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PROMOTING CONSENSUS: CONSTITUTION-MAKING IN EGYPT, TUNISIA, LIBYA

EXECUTIVE SUMMARY

The three revolutionary transitions in the Arab world – Tunisia, Egypt and Libya – are entering the stage of institution-building. Tunisia made a promising start with the 23 October elections for a Constituent Assembly (CA); Egypt's electoral cycle started on 28 November; and according to Libya's 'Constitutional Declaration' elections to a parliament ('National Public Conference') will be due by June 2012.

While it is early in all three transitions, it is already clear that too little attention is being given to establishing inclusive procedures that foster political consensus in the making of new, democratic constitutions. In particular – while supermajorities of 2/3 or 3/4 are widely used on constitutional issues, rather than a bare majority of 50%+1, such arrangements have not been much discussed in any of the three countries up to now.

Supermajority requirements create incentives for compromise and moderation because they usually mean that no one political party or group can dominate the making of a constitution. A consensual process has the benefit of making broad, public acceptance of a new constitution more likely, to the benefit of long-term democratic stability. Ideally supermajorities should be agreed on before elections, when no party yet knows its relative strength. In this way they can also serve to lower the stakes in elections, because losing an election may not amount to a complete loss of influence for any party.

In none of the three countries have supermajorities been a major part of the public debate: In Tunisia it was argued that the interim authorities should in no way pre-empt decisions to be made by the soon to be elected CA. Fortunately the parties in the CA now mostly support the concept of requiring a

supermajority of its members before adopting the constitution. They should also consider integrating other provisions that would promote the politics of consensus in the CA's rules and procedures.

In Egypt the current plan calls for the elected members of parliament to elect a CA with a 50%+1 majority, carrying a real risk that the assembly will represent only a limited political strand. Yet the idea of increasing the majority needed to choose a CA has been little discussed. Some liberals would prefer an assembly in which professional groups are represented, while the Muslim Brotherhood sees any alternative to the current plan as an underhand attempt to thwart their ambitions before the elections even start. It would be productive if the public debate in Egypt would focus more on the benefits of supermajority requirements for forming the CA, and for adopting a constitution, whether that vote is taken in the CA or in parliament.

Interestingly, Libya's transitional charter provides that the new constitution will need the approval of 2/3 of the voters in a referendum. However, such a requirement at the *end* of the reform process can lead to an impasse if the required majority cannot be mustered. In a referendum there is no negotiation, the options are either acceptance or rejection. Therefore the Libyan authorities should consider introducing supermajority requirements at an earlier stage of the process instead - that means requiring a supermajority to form the CA and for the adoption of a constitution by the CA.

1. INTRODUCTION: PROBLEMS OF THE CURRENT TRANSITIONS

The three revolutionary transitions in the Arab world – Tunisia, Egypt, Libya – are entering the stage of institution-building. Tunisia made a promising start with the 23 October elections for a CA, the body that will draw up and adopt its new constitution. Egypt's electoral cycle will begin on 28 November with the first phase of the elections to the People's Assembly (the lower house). According to Libya's 'Constitutional Declaration' an Election Commission should be established before the end of January while elections to a parliament (National Public Conference) would be due by June 2012.

Although it is still early, a worrying tendency is emerging in all three countries' transitions: they are neglecting the importance of political consensus in the building of new, democratic constitutions. Reformers in all three countries are over-emphasising the role of 50%+1 majority rule, when genuine democracy requires a more intricate system of checks and balances beyond majority rule. They are also too often defining a 'majority' as meaning 50%+1 of the votes; in fact supermajorities (2/3 or 3/4) are common for adopting new constitutions as well as for amending constitutions.

A supermajority requirement fosters consensus and provides guarantees for 'electoral minorities' (that is, the opposition). Supermajorities are common global practice both in drawing up constitutions and in enacting constitutional amendments.

When a constitution is made a supermajority requirement should be considered at three points in the process:

- When appointing the CA, in cases where the CA is not directly elected (for example in Egypt, where it is elected by parliament).
- In the CA's internal work, before proposals can be passed (in this case there can also be a commitment to strive for consensus, and go to a vote only if a committee member so demands).
- When the CA takes a vote to adopt a constitution or a draft constitution (as happened in South Africa and many other countries).

During the three countries' transitions there has been little discussion of supermajorities and none of the bodies drawing up the constitutions will require a supermajority (whether 2/3 or 3/4) before the constitution can be adopted.

