

Towards a New Syrian Constitution: Constitution Drafting Experiences in the Arab region

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Introduction

Democracy is linked to a number of concepts, including constitutional democracy promoted by Joseph Schumpeter¹. At times of democratic transition, whether as a result of a popular movement or the authorities' will to introduce reform, the first measure that comes to mind is the suspension or modification of the constitution. Throughout the past eight years, the Arab region bore witness to several cases that involved the constitution, whether through issuing constitutional declarations and constitutional amendments or through drafting new constitutions altogether.

Democratic transition can, in fact, be measured through a number of indicators, on top of which is the constitution since it is the main reference of the state and the text based on which the rights and duties of citizens are specified. This is followed by the introduction of freedoms including freedom of expression, freedom of organization, and freedom of the press. Third comes political pluralism, which means freedom of establishing political parties from which people choose their government through free and fair elections. Last but not least is the peaceful rotation of power, also through elections. It can, therefore, be said that if there is a constitution that guarantees all the above-mentioned factors, a democratic transition would be taking place.

Despite the shift from peaceful protests to armed conflict in which revolutionary forces and terrorist groups tend to overlap, attempts at drafting a new constitution for Syria, whether by the regime or the opposition, have never stopped. Initiatives like The Day After (TDA) drafted articles that detail the aspired for political system and the relationship between powers, between the state and society, and between different segments of society.

The constitution is one of the most important components of negotiations over the future of Syria and is also a source of debate between different factions. At the beginning of the Syrian revolution, the issue of the constitution was addressed in the communiqué issued at the Action Group for Syria Conference, now known as Geneva I Conference on Syria, held on June 30, 2012 by the joint special envoy to Syria Kofi Annan. The communiqué stated that “there can be a review of the constitutional order and the legal system. The result of constitutional drafting would be subject to popular approval.”² The constitution was also mentioned in several documents tackling the Syrian crisis and was eventually part of Security Council Resolution number 2254 for the year 2015, which currently constitutes the main reference for the negotiation process. Article 1 of the resolution “reconfirms its endorsement of the Geneva Communiqué of 30 June 2012... as the basis for a Syrian-led and Syrian-owned political transition” and Article 4 “expresses its support, in this regard, for a Syrian-led political process that is facilitated by the United Nations and, within a target of six months, establishes credible, inclusive and non-sectarian governance and sets a schedule and process for drafting a new constitution, and further expresses its support for free and fair elections, pursuant to the new constitution, to be held within 18 months and administered under supervision of the United Nations, to the satisfaction of the governance

¹ Joseph Schumpeter. *Capitalism, Socialism and Democracy*, 2nd edition, 1948.

² Final communiqué of the Action Group for Syria, June 30, 2012: <https://www.peaceagreements.org/>

and to the highest international standards of transparency and accountability, with all Syrians, including members of the diaspora, eligible to participate, as set forth in the 14 November 2015 ISSG Statement.”³ Since then, the constitution has become one of the “four baskets” around which negotiations in Geneva revolve between government and opposition delegations. This paper examines the main points of negotiations over the Syrian constitution and provides recommendations on the major issues that would assist in finding a way out of the current crisis.

When the Syrian revolution started, the 1973 constitution was in force. This constitution was amended twice: first in 1981 and second in 2000. In the latter, the legal age of the president was changed from 40 to 34 years old. One year after the eruption of the revolution, Syrian president Bashar al-Assad issued the 2012 new constitution that allegedly included the reforms people demanded⁴. A year earlier, particularly on October 10, 2011, presidential decree number 33 dictated the formation of a 29-member constituent assembly to rewrite the constitution. The assembly drafted a new constitution that was issued in February 2012 by presidential decree number 94. Article 1 of the 2012 constitution stated that “the Syrian Arab Republic is a democratic state with full sovereignty, indivisible, and may not waive any part of its territory, and is part of the Arab homeland” and Article 2 stated that “the system of governance in the state shall be a republican system.” The new constitution kept most of the articles of the 1973 constitution while adding 14 new articles and introducing 47 amendments. It also kept the extensive powers of the president and stated that the president is to be Muslim and that Islamic laws are the main source of legislation.

The 2012 constitution is made up of 157 articles under six titles, nine chapters, and a preamble. Article 150 in Title Five stated that “1. The President of the Republic, and so does a third of the members of the People’s Assembly, might propose amending the Constitution; 2. The proposal for amending the Constitution shall state the text proposed to be amended and the reasons for making the amendment; 3. As soon as the People’s Assembly receives the proposal for amendment, it sets up a special committee to examine it. 4. The Assembly discusses the proposal for amendment. If it approved it with a three quarters majority, the amendment shall be considered final provided that it is also approved by the President of the Republic.” However, the situation is entirely different from early 2011, especially with the intervention of several international powers. The Syrian opposition argues that the 2012 constitution was made to fit the Syrian president and allow him to control all aspects of political, economic, security, and social life in the country⁵. There is an ongoing debate between different parties in the negotiations over the shape of the new constitution. The Syrian government argues that the 2012 constitution can be amended while the opposition supports adopting the 1950 constitution with a few amendments that determine the shape of the transitional period. The opposition opted for

³ “Security Council Unanimously Adopts Resolution 2254 (2015)”:

<https://www.un.org/press/en/2015/sc12171.doc.htm>

⁴ Diaa Ouda, Reham al-Asaad, and Nour Dalati. “The amendment of the constitution: A quota system or a solution? [Arabic]” *Enab Baladi*, issue no. 329, June 2018.

⁵ Ibid.

that constitution due to its value in Syrian history and the way it represents a brief democratic phase in the country ⁶. Debates over the constitution were not confined to Syria as several Arab countries went through similar experiences, as will be demonstrated in this paper. Tunisia, for example, witnessed several sit-ins following the revolution, most importantly the first and second Qasaba sit-ins, which resulted in an agreement between different factions, particularly supporters of the Nahda Movements and members of the Tunisian General Labor Union. The two parties agreed on electing members of the constituent assembly to draft a new constitution and, therefore, discarded the initial idea of amending the old constitution.

Democratic transition necessitates a new social contract and the measures taken by each country towards that end differ, for in some cases a totally new constitution is drafted while in others, amendments are introduced to the old one. The choice of which path to take depends mainly on the shape of the new phase, whether it will break all ties with the past or offer some compromise. In Brazil, for example, the Congress was elected first then was assigned the task of drafting the constitution that, upon its completion, was put to referendum. In Tunisia, the National Constituent Assembly was elected to draft the constitution. The process of drafting constitutions during transitional periods is usually complicated and is, in many times, hindered by a number of factors. In Tunisia, members of the assembly were faced with several obstacles as a result of the changes through which the country was going. There was also a number of problems associated with the assembly's work since the choices made by its members triggered a great deal of tension, hence delaying the finalization of the constitution and at times threatening to abort the entire process. Among those obstacles were the members' inability to set a roadmap for drafting the constitution, lack of a mechanism for monitoring the performance of the members and shifting political alliances within the assembly. Despite those challenges, the initiative of the Tunisian National Dialogue Quartet concluded with setting a roadmap that led to ratifying the constitution on November 27, 2014. True, the timeline proposed by the quartet was not realistic, but it managed to alert political players to the urgency of the situation. The initial timeline stated that the ratification of the constitution should take place within four weeks of the onset of the national dialogue that officially started on October 5, 2013, which meant that the constitution was to be drafted by November 2, 2013.

In Egypt, the debate on amendment or a new constitution started as soon as Mubarak stepped down. The Supreme Council of the Armed Forces (SCAF), the de facto ruler following Mubarak's ouster, announced forming a committee to be in charge of constitutional amendments, later known as the March 2011 amendments. There was no clear mechanism for the choice of committee members other than the fact that it represented SCAF's view on the balance of power in the Egyptian political scene at the time. Choice on political basis triggered several struggles and polarization attempts within the

⁶ "Constitutional options and alternatives for Syria [Arabic]." A paper that presents the views of Syrian experts who met for the Geneva II Conference in Montreux, Switzerland on May 22-24, 2017.

committee, which came at the expense of the content of the amendments introduced by the committee⁷.

In Morocco, protests staged by the February 20 Movement took the government by surprise, not only because of the numbers of protesters but also because of how the protests spread across the country. In this context, King Muhammad VI called in a speech he gave on March 9, 2011 for the introduction of constitutional amendments that do not violate the basic pillars of the monarchy. The king specified seven pillars upon which the amendments were to be founded and promised a democratic constitution that separates between powers and gives more powers to the prime minister and the parliament.

In Syria, in addition to Article 4 of Security Council Resolution no. 2254, there was a proposal to draft a temporary constitutional document for the transitional period until a new constitution is drafted. This, in fact, was a way out for several countries that went through conflicts and crises. In those cases, temporary constitutional documents would agree on crucial issues such as the means to achieve stability in order for the constitution to be drafted at a later stage⁸. Those documents were expected to provide a healthy environment for drafting the constitution and guarantee that warlords would not be in control nor come to power eventually, as stated by the report issued by the United Nations Economic and Social Commission for Western Asia (ESCWA)⁹. However, temporary constitutional documents can be a tool to manipulate those who call for reform through issuing one document after the other and never finalizing a new constitution or ending up satisfied with the old one. This can only be avoided if the temporary document sets the timeline and mechanism for drafting a new constitution as well as stresses the principles of transparency, fair representation, societal dialogue, and the participation of women throughout different stages of drafting the constitution.

Learning from the experiences of other countries in the region is undoubtedly beneficial, including the negative ones that would give insight into dealing with challenges and avoiding obstacles that would make the process of drafting the constitution more complicated. The paper, therefore, deals with the experiences of three Arab countries—Egypt, Tunisia, and Morocco—in amending and/or drafting new constitutions throughout the past eight years and the most prominent debates that resulted from this process and how they were resolved.

⁷ Amr El Shobaki. "Constitutional amendments: A political view [Arabic]." Arab Forum for Alternatives: <https://goo.gl/VWi2uH>

⁸ ESCWA, 2016.

⁹ ESCWA, 2016.

