" the popular will.

The preservation of former leadership in subsequent regimes also illustrated the guarding of power and thus, lack of compromise in the executive. The return of El-Ganzouri to the prime minister office and Amer Moussa's former role of Foreign Minister in Mubarak's regime is one such example, which was translated into institutional resistance to the MB government under Hisham Qandil.[105] The preservation of such roles had a demonstrative effect on the contents of the new constitutions. For this reason, despite the intentions of the revolution, the new constitutions bore little resemblance to the democratic values championed in the early stages of revolution. Both subsequent regimes were anxious to maintain favorable power relations for their respective interests and merely sought to eliminate the influence of the "other."

This phenomenon can be seen clearly in the provisions of the 2012 and 2014 constitutions, which granted the executive with powers vaster than those in most democratic regimes. In addition to heading the two military councils, the President initially enjoyed an unlimited number of presidential terms in the original constitution. While amended to two terms early in the process,[106] the influence of the executive in the Judiciary and the Legislature has expanded under Al-Sisi's administration, rendering it even more oppressive than its predecessors. The judiciary and the legislature are said to work hand in hand with the executive in coordinated efforts to suppress civilian opposition through the poorly-defined and expanded interpretations of legislation in a variety of areas.[107] These provisions broaden the meaning of terms such as "counter-

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104 Abdul Hatita, *El-Sisi: The General at the Heart of Events*, Asharq Al-Awsat, July 7, 2013, http://english.aawsat.com/2013/07/article55308731/el-sisi-the-general-at-the-heart-of-events.

105 Sarah El Deeb, *Nine New Ministers in Hisham Qandil's Government*, Aug. 4, 2015, available at http://www.huffingtonpost.com/2011/12/22/kamal-el-ganzouri-egypt_n_1164820.html; *Meet Hisham Qandil New Egypt Cabinet*, Ahram Online, Aug. 2, 2012, available at http://english.ahram.org.eg/NewsContent/1/0/49365/Egypt/0/Meet-Hisham-Qandils-new-Egypt-cabinet.aspx.

106 Cairo Agencies, *Egypt Panel Proposes Limit to Presidential Term*, Al-Arabiya News, Feb. 26, 2011, available at https://www.alarabiya.net/articles/2011/02/26/139356.html.

107 *Egyptian Courts Go Berserk with Death Sentences*, Crescent Int'l, Jun. 18, 2014, available at http://www.crescenticit.com/2012/09/egyptian-courts-go-berserk-with-death-sentences-4511-articles.html.

terrorism" to indicate almost any opposition to the executive, especially with regard to the MB.[108]

Notwithstanding the deep involvement of the army, Al-Sisi's measures guaranteed the support of large segments of the population, of the liberal elite and the state's dominant institutions, especially the judiciary. Al-Sisi became the savior of the revolution in face of the fears from Al-Akhwana process, but sought to distinguish himself from the old regime by facilitating his rise to power through drafting a new more democratic constitution and general elections.[109] These steps made fledgling institutions, in particular, the constitution, an instrument for the maintenance of power relations rather than a document establishing the relationship between the state and society.

In each administration's executive, we witness one marked characteristic of its ruling party – a lack of compromise. Together with the political culture of the elite and the relative influence of the remaining institutions, we see that the actions taken by the President not only failed to reflect this democratic ideal, but institutionalized its absence. This institutionalization pushed it further along a trajectory that was decidedly undemocratic.

The Constituent Assembly

If the exclusivity of the military and the executive can be characterized by its lack of compromise, the exclusivity and behavior of the Constituent Assembly in Egypt may best be characterized as the instrument of its endeavors. The exclusivity of the Constituent Assembly was probably more apparent than any other dynamic in the institutions of the transition.

With regard to CJD, it is important to note here the importance of timing and order of the constitution-making process, whose consequences were further exacerbated by the actions of the Constituent Assembly. The strength of the MB in facilitating elections *before* the constitution-drafting process must not be overlooked. This was, of course, motivated by its lack of compromise as it was confident that as a result of its internal organizational cohesion and the fragmentation of the liberal opposition the initial elections would draw a larger

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108 Aydin, *supra* note 103.

109 Wael Eskandar, *Egyptians Still in Search of Political Messiah*, AL-MONITOR, Apr. 24, 2014, available at http://www.al-monitor.com/pulse/originals/2014/04/egypt-sisi-sabbahi-president-messiah.html#.

number of MB supporters than it would secular voters.[110] Early elections, as predicted, enabled the MB to augment the new government and its institutions in favor of its own interests. Like the actions of the executive and the military, the power dynamics were set by political players in the NCA to preserve the power of dominant parties vis-à-vis the opposition, and these dynamics did not necessitate compromise.[111]

In each case, the NCA was dominated by the political party of the executive, usually by the design of the executive itself. Morsi, in particular, made a number of decisions with regard to Egypt's Constitutional Assembly to influence its power-sharing arrangement, as can be seen in the following discussion of the judiciary. These resulted in continual withdrawals of opposition members, leading to greater imbalance in the NCA. Under Al-Sisi, this was also apparent. In the 2014 Constitution, Article 74 criminalized political parties formed on the basis of religion, aiming to outlaw the MB, as an integral player in the political game, shutting the door thereby on democratic deliberation and politics.[112]

Further, the rush to complete the constitution in order to secure favorable terms for each side also demonstrated the parties' attempts to utilize its lack of representation–skirting its need for compromise in the Constitutional Assembly. Constitutional Assembly members were similarly appointed based on their favor to the existing power structure. Hence, the constitution drafted the week of November 22, 2011, and the subsequent final constitution, were highly divisive and caused a profound political and constitutional crisis in post-revolutionary Egypt.

