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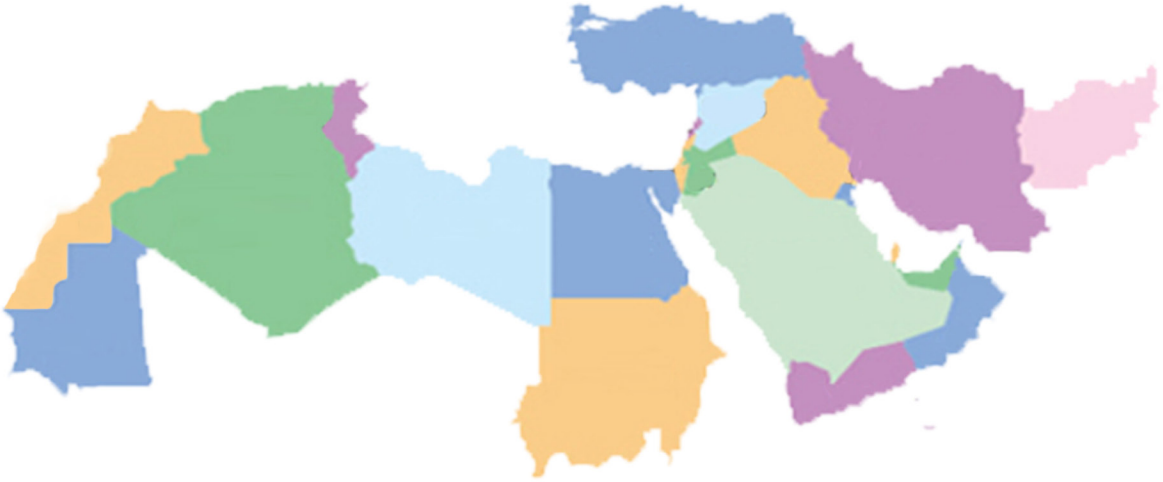

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Edited by

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LEGITIMACY & CIVICNESS in the Arab world

Research at LSE

The Arab Association of Constitutional Law

المنظمة العربية للقانون الدستوري

Arab Constitutional Responses to the Revolutions and Transformations in the Region

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The Arab Association of Constitutional Law (AACL) is the first regional network of constitutional experts in the Arab region. Founded in 2013, it aims to contribute to good governance and democratic transformation by encouraging networking and the exchange of expertise among the countries of the region. It aspires to provide objective and progressive analyses of Arab constitutional frameworks and to support constitutional and legal reform efforts in the Middle East and North Africa region.

AACL brings together leading legal scholars, judges, lawyers, parliamentarians, and civil society activists specialized in constitutional law, electoral systems, peacebuilding processes and human rights. A great number of AACL members are prominent experts in constitution-building and have participated in the negotiations or drafting of constitutions in the Arab region, including in Morocco, Algeria, Tunisia, Libya, Egypt, Iraq and Yemen.

AACL organizes and participates in a large number of activities including regional and international conferences as well as dialogue sessions in collaboration with renowned experts, decision-makers, and prominent universities and think tanks. Furthermore, AACL issues a range of publications on constitutional developments including books, policy papers, research papers and articles.

AACL endeavors to strengthen the capacities of constitutional researchers in the region through its annual Constitutional Law Academy (since 2015) and its specialized high-level working groups that bring together senior researchers, policy makers and specialists to discuss specific constitutional issues in countries that are undergoing constitutional transitions and to collaborate on joint research projects.

To learn more about AACL's activities and projects, please visit its website: aacl-mena.org and follow its social media accounts on various platforms including Facebook, LinkedIn, Twitter and Academia.edu.

The Legitimacy and Civicness in the Arab World research project aims to address the gap between the local perception and the production of knowledge regarding legitimacy and civil society and civic values in the Arab world.

The local vernacular perception of civil society and its values does not always match the normative framing often used in the literature and policy papers. From the local perspective, civic action and values have, historically, unfolded differently, with different connotations than those typically associated with the normative Western understanding. The local context and connotations provide valuable inside understanding that is often excluded from the literature or brought in as a 'local voice' to reinforce an external narrative.

The concept of civic (*madani*) has also been used in many Arab countries to refer to a state system, the civic state, which does not have an equivalent in the West. But even in the Arab world, the concept itself is vague, and the constitutional interpretations of civic state in various Arab states are vague, contradict the concept of civicness and at times are used to conceal very un-civic arrangements.

The project aims to address these issues because they lead to three main impediments. First, they limit the scholarly understanding of key social and political processes. Second, they obstruct the efforts of local civic actors pushing for equal rights and inclusive societies as they battle against local and international misconceptions and mis-framing of their actions that undermine their agency and ownership. Third, they hinder the effectiveness of local and international democratisation efforts.

The project team works closely with institutional partners and scholars from the region to produce nuanced knowledge and to publish policy and academic papers while also provide capacity building for early career researchers and integrate them into the knowledge production process.

The project funded by the Carnegie Corporation of New York. The project, previously hosted by LSE IDEAS, is now based at the Middle East Centre at the London School of Economics and Political Science (LSE).

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Note by the Editors

We are very pleased to present the fourth issue of the *Journal of Constitutional Law in the Middle East and North Africa* (JCL-MENA) titled "Arab Constitutional Responses to the Revolutions and Transformations in the Region." JCL-MENA is a double-blind peer- reviewed bilingual journal managed and edited by the Arab Association of Constitutional Law (AACL). This special edition of the Journal is published jointly with the Legitimacy and Civicness in the Arab World research project at the London School of Economics and Political Science (LSE), with the support of the Carnegie Corporation of New York.

