1. Post-conflict constitution-making

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1. INTRODUCTION

Constitution-making and constitutional design form a significant part of the post-conflict transition process in countries coming out of civil conflict and authoritarianism. The drafting of a new constitution can signify a break with a prior authoritarian regime and can ensure that the rights of previously oppressed communities are protected within the new constitutional order. The recent Arab Spring revolution, which began in 2011, resulted in the drafting of several new constitutions, some that were completed and adopted and some that were not. As such, the Arab Spring provides an excellent lens through which we can examine the best practices and challenges of post-conflict constitution-making across a range of countries, with varying outcomes.

Following the Arab Spring protests that spread throughout the Middle East and North Africa in 2011, the completion of new constitutions became a hallmark of the political transitions in those countries—Egypt, Tunisia, Libya, and Yemen—where authoritarian leaders were toppled. The Arab Spring uprisings began in late December 2010, when Mohamed Bouazizi, a fruit vendor in Tunisia, set himself on fire to protest his mistreatment by Tunisian authorities. His action was a flashpoint for long-standing grievances that people within the Middle East and North African (MENA) region held against their governments. In response, protests spread throughout the MENA region. Protesters demanded the removal of authoritarian regimes as well as economic, democratic, and human rights reforms.

The political transitions that flowed from the Arab Spring protests unfolded differently in all four of the countries that saw the removal of their authoritarian leaders, yet constitutional reform was a central component of each transition. In Egypt and Tunisia, peaceful political protest led to the toppling of their authoritarian leaders, relatively quickly, and as part of their political transitions, Egypt and Tunisia wrote and adopted new constitutions in 2014. Yet, the constitution-making processes unfolded quite differently in each state. In Tunisia, the constitutional recalibration was broadly participatory and transparent, which augured well for constitutional legitimacy and democratic advance, whereas in Egypt the recalibration was exclusive and closed, which risked illegitimacy and a continued lack of accountability for state actors.

In Libya and Yemen, the political transitions heralded by the Arab Spring devolved into civil wars that are ongoing at the time of writing of this chapter. As a consequence of these devastating civil wars, constitutional reform processes that intended to cement political transitions from authoritarianism to democracy were instead held hostage by the armed perpetrators of the protracted civil conflicts. As the political transitions in Libya and Yemen devolved into civil war, these armed actors also discovered a new battlefield in Yemen and Libya's constitutional debates. While comparative constitutional scholarship has emphasized the importance of participatory constitution-making as a post-conflict tool for political transition, ongoing violent conflict frustrates open, transparent, inclusive, and participatory processes—the hallmarks of participatory constitution-making. The violent intensity of the civil conflicts in

Yemen and Libya undermined the conciliatory objectives of participatory constitution-making in both countries. The undermining of conciliatory processes, in turn, imperiled the creation of consensus-based constitutional texts and risked the creation of conflict constitutions that would prolong, rather than remedy, the sources of conflict.

2. PARTICIPATORY CONSTITUTION-MAKING: THE RECOMMENDED APPROACH TO POST-CONFLICT CONSTITUTION-MAKING

Since the late twentieth century, constitution-making after conflict has trended towards greater transparency, citizen engagement, and inclusivity.² Scholars have advocated for participatory constitution-making in post-conflict and transitioning states in order to help resolve long-standing disputes by fostering consensus among a diverse array of groups on national principles and by addressing the concerns of previously marginalized citizens.³ Participatory constitution-making describes a set of transparent and inclusive drafting processes that have been utilized in post-conflict and transitioning states to ensure broad societal acceptance of a new regime or constitutional order, particularly those following a political revolution or the resolution of a civil conflict.⁴ As a hallmark of legitimacy for modern constitutions, participatory constitution-making emphasizes citizen involvement and participation in the drafting of constitutions.⁵ Participatory processes have frequently been post-conflict tools that have followed or been concomitant with the resolution of a political revolution or violent civil conflict. Best practice suggests that a cessation of hostilities and political settlement should be agreed to prior to the initiation of an effective participatory constitution-making process.⁶

For example, participatory constitution-making was successfully utilized in Tunisia following the Arab Spring and in South Africa following decades-long civil strife between minority groups and the apartheid government.⁷ Transition leaders in countries such as Kenya, South Africa, Thailand, Papua New Guinea, Uganda, and Brazil have also pursued participatory constitution-making processes for many purposes, including to “foster consensus on the fundamental principles of the nation and the framework of the state; strengthen and promote a common sense of belonging, national unity, and identity; acknowledge and incorporate the aspirations of citizens who have been previously marginalized; [... and] break from an autocratic past and lay a foundation for more democratic practices, a culture of rule of law, and ongoing citizen participation in decision making in the future.”⁸ These participatory constitution-making processes were largely viewed as legitimate by their citizenry and international experts because they were deliberative, transparent, occurred in phases, and provided opportunity for public feedback, participation, and acceptance (either directly or through elected representatives) among a diverse array of citizens with divergent racial, religious, and ideological backgrounds.⁹

The concepts of internal and external participatory systems help to describe the type of bodies and processes used in post-conflict participatory constitution-making.¹⁰ Internal systems enable citizens to participate directly or through representatives in the drafting process.¹¹ External systems exist where the government appoints a drafting body’s members and citizens are excluded from the drafting body but may participate through public meetings and written submissions.¹² The following Sections 2.1 and 2.2 explore these systems through an illustration of the constitution-making processes in Egypt and Tunisia.

2.1 Constitution-making in Egypt: Illustrating an External Process

The primary objective of participatory constitution-making processes is to achieve a national consensus on governing principles reflected in a new constitution by facilitating broad citizen participation in substantive discussions and deliberations.¹³ External participatory processes rarely provide clear rules ensuring that the public's comments are reviewed and reflected in the final text.¹⁴ The constituent assemblies producing Egypt's 2012 and 2014 constitutions failed to achieve this objective, which threatened the legitimacy of the constitutions they produced. The first phase of Egypt's constitution-drafting process was an external participatory process led by a small body appointed entirely by the interim military government, the Supreme Council of the Armed Forces (SCAF), which took control of the state following the popular protests that led to the removal of President Mubarak on February 11, 2011.¹⁵ The SCAF's decisions were opaque, no public record of its deliberations were maintained and it was unclear with whom it was consulting as it issued its edicts.¹⁶ The SCAF's failure to explain its constitutional amendment drafting procedures generated a great amount of suspicion within the state and detracted from the legitimacy of the process.¹⁷ The opportunity for public participation was limited until a final draft of the initial constitutional amendments were produced. These constitutional amendments, which included a process for drafting a new constitution, were adopted by national referendum on March 19, 2011.¹⁸

In 2012, the Egyptian Parliament selected members of a constituent assembly who were required to complete a draft constitution within six months.¹⁹ Despite the consensus-based drafting process, the committee's work lacked transparency outside of the body. The public leaking of drafts, partial drafts, and competing drafts by members of the committee both made the drafting process difficult to follow and led to an escalation of rhetoric on particularly controversial issues.²⁰ Ultimately, the 2012 Constitution was approved by a mere 20 percent of the voting-age public,²¹ hardly a mandate for the new foundational Egyptian text.

As noted by constitution-making scholar Mark Tushnet, two factors should be considered in assessing the inclusiveness of the constitution-drafting process: (1) the inclusiveness of the drafting, and (2) the inclusiveness of the adoption.²² In applying this evaluation to Egypt, it would be difficult to characterize the drafting process as broadly participatory and inclusive, yet all eligible Egyptian voters did have the opportunity to express their views on the document through the national referendum. In this case, the Egyptian public's opportunity to endorse the work of the drafting committee through a national referendum slightly mitigates the lack of public participation in the drafting of the constitutional revisions; however, it remains difficult to characterize this phase of Egypt's constitution-drafting process as broadly participatory.

In 2014, after tensions led to revisions of the 2012 Constitution, Egyptian voters approved a new draft constitution.²³ While the drafting committee in this case appeared to capture a wide cross-section of interests, it neither included Islamist representation in proportion to their support amongst the Egyptian public, nor provided a clear mechanism for public participation. The lack of significant Islamist representation in the committee and the lack of a public participatory process undoubtedly undermined the legitimacy of the drafting process—and the legitimacy of the final document in the eyes of a significant portion of the Egyptian public. The interpretation and application of the 2014 Constitution's provisions over time will determine whether its legitimacy can be redeemed in the eyes of a wider swath of the Egyptian public.

