



*Constitution Building:*  

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*A Global Review (2013)*  

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*Edited by:*  
Sumit Bisarya

**Contributors:**  
Melanie Allen  
Sumit Bisarya  
Sujit Choudhry  
Tom Ginsburg  
Christina Murray  
Yuhniwo Ngege  
Cheryl Saunders  
Richard Stacey  
Nicole Töpperwien



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International IDEA

Strömsborg, SE-103 34, STOCKHOLM, SWEDEN

Tel: +46 8 698 37 00, fax: +46 8 20 24 22

E-mail: [info@idea.int](mailto:info@idea.int), website: [www.idea.int](http://www.idea.int)

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## Foreword

This annual review of developments in constitutional reform, constitutional design and constitution-building processes from around the world is a most timely and welcome addition to the growing literature on these topics. This renewed interest in comparative constitutional studies is itself based on an increasing appreciation that constitutions seek to codify a national social contract not only between those who govern and those who are governed, but also among diverse groups of citizens. In turn constitutional reforms are an attempt to revise that contract in line with new social realities, new challenges to governance including increasingly assertive sub-national identities. While this is true of stable democracies, it is certainly relevant to countries undergoing transition from forms of authoritarian rule or emerging from divisive identity based conflict. 2013 in particular, witnessed considerable popular turmoil, especially in but not limited to, countries associated with the ‘Arab Spring’. In most of these countries, contested claims in regards to constitutional reform or constitution-making processes were central or at least necessarily implicated in their road maps for peace and volatile transitions. This makes a review of comparative constitutional developments of much broader political relevance than a constitutional law review.

While the right constitutional ‘fit’ will differ for each country, it is not tenable to rely on this unique particularity to ignore constitutional developments, experiences and lessons from other countries. Indeed, both the practitioner and the academic/theorist have an obligation to examine and interrogate the broadest range of contemporary constitutional approaches, mechanisms and models. This is the only way to enrich and broaden our collective constitutional imagination, and offer more effective examples to countries struggling to accommodate the competing claims that constitutions have to reconcile. What is true for constitutional content/design is also true for constitution building process. There is now wide acceptance that the broad injunctions to favour both inclusivity and full participation in any constitutional framework applies equally to all constitution building processes.

This annual review interrogates, in line with this perspective, many of the most topical issues of 2013, both in terms of process (questions of who participates, and how they participate, in constitution-building processes) as well as design (in this case, commentary on the role of the judiciary and the military respectively as well as on federalism/decentralisation). It also brings together an exceptional cast of contributors. I strongly commend this publication and I am already eagerly awaiting next year’s review.



Nicholas Haysom  
Deputy Special Representative of the Secretary-General for Political Affairs  
United Nations Assistance Mission in Afghanistan (UNAMA)

## Preface

Constitution building is an increasingly common occurrence, as countries seek comprehensive political transition or attempt to fine-tune their state apparatus to better achieve their national goals, and address their challenges. The introduction to this publication counts 22 such processes around the globe in 2013.

Given the complexity of each one of these processes, entwined as they are in the unique political and cultural context of each country, it is difficult to track the many constitutional transitions which take place each year. This publication represents a first attempt to connect some of the dots between constitution building processes and facilitate a broad understanding of recurring themes.

It is not intended to be a comprehensive compendium of each and every constitution building process in 2013 – such an endeavor would run to several volumes. Rather, it is intended to do two things: firstly, to provide a record of selected constitution building events in 2013, focusing on those countries where constitutional reform was most central to the national agenda; and secondly to act as a resource for future constitution building processes where no doubt some of the lessons learned from constitution building in 2013 will be of value.

Looking at the review as a whole, three overarching themes emerge. Firstly, the demands placed on constitutions are increasing. That is, in addition to the ‘traditional’ role of the constitution as an administrative law to organize the powers and processes of government, modern constitutions seek to fulfill an increasing range of functions including guarantees for an expanding catalogue of rights, national reconciliation and conflict resolution, signaling intentions and values to internal and external audiences, defining the national identity, and setting national objectives or goals.

Secondly, the process is inextricably linked to the substance. Throughout the review we see how the question of who writes the constitution is the most crucial determinant of what the constitution will say. Whether this is also linked to the ultimate endurance and success of the constitution in achieving its goals only time will tell but history teaches us that, all else being equal, inclusive processes are likely to increase the legitimacy, and therefore the chances of success, of the final constitution.

Lastly, we see in 2013 that constitution building processes matter. They matter to the citizens who took part in the popular uprisings of 2011 seeking social justice and accountability, and recognized their demands would not be met by simply replacing one dictator with another, but only through changing the fundamental rules of state and society. They matter to the politicians and organized interests who seek to ensure their group’s place in the nation’s future. And they matter to the international community, as peace and stability in the international order is ever-more dependent on national

constitutional frameworks which support moderation in power, inclusive development and fundamental rights.

At International IDEA, our mandate to support sustainable democracy worldwide tasks us to keep our finger on the pulse of transitions as they arise and progress throughout the globe. In a world of mass instant communication, gathering this information is easier than ever, the challenge now is making sense of this information, and how it fits together. In a field of increasing complexity and importance, the Constitution Building Global Review does just that.

A handwritten signature in black ink, appearing to read 'Yves Leterme', with a stylized flourish extending to the right.

Yves Leterme  
Secretary-General  
International IDEA

## Contents

Foreword .....	V
Preface .....	VI
Acronyms and abbreviations .....	IX
Introduction .....	1
Chapter 1: Participation and representativeness in constitution-making processes .....	4
Chapter 2: National dialogues in 2013 .....	11
Chapter 3: Women and constitution building in 2013 .....	16
Chapter 4: The judiciary and constitution building in 2013 .....	25
Chapter 5: Semi-presidential government in Tunisia and Egypt .....	33
Chapter 6: Federalism and decentralization .....	41
Chapter 7: The military and constitutional transitions in 2013 .....	47
The outlook for 2014 .....	54
Annex I: Timelines in selected countries .....	57
Notes .....	64
About International IDEA .....	72



## Acronyms and abbreviations

CA	Constituent Assembly (Egypt, Libya and Nepal)
COPAC	Constitution Select Committee of Parliament (Zimbabwe)
EAC	East African Community
FPTP	first-past-the-post
GNC	General National Congress (Libya)
GPA	Global Political Agreement (Zimbabwe)
JSC	Judicial Service Commission (Zimbabwe)
JCRC	Joint Committee for the Review of the Constitution (Myanmar/Burma)
MDC	Movement for Democratic Change (Zimbabwe)
MILF	Moro Islamic Liberation Front (Philippines)
MP	member of parliament
NCA	National Constituent Assembly (Tunisia)
NDC	National Dialogue Conference (Yemen)
NDSC	National Defence Security Council (Myanmar/Burma)
PR	proportional representation
PSC	Personal Status Code (Tunisia)
PSL	Personal Status Law (Egypt)
SCC	Supreme Constitutional Court (Egypt)
SSA	sub-Saharan Africa
UN	United Nations
WANA	West Asia and North Africa
WCoZ	Women's Coalition of Zimbabwe



# Introduction

Sumit Bisarya<sup>1</sup>

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New or revised constitutions are critical to the success of political transitions, and a brief look back at the events of 2013 reveals that constitution-building processes are high on the agenda of change across the globe. Fiji, Vietnam and Zimbabwe saw new constitutions promulgated in 2013, while Tunisia and Egypt adopted constitutions just after the New Year. Liberia, Nepal and Tanzania witnessed substantial developments towards new or significantly amended constitutions; discussions paving the way for new constitutions or significant constitutional reform progressed in Chile, Libya, Yemen, Sierra Leone, Trinidad and Tobago, the Solomon Islands and Myanmar; Turkey shelved its constitutional review process after much debate; and the year closed with the South Sudan and Zambian constitutional processes hanging in the balance. Some stable democracies, too, saw national debate over constitutional reform, including the Constitutional Convention in Ireland, amendments to the world's second-oldest active constitution in Norway, and debates over abolishing the Senate in Canada.

No two constitutions—and no two constitution-building processes—are alike; each instance is uniquely shaped by multiple layers of local politics, history, culture, knowledge and experience. However, it should not surprise us that a close scrutiny of constitution-making activity globally reveals commonalities as well as differences. After all, constitutions seek to provide solutions to the same questions which have troubled societies since they started organizing themselves into polities.

How can a constitution reflect a common, inclusive vision in a divided society? How to organize power so that it is efficient yet constrained? How to balance the need to design a strong and efficient government that is capable of leading the nation with an accountable and responsive government which acts on the will of the people? Who safeguards the constitution, and should non-elected judges overrule the will of the elected representatives of the people? How can the constituent power of a multitude of millions be channelled to produce a legitimate constitution that is owned by the people?

How to foster local territorial autonomy and protect local culture without threatening the unity of the national project?

Limited by space and time constraints, the selection of themes in this annual review is by no means comprehensive; nor does space allow greater scope or depth for each thematic chapter. However, the review aims to increase understanding of how constitution builders in 2013 approached these questions.

The seven chapters in this report tackle the issues of participation and inclusion, national dialogues as a constitution-making body, gender and constitutions, the judiciary, semi-presidential systems, federalism and decentralization, and lastly the role of the military.

The starting point is the problem of who should write the constitution? Broad-based popular participation is fast becoming a norm in constitution building, but questions remain regarding how to structure *effective* participation and how to balance mass participation with pact making by the political elite. Chapter 1 looks back at approaches to participation and representation in the processes in Fiji, Nepal, Tunisia, Zimbabwe and Libya and among its conclusions we see that expectations for mass participation and broad-based representation are uniformly high in all constitution building processes, but have not been met in several cases in 2013. We also see that a higher degree of participation leads to greater complexity, and that participation of the masses without taking into account elite interests can lead to covert constitution building overriding the formal process.

Continuing with aspects of participation and representation, Chapter 2 examines the use of the ‘national dialogue’ as an institution in constitution building processes. While it is not a new phenomenon, some form of broadly inclusive forum for discussion without responsibility for drafting is becoming an increasingly common feature of constitution-building processes. Looking in particular at two very different mechanisms with the same name, the 2013 National Dialogues in Tunisia and Yemen, the chapter shows how inclusive debate was crucial in advancing both processes.

Chapter 3 focuses on the role of women in constitution building in 2013, looking at both their role as participants in the process and how gender equity and agency have been reflected in the texts. Analysing the processes in Egypt, Tunisia and Zimbabwe, Chapter 3 posits that 2013 has seen positive progress, both in opportunities for women to participate in the drafting of new constitutions and in constitutional recognition for the rights of women. However, the case of Zimbabwe—which has a markedly progressive constitution in terms of gender equity and agency—already shows that, while participation and a gender-sensitive text are necessary, they are not sufficient to make a difference to the lives of women and girls. As activists lose energy, the international community turns away and politics—in the keen gaze of the public eye during the constitution-building process—returns to the shadows. The implementation of gender-related constitutional provisions presents numerous obstacles to the constitution living up to its promise.

Chapter 4 aims the spotlight on the role of judges in constitution-building processes, assessing how judges fared under the constitutions of 2013 and offering some notes on the approach of various judiciaries in the implementation of recent constitutions. The chapter's panoramic analysis from around the globe stresses the rise of the judiciary as an institution putting forward and defending its own interests, rather than merely acting as an arbiter for disputes between other institutions, both during the constitution-building process and within a set constitutional framework.

Continuing with aspects of institutional design, Chapter 5 distils some of the authors' research over the past two years in the Arab region and looks at semi-presidentialism under the new constitutions of Tunisia and Egypt. Why is it that both these countries chose semi-presidential government in their constitutional design? How do the forms of semi-presidentialism differ between the two countries and from pre-Arab Spring frameworks, and how likely are the new designs to prevent backsliding into authoritarianism?

Turning from horizontal to vertical power sharing, Chapter 7 examines developments linked to decentralization of power, in all its various forms. A central question for any constitutional agenda is how much detail should go into the constitution; where decentralization is concerned, this chapter posits that 2013 confirms a trend to constitutionalize more rather than less. The chapter also highlights two concerns for the constitution-building process in countries with territorially-based divisions that are politically salient: the first is that issues of identity often overshadow consideration of arrangements from a functional governance perspective; and second, decentralization creates more complexity in the design of participatory constitution-building processes because there will be additional demands for inclusion from regional groups.

The final chapter offers some thoughts on the role of the military in constitutions and constitution-building processes in 2013, focusing on Egypt and Myanmar. In these and other countries where the military exerts control over the transition, how is that control hard-wired into the constitution and what needs to be 'unwired' to enable a transition to democracy?

As stated above, the intention of this review is not to provide a comprehensive analysis of each constitution-building process that took place in 2013. Rather, the objective is to further general understanding of some key areas of constitutional design and process, and serve as a resource in keeping readers updated on how some recurring challenges to political transitions are being addressed through constitution building. For those interested in specific countries, the annex that follows the thematic chapters provides a series of timelines highlighting the major events in countries where large-scale constitutional review processes were underway in 2013.

# Participation and representativeness in constitution-making processes

Nicole Töpperwien<sup>2</sup>

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## **The drive for participatory and representative constitution making**

Currently, constitutions are often described as social contracts. Based on this understanding constitutions are no longer given out by the ruler(s), but are developed by the people, for the people. According to the handbook *Constitution-making and Reform* published by Interpeace, in countries with diverse societies, the constitution is ‘a contract ... among diverse communities in the state ... Communities decide on the basis for their coexistence, which is then reflected in the constitution, based not only on the relations of the state to citizens but also on its relations to communities, and the relationships of the communities among themselves’.<sup>3</sup> The understanding of constitutions as social contracts, with all the associations of agreement and consensus, is also one reason why constitution making is considered a means to overcome conflict and fragility by (re-)establishing a mutually endorsed basis for coexistence among communities and by building common ownership of the state.

This view on constitutions has repercussions for the constitution-making process. For instance, the Interpeace handbook identifies participation as one of four key principles for constitution making<sup>4</sup> and the authors state that ‘...there is now an established trend to build into the process broad participatory mechanisms’.<sup>5</sup> Participation has become an element of constitution making in order to create constitutions in line with society’s aspirations. Constitution making is supposed to reconcile the different interests (e.g. of men and women, the poor and the rich, the urban and the rural, different political parties). If the constitution is to be a social contract between different communities, understood as ethnic, linguistic, cultural and/or religious communities, as suggested above, then these communities must also be included in the constitution-making process, assuming that they represent different interests that have to be given space in the process. Participation is complemented by or closely linked to the idea that those who participate will be representative of the society and its different communities.

In any constitution-making process there are different stages. Participation can happen during any of these stages in a variety of compositions and forms with changing roles and intensity.<sup>6</sup> Participation can, for instance, be fostered by the election or nomination of inclusive constitution-making bodies, through public consultation processes or through referendums. In general, participatory processes tend to take longer than non-participatory ones because it takes time to inform, educate, form opinions, dialogue on opinions and build agreement. Participation and representativeness, aiming at identifying and reconciling a broad set of interests, bring complexities to the forefront.

Several countries were conducting or starting constitution-making processes in 2013. Many of them explicitly endorsed the notion of participatory constitution making and representativeness. Examples will be drawn from five in particular: two countries that concluded their constitution-making process in 2013 (Fiji and Zimbabwe), one that almost concluded (Tunisia), and two that in 2013 set the course for a new phase of constitution making (Nepal and Libya).

- The new constitution of Fiji was supposed to be developed on the basis of listening to the people.<sup>7</sup> A Constitutional Commission, composed of two international experts and three Fijian ones (three female and two male), had the task of engaging with the public and preparing a draft.<sup>8</sup> The Fiji constitution of 2013 was signed into law in September 2013.
- Zimbabwe used the slogan ‘My country. My constitution’ and mandated that the constitution-making process would be ‘people-driven, people-owned, inclusive and democratic’.<sup>9</sup> The lead for constitution making was taken by the 25-member Parliamentary Select Committee on the New Constitution (Constitution Select Committee, COPAC), composed of representatives of the three main political parties and a traditional chief, 17 male and eight female. COPAC conducted all-stakeholder conferences and public consultations before the actual drafting started. The constitution was adopted by referendum in March 2013.
- Tunisia aimed at achieving participation through a representative Constituent Assembly composed of 217 members elected through a closed list proportional representation (PR) system. There were special guarantees for the representation of women, leading to a 27 per cent share for women among the Constituent Assembly members. In addition, at least one person under the age of 30 had to be included on each list, and less populated regions were slightly over-represented.<sup>10</sup> Political party representation also led to both secular and religious forces being represented. Representatives of the former regime were mainly excluded. Where broader participation is concerned, it was mainly left to the different thematic committees within the Constituent Assembly as well as to the individual members to conduct further consultations. In January 2014, the constitution was adopted by the Constituent Assembly, exceeding the required two-thirds majority.
- Nepal re-launched its constitution-making processes in 2013 by holding elections to a new Constituent Assembly in November. Nepal has pledged ‘to formulate a new Constitution by the Nepali people themselves’ (article

63 (1) of the Interim Constitution) ensuring representation to ‘women, Dalits, oppressed communities/indigenous groups, backward regions, Madheshis and other groups’ (article 63 (4) of the Interim Constitution). In addition to a representative Constituent Assembly, participation is to be achieved through public consultations on a draft constitution. The scope of such consultations is not yet defined. Furthermore, the Interim Constitution provides the possibility to submit contested provisions to a referendum. The new constitution has to be passed by the Constituent Assembly by either consensus or a two-thirds majority.

- Libya set the course for its constitution-making process, agreeing on election legislation in 2013, with elections to the Constituent Assembly taking place in February 2014. Libya also considered ‘representativeness’ when deciding on the composition of the Constituent Assembly Commission, in particular guaranteeing an equal number of members to the three regions of Libya—Tripolitania, Cyrenaica and Fezzan.<sup>11</sup> The Constituent Assembly is supposed to draft the constitution within four months and the draft is then to be submitted to a referendum.<sup>12</sup> To what extent there will be public outreach is not yet clear. There are demands by civil society groups and informal initiatives but no clear mandate for the Constituent Assembly—or any other body. The ambitious time line will make comprehensive public participation difficult.<sup>13</sup>

These five examples can help us to reflect further on participation, representativeness and their challenges. Though there are many intriguing issues, only three will be examined further here. Who should participate? What determines representativeness? And what role for participation?