2011 was an exceptional year in the Arab world. The Tunisian and Egyptian revolutions that broke out that year were successful in ousting the presidents of both countries while barely witnessing any violence. The winds of change spread quickly across the region. Popular protests erupted in several countries, beginning with Libya and Syria. While these were met with violent repression by the regimes in place, elsewhere, governments moved swiftly to preempt calls for revolution by enacting a number of constitutional amendments, as was the case in Morocco or Jordan, for instance.

There is no doubt that the events that the countries of the region witnessed in the context of what became known as the "Arab Spring" were not random, nor did they come out of nowhere. Rather, the underlying factors that drove them had been unfolding for decades: the suppression of freedoms, the lack of social justice, and repressive security policies all contributed to the implosion.

The slogans raised differed, as did the chants, but the demands that were voiced by millions of Arab men and women all pointed in the direction of the "constitution". Dignity, equality, social justice and the end of tyranny are necessarily linked to the principles upon which the state operates. Long ignored as irrelevant at best, constitutions became centre stage. Be it because they had originally been designed to limit the power of the people rather than the state, or because the way they were implemented had left a big gap between constitutional promises and actual practice, the response to the series of protests that swept the region was to turn to those constitutions. Within two years between 2011 and 2012, seven new constitutions, including three interim ones, were written in six Arab countries, which is exactly the number of new and interim constitutions written in the Arab world in the ten years before 2011.

However, constitutional reactions varied. In some countries like Syria, the response was the adoption of a new top-down constitution whose failure to end the crisis was followed by an internationally mandated constitutional process that is yet to produce any results despite more than four years of meetings. In others, like Tunisia, the process of drafting a new constitution appeared to be more inclusive and consultative, yet the political events that followed left many open questions. In Yemen and Libya, on-off constitutional drafting processes developed amid violent conflict and political instability. In some other countries like Jordan and Morocco, pre-emptive top-down constitutional changes were quickly introduced after the first signs of public unrest. Still, constitutions in some countries, like Lebanon, remained immune to any change despite waves of public unrest.

All of this brings into question the purpose and function of constitutions, and recent constitution-making and constitutional amendment processes in the Arab world. At the heart of the matter lies the question of legitimacy and the extent to which, more than a decade down the road, the constitutional transformations that were brought about by the Arab Spring have been successful in meeting the popular demands that drove them.

The literature that has been produced around the Arab Spring is abundant. Multiple studies have addressed it from a political science perspective. Social movement scholars have attempted to make sense of protest and revolutionary processes that seemed unpredictable. The case was even made to revive transitology – despite its many detractors in recent years – in the quest for a useful perspective to understand the dramatic political changes that swept over the region. Constitution-making, particularly in Egypt, Tunisia and Libya, initially had the attention of scholars too, and a number of studies were produced, including from a comparative perspective, mostly focused on the formal processes and the constitutional texts they yielded. Yet as transitions stalled, increasingly registering regressions or the outright outbreak of violence and conflict, constitutions quickly faded into the background. There have been no systematic attempts at measuring the impact that the Arab Spring has had on the state of constitutionalism in the region. While many of the challenges that arose in the framework of a number of constitution-making processes were shared – examples include the civic nature of the state, decentralization and federalism, and the distribution of resources – they have not been looked at from a broader comparative perspective. Among other things, such perspective could help identify the specificities of Arab constitutionalism and how they manifest themselves in different contexts, and, more importantly, help assess the adequacy and legitimacy of the constitutional responses that have been attempted so far.

In an attempt to begin to fill that gap, the Legitimacy and Civicness in the Arab World research project and AACL reached out to ten scholars/practitioners from ten of those countries (Tunisia, Egypt, Lebanon, Algeria, Syria, Yemen, Libya, Bahrain, Morocco, and Jordan) and asked them each to produce a paper that would assess the constitutional response to the demands for change that manifested themselves differently across those countries. Among the questions that were put forward to the authors is the question of the extent to which the constitutional drafting/amendment process respected the principles of inclusivity and public participation. To the degree that inclusive and participatory constitution-making are increasingly understood as a necessary condition for the constitution to be perceived as legitimate, the question of how these changes are brought about becomes crucial. Another question concerns the degree to which the new/amended constitution responded to and met public aspirations and demands. In this regard, the system of government and the extent to which it upholds the principle of separation of powers as well as the constitutional guarantee of fundamental rights merit special attention. Yet another (oft ignored) question concerns the degree to which the constitutional changes that were introduced were effectively implemented. While notable innovations were introduced to a number of constitutions, particularly with regard to the powers of Constitutional Courts, the question is whether their implementation was not hindered by a lack of political will.

The papers that were submitted on this basis were publicly presented and discussed in a regional conference that LSE and AACL jointly convened in Beirut in December 2022. The authors engaged with each other and a broader group of academics, experts and practitioners from the region and beyond. Following a thorough review process, the papers are featured at present in this special issue.

In "**The 2014 Constitution of the Republic of Tunisia: The Desired Transformation vs the Imposed Reality**," Dr. Mouna Tabei takes on Tunisia's ground-breaking constitution-making process and the constitution it bore. The author acknowledges both the legitimacy of the process, which was characterized by the establishment of a pluralistic and democratic constituent authority, as well as the distinctly democratic features of the 2014 Constitution, which introduced a rights-based system and an institutional framework capable of promoting the rule of law. Dr. Tabei posits that the failure of the 2014 Constitution to fulfil its transformative potential was primarily owed to its selective implementation in accordance with political interests, which perpetuated the status quo. This was most evident in the failure to establish the Constitutional Court, which required consensus within parliament to appoint part of its members. Although it was endowed with the means to protect itself, the 2014 Constitution was left unprotected in the absence of political will, which led to its suspension and replacement in 2022 by a top-down constitution that paves the way for the return of hyper-presidentialism. The Tunisian experiment raises challenging questions with regard to the mechanisms that can ensure that constitutions are properly implemented.