2.2 Constitution-making in Tunisia: Illustrating an Internal Process

Tunisia's constitution-drafting process was internally participatory, rather than externally participatory, because Tunisian citizens directly elected the representatives that served on the body. In 2011, amid protests, Tunisian President Ben Ali fled the state²⁴ and ministers unaffiliated with Ben Ali's former party formed an interim government.²⁵ The interim government appointed an electoral commission to organize the election of a constituent assembly that would draft a new constitution.²⁶ Unlike in Egypt, the Tunisian Constitution was adopted by the constituent assembly rather than by national referendum. The Tunisian public had the opportunity to influence the constitution by directly electing the representatives of the constitution-drafting body and then by participating in a process for public review of the draft constitution. The National Constituent Assembly (NCA) was elected on October 23, 2011.²⁷ However, political toxicity led to the temporary suspension of the NCA's work in August 2013.²⁸ The interim constitution provided that the NCA would first adopt the new constitution one article at a time by an absolute majority vote before then adopting the entire constitution by a two-thirds majority vote.²⁹

Tunisia's constitution-drafting process became increasingly more inclusive and participatory with time, particularly after the constituent assembly submitted a draft for public review. Though the public was not permitted to participate in the drafting directly, each Tunisian voter was a direct constituent of a member of the drafting body. Accordingly, a degree of electoral accountability existed between the constituent assembly members and those who elected them. This directly contrasts with the body that drafted the 2014 Egyptian Constitution, which was appointed by the SCAF and thus not directly accountable to the citizens.³⁰ Because the draft constitution in Tunisia received the support of more than two-thirds of the constituent assembly when it was submitted for a vote, it became final and did not need to be submitted to the public for a referendum.³¹ Despite the fact that the public did not directly vote on the referendum, the opportunity for public engagement through elected representatives resulted in a process that was generally viewed as inclusive and legitimate.³² The Tunisian NCA's ability to achieve consensus through a broadly participatory process legitimized the final Tunisian Constitution in a manner that Egypt's highly exclusionary processes did not.

In sum, the constitutional recalibration in Tunisia was broadly participatory and transparent, which augured well for constitutional legitimacy and democratic advance, whereas in Egypt, the recalibration was exclusive and closed, risking illegitimacy and a continued lack of accountability for state actors.³³ Because constitutional reform is an opportunity for warring parties to break with the status quo and to develop new political and governance arrangements, warring parties have often agreed to constitutional reform as a key condition of the cessation of hostilities.³⁴ Therefore, the promise of constitutional reform is often an effective peacemaking tool. However, as explained in Section 3, comprehensive participatory constitution-making processes may be impossible in countries experiencing ongoing hostilities and violent civil conflict.

3. CONFLICT CONSTITUTION-MAKING: A COMMON CHALLENGE TO THE RECOMMENDED PARTICIPATORY CONSTITUTION-MAKING PROCESS

Many of the goals of participatory constitution-making processes are frustrated when constitution-making occurs during active conflict. Participatory constitution-making encourages deliberative negotiation and public participation in state creation and institutional design, but constitution-makers are unable to pursue these goals when the security environment does not permit widespread public engagement. Further, politically aligned armed actors can use violent civil conflict to manipulate constitution-making processes. Conflict constitution-making occurs when warring belligerents that seek to achieve political objectives through armed force co-opt ongoing constitution-making processes to achieve their political ends under the threat of force. These armed actors effectively transform the constitution-making process into another site of battle. The markers of a conflict constitution-making process are: (1) extreme conflict amongst constitutional drafters that mirrors the positions of warring belligerents, (2) an inability of drafters to reach consensus on these political issues, and (3) boycott and rejection of non-consensual constituent assembly choices by major blocs. The incorporation of these conflicts into constitutional texts risks the creation of conflict constitutions with embedded conflicts, rather than embedded consensus solutions. The danger of conflict constitution-making is that it can exacerbate and prolong rather than reduce societal divisions by adopting constitutional provisions that are highly divisive.

For example, the initial constitution-making processes undertaken in Iraq and Afghanistan during the U.S.-led military interventions and occupations, and in the creation of South Sudan, had limited scopes due to ongoing violent conflict and could hardly be articulated as broadly participatory. Nevertheless, these constitution-making processes were initiated with the goal of moving the respective countries' political transitions forward. Despite ongoing civil conflict in each state, the constitution-making processes arguably advanced the political transition and consolidated authority within the new successor government in each state. In the extreme circumstance of ongoing violent civil war with competing governments, such as in Libya and Yemen, the pursuit of constitution-making not only frustrates consensus-building with diverse constituencies, it fosters further conflict.³⁵

In Libya and Yemen, the political transitions heralded by the Arab Spring devolved into civil wars that are ongoing at the time of writing of this chapter.³⁶ As the political transitions in Libya and Yemen devolved into civil war, the constitution-making processes also devolved into conflict over the same outcomes that armed elites sought on the battlefield by force. As a consequence of these devastating civil wars, constitutional reform processes that were intended to cement political transitions from authoritarianism to democracy were instead held hostage by the armed perpetrators of the protracted civil conflicts. The violent intensity of the civil conflicts in Yemen and Libya undermined the conciliatory objectives of participatory constitution-making in both countries. The undermining of conciliatory processes, in turn, imperiled the creation of consensus constitutional texts and risked the creation of "conflict constitutions" that would prolong, rather than remedy, the sources of conflict. During civil war, unless a political *détente* can be reached that commits armed actors to a consensual and participatory constitution-making process, armed power brokers exploit the process and drive constitution-makers away from accommodation and into conflict. Such a conflict

constitution-making process produces a “conflict constitution” that enshrines rather than ameliorates the sources of conflict.

The transition governments in Libya and Yemen each initiated constitution-making processes before the countries devolved into civil war. The declining security environment in each state prevented broad-based, inclusive participatory constitution-making. Warring political blocs began to press for their political aims within constitution-making bodies. The constitution-making processes themselves were inappropriate fora for much-needed peacemaking as they did not allow for timely political negotiation and bargaining among key stakeholders.³⁷ External internationally backed peace negotiations became necessary to open space for meaningful constitutional reform.

3.1 Conflict Constitution-making in Libya

In Libya, a United Nations (UN) peace agreement facilitated the completion of a constitution that was backed by a new unity government. In 2011, the National Transitional Council (NTC),³⁸ a leadership body for the coalition of rebels, opposition activists, and expatriates that had come together to militarily defeat the Qaddafi regime, issued a Constitutional Declaration (“Interim Constitution”).³⁹ The Interim Constitution defined the NTC and interim government’s authorities during a 20-month transition process that would culminate in the election of a new president and legislature in early 2013. Elections for a new parliament, known as the General National Congress (GNC), were scheduled for July 7, 2012. The GNC would serve as a temporary legislative body until a Constitutional Drafting Assembly (CDA) completed a new constitution defining the authority of the new parliament and president.⁴⁰

After Qaddafi’s defeat, fissures in the opposition coalition became apparent. Various groups began to oppose the NTC’s plans for constitutional reform. On the eve of the July 2012 elections for the GNC, the NTC made a concession to the less populous Tripolitania and Fezzan regions, whose citizens threatened to boycott the GNC elections out of fear that the GNC would not adequately represent their regions when appointing members to the CDA. The NTC amended the Interim Constitution so that the CDA would be elected directly by voters instead of appointed by the GNC.⁴¹ The concession reflected one of the enduring conflicts in post-Qaddafi Libya—deciding who would have a seat at the table when determining how power would be allocated in the new Libyan state.

The minority groups also wanted to ensure they had consequential voting power within the CDA, so they pushed for a voting framework that required any decision involving minority rights to secure their agreement.⁴² Similar concerns were expressed about the scope of female representation. The Amazigh, who made up almost 10 percent of the Libyan population, were dissatisfied with, *inter alia*, the voting framework adopted for the CDA, which was a two-thirds plus one majority—a framework which would require coordination across regions but which could still result in minority groups being overruled on issues.⁴³ Ultimately, the Amazigh boycotted the CDA election and its work.⁴⁴ The boycott arose out of minority group members’ belief that the CDA was not operating in a consensus-based manner, as called for by the Constitutional Declaration.⁴⁵ Despite the boycott, the CDA was elected by national referendum in February 2014.⁴⁶ A final draft constitution was adopted in April 2016.

As for the civil conflict, two months after the CDA held its first meeting in April 2014, parliamentary elections were held. Since June 2014, Libya has had dueling governments in Tripoli and Tobruk, and the state has fallen further into political and security chaos. The polit-

ical and security vacuum created space for ISIS to infiltrate Libya and to engage in violence against both governments.⁴⁷ UN-brokered peace talks between the two governments began in September 2014. On December 17, 2015, representatives from both Libyan governments signed a UN-brokered peace deal in Morocco that called for the creation of a unity government and for forces supporting the rival governments to cease hostilities.⁴⁸ The peace deal sought to produce a unified government that, with the backing of the international community, would be able to politically stabilize the state and initiate joint operations against ISIS. The peace agreement prioritized the completion of a constitution as a key element of the transition.