### **Who should participate?**

Who is to participate is closely linked to the question of whose interests are considered relevant for the constitution-making process. In many cases, there is a demand for a representative set of people to participate and the expectation that this will contribute to including the various interests represented in society. However, the question of which criteria of identity or conviction are singled out to establish representativeness remains. ‘Ordinary citizens’ (whoever that is) as well as women are almost always among the groups considered relevant today. Who else is considered relevant very much depends on the context—as well as on the perspective of those who assess relevance.<sup>14</sup> There can be disagreement as to which groups should be represented as well as who within the groups should be included.<sup>15</sup>

Nepal and Libya both had to provide answers to the question ‘who should participate?’ in 2013. Both put the prime focus for ensuring participation in the composition of the main drafting body. Debates about participation and representation show not only which interests are seen as relevant, but also how interests are weighted, for instance, how much weight is given to the interests of women. Furthermore, they demonstrate that very often participation and representation are decided on the basis of political



necessity, not necessarily political conviction. In particular, representation in the main constitution-making body can be contentious because of the assumption that the composition of the body will have an impact on the future content of the constitution.

- In Nepal, inclusive constitution making was one of the demands of various popular movements and of the Comprehensive Peace Agreement. In 2012, Nepal's inclusive, 601-member Constituent Assembly (CA) was dissolved without a new constitution being promulgated. There have been several assessments of the reasons why constitution making was not concluded. According to many observers—this author disagrees—a main reason for the failure was the size and inclusiveness of the CA. In particular, the united stance of representatives of Madheshis from the south and of Janajatis (indigenous people) in respect to certain federalism-related issues was seen as a factor that complicated and in the end derailed the process. Therefore, in 2013, in preparation for the elections to a second CA, there have been debates on reducing the size of the CA by reducing the number of seats awarded based on the proportional system<sup>16</sup>—the main instrument for establishing inclusiveness. On 14 March 2013, based on a 'consensus' among the political parties, the president issued an Order to Remove Obstacles and in fact amended the constitution, reducing the number of PR seats from 335 to 240.<sup>17</sup> This decision triggered criticism by women and other groups who were likely to see their representation dwindle. In the end, the method for election to the CA was restored to the one used for the 2008 CA. Elections in November 2013 were again for a 601-member CA, with 335 seats awarded based on the PR system and quotas for various groups. Nevertheless, political parties seem to be making attempts to limit the effectiveness of the in the new CA. The representation of women is lower than it was in the 2008 CA and lower than that aimed at in the constitution. Political parties respected the quotas for other groups, but made sure to choose new faces from the proportional lists, and there has been outspoken scepticism towards caucuses within the CA, including the women's caucus. The previous CA caucuses had allowed groups to organize across parties. In particular, the Indigenous Peoples' caucus and the women's caucus had crossed (or questioned) the party line. In addition, there are demands for the party whip to be introduced for constitutional questions.
- In Libya,<sup>18</sup> based on the Constitutional Declaration, the Constituent Assembly was supposed to be elected by the General National Congress (GNC). Shortly before the elections to the GNC in 2012, the Constitutional Declaration was amended so as to provide for the direct election of Constituent Assembly members. During 2013, the electoral law for the Constituent Assembly elections was developed. The shift to direct elections for the Constituent Assembly was mainly meant to appease representatives of the Cyrenaica region, who were not satisfied with their representation in the GNC. The guarantee of direct elections and equal representation of the three regions within the Constituent Assembly managed to ensure relatively smooth GNC elections.<sup>19</sup> The size and the composition of the Constituent Assembly carry several historical connotations.<sup>20</sup> Among other things this means that the (distinct) interests of

the three regions are considered equally important, and thus all shall have equal weight within the CA, irrespective of population size.<sup>21</sup> In addition, within the share of each region, some seats were reserved for groups that otherwise might not find representation. It reserved 10 per cent of seats for women and two seats each for the Tebu, Tuareg and Amazigh communities. Because of this under-representation in respect to share of the population, there have been calls for an election boycott.<sup>22</sup> In the February 2014 elections, 13 of the 60 seats remained vacant because of boycotts (two) and security concerns at some polling stations (11). A second attempt at voting also had to be ended because of violence. It was then argued that it should be left to the General National Congress to decide the fate of the vacant seats.<sup>23</sup>

### **What determines representativeness?**

Representativeness is based on the idea that a certain person is representative of a group and its interests. This would lead to the assumption that when representatives of various groups manage to reconcile different interests and come to a consensus, this consensus is also acceptable to the different groups. In many cases, different political parties—or elites of the groups—are deemed to represent the different groups or interests. If this is the understanding, then it also follows that negotiations between the leadership of political parties or between the elites of groups can lead to reconciliation of different interests.<sup>24</sup> However, recent constitution-making processes demonstrate that, while a group of representatives such as political parties and their leadership might be representative in respect to certain issues, they might not be so in respect to others. The dividing lines on issues determine representativeness. Moreover, if there is a lack of representativeness it is no longer guaranteed that the political parties or elites can generate support for a compromise within their constituencies.

- In Nepal, political parties differ on the forms of government. On this issue it is likely that consensus-building mechanisms that include the leadership of the various parties can come to an acceptable agreement. The major dividing lines on the issue of federalism are not necessarily between political parties, but are to some extent within political parties. In this case, consensus-building mechanisms that can be considered representative with respect to the forms of government might not be representative in respect to the stances on federalism. An agreement between party leaderships might be acceptable on the forms of government, but not necessarily on federalism.
- In Tunisia, the main political parties represented different groups within the spectrum from secular to (moderately) Islamist. They also represented different views on the forms of government. An understanding between the leaderships of the parties was therefore able to produce agreement on both issues.

## What role for participation?

Even though participation is broadly accepted as a principle, there are still different notions about the role it should play, and in particular to what extent participation should influence concrete decisions about the constitution. Should participation inform the experts or the leaders (and be disregarded if expedient), or should the popular will that emerges through participation be binding?<sup>25</sup> The answer to this question will influence the design of the constitution-making process, but the outcome is not entirely design-dependent. For instance, even if a referendum is considered to be advisory, proponents of the outcome might argue that the referendum result is ‘democratically obliging’ if not legally binding.<sup>26</sup>

2013 has seen a number of cases which have highlighted that, almost irrespective of the role participation officially should have and irrespective of how far the draft constitution might reflect the aspirations of the people, participatory constitution making is bound to fail if powerful political elites are not part of the constitutional process and consensus.<sup>27</sup>

- Fiji passed a constitution in 2013, but it was not the draft that had been prepared by the Constitutional Commission based on public participation. Prime Minister Frank Bainimarama, who had initially promoted the participatory constitution-making process, rejected the draft as unacceptable and stopped the process. The Attorney General’s Office prepared a new one, which was then presented to the people for comment.<sup>28</sup>
- In Zimbabwe something similar happened: the main political leaders, Robert Mugabe and Morgan Tsvangirai, and their parties reviewed the draft established with public participation.<sup>29</sup> The draft was then adopted in the reviewed version through a referendum.<sup>30</sup>
- In Nepal, several political leaders were alarmed at the ‘independence’ of the last CA<sup>31</sup> and are trying to strengthen party control over the new CA.
- In Libya, there have been long discussions on the role of the constitutional commission/committee/assembly in relation to the parliament (GNC) and additional public consultations. Initially an appointed, largely non-political, constitution-drafting body was supposed to have an advisory role with the main decisions to be taken by the GNC, but this shifted to a directly elected (political but not party-based), rather independent body. It will have to be seen how far this body can develop a draft that is acceptable to the political elites, the various communities and the public in general.
- Tunisia managed to arrive at a compromise within the Constituent Assembly. Commentators acknowledge this success but some still argue that more could have been done to engage with those outside of the Constituent Assembly, including the general public, for the sake of transparency and ownership.<sup>32</sup>

## Trends in 2013

- Constitution-making processes in 2013 included commitments to participatory and representative features. They illustrate a variety of forms and degrees of participation during the different stages of constitution making. Participation in, and the representativeness of, constitution-making processes created expectations of those who participated that were not always fulfilled.
- 2013 saw the risk realized of the focus shifting to (informal) non-participatory processes when the participatory process seemed to be leading to outcomes that were not supported by the powerful elites, causing public frustration and limiting ownership. Experiences demonstrated that for participatory and representative constitution making to succeed, it is essential to have the buy-in of the powerful elites.
- Participatory constitution making presumes an agreement on the relevance of interests and an understanding of potential dividing lines at the start of the process when decisions on representativeness and participation have to be taken.
- Persons have multiple facets of identity. This said, representativeness is not static but often depends on the issues at stake. Constitution-making processes and in particular consensus-building mechanisms must be flexible enough to adapt participation so as to maintain representativeness.
- The year 2013 presents a mixed picture for participatory constitution making. It shows that the principle is by and large accepted, but that reality is often still different. It also shows that participation and representation can help to reconcile different interests, but that they also add complexity.
- Combinations of representative constitution-making bodies, relatively flexible consensus-building mechanisms and public outreach might provide the tools to enable the process to be responsive to changing understandings of interests and dividing lines, softening the lines between those within and those outside the process.

# National dialogues in 2013

Christina Murray<sup>33</sup>

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National dialogues are not new. Indeed, Yemenis claim them as a centuries-old practice. In recent years, however, they have been used with increasing frequency in a wide variety of contexts. Around the world, national dialogues have been held on tenure security, the environment, health, housing, education and a myriad of other issues, large and small. Many are sponsored by governments and some by civil society or private parties. But it is in political transitions that national dialogues have received most attention. In countries with no or only a very limited history of democracy, they have often raised expectations of democratic reform.

The increased prominence of national dialogues in transitional processes has led to a number of attempts to describe and define them, but, as this account of some of the dialogues of 2013 shows, they resist satisfactory definition. A degree of inclusiveness seems necessary before any process can be dubbed a 'national dialogue'. The term 'dialogue' is usually also intended to signal a desire to move from oppositional politics that reinforce differences and division to a process in which thought is given to understanding different positions and considering the possibility of agreement. In addition, of course, labelling a process a 'national dialogue' carries a certain rhetorical weight politically.

However, national dialogues take many and very different forms and play a variety of different roles, and their success in extending the group of decision makers and enabling more consensual agreements to be reached is, at best, varied.

National dialogues have been elements of a number of constitution-making processes, but their agenda has often been broader. For instance, the Kenyan negotiations that brought the post-election violence of early 2008 to an end took place through the Kenyan National Dialogue and Reconciliation Committee. This committee, which consisted of senior members of the two opposed political groupings, continued to function well into 2013, since the agreed list of items needing attention to secure a lasting peace included not only ending the violence and adopting a new constitution (which was

done in 2010) but also an ambitious long-term agenda extending to, among other things, ‘tackling poverty and inequity ... tackling unemployment, particularly among the youth; consolidating national cohesion and unity measures; [and] undertaking a Land Reform’.<sup>34</sup> It used a variety of formats, from negotiations between party leaders to large, televised meetings on specific issues.

National dialogue has also become a permanent part of Rwanda’s political calendar. Article 168 of Rwanda’s 2003 constitution established the National Dialogue Council, which brings representatives of local authorities together annually with the president to discuss, among other things, ‘issues relating to the state of the Nation, the state of local governments and national unity’. Each year it has chosen a different focus. The theme for 2013 was ‘Rwandan Spirit: Foundation for Sustainable Development’.

In 2013 at least five dialogues were specifically concerned with constitutional change. Three of these—in Egypt, Bahrain and Lebanon—did not achieve their stated goals. In Egypt, the year both opened and closed with attempts to resolve problems through dialogue: in January, Egypt’s National Salvation Front controversially refused an invitation by President Mohamed Morsi to join ten other political parties in the seventh round of an ongoing dialogue on the grounds that its preconditions, including agreement by Morsi to review the (brand new) constitution, had not been met. At the end of the year, in very different circumstances, the pro-Morsi National Alliance to Support Legitimacy coalition called for a national dialogue and, in December, Interim President Adly Mansour brought together about 60 representatives of youth political movements and members of the Constituent Assembly, which had drafted amendments to the 2012 constitution, in a session to discuss the controversial political road map that had been announced in July by the general commander of the armed forces at the time, Abdel Fattah al-Sisi, in July. The meeting failed to reach consensus.

The National Dialogue in Bahrain, started in 2011 after uprisings inspired by those in Tunisia and Egypt, and involving meetings between the crown prince and opposition leaders, has been a stop-start one from the outset, with disputes about the agenda and concern among opposition groups about the detention of their members. In September 2013, the main opposition party withdrew and, against a backdrop of increasing violence, the government formally suspended the Dialogue early in 2014. (By April 2014, despite ongoing discussions, a promised ‘revamped’ Dialogue had not gotten off the ground.) Lebanon’s Dialogue was equally unsuccessful in 2013. National dialogue talks among party leaders in Lebanon in 2006 that aimed to resolve political tensions failed. In 2010, President Michel Suleiman formed a new National Dialogue Committee of the political parties, primarily to discuss defence issues. In June 2012, the Committee agreed to the Baabda Declaration, in which the parties committed themselves to ‘laying the foundations of stability’ and so on, and searching for political means to secure such goals. But then the talks stalled and none took place in 2013. They resumed only in 2014, despite an ongoing boycott by Hezbollah and others. Hezbollah’s arms and its role in the war in Syria were critical stumbling blocks.

Two 2013 National Dialogues stand out as particularly significant in facilitating processes of democratic transition and constitution making—those in Yemen and Tunisia.

On 25 January 2014, Yemen's 565-member National Dialogue Conference (NDC), representing a wide spectrum of Yemeni social and political constituencies and including almost 30 per cent women and 2 per cent youth, formally ended with agreement on a lengthy 'Outcomes Document' including over 1,800 recommendations and a road map for extending the transition period, drafting a new constitution and moving to a federal system. The NDC was a step on a road map for Yemen that was brokered by the Gulf Cooperation Council with United Nations (UN) involvement. It was the focus of Yemen's political transition in 2013. Originally intended to last only six months, when agreement on a handful of key issues proved elusive, it was prolonged to allow what were, in effect, parallel negotiations among the major political stakeholders.

In a statement to the UN Security Council on 27 September, Jamal Benomar, Special Adviser to the Secretary General, said of the Yemen process:

The National Dialogue Conference—the first-ever exercise of its kind in Yemen, indeed the region—has given rise to a peaceful, inclusive and meaningful dialogue amongst diverse actors, bringing in new actors to the political process such as youth, women, civil society representatives, Ansar Allah (Houthis) and the *Hiraak* Southern Movement. The Conference has not only provided the opportunity for delegates from previously marginalized groups to participate in serious and deliberative discussions about the future of Yemen, but also has convened former parties to conflicts to negotiate solutions and address historical grievances in order to move towards a brighter and democratic future for all Yemenis.<sup>35</sup>

At much the same time, Tunisia held the national dialogue that provided the basis for agreement on the constitution adopted on 26 January 2014. But the Tunisian dialogue was very different from the Yemeni one. Its trigger was the political crisis in the country that was brought to a head by the assassination of opposition leader Mohammad al-Brahimi in July 2013. It was set up by the 'Quartet', four respected and influential civil society organizations, and, rather than including a broad spectrum of people, its participants were leaders of the main political parties whose agreement was necessary for a new constitution to be adopted in the elected Constituent Assembly. The first step, brokered by the Quartet, was political agreement on three issues: the replacement of the government by a technocrat/caretaker government whose members would not be allowed to stand in the next elections, an independent electoral body, and a time frame for completing the constitution. The Dialogue took considerably longer than the month initially agreed and it was a stop-start process. It was ultimately successful and, shortly after the new constitution was ratified, a caretaker government, which is to lead the country to the next elections, took over.

Successes such as those in Yemen and Tunisia have contributed to calls for national dialogues elsewhere. Thus, by the beginning of 2014, there was talk of national

dialogues in other places. In his Independence Day address in October 2013, Nigeria's President Goodluck Jonathan announced a national dialogue and set up a committee to plan it. Some Libyans, frustrated by their stagnating transition, are planning a national dialogue, parallel to the constitution-writing process that is entrusted to an elected Constitution Commission. Haitians are discussing holding a dialogue to resolve the political deadlock linked to their constitutional arrangements. Even the Sudanese government has announced a national dialogue to reach a consensual vision to resolve the country's crises.

In each of these cases, a national dialogue that acknowledges the importance of including all relevant parties and is serious about finding common ground could provide an important starting point for tackling difficult political problems. But the same type of process is unlikely to work in each case. Many other issues need attention as one considers how to structure each one. What are the goals? What preconditions are necessary for success? What types of processes have been used in the past? Are there traditions of problem solving that might be drawn upon? How formal should the process be? How flexible should it be? Who should be there (and how should this be decided)? What should be on the agenda? What mechanisms are best for resolving different agenda items? How important is it that decisions will be implemented? And so on.

The contrast between the Tunisian and Yemeni processes illustrates the importance of the design of all aspects of a process very well: dialogue Yemeni-style would not have resolved Tunisia's problems, and dialogue Tunisian-style might not have worked in Yemen.

Yemen's huge, comprehensive NDC was more inclusive than a negotiating forum like the Tunisian talks could ever be. The agenda was broad, covering a wide range of political, social and economic matters. The plenaries were televised and the press attended working group meetings so that, through the media, Yemenis saw men and women, young and old, with starkly opposing views, together, discussing the nation's future. And, of course, it brought those people together, often people who had been on opposing sides and who had suffered immense losses in the many conflicts of the past decades. During the period of the NDC, Yemen remained relatively politically stable; the NDC concluded with a set of recommendations that included a plan for continuing the transition through 2014 agreed by most (although not all) of the significant stakeholders. The prospect of constitutional change and elections in Yemen remains real.

But Yemen's NDC was not designed to resolve the kind of problem that confronted Tunisia. It was not a meeting of people who could implement agreements that would permit resolution of the problems facing the Tunisian Constituent Assembly. It was assembled to allow Yemenis to agree to a new vision for the country. In addition, a large conference is inevitably accompanied by a degree of inflexibility. Among other things, it requires rules, including decision-making formulae. In the case of Yemen, decision making was linked to blocs of participants, and it would have been very difficult to change the composition of the NDC en route to allow those representing the views of the majority of southerners to join, had that been desired.



By contrast, the Tunisian National Dialogue was narrowly focused and designed to respond to what seemed insuperable stumbling blocks to satisfactory agreements in the National Constituent Assembly. The participants were elected leaders of political parties. It was not a public affair and it was decidedly a process of negotiation, effectively mediated by influential local actors. It was inclusive in the sense that this was not President Zine Ben Ali's old guard: there were new faces compared to three years before. But it was not inclusive in the sense of ensuring that all marginalized groups had a seat at the table. Most importantly, however, in an environment of growing disillusionment with the transition process, it managed to retain credibility and it achieved its goal of producing the kind of agreement that permitted the constitutional transition to move forward.

The differences between the Yemeni and Tunisian dialogues demonstrate how important it is to pay attention to other elements of each process as well. Yemenis were obviously aware of this. Although the agenda and an indication of the participants was set out in the document entitled 'Implementation Mechanism for the Transition Process in Yemen', planning for the NDC took a further six months of often difficult discussion.