Judiciary

Since the beginning of the transition in 2012, the judiciary and executive dynamic fluctuated between adversarial in Morsi's administration, to unified and supportive in Sisi's regime.[113] These changes do not reflect the institutions'

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110 Eric Trager, *The Unbreakable Muslim Brotherhood: Grim Prospects for a Liberal Egypt*, THE WASHINGTON INSTITUTE, Oct. 2011, available at http://www.washingtoninstitute.org/policy-analysis/view/the-unbreakable-muslim-brotherhood-grim-prospects-for-a-liberal-egypt.

111 Nathan J. Brown, *Egypt's Daring Constitutional Gang of 50*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, Sept. 20, 2013, available at http://carnegieendowment.org/2013/09/20/egypt-s-daring-constitutional-gang-of-50/gny0.

112 CONST. 2014, *supra* note 101, sect. 3, art. 74.

113 Sahar Aziz, *Theater or Transitional Justice: Reforming the Judiciary in Egypt*, TRANSITIONAL JUSTICE IN THE MIDDLE EAST, Nov. 22, 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543313.

dispositions toward democracy; rather, they reflect the oppositions' respective powers. In Morsi's administration, the judiciary repeatedly attempted to block the executive in drafting its constitution and in exacting revenge on the secular opposition.[114] During this time, the judiciary was diverse and was comprised of several groups of courts – the Court of Cassation, the State Council, the Supreme Administrative Court; and the Military Courts, including the State Security Court, which addressed emergency laws or issues outside of the State's regular jurisdiction.[115] These divisions naturally led to political diffusion and thus were less subject to Morsi's coercion.[116]

During Morsi's regime, the judiciary's actions were also not uniformly aligned with the goals of the executive or the Constituent Assembly. This was evidenced by the judiciary's dissolution of parliament. Morsi's response to such opposition was striking. Attempting to curb the influence of the judiciary, he proclaimed its support for the Mubarak regime and allied with other Islamist parties to advocate for an earlier mandatory retirement of judges.[117] Morsi also issued a series of decrees, including one in which he elevated the role of the Constituent Assembly, excluding it from judicial oversight.[118] Such a decision facilitated cooperation between the judiciary and the army in order to block what was conceived to be a threat to the autonomy of the state.

This explains the reason that in Al-Sisi's administration, the judiciary endorsed SCAF and its anti-Islamist orientation. Note, the military was considered integral to the state and lead to the endorsement of Al-Sisi's exclusivist and oppressive legislation. This dynamic was apparent in the passage and interpretation of new legislation that curbed the rights and freedoms of opposition groups, not limited to the MB. While the 2014 Constitution afforded Egyptians more personal and political rights, including state compliance with all human rights accords, the scope of the existing laws concerning terrorism was broadened to include all "actions aimed at damaging national unity, natural resources, monuments, communication systems, the national economy, or hindering the work of judicial bodies and diplomatic missions in

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114 *Id.*

115 *In Egypt, the Executive and the Judiciary Face off*, STRATFOR, Nov. 15, 2012, available at https://www.stratfor.com/sample/analysis/egypt-executive-and-judiciary-face.

116 Nathan Brown, *The Battle Over Egypt's Judiciary*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, May 8, 2013, available at http://carnegieendowment.org/sada/2013/05/08/battle-over-egypt-s-judiciary/hr4u.

117 Bassem Sabry, *Eight Questions on 'Purging' of Egypt's Judiciary*, AL-MONITOR, Apr. 24, 2013, available at http://www.al-monitor.com/pulse/originals/2013/04/eight-questions-purging-egyptian-judiciary.html.

118 INTERNATIONAL COMMISSION OF JURISTS, *supra* note 65.

Egypt."[119] Sentencing became harsher, such as the sentencing of up to three years' imprisonment for criticizing public employees or members of the military, and impeded any meaningful protest or the exercise of freedom of speech.[120] In response to criticism raised against the judicial system after the sentencing of 529 protestors following the murder of a police officer, Al-Sisi responded, "[w]e will not intervene in judicial rulings ... The Egyptian judiciary is independent. State institutions are untouchable, even if others could not understand these rulings."[121]

Culture

Egypt's and Tunisia's political culture and historical influences are vastly distinct; which leads many to deduce that these differences played an integral part in the revolutions' deeply divergent outcomes. Egypt's historical illiberal political culture, lack of democratic experience, and divisive religious orientations provided little room for compromise between parties and their interests as they lacked a common framework for moral or political compromise.

The Secular and Islamist Movements

Initially, the Egyptian revolution was a populist movement with no specific ideological orientation. During the uprising, all sectors of society were involved – leftists, feminists, Islamists, Arab nationalists, and all social classes and educational backgrounds. However, the cracks began to show soon after Mubarak's downfall. It was clear that a united vision of Egypt was not shared by all. Greatest of all were the differences between Islamists and liberals.[122]

As a result of the revolution, the Islamic movement enjoyed greater confidence and exploited the revolution as it emerged the most viable actor to lead the transition. This prominence, however, was not necessarily the result of the movement's strengths a priori. The revolution itself helped to shape the political

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119 *"Sisi`s Egypt is a `Praetorian State` Fortified by a Justice System Whose Trade Mark is the Kangaroo Courts Assigning Death Sentences at the Military's 'Kind Requests',* World Bulletin News, *supra* note 103.

120 *Id*.