The CDA ultimately met the deadline called for by the National Accord Agreement by releasing a draft constitution in February 2016; however, that result was unassured because of the significant internal conflict that plagued the CDA's term.⁴⁹ The representatives battled over issues such as the system of government, national identity, the role of religion, the distribution of resources, federalism vs. decentralization, and the location of the capital and sovereign institutions.⁵⁰ The assembly was unable to reach agreement on issues such as the structure of the state and the scope of decentralization—key issues in dispute between the two competing governments in Tobruk and Tripoli, and their militia backers who had become engaged in protracted and intense armed conflict.⁵¹ The CDA members battled over process as well as substance, and numerous boycotts and withdrawals by CDA members undermined consensus on the constitutional text. The status of the draft constitution was thrown into further doubt when an Appeals Court purported to annul the draft constitution because it was not adopted by a quorum under the CDA's original procedural rules.⁵² Despite the appellate court ruling and the boycott by CDA members, the UN continued to view the draft constitution as legitimate and encouraged the House of Representatives to put the draft to a public referendum as soon as possible to meet the strictures of the December 2015 National Accord Agreement, which called for the transition of power from the temporary unity government to a permanent executive authority elected pursuant to a new constitution.⁵³

The UN-brokered peace agreement helped to ameliorate one of the markers of conflict constitution-making: a lack of consensus over divisive issues. The UN peace agreement committed the governments in Tripoli and Tobruk to support the consensus solutions adopted by the CDA across a range of divisive issues. The peace deal opened up political space that kept the constitutional reform process on track. The peace deal detailed the conditions for the formation of a unity government and committed the unity government to support the work of the CDA financially and logistically, and to provide for its security. Although the peace deal did not resolve nor prevent all of the CDA's internal conflicts, it enabled constitutional reform to move forward and committed the competing governments to support the work of the body. At the time of writing it, remains to be seen whether the Libyan people will support the draft constitution produced by the CDA when it is put forward for a public referendum.

3.2 Conflict Constitution-making in Yemen

In Yemen, the completion of a nonconsensual constitution fomented a new, more divisive phase of the civil war. Just as in Libya, Yemen's constitution-drafting process unfolded against the backdrop of an expanding civil war. Constitution-makers were pressured by the competing interests of multiple constituencies and were unable to achieve consensus on core issues involving the structure of the state. In 2011, the Arab Spring protests reached Yemen, in protest at the Ali Abdullah Saleh Government. Government defections, armed violence, and

potential economic collapse caused Saleh to step down from his presidency in November 2011 under a deal brokered by the Gulf Cooperation Council (GCC)⁵⁴ and supported by the United States.⁵⁵ The GCC deal called for the formation of a transitional unity government under Saleh's Vice President Abrabbuh Mansur Hadi, composed of members from Saleh's party and from opposition stakeholders, and granted Saleh and his family immunity from prosecution for human rights violations.⁵⁶

The 2011 GCC-brokered transition agreement also called for a National Dialogue consisting of stakeholders from diverse political parties and civil society to monitor the agreement and to develop recommendations for the interim government on the transition.⁵⁷ The first National Dialogue Conference (NDC) was held in March 2013 and 565 delegates focused on issues critical to the political transition, including the threat of secession in the South, armed rebellion in the North, national reconciliation and redress for human rights abuses, security sector reform, and the drafting of a new constitution.⁵⁸ The National Dialogue completed its work on January 24, 2014 and issued a comprehensive report with nearly 1,800 recommendations.⁵⁹ Key political organization recommendations included that Hadi's presidency should be extended for another year, Parliament should include equal representation between the North and the South, and that Yemen should become a six-region federation, with four regions in the North, two regions in the South, and an independent capital city—Sanaa.⁶⁰ While the international community was generally laudatory about the NDC outcome document, certain Yemeni groups were critical of the result, including the Zaidi Shiite (Houthi) Movement, and the Southern Hiraak Movement, which each expressed concern that the six-region federation would subsume the autonomy of their territory in the South.⁶¹ Much of the leadership of the Southern secessionist Hiraak Movement refused to participate in the NDC and those that did participate favored a two-region federation and a referendum on outright secession from the North in three years.⁶² The Houthis, the armed militia of the Zaidi Shiite sect, also preferred a two-region split.⁶³ While the NDC agreed that the state would be comprised of a federal structure, the specific proposal for a six-region federation was tabled and excluded from the NDC's Outcome Document due to opposition from Southern delegates.⁶⁴

The GCC-brokered Transition Plan and the NDC Outcome Document called for the creation of a 30-member constituent assembly to draft a new constitution.⁶⁵ The membership of the constituent assembly was to mirror the NDC's political, regional, and civil society representation.⁶⁶ On March 8, 2014, President Hadi appointed a 17-member Constitutional Drafting Committee (CDC). The CDC was given only one year to complete a momentous task—incorporating many of the NDC's 1,800 outcomes into a constitution. Its work was frustrated by political conflict within the body as well as civil conflict in Sanaa where it was based. In August 2014, Houthi rebels, who had long been opponents of President Saleh's regime, attacked Yemeni forces and took near control of Yemen's capital, Sanaa.⁶⁷ The Houthi attacks bolstered calls by Southern separatist groups for independence and further threatened the viability of the CDC's incorporation of the NDC's proposals regarding the division of political power into a new constitution.⁶⁸ Armed Houthis took control of several government ministries in Sanaa in September 2014 following protests that demanded the formation of a new government and the restoration of fuel subsidies.⁶⁹ The UN mediated discussions between Hadi's transition government, the Houthis, and Southern leaders throughout late 2014, but they were unable to reach agreement on divisive issues that could be incorporated into the CDC's work.⁷⁰

The conflict within the CDC mirrored the civil conflict outside of it. The NDC had produced over 1,800 outcomes with the intention that they would be incorporated into a new constitution

by the CDC. Many of the outcomes were incompatible and some issues had not been resolved by the NDC. As a consequence, the CDC was responsible for resolving divisive issues such as the federal structure of the state, the allowance of regional constitutions, the division of power between the national and regional governments, the treatment of sharia, women's political participation, and transitional justice measures.⁷¹ This undertaking was made more difficult by Saleh, his allies, and Southern separatists who consistently delayed work within the CDC, seeking to undermine its legitimacy and the broader transition.⁷² The Houthis were also spoilers and they limited their involvement in the CDC as they began to accomplish their political objectives through military means.⁷³ Unlike the Houthis, the Southern separatists did not pursue their objectives militarily while the CDC was active; rather, they sought to undermine the CDC's work by using delaying tactics and rejecting negotiated solutions to difficult issues.⁷⁴

Transition planners organized a broadly inclusive participatory process in the form of the NDC, with the goal that the agreed constitutional arrangements would be implemented by a constituent assembly. Unfortunately, the National Dialogue did not achieve consensus on an issue that ultimately caused major factions to wage war: the federal structure of the state. The National Dialogue's failure to achieve political consensus with powerful factions on fundamental issues catalyzed a civil war that undermined the work of constitutional drafters and threatened the long-term viability of the draft constitution. Given the ongoing civil war and the diverging positions of the competing governments on the structure of the federal government, the draft constitution is likely to be an ongoing source of conflict, unless a political agreement between the competing governments can be reached through a peace process similar to the UN-negotiated peace settlement in Libya.

4. CONSTITUTIONAL DESIGN—MODELS FOR MULTIETHNIC GOVERNANCE

In multiethnic sectarian societies, intergroup conflicts are frequently a source of civil discord (hereinafter, I will refer to such conflicts as interethnic conflicts). Transitioning states have sought to address the problem of interethnic conflicts in various ways. Some states have done so through constitutional structures expressly designed to accommodate ethnic cleavages. Since interethnic conflicts are frequently regional in nature, states have also sought to address such conflict through various forms of federalism and decentralization.

Comparative constitutional scholarship refers to two constitutional design approaches for addressing interethnic conflicts in highly divided societies: consociationalism and centripetalism.⁷⁵ Consociational and centripetal design features are both incorporated into constitutions and electoral laws in order to secure multiethnic support for a state's democratic institutions of governance. Consociationalism focuses on the accommodation of ethnic groups through guaranteed group representation in governing bodies. Centripetalism focuses on the moderation of ethnic group views through the election of moderate officials that represent multiethnic constituencies.

4.1 Consociationalism—Ethnic Accommodation

Under consociational democracy, ethnic groups are granted a significant amount of autonomy over their affairs, a veto or partial veto over the central government's decisions, and proportional representation in government institutions.⁷⁶ Consociationalism is designed to protect ethnic groups from harm by other ethnic groups or by the central government.⁷⁷ Because consociationalism seeks to protect competing groups, one scholar has described consociationalism as “a peace treaty extended into the workings of government.”⁷⁸ Consociationalists recognize and accommodate ethnic group identity and give them status *qua* ethnic groups within democratic institutions. Consociationalists advocate for multiethnic governing coalitions, favoring systems in which parliamentary, executive, and administrative positions are allocated on a proportional group basis through proportional parliamentary electoral systems, multiethnic cabinets operate by consensus, and proportional hiring is used in the civil service and the military.⁷⁹ Consociationalists guarantee multiethnic outcomes through multiethnic seats in bodies. Under consociational models, a majoritarian democracy accommodates ethnic diversity through the explicit guarantee of ethnic representation in political bodies. However, some have critiqued consociationalism by saying that it accommodates ethnic extremists because group representatives represent “their” ethnic group exclusively.⁸⁰

4.2 Centripetalism—Ethnic Moderation

Centripetal democracies are designed to reward moderate behavior at the expense of extremists. Centripetal design features incorporated into constitutions and electoral laws incentivize moderate politicians within ethnic groups to compromise with moderate politicians in other ethnic groups.⁸¹ Centripetal democracies contain mechanisms to elevate moderate ethnic representatives and parties, such as multiethnic electoral districts and interethnic coalitions.⁸² Centripetalists believe that these approaches support moderation because individual representatives and coalition members must represent a multiplicity of views, rather than the views of their ethnic group exclusively. Centripetalists apply a wide range of tools to support moderates such as the alternative vote (a system that allows for the interethnic exchange of second and subsequent voting preferences) or requirements that candidates receive a plurality of the vote across an ethnically diverse territorial area in order to secure electoral victory.⁸³ In short, whereas consociationalism manages multiethnic diversity through autonomy and ethnic group representation, centripetalism attempts to manage multiethnic diversity through bolstering moderation across ethnic groups.