However, emphasizing the differences between the Yemeni and Tunisian processes and the importance of the particular design of each national dialogue process should not detract from the value of inclusive dialogue. Indeed, the simple act of calling some part of a constitution-making process a national dialogue may raise expectations and thus itself contribute to making transition processes more inclusive.

# Women and constitution building in 2013

Melanie Allen<sup>36</sup>

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Constitutional reform offers a unique opportunity to transform the fundamental structure of governance through the incorporation of women's rights, the language of inclusion, and the creation of institutions and processes that protect and promote the substantive equality of women and men. As there has been a surge in constitution building in the last few decades, the recognition of women as members of the constitutional community<sup>37</sup> and expansive approaches to the role of the state in achieving gender equality have increased. Constitutions can thus be transformative tools for change, advancing women's equality and agency in the political, economic and social spheres. Conversely, constitutions can also entrench the status quo and become impediments to the realization of substantive equality.

Constitution drafters look to their international and regional legal obligations as well as current trends in the constitutional articulation of rights, and to their own legal, political and cultural heritage, when drafting constitutions. During this period of complex, high-stakes negotiations, drafters are influenced by the lobbying of citizens, pressure from international actors, and the political calculus that will position their parties favourably following the enactment of a constitution.

This chapter focuses on three constitutional processes from 2013—in Tunisia, Egypt and Zimbabwe.<sup>38</sup> Tunisia and Egypt passed new constitutions in January 2014, following contrasting paths to new dispensations after the ousting of their long-time authoritarian leaders, Zine El Abidine Ben Ali and Hosni Mubarak, respectively. Zimbabwe enacted a new constitution in May 2013, the culmination of a long, drawn-out process that began with a power-sharing agreement in the aftermath of violently contested elections in 2008.

## Tunisia

*‘...behind this successful story of revolution we find a group of women who spent their lives fighting in order to maintain their rights—not only to have more rights but just to maintain those we had ...’*

— Amel Grami, *Tunisian academic*<sup>39</sup>

Tunisia has long been at the forefront of women’s rights in Western Asia and North Africa (WANA), with some of region’s most progressive laws and comparatively higher levels of female participation in public life. The position of women in Tunisia began to transform following independence from France in 1956. The founder of the republic and first president, Habib Bourguiba, embarked on a project of national development and modernization, which required women’s participation. Bourguiba introduced the Personal Status Code (PSC) addressing family law in 1956. The PSC abolished polygamy and repudiation,<sup>40</sup> gave women new rights related to divorce and established a minimum age for marriage.<sup>41</sup> The PSC had a transformative effect on the agency of women within the family. A comprehensive family planning programme introduced in the 1960s allowed women greater opportunity to participate in public life, reducing the fertility rate from 7.2 children per family in 1965 to 2.06 by 2008.<sup>42</sup> An arguably even greater contribution to the advancement of women was the emphasis placed upon education. In 1958, universal, free education was introduced, becoming compulsory up to age 16 in 1991. In 1956, 96 per cent of women were illiterate,<sup>43</sup> but by 2012 the literacy rate for young women aged 15–24 years was 96.1 per cent.<sup>44</sup> Political rights were advanced when women gained the right to vote in 1957 and to seek office in 1959.

Women were active and visible participants in the protests that ousted Ben Ali in January 2011 and in the popular mobilizations that followed. Citizens from across the political spectrum, from liberal secularists to conservative Islamists, made a range of social and economic demands that emphasized dignity, freedom and justice. As the process to develop a new constitution coalesced, the body responsible for creating the framework for elections<sup>45</sup> decreed that elections to the National Constituent Assembly (NCA) would be on the basis of proportional representation and that party lists must have parity between male and female candidates.<sup>46</sup> Although political parties placed men first on the party lists in almost all cases, the party list quota led to the election of 59 women (27 per cent), 40 of whom are from the Islamist Ennahda party.<sup>47</sup>

With 37 per cent of the vote and 89 seats in the NCA, Ennahda obtained a plurality of seats but lacked a majority.<sup>48</sup> Thus it was necessary for the party to compromise on a number of key issues, including women’s rights and the articulation of women’s role in society, as was evident in the evolution of the text of the constitution over the course of four drafts.

When the first draft of the constitution was released in August 2012, observers and more liberal members of the NCA were alarmed by language describing women’s role as ‘complementary’ to that of men in the family.<sup>49</sup> This seemingly confirmed the fears of those who accused Ennahda of intending to impose a conservative social vision, eroding

the rights of women in the process. On 13 August, Tunisia's National Women's Day, thousands of women and men, ranging from members of civil society organizations and progressive political parties to ordinary citizens, gathered in Tunis to protest against the provision. The media reported widely on this and on demonstrations occurring in other parts of the country. International criticism was swift and severe. Following widespread opprobrium, this language was dropped, as was the specific reference to the rights of women in the context of protecting family structures.<sup>50</sup> The final provisions not only affirm equality between women and men, but commit the state to 'protect[ing] women's accrued rights',<sup>51</sup> a critical commitment ensuring that 'women's rights as they stand today are now considered to be a minimum standard that the state cannot retreat from and that it can only work to improve'.<sup>52</sup> The role of women in the public and private spheres is further strengthened by article 46: 'The state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains'. Article 40 affirms and advances women's gains in economic life through recognition of work as 'a right for every citizen, male and female'. Article 46 goes on to commit the state to eradicate violence against women.

The provision on women's political participation places Tunisia firmly at the forefront not only in WANA, but globally, through a commitment that 'the state works to attain parity between women and men in elected assemblies'.<sup>53</sup> Although the language could be interpreted as articulating an aspiration rather than an obligation,<sup>54</sup> the inclusion of parity rather than a (lower) quota sets a high bar: Tunisia joins Bolivia and Ecuador as states with constitutional commitments to parity in legislatures at the national and/or sub-national levels.<sup>55</sup> Article 34, in which 'the state seeks to guarantee women's representation in elected bodies', is a weaker commitment as it does not aim for a specified minimum level of representation, but its inclusion is nonetheless a positive signal. Gender-inclusive language is extended to article 74 which establishes eligibility criteria for presidential candidates.<sup>56</sup>

However, gender equality advocates still have concerns about ambiguous language regarding the role of religion. Article 1 indicates that Islam is the religion of Tunisia and article 6 establishes the state as the guardian of religion and the state's role in the 'protection of the sacred'. However, article 6 goes on to guarantee freedom of conscience and belief, and the free exercise of religious practice, and prohibits *takfir*.<sup>57</sup> It remains to be seen how these ambiguous and potentially contradictory provisions will impact on legislation, policy, and judicial interpretation. Article 46 may serve as a bulwark against potential encroachments on the rights of women.

The compromises made evident by the evolution of the provisions related to women and religion and the ambiguities in the text underscore different understandings of the shared revolutionary slogans of freedom, dignity and justice. To liberal and secular gender equality advocates, defending the civil nature of the state and the gains women have made in the past six decades is a priority. To Islamists, freedom and dignity correlate to the ability to practise their brand of faith openly, free from government harassment.<sup>58</sup> Monica L. Marks observes that 'many Ennahda supporters ... saw January 2011 not just as a democratic revolution but as a revolution for religious freedom'.<sup>59</sup> The continued

ability of the main political actors to compromise and accommodate will determine whether there is room in the new Tunisia to contain multiple understandings of *freedom, dignity and justice*.

## Egypt

*'They [the family] would turn off the Internet, so I went to the street. They forbade me to go to the street, so I used the phone. Women in Egypt have more spirit to persevere.'*

– *Asmaa Mahfouz, co-founder of the April 6 youth movement*<sup>60</sup>

Egyptian women were also active participants in the protests that ousted President Hosni Mubarak, with a young woman's<sup>61</sup> call to action via a YouTube video credited with sparking the mass mobilizations.<sup>62</sup> However, Egypt's transition has been far more halting than Tunisia's, characterized by deep divides between the main political players—the military and the Muslim Brotherhood—and a 'winner-takes-all' approach to politics and constitution building.

Under the 1956 constitution of Egypt's second president, Gamal Abdel Nasser, women were granted the right to vote and stand for election. Nasser sought to reform Egypt's Personal Status Law (PSL) in the 1960s, but was blocked by conservative clergy. Mubarak later introduced some 'minor reforms' to the PSL related to divorce, alimony and child custody.<sup>63</sup> In the late 1980s the government renewed its focus on the education of girls. By 2012 the adult literacy rate for women was 66 per cent<sup>64</sup> but was a more promising 86 per cent for female children.<sup>65</sup> Violence against women continues to be a major concern. In the private sphere this takes the form of domestic violence, female circumcision<sup>66</sup> and, more rarely, honour killings, while in the public sphere women frequently face harassment. During the period of mass protests in 2011 and 2012, women were subject to coordinated attacks and also to the notorious 'virginity tests' by the military,<sup>67</sup> an effort to discredit and demoralize protesters.

During the politically tumultuous period since 2011, Egypt has convened a Constituent Assembly (CA) and a Constitutional Committee (C50), and passed two constitutions. The representation of women in the constitution-making bodies was very low, reflecting the low priority assigned to principles of inclusivity by the major political actors. After Mubarak's ousting, new electoral laws scrapped the 64 seats reserved for women in the People's Assembly.<sup>68</sup> For the subsequent November 2011–January 2012 parliamentary elections, political parties were only required to include one woman on their district candidate lists.<sup>69</sup> As a result, only 1.8 per cent of the new members elected were women, with appointments by the Supreme Council of the Armed Forces raising the percentage to 2.2.<sup>70</sup> It was not surprising, therefore, that the first CA, appointed by the parliament, had only five women members out of 100. Islamist politicians dominated the parliament and the CA, with the CA coming under intense criticism for its lack of diversity. Nonetheless, President Morsi took the draft constitution to a referendum in December 2012, where it passed with 64 per cent approval (although voter turnout was a low 33 per cent). Following Morsi's ousting in July 2013 and the suspension

of the constitution, Acting President Adli Mansour issued a constitutional declaration appointing the C50, marginalizing Islamist parties and appointing only four women (8 per cent). The C50 draft was put to a referendum and passed in January 2014.

The 2014 constitution, in spite of having few women among its drafters, offers stronger protections for women's rights than the 2012 and 1971 constitutions. Principles of equality and non-discrimination have been strengthened through new language in article 53, which establishes equality before the law and bars discrimination based on sex, and in article 11, which inter alia commits the state to the 'achievement of equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of' the constitution. Women's right to pass on Egyptian citizenship to their children is recognized in article 6.

The constitution includes a number of provisions to protect women and girls from harmful practices. Foremost is article 11, which includes a provision that commits the state to 'protect women from all forms of violence'. In article 80, the state commits itself to provide 'care and protection' to children from sexual exploitation, defining 'child' as anyone under the age of 18. Child marriage is still common, with a strong relationship to economic status; the rate of child marriage is 37 per cent for the poorest 20 per cent of Egyptians, but only 8 per cent for the richest 20 per cent.<sup>71</sup> Thus article 80 may strengthen efforts to enforce the marriage age of 18 and prevent its being lowered,<sup>72</sup> providing protection against early marriage, especially to poor girls. Another provision that may provide additional protection to girls is article 60, which states: 'the human body is inviolable and any assault, deformation or mutilation committed against it shall be a crime punishable by law'. While female circumcision was banned in 2008, this provision constitutionalizes the prohibition of such practices, which, while on the decline, are still widespread.<sup>73</sup>

There is also progress in the promotion of the political participation of women, although overall the commitments are not robust. Article 11 ensures that women will be represented in the national legislature, a provision not included in the 2012 constitution. However, the weak language fails to establish a minimum level of representation, instead committing Egypt to an 'appropriate' level of representation of women, an undefined term. The same provision only goes so far as to guarantee women's right to hold or be appointed to public and senior management positions within the state and to judicial bodies without discrimination, rather than establishing a minimum level of representation that must be achieved. Stronger language is found in article 180, which directs that 25 per cent of seats in the local councils be reserved for women.

The full participation of women in public life on equal terms with men may be undermined by the provision in article 11 that discusses women's ability to strike a balance between family duties and work requirements. No such 'balancing' in duties is imposed upon men, resulting in an inherently biased provision that may have discriminatory outcomes.

As in Tunisia, gender equality advocates also have concerns regarding the role of religion in law making and interpretation. Article 2 from the 2012 constitution is maintained, establishing that ‘the principles of Islamic Sharia are the main sources of legislation’.<sup>74</sup> But, in a positive development for legislative and judicial independence, the provision of the 2012 constitution which required that the Council of Senior Scholars from al-Azhar<sup>75</sup> be consulted in matters relating to sharia has been dropped from the new constitution, with the preamble reaffirming the rulings of the Supreme Constitutional Court as the reference for interpretation of the principles of sharia, which could allow for more progressive judicial interpretation.

However, the primary human rights challenge in Egypt has not been a lack of legislation, but rather the gap between the law and the lived reality of women and men. One expert, noting the absence of meaningful enforcement mechanisms in the new constitution, the lack of judicial reform measures, and the continued centralization of state authority, is reserving optimism that the additional rights and protections granted in the new constitution will be fulfilled.<sup>76</sup>

## Zimbabwe

*‘While we applaud the successful end to the constitution-making, this ushers in the more difficult exercise of constitution-building, ensuring that rights become reality for women.’*

– Netsai Mushonga, gender equality activist<sup>77</sup>

Unlike Tunisia and Egypt, in Zimbabwe the long-time leader, Robert Mugabe, still occupies the presidency, having won the disputed July 2013 presidential election with almost 62 per cent of the vote.<sup>78</sup> These elections<sup>79</sup> were the first to take place under the new constitution, approved in a March 2013 referendum with 94 per cent voting in favour.<sup>80</sup> The previous ‘Lancaster House’ constitution had been in force since independence in April 1980. Negotiated by the United Kingdom and the leaders of the freedom movements that fought colonial occupation, it only referred to women in a brief provision concerning citizenship and did not prohibit discrimination based on gender or sex. Later amendments added gender and sex to the non-discrimination provision, but included a clause exempting customary law and practices.<sup>81</sup>

In 2008, opposition leader Morgan Tsvangirai challenged Mugabe in the presidential election, winning 48 per cent of the vote to Mugabe’s 43 per cent, triggering a run-off election. This unleashed a wave of political violence and intimidation, causing Tsvangirai to pull out of the election re-run. Mediation between the main political factions<sup>82</sup> resulted in the Global Political Agreement (GPA), a power-sharing arrangement that established a road map for the development of a new constitution.

The Constitution Select Committee of Parliament (COPAC) was established to lead the constitution-building process. COPAC was made up of 25 members of parliament (MPs), with women comprising 32 per cent.<sup>83</sup> Although the process faced many challenges and delays, COPAC led an extensive public consultation campaign, held two

all-stakeholder conferences, and released two drafts for public comment. Women led vigorous lobbying and public participation campaigns, with the umbrella organization Women's Coalition of Zimbabwe (WCoZ) at the forefront.<sup>84</sup> The high-level Group of 20, made up of members of COPAC, gender activists, academics and the national women's machinery, was formed to monitor and lobby for gender equality issues during the constitutional review process.<sup>85</sup>

The efforts of gender equality advocates yielded results in the new constitution, which embodies a significant leap forward in the constitutional recognition and protection of the rights of women in Zimbabwe.<sup>86</sup> Advocates anchored their demands in the international legal instruments on gender to which Zimbabwe is a party.<sup>87</sup>

Gender-inclusive language is used throughout the constitution, and gender equality is recognized as a founding principle.<sup>88</sup> In addition to equal treatment, women's 'right to equal opportunities in political, economic, cultural, and social spheres' is recognized<sup>89</sup> and the chapter on national objectives mandates that the 'State must promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men'.<sup>90</sup> An extensive non-discrimination clause prohibits discrimination based on, *inter alia*, sex, gender, marital status and pregnancy.<sup>91</sup> Crucially, in a country in which there is a wide gap between the law and the lived realities of women, affirmative action measures are recognized as both lawful and required by the state in article 17(2) and article 56(6).<sup>92</sup> A wide range of economic and social rights are found in chapter 4, including the right to food, water,<sup>93</sup> education,<sup>94</sup> health care<sup>95</sup> and a healthy environment,<sup>96</sup> though these are all subject to the limits of the resources of the state, and are to be progressively realized rather than serve as guarantees. A positive point for those seeking to claim these rights is that chapter 4 (articles 44–87) expressly allows the courts or any other body interpreting the rights contained in it to 'consider relevant foreign law'<sup>97</sup> and indicates that interpreting bodies 'must take into account international law and all treaties and conventions to which Zimbabwe is a party',<sup>98</sup> thus allowing the courts to look to other countries' experiences in the progressive realization of economic and social rights as well as hold the state accountable to its international obligations in spite of resource limitations.

The commitment to women's equal political participation is equivocal in that a strong general commitment is not fully supported by the institutional design of the parliament. Article 17 ('Gender Balance') is found under chapter 2, 'National Objectives'; while this section may not be justiciable and may instead serve the purpose of guiding state action, article 17(1)(b) offers a categorical objective of gender equality in political institutions: 'The State must take all measures, including legislative measures, needed to ensure that (i) both genders are equally represented in all institutions and agencies of government at every level; and (ii) women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament.'

However, the structure of the Senate and National Assembly is not fully (and the latter only temporarily) conducive to this objective. The Senate is composed of 80 members,



60 of whom are elected on the basis of proportional representation, with party lists that must alternate between women and men and must be headed by a woman.<sup>99</sup> ‘Zipper’ party lists headed by women are effective mechanisms for ensuring women’s representation in the Senate, although, as 18 seats are reserved for chiefs and the National Council of Chiefs, this formula is not guaranteed to yield equal representation. However, it is the design of the National Assembly that causes greater concern.<sup>100</sup> For the life of the first two parliaments<sup>101</sup> the National Assembly comprises 270 members: 210 members directly elected in first-past-the-post (FPTP) elections and 60 reserved seats for women elected through a list PR system.<sup>102</sup> After ten years, it is implied that the 60 reserved seats for women will be removed, with no additional constitutional mechanisms to ensure that women will maintain at least this 22 per cent level of representation. It is unclear why the reserved seats for women are time-limited. But the generally positive effect of the quotas in parliament on representation has been clear: after the July 2013 elections, women’s representation rose from 20 per cent to 35 per cent,<sup>103</sup> although it must be noted that the number of women directly elected fell from 32 in 2008 to 25 in 2013.<sup>104</sup> Women reported that their parties did not view them as ‘winning’ candidates and that they were ‘shunted’ to reserved seats or to the Senate lists, and therefore the number of women standing for constituency seats (as opposed to reserved seats) fell.<sup>105</sup> Additionally, it is difficult to increase the representation of women in FPTP systems without reserved seats.<sup>106</sup> This raises concerns about whether women will be able to maintain their levels of representation in parliament after the reserved seats expire.