In "**Constitution-Making during Political Turmoil and Change: Egypt 2011-2014**," Dr. Ahmed Morsi draws on Egypt's experience in the aftermath of Mubarak's fall to offer a sobering reflection on the perils involved in constitution-making in the immediate aftermath of an autocratic collapse or amidst revolutionary fervour. The author argues that constitutions must both reflect to an extent the distribution of existing political and social forces to earn acceptance, while also be capable of accommodating future shifts in that distribution to outlast the constitutional moment. Turning to Egypt's experience in both 2012 and 2014, Dr. Morsi points to the political flux and impossibility to gauge the weight and power of the various political factions at the time as polarizing factors that played into both constitution-making processes. A crucial insight in this respect is that rushed constitution-making in a changing political environment deepens instability instead of generating long-term consensus.

In "**The Lebanese Constitution: A Hampered Transition from the Rule of Sects to the Rule of Law**," Mireille Najm-Checrallah considers Lebanon's constitutional trajectory both from the perspective of its historical specificity and against the broader transformations in the region. The author argues that, while it may be surprising to consider the impact of the Arab Spring on Lebanon, its repercussions did eventually surface there, particularly following the severe financial and economic crisis that struck the country in October 2019. Lebanon's ongoing constitutional crisis is considered against its distinctive features: a secular state, a pluralistic society, and a liberal system. The author considers the crucial question of whether the Lebanese Constitution continues to provide a sound framework for transitioning from a state controlled by sectarian logic and sectarian leaders to a state based on citizenship and the rule of law. Najm-Checrallah carefully considers the constitutional framework that was laid down by the Taif Agreement against the practices of a state that has gradually submitted to the will of the sects and the factional interests of their leaders at the expense of public interest.

The author leaves open the question of whether the recovery of legitimacy and the establishment of the rule of law can be achieved by maintaining the sectarian foundations of the system of government while introducing appropriate corrective mechanisms, or by abolishing political sectarianism, through the mechanisms stipulated by the constitution, or according to other formulas.

In "**The Effectiveness of Algeria's Constitutional Amendments**," Dr. Zahia Aissa considers Algeria's recent constitutional amendments, with a particular focus on the amendments that were adopted in 2016 and in 2020. While the author attributes the adoption of the 2016 amendments to the popular protests of 2011, her analysis of the manner in which those amendments were introduced points to a top-down, executive-driven process that does not differ qualitatively from past processes, except perhaps for the consultations that were undertaken with different political parties and national figures. At the substantive level, she highlights a number of provisions aimed at consolidating the rule of law. Most notably, indirect individual access to the Constitutional Council was introduced and the presidential number of terms was limited to two. The degree to which these amendments effectively responded to people's aspirations was brought into question with the eruption of the popular Hirak in 2019. The amendments of 2020 were also introduced on the initiative of the President, although, unlike in 2016, they were approved through referendum. While the institutions and bodies introduced in 2020 have been successfully established, the question remains as to whether the amendments can be deemed effective. The Constitutional Court, which replaced the Constitutional Council in 2020, remains under-used by ordinary citizens, signalling perhaps a lack of a sense of popular ownership of the constitution.

In "**Syria: The Constitution of the "Crisis" or the Crisis of the Constitution?**" Dr. Ibrahim Daraji considers the adoption of the Constitution of 2012 against the backdrop of a multifaceted armed conflict of regional and international dimensions. The author purports to consider the arguments of both its supporters and its detractors, whether with respect to how it was drafted, the extent to which it contained "revolutionary" provisions, or whether it has been effectively implemented. In considering whether the drafting process could be deemed inclusive and participatory, Dr. Daraji shifts the focus from the how to the environment in which it unfolded, which was characterized by a lack of trust-building climate and significant division. In terms of the content of the new constitution, the author offers an analysis of the key changes that were introduced, particularly with respect to the recognition of political pluralism, the direct election of the President, or the broadening of the powers of the Supreme Constitutional Court among others. The author concludes that the 2012 Constitution did not establish a new a political system; rather, it provided a new constitutional framework for an existing political system, enhancing its powers, safeguarding its position, and legitimizing its dominance while further exacerbating the crisis it purported to address.

In "**Yemen's Constitutional Process after the 2011 Revolution**," Dr. Abbas Mohammed Zaid methodically considers the questions of public participation in Yemen's constitution-making process initiated in 2011, the draft constitution and whether it responded to key popular demands – namely, the establishment of a secular and federal state – and how likely the draft constitution is to succeed were it to be adopted. A distinctive feature of the constitutional drafting process is the fact it was embedded in a broader constitution-building process that largely drew on the outcomes of an inclusive and participatory national dialogue process that lay the foundations for the future constitution. In this case, it would seem that constitution-building was trumped by conflict fuelled by external actors.