Chapter 1

Drafting the constitution: Syria and Arab countries

First: The foundation of constituent assemblies:

Upon the conclusion of the First Astana Conference in January 2017, Russia submitted constitution draft prepared by Russian experts. According to Syrian experts, none of the Syrian factions were consulted about this draft, including the Syrian regime. The Russian move was met with strong reservations whether from the opposition that considered the articles of the constitution humiliating or the Syrian regime that saw the constitution as full of concessions. The Russian draft proposed crossing out the word “Arab” from Syria’s name and brought back the condition that the president, to be elected for only two seven-year terms, should be at least 40 years old. The draft limited the president’s powers in favor of the government and secularized the state through crossing out the article about Islamic laws being the main source of legislation. The debate about this draft lasted for a whole year. After the Sochi Conference, Russia lobbied the Syrian regime to announce names of the members of the committee that would be in charge of drafting the constitution as a first step towards reaching a settlement and putting an end to the military struggle ¹⁰. The establishment of a constituent assembly was authorized at the Syrian National Dialogue Conference in Sochi in January 2018. A debate ensued on how the assembly would go about the constitution and whether only a few articles would be amended, or an entirely new constitution would be drafted under the auspices of international powers, particularly Russia, Turkey, and Iran. Following the failure of negotiations at Astana and Sochi and the UN proposal about establishing a constituent assembly, Russia put pressure on UN envoy to Syria Staffan de Mistura in order to guarantee that 50% of the members of the assembly would be from the Syrian regime, 30% opposition, and the rest independent experts, which practically meant that the constitution would not really undergo any substantial change. De Mistura had already called upon the Security Council to set the main framework of a new Syrian constitution and prepare for new elections. Three parties are expected to take part in the constituent assembly: First, nominees of the Syrian regime, whose names were leaked to the Saudi newspaper *Al-Sharq al-Awast* and mainly belonged to the ruling Baath Party and the regime’s negotiating team; second, nominees of the Syrian opposition, including all factions; third, independent members to be named by De Mistura ¹¹. Syrian Foreign Minister Walid al-Muallem announced that the regime already submitted the names of 50 members of the constituent assembly and added that constitutional amendments, to be agreed upon by members, would be submitted to the Sochi Conference to be authorized then returned to the Syrian government to apply those amendments. This was met with rejection on the part of the Syrian opposition. The main problem lies in the procedural aspect of drafting the constitution. In other words, there is no agreement on who gives the constituent assembly its powers, who approves the outcome of the assembly’s

¹⁰ Diaa Ouda, Reham al-Asaad, and Nour Dalati. Op. cit.

¹¹ Ibid.

work, how this outcome is implemented, and what entities guarantee implementation¹². The working mechanisms of the assembly are also unclear. The regime wants to amend the constitution provided that the amendments are approved by the president and three quarters of the parliament while the opposition wants to draft a new constitution that would first be authorized by the parliament then put to public referendum. According to Nasr al-Hariri, head of the High Negotiations Committee, the committee is cooperating with the UN, based on Security Council Resolution no. 2245, to agree on the mechanisms that make it possible for political negotiations to start between the regime and the opposition, but the working mechanisms of the constituent assembly and the member list have not yet been finalized¹³.

The National Constituent Assembly of Tunisia was established through elections held on October 23, 2011. The assembly was assigned particular tasks, which included drafting a new constitution and electing an interim president. The assembly was made up of 217 elected members. The Nahda Movement got 89 seats, the Congress for the Republic 29 seats, and the Popular Petition for Freedom, Justice and Development 26 seats. The assembly's board was made up of the assembly's president and nine members. In order to deal with the constitutional vacuum in the interval between the establishment of the constituent assembly and the authorization of the new constitution, the Law on the Provisional Organization of Public Powers was drafted and authorized on December 10, 2011 to determine how the country is to be run during that interval. However, the absence of a clear roadmap that delineates the different stages of drafting the constitution and the timeline for each was among the main obstacles that faced the assembly and triggered nation-wide discontent. The internal structure of the assembly, ratified in January 2012, was also not unclear, which constituted another challenge.

In March 2013, during the political crisis that followed the assassination of Chokri Belaïd, the assembly met to amend the internal structure in order to expedite the process of drafting the constitution. The powers of the Joint Coordination and Drafting Commission were amended in order to tackle international disputes and an ad hoc Consensus Commission was formed to work with it. This crisis impacted the legitimacy of the assembly, which was given one year to accomplish its mission and ratify a new constitution within the framework of what is known as Ten-Party Agreement under the supervision of the Higher Commission for the Realization of the Objectives of the Revolution.

Lack of a clear mechanism through which the performance of the assembly is monitored also contributed to stalling the process of drafting the constitution. While the Constitutional Council, established in the Bin Ali era, was disbanded under the Law on the Provisional Organization of Public Powers, the Administrative Court played a major role in monitoring the administrative performance of the constituent assembly. The court suspended raises for constituent members once and stopped the process of choosing members of the electoral committee twice. However, the court considered the drafting process itself outside its jurisdiction. The final draft of the constitution stipulated the establishment of a constitutional court three years after the constitution is put into effect and the public

¹² Ibid.

¹³ Ibid.

arbitration sessions of the Administrative Court were given the powers of the constitutional court during the transition. A crisis erupted between members of the constituent assembly and the Administrative Court when the latter issued a ruling in September 2013 that stops the process of choosing potential members of the electoral committee, which led members of the Nahda Movement and the Congress for the Republic to reject granting the Administrative Court constitutional monitoring powers. At the end, a compromise was reached through establishing a temporary committee that was assigned the task of monitoring the constitutionality of draft laws proposed by the constituent assembly until the constitutional court was established.

Egypt went through different experiences as far as drafting the constitution is concerned. In March 2011, the transitional authority, represented by the Supreme Council of the Armed Forces, appointed eight legal experts to study and phrase amendments proposed by the Constitutional Amendments Committee¹⁴. Those amendments were glorified by Islamist factions then were later severely criticized for their alleged role in the polarization process that took place at the time and in paving the way for a defected political system that is based on a momentary balance of power. The amendments were seen by opponents as incapable of establishing a post-revolutionary regime that would avoid past setbacks. The Constitutional Amendments Committee set the criteria for choosing members of the constituent assembly. The constitutional declaration issued on March 30, 2011 confirmed the criteria and stated that the assembly would be made up of elected members of parliament, which was bicameral at the time. This led to a debate about how far the assembly represents Egyptian people since its members will be appointed by the two chambers of the parliament, 70% of which are dominated by Islamist factions. The inclusion of members of parliament in the assembly was problematic in principle for many as allowing the legislative authority to write the constitution was seen to undermine the separation of powers. It was against this tension that the constitution was issued in January 2012 and put to referendum. The constitution was approved by 63.8% of the voters and rejected by 36.2%. Participation in the referendum did not exceed 32.9% of registered voters¹⁵. The constitution was labelled “the constitution of the Muslim Brotherhood” since it was marketed by members of the group as proof of the legitimacy of the president, who had only been in power for six months, and the opposition saw the turnout and the result as proof that a large segment of Egyptians do not approve of the regime.

In 2014, participation in the referendum on the new constitution did not exceed 38% of registered voters¹⁶. In order to draft a new constitution following the ouster of the Muslim Brotherhood, a ten-member committee was appointed in accordance with the roadmap

¹⁴ Judge Tarek al-Bishri (former first deputy of the Council of State), Dr. Atef al-Banna (professor of constitutional law at Cairo University), Dr. Hussein Abdel Aal (former dean of the School of Law, Cairo University), Dr. Mohamed Bahi (vice dean of the School of Law, Cairo University,) Judge Maher Sami Youssef (technical advisor to the head of the Supreme Constitutional Court), Sobhi Saleh (lawyer at the Court of Cessation and member of the Muslim Brotherhood), Judge Hassan al-Badrawi (deputy director of the Supreme Constitutional Court), and Judge Hatem Bagato (head of Commissioners Committee at the Supreme Constitutional Court).

¹⁵ See the website of the National Elections Commission: <https://bit.ly/2PN9Kwv>

¹⁶ See the results of the referendum on the 2014 constitution: <https://bit.ly/2NBML6t>

announced on July 3, 2013 and to Article 28 of the Constitutional Declaration and it was a purely legal committee¹⁷. This was followed by the establishment of the 50-member Constituent Assembly whose members were chosen based on particular criteria¹⁸. Despite the fact that many members in the assembly were elected by their respective entities, which was the case with representatives of syndicates, it is not possible to claim that the assembly was elected. The assembly, however, did contain a wide range of legal experts, politicians, and civil society players. This method of choosing assembly members can be said to rely on appointment through choice, which means it is an assembly whose members were chosen by particular factions and entities.

In Morocco, the king appointed members of a consultative committee tasked with drafting a new constitution and it was headed by legal expert Abdel Latif Menouni. In addition to the committee, the king assigned his advisor Mohamed Moatassim the task of conducting negotiations with heads of political parties and syndicates about the new proposed amendments¹⁹. Morocco's constituent assembly included university professors, legal experts, and human rights activists. The king decreed the establishment of a committee known as the Political Mechanism for Monitoring Constitutional Amendments. The committee was made up of the head of the constituent assembly and representatives of political parties and syndicates and aimed at allowing the exchange of views on the constitution between different players in the political scene²⁰.

¹⁷ The committee was made up of 10 legal experts from the entities specified by the constitutional declaration including Judge Mohamed al-Shinnawi (deputy director of the Supreme Constitutional Court), Judge Mohamed Khairy Taha (deputy director of the Supreme Constitutional Court), Judge Hatem al-Sayed Mohamed Bassiouni (head of the Cairo Court of Appeals), Judge Mohamed Eid Mahgoub (deputy director of the Court of Cessation), Dr. Fathi Fikri (professor at the School of Law, Cairo University), Dr. Hamdi Ali Omar (dean of the School of Law, Zaqaziq University), Dr. Salah al-Din Fawzi (professor at the School of Law, Mansoura University), Dr. Ali Abdel Aal Sayed Ahmed (professor at the School of Law, Ain Shams University): <https://bit.ly/2LCquU2>

¹⁸ The Constituent Assembly, also known as the 50-member committee, was established by decree no. 570 for the year 2013. According to Article 29 of the Constitutional Declaration, the Experts' Committee was to prepare a draft of the new constitution within 30 days at most. The draft was then to be presented to a committee of 50 members, who were to represent all segments of the Egyptian society, particularly political parties, intellectuals, workers, farmers, trade unions, al-Azhar, Egyptian churches, the Armed Forces, the police, and public figures, provided that at least 10 of them are women and youths. The assembly included three representatives of al-Azhar, three for churches, four for youths, one for each of the Writers' Union, the Union of Arts Syndicates, the Fine Arts Sector, the Supreme Council of Culture, two workers, two farmers, one for each of the lawyers', doctors, and journalists', and engineers' syndicates, the Federation of Chambers of Tourism, the Federation of Chambers of Commerce, Egypt Students Union, the General Union of National Institutions and NGOs, the National Council for Women, the National Motherhood and Childhood Council, the National Council for Human rights, the Supreme Council of Universities, the Union for Special needs, the Armed Forces, the police, two for the Islamist trend, one for the leftist trend, and one for the nationalist trend, and 10 public figures.