121 Al Masry Al Youm, *Egyptian Judiciary Independent, Says Sisi*, Egypt Independent, Jun. 24, 2014, available at http://www.egyptindependent.com/news/egyptian-judiciary-independent-says-sisi.

122 Hellyer, *supra* note 70.

actors and their role in the transition, as it opened the political arena to new actors. For the first time, the MB and Salafists founded official political parties that competed for power with other secular parties.

However, providing Egypt's Islamist parties with a central role in the new government proved to be disastrous, and the revolution was reduced to a power struggle between the elite and became disconnected with its initial resistance.[123] Although only a slight majority in the vote, the party enjoyed insuperable prominence in each of the transitioning institutions, most notably the Constitutional Assembly. The same could be said for Al-Sisi's administration, wherein secularists prevailed in each level of the transitioning government. This prominence precluded the necessity for compromise.

Unlike supporters of the Arab cultural explanation for failed democratization in the region, we do not support the contention that such power dynamics are inherent in the Arab world. Egyptian and Tunisian Islamist parties played demonstrably different roles in facilitating their respective transitions. Rather, we argue that the structure of the institutions *combined* with the political culture in each setting set the stage for each state's necessity – or lack thereof – for compromise. This is clearly evidenced by the motives and evolution of the parties themselves which occupied different positions – the opposition and the power elite – in the two subsequent administrations. For example, secularists in Egypt greatly evolved between the initial revolution and Morsi and Al-Sisi's administrations, illustrating the impact of their place on the institutional and cultural critical juncture. In an attempt to vie for power, many secularists abandoned their prerevolutionary orientations in an attempt to circumvent the MB's domination.[124] This was evidenced by the willingness of some liberal forces to forego democratic and populist principles that they had previously championed in an attempt to curb Islamization of the state and, thus, preserve their influence in the new regime. Those standing behind Al-Sisi's measures against the MB reflected their readiness to compromise with authoritarianism as long as it opposed institutionalization of religion. Under Al-Sisi as the dominant political party in each institution, it no longer needed to concede to the opposition.

Therefore, when we speak of culture in the context of the Arab Spring, it is important to understand that this culture is a product of the political dynamics of each context. More explicitly, when we speak of culture, we speak of *political*

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123 Marina Ottaway, *After the Constitution, a New Battle in Egypt*, 15 (1) Insight Turkey 1 (2013).
124 Stepan & Linz, *supra* note 60; Laurel E. Miller & Jeffrey Martini, *Democratization in the Arab World: A Summary of Lessons from around the Globe*, Rand National Defense Research Institute, 2013, available at http://www.rand.org/content/dam/rand/pubs/monographs/MG1100/MG1192z2/RAND_MG1192z2.pdf.

culture and parties' propensity to compromise based on their political dynamics. The dynamic, the lack of necessity to compromise by both Islamists and secularists, was manifested in the 2012 and 2014 Constitutions, respectively and solidified the path away from democratization. While both constitutions declared Shari'a the main source of legislation and even referenced Al-Azhar, the MB constitution emphasized the central role of the state in promoting "morality, decency, and public order, as well as a high level of education and religious and patriotic values, scientific truths, the Arab culture, and the historical and civilizational patrimony of the People."[125] This language, which was omitted from the 2014 Constitution, raised fears among secular social forces, since it reflected the elevated status of the "politics of the good" over the "politics of the right."[126] In contrast, any political activity based on religion or any religious party was subsequently excluded under the 2014 version.[127] The inclusion of Article 2 in both versions illustrates that Al-Sisi's constitution sought not to separate religion and state, so much as exclude religious parties from the political process, paving the road for new legislation banning parties based on religion. This intent was also obvious by the fact that neither version made any assertion of a civil state, civil values, or any balance between state and religion.

Timing and CJD

This confluence of events – the centrality of Islamist parties in the former regime, the marginalization of the secular movement, then the marginalization of the MB under Al-Sisi, as well as the timing and order of the constitutional process all reflect an interdependency between political and cultural forces at a critical historical juncture, opening the door to institutional failure, and consequently, closing the door on compromise – all which encouraged the army to step in as the savior of the state, conceding democratization. The product of this critical juncture – the constitution – locked in an inherent imbalance of power between the central political parties and an exclusivist orientation under each administration, barred development of a true democracy.

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125 Const. 2012, *supra* note 98, sec. 2, art. 11.
126 *Id.*
127 Const. 2014, *supra* note 101, at sec.3, art. 74.

Tunisia

The transfer of power and the progression of the transitional phases that have taken place since the revolution reveal much about the power of constitutionalism in Tunisia and in particular, its level of compromise.[128] This compromise led to a markedly efficient transition despite societal divisions, compared to that of Egypt. In less than ten months, Tunisia moved from brutal authoritarian rule to free, fair, and transparent elections.

On December 17, 2010, Mohamed Bouazizi's self-immolation in protest against police harassment and unemployment in Sidi Bouzid set off a series of riots and protests across the country.[129] Then President Ben Ali fled to Saudi Arabia, leaving Prime Minister Mohamed Ghannouchi to take over.[130] Amid continued protest for more radical reform, Ghannouchi promised that elections would be held within six months and that he would thereafter quit politics. This was deemed insufficient by the protesters, who returned to the streets on January 23, 2011.[131] On February 27, Ghannouchi resigned with all ministers who had served in Ben Ali's government and was replaced by Beji Caid Essebsi.[132]

On March 1, 2011, the Ennahda party was legalized.[133] This signaled the inclusion of all parties with a serious following in the political system and in the constitutional process to come. On October 23, 2011, the NCA was elected and tasked with writing the new constitution and establishing an interim government until elections could be held.[134] In the elections, the Ennahda party won 89 of the 217 seats – a much more balanced majority than that in Egypt.[135] The balance of power within parliament and the moderate ideological worldview of Ennahda's leader, Rashid Al-Ghannouchi made compromise a necessity. Despite the balance of power in parliament, violence erupted across Tunisia between

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128 Duncan Pickard, Al-Nahda: Moderation and Compromise in Tunisia's Constitutional Bargain, POLITICAL AND CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA, 4 2014, available at http://allafrica.com/stories/201301171442.html.