In "**The Libyan Constitutional Narrative Since 2011: Facts, Assessment, and Recommendations**," Azza Kamel Maghur reviews Libya's long constitutional trajectory since the adoption of the Constitutional Declaration of 2011. It considers the circumstances under which the Constitution Drafting Assembly – Libya's first elected constitutional body – was elected and discharged its mandate amidst ongoing conflict and a competing constitutional track led by the international powers. It analyses the 2017 draft constitution that was approved by the assembly but failed to be adopted by parliament and considers the possible way out of the country's ongoing stalemate. The author draws on Libya's experience over the past decade to reflect on constitution-making in a time of conflict, and makes the case for the adoption of temporary constitutions and settlements that can provide the stability needed to draft a constitution, instead of turning the constitution-building process into a long tale of conflict and division. At the same time, the author acknowledges that the country has come a long way in terms of constitution-building, where increased awareness of constitutional issues among Libyans, as well as the nature of their disagreements and their limited scope, have helped prepare the ground for the adoption of a lasting constitution.

In "**Between Law and Crisis: Creating and Changing the Constitution in Bahrain**," Bader Al-Noaimi draws on the concept of crisis – understood as inherent in constitutionalism – to offer an analysis of Bahrain's 2012 constitutional amendments, which were a direct response to the 2011 protest movement and the recommendations reached at the National Consensus Dialogue held in July 2011. The author analyses the amendments introduced to the Chamber of Deputies as well as to the powers of the monarch, only to conclude that the features of a parliamentary system were scarcely enhanced. Most interestingly, Al-Noaimi considers the abstract interpretation of the "bicameral" system as the "joint will of the people and the King" as a generalization of the interests of the ruling family at the expense of the popular will, pitting constitutionalism against democracy. His is an account of how constitutionalism can be employed to effectively impose a formal constitution stripped of any political or social considerations at the expense of the material constitution.

In "**The Shifting Balance between Representative and Post-representative Forms of Governance: Evidence from Moroccan Constitutionalism,**" Dr. Abderrahim El Maslouhi considers Morocco's 2011 Constitution from the perspective of the counter-majoritarian institutions it introduced and how their functioning constitutes a major challenge for the dictates of popular sovereignty and representative democracy. Despite some attempts at enhancing the parliamentary form of government, the parallel quest to preserve the monarch's prerogatives meant it features overlaps with both the logic of presidentialism and post-parliamentary governance.

In "**Jordan's Constitutional Amendments: A Coup against the Parliamentary System**?" Omar Al-Atout offers a comprehensive overview of Jordan's constitutional amendments following the 2011 protests. The author addresses the questions of public participation, responsiveness to popular demands and effective implementation, only to conclude that the 2011 amendments merely aimed at appeasing public discontent and did not produce any substantial changes in power dynamics. Even more, the amendments introduced in 2014, 2016, and 2022 consolidated power in the hands of the King, effectively undermining the very nature of the parliamentary monarchy upon which the 1952 Constitution was originally based.

Taken together, the ten contributions capture both the opportunities that were raised by the prospect of a constitutional change in the wake of the Arab Spring, as well as the many challenges it faced. At first glance, the outcome is somewhat disheartening. More often than not, constitution-making seemed to exacerbate divisions instead of laying the foundations of a consensus constitution, as witnessed in both Syria and Egypt. Constitutional drafting remained predominantly a top-down affair, with the notable exception of Tunisia's National Constituent Assembly. In a number of instances, confrontation over constitutional issues revealed a deeper lack of consensus over the very identity of the state. The relation between religion and the state was hotly debated in Yemen and Libya, but also in Tunisia and Egypt. The tension between maintaining the unity of the state and laying the foundations for the deconcentration of power was prevalent in both Libya and Yemen. The largely unilateral amendments that were introduced by the monarchical regimes of Bahrain, Jordan and Morocco did little to curb the monarch's prerogatives or strengthen the parliamentary nature of the monarchy, contrary to what was claimed. Conflict and war swept over Syria, Yemen and Libya, largely fuelled by external actors pursuing their strategic interests in the region. Lebanon remained mired in institutional paralysis.

However, cosmetic reforms aside, constitution-making processes that have so far failed in the sense of delivering a constitution must perhaps be considered through the broader lens of constitution-building, understood as a long-term process that lays the foundations for a constitution to be both adopted and implemented in a manner that fulfils its purpose. In this regard, both Libya and Yemen offer compelling instances of what can be characterized as incremental constitution-making. Yemen's broad national dialogue effectively laid the foundations for the constitution-making process, and even as the draft constitution was rejected, it can legitimately be built upon.

The Arab Spring may have done little to effectively address the legitimacy deficit in the region. However, it did bring constitutions and constitution-making to the fore, signalling just how much they matter – also in the Arab world. While most of the constitution-making processes that were undertaken in the past decade failed to adequately address people's demands, there is no denying that ordinary citizens across the Arab world became acutely aware of how important constitutions are and can be. Awareness levels among the general public with respect to constitutional matters increased significantly, and while the uprisings that broke out a little over a decade ago may have been entirely unexpected, that ordinary citizens will continue to push for constitutional change in the coming years will not come as a surprise. With this special issue, we hope to have contributed to address the gap in the literature with respect to what the constitutional response to the Arab Spring looked like and where we stand today. We also hope to keep providing a space for constitutional experts from the region and beyond, but also political scientists, to engage with constitutional developments as they continue to unfold throughout the MENA region.

Dr. Rim Turkmani

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December 2023

The 2014 Constitution of the Republic of Tunisia: The Desired Transformation vs the Imposed Reality

Dr. Mouna Tabei *

ABSTRACT

Throughout the various stages of its political history, the Republic of Tunisia has adopted multiple constitutions, but the 2014 Constitution stands out as one of the most important, due to a unique set of characteristics that brought it close to achieving democratic rule and a constitutional system guaranteeing rights and freedoms. However, the successive governments that came to power under it sought to maintain the status quo, leading to the failure of that Tunisian constitutional experience and to the perpetuation of the status quo. This was true both while the 2014 Constitution was in force and after its suspension, as the analysis in this article will show.