¹⁹ "Constitutional amendments in Morocco: Reform or containment of democratic transition? [Arabic]" *Eplume*, July 18, 2011: <https://goo.gl/Rs4veu>

²⁰ Abdullah al-Turabi. "Constitutional amendments in Morocco: Developments in the revolutionary context [Arabic]." Arab Reform Initiative. Nov. 2011: <https://goo.gl/GkCcuh>

The Moroccan constitution was drafted through a committee of experts appointed by the king and not through an elected committee or a committee whose members were elected by their respective entities. The criteria based on which the constitution was to be amended were also determined in a speech delivered by King Muhammad VI on March 9, 2011. This means that the constituent assembly worked on a draft submitted by the monarchy and it was headed by one of the king's advisors, which stirred controversy on how objective that assembly could be.

In other experiences on the international level, members of the constituent assembly are usually elected by the people, which was the case in Brazil in the 1980s, post-independence India, South Africa in the 1990s, and Tunisia in 2011.²¹ People can first elect members of parliament who would later draft the constitution or directly elect members of the constituent assembly, the latter having the advantage of a higher level of legitimacy. Different experiences demonstrate that drafting the proposal is a long process that takes between 18 and 24 months. In South Africa, drafting the new constitution took five years that started with negotiations between different parties and ended with the ratification of the final constitution.

Second: Constituent assemblies' working rules:

In Tunisia, the Constituent Assembly included two types of committees: The first are constitutive committees (Preamble, General Principles, and Constitutional Amendments Committee, Rights and Freedoms committee, Executive and Legislative Powers Committee, Judicial System and Administrative, Financial and Constitutional Judiciary Committee, Independent Constitutional Bodies Committee, and Local Government Committee). The second are legislative committees (Rights, Freedoms, and External Relations Committee, General Legislation Committee, Finance, Planning, and Development Committee, Energy and Production Sectors Committee, Service Sectors Committee, Infrastructure and Environment Committee, and Social Affairs Committee).

In Egypt, according to Article 29 of the Constitutional Declaration issued on July 8, 2013, the 10-member Experts' Committee was to prepare a draft for constitutional amendments within 30 days. The committee started working on July 21, 2013 and dedicated a week to receiving amendment proposals whether from political parties, citizens, or any other entities²². Voting in the committee was by simple majority and a technical general secretariat was established to assist the committee's 10 members. The committee submitted a draft constitution that contained 198 articles on April 22, one month after it established the 50-member Constituent Assembly²³. Five committees branched out of the Constituent Assembly: Societal Dialogue and Proposals Committee, Main Principles and State

²¹ Karim Sarhan. "Criteria for choosing the Constituent Assembly [Arabic]." Arab Forum for Alternatives, 2011: <https://goo.gl/ivTpYQ>

²² "Egyptian constituent assembly set a week to receive amendment proposals [Arabic]." *Al-Hurrah*, July 21, 2013: <https://arbne.ws/2SSmHKE>

²³ Mohamed Gharib and Hussein Ramzi. "Final draft of constitutional amendments: The full text [Arabic]." *Al-Masry al-Youm*, Aug. 22, 2013: <https://bit.ly/2SPzkGo>

Committee, Rights and Freedoms Committee, Governance and General Powers Committee, and Drafting Committee. Members of the Constituent Assembly agreed that the texts drafted by the Experts' Committee as well as previous Egyptian constitutions (1923, 1954, 1971, and 2012) are to be taken into consideration when drafting the new constitution. The assembly had the right to consult with external experts and establish specialized technical committees to assist in particular matters. The assembly agreed to make decisions based on majority votes among principal members and in cases of disagreement over a particular article, a majority vote of 75% can resolve the issue²⁴.

The Moroccan case was distinguished by the fact that many of the experts contacted by the Consultative Committee submitted drafts for the entire constitution while some proposed particular amendments. Civil society organizations were not made aware of the new draft until June 8, 2011 and even then, they did not receive a written document, but listened to an oral presentation in a meeting that lasted for 10 hours. Members of the Consultative Committee themselves did not see a written draft until June 16, 2011, one day before the king presented it to the nation in a televised speech. The cabinet was asked to vote on the draft on the same day it was made public²⁵.

Third: Societal response to constituent assemblies' work:

The process of building a state starts with drafting a new constitution that breaks away from the previous authoritarian system and lays the foundations for a democracy that warrants peaceful rotation of power and protects citizens' rights and freedoms. For this reason, writing a constitution is a complicated process. The content of the new constitution is expected to be determined following discussions among different political factions since that content is political at its core. The content of the constitution is distinguished from the technical and legal processes involved in the actual drafting of the text. Previous experiences demonstrated that democratic transition is a complicated process and that is why the constitution should be the result of an entire path referred to as "the path of drafting the constitution" or "the constitutive path." This path has a strong impact on the final text of the constitution whether in terms of its content or the effectiveness and viability of its articles²⁶.

In December 2012, the committees affiliated to the Tunisian Constituent Assembly submitted the first constitution draft. The draft was met by reservations from opposition parties and civil society, especially on the articles that dealt with the political system, freedom of expression, freedom of faith, and the position of woman. A second draft was issued in January 2013 and by that time finalizing the constitution was becoming a pressing need due to the social and economic crisis and the escalation of violence. A third draft was

²⁴ "Egyptian Constituent Assembly: Amendments require 75% approval [Arabic]." *Al-Itihad Newspaper*, Sep. 10, 2013: <https://bit.ly/2IrMFQt>

²⁵ Marina Utawi. "The new Moroccan constitution: Real change or more procrastination? [Arabic]" Carnegie Middle East Center, June 23, 2011: <https://goo.gl/wfQL11>

²⁶ Narjis Zaher and Donia bin Ramadan. "Constitution drafts: Comparative experiences and lessons learnt [Arabic]." International Institute for Democracy and Electoral Assistance, June 2013.

issued in April 2013. Meanwhile, negotiations took place between then president Moncef Marzouki and the Tunisian General Labor Union to resolve disputed issues and national dialogue sessions were organized. In June 2013, the final draft was submitted amid objections by opposition parties because the Joint Coordination and Drafting Commission changed the phrasing of several articles submitted by specialized committees. A report submitted by the committees to the Coordination and Drafting Commission about the final phrasing led to the completion of the final draft. In this case, civil society played a major role in monitoring the process of drafting the constitution and facilitating dialogue between experts taking part in drafting the constitution and the people.

Societal participation in Egypt started with the establishment of the 10-members Experts' Committee based on the Constitutional Declaration issued on July 8, 2013. The Experts' Committee received proposals from the National Salvation Front, the main opposition bloc at the time, and political parties. The 50-member Constituent Assembly also organized several sessions of national dialogue with representatives of entities whose affairs are regulated by the constitution and representatives of civil society as well as at universities. The assembly also received proposals from research centers and different organizations. The participation of secondary members of the assembly was also considered part of the national dialogue.

In Morocco, the process of drafting the constitution was more transparent. The process started with extensive societal dialogues that involved different parties including representatives of civil society and syndicates. The assembly also received proposals for amendments. Consultative assemblies that were formed at the time played a major role in facilitating communication between the constituent assembly and different segments of civil society. A website was also created to receive citizens' proposals and to stream the assembly's meetings, yet the latter did not materialize citing implementation difficulties²⁷. The assembly received 185 documents containing proposals from different political parties, syndicates, and organizations. The assembly then drafted the new constitution and submitted it to the king as a last step before putting it to public referendum²⁸. In June 2011, the Constituent Assembly ran the draft by representatives of political parties and syndicates as part of the monitoring mechanism agreed upon earlier. However, in the first meeting between the assembly and representatives, the main issues addressed in the new constitution were just presented orally and the representatives did not receive a written copy. This led representatives of several political parties and the Democratic Confederation of Labor to leave the meeting, voicing their objection to the working methodology adopted by the assembly²⁹. Following this disagreement, the assembly abandoned the transparency mechanism altogether and started working secretly and with a faster pace³⁰. The

²⁷ Mohamed Bask Manar. "The 2011 Moroccan constitution: What context for what content? [Arabic]." Arab Center for Research and Policy Studies, January 2014: <https://goo.gl/HXVUXq>

²⁸ "Constitutional amendments in Morocco: Reform or containment of democratic transition? [Arabic]" Op. cit.

²⁹ Abdullah al-Turabi. Op. cit.

³⁰ Mohamed El Agati. "The new constitution and the nature of the political system in Morocco [Arabic]." Arab Forum for Alternatives, 2011: <https://goo.gl/vK9Sc6>

Democratic Confederation of Labor then issued a statement in which it called the process of drafting the constitution “the furthest it could be from participatory methodology” while the Socialist Democratic Vanguard Party announced boycotting the referendum.

Fourth: Voting mechanisms and ratification:

The main political players in Tunisia managed to agree on a new constitution after two years of debate and an escalating political crisis. The Constituent Assembly was supposed to ratify the draft constitution through first voting on each article then voting on the entire text by January 14, 2014, on the third anniversary of the Tunisian revolution. The assembly started the ratification process on January 3, 2014 but could not finish on time and debates over the constitution lasted for more than two years due because of the political crisis. The first voting session, on individual articles, started off with the attendance of 184 out of 217 lawmakers that made up the assembly. There were several controversial articles that were ratified after extensive negotiations among members of the assembly. The Tunisian case demonstrates the link between the political and constitutional paths. The ratification of the constitution was made possible following the end of the Troika phase and the settlement reached between Islamists and secularists, hence a change in the balance of power. The constitution was ratified by 200 members out of the 216 present and it came into effect after it was published in a special issue in the Tunisian Official Gazette on February 10, 2014.