A feature of the new constitution that will have an immediate, practical impact on the lives of women is the treatment of customary law. As mentioned above, the Lancaster House constitution included an exemption clause which stipulated that the non-discrimination provisions were not applicable in matters relating to personal and customary law.<sup>107</sup> In the new constitution, it is explicit that all legal practices and customs must align with the rights enumerated in the constitution, as set out in article 2 and reaffirmed in article 80(3).<sup>107</sup> Almost 69 per cent of the population lives in rural areas,<sup>109</sup> and especially outside of urban centres, ‘traditional courts and systems ... often provide the first line of access to justice for women’.<sup>110</sup> The alignment of customary laws and practices with the rights of women protected in the constitution should serve to empower women in the social and economic spheres, especially with regard to family life.

A number of other provisions related to economic and social life aim to empower women, such as equality in marriage and family life<sup>111</sup> and access to reproductive health care.<sup>112</sup> An estimated 68 per cent of women have experienced some form of gender-based violence in their lifetime,<sup>113</sup> making the provisions relating to the prevention of domestic violence<sup>114</sup> and the right to ‘freedom from all forms of violence from public or private sources’<sup>115</sup> essential for women to participate fully in all spheres of life.

The constitution also establishes several new independent commissions, including the Zimbabwe Gender Commission.<sup>116</sup> The Gender Commission has a broad mandate to ‘do everything necessary to promote gender equality’, including, inter alia, investigate possible violations of rights; receive and take action on complaints from the public;

conduct research relating to gender and social justice; make recommendations on law and policy; and recommend affirmative action programmes.

## **Conclusion**

The cases considered here each represent, to varying degrees, positive national advances in the constitutional recognition and promotion of the rights of women. Women vigorously asserted and defended their visions for the future of their states and societies, though in Tunisia and Zimbabwe a greater level of public participation was possible. In Tunisia and Egypt, these visions were not always congruent, with secular and religious values competing for ascendancy, but the mere fact that these debates were occurring in public spaces represents a political advance in both contexts.

While these achievements are critical, the difficult work of implementation will determine whether the ideals these constitutions embody, including gender equality, will be realized. An array of challenges to implementation still exist, not least of which is the technical challenge of legislative review to ensure that all existing laws are aligned with the new constitution. Women and men must be sensitized to their rights,<sup>117</sup> so that an informed citizenry can demand their fulfilment from the local level up, including within the realm of tradition and customary law.

An additional challenge emerges when there is a return to ‘politics as usual’: activists lose momentum and alliances forged during the constitution-building process fade; and women politicians and political party members may be sidelined as conventional party politics resumes,<sup>118</sup> contributing to diminished political will to focus on gender issues. This in turn demands that gender equality advocates, whether in civil society, government, political parties or ‘average’ citizens, continuously monitor implementation and hold their governments accountable.

# The judiciary and constitution building in 2013

Tom Ginsburg<sup>119</sup> and Yuhniwo Ngenge<sup>120</sup>

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The global rise of judicial power has been one of the major trends in 21st-century government, as judges have expanded the scope and depth of their decision making. Constitution building is an important arena in which this development is apparent, in three different ways.

First, judges are playing an enhanced role in some constitutional reform processes. This may involve judges as direct participants in the process of drafting (as in Egypt in 2013), or as arbiters of the procedure (as in Nepal for the past several years or Kenya in early 2004). The experience of 1996 South Africa, where the nascent Constitutional Court sent back the first proposed constitution, is often seen as a positive example of the role of judges in constitution-building processes, but this survey of events in 2013 also provides some counter-examples in which judges played a much larger role in constitution building than simply serving as guardians of the process.

Second, beyond their role in constitution making, the scope of judicial power and protections for judicial independence is defined by the constitution, and can be a contentious issue in constitutional design. For example, whether or not to adopt a constitutional court turned out to be one of the major topics in the Vietnamese constitution-making process in 2013. Similarly, questions about judicial design were on the constitutional reform agenda in Tanzania, Zambia, Tunisia and Egypt.

Third, the judiciary played an important role in implementing new constitutions in 2013, as in several sub-Saharan cases discussed below. Judges are often called upon early in the life of the constitution to issue crucial decisions that will set patterns for years to come. They can make the difference between success and failure of the entire constitutional order.

## The Middle East and North Africa

The countries of the Middle East and North Africa continue to struggle with the challenges of institutionalizing the Arab Spring in new constitutions. Egypt and Tunisia finalized their new charters in early 2014, with both documents going a long way towards formally securing judicial independence. But in many ways the greatest challenges lie ahead in both countries.

### *Egypt's turmoil: the judge as president*

Perhaps the most extreme swing in constitutional governance anywhere in the world in 2013 took place in Egypt. As the year began, the constitution adopted in December 2012 with the strong support of the Muslim Brotherhood entered into force, after a tortuous constitution-making process that was hindered at several junctures by the senior judiciary. Yet in many ways the 2012 document reflected a good deal of continuity with Egypt's earlier tradition, in which constitutions enshrined judicial autonomy. President Mohamed Morsi and the Brotherhood were loath to interfere with either the military or the judiciary, and so each of these bodies was allowed to maintain a good deal of control over its own affairs.

As is well known, Morsi's constitution was not to last beyond his brief presidency. The same judges who played a prominent role in the drafting process of 2012, disbanding the first Constituent Assembly and voiding parliamentary elections, continued to block Morsi in some of his objectives. His few months in office became progressively more difficult, culminating in his removal by the army on 30 June 2013. After his removal, the newly appointed chief justice of the Constitutional Court, Adly Mansour, was named acting president, a rare instance of a sitting judge becoming a head of state. Unusually in such situations, Mansour retained his judicial post, but such niceties as separation of powers were set aside during the rapid consolidation of the new regime.

The next few months witnessed a constitution-making process in which judges played a prominent role, holding six of ten seats in the Committee of Experts that proposed the initial draft in August. While the ultimate draft was modified by a broader Committee of 50 in the next four months, the judiciary (along with the military) came out as a strong winner in the 2014 constitutional order, with great independence and little accountability. Judges cannot be removed, and are appointed on the basis of the recommendation of the Supreme Judicial Council, an existing body run by senior judges that is mentioned in the constitution but not defined. The judicial budget is given to the courts in a lump sum. The Supreme Constitutional Court (SCC), which exercises the power of constitutional review, is essentially self-appointing.

The jurisdiction of the military courts, to which ousted President Hosni Mubarak regularly referred civilian legal cases in which he wanted a guilty verdict, was generally similar to that in Morsi's document and prior constitutional text. The constitution allows civilians to be tried before military judges for crimes that harm the armed forces, as defined by law. This might be construed to include, for example, civilian protesters

in Tahrir Square who get into physical or even verbal confrontations with military personnel. Military judges also retain the benefits and status of civilian judges.

The role of Islam in the legal system implicates the courts. All of Egypt's constitutions have retained the same language for article 2, providing that 'the principles of Islam are the main source of legislation'. In practice, this has been interpreted by the SCC, and the preamble to the 2014 constitution makes this clear by stating that the collected rulings of the SCC are the only binding interpretation of article 2. This drafting decision marked a return to Egypt's recent tradition, and a blow to the Muslim Brotherhood's efforts to expand the role of sharia law. The constitution also eliminated a provision that gave the al-Azhar Mosque a consultative role in interpreting Islamic law. Again, continuity with the Mubarak regime seems to be the theme. The overall story seems to be one of a self-governing and self-replicating judiciary, consolidated in a constitution-making process in which a judge served as interim president.

### *Tunisia: judicial autonomy secured in the constitution*

Whereas Egypt's constitution was largely drafted behind closed doors, Tunisia's Constituent Assembly spent most of 2013 continuing to negotiate and finalize the new constitution, finally approved in January 2014. The constitutional provisions on the judiciary were hotly debated at various points in the process.<sup>121</sup> At one point in 2012, the Ennahda party insisted on having a certain number of non-jurists on the constitutional court; this issue led to a total breakdown in negotiations for several months. Later, in early 2014, Ennahda proposed a shift in the power to nominate judges from the Supreme Judicial Council to the Minister of Justice (along with a shift in power of final approval from the president to the government). This led the judges to go on strike. Ennahda backed down, and the final constitution guarantees a fairly extensive degree of independence to judges. Ordinary judges are to be appointed by the president upon proposal by the Supreme Judicial Council; appointments of higher-level judges also require consultation with the prime minister. The Supreme Judicial Council, in turn, is to be composed of two-thirds judges (whereas the Egyptian equivalent is not defined in the constitutional text).

The draft also establishes a Constitutional Court, replacing the earlier Constitutional Tribunal, with jurisdiction over laws before they are promulgated upon request by certain government officials or a parliamentary minority. The Court can also hear claims referred to it from ordinary courts. The Constitutional Court has 12 members, four each appointed by the president, legislature and Supreme Judicial Council; its predecessor had been composed exclusively of presidential appointees.

Tunisia's constitution does not contain a clause about the status of Islam as a source of law. This means that the judiciary is unlikely to be called on to enforce religious norms, as other judiciaries in the region have been. If nothing else this will keep the judiciary away from controversy over contentious interpretations of religious norms.

## Sub-Saharan Africa

### *Judicial decisions and constitution building in sub-Saharan Africa*

In contrast with the Arab region, the judiciary in sub-Saharan Africa (SSA) was not particularly active in processes of constitution drafting in 2013. On the other hand, the role of courts in constitutional implementation was significant, and so can be seen as important from the broader perspective of ‘constitution building’. One key area in which courts were particularly active in SSA was election adjudication, especially in Zimbabwe, Ghana and Kenya.

In Zimbabwe, the Supreme Court (in its first foray sitting as the Constitutional Court under the new constitution) had to determine when, after the dissolution of parliament, harmonized elections were due under the terms of the newly promulgated constitution.<sup>122</sup> In simple terms, the court was being asked to adjudicate on how particular constitutional provisions, in this case those on elections, should be interpreted and implemented. But by coming up with firm rules, the court helped to manage expectations for both government and opposition, allowing them to coordinate their behaviour.

In the Kenyan case of *Odinga & Others v. IEBC & Others*,<sup>123</sup> decided in April 2013, the Supreme Court of Kenya was asked to determine the validity of the March 2013 presidential election that had brought Uhuru Kenyatta and William Ruto to power. To do so, the court had first to decide several incidental questions, key among which was whether the March elections had been conducted in compliance with the provisions of the 2010 constitution. The court’s decision, holding that Kenyatta and Ruto had been validly elected, was respected by all parties, in stark contrast with the election violence of 2007–2008. At least in part, this was due to the significant reforms forced upon the judiciary by the 2010 constitution, which increased the independence and perceived legitimacy of the courts. For example, not only was the chief justice nominated after consultation between President Mwai Kibaki and Prime Minister Raila Odinga, but the panel of judges was also vetted and approved by an independent board prior to their appointment. Had Kibaki unilaterally appointed the chief justice (as he attempted to do) or the entire panel of judges, it is questionable whether Odinga would have complied with the court’s judgement, or even referred the matter to it in the first place.

In the Ghanaian case of *Akufo-Addo v. Dramani Mahama*, decided in August, the issue at bar was similar. Petitioners asked Ghana’s Supreme Court to find that the defendant’s election in December 2012 as president of the republic was invalid. Among the many issues the court had to address was whether the petitioner’s assertion of irregularities such as election officers’ failure to sign results sheets or identify polling stations in certain districts as required by section 49 of the constitution were, inter alia, serious enough to have an impact on the overall electoral intent of the Ghanaian voters, so as to warrant the court’s invalidation of the results. The court answered in the negative and Dramani Mahama retained his office.

While these look like simple cases of administration of electoral justice, the underlying question that all three courts were being asked was whether the constitutions were

being implemented as required. Courts' roles in monitoring implementation make them key actors in the constitution-building process. This assessment is supported by the evolutionary approach to constitution building which sees it as a larger process of change affecting the life of constitutions,<sup>124</sup> beyond simple adoption and promulgation.

### *Constitution building and judicial design in sub-Saharan Africa*

If courts have taken an active role in the interpretation and implementation phase of the constitution-building cycle, the design of the judiciary and its role in the constitutional and political systems have also been key aspects of many draft constitutions that were finalized or released for public consultation across the region. The first draft of the Tanzanian constitution, released in June 2013, proposes a number of important reforms to the judiciary. While maintaining the Court of Appeal, which has functioned as Tanzania's highest appellate court since 1979,<sup>125</sup> the draft also proposes the establishment of a Supreme Court as the highest appellate organ, which will also exercise exclusive jurisdiction over certain disputes arising under the constitution. These would include conflicts between the states of the union especially. According to observers,<sup>126</sup> this is an important development, as it aligns Tanzania's judicial system with those of other member states in the East African Community (EAC) and also provides a neutral forum to resolve disputes over the status of Zanzibar.

Changes to the judicial system are also part of the reformed Zimbabwean constitution, promulgated in 2013, as referenced above. The constitution provides for the establishment of a Constitutional Court, as one of three superior courts of record,<sup>127</sup> with exclusive jurisdiction over all matters relating to the interpretation of the constitution.<sup>128</sup> With this reform, the powers of the Supreme Court, which had hitherto exercised jurisdiction over constitutional issues, will be revoked within seven years following the promulgation of this constitution. This implies that the current Supreme Court will also double as the Constitutional Court, at least until 2020.

It is unclear why this provision was inserted, but we can speculate on the intentions of President Robert Mugabe, who is undoubtedly the biggest beneficiary of this clause. Zimbabwe's new charter is very progressive and generous in its guarantees for judicial independence. Article 180 gives the Judicial Service Commission (JSC)—most of whose members are independently appointed<sup>129</sup>—extensive powers in the process for selecting judges. The JSC receives applications and prepares, vets and recommends a list of candidates from which the president must either make an appointment or veto. Unless s/he chooses to use their veto power—at the risk of a potential conflict with the JSC, should the latter be intransigent in its recommendations—presidential power to 'appoint' is effectively reduced to an administrative formality.

The idea of having the current Supreme Court serve as a newly constituted Constitutional Court for an interim period ensures that any disputes arising from the 2013 general elections (which were predicted to be contentious) would be adjudicated by the current pro-ZANU-PF<sup>130</sup> Supreme Court. In addition, the clause allows Mugabe to serve out

what many consider is likely to be his last term, undisturbed by Constitutional Court judges upon whose loyalties he cannot count because he will have only constrained involvement in their selection process. Why the opposition Movement for Democratic Change (MDC), which is unlikely to benefit from such a clause—at least for the interim period—consented can probably only be explained by the fact that it was part of the political horse-trading through which Zimbabwe’s new constitution was crafted.

In Zambia, the issue of establishing a separate judicial institution with exclusive jurisdiction over constitutional questions was also considered at length in the course of its constitutional reform process.<sup>131</sup> The most recent draft constitution of Zambia, finalized in December 2013, now has a provision proposing the establishment of a separate Constitutional Court with exclusive original and final jurisdiction on all constitutional questions.<sup>132</sup> This proposal is significant in that it would, for the first time, give the judiciary explicit grant of jurisdiction on constitutional questions. With the current constitutional and legal framework mostly silent on the issue,<sup>133</sup> it appears that Zambian courts, like their US counterparts, have been exercising that power on the basis of an expansive interpretation of their judicial function, rather than on any expressed or implied grant of jurisdiction in the texts.<sup>134</sup>

It is unclear how big an issue this was in constitutional debates, but the December draft explicitly prohibited the Constitutional Court from interfering with resource allocation decisions through the enforcement of positive rights. This marks an explicit recognition of an issue that has come to the fore in other countries with socio-economic rights clauses, in which judicial decision making is sometimes criticized for usurping the prerogatives of the legislature. The Zambian draft defuses this criticism.

These developments, in which traditionally common law legal systems are establishing specialized institutions of judicial review, are significant, but not unprecedented in the region. South Africa, Sudan, Uganda and Ethiopia have predominantly common law systems with different variations of this form of judicial review, which is typically seen as a distinctive feature of civil law systems. We thus observe some movement toward convergence in the model of constitutional adjudication.

## **Latin America**

### *Chile: time to redress the illegitimate birth of the constitution?*

Chile continues to be governed by the constitution promulgated by the junta of President Augusto Pinochet in 1980 (albeit with significant amendment), but constitutional reform may be on the horizon soon, as it is part of the platform of newly elected President Michelle Bachelet. One of the areas for potential reform is the role of the Constitutional Tribunal in constitutional protection. The tribunal has traditionally played a fairly minor role in this regard. According to current rules, it can engage in prospective abstract review, deciding on the constitutionality of law, and can also declare a law inapplicable in specific cases. In local legal terms, the tribunal can review writs of inapplicability and writs of unconstitutionality, but not writs of protection, which remain within the



jurisdiction of the Supreme Court.<sup>135</sup> There is no direct access to the Constitutional Tribunal for violations of fundamental rights. The Supreme Court, in turn, has not been perceived as an active defender of constitutionalism.<sup>136</sup> As in many systems in which a Constitutional Court coexists with a Supreme Court, there are occasional conflicts between the jurisprudence of the two bodies. Furthermore, the procedure for constitutional control by the Constitutional Tribunal has been criticized.<sup>137</sup> These criticisms have in turn informed proposals for the role of the Constitutional Tribunal in rights protection to be clarified and enhanced. Proposals have included changes to the composition and powers of the tribunal, as well as a more explicit designation of the tribunal as a rights-protecting body in the new constitution.

## Asia and the Pacific

### *Nepal: courts as the last hope*

Nepal's constitution-making process has been a stop-start one for several years, and in March 2012 the Supreme Court ruled that the term of the Constituent Assembly could not be extended any further beyond 27 May, even if it did not agree on a constitution. When the assembly failed to meet this deadline, the prime minister dissolved it. In March 2013 the chief justice of the Supreme Court became the head of the interim government charged with organizing elections. He stepped down only in February 2014. Also in April 2013, the Supreme Court suspended a law setting up a Truth and Reconciliation Commission, and in January 2014 ruled that it was unconstitutional because it did not meet international standards on a number of issues, including amnesties. This has been a very important political issue in Nepal after the bloody civil war.

Many observers have attributed Nepal's failure of constitution making to an excess of participation, in which many different groups are insisting on self-government units; such a system would risk excessively fragmented authority. Political grandstanding has played a role as well. In the face of these difficulties, Nepal's Supreme Court has played an important role in policing the process of constitution making, emerging as a stopgap source of authority in the face of paralysing political gridlock. In some sense, it provides a kind of technocratic check on, and supplement to, failed constitution-making processes.