5. MODELS FOR ALLOCATION OF STATE POWER IN DIVIDED STATES

The allocation of state power between the central and local governments can drive civil conflict, as occurred in Libya and Yemen. In light of this, comparative constitutional scholars have suggested various models of allocating state power through constitutional provisions to address ethno-regional conflict. These models include ethnic federalism and political decentralization, which focus on the devolution of state power in a manner intended to reduce ethnic divisions.

5.1 Ethnic Federalism

Federalism refers to the sharing of state power between a national authority and subnational or regional authority.⁸⁴ Ethnic federalism is “a term used to describe a particular set of governmental arrangements specifically designed to ameliorate conflict among or between [ethnic] subgroups in a sharply divided state.”⁸⁵ Ethnic federalism is a form of consociationalism as it reflects the elements of that system: (1) executive power-sharing among the representatives of all significant groups; (2) a high degree of internal autonomy for groups that wish to have it; (3) proportional representation and proportional allocation of civil service positions and public funds; and (4) a minority veto on the most vital issues.⁸⁶ As with other forms of consociationalism, some scholars have questioned whether ethnic federalism exacerbates or ameliorates ethnic conflict.⁸⁷ While systems of federalism often differ, some of the characteristics of a constitutional system premised on ethnic federalism are as follows:

5.1.1 Protections for cultural and linguistic identity

The protection of an ethnic group’s distinct cultural and linguistic identity within a broader national culture frequently underlies an ethnic group’s desire for political autonomy. For instance, the South African Constitution recognizes ethnic groups’ rights to their own languages and cultures, and reinforces those rights through a federal form of government that empowers provinces to protect those rights.⁸⁸

5.1.2 Ethnicity-based “self-rule”

Some states have permitted subnational “self-rule” on the basis of ethnic identity to address ethnic groups’ desire for cultural, linguistic, and political autonomy. For example, the Ethiopian Constitution provides for a model of ethnic federalism that allows subnational groups to have self-governing status on the basis of their ethnic identity.⁸⁹ The entire Ethiopian state is organized along an ethnic federal form of government that consists of nine ethnic-based federal states.⁹⁰ Most Sub-Saharan African states have avoided Ethiopia’s model of constitutional recognition of federal self-rule, but ethnic groups have continued to press for ethnic-based federal self-rule in a number of sub-Saharan African countries, often because of their historic presence and concentration in particular regions of a state.⁹¹

5.1.3 Subnational constitutions

Some, but not all, federal systems permit subnational units to create their own constitutions. Some subnational constitutional scholars have argued that merely the authority to create a subnational constitution, even if it is not exercised, can serve important conflict reduction goals.⁹² The transitional constitutions of South Africa and Iraq both included provisions that allowed regional governments to develop subnational constitutions as part of the power-sharing arrangement negotiated among major ethnic groups.⁹³ In some circumstances, difficult issues that could not be resolved during national constitution-making processes can be deferred to the regional constitution-making process.⁹⁴

5.1.4 Political and legal autonomy

Federal systems are designed to provide a degree of autonomy to regional governments to resolve legal, political, and governance matters left to their competency by the national constitution. Though rare, some federal arrangements, such as the Ethiopian Constitution, provide an

option for a region to secede.⁹⁵ It is more typical, however, for negotiators to grant significant autonomy, short of secession, to ethnic groups, such as the Kurds in Iraq, in order to keep the regional ethnic group within the state.⁹⁶

5.2 Political Decentralization

Whereas federal governments share political power with regional governments, unitary states decentralize singular national administrative authority to local governments.⁹⁷ Federal systems create subnational (regional) governance structures such as governors, regional parliaments, and regional courts that exercise exclusive or concurrent powers with the central government. In contrast, unitary state decentralization does not require the creation of subnational regional governance structures to share power with the central government. Decentralization is an administrative delegation of central authority to subordinate geographic or functional units.⁹⁸

The objectives of federalism and decentralization may also differ. As discussed above, federalism can ease tensions in highly divided societies with ethnic groups centered in different regions by providing a degree of ethno-regional autonomy.⁹⁹ In a democratic system, decentralization goes beyond the mere administration of central authority in also fostering democratic stability by supporting individual rights and collective self-government.¹⁰⁰ One scholar argues that democratic decentralization gives people better incentives, more opportunity to exercise their rights, and less reason to oppress one another.¹⁰¹ These are the precise interests that individuals in highly divided ethno-regionally diverse societies have in a reconstructed state—the ability to exercise their rights free of oppression.

In examining the different forms by which democratic decentralization may occur, it is helpful to use Professor Roderick Hills' rubric of federalist, unitary, and localist democracies.¹⁰² The attributes of a federalist democracy were discussed above. A unitary democracy exists where the central government may devolve power and responsibilities to a subnational local entity but that entity or subnational unit receives no protections in the national constitution or law—its authority and existence are at the whim of the central government. In a unitary democracy, the local subnational unit exists merely as an instrumentation of the central government and carries out national law in accordance with local conditions.¹⁰³ In a localist democracy, the local government is granted authority under the national constitution, which protects it from interference by the national government (or regional government, if one exists) in its areas of competency.¹⁰⁴

In ethno-regionally divided societies, a federalist or localist democracy may be beneficial, as both approaches provide constitutional guarantees that ethnic groups will have control over their affairs at the regional and/or local level. In some circumstances, a decentralized localist democracy might be preferred to a federalist democracy. For example, national governments might fear that an ethnically defined regional government in a highly divided state might seek to declare independence from the state—a recurring fear of the national governments of Iraq, Iran, Syria, and Turkey, regarding Iraq's Kurdish Region.¹⁰⁵ Devolving power to local authorities rather than to regional governments is an alternative constitutional design option that supports local autonomy, without empowering a regional government that might compete with the state. In divided multiethnic states, such as Kosovo, the creation of decentralized local governments helped to prevent the partition of the state along ethnic lines by creating local institutions in which Kosovar Serbs and Albanians cooperated. In such environments, local decentralization may foster national unity and stability to a greater degree than regional feder-

alism.¹⁰⁶ However, the quality and nature of the political decentralization in a specific state will determine whether it fosters greater democratic accountability and local citizen engagement.

5.3 Libya's Draft Constitutional Design

Libya's draft constitution fails to include consociational or centripetal design features that explicitly accommodate or moderate ethnic group divisions. And rather than designing a federal system that empowers Libya's three historic regions as political entities, the CDA instead drafted a constitution that creates a "unitary" state system by concentrating power in the central government and devolving more limited authorities to local councils. This unitary decentralized state design is referenced in the constitution's preamble, where the drafters exhort the preservation of the state's unity by continuing "with the establishment of the Libyan State in 1951 with the three provinces (Cyrenaica, Tripolitania, and Fezzan), then their transition into a united states as of 1963."¹⁰⁷ The 1963 transition refers to the removal of federal provisions from the 1951 Constitution and the formation of ten governorates and local municipalities.¹⁰⁸ The drafters appear to avoid the creation of regional organizational structures that might be perceived as competition to the central government. Article I of the constitution makes this clear by stating that Libya shall be an "indivisible state" and that "it shall not be permissible to relinquish any part of its sovereignty nor its territory."¹⁰⁹ The fact that drafters opted for a unitary state without competing regional power structures is not surprising given Libya's history of regional tensions and the desire of nationalists in the CDA to continue the concentration of power in the central government.

The constitution also failed to sufficiently address the concerns of minority groups, which raises the potential for minority opposition to the constitution and sustained conflict. The CDA, whose minority group members left in boycott, enshrined a specific preference for Arabic identity and Arabic language into the constitution, by declaring Libya to be an Arabic State and declaring Arabic as Libya's official language.¹¹⁰ The CDA also limited the offices of President and Prime Minister exclusively to Muslims.¹¹¹ While minority languages are given some protection under various provisions, Arabic and Muslim identity are clearly favored statuses under the constitution.¹¹² The provisions adopted by the CDA would have faced opposition from minority groups if they had continued their involvement within the CDA. Because the CDA developed language addressing minority group rights without minority group input, the CDA risked long-term minority group opposition to the constitution and sustained conflict over its provisions. The CDA could have opted for a consociational model of governance and allocated reserved seats in parliament and in executive institutions to minority groups in order to secure their support. However, they missed this opportunity.