In Egypt, the 10-member Experts’ Committee submitted the draft constitution, made up of 198 articles, on August 22, 2013, one month after the establishment of the 50-member Constituent Assembly³¹. The Constituent Assembly agreed to make decisions on procedural matters through majority votes by attending principal members and in case members were unable to agree on a particular article, this article is passed if 75% of members who have the right to vote agree on it ³². In the case of Egypt, the 2012 draft constitution was put to public referendum in which 32.9% of registered voters took part, 63.8% of whom approved the draft³³. The referendum on the 2014 constitution took place in January 14-15, 2014 with 38.6% of registered voters taking part and 98.1% of them approving the new constitution³⁴.

In Morocco, simple majority voting took place within the constituent assembly first then the constitution was ratified through a public referendum in which 98.5% approved. The turnover was estimated at 73% of registered voters ³⁵. Parties that approved the constitution welcomed the results and called the referendum free and fair. Meanwhile, senior members of the Justice and Development Party made contradictory statements about the results. The February 20 Movement said the results were rigged and argued that most Moroccans

³¹ Mohamed Gharib and Hussein Ramzi. Op. cit.

³²“Egyptian Constituent Assembly: Amendments require 75% approval [Arabic].” Op. cit.

³³ See the website of the National Elections Commission: <https://bit.ly/2PN9Kwv>

³⁴ See the results of the referendum on the 2014 constitution: <https://bit.ly/2NBML6t>

³⁵ Abdullah al-Turabi. Op. cit.

boycotted the referendum. The movement also noted several violations that took place before and on the day of the referendum including mosque imams telling worshippers on Friday prayer sermons that approving the constitution is a religious duty. The February 20 Movement submitted reports that underline the defects of the voting mechanism. These included determining the number of voters based on registered ones not the entire population, which meant the exclusion of around 10 million citizens who, if counted, would show that the turnover did not exceed 37%, which means that 63% boycotted the referendum³⁶.

Fifth: The Syrian context:

The constitution has become one of the main contention points in the negotiations between the Syrian regime and opposition factions. The conflict through which Syria has been going for years resulted in a reality that cannot be overlooked during negotiations. Opposition factions and centers that work on transitional justice such as the Syria Justice and Accountability Center stress the necessity of taking the repercussions of the war into consideration upon reaching a settlement. According to them, such settlement has to include repatriation and warranting political, economic, and social rights. These entities also stressed the importance of the participation of all political factions in the drafting of the constitution and considered this participation the only guarantee for democratic transition. The constitution acquires a special significance in Syria not only because it will determine the political future of the country, but also because many segments of the Syrian society suffered from marginalization and complained that legislations do not represent their needs, which is arguably one of the reasons for the escalation of violence. That is why drafting a constitution that repeats the same mistakes is bound to intensify the crisis.

Owing to the specificity of the Syrian situation and the necessity of achieving stability, the new constitution cannot allow for more polarization nor leave the country in a fragile position where war is likely to erupt at any time. This not only done through the participation of all political factions, but also through making sure that approving the constitution is not done through simple majority (50% + 1). In order for the Syrian constitution to guarantee political stability, a number of factors need to be taken into account:

- A timeline should be set in a way that allows for extensive negotiations while at the same time making sure there is no space for procrastination since the Tunisian case demonstrated that an open-ended process hinders democratic transition and opens the door for particular powers to dominate the political scene and the drafting of the constitution while, on the other hand, the Egyptian case shows that constitutions drafted within three months and voted on immediately are not sustainable.
- A clear mechanism is to be determined for wide-scale participation not only in negotiating over the articles of the constitution, but also in monitoring the drafting process, which requires the presence of influential civil society entities that are granted freedom of organization. The role of the Tunisian General Labor Union

³⁶ Ibid.

offers the best example of this type of participation. It is noteworthy that popular participation requires an environment where freedom of expression is protected and where media outlets can take part in the dialogue. In the Syrian case, it is important to allow women, youths, and different sects, religions, and ethnicities to take part in the drafting process.

- The committee in charge of drafting the new constitution should include all segments of the Syrian society. Different experiences across the region demonstrated that drafting constitutions is not a technical process carried out by legal experts, but a societal one in which the whole country needs to be represented. Legal experts play a bigger role in the sub-committee in charge of the actual phrasing of constitution articles, but they should not constitute the majority of the constituent assembly. Those experiences also proved that drafts written by experts are quite rigid, which was illustrated in the case of the 10-member committee in Egypt, since experts are technocrats whose mission is to implement the constitution rather than draft it. In the case of Syria, the committee in charge of drafting the constitution can be formed along the lines of Egypt's 2014 Constituent Assembly in which different entities choose their representatives to be members of the committee.
- The committee in charge of drafting the constitution should be independent and should determine its internal bylaws and timeline without interference. It should also be led by a secretariat whose mission is the facilitation of the process and not managing the committee.
- The committee's internal bylaws should stress the principles of democracy and transparency, determine the division of labor and working and voting mechanisms, channels of popular participation, and a timeline.
- Voting needs to be based on consensus and the committee secretariat should be in charge of the voting process. It is important to stress that no member of the committee should have veto power regardless of the entity this member represents and that a veto can only be valid if more than two members voice their objection to any of the articles, regardless of the entities those members represent.
- Unless members of the constituent assembly are directly elected by the people, which is quite difficult in the Syrian case, a public referendum has to be held and Syrians inside and outside Syria have to take part in voting for the constitution. International organizations need to offer financial and logistical support for the referendum and to make the voting process electronic.
- The referendum needs to be conducted democratically and transparently in accordance with international standards.

Chapter 2

Important issues in the Syrian context:

Experiences from Arab constitutions

Debates about the constitution focus on the system of governance, both political and administrative, and, as stressed by the National Agenda for the Future of Syria, the role of the people in determining this. The future state in Syria needs to be formulated in a way that guarantees preserving the unity of the country and protecting it from conflicts and divisions as well as making sure it does not fall prey to any forms of exploitation. Several crucial issues need to be taken into consideration when determining the characteristics of the future system in Syria.

First: Decentralization and federalism:

In several democratic countries, municipal councils are considered an open space for managing political, social, religious, and ethnic diversity within a framework that promotes coexistence and the peaceful resolution of political disputes and strengthens the rule of law³⁷.

The Russian draft constitution proposed the establishment of a “provincial association” to manage municipalities and that power is divided between the “people’s assembly,” as the draft refers to the parliament, whose members are elected, and the provincial association whose members are appointed by the president. Members of the provincial association enjoy more powers than the parliament including declaring war and peace, ousting the president, authorizing state of emergency and general mobilization, and appointing members of the Supreme Constitutional Court³⁸.

The Tunisian 2014 constitution included 14 articles on decentralization. Article 71 of the 1959 constitution tackled the provincial administration of the Tunisian state: “Municipal councils, regional councils and the structures to which the law gives the quality of local authority, manage local affairs according to the terms set by law.” There is a will in Tunisia to shift to decentralization, which is demonstrated in the constitution that dealt with this issue on three levels as it stated that decentralization is “through local authorities comprised of municipalities, districts, and regions” as stated by Article 131. Article 14 also states that “the state commits to strengthen decentralization and to apply it throughout the country, within the framework of the unity of the state.”

³⁷ Habiba Mohsen, Rania Zada, and Mahmoud Abdel Fattah. “Decentralization and the municipal system: Towards a new Egyptian constitution: Experiences and visions [Arabic].” Arab Forum for Alternatives, 2011: <https://goo.gl/CokMoj>

³⁸ Radwan Ziada. “The Russian version of the Syrian constitution [Arabic].” *Al-Hayat*, Dec. 20, 2017: <http://www.alhayat.com/article/847600/النسخة-الروسية-للدستور-السوري>

The Moroccan constitution states in Article 1 that “the territorial organization of the Kingdom is decentralized. It is founded on an advanced regionalization.” According to the constitution, decentralization is regulated through a law that guarantees the democratic management of regions, number of councils, the electoral system, conditions based on which decisions by municipal governors are implemented, powers enjoyed by municipal councils, and financial issues. The constitution states that members of regional councils, referred to as “territorial collectivities,” are chosen through direct elections and that councils handle development programs in their respective regions. Article 143 states: “In the enactment and the application of the programs of regional development and of the regional schemes of management of the territories, the region assures, under the supervision of the President of the Council of the region, a preeminent role for good relations with the other territorial collectivities”³⁹. Article 140 states that “territorial collectivities have their own competences, competences divided with the State and those which are transferable to them by the latter” while Article 141 states that “the regions and the other territorial collectivities dispose of their own financial resources and of financial resources allocated by the State. Any transfer of competences of the State to the regions and the other territorial collectivities must be accompanied by a transfer of corresponding resources.” Municipal councils are also authorized to design and implement programs of economic and social development based on the needs of their respective regions provided that this is done within the framework of the broad national plan. The councils have the power to audit the budgets and administrative expenses of public institutions under their jurisdiction. According to Article 145, regional councils “assure the application of the laws, implement the governmental regulations and decisions and exercise the administrative control.” However, representatives of the central government play a major role in municipal councils, which makes decentralization quite limited⁴⁰.

While the 2011 Moroccan constitution supported the concept decentralization, the Law for the regulation of Territorial Collectivities was issued in 2015 to specify the laws governing the management of municipalities. However, like the constitution, the law is still defective as far as decentralization is concerned since it gives powers to the central government at the expense of elected municipal councils, which is expected to hinder the councils from practicing their constitutional rights and carrying out their developmental projects, hence defeating the purpose of decentralization ⁴¹.

While the Moroccan experience can be utilized in the Syrian context in theory, the gap between the text and its implementation remains a problem. In fact, the Moroccan experience demonstrates that constitutional articles are never enough and will not make a

³⁹ “A critical study of the 2011 Moroccan constitution [Arabic].” International Institute for Democracy and Electoral Assistance, 2012: <https://goo.gl/zSKKcU>

⁴⁰ Ibid.

⁴¹ Mohamed Tare. “Principles of good governance and local transparency in Morocco: Between constitutional/legal efforts and practice [Arabic].” *Municipal Councils and Empowerment of Societal Participation: Arab Cases* [Arabic]. Arab Forum for Alternatives, 2016: <https://goo.gl/DjyNQ3>

change unless translated into actual laws that support them. It is also important that these laws avoid any gaps that might hinder the implementation of a decentralized system.