## Conclusion

A strong, independent, effective judiciary is increasingly seen as an essential part of a well-functioning constitutional order. The year 2013 saw many examples of the different roles courts can play in constitution building and maintenance of the constitution. For example, resolving electoral disputes in the nascent democracies of sub-Saharan Africa has helped to mitigate potential conflicts that in other circumstances have derailed young constitutions. By articulating the rules of the game and clarifying their application, courts facilitate political competition.

As judiciaries assume a more prominent role in the governance of different societies, they are confronted with new challenges. One such challenge is the occasional demand on judges to serve explicitly political functions—as in Egypt and Nepal, where judges served as interim heads of government during the past year—which might put the image of judicial impartiality and neutrality at risk. In both Nepal and Egypt, the judges in question seem to have acquitted themselves fairly well, though in the Egyptian case they are clearly on one side of a deep partisan division.

Judicial power is enshrined in constitutional texts and sometimes can become a major issue during drafting, as happened in Tunisia. Unsurprisingly, judicial power is not always accepted by all parties as unproblematic. In 2012, for example, the entire membership of Myanmar's Constitutional Council was forced to resign following a case in which it ruled against the parliament, after the parliament began impeachment proceedings. This was followed in 2013 by an amendment to the Constitutional Tribunal law which takes away its power to invalidate legislation.

Finally, it is worth noting that judges sometimes play a negative role in constitution making by triggering a political backlash and demands for policy makers to be insulated from judicial scrutiny. The constitution of Fiji was completed in 2013, four years after Prime Minister Frank Bainimarama abrogated the previous constitution and dismissed the judiciary. Those actions followed a Court of Appeal decision that Bainimarama's 2006 seizure of power was illegal. The 2013 constitution seeks to legitimate the regime, and contains conventional language about judicial independence, as well as the structure of the courts. Crucially, the new constitution seeks to ensure the immunity of the prior government, stating that the immunities granted in a 2010 decree cannot be revoked or amended. This incident reminds us that the expansion of judicial power is not a one-way ratchet, and can be reversed or mitigated.

# Semi-presidential government in Tunisia and Egypt

Sujit Choudhry<sup>138</sup> and Richard Stacey<sup>139</sup>

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## Introduction

In early 2014, both Tunisia and Egypt adopted new constitutions. Both constitutions establish a semi-presidential form of government, in which a popularly elected president shares executive power with a prime minister and government selected by a democratic legislature. The semi-presidential form of government is thus neither a purely presidential system nor a purely parliamentary system, but neither is a system that operates simply as a hybrid of the two 'pure' forms of government. On the contrary, semi-presidentialism's dual executive structure creates a unique power-sharing dynamic within government, and establishes a system of government that must be understood as more than merely the sum of its 'pure' parts. The way in which a semi-presidential system distributes executive power between the president and the government is thus an important factor in whether this power-sharing form of government will succeed.

Semi-presidentialism emerged as a form of democratic government only in the 20<sup>th</sup> century, much later than the presidential and parliamentary systems. Finland and the Weimar Republic are early examples, with semi-presidential constitutions adopted in 1919. Since the end of World War II, the proportion of global democracies that have adopted a semi-presidential system has increased significantly. By the late 1990s, semi-presidential systems accounted for 22 per cent of the world's democracies, and by 2007 this figure had risen to 33 per cent.<sup>140</sup> Semi-presidentialism has been especially prominent among new democracies, especially those emerging from authoritarian government. Of the 52 semi-presidential systems in place today, 15 emerged in Africa following the demise of a dictatorial or colonial system or after internal conflict, and 21 emerged in Eastern Europe following the break-up of the Soviet Union.

There are two questions facing the West Asia and North Africa (WANA) region. The first is why Tunisia and Egypt chose to follow these trends and embrace semi-presidentialism. The second is whether the specific institutional arrangements put in

place by the 2014 Tunisian and Egyptian constitutions are consistent with the reasons for adopting a semi-presidential system in the first place. The answers to these two questions may suggest whether semi-presidentialism presents a promising way forward for constitutional reform in the WANA region, and, if so, how.

### **Why semi-presidentialism?**

A compelling attraction that semi-presidentialism has held for the young democracies of the last 50 years or so lies in the opportunities it creates for enjoying the benefits of each of the ‘pure’ systems of government while avoiding the risks each carries. Twentieth-century experiences of pure presidential systems support the view that presidential government encourages the consolidation of power by populist leaders, undermining the democratic process and frustrating representative and deliberative politics. The rigidity of having a single, fixed-term, popularly elected chief executive reduces both space for, and incentives to, accommodate diverse political interests in the government, and may spur the emergence of autocratic leadership.<sup>141</sup> The lack of legislative oversight or control over the president makes it easier for autocratic and non-accountable governments to emerge. Semi-presidentialism may offset this danger by linking government’s time in office to its performance in the eyes of the legislature, imbuing parliaments with real control over the government.

On the other hand, a long-standing criticism of pure parliamentary systems is that the prime minister and the government are beholden to political parties in the legislature rather than to the electorate. A parliamentary government and its prime minister must retain the confidence of the legislature if they are to survive, and the lack of an electoral mandate outside the confidence of parliament ties the cabinet to parliament rather than to the people.<sup>142</sup> In a semi-presidential system, the directly elected president serves as an agent of the people in government, and stands as a popular counterpoint to parliamentary parties’ influence over the prime minister and cabinet.

The attractions of semi-presidentialism’s dual executive are summarized in the pithy aphorism that political parties get two bites of the cherry. This is so in two different respects, which are set out below.

### ***Two elections***

After the fall of autocratic rulers in Tunisia and Egypt during the Arab Spring, it quickly became apparent that the Islamist parties in both countries (Ennahda in Tunisia and the Muslim Brotherhood in Egypt) were likely to dominate the legislative elections. Unlike other political parties that contested the elections in Tunisia and Egypt, Ennahda and the Brotherhood were founded years before the Arab Spring, had endured authoritarian rule in their respective countries, and had developed party structures and organizational networks. The Islamist parties held an electoral advantage over newer political parties for these reasons. In the first post-Arab Spring elections in October 2011 in Tunisia and November 2011–January 2012 in Egypt, the two Islamist parties did indeed win more

seats in the legislature than the other parties. In both Tunisia and Egypt, all the parties at the constitution-drafting table had a fairly good sense of how the seats would be divided after the coming elections: the secular, centre-left and liberal parties who would be contesting the elections against the Islamists knew that they would be in the minority in the legislature.

In a purely parliamentary system, the chances that the opposition parties would be represented in government, or have a significant voice in policy-making and law-making processes, would be low. In a semi-presidential system, however, where the president must be elected by an absolute majority (after two rounds of voting if necessary), presidential candidates must appeal to a broader political base. While a single political party might be able to dominate the legislature, it may not be capable of winning an absolute majority in a presidential election. A presidential candidate with broader, cross-cutting political appeal—a compromise candidate—is thus more likely to win a presidential election. In a situation where smaller opposition parties are unlikely to win representation in a parliamentary cabinet, they stand to gain from a dual executive system where the president must carry broad appeal.

For the liberal and secular parties in Tunisia and Egypt, the calculation is precisely that an Islamist presidential candidate will not generate sufficient appeal to win an absolute majority in a presidential election. If they are dominated by an Islamist party in the legislature, they may yet be able to present a broadly popular candidate for president and protect their interests in the executive.

For the dominant parties in Egypt and Tunisia, the Muslim Brotherhood (up until July 2013) and Ennahda, the opportunity to win both legislative and presidential elections must have been attractive. Already dominant in the legislature, and in the case of the Muslim Brotherhood also in control of the presidency, they must have felt confident that they had promising prospects of winning a presidential election as well, thus ensuring exclusive control of the executive. For the Islamist parties in the two countries, semi-presidentialism offered two routes to executive power. For secular parties, faced with the prospect of an Islamist party likely to dominate the legislature, semi-presidentialism offered an alternative route to executive power in the form of a popularly elected president whose election requires broad, cross-cutting electoral appeal.

This logic does not explain the outcome of Egypt's 2013 constitution-drafting experience. However, since the 2012 semi-presidential constitution was abrogated and the Muslim Brotherhood was forced underground after President Mohamed Morsi was ousted from power, there was no longer an immediate need for the secular parties to ensure their electoral prospects with two separate elections. Other factors should therefore be considered to explain why semi-presidentialism has remained the favoured system of government in the region. In both Egypt and Tunisia, for example, it is not unimportant that semi-presidentialism has been the system of government for many years. Historical bias towards a system that people are familiar with may have played a role, and in Tunisia in particular, the cultural influence of France, which has operated a semi-presidential system since the 1960s, should not be discounted.

Semi-presidentialism is in some sense the only game in town for the WANA region, offering a middle ground between pure presidential and pure parliamentary systems of government. The pure parliamentary system has little historical or cultural foundation in the region, and, moreover, political conditions in a region dominated by authoritarian presidents for decades are not conducive to parliamentary democracy: party structures are weak, and the parties that do exist have no experience with the parliamentary system. The pure presidential system, on the other hand, holds little appeal both because the spectre of presidential power looms large in the region and semi-presidentialism offers an alternative, and because parties likely to dominate the legislature, anticipating that a compromise candidate with broad electoral appeal might win a presidential election, have sought to ensure access to executive power through the prime minister.

### *Two forms of accountability*

A second reason why semi-presidentialism may be attractive has more to do with the recent history of autocratic leaders than with electoral realpolitik. Semi-presidentialism potentially offers greater government accountability than the pure forms of government, appealing greatly to transitional societies previously cowed by unaccountable chief executives. In both presidential and parliamentary systems, there is only one mechanism through which the chief executive and the government are accountable to the electorate.

A president or his or her party must face voters at the end of their term in office. The success of his or her party's bid for re-election depends on the government's performance, in the assessment of the voters, during the term gone by. This popular, retrospective accountability is high where office-holders can be held directly accountable for their performance.<sup>143</sup> The difficulty with popular accountability is that the voters only have an opportunity to voice their approval or displeasure once every four or five years, at regularly scheduled presidential elections.

The parliamentary system's comparative advantage here is an immediate and rapid response on the floor of parliament to the performance of the executive. A prime minister and his or her government must remain sensitive to the wishes of parliament because their tenure depends on retaining parliament's confidence. Even apart from the possibility of a vote of no confidence and the dismissal of the government, a prime minister's government is far more easily questioned, criticized or censured by parliament in the ordinary course of business than a president's cabinet.<sup>144</sup> In presidential systems, in contrast, the complete separation of the executive and legislative branches and the president's distinct electoral mandate help to shield a president and his or her cabinet from parliamentary scrutiny.<sup>145</sup>

Parliamentary systems thus have high levels of what we term 'responsive accountability', where MPs are able to exercise immediate oversight of the government's actions, and the government must respond if it is to stay in office. The trade-off that responsive accountability carries with it, though, is that it must be exercised by a representative institution rather than by the electorate itself. It is logistically and organizationally

difficult—the transactions costs are high—to test whether a government retains the confidence of the whole electorate between scheduled elections. That task is instead delegated to representatives elected to parliament. While this is a pragmatic approach, the drawback is that it limits the voters' ability to hold the government to account. It is unlikely, for instance, that a disciplined majority party will sanction its own government however poorly it performs, leaving voters having to wait until the next election before they can hold anyone to account. Even then voters cannot hold the government to account directly, since they vote only for members of parliament. Second, when government or opposition MPs remove the government through 'no confidence' procedures, they do so 'with no consideration of voters' preferences'. By removing the government, members of parliament can in fact limit the voters' ability to reward or sanction members of the government perceived to be responsible for policy outcomes.<sup>146</sup>

In sum, parliamentary systems have high levels of responsive accountability, but low levels of popular accountability. By contrast, presidential systems have low levels of responsive accountability, but make up for this with higher levels of popular accountability. Many of the disagreements between proponents of presidential and parliamentary democracy over which form of government is more accountable can be understood as privileging of one of these kinds of accountability over the other.

The attraction of semi-presidentialism to its proponents as a form of government for the Arab Spring countries is that it avoids the zero-sum choice between responsive and popular accountability, because it combines a directly elected and popularly accountable chief executive with a government serving at the pleasure of an elected legislature. This dual executive structure introduces both responsive and popular accountability to the system. If a semi-presidential system is designed so that the government is accountable only to the legislature and not to the president in addition, then parliament will exercise continuous scrutiny over the government during its term, and the voters will hold the chief executive, in the form of the president, directly to account at the end of his or her term in office. The sharing of executive power between the president and the prime minister ensures that the executive is popularly accountable for the president's actions, and responsively accountable for the government's actions.

For post-authoritarian countries like those in the WANA region, where executive accountability has long been non-existent but where there is little experience of meaningful parliamentary democracy, semi-presidentialism's seeming accountability advantages over the pure forms are understandably alluring. These advantages, however, do not flow simply from the adoption of a semi-presidential system. It should be borne in mind that both Tunisia and Egypt were, formally at least, semi-presidential systems for much of the pre-Arab Spring period. The advantages of the semi-presidential system can be realized only if, first, the system is designed in such a way that the president is not able to dominate the prime minister and government. In all semi-presidential systems, as in pure parliamentary systems, the legislature is empowered to dismiss the prime minister and/or the government. In some semi-presidential systems, however, the president is also empowered to dismiss the prime minister and/or government. In these latter semi-presidential systems, the prime minister is accountable to the president

in addition to the legislature, and in effect answers to two masters. Facing the threat of dismissal from the president as well as from the legislature, the prime minister is less likely to act as a check on presidential power than he or she would be if the president were not empowered to dismiss him or her. Historically, the likelihood of a reversion to authoritarian rule is higher when the president has the power to dismiss the prime minister and/or government. Second, the success of semi-presidential democracy depends on factors beyond the design of the system of government. In particular, the independence and competence of the judiciary are important safeguards of the principles of democracy. In addition, semi-presidentialism works better when true multiparty democracy exists and a number of parties are able to meaningfully compete for power in competitive multiparty elections.

### **Semi-presidentialism in Tunisia**

Article 71 of the 2014 constitution of Tunisia provides that:

‘Executive authority is exercised by the President of the Republic and by a government which is presided by the head of the government.’

Article 71 designates the president of the republic as the head of state, while article 89 provides that the government shall be made up of the head of government (the prime minister), ministers and secretaries of state.

The president is elected for a five-year term in universal, free, direct, secret, fair and transparent elections. A presidential candidate must win an absolute majority of votes cast to win the presidency. If no candidate wins an absolute majority in the first round of voting, the two candidates with the highest number of votes must enter a second round of voting. No person can serve more than two terms as president, whether those terms are consecutive or not, and the constitution may not be amended to increase the number of terms a person may serve or to increase the length of the presidential term of office (article 75).

As with all semi-presidential systems, the 2014 constitution of Tunisia goes on to provide that the government is accountable only to the elected legislature—and not to the president in addition (article 95), and that that legislature may vote to dismiss the government and appoint a new head of government through a vote of no confidence supported by an absolute majority of the members of the legislature.

The government is not accountable to the president, and the president has no constitutional authority to dismiss the government. The president may, however, ask the legislature to renew its confidence in the government a maximum of two times during the presidential mandate. If the legislature does not renew confidence in the government, the government is considered to have resigned (article 99).



## Semi-presidentialism in Egypt

Article 114 of the 2014 constitution of the Arab Republic of Egypt sets out the mandate of the president of the republic:

The President of the Republic is the head of state and chief of the executive branch of government.

Article 137 sets out the mandate of the government:

The government is the supreme executive and administrative organization of the state and it consists of the Prime Minister, the Prime Minister's deputies, the ministers, and their deputies.

The Prime Minister heads the government, oversees its work, and directs it in the performance of its functions.

Comparing this arrangement to the 2014 constitution of Tunisia, it would appear that the Egyptian president enjoys greater executive authority than the Tunisian president. The former is both head of state and 'chief of the executive branch of government', while the latter is head of state only. The Egyptian president's relatively greater power to direct the executive is reinforced by article 122, which provides that the president 'exercises presidential authority via the prime minister, his deputy and ministers'. A similar provision in Egypt's 2012 constitution led to confusion about the extent to which the president acts as head of government vis-à-vis the prime minister.<sup>147</sup>

Problems of indeterminacy arise elsewhere in the Egyptian constitution. Article 118 provides that the president must be elected by an absolute majority of votes, but allows that the specific procedures for electing the president may be regulated by law. The failure to constitutionalize the procedures for the election of the president—particularly, for example, whether run-off or second-round elections are to be held in the event that no candidate wins an absolute majority—leaves a great deal in the hands of the legislature. This creates opportunities for manipulation of the electoral laws in order to influence the election of the president.

## Conclusion

The stated advantages of semi-presidentialism over parliamentary or presidential systems lie in the electoral implication that the president will have cross-cutting political appeal, and in the greater accountability that the form offers. While both Tunisia and Egypt have adopted semi-presidential constitutions, the 2014 Tunisian constitution tracks more closely than does Egypt's 2014 constitution the two reasons that are offered to justify semi-presidentialism's comparative advantage. Leaving crucial details of the electoral system to the determination of ordinary law creates the opportunity for dominant legislative parties to construct electoral rules that favour or disadvantage specific parties or people.

Similarly, leaving unclear the division of executive power between the president and the prime minister may lead to conflict and inefficient government.<sup>148</sup> If the power-sharing arrangement is to work, and deliver a comparatively superior mechanism for holding the government accountable, it must at the very least be clear in the text of the constitution which executive powers and functions the president and prime minister are respectively afforded.

# Federalism and decentralization

Cheryl Saunders<sup>149</sup>

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## The issues

Decentralization may take a wide variety of forms, ranging from devolution to federalism. In one form or another, it is a feature of most systems of government. Where decentralization works effectively it offers responsive government that is more closely attuned to local needs, diversity in ideas about policy directions, the stimulus that comes from healthy competition, checks and balances in the public sphere, and opportunities for a much wider range of people to play an active role in democratic life. The nature and extent of decentralization are likely to be affected by demographic divisions, historical practice, the geographic size of a country and its level of economic development. Sometimes these factors pull in different directions, however. A past history of concentration of power and resources at the centre may be an incentive to more extensive decentralization, rather than favouring the status quo. An impulse to decentralize to provide a measure of autonomy to groups that are ethnically defined may be resisted as an encouragement to separatism, real or perceived.

As a key aspect of the system of government, decentralization is likely to require attention in the context of constitution building. Apart from the design of the specific arrangements for decentralization, it is necessary to determine whether and to what extent the constitution should entrench them, bearing in mind the competing values of protection and flexibility. These issues may be contentious, as a threat to vested interests, a perceived challenge to national unity or an additional potential impediment to policy goals. Federalism or other forms of deeply entrenched autonomy may spark particular antipathy, but weaker forms of decentralization can encounter opposition as well. Egypt offers a case in point, where controversy over the election of governors in the constitution of 2014 was ultimately resolved by leaving the issue to be determined by law (article 179).