The draft Libyan constitution also provides the foundation for continued conflict between local authorities and the central government. The constitution states that local authorities will have autonomous, transferrable, and shared powers with the central government but it does not define how those shared powers will be exercised in concert with the central government.¹¹³ As such, the constitution is a unitary democracy, rather than a localist democracy. As discussed *supra*, a localist democracy grants and protects local competencies, whereas in a unitary democracy, the authorities of the local entity are at the whim of the central government. Undefined political decentralization in the constitution can lead to the national government granting and revoking limited authorities, as occurred in Jordan. The lack of defined local authority will lead to disputes when local concerns conflict with national priorities.

5.4 Yemen's Draft Constitutional Design

In addition to the conflict over the federal structure of the state, the division of authority between the regions and the central government will continue to be a source of conflict between nationalists and Southern Secessionists and other groups desiring regional autonomy. Yemen's 2015 draft constitution appears to give concessions to both sides. It creates an empowered national government with consociational features to ensure broad representation from the regions. By creating a federal structure, the constitution also devolves certain authorities to the six regions.

Although Yemen's draft constitution expressly prohibits racial, sectarian, and religious parties, its provisions support *de facto* ethnic federalism.¹¹⁴ Consociational features in the constitution provide for diverse representation from Yemen's ethno-religious sects based upon geographic, rather than explicitly sectarian, allocation.¹¹⁵ For example, the House of Representatives, the lower chamber of the Parliament, is made up of 260 representatives elected under a closed proportional list system and after the first legislative cycle, the Southern Regions of Aden and Hadhramout are guaranteed 40 percent representation in the legislature.¹¹⁶ The 84-member Federal Council, the upper house of Parliament, is represented with an equal number of 12 representatives from each of the six regions and six representatives from the cities of Aden and Sanaa (the competing capitals).¹¹⁷ This model guarantees that the Shaffi, Southern Hiraak, and other Southern sectarian groups will have 40 percent representation in the legislature. It also guarantees that ethnically defined regional strongholds such as the Houthis home base in Azal will have an equal number of representatives in the legislature as other regions. Consociational features also apply to the courts and the armed services. The Supreme Federal Judicial Council includes one member of the High Court of each region.¹¹⁸ Further, the Constitutional Court is to include representation from all of the regions.¹¹⁹ The regions are also entitled to equitable representation in the command structures of the armed forces (as determined by law).¹²⁰ Additional concessions are given to the Southern Regions—for example, decisions in the Federal Council are taken by majority vote, but if two-thirds of the representatives from the Southern Regions oppose a decision dealing with natural resources including oil and gas, electoral law matters, regional boundaries, the shape of the Federal State, the special status of the city of Aden, or any constitutional amendment relevant to Southern representation, they may veto the proposal.¹²¹

Some features in the constitution could also be considered centripetal in that they encourage ethnic moderates who can appeal to multiethnic constituencies. Candidates for President must be endorsed by 5 percent of the members of one of the national legislative bodies, or by signatures of 6,000 voters from a majority of regions, with at least 500 signatures from each region.¹²² The President and Vice President are elected together on the same ticket provided they hail from different regions.¹²³

In addition to ensuring diverse regional representation at the federal level, Yemen's draft constitution also envisions empowered regional governments. The constitution creates a parallel structure to the national government at the regional level, including executive, legislative, and judicial branches. As at the national level, regional parliaments are elected under a proportional list system.¹²⁴ The parliaments are given the authority to pass laws on regional matters based on competencies defined in the constitution.¹²⁵ The regional government has competencies of which some are exclusive¹²⁶ and others are concurrent with the national government.¹²⁷ The constitution also establishes regional governors with executive authority.¹²⁸

First-level courts are established in the districts, appellate courts in the wilayas and supreme courts in the regions.¹²⁹ The rulings of the regional supreme courts are final, except for matters falling within the competency of the Federal Supreme Court.¹³⁰ The constitution also requires that each regional legislature draft and adopt a regional constitution, provided that it may not conflict with the federal constitution.¹³¹ Each region is tasked with passing its own regional budget and local laws.¹³²

While these consociational features are intended to address regional and sectarian divisions, the Houthis rebel movement and Southern Hiraak Movement separatists have made clear their opposition to a six-region state and their preference for a two-region state.¹³³ Given the ongoing civil war and the diverging positions of the competing governments on the structure of the federal government, the draft constitution is likely to be an ongoing source of conflict—unless a political agreement between the competing governments can be reached through a peace process similar to the UN negotiated peace settlement in Libya.

6. PROTECTION OF HUMAN RIGHTS

Even where participatory constitution-making occurs, authoritarian figures may co-opt extraordinary constituent political processes meant to ensure popular participation.¹³⁴ Given the potential for authoritarian leaders to co-opt constitution-drafting processes, post-conflict transition efforts must consider both the constitution-drafting process and the substance of the text that results from that process. The substantive legitimacy of new post-conflict constitutions should be determined vis-à-vis their accordance with international human rights law.

International human rights law grew out of the international community's collective desire to protect citizens from state abuse and to ensure that appropriate limits were placed on a domestic government's exercise of power following World War II—goals consonant with those of the Arab Spring protesters. The incorporation of international human rights law norms into constitution-drafting processes became commonplace in the late twentieth and twenty-first centuries.¹³⁵ This approach to constitution-making, referred to as “transnational constitutionalism,” became known as a “form of new constitution-making, of instilling substantive principles and values in a constitution, in light of the developing system of secular international human rights, [and it] became the basis for a rising system of global constitutional legitimacy.”¹³⁶

The Egyptian and Tunisian Constitutions each refer to the legal obligations arising from international human rights law treaties; Egypt and Tunisia are both parties to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³⁷ Article 93 of the 2014 Egyptian Constitution, a provision that did not exist in the Egyptian Constitution prior to the Arab Spring, declares that “[t]he State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law.”¹³⁸ Article 20 of the Tunisian Constitution states that ratified international agreements “have a status superior to that of laws and inferior to that of the Constitution.”¹³⁹ This provision appears to void any legislation that is inconsistent with international human rights treaties, but it also appears that any provision in the Tunisian Constitution that conflicts with an international human rights treaty would trump the treaty. Part III of the Egyptian Constitution, titled “Public Rights, Freedoms and Duties,” contains many of the civil and political rights laid out in the ICCPR. Title II of the Tunisian

Constitution, titled “Rights and Freedoms” details civil and political rights similar to those contained in the ICCPR. The 1971 Egyptian Constitution and the 1959 Egyptian Constitution also contained similar protections, yet the constitutional systems in place were viewed by citizens and the international community as illegitimate due to rampant human rights abuses and the lack of enforcement of constitutional protections.¹⁴⁰ The substantive rights contained in the Egyptian and Tunisian Constitutions generally accord with international human rights law norms as they pertain to political and expressive rights, equal protection, and due process. Still, Egypt’s and Tunisia’s capacities for enforcing (even against the state itself) the rights contained in their constitutions will determine the legitimacy of their nascent constitutional systems.

7. ENFORCEMENT MECHANISMS

Even where a constitution has been drafted and ratified through a participatory process and includes international human rights law protections, a constitution will lack legitimacy if its protections are not implemented and enforced. Providing for the enforcement of constitutional protections is particularly important in light of the phenomenon that David Landau refers to as *abusive constitutionalism*: “Abusive constitutionalism involves the use of the mechanisms of constitutional change—constitutional amendment and constitutional replacement—to undermine democracy.”¹⁴¹ The danger of abusive constitutionalism is particularly acute in the Middle East and North Africa, for example, where authoritarian regimes historically have failed to enforce constitutional protections and have used constitutional replacement processes to entrench their own power.¹⁴² In moments of political transition, authoritarian or dominant political actors are often able to manipulate participatory constitution-making processes designed to involve the public, such as constitutional assemblies and referenda, to sidestep parliamentary opposition and to push through authoritarian constitutions.¹⁴³ Dominant political actors are able to manipulate these constitution-making processes because stable rules and institutions are often absent during transitions.¹⁴⁴ For instance, reflecting the manner in which it was drafted, the Egyptian Constitution fails to provide clear mechanisms for citizens to challenge state violations of civil and political rights and does not provide for horizontal accountability to check the powerful military and judiciary. The Tunisian Constitution, on the other hand, creates a new constitutional court to ensure the protection of constitutional rights.¹⁴⁵ The Tunisian Constitution also creates several new independent commissions, including a human rights commission, an electoral commission, and a good governance and anticorruption commission to investigate the protection and enforcement of constitutional rights.¹⁴⁶

The new constitutions must provide a foundation for the full and fair implementation of their substantive rights to ensure the protection of human rights and the prevention of authoritarian abuse. The establishment and maintenance of empowered, independent, and effective governance institutions is the best mechanism for ensuring that these rights are enforced. Accordingly, the potential for full and fair implementation of constitutional rights is another indicator of constitutional legitimacy.

8. CONCLUSION

Ultimately, the legitimacy of these constitutions resulting from the Arab Spring will be determined by their application over time. While both Egypt and Tunisia confronted similar challenges in reconciling Islamist and secular political interests, Tunisia was able to arrive at a consensus text that was broadly supported by various constituencies and which was informed by public participation in later stages. The final constitution adopted by Egypt was drafted in a secretive manner and did not achieve a broad public consensus on its provisions because of the lack of public participation and input.