In Egypt, the 2012 constitution addressed the issue of decentralization in Articles 183-190. The 2014 constitution contains eight articles about municipal councils and decentralization. According to Article 176, “the state ensures support for administrative, financial, and economic decentralization. The law organizes empowering administrative units in providing, improving, and managing public utilities well, and defines the timeline for transferring powers and budgets to the local administration units.”⁴². While the text is promising in principle, the constitution does not specify the rules for electing governors or heads of municipal councils and does not specify the legal powers they have and which are always dictated by the executive power. This explains why decentralization did not materialize on the ground. In fact, no municipal councils were elected since the older ones were disbanded in 2011 and governors and heads of municipal councils were always chosen by the executive power, which places provinces under the control of the central government. This also renders the central government the sole monitoring entity rather than the legislative power and renders any form of popular monitoring nonexistent.

In Syria, there has been calls for establishing a decentralized system while a large segment of Kurds see federalism as the only means through which they can get their legitimate rights⁴³. Law no. 107 for the year 2011, which regulates municipal administration, is seen as a means of reinforcing the centralized system and supporting authoritarian rule. Meanwhile, the Iraqi experience proves that federalism and the quota system do not necessarily solve the problems caused by absolute centralism and at times introduces new problems. That is why decentralization only becomes effective if supported by the principle of democracy and citizenship.

Second: Citizenship and social diversity:

According to the ESCWA report, the Syrian constitution should include citizenship as a main principle that cannot be manipulated in any way, which was not the case with previous constitutions. Sectarian, ethnic, and religious diversity in Syria makes the principle of citizenship even more indispensable since it is the only means of guaranteeing equal rights for all citizens. The issue of religion is particularly sensitive in Syria as there is an ongoing debate between factions that want to establish Syria as a secular state where religion and politics are separated and others that want to assert the religious identity of Syria. It is important in either cases to abide by UN Human Rights Committee, General Comment 22 on International Covenant on Civil and Political Rights (ICCPR) Article 18 which states the following: “The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under

⁴² See Egyptian 2014 constitution, drafted approved in a referendum held on May 14-15, 2014: <http://dostour.eg/2013/topic/regime/>

⁴³ Basma al-Qadmani. “Towards safe democratic decentralization for Syria [Arabic]. Arab Reform Initiative, Dec. 29, 2017: <https://www.arab-reform.net>

the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers”⁴⁴. Several factions in Syria also call for liberating the state from ideological hegemony so that a civilian state founded on citizenship and the rule of law can be established⁴⁵.

The cases of Tunisia, Morocco, and Egypt are quite different from Syria since in all three there is an obvious religious majority and none of them is as diverse as Syria in terms of sects and ethnicities. However, the position of different social components such as women and youths is tackled in all three experiences. The Tunisian constitution stresses the principle of equality between citizens. The Preamble states that “the state guarantees the supremacy of the law and the respect for freedoms and human rights, the independence of the judiciary, the equality of rights and duties between all citizens, male and female, and equality between all regions” while Article 21 states that “all citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination. The state guarantees freedoms and individual and collective rights to all citizens and provides all citizens the conditions for a dignified life”⁴⁶. Regarding women rights, Article 46 states the following: “The state commits to protect women’s accrued rights and work to strengthen and develop those rights. The state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains. The state works to attain parity between women and men in elected Assemblies. The state shall take all necessary measures in order to eradicate violence against women”⁴⁷. The constitution, however, does not mention youths, citizens residing abroad, or minorities, but mentions people with special needs in Article 48: “The state shall protect persons with disabilities from all forms of discrimination. Every disabled citizen shall have the right to benefit, according to the nature of the disability, from all measures that will ensure their full integration into society, and the state shall take all necessary measures to achieve this”⁴⁸.

In Egypt, the debate over identity, citizenship, and religion started after the revolution as calls for a civilian state increased. Equality is mentioned in the Egyptian constitution in the following articles:

Article 4: “Sovereignty belongs to the people alone, which exercises it and protects it. They are the source of power. They safeguard their national unity, which is based on the principle of equality, justice and equal opportunity between citizens, as provided in this Constitution.”

Article 11: “The state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this

⁴⁴ ESCWA 2016.

⁴⁵ ESCWA 2016.

⁴⁶ Tunisian constitution issued on March 27, 2014.

⁴⁷ Ibid.

⁴⁸ Ibid.

Constitution. The state commits to taking the necessary measures to ensure appropriate representation of women in the houses of parliament, in the manner specified by law. It grants women the right to hold public posts and high management posts in the state, and to appointment in judicial bodies and entities without discrimination.”

Article 81: “The state shall guarantee the health, economic, social, cultural, entertainment, sporting and education rights of dwarves and people with disabilities. The state shall provide work opportunities for such individuals, and allocate a percentage of these opportunities to them, in addition to equipping public utilities and their surrounding environment. The state guarantees their right to exercise political rights, and their integration with other citizens in order to achieve the principles of equality, justice and equal opportunities.”

Article 180 deals with women, already mentioned in Article 11 above, youths, and minorities: “Every local unit elects a local council by direct, secret ballot for a term of four years. A candidate must be no younger than 21 years old. The law regulates other conditions for candidacy and procedures of election, provided that one quarter of the seats are allocated to youth under 35 years old, one quarter is allocated for women, workers and farmers are represented by no less than 50 percent of the total number of seats, and these percentages include a proper representation of Christians and people with disability.”

In addition to Article 180, other articles in the Egyptian constitution deal with youth:

Article 82: “The state guarantees the care of youth and young children, in addition to helping them discover their talents and developing their cultural, scientific, psychological, creative and physical abilities, encouraging them to engage in group and volunteer activity and enabling them to take part in public life.”

Article 244: “The state grants youth, Christians, persons with disability and expatriate Egyptians appropriate representation in the first House of Representatives to be elected after this Constitution is adopted, in the manner specified by law.”

In addition to articles 180 and 224, minorities are also mentioned in Article 236: “The state shall develop and implement a plan for the comprehensive economic and urban development of border and underprivileged areas, including Upper Egypt, Sinai, Matrouh, and Nubia. This is to be achieved by the participation of the residents of these areas in the development projects and the priority in benefiting from them, taking into account the cultural and environmental patterns of the local community, within ten years from the date that this Constitution comes into effect, in the manner organized by law.”

Several articles in the Egyptian constitution deal with the issue of discrimination:

Article 9: “The state ensures equal opportunity for all citizens without discrimination.”

Article 19: “Every citizen has the right to education with the aim of building the Egyptian character, maintaining national identity, planting the roots of scientific thinking,

developing talents, promoting innovation and establishing civilizational and spiritual values and the concepts of citizenship, tolerance and non- discrimination. The state commits to uphold its aims in education curricula and methods, and to provide education in accordance with global quality criteria. Education is obligatory until the end of the secondary stage or its equivalent. The state grants free education in different stages in state educational institutions as per the law. The state commits to allocating a percentage of government spending that is no less than 4% of the GDP for education. It will gradually increase this until it reaches global rates. The state oversees education to ensure that all public and private schools and institutes abide by its educational policies.”

Article 48: “Culture is a right of every citizen that is guaranteed by the state. The state is committed to support it and provide all types of cultural materials to the different groups of people without discrimination based on financial capacity, geographical location, or anything else. The state gives special attention to remote areas and the groups most in need. The state encourages translation from and to Arabic.”

Article 53: “Citizens are equal before the law, possess equal rights and public duties, and may not be discriminated against on the basis of religion, belief, sex, origin, race, color, language, disability, social class, political or geographical affiliation, or for any other reason. Discrimination and incitement to hate are crimes punishable by law. The state shall take all necessary measures to eliminate all forms of discrimination, and the law shall regulate the establishment of an independent commission for this purpose.”

Egyptians living abroad were mentioned in Article 88: “The state shall protect the interests of Egyptians living abroad, protect them, guarantee their rights and freedoms, enable them to perform their public duties towards the state and society, and engage them in the nation's development. The law shall regulate their participation in elections and referendums in a way consistent with their particular circumstances, without being restricted by the provisions on voting, counting of ballots and announcing of results set forth in this Constitution. This shall be done with the granting of guarantees that ensure the fairness and neutrality of the election and referendum process.”

The 2011 Moroccan constitution included several articles about citizenship as the main foundation of the modern state. This is demonstrated in Article 16: “The Kingdom of Morocco works for the protection of the rights and legitimate interests of the Moroccan citizens resident abroad, within respect for international law and for the laws in force in the host countries. It is committed to the maintenance and to the development of their human ties, notably cultural, with the Kingdom, and the preservation of their national identity. It sees to the reinforcement of their contribution to the development of their homeland, Morocco, and to the strengthening of ties of amity and of cooperation between the governments and the societies of the countries where they reside, and of which they are citizens.” Article 17 deals with Moroccans living abroad: “Moroccan residents abroad enjoy the full rights of citizenship, including the right to be electors and eligible. They can be candidates to the elections at the level of lists and of local, regional and national electoral circumscriptions. The law establishes the specific criteria of eligibility and of incompatibility. It determines, as well, the conditions and the modalities of the effective

exercise of the right to vote and of candidature from the countries of residence.” Gender equality is mentioned in Article 19: “Man and the women enjoy, in equality, the rights and freedoms of civil, political, economic, social, cultural and environmental character, enounced in this Title and in the other provisions of the Constitution, as well as in the international conventions and pacts duly ratified by Morocco and this, with respect for the provisions of the Constitution, of the constants of the Kingdom and of its laws. The State works for the realization of parity between men and women. An Authority for parity and the struggle against all forms of discrimination is created, to this effect”⁴⁹.

The Moroccan constitution also dealt with one of the most pressing citizenship issues in the country, the Amazigh. This issue was not addressed until recently for since independence from the French, the Moroccan state embarked on a process of Arabization and worked on asserting the Arab identity of Morocco, which led to the marginalization of Amazigh identity. Amazigh groups were indignant at the discrimination to which they were subjected yet were not powerful enough to start an organized movement. This changed in the 1980s with the Amazigh Spring that started in Algeria. The Université d'été d'Agadir was established in the city of Agadir and constituted the first step towards coordination between Amazigh players in Morocco. However, actual dialogue with the Amazigh community only started as King Muhammad VI came to power and gave a speech in 2001 stressing the deep rootedness of Amazigh culture. The speech was followed by a number of developments, the most significant of which was incorporating the Amazigh language in the educational process. The most prominent development took place with the amended constitution issued in 2011. Article 5 stated that while Arabic remains the official language of the state, Amazigh will also acquire official status: “Arabic is the official language of the State. The State works for the protection and for the development of the Arabic language, as well as the promotion of its use. Likewise, Tamazight [Berber/Amazigh] constitutes an official language of the State, being common patrimony of all Moroccans without exception”⁵⁰. While the Moroccan constitution is seen to have taken several positive steps towards promoting the principle of citizenship, it is worth noting that the new constitution does not mention freedom of faith and that according to Article 3, Islam remains the official religion of the state: “Islam is the religion of the State, which guarantees to all the free exercise of beliefs”⁵¹. This undermines the principle of citizenship, which remains incomplete if freedom of faith is not part of it.