129 Ryan Rifai, *Timeline: Tunisia's Uprising*, AL-JAZEERA, Jan. 23, 2011, available at http://www.aljazeera.com/indepth/spotlight/tunisia/2011/01/201114142223827361.html.

130 *Id.*

131 *Id.*

132 *The Jasmine Revolution: A Timeline*, TUNISIA WEEKLY, Nov. 22, 2015, available at https://tunisiaweekly.wordpress.com/2012/02/14/the-jasmine-revolution-a-timeline/.

133 *Tunisia Legalises Islamist Group Ennahda*, BBC: AFRICA, Mar. 1, 2011, available at http://www.bbc.com/news/world-africa-12611609.

134 TUNISIA WEEKLY, *supra* note 132.

135 *Tunisia's Islamist Ennahda Party Wins Historic Poll*, BBC: AFRICA, Oct. 27, 2011, available at http://www.bbc.com/news/world-africa-15487647.

Salafists, loyalists, secularists and the police.[136] The following December, however, Ennahda was able to establish a governing coalition within the NCA led by Ettakatol's Mustapha Ben Jaafar.[137] Human rights activist, Monsif Marzuki was elected president of the NCA and Ennahda's Hamadi Jebali was sworn in as prime minister.[138]

Between December 2012 and June 2013, the NCA released a second, third, and fourth draft of the constitution for public scrutiny[139] During this time, the NCA successfully facilitated a number of compromises between parties and interests. Protests for women's rights, for example, led to changes in the August 2012 draft which referred to women as "complementary to men" and brought about one of the most progressive and equitable provisions toward women.[140] Later, parties agreed that neither the president nor the prime minister would have exclusive control over the executive.[141]

Despite these compromises, the transition faced a number of obstacles. In February 2013, Ennahda adhered to its compromising stance on the new government, leading Prime Minister Jebali to resign after the party rejected his proposals for a government of technocrats following the murder of opposition leader Chokri Belaid.[142] In August, Mustapha Ben Jaafar suspended the NCA's work as it seemed the transition would collapse just as the constitution neared its completion and concrete plans for new elections were being laid. Thereafter Ghannuchi began discussions with opposition leaders to reach a compromise, and in September, the Assembly was able to resume its work.[143]

Despite its power and influence up until this point, Ennahda agreed to hand over power to a caretaker government tasked with organizing new elections in

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136 *Tunisia Profile – Timeline*, BBC: Aᴠʀɪᴄᴀ, Oct. 13, 2015, available at http://www.bbc.com/news/world-africa-14107720.

137 *Tunisia's Coalition "Reaches Agreement*, Aʟ-Jᴀᴢᴇᴇʀᴀ, Nov. 19, 2011, available at http://www.aljazeera.com/news/middleeast/2011/11/20111118213914899119.html.

138 BBC: Aᴠʀɪᴄᴀ, *supra* note 136.

139 *The Best and Worst of Tunisia's New Constitution*, Aʟ-Mᴏɴɪᴛᴏʀ, Jan.29, 2014, available at http://www.al-monitor.com/pulse/politics/2014/01/tunisia-constitution-drafting-best-worst.html#.

140 Synda Tajine, *Will Tunisian Women Become "Complementary" to Men by Law?* Aʟ-Mᴏɴɪᴛᴏʀ, Aug. 14, 2012, available at http://www.al-monitor.com/pulse/politics/2012/08/tunisia-are-womens-rights-fading.html#.

141 *Officials: Tunisia's Draft Constitution Completed*, Aʟ-Aʀᴀʙɪʏᴀ Nᴇᴡs, Jun. 1, 2013, available at http://english.alarabiya.net/en/News/middle-east/2013/06/01/Officials-Tunisia-draft-constitution-completed-.html.

142 BBC: Aᴠʀɪᴄᴀ, *supra* note 136.

143 Monji Saidani, *Tunisia Preparing for National Dialogue*, AsʜᴀʀQAʟ-Awsᴀᴛ, Oct. 3, 2013, available at http://english.aawsat.com/2013/10/article55318244.

2014.[144] Amid widespread social unrest, the country's first constitution was passed in January 2014 and in December, Nidaa Tounes candidate, Beji Caid Essebsi, won Tunisia's first free presidential election.[145]

Isolated cases of violence have sprung up over the course of 2015 and 2016; Tunisian youth have also engaged in violent protests over unemployment and under development. Heightened security and questionable policies raise concern among many about the future of Tunisian democracy. However, it appears that despite these concerns, the transition has resulted in a relatively stable, equitable, and compromising new government that continues to weather the post-revolution storm.