A better understanding of the impact of violence on constitution-making processes will also better enable citizens, scholars, and practitioners to assess and, if necessary, reform those processes as well as the constitutions created by them. While participatory constitution-making is the aspirational ideal, conflict constitution-making may increasingly become the reality in transitioning states. Examination of the conflicts in Libya and Yemen shows that during violent civil war, unless a political agreement is achieved that commits armed actors to a consensual constitution-making process, armed actors will exploit existing constitution-making processes for their own ends, increasing the likelihood that provisions of the resulting constitution will contribute to the persistence rather than the resolution of the underlying conflicts.

Libya's constitution-making processes were stymied by internal conflict but a UN-brokered political agreement created renewed space for armed actors to support the constituent assembly and a unified state under the new constitution. In Yemen, the National Dialogue's failure to achieve political consensus with powerful factions on fundamental issues catalyzed a civil war that undermined the work of constitutional drafters and threatened the long-term viability of the draft constitution. Yemen attempted to address ethnic and regional divisions through devolving power to regions and guaranteeing ethnic representation at the federal level, while Libya sought to address the same challenge by retaining power in the central government, however, the conflict constitution-making processes led to draft constitutions that were not accepted by major constituencies in both countries. For the constitutions to contribute to societal cohesion rather than conflict, peace must be brokered outside of the constitution-making process, and remedial measures must be undertaken to increase broad public engagement and support for the constitutions among major constituencies. Further, the constitutional texts themselves must be modified to include measures that support multiethnic and moderate political representation that can sustain peace over time and prevent relapses into civil war.

Ultimately, for effective constitution-making to occur, there must be a state to constitute. Where civil war has destroyed the fabric of the state and created warring *de facto* states, defined by region and ethnicity, a peace must be achieved committing the parties to the creation of one state. That collective commitment to re-constituting the state is made effective through a consensual constitution-making process that involves the public and incentivizes continuing peace and broad public commitment to the newly constituted state through constitutional design features specifically tailored to mitigate societal divisions. If the new constitutions are implemented in a manner that protects human rights, limits state oppression, and enables citizens to fully realize their potential, then they are more likely to be viewed as legitimate despite any polarizing history surrounding their formation.

NOTES

1. Associate Professor of Law, Howard University School of Law; J.D., Harvard Law School; B.A., Yale College. The author served as Chief of Staff in the State Department Office of the Special Coordinator for Middle East Transitions from 2012–14, which was tasked with coordinating the U.S. foreign assistance response to the Arab Spring transitions. The author would like to thank Keema Givens, Howard Law Class of 2019, for her research assistance with this piece. This chapter draws from the author's prior scholarship on Arab Spring constitutionalism—*Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Libya*, 50 WFLR 1007 (2015) and *Conflict Constitution-Making in Libya and Yemen*, 39 U. PA. J INT'L LAW 293 (2017).
2. For example, transition leaders in an array of countries, including Kenya, Uganda, Brazil, Thailand, Papua New Guinea, and South Africa, have utilized participatory constitution-making processes. Jason Gluck & Michele Brandt, U.S. Institute for Peace, *Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring*, 105 PEACEWORKS 5, 5–6 (2015), <http://www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-Constitution-Making.pdf> [<https://perma.cc/JJ6G-NZVT>].
3. Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1046–48 (2008); Vivien Hart, *Constitution-Making and the Transformation of Conflict*, 26 PEACE & CHANGE 153, 154 (2001); Gluck & Brandt, *supra* note 2, at 5–6.
4. See Hart, *supra* note 3 (describing the importance of constitutions and the process of constitution-making to completing the establishment of a new polity).
5. Banks, *supra* note 3 at 1046; Alicia L. Bannon, Note, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824, 1826–27 (2007). See generally Kevin L. Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. INT'L L. 667 (2013) (discussing the influence of transnational and domestic forces on constitutional rights and structural provisions).
6. Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 664 (2006). (“It is widely acknowledged that the provision of security is the sine qua non of peace-building, and increasingly that the building or rebuilding of public institutions is key to sustainability; however, the fact remains that a successful political and governance transition must form the core of any post-conflict peace-building mission ... Constitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate”).
7. See generally Darin E.W. Johnson, *Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Tunisia*, 50 WAKE FOREST L. REV. 1007 (2015) (discussing the constitution-making processes in conflicted regions); Ziyad Motala, *Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience*, 15 TEMP. POL. & CIV. RTS. L. REV. 147 (2005) (using South Africa as an example of successful participatory constitution-making).
8. Gluck & Brandt, *supra* note 2, at 6.
9. See *supra* note 7.
10. Angela M. Banks, *Challenging Political Boundaries in Post-Conflict States*, 29 U. PA. J. INT'L L. 105, 108 (2007).
11. *Id.* at 109.
12. *Id.* at 108–09.
13. *Id.* at 106, 107 n. 6 (referencing several scholars).
14. Banks, *supra* note 3, at 1049.
15. *Egypt's Supreme Council of the Armed Forces: Statements and Key Leaders*, N.Y. TIMES, <http://www.nytimes.com/interactive/2011/02/10/world/middleeast/20110210-egypt-supreme-council.html> (last updated Feb. 14, 2011).
16. Nathan J. Brown & Kristen Stilt, *A Haphazard Constitutional Compromise*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 11, 2011), <http://carnegieendowment.org/2011/04/11/haphazard-constitutional-compromise>.

17. *Id.*
18. *Id.*
19. Nathan J. Brown, *Midnight for the SCAF's Cinderella Story*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 19, 2012), <http://carnegieendowment.org/2012/03/19/midnight-for-scaf-s-cinderella-story>.
20. Nathan J. Brown, *Egypt's Constitution: Islamists Prepare for a Long Political Battle*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 23, 2012), <http://carnegieendowment.org/2012/10/23/egypt-s-constitution-islamists-prepare-for-long-political-battle>.
21. 64 percent of the 33 percent of eligible voters supported the referendum, constituting only 20 percent of the voting-age public. See *Egyptian Constitution 'Approved' in Referendum*, BBC (Dec. 23, 2012), <http://www.bbc.com/news/world-middle-east-20829911>.
22. Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 1994, 1997 (2013).
23. Erin Cunningham, *Egyptians Approve New Constitution, According to Unofficial Referendum Results*, WASH. POST (Jan. 16, 2014), https://www.washingtonpost.com/world/middle_east/egypt-said-to-approve-new-constitution/2014/01/16/a7ae8eb6-7ebf-11e3-93c1-0e888170b723_story.html; Nathan J. Brown, *After the Egyptian Coup*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 4, 2013), <http://carnegieendowment.org/2013/07/04/after-egyptian-coup>; Nathan J. Brown, *Mrs. Lincoln's Egyptian Constitution*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 20, 2013), <http://carnegieendowment.org/2013/08/20/mrs.-lincoln-s-egyptian-constitution>.
24. *Tunisia: Ex-President Ben Ali Flees to Saudi Arabia*, BBC (Jan. 15, 2011), <http://www.bbc.com/news/world-africa-12198106>.
25. *Ben Ali Allies Dropped from Cabinet*, AL JAZEERA (Jan. 28, 2011, 2:17 GMT), <http://www.aljazeera.com/news/middleeast/2011/01/201112720356405308.html>.
26. THE INT'L REPUBLICAN INST., *TUNISIA CONSTITUENT ASSEMBLY ELECTIONS OCTOBER 23, 2011: ELECTION OBSERVATION MISSION FINAL REPORT 8*, <http://www.iri.org/sites/default/files/Tunisia%202011%C20Constituent%C20Assembly%20Elections.pdf>.
27. BILL PROCTOR & IKBAL BEN MOUSSA, INT'L INSTITUTE FOR DEMOCRACY & ELECTORAL ASSISTANCE, *THE TUNISIAN CONSTITUENT ASSEMBLY'S BY-LAWS: A BRIEF ANALYSIS* 11 (2012), <http://www.idea.int/publications/tunisian-constituent-assemblys-by-laws/loader.cfm?csModule=security/getfile&pageid=56635>.
28. *Tunisia Constituent Assembly Suspended Pending Talks*, BBC (Aug. 6, 2013), <https://www.bbc.com/news/world-africa-23596640>.
29. PROCTOR & MOUSSA, *supra* note 27, at 27.
30. One could argue that having a drafting body not subject to an electorate protects the independence and neutrality of the drafting body; however, when drafting a constitutive document of the state, accountability to the electorate—as opposed to a transitional military regime—provides a greater likelihood that the citizens' interests will be represented.
31. Gluck & Brandt, *supra* note 4, at 10.
32. *Id.*
33. See generally Johnson, *supra* note 7 (highlighting the differences in constitution-making processes resulting from the Arab Spring between Egypt and Tunisia).
34. Samuels, *supra* note 6, at 664.
35. Darin E.W. Johnson, *Conflict Constitution-Making in Libya and Yemen*, 39 U. PA. J. INT'L L. 293 (2017).
36. The “civil wars” in Libya and Yemen began after the NATO intervention supporting the Libyan opposition's ouster of Mohamed Qaddafi in Libya, and after the UN- and US-brokered departure of President Hadi in Yemen. Although civil conflict occurred immediately following the Arab Spring uprisings in both countries, the “civil wars” discussed in this chapter began in 2014 when dual governments in each state arose, violently clashing with one another and claiming authority in the wake of the initial Arab Spring political transitions.
37. Jason Gluck, *Constitution-Building in a Political Vacuum: Libya and Yemen in 2014*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 43, 44 (2015), <http://www.idea.int/publications/annual-review-of-cbp-2014/upload/annual-review-of-cbp-2014-c2.pdf> [<https://perma.cc/996F-5GAC>].
38. See S.C. Res. 1973, ¶ 4 (Mar. 17, 2011) (authorizing an international coalition of military forces to use military force against Qaddafi and his forces in protection of Libyan civilians).