Syria is a more complicated case owing to the diversity of sects and ethnicities, which is why in addition to debates over the choice between secularism and religious identity, the quota system is also subject to negotiations. While this system could seem as the best means of dealing with diversity, the cases of Iraq, and Lebanon, Northern Ireland, and Bosnia prove otherwise. This is because instead of contributing to the establishment a democracy, the quota system eventually leads to the monopolization of particular positions

⁴⁹ “Citizenship in the new Moroccan constitution [Arabic].” *Maghress*, June 30, 2011: <https://goo.gl/LX9Ttt>

⁵⁰ Akram Adnani. “The Amazigh spring in Morocco: A North African model [Arabic].” April 26, 2014: <https://goo.gl/ZELNzn>

⁵¹ Mohamed El Agati. Op. cit.

by particular sects.⁵² The Syrian constitution should, therefore, stir away from the quota system and look instead for profound solutions for economic, social, and political crises other than adopting a system that will only deepen the gap between different communities.

Third: Democracy and political rights:

When drafting a constitution, it is necessary to include articles that prevent its violation at a later stage. Constitutions mentioned above do not include penalties for the violation of their articles, which led successive regimes to commit such violations with impunity. Constitutions also have to include articles that assert its supremacy and that determine the status of international charters in the local legal system⁵³. It is necessary to refer to those charters when addressing social, political, and economic rights and not to use cultural specificity as a pretext to do otherwise. It is, in fact, the absence of those rights that contributed to the escalation of violence in Syria and this is not expected to change unless those rights are clearly stated in the constitution.

In the chapter entitled Rights and Freedoms, the Tunisian constitution dealt with this issue. Article 49 addressed the limitations which can be applied to rights and freedoms and which, in all cases, cannot affect the core of those rights and freedoms and have to be regulated by the law: “The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defense, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.” This article is unique within the Arab context since several constitutions in the region allow the restriction of rights and freedoms in a way that defeats the purpose of the original constitution articles and permits passing laws that undermine the very concept of rights and freedoms⁵⁴.

The 2014 Egyptian constitution stresses the importance of civil and political rights such as the right to organize, political pluralism, and the right to establish NGOs, which is demonstrated in Articles 73-77 and 87. However, the laws issued in relation to these articles did not regulate their implementation on the ground as they are supposed to do, but rather restricted it. This is illustrated in restricting the right to organize, which particularly impacted the establishment of labor unions and civil society organizations and favored individual candidacy to party lists in parliamentary elections⁵⁵. Also, one of the problems that faced drafting the Egyptian constitution was uncertainty about whether the ruling system is presidential or mixed and whether the parliament should be unicameral or

⁵² Radwan Ziada. Op. cit.

⁵³ ESCWA 2016.

⁵⁴ Mahmoud Bayoumi. “The judiciary in Arab Spring constitutions: Egypt, Tunisia, Morocco, Yemen [Arabic].” Arab Forum for Alternatives, 2014: <https://goo.gl/gzKxLR>

⁵⁵ “Sisi orders revision of law restricting NGOs [Arabic].” Reuters, Nov. 6, 2018: <https://ara.reutersmedia.net/article/topNews/idARAKCN1NB2MH>

bicameral. Article 226 about the amendment of the constitution stated that amending the constitution should be linked to enhancing rather than undermining basic rights: “In all cases, texts pertaining to the re-election of the president of the republic or the principles of freedom and equality stipulated in this Constitution may not be amended, unless the amendment brings more guarantees.”

While protests in Morocco did not call for ousting the regime as was the case with Egypt and Tunisia, the main demands of protestors still revolved around rights, freedoms, and democracy. The amended Moroccan constitution addressed these issues in a manner that would introduce actual changes to the political scene. For example, Article 47 states that “the King appoints the Head of Government from within the political party arriving ahead in the elections of the members of the Chamber of Representatives, and with a view to their results” while in the past the king was to choose anyone he wants for this position. Articles 87-112 reduce the political and religious powers the king used to enjoy and give more powers to the parliament. Article 1 also stated that “Morocco is a constitutional, democratic, parliamentary and social Monarchy” and that “the constitutional regime of the Kingdom is founded on the separation, the balance and the collaboration of the powers, as well as on participative democracy, and the principles of good governance and of the correlation between the responsibility for and the rendering of accounts”⁵⁶. The Moroccan constitution includes a number of civil and political rights such as the right to vote and run for elections (Article 30), freedom of thought, opinion, creativity, and academic research (Article 25), freedom of the press (Article 28), and freedom of assembly, peaceful demonstration, and association (Article 29)⁵⁷.

These texts constitute a positive development in the Moroccan political system, yet the problem lies in lack of guarantees on the ground that those articles would not be violated as well as in the powers that the king retains such as the right to disband the parliament according to Article 96⁵⁸. There is also an obvious overlap between powers in the constitution. For example, Article 56 states that the head of the executive power, the king, is also head of the Supreme Judiciary Council and that judges are appointed through royal decrees, which undermines the independence of the judiciary. This overlap contradicts Article 42 of the constitution and which states that the king is the “Supreme Arbiter between the institutions.” This arbitration, which requires assuming a neutral position, is contradictory to the fact that the king is the head of the Supreme Judiciary Council⁵⁹.

Article 27 on free access to information states that “citizens have the right of access to information held by the public administration, the elected institutions and the organs invested with missions of public service,” yet adds that “the right to information may only be limited by the law, with the objective of assuring the protection of all which concerns national defense, the internal and external security of the State, and the private life of

⁵⁶ The 2011 Moroccan constitution: <https://goo.gl/ZroYCf>

⁵⁷ Ibid.

⁵⁸ “A critical study of the 2011 Moroccan constitution [Arabic].” Op. cit.

⁵⁹ Mahmoud Bayoumi. Op. cit.

persons, of preventing infringement to the fundamental freedoms and rights enounced in this Constitution and of protecting the sources and the domains determined with specificity by the law.” Restrictions to access to information are linked in this article to broad terms that can be interpreted in different ways and laws that impose such restrictions are allowed according to the same article. Article 165 on media regulation deals with the establishment of the High Authority of Broadcasting, yet Article 171 states that “laws establish the composition, the organization, the attributions and the rules of functioning of the institutions and instances specified in Articles 161 to 170,” hence leaving the matter once more to the laws which can only add more restrictions⁶⁰. These examples, among others, led many experts and political players in Morocco to argue that this constitution is not enough to guarantee the establishment of democratic institutions in the country⁶¹.

The Syrian constitution is expected to safeguard citizens’ rights and freedoms and should prioritize the rule of law, the separation of powers, and the independence of the judiciary and lay the foundations for a pluralist system based on accountability and transparency. For this to be possible, it is necessary to restrict the powers given to any entity, particularly the head of state through determining the length and number of terms in office, and the creation of consultative councils. This restriction of power should also apply to the police and the military and would not be possible without disarming all existing militias. The constitution should also stress that the state should not interfere in political and partisan activities and its performance should be monitored by civilian bodies and should abide by international charters. In addition, declaring a state of emergency should be restricted and the powers granted to different entities in this case should also be specified.

One of the main mechanisms that guarantee democratic transition is the system that regulates elections, including the division of constituencies and quota rules, and which should not be referred to laws that are to be passed later. The constitution has to include all the main rules that govern the electoral process in order to make sure that different segments of society and different regions are given equal opportunities and that sectarian and/or ethnic prejudices do not interfere with elections. The best way to achieve this is through party lists, each of which abiding by the quota system in order to have different factions represented or in another words the system known as open list proportional representation.⁶² The rights of political parties and syndicates should also be guaranteed in the constitution so that their activities cannot be banned and the state would not have the right to suspend them or prevent their establishment. The Syrian case in particular necessitates a shift from the presidential to the parliamentary system, a shift that would constitute a way out from different crises and would contribute to reaching a political settlement.

⁶⁰ Mahmoud Bayoumi. “The media in Arab Spring constitutions: Egypt, Tunisia, Morocco, Yemen [Arabic]. Arab Forum for Alternatives, 2011: <https://goo.gl/9zrjps>

⁶¹ “A critical study of the 2011 Moroccan constitution [Arabic].” Op. cit.

⁶² For more info see: <https://bit.ly/2IeOsra>

Fourth: Transitional justice and reconstruction:

The issues of transitional justice and reconstruction are of extreme importance for the future of Syria and since reconstruction is not addressed in the constitutions subject of this paper or other constitutions in the region, transitional justice will be the main focus while reconstruction will be dealt with at the end of this section. The concept of transitional justice is an extremely broad one that includes a series of procedures, legal or otherwise, compensations, fact finding processes, constitutional and legislative reforms, and investigations of violations committed by civil servants and security personnel.⁶³

The Moroccan experience offered, despite its setbacks, a positive example of transitional justice. The rule of late King Hassan II, which lasted from 1961 till 1999, witnessed a number of serious human rights violations, particularly forced disappearances. In 1991, international pressure resulting from initiatives by the families of the disappeared forced King Hassan II to shut down the Tazmamart prison and release its 341 inmates. The king also agreed to offer compensations for victims' families. When Muhammad VI, King Hassan's son, came to power in 1999, he was determined to cut all ties with the previous era, commonly known as "Years of Lead." Negotiations between the royal palace and civil society resulted in the establishment in November 2003 of the Equity and Reconciliation Commission, to which the king assigned the mission of achieving national reconciliation and redressing human rights violations committed in the previous era. The commission officially started its work in December 2004 and took 23 months to investigate cases of forced disappearances, arbitrary arrests, torture, and sexual violence. The commission solved 742 cases of forced disappearance and offered compensations to 9779 victims and held seven TV hearings that featured testimonials of that era. The commission submitted its final report to King Muhammad VI in November 2005. The report recommended the initiation of community reparation programs in 11 regions across Morocco and included recommendations on public policies and constitutional protection of human rights. The National Human Rights Council was assigned the task of implementing the recommendations of the commission.