However, on a positive note the CA of Tunisia is now considering adopting such a rule. In Egypt the issue has come up recently in discussions of how parliament should appoint the CA. Ideally such rules should be agreed before elections reveal the relative strength of parties.[1] Parties may be less inclined to agree to supermajority rules once they know they have performed strongly, and may misinterpret a proposal for supermajorities as an unfair tactic to limit the impact of its rightful electoral gains.

2. TUNISIA

Before the recent Tunisian elections there were debates about how the resulting CA's work should be framed. However, since the transitional bodies lacked electoral legitimacy, it was decided that the CA should determine its own procedures.

This is understandable, but – as mentioned – some procedural rules are better agreed before an election. After an election the parties know their relative strengths and the strongest party has less incentive to agree to supermajorities.

The CA now has to define its rules and procedures, including whether it will require a supermajority before a new constitution can be adopted. It appears that the major parties are in favour of such a requirement.[2] Debates are also being held about the precise majority requirements to be used in the work of CA committees.

[1] In *A Theory of Justice* philosopher John Rawls observed that participants in a discussion about justice who do not know their position in society ('veil of ignorance') will argue for a fairer system. Since people do know their position in society, this can only be tested in a thought experiment. But post-revolutionary Tunisia before the elections provided a real situation of 'ignorance' about the respective strength of political forces. This would have been the ideal moment to agree on questions of constitutional process.

[2] DRI interviews with leading Tunisian parties, November 2011.

3. EGYPT

In Egypt there is a double challenge to consensus building: According to the Constitutional Declaration, adopted by the Supreme Council of the Armed Forces (SCAF), the CA can be elected merely by a 50%+1 majority and the constitution may then also be adopted by a 50%+1 majority of the CA. The 50%+1 majority for electing the CA is the most critical issue, since the mechanism for passing the constitution loses importance when the CA is dominated by one party or part of the political spectrum.

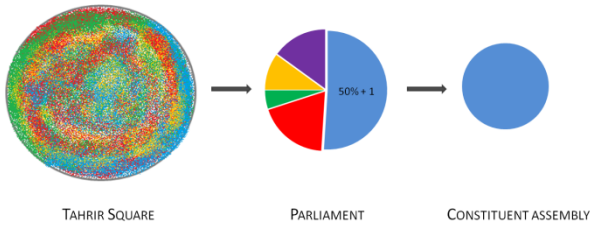
FORMING THE CONSTITUENT ASSEMBLY

While Tunisia held direct elections to its CA, Egypt's will be elected by parliament. Article 60 of the Constitutional Declaration of 30 March stipulates:

> "The members of the first People's Assembly and Shura Council (except the appointed members) will meet in a joint session following an invitation from the Supreme Council of the Armed Forces within 6 months of their election to elect a provisional assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum."

The Article indicates that the members of parliament[3] will elect the 100 members of the CA but it provides no details on how they will do this. There are many ways such an election could take place. Parliament could vote in each member of the CA with a 50%+1 majority, it could vote for slates of 100 candidates in one ballot or it could adopt a Single Non-Transferable Vote System (SNTV) where each MP would have one vote and the highest-scoring candidates would win. It could also adopt a block vote whereby each MP would have 100 votes and the highest-scoring CA candidates would win.

Whatever the relative merits of these systems, there is one strong argument against them all: they could allow a narrow majority (50% +1) of MPs to ensure the election of 'their candidates' for most if not all CA seats. Whichever of these systems is chosen, the political pluralism of parliament would be reduced. This is contrary to the logic of constitution-making. A CA should not be controlled by the political majority of the day. If anything a CA should be more pluralistic than a parliament. But in Egypt there is a risk that just the opposite will happen: the parliament may become a filter, which reduces Egypt's new-found pluralism to one-party dominance in the CA, as illustrated in the graphic below.



The public debate in Egypt has not been about the political composition of the CA, but about the backgrounds of its individual members. There have been demands that various professional bodies as well as women and minorities be represented in the CA. Indeed the civil cabinet recently proposed detailed rules on who should be in the CA, including a proposal that a range of professional associations should nominate candidates – two for each position – with parliament selecting from these nominations.

There are two concerns about this procedure. Firstly, this focus on the professional profiles of potential members is insufficient to ensure the CA is broad-based and inclusive - a CA composed of professors or judges could still have only members from a narrow political spectrum. More importantly, this 'corporatist process' would hand over political power to the professional bodies that nominate candidates, giving them undue collective influence over the composition of the CA at the expense of the elected parliament, raising concerns about democratic accountability.