Institutional Design

The impact of Tunisia's former regime and its institutional arrangements on the constitution-making process was less palpable than that in Egypt. Although many of the players remained the same – for example, the Islamic movement still played a significant role in the transition – their strategies were based less on promoting their own exclusive interests and more on reaching a compromise between different institutional and political players. From the initial stages Ennahda clarified it readiness to advance a civic character of the state.[146] The promotion of a civic state through compromise and negotiation, as opposed to coercion used by the MB and secularist parties and the military's intrusion in politics, helped facilitate a comparatively more successful transition. The willingness of Islamic parties to adopt a more conciliatory role in the transitioning government was evidenced principally by its agreement to draft the constitution from scratch.This in itself was initially a radical move designed to meet revolutionary expectations and start anew the construction of a nation plagued by autocracy and corruption. It also reflects a prominent feature in the literature on successful constitution-making – the need for a complete dissociation from the former regime.[147]

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144 BBC: AFRICA, *supra* note 136.

145 *Id.*

146 Elizabeth Dickinson, *Tunisia's Democracy Blooms as Model for Arab Spring*, CHRISTIAN SCIENCE MONITOR, Nov. 12, 2011, available at http://www.csmonitor.com/World/Europe/2011/1112/Tunisia-s-democracy-blooms-as-model-for-Arab-Spring.

147 Arjomand, *supra* note 18; Miller & Martini, *supra* note 124; Paola Rivetti, *Continuity and Change before and after the Uprisings in Tunisia, Egypt and Morocco: Regime Reconfiguration and Policymaking in North Africa*, 42 (1) BRIT. J. M.E. STUD. 1 (2015).

Military

In Tunisia, the military did not govern or rule in the old and new regimes.[148] In fact, members of the military were forbidden to declare party affiliation or hold public office.[149] It is true that Ben Ali utilized security forces to maintain power and enforce law and order; it is also true that the army was involved in protecting public institutions during upheaval. However, the army did not lead the toppling of the old regime or facilitate the rise of the new one.[150] Instead, it remained neutral during the protests and did not seek to curb them. It sided neither with secularists nor Islamists. With that, the army made it clear that public order and state security were a red line that should not be crossed.[151] The army was able to stay on the side line because it was aware of the parties' intentions to facilitate the transition process, avoid exclusive control of the state, or allow society to deteriorate into civil war.

The military's lack of centrality to the transition was reflected in the new constitution, which assigns no special status to the armed forces. The military submits to the executive's authority, which is established by popular vote and civil society.[152] The neutral role of the army during the transition was apparent in the election of its officials following the revolution. The first elected president, Munsif Al-Marzuki, one of the prominent figures in the Tunisian opposition, declared several times that the state under civil leadership should compensate the army for its limited role during the upheaval.[153] According to Al-Marzuki, the army was not granted the resources that enabled it to protect the land in the post-revolution era. These declarations clearly demonstrate the constitutional submission of the army to the elected civil leadership.[154]

The relative distance between the military and the other institutions in the transitioning state illustrates CJD in the same way Egypt's *did not*. In Egypt, the alignment of the military with the prevailing parties' objectives bolstered the strength of political players, who then lacked all incentive to compromise. The

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148 Battera, *supra* note 91.

149 *Id.*

150 Badra Gaaloul, *Back to the Barracks: The Tunisian Army Post-Revolution*, Carnegie Endowment, Nov. 3, 2011, available at http://carnegieendowment.org/sada/?fa=45907; *Discussing the Revolution: The Special Characteristics of the Tunisian Army Compared with the Egyptian*, Al-Jazeera, Mar. 4, 2015, available at http://www.aljazeera.net/reportslibrary/pages/5ca8abbc-910a-4d1a-a247-bbe1cea28202.

151 *Id.*

152 دستور تونس [Constitution] 2014, arts. 18 & 75 (Tunisia).

153 *Discussing the Revolution*, *supra* note 150.

154 Constitution of Tunisia, *supra* note 152, art. 18.

fact that elections were not held until after the constitution-making process in Tunisia,[155] coupled with the distance of the military from the party system, ensured that no party was given deference or support.[156] The fact that neither of the parties was sure of its ability to dominate the system made compromise necessary. Tunisia's military played no small part in ensuring this necessity. The fact that this dynamic was enshrined into law in the new constitution solidified the path to democracy and future shifts in power in subsequent elections.

Executive

From the very beginning of the transition, the executive was characterized as responsive to public opinion and balanced with regard to its involvement in the constitution-making process. The transitioning executive also rejected and prevented the legacy of the former authoritarian regime from jeopardizing the transition through balanced and non-retaliatory measures toward opposition party membership. Furthermore, the interim government's responsiveness to public opinion helped it to maintain remnants of its revolutionary fervor and ensured a marked differentiation between the new regime and the old. The presence of active and strong civil organizations, which would have confronted any attempt to hijack authority, was an important factor in facilitating compromise and agreed transition.[157]

This level of compromise and balance were first evidenced by Ghannouchi's, the head of Ennahda, decision to appoint 11 leading opposition and civil society figures among its 23 ministers.[158] By this time it was clear that any idea Ghannouchi had for a gradual democratic transition through piecemeal reform of the existing system could not form the basis of a new national consensus and was, thus, unworkable. Acknowledging this fact and agreeing to adapt to the demands of the public, show that Tunisia's dedication to institutional change was not merely lip service and that it was valid even so

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155 *Id.* art. 148.

156 *Id.* art 18.

157 Jason William Boose, *Democratization and Civil Society: Libya, Tunisia and the Arab Spring*, 2 (4) Int'l J. Soc. Sci. & Human. 310 (2012).