Compared with previous and subsequent Tunisian constitutional experiences, the constituent process that led to the adoption of the 2014 Constitution was democratic and aligned with the main international standards adopted in the framework of contemporary constituent processes. It was characterized by a pluralistic and democratic approach in a genuine attempt to establish a legitimate constituent authority. The process was also inclusive and consensus-based and proved capable of resolving the political crises that arose during the constituent period.

In terms of its contents, it can be said that the 2014 Constitution was successful in establishing a rights-based system that drew inspiration from the popular aspirations of the revolution. It also built an institutional framework capable of promoting the rule of law. However, the constitution contained some ambiguous provisions and omissions that resulted from the political disputes that accompanied the constituent process, giving rise to differing interpretations with respect to the constitutional sources that should serve to interpret the rights and freedoms enshrined in it.

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This paper was finalized in January 2023.

In practice, the 2014 Constitution was also applied selectively in accordance with political interests, especially in terms of the laws that were adopted to implement its provisions. In addition, the constitutional institutions that ensure the supremacy of the constitution and give it precedence over all other laws, the most important of which is the Constitutional Court, were not established. This led to maintaining the status quo, both under the 2014 Constitution and after its suspension and the adoption of the Constitution of 25 July 2022.

Keywords: *Tunisian Revolution, democracy, constituent process, political consensus, guaranteeing rights and freedoms, duality of constitutional sources, selective implementation of constitutional provisions.*

CONTENTS

Introduction

Tunisia has had numerous constitutions throughout its political history. The first was the "granted" constitution, also known as the Law of the Tunisian State, promulgated by Muhammad as-Sadiq Bey for his subjects in 1861. It was suspended in 1864 following the revolt led by Ali Ben Ghedhahem. This was followed by the Constitution of 1 June 1959, which laid the foundations of the Tunisian Republic and an independent state after the monarchy was toppled and the republic proclaimed in 1957. The 1959 Constitution was suspended after the revolution of 17 December 2010 –14 January 2011, which toppled Ben Ali's regime and ushered in the second republic following the adoption of the Constitution of 26 January 2014. Some provisions of this constitution were applied for a few years, before it was suspended gradually after the state of exception was declared on 25 July 2021, and Decree No. 117 was issued.[1] The constitution was completely suspended following the referendum of 25 July 2022, and replaced by the "Constitution of the New Republic of Tunisia."

Every constitution that was adopted in Tunisia was drafted under a different set of circumstances and in a specific context. Along with that, the constitution-making process, the contents of the constitutional text, and the adopted system of government differed every time. Each constituent period represented an endeavour to draft a constitution that would achieve the desired outcomes by breaking with the reality in place. The process of drafting the 2014 Constitution was one of the most important constitutional and political developments in the modern history of Tunisia. This was the "Constitution of the Revolution," and it represented the culmination of a popular uprising that started in 2010 and turned into a revolution that toppled the existing institutional and constitutional regime and paved the way for a new regime through a more peaceful constitution-making process.

Indeed, the adoption of the 2014 Constitution was a primary outcome of the revolution and its protests, ramifications, and struggles. Despite the contradictions that surrounded the constituent process, all the stakeholders agreed on the objective behind the constitution, which was to achieve the desired transformation.

This transformation can be defined as "the transition from an authoritarian regime, whatever it may be called (one-party regime, military or totalitarian dictatorship, hereditary oligarchy, or autocracy) to a regime that is governed by the rules and procedures of citizenship, i.e. political freedom and participation, after having been previously governed by other principles (mandate, coercive or bureaucratic control, clientelism…."[2] The desired transformation that the new constitution sought to achieve lay in guaranteeing the transition from the authoritarian regime that had been in place for decades to a democratic one capable of achieving the demands of the revolution in terms of citizenship,

1 Presidential Decree No. 117 of 22 September 2021, on exceptional measures, Official Gazette of the Republic of Tunisia, Issue No. 86 of 22 September 2021. The decree changed the hierarchy of authorities adopted in the 2014 Constitution. Article 20 stipulated: "The Preamble of the Constitution, Chapters I and II thereof, and all other provisions that are not in conflict with this Presidential Decree shall remain in force."

2 Hamadi Redissi, *Political Transformation in Tunisia 2011-2014: Course and Stakes* (Paris: Arab Reform Initiative, 2018).

"work, freedom, and national dignity" – a regime that sustains and reinforces the revolution, in accordance with internationally recognized democratic standards.[3]

The fact that the 2014 Constitution was suspended despite its symbolism and success in culminating the peaceful revolution, leaves us facing fundamental questions concerning its assessment and the extent to which its provisions and their practical implementation achieved the desired transformation in Tunisia. While the 2014 Constitution set the foundations and rules for a democratic system capable of achieving the desired outcomes, the authorities established by virtue of it veered off that path by adopting a policy of maintaining the status quo.

Therefore, the article begins by assessing the extent to which the adoption of the 2014 Constitution resulted from a constituent process based on the principles of legitimacy, participation, and representativeness (I). It then explores whether the 2014 Constitution established a constitutional system that enshrined the goals of the revolution goals in terms of guaranteeing rights and freedoms and the necessary mechanisms to reinforce them (II). Lastly, the article looks into the extent to which the successive governments were committed to the implementation of the provisions of the constitution during their respective terms (III).