At the time of writing, this proposal is being discussed but without agreement. The Muslim Brothers (MB) are opposed to it, fearing such provisions will outflank its expected strong showing in the elections. Instead the MB is indicating, somewhat vaguely, that it will seek to achieve consensus for decisions by parliament.[4]

CA ADOPTION OF A NEW CONSTITUTION

Article 60 does not elaborate on the majority required in the CA for a draft constitution to be adopted. While the SCAF, parliament or the CA itself may yet define the majority, this is not currently being discussed.

The MB has described the CA as a mere 'technical committee' of parliament, implying that it would report back to parliament. This interpretation is not supported by the text of the Constitutional Declaration. If a draft text went back to parliament for adoption, parliament should consider adopting it only by supermajority.

[3] This includes 498 members of the People's Assembly (lower house) and 180 elected members of the Shura Council (upper house). Both bodies are elected on the same electoral model (mix of 1/3 individual seats, 2/3 proportional representation on the basis of lists). 90 members of the Shura Council are appointed by the President but according to the Constitutional Declaration they do not participate in the election of the CA.

[4] Interview with a representative of the Freedom and Justice Party on 15 November.

4. LIBYA

In August 2011, before the end of the conflict with Gaddafi regime forces, the Interim Transitional National Council (ITNC) in Libya circulated a 'Draft Constitutional Charter for the Transitional Stage – The Constitutional Declaration'. The text promised that the 'announcement of liberation' (later made on 23 October 2011) would set in motion a timetable of transitional steps:

- Formation of an interim government within 30 days;
- Within 90 days of the liberation (by January 2012):
  1. Promulgation of a law on electing the National Public Conference
  2. Appointment of a National Supreme Commission for elections
  3. Registration of candidates for election to the National Public Conference
- Elections for the National Public Conference (NPC) within a period of 240 days (by the end of June 2012);
- Within 30 days of the NPC's first meeting:
  1. Appointment of an interim government.
  2. Designation of a 'Constitutional Power' charged with drafting a new constitution within 60 days from the date of holding its first meeting.
- Submission of the draft constitution to a referendum within 30 days of its approval by the NPC
- The Constitutional Power's adoption of the draft constitution as the Constitution of Libya, subject to its approval by 2/3 of the majority of voters in the referendum
- If the constitution is rejected by voters: the Constitutional Power's reformulation of the draft constitution and re-submission to referendum within 30 days.

Libya is the only one of the three countries to require a supermajority in the process of building their new constitution. However, the Constitutional Charter provides for a supermajority only in the referendum at the end, which not only creates an unnecessary obstacle to the eventual adoption of a constitution,[5] but also fails to capitalise on the benefits supermajority requirements can offer.

Furthermore, the benefits of supermajorities in forming a constitution-making body or for adopting a constitution by the body – namely to promote a consensual process – would not materialise in a referendum. A referendum is not a negotiating process. Voters can only approve or disapprove the constitution. If they disapprove, they may do so for diverse reasons and a provision to re-write a constitution is no guarantee that these reasons will be addressed.

The Libyan authorities should consider supermajority requirements at these earlier stages - when the NPC forms the Constitutional Power and when the NPC adopts the draft of a constitution. An inclusive process is a more stable process, and this is of special relevance to Libya, a diverse society consisting of many tribes and clans.

The Libyan authorities should also consider loosening the timetable of their transition. Sixty days is insufficient to draw up a constitution; the necessary awareness-raising and public consultations require more time. The current hurried schedule will result in a lack of public understanding and less than full participation, potentially undermining acceptance of the constitution that emerges from the process.[6]

5. SUPERMAJORITIES TO FOSTER CONSENSUAL CONSTITUTION-MAKING

Supermajorities are an important tool in building consensus. Once in place, they oblige political groups to reach across their divisions to muster the majorities necessary to elect a CA or adopt a constitution, for example. This process strengthens moderate forces in all parties and discourages the adoption of more extreme political positions. The rule that a constitution has to be adopted by a supermajority helps avoid the writing of partisan constitutions that can tear societies apart. It also reassures 'electoral minorities' that they may have a voice in the process of drawing up the constitution. The South African example is particularly instructive in this regard (see case study in the Annex).