158 حكومتا الوزير الأول محمد الغنوشي [The Governments of Mouhamad Ghannouchi], Alkasbah, Nov. 22, 2015, available at http://www.alkasbah.tn/%D8%AD%D9%83%D9%88%D9%85%D8%AA%D8%A7-%D8%A7%D9%84%D9%88%D8%B2%D9%8A%D8%B1-%D8%A7%D9%84%D8%A3%D9%88%D9%84-%D9%85%D8%AD%D9%85%D8%AF-%D8%A7%D9%84%D8%BA%D9%86%D9%88%D8%B4%D9%8A.

far as it reduced the ruling parties' influence. This perception was also reflected in Habib Essid's government in January 2015.[159]

This level of conscientiousness by the executive was also reflected in the Constitution. While the length of Tunisia's presidential terms are five years instead of Egypt's four years, the Tunisian Constitution always limited presidential terms to two.[160] The division of labor between the president and the government decentralizes power and enables horizontal authority to take control, forcing all players in the political system to deliberate and reconcile.

The National Constituent Assembly

Scholars agree, almost unanimously, that the most supportive aspects of the Tunisian transition can be attributed to the level of inclusiveness and compromise in its representative institutions – namely the National Constituent Assembly (NCA).[161] Tunisia's interim government was much more representative of its people than in Egypt – its Assembly included all political parties and its level of inclusiveness was apparent from the beginning of the process. Unlike Horowitz's estimation of consociational constitution-making[162] and Masoud et al.'s treatment of Tunisia as "smarter" than Egypt,[163] we posit that this was a result of the CJD. Tunisia's NCA was substantially more balanced in terms of the proportions of party representation in the transition. Compromise was a necessity, as neither Islamists nor secularists had as advantageous a majority as in Egypt.[164] In Egypt only a small percentage of voters turned out during Morsi's election,[165] the percentage by which it won necessitated it exert its control over shaping Egypt's institutions to ensure that it retained power. This was neither a

159 *Tunisia Premier-Designate Forms New Government Without Islamists*, Reuters, Jan. 23, 2015, available at http://www.reuters.com/article/2015/01/23/us-tunisia-politics-idUSKB N0KW1LA20150123.

160 Constitution of Tunisia, *supra* note 152, art. 75.

161 *See, e. g.*, John M. Carey, Why Tunisia Remains the Arab Spring's Best Bet (Aug. 27, 2013) (unpublished draft) (on file with Dartmouth College Hanover, NH, USA), available at http://sites.dartmouth.edu/jcarey/files/2013/08/Tunisia-Carey-Aug_2013.pdf; Marina Ottaway & Woodrow Wilson Center, *Learning Politics in Tunisia*, 26 Viewpoints 1 (2013).

162 Horowitz, *supra* note 20.

163 Brownlee et al., The Arab Spring, *supra* note 26.

164 Eymen Gamha, *Final Results of Tunisian Elections Announced*, Tunisia Live, Nov. 14, 2011, available at http://www.tunisia-live.net/2011/11/14/tunisian-election-final-results-tables/.

165 الإخوان: مرسي متقدم يليه شفيق [The MB: Morsi First and then Shafiq], Sky News, May 25, 2012, available at http://www.skynewsarabia.com/web/article/22773/%D8%A7%D9%84%D8%A7% D9%95%D8%AE%D9%88%D8%A7%D9%86-%D9%85%D8%B1%D8%B3%D9%8A-%D9%85%

possibility nor was it an effective strategy in Tunisia, as elections occurred after the constitution was drafted and such attempts to grab power could be countered in the coming election.

These elections were the first clear institutional test for the democratic aspirations reflected in the Arab Spring.[166] For the first time, Tunisians had an opportunity to choose, freely and democratically, their representatives and to determine their own future.[167] The legal structures put in place for the elections represented a triumph of democratic intention, facilitating a smooth transition of power. The norms of civility – freedom, equality, and plurality – were woven into both the constitutional process and construction, while retaining the role of the state in curbing uncivil behaviors. As a result, this outcome was due largely to the NCA's commitment to inclusiveness and deliberation. From the time the NCA was elected, its level of organization and disposition to future and present institutional arrangements were clearly defined. Many scholars attribute this fact to the planning which occurred *years* prior to the initial protests.[168] Likewise, the NCA's mission included a detailed and established timeline for the drafting of the Constitution and an endorsed power-sharing arrangement among its members.[169] It included six sub-commissions with a division of labor for each section of the constitution: the preamble; basic principles and constitutional amendment provisions; rights and freedoms; legislative and executive powers and their relationship; the ordinary, administrative, financial and constitutional judiciary; constitutional bodies; and state, regional and local authorities.[170] The president of the NCA and the six chairs of these sub-commissions formed a Joint Committee for Coordinating and Drafting, which was responsible for reconciling each component and draft.

Another notable characteristic of the NCA was its disposition toward transparency. The NCA employed a detailed work plan and timeline that was

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D8%AA%D9%82%D8%AF%D9%85-%D9%8A%D9%84%D9%8A%D9%87-%D8%B4%D9%81%D9%8A%D9%82.

166 Ames Heiser, *Low Voter Turnout as Egypt Chooses a New President*, Tʜᴇ Nᴇᴡ Aᴍᴇʀɪᴄᴀɴ, Jun. 30, 2012, available at http://www.thenewamerican.com/world-news/africa/item/11754-low-voter-turnout-as-egypt-chooses-a-new-president.

167 *Tunisia: Joint Statement by EU HR Ashton and Commission VP Rule on Constitutional Assembly Elections*, Eᴜʀᴏᴘᴇᴀɴ Uɴɪᴏɴ Dᴇʟᴇɢᴀᴛɪᴏɴ ᴛᴏ ᴛʜᴇ Uɴɪᴛᴇᴅ Nᴀᴛɪᴏɴs – Nᴇᴡ Yᴏʀᴋ, Oct. 28, 2011, available at http://www.eu-un.europa.eu/articles/fr/article_11534_fr.htm.