A federal form of government combines ‘self-rule’ in the sense of a measure of guaranteed local autonomy with a degree of ‘shared rule’ through central institutions.<sup>150</sup> Self-rule requires determination of the number and boundaries of the constituent units of the federation; a division of authority and resources between the centre and the constituent units; and arrangements for governance in each of the constituent units which may (but need not) involve separate constitutions. Shared rule typically involves at least representation of the constituent units in a federal chamber of a central bicameral legislature that has significant powers, in particular in relation to matters of federal concern. Ideally, it involves more, in the interests of ensuring the inclusiveness of the institutions of the central state and strengthening the commitment to the state of all of its component parts. So, for example, the federal design of the state might be reflected in the arrangements for altering the constitution, in the composition of both houses of the legislature, in the arrangements for the election of a president or the membership of a cabinet, in the constitution of the civil service and the armed forces, or in appointments to the court that finally interprets and applies the constitution. Seen in this light, the federal features of a state are inextricably mixed with those of the state as a whole.

There is now considerable world experience with federalism and other forms of decentralization. Standard approaches to federal design often treat as paradigms the United States, with its dualist federal structure, and Germany, with its more integrated approach to the enactment and execution of law. Between these two extremes, however, there is a vast array of other models, developed in response to the circumstances of the state concerned. India, Nigeria, Canada and Switzerland are examples. In some cases, states are effectively federal in design and operation but are not formally so described. Spain is an example, for reasons that can be traced both to ingrained beliefs about the nature of the state and to the manner in which the Spanish autonomous regions evolved gradually over time. The principal lesson to be drawn from these and other examples is that there is plenty of scope to develop arrangements for decentralization that suit the needs of a particular state and its people in the course of a constitution-building process.

### **Developments in 2013**

The rapid evolution of forms of multi-level government both above and below the level of the state in the last decades of the 20th century led to predictions that the 21st century would be a period of ‘federalism rather than statism’.<sup>151</sup> Developments so far have borne out the prediction, if federalism is understood loosely to encompass a range of approaches to decentralization, combining self-rule and shared rule in varying degrees. The trend is evident in 2013, when decentralization was an issue in all constitution-building projects, with results that took a variety of forms.

In some cases the degree of decentralization was relatively light. Egypt and Tunisia are examples. Both their constitutions were drafted during 2013, coming into effect early in 2014. Both recognize local government, but in relatively brief terms towards the end of the constitution, leaving much to be determined by law.<sup>152</sup> In comparative terms, the Tunisian constitution makes more of a commitment to decentralization, recognizing

the principle of subsidiarity (article 134), providing principles for the democratic governance of local authorities (article 139) and establishing a High Council of Local Authorities as a representative body (article 141). Both Tunisia and Egypt go further than the constitution of the Republic of Fiji, however, which came into effect in 2013. Unlike the draft produced in Fiji by the Constitutional Commission,<sup>153</sup> which was scrapped unceremoniously in 2012, the final constitution makes no mention of local government at all, leaving its structure and powers entirely subject to ordinary law.

In some other recent constitutions, provision for decentralization is more substantial, although still falling well short of federation. Zimbabwe and Kenya are examples. The constitution of Zimbabwe, which came into effect in 2013, recognizes the existence of tiers of government (article 5), promotes the ‘fair’ representation of regions in central institutions (article 18), and incorporates a chapter on provincial and local government that acknowledges the importance of devolution in the interests of national unity, democratic participation and the equal allocation of resources (chapter 14). Despite constitutional endorsement of the principle of devolution, however, operational details are left largely to legislation and practice. By contrast, the constitution of Kenya, which came into effect in 2010 and was in its implementation phase in 2013, makes relatively specific provision for the boundaries, structure, operation and powers of county government in a detailed chapter (chapter 11, ‘Devolved Government’), which nevertheless leaves some important matters, including resourcing, to be provided by ordinary law. By 2014, however, Kenyan devolution was encountering some opposition in the course of implementation. At the First Annual Devolution Conference in early April 2014, the chair of the Constitution Implementation Commission was quoted as urging provincial governors to ‘hold firm’ in the face of proposals to amend the constitution to drastically reduce the number of counties.<sup>154</sup>

In at least two countries, demands for effective autonomy by a distinct portion of the population required innovative responses in 2013, neither of which was formally described in terms of federalism. In Tanzania a Constitutional Review Commission, comprising an equal number of representatives from mainland Tanzania and the islands of Zanzibar, presented two draft constitutions to the president, drawing on views expressed by the public. Both drafts proposed a ‘three-tier union’, with separate spheres of government for Tanganyika and Zanzibar and a central Union government with significantly reduced powers.<sup>155</sup> It remains to be seen whether this proposal will be accepted by the Constituent Assembly in the course of 2014. In the Philippines, negotiations were under way throughout 2013 to achieve agreement between the government and the Moro Islamic Liberation Front (MILF) to resolve the long-running, violent conflict in the area of Mindanao. A framework agreement in 2012 foreshadowed a new autonomous entity, the Bangsamoro, in Mindanao. A comprehensive agreement on the Bangsamoro was finally reached in March 2014. Implementation requires development of a basic law by the Moro people and action by the Philippines Congress. While the proposal is said to be consistent with the constitution of the Philippines, a constitutional challenge seems likely.

In addition, in 2013, at least three constitution-building projects aimed for federalism strictly so-called, and in two others it was an issue to be resolved.

In the first category were the Solomon Islands, Nepal and Yemen. In the Solomon Islands, the 2013 draft of a constitution for the Federal Democratic Republic of the Solomon Islands described a 'federal system of government' as a more 'suitable political system' for the country, provided for three spheres of government, and divided powers and financial resources between them. Under this draft, each of nine states would have its own constitution and its own institutions of government, including state courts. A Continental Congress and Eminent Persons Advisory Council met in joint plenary session to review the draft early in 2014. Discussions are continuing. In Nepal, a new Constituent Assembly was elected to finalize the work of the previous assembly, whose term ended in 2012. One of the major unresolved issues before the previous CA was the structure and design of a federal system, in compliance with the requirement in the interim constitution to restructure the state as a 'progressive, democratic, federal system' (article 138). Federalism remains contentious in some quarters, however, and it remains to be seen how the issues will be resolved in the new assembly, with its different majorities.<sup>156</sup> In Yemen, the NDC that met from early 2013 finally agreed to establish a federal state. Both the number of regions and the division of resources remained unresolved, however, and while a subsequent process agreed to the creation of six regions, this remains a contested issue.<sup>157</sup>

In two other constitution-building processes, in South Sudan and Libya, federalism is a possibility but the issue is still unresolved. In South Sudan constitution building has been impeded by conflict, causing further delays in the work of the National Constitutional Review Commission. The 2011 Transitional Constitution foreshadows some form of decentralized government but both federalism and the form of federalism are contentious, for ideological and practical reasons. In Libya, where constitution building was still in its early phases in 2013, the issue of federalism divides Benghazi and the east from the rest of the country and will be one of the principal matters for decision by the Constituent Assembly.

## Reflections

The experience of constitution building in 2013 has confirmed decentralization as one of the key features of a contemporary system of government, although one that still has a lower profile than the other two critical sets of issues: the design of the institutions of the central state and the protection of human rights. Most of the constitution-building projects canvassed here have taken place in states that are divided along ethnic or religious lines, which accounts partly, although by no means solely, for the interest in decentralization. Collectively, these cases testify to the variety of the forms of decentralization, ranging from limited provision for devolution in Egypt to the extensive autonomy for Zanzibar proposed in Tanzania to the asymmetry of the proposal for autonomy in Mindanao. Whatever the degree of decentralization, the experience of 2013 confirms the trend to provide some constitutional protection for

it: the constitution of Fiji is now atypical in this regard. On the other hand, as the examples of Egypt and Zimbabwe show, constitutional provision for decentralization is sometimes cast in general terms, leaving many matters of substance to be determined by ordinary law.

Where a relatively specific framework is provided for decentralization, as in the case of Kenya, for example, the system may be indistinguishable from federalism, except in matters of degree. One effect of the move to constitutionalization of these arrangements is to make the border between federal and non-federal forms of the state even less distinct than it was before. Nevertheless, one marked feature of 2013 is the number and range of constitution-building projects for which a so-called federated state is a *sine qua non* or at least a serious goal. It remains to be seen, of course, whether federalism ultimately is secured in these states and, if it is, what form it will take. The arguments on either side are familiar. The case for federalism or deep regional autonomy has typically been pressed most strongly by territorially defined communities with a historical identity and a sense of grievance against the central state, which may be fuelled by a variety of factors, as the very different circumstances of the Solomon Islands, Yemen and Nepal show. The potential for better governance through federal arrangements generally has been a secondary consideration. This may help to explain the focus on the symbolism of the number and delimitation of regions in Nepal and Yemen, for example, at the expense of substance, which is or should be a cause for concern. Opposition to federalism has sometimes been practical, pointing to problems of capacity and cost. More often than not, however, it has been ideological, based on assumptions about the nature of a state and the implications of federalism for the accepted understanding of national sovereignty. Where there is an existing constitution, as in the Philippines, these arguments have the potential to feed into questions about whether regional autonomy can be secured without constitutional change.

Most constitution-building processes in recent decades have emphasized the importance of public participation and broad inclusion of interested parties. The cases from 2013 canvassed in this chapter are no exception. Their common interest in decentralization, however, offers an opportunity to reflect on whether and, if so, how the dynamics of decentralization have a bearing on the processes that are followed. Three conclusions can be drawn. First, not surprisingly, where decentralization occurs within the context of a unitary state, with no pre-existing defined regions, the process involves no participation of regions as regions. Second, however, even in this case, the political process may result in a degree of *de facto* regional representation through the emergence of regional parties, as occurred with the Madhesi parties in Nepal. Third, where regions can be identified before the constitutional moment occurs, they are likely to play a structural role in the constitution-building process. Thus in the Solomon Islands a majority of the members of the Constitutional Congress are nominated by the respective provincial governments.<sup>158</sup> The Constitutional Review Commission of Tanzania comprises an equal number of representatives from the mainland and from Zanzibar.<sup>159</sup> And in Yemen a group comprising an equal number of representatives from the north and the south of the country was appointed towards the end of the national dialogue process to resolve

the vexed issue of the final number of regions in the federalized state.<sup>160</sup> More work is needed to examine such processes of regional representation and how it can be harnessed to produce positive outcomes.

Some important questions about the substance of decentralization were also highlighted by the experiences of 2013. One is the extent to which the constitution mandates decentralization. Where the constitution provides relatively little detail, the implementation phase is likely to be prolonged and vigilance is likely to be needed to ensure that decentralization occurs in an appropriate form. A second question concerns the depth of decentralization and, in particular, the degree of regional autonomy. This involves more than the familiar issues of the distribution of power and resources. Central power is enhanced and decentralization diminished if regional boundaries can be altered and new regions created without regional consent, or if the centre is given authority to intervene in regional affairs when things go wrong. This latter issue presents choices that may be critical to the effectiveness of decentralization. Central power to intervene undermines regional responsibility and can be abused or misused. On the other hand, regional self-government demands a level of capacity that may be lacking in the immediate aftermath of a constitution-making process. In the absence of a central power to intervene, the case for progressive implementation of decentralization is strengthened, bringing problems of compliance of its own.



# The military and constitutional transitions in 2013

Sumit Bisarya<sup>161</sup>

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*'The army, the people: One hand!'*

**Tahrir Square protesters' chant, January 2011**

*'Enabling the Defense Forces to participate in the national political leadership role of the State'*

**One of the six basic principles of Myanmar's 2008 constitution<sup>162</sup>**

## Introduction

Civil-military relations have been described as 'the neuralgic point of democratic consolidation'.<sup>163</sup> Where the military retains tutelary powers not generated by democratic means or maintains 'reserve domains' of policy making, democracy is undermined.<sup>164</sup> As Zoltan Barany concludes from his comparative study of 27 country contexts in times of transition, 'democracy cannot be consolidated without military elites committed to democratic rule and obedient to democratically elected political elites'.<sup>165</sup> It follows that no account of democratizing transitions in 2013 can be complete without consideration of the interaction between the military and democratically elected civilian leaders.

Due to the unique nature of the military, and in particular its monopoly on the use of force, careful consideration needs to be given to military interests when understanding what drives constitutional transitions in those countries where the military enjoys a de jure, or de facto, role in governing the nation.

From Myanmar/Burma to Kenya, Thailand to Egypt, and Fiji to Chile, the role of the military has been a central item on the constitutional agenda in 2013. Here I focus on developments in two of these cases—Egypt and Myanmar.

## **Military reform and the constitution**

For the leaders of the ongoing reforms in both Myanmar and Egypt, the transitions have an explicitly democratizing objective.

In order to progress towards a situation where all players agree that ‘democracy is the only game in town’,<sup>166</sup> it is necessary to eliminate any ‘reserve domains’ of policy making not subject to democratic control. While some degree of autonomy will always be necessary, for reasons both of specialized expertise over decision making and of genuine national security concerns, the boundaries of autonomy should be defined by the democratic civilian authorities, through the constitution, legislation and policy, rather than by the armed forces. In sum, military organizations must be subject to civilian control, and the civilians who control the military must be subject to the democratic process.

In terms of constitutional analysis, we turn first to provisions of civilian oversight over the military in order to understand the ‘partial regime’ of democratic military transition while seeking to incorporate a broader understanding of the historical and political contexts in which these provisions arose, and in which they must operate.

### **Myanmar background: national unity and the military**

Myanmar is an ethnically diverse country where (generally) ethnic minorities are territorially concentrated in a series of border regions, while the centre is predominantly of Burman ethnicity. The independence constitution of 1947 provided for a right to secession for the Chin, Shan and Kachin ethnic peoples after a period of ten years within the Union of Burma.<sup>165</sup> This historical right to secession has not been forgotten, in particular during armed struggles between ethnic groups and the state military, and it is fair to say that the country has never achieved a state of coherent national unity.

In 1958 the military stepped into politics for the first time, forming a caretaker government for two years, doing a fair job of restoring law and order, and performing well in managing the economy. This brief intervention in politics had three long-lasting effects germane to our discussion here: first, it gave the military leadership the confidence that they could manage government; second, it provided the initial opportunity to broaden a military supplies store into a dominant economic force; and, lastly, it reinforced the military’s perception that it alone is capable of safeguarding national unity—a perception which has continued to underpin military policy to the present day.

This brief snapshot of the birth of Burma facilitates our reading of the 2008 constitution. National unity and territorial integrity are primary concerns of the document, from the preamble and basic principles to structural elements, including relations between the centre and the states/regions. The other central theme is a leadership role for the military in ensuring unity and holding the country together.

### *The 2008 Myanmar constitution*

To briefly detail the role of the military in the constitutional framework: 25 per cent of seats in both Union and regional legislative assemblies and executive bodies are reserved for the military, nominated by the commander-in-chief. The commander-in-chief also selects the ministers of defence, home affairs and border affairs, all of whom can only be removed with his permission. The electoral college system which elects the president ensures military control of at least one out of the three most senior civilian positions in the government, that is, at least one of the two vice-presidents if their candidate does not win the presidency itself. The 25 per cent parliamentary quota, coupled with a 7 per cent constitutional amendment threshold, gives the military a veto on constitutional change. The National Defence and Security Council (NDSC), the majority of the members of which are military officials or persons owing their job to military nomination, is the most powerful executive body under the constitution and a convener of the most powerful officials within the administration, and is given a central role in foreign and domestic policy. This military-dominated body appoints the commander-in-chief. The NDSC must be consulted before the president can declare a state of emergency, following which extraordinary powers pass to the commander-in-chief, who cannot be held accountable for their exercise—including, in the case of an emergency threatening the unity of the country, the entire sovereign power of the state. Lastly, the military has the ‘right to independently administer and adjudicate all affairs of the armed forces’.<sup>166</sup>

Thus, in sum, the military exerts considerable influence in politics and enjoys complete autonomy over its own affairs. It is seen as an institution apart from the civilian government, a ‘sole patriotic force’, with the unique power and capacity to ensure political leadership and national unity.

### *Reform of the constitution*

In July 2013, to the surprise of many, the parliament announced the formation of a Joint Committee for Review of the Constitution (JCRC) to examine possible changes to the constitution, including through the collection of public submissions. The JCRC report, however, is clear in its finding that the leadership role of the military is not to be subject to revision.<sup>169</sup>

Like most developments in Myanmar, the situation is not as clear-cut as it would seem. In 2013, Commander-in-Chief Senior General Min Aung Hlaing suggested publicly that ‘the participation of the armed forces in political life will be reduced’.<sup>170</sup> This echoed similar sentiments made by Defence Minister Hla Min in 2012, as well as my own discussions with ruling party MPs in October 2013. The explicit sentiment was that the 2008 constitution was the right document for the context at that time, but as the context changed, the role of the military should also be open to review.

These intimations have found their way into the ongoing constitutional reform process. Subsequent to the JCRC, the parliament established an ‘Implementation Committee’ to prepare a constitutional amendment bill. Despite the findings of the JCRC report, the

speaker has asked the new committee to consider how ‘the present role of the military in the [parliament] should be reduced to bring it in line with democratic practice’.<sup>171</sup>

However the amendment process unfolds, drastic changes to civil-military relations should not be expected. Narcis Serra describes seven stages<sup>172</sup> through which military transitions progress, normally over a course of several years, if not decades, from military control of political power (first stage) to democratic civil control of the armed forces (final stage). Myanmar has been rooted firmly at the first stage for many years, although, judging from the reforms which have taken place, the credible by-elections in 2012 which saw the re-entry of the National League for Democracy into formal politics, and the remarks of influential and powerful figures such as Shwe Mann and others, this is changing. However, Serra’s staged process is instructive for two reasons.

First, there have been no successful military transitions which moved at one stroke from military control over politics to civilian oversight of the military. Chile, Spain and Portugal are all successful examples of how progress can be made incrementally in a manner which does not destabilize reform. Second, in the stages described by Serra, loosening of political control comes well before a reduction of organizational and operational autonomy.

If democratic transitions are to progress, the military needs to perceive that it remains in control of the pace of reform and that (i) its economic interests are protected, (ii) its hands will not be tied by civilian leaders should it perceive genuine threats to national unity, (iii) it retains a role of national prestige and (iv) it will receive some degree of immunity from any potential prosecutions. This should not preclude important discussions and debates in other sectors; indeed, increased local autonomy, the electoral system and the system of government are all on the agenda of the Implementation Committee. However, how far these reforms are able to progress will depend on the extent to which the ‘winners’ from such reforms—whether it be ethnic groups, the National League for Democracy or Aung San Suu Kyi as an individual—are willing to accommodate continued constitutional protections for the military’s interests.