I. The Adoption of the 2014 Tunisian Constitution: A Constituent Process Torn between a Desired Democracy and an Imposed Consensus

The constituent process that led to the adoption of the 2014 Constitution was democratic and in line with the main international standards adopted within the framework of contemporary constituent processes. It was also characterized by a pluralistic and democratic approach, unlike previous and subsequent constitution-making processes. The provisions of the Constitution of 1 June 1959 were neither drafted not approved according to such a democratic and participatory approach. Despite the fact that it was adopted by an elected constituent assembly, the elections that were held at the time excluded women, and their only purpose was to consolidate the dominance of a single party – the Constitutional Party. This effectively led to a lack of plurality within the National Constituent Assembly, where a single political front was represented, amidst the exclusion of the opposition.[4]

The drafting the Constitution of 25 July 2022 did not meet the democratic standards adopted in the framework of contemporary constituent processes. It was neither participatory nor representative, and it did not abide by the same transparency standards that were followed during the drafting of the Constitution of the Second Republic. Despite resorting to a popular referendum as a means to issue the Constitution of 2022, the mechanism for drafting

3 See: Michael Meyer-Resende, *International Consensus: Essential Elements of Democracy* (Berlin: Democracy Reporting International, 2011).

4 For more on this issue, see: Abdeljalil Bouguerra, *The National Constituent Assembly of Tunisia: The Difficult Birth of the Constitution of June 1959*, 2nd edition (Tunis: Dar Afaq – Perspective Publishing, 2012), 21-31.

its different provisions was marred by the lack of proper deliberations and discussions amidst the absence of the elected parliament and the failure of the committee of experts to convene. In fact, the President of the Republic unilaterally drafted and fine-tuned the provisions of the constitution, leading many parties, organizations, and citizens to boycott the process and to abstain from voting in the referendum as a way to express their rejection of the lack of participation and to delegitimize the process.[5]

By contrast, the constituent process of the 2014 Constitution was characterized by a genuine attempt to establish a legitimate constituent authority (A) and a consensus-based and participatory approach to resolve the political crises that imposed themselves (B).

A. The Commitment to Legitimacy in the Establishment of the Constituent Authority

From a constitutional law perspective, revolutions are the true basis for the rise of a genuine constituent authority, which should derive its legitimacy from the people through modern democratic means. The Tunisian constituent approach for drafting the 2014 Constitution fits within this framework, as it drew upon revolutionary legitimacy to launch a new constituent process. This reflected a break with the existing constitutional legitimacy (1) and established a constituent authority based on electoral legitimacy, thereby allowing the people to elect the members of the National Constituent Assembly based on a pluralistic and representative approach (2).

1. Revolutionary Legitimacy as a Basis for Adopting a New Constitution

The idea of adopting a new constitution was proposed after the President of the Republic fled the country on 14 January 2011, in the wake of protests demanding his departure and the toppling of the existing regime. This idea then began to take form in the first political demands proposed by the opposition. On 20 January 2011, the "January 14th Front" stressed in its founding statement the need to: dissolve the Chamber of Deputies, the Chamber of Advisors, and all existing nominal bodies, as well as the Higher Judicial Council; dismantle the political structure of the old regime; and prepare for the election of a constituent assembly within a maximum period of one year in order to draft a new democratic constitution and establish a new legal system to govern public life in a manner that guarantees the political, economic, and cultural rights of the people." In its statement issued on 28 February 2011, the National Council for the Protection of the Tunisian Revolution endorsed the same demand, calling for the formation of an interim caretaker government whose mandate would end with the election of a National Constituent Assembly charged with drafting a new constitution for the republic. The first and second Kasbah sit-ins were also in favour of this demand, as they were held under the slogans of "the people want a new constitution," "free elections," and "National Constituent Assembly."[6]

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[5] For more information on the assessment of the process of drafting the 2022 Constitution, see: Mouna Tabei and Ikbal Ben Moussa, *Tunisia - Referendum on the New Constitution: Drafting and Adoption* (Beirut: Arab Association of Constitutional Law, 2022).

[6] Yadh Ben Achour, "The People are the Source of the Law and the Interpreters of the Constitution," *author's blog*, 16 February 2015.

The ruling authorities at the time acceded to this popular demand and decided that the country would adopt a new constitution drafted by an elected National Constituent Assembly, thus abandoning the idea of holding on to the 1959 Constitution. The decision was also made to hold legislative and presidential elections, in addition to introducing amendments to the 1959 Constitution at a later stage. This decision ended the legal and political debate around whether or not it was necessary to break entirely with the previous constitutional system, particularly with respect to the political system in place.

The 2014 Constitution derived its legitimacy from the revolution. This was clearly reflected in the Decree on the provisional organization of public authorities issued at the time,[7] whose preamble state: "Considering that the Tunisian people are sovereign … and have expressed during the revolution of 14 January 2011, their will to exercise their full sovereignty within the framework of a new constitution; Considering that the current state of the nation following the definitive vacancy of the Presidency of the Republic on 14 January 2011 … impedes the proper functioning of public authorities, and that the full implementation of the provisions of the constitution has become impossible …." Article 1 of the decree further stipulated that it was necessary to establish a "National Constituent Assembly elected through a universal, free, direct, and secret vote according to an electoral system developed for this purpose."