168 Stepan & Linz, *supra* note 60.

169 *Interview: Ennahda Movement's Rachid Ghannouchi*, AsʜᴀʀǫAʟ-Aᴡsᴀᴛ, Oct. 25, 2012, available at http://www.aawsat.net/2012/10/article55240109; Art. 148.

170 Katie Zoglin, *Tunisia at a Crossroads: Drafting a New Constitution*, Aᴍ. Sᴏᴄ. Iɴᴛ'ʟ L., Aug. 19, 2013, available at http://www.asil.org/insights/volume/17/issue/18/tunisia-crossroads-drafting-new-constitution.

inclusive of periods for deliberation and public scrutiny.[171] In Egypt, this process was marred by disorganization and disruption by competing interests of the secular elite, dominating MB and the strong role of state institutions, especially the judiciary. These elements helped to structure and organize the NCA's work and increase its visibility, ensuring its accountability to the public.[172] The most important feature of this dimension was that all issues were for open debate and no end result was sought a priori by any party. Through the transition, the provisional government passed legislation and issued decrees, while the High Commission for Achieving the Goals of the Revolution served as the main framework for parties, associations and prominent civil society actors.[173]

The end result of Tunisia's constitution-making process demonstrates the relationship between its procedural and substantial dimensions, which afforded the constitution special status and legitimacy. It reflected the ideals of the revolution on the one hand and the need for a balance between the political system and society on the other. The Constitution also reflected balance between secular and Islamic forces, with parties' equal submission to open and transparent competition. Despite the fact that Article 1 declares that Islam is the religion of the state, Article 2 asserts that the Tunisian state is a civil state.[174] This means that religion is separate from the state and that state institutions are not responsible for the religious values of its citizens. Moreover, it indicates a break from policies adopted by the old regime, which abolished religion from the state and suppressed its presence in the public sphere.

Judiciary

One characteristic of the Tunisian transition and its constitution was its orientation toward justice. The Tunisian regime ensured transitional justice would be employed in order to establish a clear distinction between the old and new regimes and to make the process more conciliatory and inclusive.

The prosecution of former President Ben Ali was a testament to this fact. Ben Ali was sentenced to prison twice – once in June 2011 for 35 years and again in

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171 Constitution of Tunisia, *supra* note 152, arts. 82 & 148.
172 *The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process; Calls for Progress to Establish Independent Election Management Body*, The Carter Center, May 11, 2012, available at http://www.cartercenter.org/news/pr/tunisia-051112.html.
173 Asma Nouira, *Tunisia: Elections… and then What?* Arab Reform Initiative, Jan. 2012, available at http://www.arab-reform.net/tunisia-elections%E2%80%A6-and-then-what.
174 Constitution of Tunisia, *supra* note 152, art. 2.

June 2012 for life over the killing of protestors during the 2011 revolution.[175] In contrast to the Egyptian transitional process, which was clearly retaliatory, especially between Morsi's and Sisi's administrations, Tunisia's measures against the former regime were more balanced. While Ben Ali's political party was banned from participating in the first set of elections, it was allowed to organize and participate in future elections. This is in stark contrast to Egypt, where Mubarak's national party was banned and all religious parties were declared illegal under Al-Sisi.

The Constitution's orientation toward justice also reflected this balance as, in contrast to Egypt, judicial review was not relegated to the authority of the executive. While the executive enjoys judicial immunity, the judiciary was considered independent; the law was considered the sole authority over its functions.[176]All state institutions and political players, including the army, fall under civil jurisdiction. Article 97 further asserts that both the judiciary, as an institution, and the judges, as individuals, are to be independent.[177] The judiciary is to be protected from non-legal interference and any infringement would be punishable under the law.[178] The Tunisian Constitution also protects the judiciary exclusively from the executive under Article 101, which prohibits transfers between appointments without consent.[179] Unlike Egypt, it does not include provisions specifying judges' tenure. Morsi's attempt to lower the mandatory retirement age[180] to mitigate influence of Mubarak-era judges was one of many sources of contention between the executive and the judiciary, something which Tunisia did not face.

Culture

Tunisia's ability to accommodate both Islamist and secular demands is a prime example of the "twin tolerations"[181] and the inaccuracy of scholars' claims that

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175 *Tunisia's Ben Ali Sentenced to Life in Jail*, AL-JAZEERA, July 19, 2012, available at http://www.aljazeera.com/news/africa/2012/07/2012719161231698132.html;Tarek Amar, *Tunisia's Ben Ali Sentenced in Absentia to 35 Years in Jail*, REUTERS Jun. 21, 2011, available at http://www.reuters.com/article/2011/06/21/us-tunisia-benali-trial-idUSTRE75J2A020110621.

176 CONSTITUTION OF TUNISIA, *supra* note 152, title V, arts. 102 & 104.

177 *Id*. art. 97.

178 *Id*. art. 103.

179 *Id*. art. 101.

180 *Egypt Justice Minister Mekky Quits 'Over Cleansing Call'*. BBC: MIDDLE EAST, Apr. 21, 2013, available at http://www.bbc.com/news/world-middle-east-22240538.

181 Stepan, *supra* note 60.

religion itself is incompatible with democracy. Philpott's argument[182] on differentiation, the manner religious and political authorities are related, political theology, and shared ideas on legitimate political authority in religious bodies is evident in Tunisia's successful democratization process.