## **Egypt**

The birth of the Egyptian Republic was midwifed by a military coup, and military leaders have played a prominent role in Egyptian government ever since. If General Abdel Fattah al-Sisi is elected Egypt’s new president he will be the fourth to be drawn from the ranks of the armed forces, with Mohamed Morsi’s brief incumbency the only exception. It should not surprise us, therefore, that in terms of the Arab Spring transition, from the moment army generals refused to fire on the Tahrir Square protesters, through the numerous constitutional declarations issued by the Supreme Council for the Armed Forces, to the decision of General al-Sisi to stand for president in 2014, the Egyptian military have never been far from centre stage during the post-Arab Spring transition. This influence has predictably been reflected in the constitutional framework.

### *The 2014 constitution of Egypt*

From the text alone, there is little which would give the military direct power over government policy making outside the sphere of security. There is complete protection, however, for the military's autonomy as a reserve domain alongside the state administration, and outside civilian control, with enough scope for involvement in politics should any threat to that autonomy arise.

There are several safeguards to ensure that autonomy remains intact. The minister of defence is the commander-in-chief, and is appointed from among the armed forces' officer corps, and for the first two presidential terms the Supreme Council of the Armed Forces must approve this appointment. Military trials await anyone who falls foul of the vaguely worded proscription of 'crimes that represent a direct assault against its officers or personnel because of their performance or duties',<sup>173</sup> ensuring that criticism, or even discussion, of the conduct of the armed forces is off limits.

Importantly, the National Defence Council, a previously moribund institution<sup>174</sup> reactivated by the Constitutional Declaration of 2011, protects the autonomy of the military while enabling it to intervene in civilian policy areas should the need arise. The majority of the Council's members are from the military, and it is the exclusive locus for any discussion of the military budget. Its mandate covers 'methods of ensuring the safety and security of the country', which can be as broad as the military wishes—in the past issues such as food supply and economic restructuring have been 'securitized' to bring them under the domain of military policy.<sup>175</sup>

These provisions have been commented on extensively elsewhere.<sup>176</sup> However, to understand the full relation of the constitution to the military, it is important to look more broadly at the constitution in the context of how Egypt's public administration functions.

The Egyptian military has not sought an active role in politics for a long time,<sup>177</sup> preferring instead a deal of accommodation consisting of an exchange of loyalty and non-interference in politics for autonomy over its organizational affairs, the scope to maintain and develop its vast economic interests, and the prospect of appointment to lucrative civilian positions after retirement. This tacit deal—loyalty in exchange for benefits and autonomy—has resulted in a system of patronage which cuts Egyptian democracy off at the knees. During the debates surrounding the constitution, for example, one strong demand from reformists was to allow governors to be elected, rather than appointed by the president, but the constitution replicates the provision of the 2012 constitution in leaving the issue to legislation. Since the 1990s, between 50 and 80 per cent of the country's governors have been drawn from retired military personnel.<sup>178</sup> In August 2013, the government announced 25 new governors, of which 17 were from the military.<sup>179</sup> Governors appoint their deputies, directors and other local government civil servants, which leads Yezid Sayigh to make a conservative estimate that over 2,000 former military personnel are employed in local government.<sup>180</sup>

While the constitution did not go as far as constitutionalizing the appointment process, it did not constitutionalize the election of governors either, which makes it unlikely that a parliamentary majority would have the will or power to take this system apart. Indeed, the spokesperson for the ‘Committee of 50’ indicated that it would be unsuitable for border governorates, or those where security is an issue, to have elected governors<sup>181</sup>—symptomatic of the way in which the securitization of a broad range of issues (in this case the selection of governors) allows military involvement in civilian domains and strengthens the web of patronage at the heart of Egypt’s public administration.

The civil service is another example of how the constitutional structure perpetuates the patronage-for-loyalty exchange. The constitution provides that the president alone appoints civil service personnel, with neither a requirement for meritocratic competitive selection nor an independent civil service commission to oversee the process. Former military officers are found throughout the civil service, and at all levels. This provides senior officers with post-retirement career tracks and financial security, both through an additional salary and through opportunities for rent-seeking in areas such as land, tourism and natural resource administration.

In short, in terms of the role of the military the constitution provides for a return to ‘normal authoritarian times’.<sup>182</sup> Should any coherent reform-minded political opposition form and gather enough support to realize the democratizing demands of the Tahrir Square protesters, they would have to restructure the civil-military accommodation arrangement perpetuated by the 2014 constitution. Increased civilian control would threaten the sprawling web of patronage, and the constitution provides enough scope for the military to step into politics when it sees that its interests might be at risk.

## **Concluding thoughts**

The issues complicating the civil-military relationship in Myanmar and Egypt are by no means limited to these two contexts, but are symptomatic of modern-day military transitions; I include here patronage networks as part of an accommodation deal for loyalty, economic interests, and the securitization of a broad range of civilian policy areas, as well as the traditional interests of autonomy, prestige and immunity from prosecution for past crimes. If one accepts that the nature of the military means that transition to civilian control has to be negotiated rather than dictated, replacing the existing arrangements with legitimate, democratic methods should be a key consideration for would-be reformers. A measure often suggested in Egypt, for example, is raising the comparatively low military salaries to compensate for the loss of the opportunity for post-retirement patronage.

Narcis Serra proposes several factors which can impact on the military’s acceptance of the reform process, including external influences (e.g. participation in regional alliances), coherent government action, the behaviour of key political actors, legitimizing democracy, and the existence of internal conflicts.<sup>183</sup> While all are relevant to both Myanmar and Egypt, I will close with some words on the last two.

The partial regime of military transition cannot be dissociated from the overall progress to democracy. Corruption, poor delivery of government services and a non-inclusive approach to decision making will undermine the credibility of the nascent political system, making assertion of civilian control over the military an impossibility.<sup>184</sup> Should the National League for Democracy come to power in the 2015 elections in Myanmar, there may well be lessons to be learned from the way in which the government of Mohamed Morsi in Egypt allowed public opinion against it to swell.

Finally, the existence of internal armed conflicts provides the military with ready-made reasons for postponing reform and allows the securitization of a broad area of policy, again making the assertion of civilian oversight impossible. In this regard, should both the Islamists and the secular reformists wish to pursue democratization in Egypt, channels of political dialogue need to be open between the two camps, rather than a continued campaign of low-level violence waged by the Muslim Brotherhood, which only strengthens the military's hand. In this regard, it will be interesting to observe the approach of the one confirmed opponent to General al-Sisi in the presidential elections, Hamdeen Sabahi, towards the Islamist camp.

With regard to Myanmar, the key to sustaining the momentum for reform will be a sustainable resolution to the ethnic conflicts, reflected in constitutional amendments which institutionalize the results of otherwise fragile peace agreements.

# The outlook for 2014

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What do the years 2014 and beyond hold in store in terms of constitutional transitions? First, constitution building is likely to continue to be important to societies not just as a state-building exercise but also as part of a nation-building endeavour. It is notable that in the aftermath of many of the Arab Spring uprisings, a new constitution was called for before anything else: a change of government was not enough without a fundamental revision of the rules of the game and a chance to open up a discussion on what the nation should stand for. With the continued expansion of supranational organizations, increasing demands for stronger local autonomy and a growing disillusionment with politics and government in established democracies, debates and conflicts over how nations are governed, what nations stand for, and the relation between the citizen and the state will continue to result in calls for review of the constitutional framework.

The (non-exhaustive) list in the introductory chapter included 18 countries which witnessed extensive efforts to rewrite their constitutions, or write new constitutions, in 2013. The list of countries in 2014 is likely to be as long if not longer. Countries such as Yemen and Libya will seek to advance processes commenced in 2013, while new countries will initiate constitution-building processes (as this review goes to press, Thailand is the latest country to do so). While the outcome of none of these processes is clear, resolution of some of the challenges outlined in our selected themes from 2013 will be central to the debates.

As the development of mobile technology, social media and other user-generated online information networks continues to change the way billions of people access information and connect with each other, the clamour for increased involvement in decision making will ensure that expectations for participatory constitution-building processes remain high. How to meet these expectations will be the challenge for those designing these processes. For example, in places such as Libya and Yemen, security presents massive obstacles to public consultations.



Similarly, ensuring that constitution-making bodies are representative has already presented challenges for processes in Tanzania and Libya, among others. In Libya certain groups have boycotted the process over demands for higher representation, whereas in Tanzania disputes over the selection of Constituent Assembly members from civil society are creating doubts over the future of the process.

Women will have to continue to fight for fair representation on constitution-making bodies. In Yemen, for example, the Constitution Drafting Committee did not achieve the 30 per cent quota for women set just a few months earlier by the NDC outputs: the 17-member committee included only four women. Given that the representation of women in the Myanmar parliament is under 7 per cent, it is likely that there, too, the body tasked with reviewing the constitution, a parliamentary committee, will be lacking in female membership.

Despite these challenges, constitutions are likely to feature improved protections for women's rights compared with previous years. However, as chapter 3 makes clear, implementation of those rights should not be taken for granted.

A national dialogue as a constitution-building mechanism may not be on the agenda of many processes in 2014 but will remain an attractive option for future constitution-building processes in divided societies. One remarkable aspect of the Yemen process is that competitive elections have yet to take place following the revolution, yet in general the public has exhibited unusual patience with the transition process, including the extension of the NDC beyond its deadline, which has resulted in further postponement of elections. A successful outcome for the Yemen transition process may lead other countries to look at the Yemeni NDC as a possible model.

The trend for judicial power to be extended and for judges to be involved as actors in the constitution-building process itself will ensure that questions over the design of the judiciary will play a major role in 2014 constitutional transitions. For example, as this review goes to press, the process of appointing judges in Nepal has been thrown into controversy as the parliament and judicial council tussle over their respective powers under the interim constitution, and this is sure to affect the way in which the new constitution will provide for the process of appointment to the judiciary.

In terms of semi-presidential forms of government, there seems to be a possibility in Nepal that the new constitution will adopt semi-presidentialism, either immediately or after a set amount of time, although the all-important division of powers is yet to be agreed upon. Another example of a country where semi-presidential government is high on the constitutional reform agenda is Ukraine, where the constitutional reform process following the recent upheaval will need to resolve a semi-presidential structure that has seen the country oscillate between premier-parliamentary and parliamentary-presidential forms of government depending on the shifts of power between parliament and president. Creating a balance in the sharing of powers in the split executive that stands the test of changing tides of power will be a critical step in providing a constitutional solution to the problems faced by Ukraine.

Vertical power sharing will also be high on the agenda in Ukraine, as it is in numerous other countries from Tanzania to Libya, Nepal to Yemen and Myanmar to Trinidad and Tobago. In many of these countries there will indeed be no new constitution without a workable consensus on how power will be shared between the centre and the regions or states. In Kenya the government and people will continue to struggle with the implementation of devolution as envisaged in the 2010 constitution, and in Somalia the 2012 provisional constitution creates a federal republic, but what that is actually to look like is still being determined. Indeed, there is perhaps no issue as central to global constitution building in 2014 as decentralization and federalism.

Finally, the role of the military in constitutional transitions will be interesting to watch across the globe. How much change will the military allow to the Myanmar constitution? What will the role of the military be in a Sisi-led Egyptian constitutional order? We will follow with close interest the plans of the Thai military for the transition they have instigated, and, while the spectre of military government may have long passed in Chile, President Michelle Bachelet has indicated that she would like to review the constitution to remove some of the vestiges of the deal made between the incoming civilian and outgoing military governments at the time of transition.

We at International IDEA are conducting ongoing research on all these issues and look forward to disseminating comparative knowledge resources on many of the issues above during the coming year.

# Annex I: Timelines in ten countries

This annex provides chronological outlines of the major events relating to constitution-building processes in selected countries. Further information, including the primary source documents referred to in the timelines, can be found in the country profile or virtual library sections of our online information portal for the constitution-building community, <<http://www.constitutionnet.org>>.

## Egypt

30 November 2012	Constitution approved by Constituent Assembly
15–22 December 2012	Referendum approves constitution with 64% of the vote, and voter turnout of 32%
26 December 2012	Constitution signed into law by President Morsi
3 July 2013	President Morsi removed from power. Chief Justice Adly Mansour becomes interim president. 2012 constitution suspended
8 July 2013	Constitutional Declaration sets out new constitutional process
20 August 2013	Expert committee of 10 produces recommendations for amendments to the 2012 constitution
1 September 2013	Committee of 50 established by presidential decree to review draft constitution
3 December 2013	Draft constitution completed and presented to president
14–15 January 2014	Referendum approves constitution with 98% of the vote, and 39% turnout
18 January 2014	Constitution signed into law by Interim President Mansour

## Tunisia

6 February 2013	National Constituent Assembly (NCA) opposition member Chokri Belaid is assassinated, further polarizing the political atmosphere in Tunisia
22 April 2013	Third draft of constitution produced by NCA
1 June 2013	Fourth draft of constitution produced by NCA
June/July	Disagreements, in particular over the role of religion and relations between executive and legislature, lead to establishment of a consensus committee
25 July 2013	NCA opposition member Mohammad al-Brahimi is assassinated. Opposition boycotts NCA and deliberations on the constitution are suspended
16 October 2013	Establishment of national dialogue to resolve deadlock. Opposition insists on resignation of government
4 November 2013	National Dialogue suspended over disagreement on identity of interim prime minister
14 December 2013	Key breakthrough as parties agree on Mehid Jomaa as new prime minister
3 January 2014	Constitution debate recommences in NCA
26 January 2014	NCA approves constitution with a vote of 200 to 12, with 4 abstentions

## Myanmar/Burma

14 March 2013	Parliament approves a proposal to review constitution for possible amendments
25 July 2013	Joint Committee for the Review of the Constitution (JCRC) of 109 members of parliament commences work
31 January 2014	JCRC releases its report, listing which sections of the constitution were requested to be amended, and which were requested to remain the same, according to public consultations
2 February 2014	Parliament forms the Committee for Implementation of Amendments to the 2008 Constitution to prepare a Constitutional Amendment Bill at least 6 months before the 2015 elections

## Nepal

14 March 2013	Chief Justice Khil Raj Regmi is sworn in as chairperson of the Interim Election Government to hold elections for a new Constituent Assembly following a presidential order for the interim constitution to be amended to form a new government by political consensus
16 March 2013	Four major political forces—the UCPN (Maoist), Nepali Congress, CPN-UML and United Democratic Madhesi Front—form a High-level Political Committee to assist in building consensus among the parties and holding polls under the interim government
13 June 2013	Government sets 19 November as the date for Constituent Assembly elections after amendments to election-related laws, including to reduce the size of the Assembly
6 September 2013	High-level Political Committee agrees to a 601-member Constituent Assembly to bring parties opposed to the poll on board the election process;
16 September 2013	A 33-party alliance led by CPN-Maoists insists on resignation of chairperson of the Interim Election Government, Regmi, as chief justice but does not commit itself to participating in the elections that it had been demanding be deferred to next year
19 November 2013	Elections held for Constituent Assembly despite boycott of the 33-party alliance
24 December 2013	UCPN (Maoists) and other parties that had disputed the election results agree to participate in the newly elected Constituent Assembly after the Nepali Congress and CPN-UML, which emerged as the largest parties, agree on a parliamentary investigation into election-related issues and establishment of a committee of top leaders to assist in completing the constitution within a year, among other things
22 January 2014	First meeting of Constituent Assembly, with constitution due to be completed within 1 year

## Yemen

18 March 2013	National Dialogue Conference (NDC) is launched at the Movenpick Hotel in Sana'a
18 September 2013	Six months after its launch, the NDC is scheduled to close but extends its deadline to resolve outstanding issues, in particular relating to federalism and the status of territories in southern Yemen
24 January 2014	National Dialogue Conference closes and Final Outcomes Document is released
10 February 2014	President Hadi announces Yemen will be a 6-state federation
8 March 2014	Formation of a 17-member Constitution Drafting Committee tasked with producing first draft of constitution for public comment. The final constitution is scheduled to go to referendum within 1 year

## Liberia

August 2012	President Sirleaf forms 5-member Constitutional Review Committee (CRC)
12–14 November 2013	CRC holds three-day consultative meeting with 32 political parties
5–7 December 2013	Civil society organizations submit initial proposals on constitutional reform to CRC at a 3-day consultative meeting organized by CRC
14 February 2014	CRC launches a civic education campaign and deploys about 100 civic educators across the country
March 2014	CRC launches public consultations programme

## Zimbabwe

February 2012	First draft of constitution (completed in December 2011) released
March 2012	Constitution Select Committee of Parliament (COPAC) Management Committee begins negotiations on contentious unsettled issues
17 July 2012	Second draft of constitution released
October 2012	Second All-Stakeholders Conference meets to debate July draft

February 2013	Third draft of constitution released. Referendum date announced for March
16 March 2013	Constitution overwhelmingly approved in referendum, with 94.5% voting in favour
14 May 2013	Senate passes constitution unanimously
22 May 2013	President signs constitution. According to the transitional provisions, date of next election is to be determined under previous constitution, such that the elections must be held within 4 months of 29 July 2013
May 2013	President Mugabe begins to signal in public statements that general elections might be called by June 2013, in spite of strong opposition from the Movement for Democratic Change (MDC), which wishes to see constitutionally mandated reforms of the media, security sector and election law before elections are held
30 May 2013	Supreme Court, on application by a private citizen, orders government of Zimbabwe to call general elections not later than 31 July. MDC calls for second review of the decision
12 June 2013	President, under the terms of the Presidential Powers Act, revises election law
4 July 2013	Supreme Court upholds its 30 May decision, authorizing the government to call general elections by 31 July
31 July 2013	Presidential and parliamentary elections held, without the violence that marred the 2008 elections. Mugabe wins almost 62% of vote to main challenger Tsvangirai's 34%. ZANU-PF wins 67% of seats in parliament. Women occupy 35% of seats in new parliament
August 2013	MDC files legal challenge at the Constitutional Court demanding nullification of election results, citing gross irregularities. Days later, MDC withdraws its participation over concerns about the impartiality of the court. Court dismisses the legal challenge
September 2013	Opening of first parliament elected under new constitution. MDC, citing claims of rigged elections, boycotts the opening

## Fiji

12 December 2012	Constitutional Review Commission headed by Professor Yash Pal Ghai completes draft constitution
10 January 2013	Government announces it is rejecting the draft constitution and will propose a new draft to the Constituent Assembly
21 March 2013	Prime Minister Bainimarama announces cancellation of the planned Constituent Assembly, instead giving the public 2 weeks to comment on the government's draft constitution
22 August 2013	Government releases final draft of constitution
6 September 2013	Promulgation of new constitution

## Tanzania

December 2011	Parliament passes Constitutional Review Act, providing for the establishment of the Constitutional Review Commission (CRC) and launch of a Constitutional Review Process
2012	CRC appointed and begins extensive public consultations
3 June 2013	CRC releases first draft constitution for public review and comment
6 September 2013	National Assembly passes amendment to the Constitutional Review Act specifying a Constituent Assembly of 604 representatives, with 166 members of civil society appointed by the president
9 November 2013	National Assembly passes amendment increasing the number of civil society members to 201, and the total membership to 639. The amendment also revises the modalities for nomination and appointment
30 December 2013	CRC releases the second draft constitution
18 February 2014	Constituent Assembly opens with 70 days stipulated for its deliberations
April 2014	Constituent Assembly requests an extension until August 2014



## Zambia

(16 November 2011)	President Sata appoints Technical Committee on Drafting the Zambia Constitution (TCDZC), without a clear legal framework for the process. TCDZC holds public meetings throughout 2012
April 2013	National Constitutional Convention discusses draft constitution
June 2013	Civil society launches the 'Basic Minimums' on what it expects to be included in final draft constitution
31 October 2013	Technical Committee issues a statement saying that the draft constitution had been finalized and would be printed on 1 November
8 November 2013	The Technical Committee issues a statement informing the public the government has instructed it to print only 10 copies of the draft constitution and hand them to the president
30 November 2013	President Sata declares that the constitutional review is not needed, only slight amendments, calling the review process into question
15 January 2014	Zambian Watchdog leaks final draft constitution
16 January 2015	Government refutes assertions by Technical Committee that it has received the final draft constitution
1 April 2014	Technical Committee issues a statement that it has handed over the draft constitution to the permanent secretary at the Ministry of Justice
19 April 2014	16 opposition leaders ask to meet President Sata over the draft constitution
21 April 2014	President Sata continues to maintain that Zambia is not facing a constitutional crisis and the country has a functional constitution

# Notes

## Introduction

1 Sumit Bisarya is Senior Project Manager for the International IDEA Constitution Building Programme.

## Chapter 1

2 Dr. iur. Nicole Töpferwien is an expert consultant, focusing on constitution making and power-sharing issues in conflict and post-conflict situations. From March 2012 to March 2013 she served as Senior Power-sharing Expert in the Standby Team of Mediation Experts for the Mediation Support Unit, Department of Political Affairs of the UN. She is co-founder of the Swiss think tank and consultancy company Ximpulse, see <<http://www.ximpulse.ch>>.