In this context, it should be noted that the pre-constituent stage in Tunisia was characterized by attempts to commit to several legal principles and provisions. The first stage, which paved the way for the election of the National Constituent Assembly, was based on the constitutional legitimacy that existed at the time. The process relied on the provisions of the 1959 Constitution that regulated the vacancy of the Presidency of the Republic, in addition to those that allowed to legislate through decrees,[8] so that the interim president could draft the necessary legal texts to establish a new constituent authority and to manage the transitional period until the National Constituent Assembly could exercise its mandate. A number of necessary decrees were issued to restructure the electoral system and to revoke legal and political texts that could have undermined the election of the constituent body. Other important aspects were further addressed, and the laws regulating political parties, the media, and associations were replaced with new decrees aligned with the democratic transition.

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7 Decree No. 14 of 23 March 2011, on the provisional organization of public authorities, Official Gazette of the Republic of Tunisia, Issue No. 20 of 25 March 2011. The decree marked a complete break with the previous constitution and the dissolution of all the political institutions and some of the constitutional institutions associated with it. It also suspended the provisions of the 1959 Constitution and announced the promulgation of a new constitution aligned with the demands of the Revolution.

8 Following the declaration by the Tunisian Constitutional Council of the permanent vacancy of the presidency in accordance with the provisions of the 1959 Constitution, Interim President Fouad Mebazaa went to the Assembly of Representatives and requested that he be given a mandate in accordance with the provisions of Article 28 of the 1959 Constitution to manage the transitional period through decrees, and he referred the draft law granting him such mandate to the Constitutional Council. The latter confirmed the constitutionality of the draft law in Opinion No. 2 of 2011 on the draft law grating the interim president the mandate to issue decrees in accordance with Article 28 of the Constitution.

The Higher Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition[9] played a pioneering role in aligning the contents of those laws with the main international standards to manage the transitional period. The Higher Authority also played a significant legal role through the work of a committee of experts who drafted legal texts that were later issued by the interim president in the form of decrees. It also played an equally significant political role, as it provided an institutional alternative for deliberation and discussion between actors and politicians from all backgrounds and allowed them to explore the available options following the dissolution of parliament.[10]

Despite all the struggles that the Higher Authority faced and the tense political landscape, it managed to establish a legal system based on democratic standards and thus guaranteed the continued legitimacy of the revolution in full respect of the new laws and regulations. The Higher Authority's respect for and compliance with the newly adopted legal system helped restore citizens' trust in the state and led to the election of the National Constituent Assembly.

2. Electing a National Constituent Assembly on the Basis of a Pluralistic and Representative Approach

In accordance with the principle of the sovereignty of the people, a new constituent authority was elected directly by the people, through a general and free electoral system entirely different from the previous one.[11]

To ensure the integrity of the elections, the first Independent Higher Authority for Elections[12] was established. It oversaw the organization of the National Constituent Assembly elections in accordance with internationally recognized standards. Indeed, these standards require the involvement of an entity that is independent from the political authorities to organize the electoral process. The establishment of the Higher Authority represented a break from previous practice, where the Tunisian Ministry of Interior held sole responsibility for organizing and supervising elections in Tunisia.

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9 Established by Decree No. 6 of February 18, 2011, on the establishment of the Higher Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition and chaired by Yadh Ben Achour. The updated decree stipulates that it undertakes to examine legislative texts relating to political organization and to propose reforms aimed at realizing the objectives of the revolution and the democratic transition. It is empowered to advise on the government's activities in coordination with the Prime Minister.

10 For more information on the important role of the Higher Authority, see: Jean-Philippe Bras and Éric Gobe, «Légitimité et révolution en Tunisie. Les leçons tunisiennes de la Haute Instance pour la réalisation des objectifs de la révolution, « *Revue des mondes musulmans et de la Méditerranée* 142 (2017).

11 The electoral decree incorporated these principles in its preamble and declared its commitment to "moving away from the previous oppressive regime that disregarded the will of the people through illegitimate means and electoral manipulation. In line with the aspirations of the Tunisian people's revolution, which aimed to establish a legitimate system rooted in democracy, freedom, equality, social justice, dignity, pluralism, human rights, and open dialogue, it was decided that a National Constituent Assembly would be elected. Recognizing the inadequacies of the previous electoral law in ensuring democratic, pluralistic, transparent, and fair elections, the following provisions were agreed upon for the election of the National Constituent Assembly…."

12 Decree No. 27 of 2011, dated 18 April 2011, establishing an Independent Higher Authority for Elections, Official Gazette of the Republic of Tunisia, Issue No.27 of 19 April 2011, 488-490.

The Independent Higher Authority for Elections worked on guaranteeing the transparency and impartiality of the National Constituent Assembly elections. International and local organizations were able to monitor the entire electoral process, publish their findings, and exercise their right to legal remedy.

Decree No. 35 of 2011, on the election of the National Constituent Assembly,[13] introduced a legal framework aimed at guaranteeing pluralistic representation within the constituent body.[14] The decree enshrined a voting system based on closed lists and proportional representation, employing the largest remainder method. This system has been widely adopted by countries undergoing democratic transitions because it ensures a more balanced representation of diverse political groups in elected bodies. It allows for the inclusion of smaller parties, minorities, and women, enabling them to voice their opinions and perspectives.[15] The implementation of this system resulted in a constituent assembly that effectively represented the various political tendencies that emerged during that time, as evidenced by the election results of 23 October 2011. Despite the significant difference in representation between Ennahda Movement, which secured the majority of seats, and other parties, the adopted electoral system mitigated the potential for absolute political dominance within the assembly. The majority of votes obtained by the Islamist party did not grant it an absolute majority, requiring it to seek a coalition with other parties with different orientations and affiliations. It is important to recognize that the approved voting method facilitated political pluralism within the assembly, fulfilling the requirement at that time to establish a new social contract that would be acceptable to all.