39. See THE CONSTITUTIONAL DECLARATION Aug. 3, 2011 (Libya) (declaring the collapse of Qaddafi's regime).
40. See *id.* at art. 30 ("The National Public Conference shall ratify and announce the results of the elections, and shall convoke the Legislative Authority for meeting within a period not exceeding thirty days. In the first session thereof, the National Public Conference shall be dissolved and the Legislative Power shall fulfill its legislative tasks").
41. See CONSTITUTIONAL DECLARATION amend. No. 3-2012, art. 1 (Libya) ("Elect a constituent assembly of non-GNC members by direct free vote to draft the state's permanent constitution, to be called the Constitutional Drafting Assembly (CDA)"); see also CONSTITUTIONAL DECLARATION amend. No. 5-2013 (Libya) (repromulgating the election of the CDA by direct free ballot as the result of a court decision); see also INT'L COMM'N OF JURISTS, THE DRAFT LIBYAN CONSTITUTION: PROCEDURAL DEFICIENCIES, SUBSTANTIVE FLAWS 15 (2015) <https://perma.cc/7TA9-FFNY> ("The requirement for the CDA to be elected was initially provided for by Constitutional Amendment No. 3, but later replaced by Constitutional Amendment No. 5 following a Supreme Court ruling that Constitutional Amendment 3 had not been legally promulgated").
42. Jorg Fedtke, *Eur. Union, Comp. Analysis Between the Situations in Egypt and Tunis—Lessons Learnt—Overview of the Const. Situation in Libya*, 21 (Apr. 2014), <https://perma.cc/A3YP-WPFU>.
43. Gluck, *supra* note 37, at 46.
44. See INT'L COMM'N OF JURISTS, *supra* note 41, at 16 (commenting on how the Amazigh boycotted the elections and continued to boycott the constitutional drafting).
45. See Ronald Bruce St. John, *Libya's Draft Constitution: Compromise or Compromised?*, ATLANTIC COUNCIL (Mar. 3, 2016), <http://www.atlantic-council.org/blogs/menasource/libya-s-draft-constitution-compromise-or-compromised> [<https://perma.cc/FB85-MTDK>] (detailing the boycott after the GNC ignored demands for official recognition of the Amazigh language, cultural identity, and contribution to Libyan history).
46. Fedtke, *supra* note 42, at 20–21.
47. Rebecca Murray, *Libya: A Tale of Two Governments*, AL JAZEERA (Apr. 4, 2015), <http://www.aljazeera.com/news/2015/04/libya-tale-governments-150404075631141.html> [<https://perma.cc/KNZ4-4Y5N>].
48. *Rival Libyan Factions Sign UN-backed Peace Deal*, AL JAZEERA (Dec. 17, 2015), <http://www.aljazeera.com/news/2015/12/libya-rival-parliaments-sign-backed-deal-151217131709056.html> [<https://perma.cc/8H5P-5D6K>].
49. DRAFT LIBYAN CONST. (2016), http://www.constitutionnet.org/sites/default/files/draft_constitution_of_libya_april_2016_unofficial_english_traslation.pdf [<https://perma.cc/MZE2-LKVC>].
50. See *In Depth: Over a Year Late Libya Struggles to Finish Constitution*, LIBYA CHANNEL (Feb. 9, 2016), <https://web.archive.org/web/20161109074013/http://en.libyaschannel.com/2016/02/09/in-depth-over-a-year-late-libya-struggles-to-finish-constitution> [<https://perma.cc/7ESX-ZXU9>] (describing variety of the issues in contention within the CDA); see also Omar Ould Dedde O. Hammady & Michael Meyer-Resende, *Saving Libya's Constitution-Making Body*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec. 18, 2014), <http://carnegieendowment.org/sada/?fa=57565> [<https://perma.cc/K7JR-SLFT>] ("After all, it is the democratically elected body tasked to find constitutional solutions to Libya's major problems, including the management of oil resources, decentralization, minority rights, the role of religion, and the system of government").
51. Gluck, *supra* note 37, at 48.
52. Abdulkader Assad, *Al-Bayda Appeals Court Annuls the Constitution Draft*, LIBYA OBSERVER (May 9, 2016), <http://www.libyaobserver.ly/news/al-bayda-appeals-court-annuls-constitution-draft> [<https://perma.cc/6RJ4-FD8A>].
53. Article 1(4) of the National Accord Agreement called for the transition of power from the unity government to an executive authority elected pursuant to the new constitution, prior to or at the expiration of the unity government's one-year term. The unity government may be continued for an additional year if the constitution is not completed during its first year. This provision appeared to give the CDA until the end of 2016, or the end of 2017 at the outer limit, to pass the constitution by national referendum. LIBYAN POL. AGREEMENT (2015) art. 1.4.

54. The GCC is a regional, intergovernmental economic and political union whose members include all of the Arab states on the Persian Gulf, i.e., UAE, Qatar, Oman, Bahrain, Kuwait and Saudi Arabia, except Iraq.
55. Alma Abdul Hadi Jadallah, *Conflict Assessment of the Republic of Yemen*, SCH. FOR CONFLICT ANALYSIS & RESOL. 11 (2015), http://activity.scar.gmu.edu/sites/default/files/Yemen_CDA_Final_July.13.2015-2.pdf [https://perma.cc/77XB-RW4D].
56. Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (GCC), Dec. 5, 2011, https://peacemaker.un.org/sites/peace-maker.un.org/files/YE_111205_Agreement%20on%20the%20implementation%20mechanism%20for%20the%20transition.pdf [https://perma.cc/K58T-URP8] [hereinafter GCC Agreement].
57. *Id.* at para. 20.
58. ERICA GASTON, U.S. INST. OF PEACE, PROCESS LESSONS LEARNED IN YEMEN'S NATIONAL DIALOGUE 3 (Feb. 2014), https://www.usip.org/sites/default/files/SR342_Process-Lessons-Learned-in-Yemens-National-Dialogue.pdf [https://perma.cc/7FVT-89W2].
59. *Id.* at 4.
60. Jadallah, *supra* note 55, at 12.
61. *Id.* at 14.
62. *Id.*; INT'L CRISIS GRP., YEMEN'S SOUTHERN QUESTION: AVOIDING A BREAKDOWN (Sept. 25, 2013), <https://d2071andvip0wj.cloudfront.net/yemen-s-southern-question-avoiding-a-breakdown.pdf> [https://perma.cc/3AGY-PR25]. See also Gluck, *supra* note 37, at 50 (listing Hiraak's refusal to participate as one of the reasons why the NDC could not come to an agreement).
63. *Yemen's Houthis Reject Draft Constitution*, PROJECT ON MIDDLE EAST DEMOCRACY, <http://pomed.org/blog-post/political-process/political-transition/yemens-houthis-reject-draft-constitution> [https://perma.cc/R4HR-JX5N].
64. See GASTON, *supra* note 58, at 3–4 (noting that the compromise agreement on Yemen's future as federal state did not settle the issue of the number of subnational regions).
65. GCC Agreement, *supra* note 56, at para. 22; see also Ashraf Al-Falahi, *Yemen's Fraught Constitution Drafting Committee*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 2, 2014), <http://carnegieendowment.org/sada/?fa=55496> [https://perma.cc/E89R-8N3F] ("In his announcement, Hadi specified that the CDC would have seventeen members; this contradicts the agreement reached by the nation-building team at the National Dialogue Conference, which recommended that the CDC be comprised of 30 members selected according to their area of expertise").
66. GCC Agreement, *supra* note 56, at para. 20.
67. Gluck, *supra* note 37, at 52.
68. *Id.*
69. Arafat Madabish, *Yemen: Uncertainty Over New Constitution Continues Following Kidnapping*, ASHARQ AL-AWSAT (Jan. 18, 2015), <https://eng-archive.aawsat.com/arafat-madabish/news-middle-east/yemen-uncertainty-over-new-constitution-continues-following-kidnapping> [https://perma.cc/6ZHU-4YUP].
70. Gluck, *supra* note 37, at 52.
71. Helen Lackner, YEMEN'S 'PEACEFUL' TRANSITION FROM AUTOCRACY: COULD IT HAVE SUCCEEDED? INT'L IDEA 56 (Mar. 2016), <https://www.idea.int/sites/default/files/publications/yemens-peaceful-transition-from-autocracy.pdf> [https://perma.cc/Q4MR-CMXR].
72. See *id.* at 57 (discussing the tension between Saleh and Southern separatists that delayed efforts to solve problems).
73. See *id.* (explaining that the Houthis were focused on advancing their military objectives during the CDC period).
74. *Id.*
75. See Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1216–17 (2008) (explaining the difference between the consociationalism design, which is centered on a "regime of guarantees," and the centripetalism design, which focuses on electoral incentives).