Based on the commission's recommendations, individual and community reparation programs were established and financial compensations and healthcare were provided for victims of forced appearances, arbitrary arrests, rape and other violations. In regions that were most affected by violations, whether because their residents suffered collective repression or because secret detention centers were established there, communal reparation programs took the shape of social and economic developmental projects. Those programs offered a unique example among other transitional justice experiences across the world, especially that it paid special attention to the issue of marginalization through underlining how the marginalized, economically or socially, are easily targeted by totalitarian regimes⁶⁴. One of the most important achievements was the inclusion of all the

⁶³ Ziad Abdel Tawab. "Laws pertaining to political ostracism and transitional justice [Arabic]." Arab Forum for Alternatives: <https://bit.ly/2MZ4ho3>

⁶⁴ "Morocco: A case of transitional justice in the Middle East, yet questions remain [Arabic]." The International Center for Transitional Justice, Feb. 12, 2016: <https://goo.gl/iuADw5>

commission's recommendations in the 2011 amended constitution through articles on the guarantees of basic rights and freedoms⁶⁵.

Despite the positive achievements of the process of transitional justice in Morocco, it is important to view that process within the political and historical context in which it took place. The reconciliation process was carried out under the auspices of the same regime that committed violations in the past. Accountability for violations was not included in the reconciliation process even though it was one of the commission's recommendations. This lack of accountability was a result of an implicit agreement between the regime and civil society in order to move on through other measures such as reparation programs. As a result, those responsible for the violations were not identified. In fact, victims were prevented from mentioning the names of culprits when giving their testimonies, which led those responsible to get away with their crimes and even keep their official positions. Moreover, the effectiveness of reparation programs was partially undermined by the categories used to classify marginalized groups, which led to the exclusion of a substantial number of victims.

In addition to absence of accountability, transitional justice in Morocco was criticized by victims and their families as well as NGOs for its failure to achieve its main goal: national reconciliation. This is partly because the Equity and Reconciliation Commission started its work while the regime continued using the same repressive measures the commission was supposed to investigate. While forced disappearances decreased remarkably, torture and arrests continued. This is seen by many observers as a major obstacle in the way of national reconciliation.

Among the most important recommendations stated in the commission's report was reforming the judiciary and state institutions and this remained an incomplete process in Morocco. While the 2011 constitution supported civil rights and criminalized torture and other human rights violations, this development remains almost confined to the constitution and was not translated into legal and institutional reforms. This means that all political reforms recommended by the commission were indeed included in the constitution, but the same cannot be said on the legal level⁶⁶.

Despite the setbacks of the transitional justice process in Morocco, its positive impact on the Moroccan society cannot be overlooked. The efforts exerted by victims and their families to demand justice and the way they managed to reach a common ground with the regime present a model that other countries in the region can follow. The same applies to extensive negotiations that took place between civil society and decision-makers. The setbacks of this process can also guide other countries as to what should be avoided in talks over transitional justice.

⁶⁵ "Report on roundtable discussion over transitional justice [Arabic]." Center for Arab Unity Studies, May 2013: <https://goo.gl/Xkqinv>

⁶⁶ "Morocco: A case of transitional justice in the Middle East, yet questions remain [Arabic]." Op. cit.

In Egypt, there were no articles on transitional justice in the 2012 constitution while in the 2014 constitution Article 241 states the following: “In its first session after the enforcement of this Constitution, the House of Representatives commits to issuing a transitional justice law that ensures revealing the truth, accountability, proposing frameworks for national reconciliation, and compensating victims, in accordance with international standards.” However, this never materialized on the ground.

In Tunisia, the tenth and last title of the constitution was dedicated to transitional provisions. Article 148, the first in that title, states the following: “The state undertakes to apply the transitional justice system in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of *res judicata*, and the prescription of a crime or a punishment are considered inadmissible.” The National Constituent Assembly ratified in December 2013 law 53/2013 that regulates the process of transitional justice. The law assigned the Truth and Dignity Commission the task of investigating within four years human rights violations committed between 1955 and 2013. This included holding hearing sessions for victims and witnesses, looking into complaints and testimonies and documenting those violations, and establishing a comprehensive reparation program. Human rights activist Sihem Bensedrine was elected president of the commission. The commission conducted around 50 thousand personal interviews with the victims, referred dozens of cases to relevant courts, and aired public hearings on state TV.

Reconstruction is a crucial issue in Syria not only because of the destruction the conflict caused across the country, but also because this conflict is linked to struggle over areas of influence by political powers both inside and outside Syria⁶⁷. Last year, the ESCWA estimated the cost of the damage in Syria at 388 billion US dollars, not including human damages resulting from death and the displacement of people, including skilled labor, as well as the brain drain⁶⁸. A number of international rights activists set ten conditions for the reconstruction of Syria and sent them to UN Secretary General António Guterres, High Representative of the Union for Foreign Affairs and Security Policy Federica Mogherini, World Bank president Jim Yong Kim, and foreign ministers of donor states. The activists warned of the risk of starting the reconstruction process in a manner that covers up the violations committed during the conflict. The conditions are as follows:

- Financial or logistic support offered for Syria and the rules based on which the construction process is implemented should not in anyway undermine the protection of human rights.
- Donors have to guarantee that sectarian or ethnic cleansing is not carried out during the process.
- An investigation should be conducted on people who are missing or forcefully disappeared.

⁶⁷ “The battle for the reconstruction of Syria [Arabic].” *Al-Ittihad Newspaper*, Aug. 21, 2018: <https://bit.ly/2UsBrN8>

⁶⁸ “Seven years of war: 338 billion-worth damages in Syria [Arabic].” *Al-Jazeera*, Aug. 9, 2018: <https://bit.ly/2NMNum7>

- Relevant entities should take the necessary measures to guarantee the protection of human rights before starting any project to make sure that these entities do not take part in covering up past violations or facilitating new ones.
- Policies and measures against corruption have to be adopted.
- Reforms are to be carried out in the security and judiciary sectors.
- The voluntary repatriation of refugees, whether inside or outside Syria, is to be carried out peacefully and transparently following negotiations with the refugees.
- Violations of international human rights charters and of international laws are to be investigated and culprits are to be penalized.
- Victims need to have access to fast means of receiving proper compensation.
- Throughout the entire reconstruction process, special attention is to be given to gender-based damage⁶⁹.

The return of refugees is closely linked to the reconstruction process since the latter is remains incomplete without the former especially with the increasing number of refugees in different countries, many of whom with temporary residence permits. It is also important to make sure that refugees return to or are compensated for their houses and property. Meanwhile, the police and the military are to abide by the law and human rights.

Despite growing international interest in the repatriation of refugees, western countries are reluctant to be involved in the reconstruction process for fear their involvement would constitute a form of normalization with the Syrian regime. This is especially the case following the repatriation initiative Russia launched on July 16, 2018, one day after a summit meeting took place between Russian president Vladimir Putin and American president Donald Trump in Helsinki. In addition to the reluctance of Western countries, several complications surfaced including the fact that most countries involved stipulate that the United National High Commissioner for Refugees (UNHCR) supervises the return of refugees, yet the UNHCR still considers Syria unsafe for refugees to go back⁷⁰. Many entities oppose the initiative for the return of refugees since they find the timeline too ambitious. Several observes also argue that the suggested numbers of returning refugees demonstrate that not all refugees will be allowed back and raises concerns that the criteria based on which the selection of the refugee is made will be determined by the Syrian regime⁷¹. That is why any talk of the safe and voluntary return of refugees is not realistically possible in the absence of a comprehensive political settlement in Syria.

While the Moroccan experience offers a relatively positive model for transitional justice, it is important to ensure that the articles which deal with transitional justice in the constitution cannot be manipulated. The Egyptian scenario, where no practical steps were

⁶⁹ “10 conditions for a rights-based reconstruction of Syria [Arabic].” The Syrian Observatory for Human Rights, Sep. 27, 2018: <http://www.syriahr.com/?p=285599>

⁷⁰ “An evaluation of the Syrian initiative for the return of Syrian refugees [Arabic].” Issam Fares Institute for Public Policy and International Affairs, 2018.

⁷¹ Ibid.

taken towards implementing the parts about transitional justice the constitution, should be avoided.

Fifth: Economic, Social, and Cultural rights:

The 2012 and 2014 Egyptian constitutions tried to support economic and social rights in different articles, yet the philosophy behind the two remained quite similar. The 2012 constitution detailed types of property and added endowments, called “waqf” in Arabic, as a form of public or communal property in addition to private and cooperative ownership. The constitution included general texts about social justice, the right to work, and the right to organize⁷². The constitution also authorized in Article 204 the establishment of the National Anti-Corruption Commission: “The National Anti-Corruption Commission combats corruption, deals with conflicts of interest, promotes and defines the standards of integrity and transparency, develops the national strategy concerned with such matters, ensures the implementation of said strategy in coordination with other independent bodies, and supervises the concerned agencies specified by law.” Articles dealing with this commission were crossed out in the 2014 constitution. The new constitution added articles that specified percentages of spending on education (4% of the GDP for pre-university education and 2% for university education), healthcare (3%), and academic research (1%). However, this was not implemented on the ground and those percentages were seen as the source of a crisis later⁷³. The 2014 constitution, on the other hand, constituted a development in terms of the right to work, the right to organize, equality and equal opportunities, and percentages of spending on social and economic rights.

In the Tunisian constitution, the second title on rights and freedoms tackled the right to a dignified life, healthcare, and a healthy environment. The constitution tried to be as faithful as possible to the objectives of the revolution as well as the International Covenant on Economic, Social and Cultural Rights, which was demonstrated in the parts asserting the state’s commitment to achieving social justice, sustainable development, decentralization, and balance between state institutions. As for healthcare, Article 38 of the Tunisian constitution states the following: “Health is a right for every human being. The state shall guarantee preventative health care and treatment for every citizen and provide the means necessary to ensure the safety and quality of health services. The state shall ensure free health care for those without means and those with limited income. It shall guarantee the right to social assistance in accordance with the law.” Article 39 addressed the issue of education: “Education shall be mandatory up to the age of sixteen years. The state guarantees the right to free public education at all levels and ensures provisions of the necessary resources to achieve a high quality of education, teaching, and training. It shall also work to consolidate the Arab-Muslim identity and national belonging in the young generations, and to strengthen, promote and generalize the use of the Arabic language and to openness to foreign languages, human civilizations and diffusion of the culture of human

⁷² Magdi Sobhi. “The economy and economic rights in Egyptian constitutions 1923-2012 [Arabic].” Al-Ahram Center for Political and Strategic Studies. March 12, 2013: <https://bit.ly/2NwWALS>

⁷³ “Constitutional spending percentages: A crisis that threatens parliament approval of budget [Arabic].” *Al-Watan*, April 15, 2018: <https://bit.ly/2Pj25Fi>

rights”⁷⁴. The constitution also asserted the right to culture and freedom of creative expression and stated that the state is committed to supporting national values, promoting the principles of tolerance and rejection of violence, and encouraging interaction with other cultures.