3 Brandt, Michele, Cottrell, Jill, Ghai, Yash and Regan, Anthony, *Constitution-making and Reform: Options for Process* (Geneva: Interpeace 2011) (referred to below as the 'Handbook'), p. 15.

4 Handbook, p. 9. The other three are inclusiveness, transparency and national ownership.

5 Handbook, p. 9.

6 See e.g. Handbook, pp. 26, 80–148.

7 See e.g. the interview by Yash Ghai, chairperson of the Constitutional Commission at the start of the process, available at <<http://www.youtube.com/watch?v=8J5aR3WuN9s>>, last accessed 28 February 2014.

8 The mandate was established in Decree 57 of 2012. See also e.g. the civic education flyer of the Constitutional Commission, available at <[http://www.c-r.org/sites/c-r.org/files/ConstitutionCommission\\_Fiji\\_CivicEducation\\_Flyer.pdf](http://www.c-r.org/sites/c-r.org/files/ConstitutionCommission_Fiji_CivicEducation_Flyer.pdf)>, last accessed 28 February 2014.

9 Constitution Select Committee (COPAC), 'Milestones towards a New Constitution for Zimbabwe' (brochure), 2012, available at <<http://www.copac.org.zw>>.

10 See e.g. 'National Constituent Assembly Elections in Tunisia, Final Report', Carter Center 2011, available at <[http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/tunisia-final-Oct2011.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/tunisia-final-Oct2011.pdf)>, last accessed 1 March 2014.

11 See e.g. International Foundation for Electoral Systems (IFES), 'Elections in Libya: The Constituent Assembly for the Drafting of the Constitution', 2014, available at <<http://www.ifes.org/Content/Publications/FAQ/2014/-/media/Files/Publications/White%20PaperReport/Libya%20FAQs%202014%20Constitution%20Drafting%20Assembly.pdf>>, last accessed 27 February 2014.

12 There are a number of ambiguities in the Constitutional Declaration concerning the mandate of the General National Congress and the Constituent Assembly. For instance, it is not regulated who could decide on extending the deadlines. See e.g. Karim, Mezram and Pickard, Duncan, 'Negotiating Libya's Constitution', IssueBrief, Atlantic Council, January 2014.

13 See Karim and Pickard, 'Negotiating Libya's Constitution'. See also 'Women's "It Will Be Our Constitution" Campaign Launched with 50,000 SMS Messages', *Libya Herald*, 17 February 2014, available at <<http://www.libyaherald.com/2014/02/17/womens-it-will-be-our-constitution-campaign-launched-with-50000-sms-messages/#ixzz2tgYr5nFh>>, last accessed 27 February 2014.

14 See e.g. Handbook, pp. 25–6: 'A good process must balance the interests of different groups and communities. Sometimes the interests that dominate are those of the powerful, the urban population, or warring factions in conflict

or post-conflict situations. Frequently it is considered expedient to restrict public participation in order to ensure that interests critical to a settlement are privileged. By contrast, there are cases in which deliberate attempts are made to bring in groups that have been marginalized by political and economic forces. Indeed, the trend is toward the wide participation of the public, as a manifestation of its “sovereignty”, to secure legitimacy, and—most important—to find out the expectations and wishes of the ordinary people. Today’s process is likely to involve political parties, religious groups, ethnic communities, professionals, business organizations, trade unions, women, the disabled, diasporas, regions, and parts of the international community.’

- 15 For instance, in Nepal there is a frequent criticism that of each group again elites are invited to participate and that the hierarchical relationships within groups are largely disregarded.
- 16 Nepal has a mixed electoral system in the sense that seats are awarded on the basis of three different electoral systems: first-past-the-post (FPTP), PR with quotas and by appointment.
- 17 Order to Remove Obstacles, 14 March 2013, cl. 10. During that time, Nepal did not have an elected parliament, as the parliament was dissolved with the Constituent Assembly. Therefore, there was also no clear procedure for amending the constitution. It was decided that constitutional amendments are possible based on a political consensus among the main political parties and a presidential order to remove difficulties.
- 18 For a short assessment of the constitution-making process so far, see Karim and Pickard, ‘Negotiating Libya’s Constitution’.
- 19 See e.g. ‘Congress Opts for an Elected Constitutional Commission’, *Libya Herald*, 2 June 2013, available at <<http://www.libyaherald.com/2013/02/06/congress-opts-for-an-elected-constitutional-commission/#ixzz2tgWz6F13>>, last accessed 28 February 2014.
- 20 Mainly alluding to the 1951 Constituent Assembly, which was of the same size (60) and also had equal representation (20 members each) for the three historical regions.
- 21 The three regions differ quite substantially in population size. Tripolitania includes about 60% of the population, Cyrenaica accounts for about 30% and Fezzan for 10%.
- 22 See e.g. ‘Tebus Announce Boycott of Constitutional Committee Elections; Tuareg Split’, *Libya Herald*, 17 February 2014, available at <<http://www.libyaherald.com/2014/02/17/tebus-announce-boycott-of-constitutional-committee-elections/#ixzz2tgY2jrWZ>>, last accessed 28 February 2014.
- 23 See e.g. <[http://www.europeanforum.net/news/1882/libya\\_announces\\_preliminary\\_results\\_of\\_constitutional\\_assembly\\_elections\\_amongst\\_political\\_unrest](http://www.europeanforum.net/news/1882/libya_announces_preliminary_results_of_constitutional_assembly_elections_amongst_political_unrest)>, last accessed March 2014.
- 24 The focus on elites and political party leaderships also stems from the (sometimes wrong) assumption that they can reconcile different interests.
- 25 This begs the very relevant question of how to ascertain the will of the people.
- 26 As happened in Iceland. Iceland is an extreme example of an attempt at crowd-sourced constitution making. Björg Thorarensen sees one reason for the failure of the constitution-making process in 2013 in the assumption that representativeness alone could produce a comprehensive constitution: ‘...defining constitution-making as a non-political issue and distancing it entirely from the political forum was bound to end in failure. At the end of the day, political involvement had to come into the picture and the political forces needed to take a stance on the substance of a new constitution before its final adoption. ... Thus, an advisory referendum, or other evidence of powerful popular support, could not legitimize such a deviation from the constitutional process nor deprive the members of parliament from their constitutionally protected free mandate’. Thorarensen, Björg, ‘Why the Making of a Crowd-sourced Constitution in Iceland Failed’, *Constitutionnet*, available at <<http://www.constitutionnet.org/news/why-making-crowd-sourced-constitution-iceland-failed>>, last accessed 27 February 2014.
- 27 There are also limits to the willingness of those involved to resist the will of the powerful (e.g. the power of the street or of political elites)—a trend that can currently also be noticed in other processes. One might think of talking of a decline of liberal democracy.
- 28 See e.g. Australia Network News, ‘A Controversial Path to Fiji’s New Constitution’, 8 February 2013, available at <<http://www.abc.net.au/news/2013-02-08/an-fiji-constitution-background/4508266>>, last accessed 26 February 2014. See also the video on the new constitution, featuring Yash Ghai, at <<http://www.abc.net.au/news/2013-10-23/constitutional-expert-slams-bainimaramas/5041942>>, last accessed 26 February 2014.
- 29 Public participation was bumpy and mainly took place during the initial phase of agenda setting, not so much during drafting. Some civil society organizations boycotted the process because they perceived it as dominated by political parties and as highly polarized along party lines. Agreement among the parties was clearly given preference over reconciling the various interests of the population. See e.g. Dzinesa, Gwinyayi A., ‘Zimbabwe’s Constitutional Reform Process: Challenges and Prospects’, Institute for Justice and Reconciliation, South Africa, 2012.
- 30 Langen, Jürgen, ‘Simbabwe stimmt über die Verfassung ab’ [Zimbabwe Votes on the Constitution], *Länderbericht Konrad Adenauer Stiftung*, March 2013.
- 31 At one point in the final stage of the 2008 CA a majority of CA members had collected signatures against a consensus agreement among the major leaders.
- 32 See e.g. Pickard, Duncan, ‘Lessons from Constitution-making in Tunisia’, Issue Brief, Atlantic Council, 2012.

## Chapter 2

- 33 Christina Murray is professor of constitutional law and human rights at the University of Cape Town and a current member of the United Nations Standby Mediation Team.
- 34 Agenda 4 of the National Accord Agreement, signed 28 February 2008.
- 35 United Nations Yemen Security Council Report, 27 September 2013, 7037<sup>th</sup> meeting of the UN Security Council, New York, USA

## Chapter 3

- 36 Melanie Allen is Programme Officer for the International IDEA Constitution Building Programme.
- 37 Irving, Helen, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (New York: Cambridge University Press, 2008)
- 38 While virtually all elements of a constitution can be analysed from a gender perspective in order to understand how rights, institutional structures, and power relations may impact on women, this chapter only addresses the gender-specific provisions of these new constitutions and the provisions that are particularly relevant to the ability of women to fully exercise their rights in each context.
- 39 Bennoune, Karima and Grami, Amel, 'Tunisia's Fight against Fundamentalism: An Interview with Amel Grami', *Open Democracy*, 7 October 2013, available at <<http://www.opendemocracy.net/5050/amel-grami-karima-bennoune/tunisia-fight-against-fundamentalism-interview-with-amel-grami>>, accessed 27 February 2014.
- 40 Repudiation is a husband's right to divorce his wife for any reason and even without her consent.
- 41 Ben Salem, Lilia, 'Tunisia', in Sanja Kelly and Julia Breslin (eds), *Women's Rights in the Middle East and North Africa: Progress amid Resistance* (New York: Freedom House, 2010); Charrad, Mounira M., 'Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation', *Washington and Lee Law Review*, 2007, pp. 1513–27.
- 42 Tchaicha, Jane D. and Arfaoui, Khedija, 'Tunisian Women in the Twenty-first Century: Past Achievements and Present Uncertainties in the Wake of the Jasmine Revolution', *Journal of North African Studies*, 17/2 (2012), pp. 215–38.
- 43 Ben Salem, 'Tunisia', p. 14.
- 44 UNICEF, 'Tunisia: Statistics', available at <[http://www.unicef.org/infobycountry/Tunisia\\_statistics.html](http://www.unicef.org/infobycountry/Tunisia_statistics.html)>, accessed 9 March 2014.
- 45 The Haute Instance pour la réalisation des objectifs de la révolution, des réformes politiques et de la transition démocratique (High Authority for the Realization of the Objectives of the Revolution, for Political Reforms and for a Democratic Transition) included members of the Committee for Political Reform (primarily legal experts appointed by Prime Minister Mohamed Ghannouchi) and the National Council for the Protection of the Revolution (created by opposition groups and including members of civil society organizations and trade union representatives). Zemni, Sami, 'The Extraordinary Politics of the Tunisian Revolution: The Process of Constitution Making', *Mediterranean Politics*, 2014, pp. 1–17.
- 46 Zemni, 'The Extraordinary Politics of the Tunisian Revolution', pp. 7–8.
- 47 Carter Center, 'National Constituent Assembly Elections in Tunisia: Final Report', 2011, available at <[http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/tunisia-final-Oct2011.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/tunisia-final-Oct2011.pdf)>.
- 48 The closed list PR system used in Tunisia allocated seats based on the Hare Quota with Largest Remainders formula (HQ-LR). According to John M. Carey, 'The technical decision to use HQ-LR ... greatly increased the number of lists winning representation and, in particular, diminished the representation of the largest party. This, in turn, determined that Tunisia's constitutional moment would be characterized by negotiation among diverse parties and groups rather than imposition by the dominant party'. Carey, John M., 'Electoral Formula and the Tunisian Constituent Assembly', 9 May 2013, p. 1, available at <<http://sites.dartmouth.edu/jcarey/files/2013/02/Tunisia-Electoral-Formula-Carey-May-2013-reduced.pdf>>, accessed 27 February 2014.
- 49 Draft from 14 August 2012, article 2.28: 'The state shall guarantee the protection of the rights of women and shall support the gains thereof as true partners to men in the building of the nation and as having a role complementary thereto with the family'.
- 50 Article 1.10 of the 14 August 2012 draft: 'The state shall protect the rights of women as well as protect family structures and maintain the coherence thereof'. The corresponding provision in the 2014 constitution is article 7: 'The family is the nucleus of society and the state shall protect it.'
- 51 Constitution of Tunisia 2014, article 46: 'The state commits to protect women's accrued rights and work to strengthen and develop those rights'.
- 52 Al-Ali, Zaid and Ben Romdhane, Donia, 'Tunisia's New Constitution: Progress and Challenges to Come', *Open Democracy*, 16 February 2014, available at <<http://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to->>, accessed 8 March 2014.
- 53 Constitution of Tunisia 2014, article 46.
- 54 Al-Ali and Ben Romdhane, 'Tunisia's New Constitution'.

- 55 See article 278 of the Bolivian constitution (2009) regarding sub-national legislatures and articles 61 and 116 of the Ecuadorian constitution regarding national and sub-national legislatures, respectively. See also the discussion of political representation in Zimbabwe later in this chapter.
- 56 Constitution of Tunisia 2014, article 74: 'Every male and female voter who holds Tunisian nationality since birth, whose religion is Islam shall have the right to stand for election to the position of President of the Republic'.
- 57 *Takfir* is the issuing of 'religious edicts claiming someone is an apostate'. Al-Haddad, Mohammad, 'Tunisia's New Constitution Criminalizes "Takfir"', *Al Monitor*, available at <<http://www.al-monitor.com/pulse/security/2014/02/tunisia-new-constitution-bans-takfir.html#>>, accessed 12 March 2014.
- 58 Marks, Monica L., 'Convince, Coerce, or Compromise? Ennahda's Approach to Tunisia's Constitution', Brookings Institute, 2014.
- 59 Ibid., p. 15.
- 60 Zoepf, Katherine, 'A Troubled Revolution in Egypt', *New York Times*, 21 November 2011.
- 61 Asmaa Mahfouz posted two videos to YouTube in January 2011 exhorting viewers to join her in protest at Tahrir Square.
- 62 Zoepf, 'A Troubled Revolution in Egypt'.
- 63 Johansson-Nogues, Elisabeth, 'Gendering the Arab Spring? Rights and (In)security of Tunisian, Egyptian and Libyan Women', *Security Dialogue*, 44/5-6 (2013), p. 397.
- 64 As compared to 82 per cent for men.
- 65 World Bank, World Development Indicators.
- 66 In 2012 the percentage of women between the ages of 15 and 49 who had undergone female genital mutilation/cutting (FGM/C) in Egypt was 91.1 (UNICEF, 'Egypt: Statistics' (2013), available at <[http://www.unicef.org/infobycountry/egypt\\_statistics.html](http://www.unicef.org/infobycountry/egypt_statistics.html)>, accessed 13 March 2014). The practice was banned in 2008, and there is evidence that it is on the decline, with a 2008 survey showing a prevalence rate of 74 per cent for girls between the ages of 15 and 17. There is a strong correlation between FGM/C and economic status, with the prevalence higher among girls from poorer families. United Nations Population Fund, 'FGM/C in Egypt: Prevalence and Prospects', available at <[http://egypt.unfpa.org/english/fgmStaticpages/0c3b708e-9c55-4b05-994f-a437f89a81d9/Egypt\\_Prevalence\\_rate\\_and\\_Prospects.aspx](http://egypt.unfpa.org/english/fgmStaticpages/0c3b708e-9c55-4b05-994f-a437f89a81d9/Egypt_Prevalence_rate_and_Prospects.aspx)>, accessed 20 March 2014.
- 67 Zoepf, 'A Troubled Revolution in Egypt'.
- 68 Global Database of Quotas for Women, Country Overview: Egypt, available at <<http://www.quotaproject.org/uid/countryview.cfm?country=69>>, accessed 13 March 2014.
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- 70 Ibid.
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92 Article 56(6): 'The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination.' Article 17(2): 'The State must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies.'

93 Article 77.

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#### Chapter 4

- 119 Tom Ginsberg is Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar and Professor of Political Science University of Chicago, Senior Technical Advisor to the International IDEA Constitution Building Programme.
- 120 Yuhniwo Ngenge is Programme Officer for the International IDEA Constitution Building Programme.
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#### Chapter 5

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- 139 Richard Stacey is Assistant Professor of Law at the University of Toronto and Director of Research at the Center for Constitutional Transitions.
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## Chapter 6

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and International Law, Melbourne Law School, and is Vice-Chair of the International IDEA Board of Advisors.
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## Chapter 7

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# About International IDEA

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