76. See Karol Edward Soltan, *Constitution-Making at the Edges of Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1409, 1423–24 (2008) (elaborating on the defining characteristics of a constitutional democracy).
77. *Id.* at 1424.
78. *Id.*
79. See Horowitz, *supra* note 75, at 1216 (emphasizing that the consociationalist design is rooted in the principle of proportional inclusion and a group culture).
80. *Id.* at 1216–17.
81. See Soltan, *supra* note 76, at 1424 (explaining that the centripetal approach focuses on collaboration among moderate politicians at the expense of excluding extremists).
82. See Horowitz, *supra* note 75, at 1217 (explaining that the underlying mechanism of the centripetal approach consists of politicians compromising on ethnic issues in order to appeal for voter support from disparate ethnic groups).
83. *Id.*
84. See Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT'L L. 51, 56–58 (2003) (explaining that federalism contains two essential attributes: (1) dispersion of power among many centers of authority; and (2) existence of constitutional mandates that legitimize the various centers of authority's claims of rights against the central government).
85. *Id.* at 54 (internal citations omitted). See e.g., Hallie Ludsin, *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, 33 U. PA. J. INT'L L. 239, 290 (describing the insertion of ethnic federalism clauses into Nepal's 2006 Interim Constitution, which led to the signing of the Comprehensive Peace Accord later that year).
86. David Wippman, *International Law and Ethnic Conflict on Cyprus*, 31 TEX. INT'L L. J. 141, 173 n. 220 (1996).
87. See Selassie, *supra* note 84, at 86 (asserting that ethnic federalism exacerbates ethnic distrust and social discord because it deliberately and openly highlights ethnic differences that might otherwise fade with time).
88. *Id.* at 54.
89. See *id.* (discussing the inclusive approach to ethnic identity that the Ethiopian Constitution provides).
90. See *id.* at 54–55 (noting that eight of the nine provinces were organized along ethnic lines to make the province the principle vehicle for aggregating major ethnic groups' political, cultural, and linguistic identity). The Ethiopian model of ethnic federalism goes much further than South Africa's model, which does not organize provinces primarily along ethnic lines.
91. See *id.* at 60 (highlighting the fact that many ethnic groups within African countries have staged uprisings against the central government to demand official recognition of their separate social identities).
92. See Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transnational Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J. TRANSNAT'L L. 585, 589–90 (2008) (discussing how, although certain provinces did not create their own subnational constitutions, gaining the authority to do so was an important part of the political settlement to mitigate inter-ethnic conflict).
93. See *id.* (describing the strategic provisions in transition constitutions that help create a smooth transition of power); see generally Michael J. Kelly, *The Kurdish Regional Constitutional within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707 (2010) (discussing the creation and adoption of the Kurdish regional constitution).
94. See Kelly, *supra* note 93, at 746 (discussing that one such issue left unresolved in the federal constitution was the status of the oil-rich city of Kirkuk in Iraq, wherein both Baghdad and the Region of Kurdistan wanted to maintain control of Kirkuk and the Iraqi Constitution deferred resolution of the issue to a referendum; ultimately, the regional Kurdish Constitution defined Kirkuk as part of the Kurdish region).
95. See Selassie, *supra* note 84, at 54 (discussing how the ethnic-federal system of government in Ethiopia enables it to accommodate ethnic groups' cultural, linguistic, and political decisions).

96. See Kelly, *supra* note 93, at 726 (explaining that the Kurds settled for a federal structure of autonomy and regionalism).
97. Ctr. for Const. Transitions et al., *DECENTRALIZATION IN UNITARY STATES: CONSTITUTIONAL FRAMEWORKS FOR THE ARAB STATES REGION 11* (2014) [hereinafter *DECENTRALIZATION IN UNITARY STATES*].
98. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 910 (1994).
99. See *DECENTRALIZATION IN UNITARY STATES*, *supra* note 97, at 12 (noting that one goal of a federal system of governance is to ease tensions between different groups in society).
100. See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 *J.L. & POL.* 187, 190–91 (2005) (critiquing Rubin and Feeley for characterizing the value of decentralization as primarily being administrative efficiency, and stating that it serves fundamental purposes crucial to democracy).
101. See *id.* at 191 (arguing that decentralization feeds into the goals of self-government).
102. See *id.* at 195–99 (distinguishing decentralized regimes into “federalist,” “unitary,” or “localist” based on the central government’s power to regulate and interfere with local governments).
103. See *id.* at 198 (discussing how subnational governments in a unitary democracy do not receive legal protection, and thus function to carry out national law).
104. *Id.* at 199.
105. See Kelly, *supra* note 93, at 726 (noting Syria, Iran, and Turkey’s concern that an independent Kurdistan may lead to secessionist movements among their own Kurdish populations). This fear of ethnic secession is not unfounded. As the International Court of Justice determined in its Advisory Opinion regarding Kosovo’s Unilateral Declaration of Independence, such declarations of independence by ethnically defined regions are not violations of general international law and may represent a people’s appropriate exercise of their right to self-determination; see also Elena Cirkovic, *An Analysis of the ICJ Advisory Opinion on Kosovo’s Unilateral Declaration of Independence*, 11 *GERMAN L.J.* 895, 900 (2010) (discussing the dialogue surrounding the right to external self-determination and the recognition of states that do break off within the broader arena of international law).
106. See *DECENTRALIZATION IN UNITARY STATES*, *supra* note 97, at 30 (explaining that decentralization preserves national stability by broadening citizenship participation and fragmenting central power).
107. *DRAFT LIBYAN CONST.*, pmb1.
108. NADINE SCHNELZER, *LIBYA IN THE ARAB SPRING: THE CONSTITUTIONAL DISCOURSE SINCE THE FALL OF GADDAFI* 32 (Springer VS, 2016) (recounting that rapid economic changes, which were spurred by the 1959 discovery of vast oil reserves in Libya, created social conflicts between the Libyan people and their political leadership and motivated the 1963 administrative transition).
109. *DRAFT LIBYAN CONST.*, art. 1.
110. *Id.* at art. 2.
111. *Id.* at arts. 110, 125.
112. *Id.* at arts. 2, 64, 117.
113. *Id.* at art. 158.
114. 2015 *DRAFT YEMENI CONST.*, art. 13.
115. *Id.* at art. 13(5) (“It is prohibited to establish political parties and organizations on the basis of racial, sectarian or doctrinal grounds”).
116. *Id.* at arts. 138–39.
117. *Id.* at art. 141.
118. *Id.* at art. 219.
119. *Id.* at art. 329.
120. *Id.* at art. 311.
121. *Id.* at art. 143.
122. *Id.* at art. 183.
123. *Id.* at art. 180.
124. *Id.* at art. 230.
125. *Id.* at art. 237.
126. *Id.* at art. 337.

127. *Id.* at art. 336.
128. *Id.* at art. 239.
129. *Id.* at art. 226.
130. *Id.*
131. *Id.* at art. 237.
132. *Id.*
133. GASTON, *supra* note 58, at 4–5; Gluck, *supra* note 37, at 50; *Yemen's Houthis Reject Draft Constitution*, *supra* note 63.
134. William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193, 196 (2012).
135. *Id.* at 197.
136. Larry Catá Backer, *God(s) over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C.L. REV. 11, 13 (2007–2008).
137. For Egypt's ratification of the ICCPR, see International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 1259 U.N.T.S. 14668; and for its ratification of the ICESCR, see International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 1259 U.N.T.S. 14531. For Tunisia's ratification of the ICCPR, see International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 14668, and for its ratification of the ICESCR, see International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 14531.
138. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 93 (translated from Arabic to English).
139. CONSTITUTION OF THE REPUBLIC OF TUNISIA, art. 20.
140. *See generally* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, EGYPT 2012 HUMAN RIGHTS REPORT (2012), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dldid=204357> (discussing the abuses of the Mubarak regime and their effect on constitutional rights); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, TUNISIA 2012 HUMAN RIGHTS REPORT (2012), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dldid=204385> (discussing the abuses of the Ben Ali regime and their effect on constitutional rights).
141. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191 (2013).
142. *See generally* Nathan J. Brown, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT (2002) (discussing continued violations of constitutional texts and the authoritarian motives underlying the perpetual proliferation of replacement constitutions).
143. Partlett, *supra* note 134, at 196 (noting “the importance of stable rules and institutions in constraining the constitution-making process”).
144. David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 925 (2013).
145. CONSTITUTION OF THE REPUBLIC OF TUNISIA, art. 118.
146. *Id.* at arts 125–30.