Following the revolution, conflict ensued among the political elite regarding the nature of state and religion in the future democratic system. One of the main concerns of the election discourse related to whether Ennahda intended to transform Tunisia into a new theocracy.[183] Secularists caricatured Ennahda, fueling the public's fears that it would enforce the wearing of the *hejab*, erode women's rights, and destroy the tourism industry by banning alcohol and beachwear.[184]

However, the writings and pronouncements of Ennahda leaders in the decade preceding the 2010–11 uprisings indicated a deep engagement of the Islamist project with concepts at the heart of liberal democracy. This involvement was based on their adherence to the principles of electoral democracy and the interpretation of Islamic law as the result of democratic legislation rather than divine command. In Tunisia, secular liberals and Islamists were meeting almost ten years prior to the fall of Ben Ali to strategize drafting the constitution.[185] Changes in Ennahda's political attitudes and the position of religion in the public sphere during this time helped soften the parties' initial distrust, promoting a culture of compromise. After Ennahda came to power, these fears subsided and the Islamist party was portrayed as integral to the democratization process.

The decision of the drafters to keep Islam as its established religion also helped to quell resistance among the public. Malika Zeghal describes it nicely:

> Ennahda's emphasis on democracy was also accompanied by a desire to keep established religion at the heart of the polity, in continuity with the regimes of Bourguiba and Ben Ali. This allowed the movement to speak of the state as a 'civil state'... (*dawla madaniyya*) that was nonetheless the guardian and the regulator of Islam ... at the center of politics.[186]

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182 Philpott, *supra* note 53.

183 Mathieu von Rohr, *Victory for Ennahda: Why Tunisians Voted for the Islamists*, Spiegal Online Int'l, Oct. 26, 2011, available at http://www.spiegel.de/international/world/victory-for-ennahda-why-tunisians-voted-for-the-islamists-a-794133.html.

184 Lin Noueihed & Tarek Amara, *Tunisia Still Wants Sun Lovers, Islamist Gov't Says*, Reuters, Apr. 16, 2012, available at http://uk.reuters.com/article/2012/04/16/uk-tunisia-tourism-islamists-idUKLNE83F02Z20120416.

185 Stepan & Linz, *supra* note 60.

186 Malika Zeghal, *Competing Ways of Life: Islamism, Secularism, and Public Order in the Tunisian Transition*, 20 (2) Constellations 254 (2013).

Further, Ghanouchi noted,

> We saw the benefits of democratic transition, not to mention that the first draft of the constitution is sufficient, culturally and legislatively. Therefore what is important is not the text... but the soul and culture of the country. I lived in Britain for more than 20 years, which has no constitution, however the culture and awareness and law governed the people.[187]

As Ennahda was also never a part of the former regime, cooperation was made possible through mutual trust. At no point in the upheaval did the protestors represent an "Islamic" or "secular" future. The sudden absence of institutionalized politics made society ripe for change, allowing ideologically divergent parties to unite around demands for a total rupture with the past. In fact, catalysts of the initial revolution were related more to protestors' discontent over socioeconomic, rather than with ideological, issues.

Timing and CJD

National myth suggests that Tunisia's population is endowed with a singularly moderate, peace-loving, and consensus-oriented political culture that reflects social homogeneity, a relatively non-violent path to independence and a high degree of socio-economic modernization.[188] Some suggest that Tunisia's successful transition was due to a thoroughly institutionalized state, in large part because of its long and well-entrenched constitutional history and French colonial legacy.[189] While we agree that these elements had a significant impact on the political culture of Tunisians, we argue that it is the totality of these elements combined with the institutional dimension that precluded anything *but* compromise that led to the CJD. While the new democracy continues to face challenges raised by its less compromising constituency, five year later it appears to still be weathering the storm.

Conclusion

The examination of the Tunisian and Egyptian transition processes demonstrate that we cannot and should not "close the door" on Arab democratization based

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187 AsharqAl-Awsat, *supra* note 169.

188 Isabelle Mandraud, *Tunisia's Islamists Learn to Embrace Political Culture of Compromise*, The Guardian, July 1, 2014, available at http://www.theguardian.com/world/2014/jul/01/tunisia-government-ennahda-islamists-election.

189 Pickard, *supra* note 128.

on pre-existing state structure, history, culture, and institutions. Rigid, categorical variables cannot serve as predictors of long-term, viable democratization. Changes in the Arab world are deeply rooted in the social, economic, and political movements and dynamics that prompted them in the first place. As these elements are also evolving, only a context-sensitive and non-deterministic model – one that is open for change and takes political agency into consideration- can explain the two divergent outcomes.

Critical junctures for democratization examines states' unique combination of cultural and institutional conditions at the time of the transition process that either "opens" or "closes" the door to democratization. The two case studies demonstrate that these conditions are not necessarily constant across different states and transitional processes. Nonetheless, they are crucial to the resultant level of compromise, which we argue is the main casual variable for democratization arising from the critical juncture.

Constitution-making, as a microcosm of broader political processes, carries the potential to regenerate social solidarity based on inclusive deliberation between all stakeholders if it employs conciliatory civic approaches regarding fundamental procedural, and substantive principles. The Egyptian and Tunisian cases demonstrate that constitution-making can lead to democratic empowerment and nation-building if it reflects a broad consensus and compromise on the forms and tools used to deliberate and settle issues. However, it could also set the stage for institutionalizing exclusion. The theory of CJD explains whether the first option or the second carries the greatest chances to unfold.

At the time of this writing, both Egypt and Tunisia face substantial obstacles to viable democratization, including but not limited to internal political and social unrest, as well as foreign and domestic terrorism. Only time will tell whether the Tunisian and Egyptian trajectories will maintain their courses or if these institutional and cultural elements will shift to form a new critical juncture.