Indeed, in countries where the process of building a constitution has required a vote by the responsible body, 2/3 majorities have been the norm. In recent decades many countries have required majorities of 2/3 or 3/4 for adoption by the constitution-making body, including: Albania, Armenia, Azerbaijan, Croatia, Czech Republic, East Timor, Georgia, Hungary, Latvia, Moldova, Montenegro, Namibia, Poland, Romania, Rwanda, Serbia, Slovenia, South Africa and Uganda.[7]

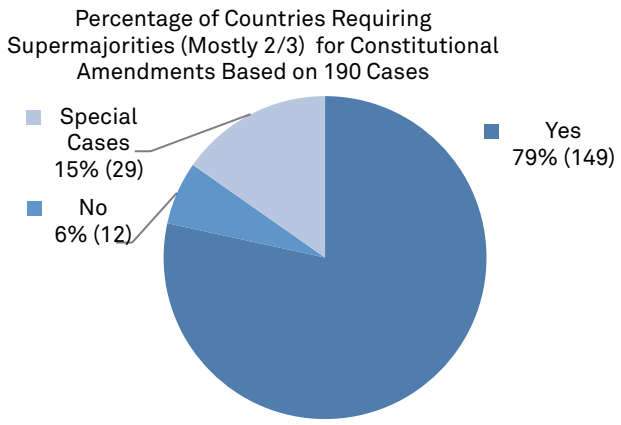
It is no coincidence that most countries protect their constitutions from the whim of majorities of the day by requiring a supermajority (usually 2/3) for constitutional amendments.

Furthermore, were the new constitution to be passed by a 50%+1 majority in Tunisia, Egypt and Libya but later be impossible to amend without a 2/3 majority, not only would a group or party with a narrow majority be able to impose their view of the state, they would also be able to prevent it being altered.

[5] It should also be specified whether 2/3 of registered voters ('electors') or actual voters are required for approval.

[6] See DRI's Briefing Paper no.19 *Lessons learned from constitution-making: Processes with broad-based public participation,* November 2011

[7] DRI's research continues, but so far only one case of a CA using a simple majority to adopt a constitution has been identified: Ecuador in 2008.



Source[8]

Another critical consideration in establishing the rules for drawing up a constitution is **timing**. Such rules should be in place before the first elections are held, before parties know their relative strengths. This builds a safeguard of inclusiveness into the process, which also lowers the stakes of elections, reducing the potential for conflict and tension around them. Parties will be assured that losing elections does not mean losing any ability to play a role in the subsequent process.

6. CONCLUSION

As Tunisia, Egypt and Libya plan to write new constitutions, they are paying too little attention to procedures that foster consensus. Looking at the discourse of transition in these countries, two misconceptions about democracy can be observed which may explain why this might be:

First, a **'big bang'** understanding of foundational elections. This view, which was especially widespread in Tunisia, supposes it to be undemocratic for unelected bodies to define transitional parameters that remain in place after the first election. It regards elections as cut-off points that should reset all previous agreements. This position overlooks the many precedents for a transition where detailed parameters have remained in place well beyond the first elections. And even if one holds this 'big bang' view of democratic legitimacy, nothing should stop parties from agreeing to respect procedures even after elections. Voters can then decide if they accept such self-imposed obligations or wish to vote for other parties.

Second, the fallacy that a **50%+1** majority always constitutes a democratic majority. Supermajorities are a widely used requirement, specifically in drawing up and amending constitutions.

Supermajority requirements benefit the process of drawing up a new constitution. They create an incentive for political actors to overcome partisan division and seek out common ground where more of society will be represented. Constitutions that are drawn up around such greater consensus are more likely to be well-rooted and long-lasting.

In Tunisia, Egypt and Libya alike there is still scope to discuss arrangements for more inclusive constitution-making:

- In **Tunisia** the CA is starting its work and could write a requirement to adopt the constitution by supermajority into its rules and procedures. The Tunisian CA could also consider provisions that foster consensus in the way that its committees operate, for example by trying to make committee decisions by consensus, using voting only as a fall-back option where consensus cannot be reached.
- In **Egypt** the political situation at the time of writing is tense and unclear. Whether the transitional parameter will change or the Military Council's plans, enshrined in the constitutional declaration, are maintained, there is still scope to agree on a supermajority for the election of the CA by parliament, as well as for the adoption of a draft constitution by the CA or by parliament itself.
- In **Libya** the transition is at an early stage and many observers expect that the parameters of the transition will change, not the least because the current timetable looks too ambitious. It would be worthwhile to consider introducing supermajority requirements for the formation of the Constitutional Power as well as for the adoption of a constitutional draft by parliament. Furthermore, the planned two-month timeframe for constitution-making is too short to allow meaningful public consultation which will be vital for public acceptance of the constitution.