The 2011 Moroccan constitution asserted a number of economic and social rights such as healthcare, social protection, education, decent housing, work, merit-based access to public positions, access to water, a healthy environment, and sustainable development (Article 31). The state is committed to expanding the participation of youth in social, political, economic, and cultural development (Article 33) and to implementing policies that support people with special needs (Article 34). The constitution warranted several cultural and linguistic rights since Amazigh became an official language together with Arabic, referred to Hassani as an integral component of Moroccan cultural unity, and guaranteed the preservation of all dialects and cultural expressions in the country (Article 5)⁷⁵. According to Article 31, the state and public establishments as well as municipal councils (territorial collectives) are in charge of facilitating equal access to the rights mentioned in the constitution. It is noteworthy that social and economic rights are the means through which equal opportunities and general equality between citizens can be guaranteed⁷⁶.

In order to guarantee access to those rights, the Moroccan constitution listed a number of institutional mechanisms, which include the following:

- Establishing the National Council of Human Rights, “a pluralist and independent national institution, charged with taking cognizance of all the questions relative to the defense and to the protection of the Rights of Man and of the freedoms, to the guarantee their full exercise and their promotion, as well as the preservation of the dignity, of the individual and collective rights and freedoms of citizens, and this, with strict respect for the national and universal charters in the matter” (Article 161).
- Establishing The Mediator “an independent and specialized national institution which has for its mission, within the framework of the relations between the administration and the users, to defend the rights, to contribute to reinforcing the primacy of the law and to disseminate the principles of justice and of equity, and the values of moral behavior and of transparency in the managing of the administrations, of the public establishments, of the territorial collectivities and of the organs endowed with prerogatives of public authority” (Article 162).
- Amendments to the constitutions can only be made so long as they do not have a negative effect on “freedoms and of fundamental rights inscribed in this Constitution” (Article 175)⁷⁷.

⁷⁴ The Tunisian constitution issued on March 27, 2014.

⁷⁵ “The Moroccan constitution of 29/72011: Profound and structuralized change [Arabic].” *Maghress*, April 19, 2014: <https://goo.gl/HzGz4N>

⁷⁶ Osman Kaber. “On economic and social rights [Arabic].” *Hespress*, Sep. 23, 2011: <https://goo.gl/gJvmyF>

⁷⁷ “The Moroccan constitution of 29/72011: Profound and structuralized change [Arabic].” Op. cit.

Generally speaking, rights and freedoms to be included in the constitution are not confined to civil, political, social, economic, and cultural rights since every constitution should also include the third generation of rights, which includes the right to a healthy environment, a decent life, and sustainable development in addition to the right to demonstration, organization, and work and freedom of the media. The constitution should include guarantees that citizens would have equal access to those rights through limiting the state's ability to restrict them and through ensuring the independence of the judiciary⁷⁸ while making sure international charters on rights and freedoms are observed.

The Brazilian experience is quite relevant in this context since the constitution was drafted after 21 years of authoritarian military rule that started with a coup that took place in 1964 and ended in 1985. The Brazilian constitution was drafted in a way that restricts the state's ability at undermining basic rights and freedoms. Guarantees for citizens' access to rights and freedoms were addressed on the Preamble: "We, the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil"⁷⁹. The second chapter of the constitution is dedicated to listing basic rights and freedoms, including equality before the law, gender equality, freedom of thought, expression, and faith, access to information, and the right to organize. The constitution also states that infringements upon basic rights and freedoms are penalized, which constitutes a form of guarantee.

Human rights should be the basis for drafting any constitution regardless of the economic model the state intends to follow, and which should be determined at a later stage after the constitution is drafted by neutral entities. Social, economic, and cultural rights are crucial to the decentralization process and this is where the municipal councils play a major role since they are the entities capable of determining the priorities of their respective regions. This is not the case with the centralized system that is usually incapable of addressing the needs and specificity of each region. Decentralization also allows citizens from all over the country to take part in shaping this country's future and eliminates the problem of marginalization where residents of remote areas are excluded from the political process.

⁷⁸ ESCWA 2016.

⁷⁹ The 1988 Brazilian constitution: https://www.constituteproject.org/constitution/Brazil_2015?lang=ar

Conclusion

In the case of Syria, a substantial number of observers agreed that adopting the principles of the current constitution or previous ones is not advisable not only because the context has changed, but also owing to the fact that those constitutions have already proven incapable of addressing major issues, hence are not suitable for the transitional period. The Syrian constitution should include transitional articles that address pressing issues related to the consequences of war such as the return of refugees, the problematic of identification documents, compensation and repatriation, citizenship rights, national reconciliation, and transitional justice⁸⁰. While addressing the repercussions of war is of extreme importance in writing the new Syrian constitution, this should not in any way come at the expense of asserting the economic, social, and political rights of the Syrian people and guarantees for equal access to basic freedoms⁸¹.

It is noteworthy that the establishment of constitutional committees is not addressed in international documents or Security Council resolutions about Syria. Article 9 of the Final Communiqué of the Action Group for Syria (Geneva Communiqué) stipulates the establishment of a transitional governing body that includes members of both the regime and the opposition and the start of national dialogue that is expected to conclude with a review of the constitutional and legal systems to be followed by free and fair elections. This means that the drafting of the constitution comes after a transitional government is formed⁸².

Understanding the problems of the previous constitution and legal system in Syria is essential in order to determine the means through which the Syrian society can be restructured⁸³. That is why drafting a new constitution is not only about writing the text, but also reconstructing the national identity of the Syrian people and building trust between different factions in order to achieve national communication and succeed in establishing a democracy founded on comprehensive and fair policies.

In Tunisia, drafting the constitution was the main step towards the shift from dictatorship to democracy, yet it was not enough to achieve a successful democratic transition. This is because designing laws that guarantee the implementation of constitutional principles and the protection of basic rights and freedoms included it are indispensable for the creation of a democracy. The Tunisian experience is a relatively successful one since the country is still taking steps toward democratization despite the escalation of violence for quite a long time. The case of Tunisia offers a positive example of overcoming differences and renouncing violence in order to start a fruitful national dialogue. It also proves that writing

⁸⁰ “Constitutional options and alternatives for Syria [Arabic].” Op. cit.

⁸¹ Diaa Ouda, Reham al-Asaad, and Nour Dalati. Op. cit.

⁸² Diaa Ouda, Reham al-Asaad, and Nour Dalati. OP. cit.

⁸³ “Constitutional options and alternatives for Syria [Arabic].” Op. cit.

the constitution and holding elections are not enough if state institutions do not abide by democratic principles and if political exclusion of particular factions is not eliminated.

The Egyptian experience demonstrated that the demands of the revolution cannot be met without a regime that works towards achieving social justice and fair political representation. A constitution that details the channels through which this can be done is extremely necessary so that drafting the constitution is not transformed into a sheer formality that only aims at having a semblance of transitional justice. Failing to do this might result in a constitution that is as flawed as its predecessor especially if it does not explicitly state that violation of basic rights and freedoms is penalized and if it does not address in detail the problems facing the society and means of solving them.

In Morocco, the February 20 Movement pushed for democratic reform, which resulted in amending the constitution. While this seems to be a positive step, the new constitution reasserted the authority of the king, who was also at the head of the amendment process whether through calling for amending the constitution to start with, appointing members of the committee in charge of drafting the new constitution, or having the final say on the resulting amendments. This led actual change in Morocco to be more limited than that in Tunisia. If this scenario is repeated in Syria and only one faction or entity becomes in charge of drafting the new constitution, then this constitution will not in any way contribute to reaching a settlement to the conflict or the reconstruction of Syria.

In terms of decentralization, citizenship, and transitional justice, Morocco offers a positive model that can be followed in Syria. This is because the Moroccan constitution addressed the issue of cultural diversity and asserted the rights of different communities as well as prohibited all forms of discrimination. The transitional justice process in Morocco, despite its setbacks, also managed to create a stable political atmosphere in which difference communities coexist and where human rights violations were remarkably reduced. In addition, giving the parliament and municipal councils more powers can be applicable to the Syrian context. Following the Moroccan example can help Syrians end the state of war as well as establish a new system founded on justice, democracy, and the principles of citizenship.

Reaching stability in Syria necessitates drafting a constitution that belongs to the third generation of constitutions⁸⁴. A review of different constitutions across the world demonstrates that there are three generations of constitutions. The first is represented by historic constitutions that marked the creation of new nations or major changes in already existing ones such as the American Constitution and the Magna Carta in Britain. The second is the post- World War II generation that includes constitutions written after the end of a war or following independence, which is the case of French and German constitutions as well as constitutions of post-independence nations. The third generation is made up of democratic transition constitutions, which started with the Spanish constitution following the fall of the Franco regime followed by the Portuguese constitution and

⁸⁴ Mohamed El Agati. "A critical reading of the new constitution [Arabic]." *Al-Shorouk*, Dec. 10, 2012: <https://bit.ly/2v8mhS5>

constitutions of African, Latin American, and Southern European countries. Among the most prominent constitutions that fall under the last category are those of India, Brazil, and South Africa.

Third generation constitutions are distinguished by the philosophical dimension of legal phrasing, which is demonstrated in the way controversial concepts are defined and issues that might restrict basic rights and freedoms are addressed. As for rights and freedoms, international charters should be the main reference upon drafting constitutions in the third generation. The political system, on the other hand, should not be confined to traditional players but should be expanded to include municipal councils and civil society organizations. The third generation also depends more on details in the sense that it describes different concepts accurately, lists the powers of each entity or institution, includes guarantees that protect basic rights in order to ensure that subsequent laws are designed to protect the rights mentioned in the constitution, and determines penalties in case of violation.