[8] CCP dataset, survey of 190 national constitutions (as of November 2011); Elkins, Zachary, Tom Ginsburg, and James Melton. 2010. Characteristics of National Constitutions, Version 1.0. Comparative Constitutions Project. Last updated: May 14, 2010. Available at: http://www.comparativeconstitutionsproject.org/index.htm

ANNEX

CREATING CONFIDENCE: THE CASE OF SOUTH AFRICA[9]

South Africa successfully managed the transition from apartheid rule to democracy in a challenging context of violence and deep-seated fear of the negotiations on all sides. The African National Congress was concerned not to become divided during the negotiations and to ensure the transition created irreversible progress, while the white minority was afraid of rapid marginalisation at the hands of the black majority.

To allay such fears the constitutional reform process was designed to give all sides a meaningful voice and guarantees of inclusion. The main stages of the transitional process included:

- Talks about Talks (1990–1991)

At this stage the white government and the ANC discussed the question of the transitional sequence: which would come first, elections or the constitution? What would be the role of current state institutions? The main stakeholders were able to develop their policy positions in this phase. It has been noted that, "this marked a historic shift in the country's politics, from conflict among competing forces to competing constitutional visions".[10]

- Convention for a Democratic South Africa (1991–1992)

The Convention for a Democratic South Africa (CODESA) involved 19 organisations and parties, including even small parties. It was agreed that decisions should ideally be made by consensus or at least by 'sufficient consensus', which was understood to mean the agreement of the government and ANC as well as additional parties. CODESA was a highly complex process involving more than 400 negotiators. It made progress in establishing a consensus that South Africa should become a genuinely non-racial, multi-party democracy but otherwise failed to reach agreement on the overall transition. Analysts put the reasons for this failure down to an absence of a technical secretariat – meaning that each party worked with its own experts, making the process bloated – and the fact that CODESA worked mainly behind closed doors, creating little public support and momentum towards a new constitution.

The failure of CODESA was followed by a fragile period of escalating violence and concerns about a failing transition. The ANC then adopted a negotiating strategy ('Strategic Perspectives') proposing the next phases, which ultimately did become the script of the country's transition. The ANC and the white National Party negotiators met privately for several days in a retreat to re-engage with the transition process. Analysts credited these first social contacts between the two sides with building a basis of trust that became a critical resource during the next stages.

- Multi-Party Negotiating Process (1993) resulting in Interim Constitution and Elections

The Multi-Party Negotiating Process (MPNP) involved even more parties and organisations (26) than CODESA, but was ultimately successful because of the lessons learned from CODESA's failure. In particular, MPNP had a single negotiating council as opposed to CODESA's five working groups, giving the process a central driving institution. Another innovation was technical committees made up of non-party experts, which enjoyed the parties' trust and advised them on an equal footing. Parties were required to make written submissions, which created transparency as well as making it easier to compare positions and seek compromise.

In April 1993 the assassination of an ANC leader by a right-wing extremist and ensuing protests threatened to derail the transition once more. The parties resolved to create more urgency by agreeing on a date for the first elections, setting an end date for the MPNP, and establishing a transitional executive council. Within months the MPNP had agreed to an interim constitution, as well as the process for drawing up and adopting the final constitution.

The interim constitution included 34 principles that were to be upheld in the final constitution and overseen by a newly-created constitutional court. They included a general bill of rights and many principles related to the division of powers.

- Constitutional Assembly, 1994–1996

The interim constitution required the Constitutional Assembly (CA) to respect the 34 principles to the satisfaction of the Constitutional Court; to adopt a final constitution within two years (giving the process momentum and finality) and to adopt the constitution by a 2/3 supermajority. Given that the dominant party, the ANC, did not gain 2/3 of the seats in the elections, it could not dictate the terms of the new constitution. There was significant public consultation and outreach throughout the two years of the CA's work. The new constitution was adopted by the CA on 8 May 1996, with 87% voting in favour.

The process by which South Africa drew up and adopted a constitution are considered the cornerstone of the new nation: "The constitution-making was at the heart of a transition that, against the odds, was essentially peaceful. (...) The nature of the process – its qualities, on the whole, of inclusiveness, transparency and participation – was clearly instrumental in creating the outcome. Indeed the process and the outcome, were two sides of the same coin."[11]

[9] This case study draws on the excellent overview of South Africa's transition in *Creating the Birth Certificate of a New South Africa,* by Hassen Ebrahim and Laurel E. Miller, in *Framing the State in Times of Transition, Case Studies in Constitution Making*, ed.: Laurel E. Miller, Washington 2010.

[10] *Supra* page 117.

[11] *Supra* page 144.

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Democracy Reporting International (DRI) is an non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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