The assembly also witnessed a notable proportion of women's representation due to the incorporation into the electoral decree of the principle of gender parity, which replaced the previously utilized quota mechanism. The assembly imposed vertical parity within the closed lists; candidacies that did not abide by it were disqualified.[16] This approach compelled political parties and independent candidates to acknowledge the role of women in politics. However, the lack of a requirement for horizontal parity at the top of electoral lists hindered the achievement of full gender parity within the assembly. Upon the declaration of results, the representation of women did not exceed 25%. It later reached 30% when certain members of the assembly resigned to assume ministerial positions.

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13 Decree No. 35 of 10 May 2011, on the election of the National Constituent Assembly, amended by Decree No. 2011-72 of 3 August 2011, Official Gazette of the Republic of Tunisia, Issue No. 33 of 10 May 2011, 651-661.

14 It should be noted that, in response to the demands of the revolution, the decree forbade anyone who previously held responsibility within the former ruling party or contributed to Ben Ali's regime and expressed support for it from running for the elections to the constituent assembly. However, this exclusion did not preclude the participation of members of the former Democratic Constitutional Rally in the National Constituent Assembly (deputies of the National Destourian Initiative and the Al Watan Party).

15 On the advantages of proportional representation see: Andrew Reynolds et al., *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2008).

16 Article 16 of the decree specifies the following: "Candidacies are based on the principle of gender parity between women and men. Candidates are arranged within the lists in a rotational order, alternating between women and men. Lists that do not adhere to this principle are allowed only in cases where the number of seats allocated to certain constituencies is odd."

At the beginning, the representation of women within the assembly fell short of the desired level. None of the female deputies assumed leadership of a parliamentary bloc, and only a limited number were able to make a significant impact in the political sphere. Furthermore, it is worth noting that not all female representatives prioritized advocating for gender equality. The majority of women in the assembly were conservative Islamists[17].

Even so, the election of the National Constituent Assembly garnered acceptance from a broad range of Tunisian society's diverse components. However, after it was established and began functioning, certain concerns arose regarding its approach and its level of commitment to upholding the demands of constitution-making in line with established democratic standards and the agreed-upon timeline.

B. Drafting and Approving the Constitution through an Imposed Inclusive and Consensus-Based Approach

The National Constituent Assembly held its inaugural session on 22 November 2011, and subsequently enacted Constitutional Act No. 6 on 16 December 2011. The law, often referred to as the "small/temporary constitution," outlined the provisional organization of authorities. In addition to its primary task of drafting a new constitution, the assembly granted itself various responsibilities, including the election of the President of the Republic, the appointment of government members, and the exercise of legislative and oversight functions over the government.

The constituent work of the assembly did not commence until 13 February 2012, following the approval of its rules of procedure on 20 January 2012. This delay intensified the tensions that had emerged prior to the elections, when the question of the timeframe for the completion of the constitution-making process became a subject of widespread political controversy.[18] An agreement was reached among the heads of the major parties, stating that the constituent period should not exceed one year, which was the deadline that was established in the voter invitation order.[19] However, this commitment was later disregarded by the three parties of the ruling Troika coalition.[20] They asserted that the Constituent Assembly, as an original constituent authority deriving its legitimacy from the elections, possessed sovereignty and supremacy. Consequently, they argued that political agreements and previous legal texts could not restrict its authority. The Constituent Assembly was deemed to be "its own master," with the sole authority to determine the methods and duration of its work. These statements generated concerns and doubts among the

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17 Salwa Hamrouni, *For a Meaningful and Effective Political Participation of Women: The Experiences of Jordan, Morocco and Tunisia* (Forum of Federations, 2022), 15.

18 Yadh Ben Achour, *Tunisia: A Revolution in the Land of Islam* translated from French by Fathi Ben Haj Yahia (Tunis: Institut de traduction de Tunis-Siras Publishing, 2018), 301-303.

19 Decree No. 1086, of 3 August 2011, on calling upon voters to elect members of the National Constituent Assembly, stipulates in Article 6 that "the National Constituent Assembly shall convene once the central committee of the Independent Higher Authority for Elections has officially announced the final election results. It shall then undertake the task of drafting a constitution for the country within a one-year deadline starting from the date of its election."

20 Fadhel Moussa, "The Era of the Constitution," opening lecture for the academic year 2016/2017, *Tunisian Journal of Legal and Political Sciences* 1 (2017): 21.

public regarding the approach and methodology employed in drafting the forthcoming constitution. There was apprehension that the dominant majority parties might shape the constitution without adequately considering the demands of the revolution.

The provisions outlined in the assembly's rules of procedure established a structural organization that appeared to address the needs of the constitutional drafting process. Thematic committees[21] were established, with each committee responsible for preparing proposals for the specific constitutional topics assigned to it. The Joint Committee for Coordination and Drafting was tasked with preparing the final version of the constitution. The rules of procedure also included provisions that allowed for participatory and transparent engagement. Committees had the option to seek input from individuals or organisations "in order to achieve a deeper understanding of subjects under discussion,"[22] promoting inclusivity in the drafting process. The work of both the committees and the plenary sessions was required to be conducted in a transparent manner, ensuring openness. Furthermore, the rules of procedure mandated the publication of reports, draft laws, and the draft constitution on the assembly's website.

In practice, the committees did engage with Tunisian and foreign experts, as well as representatives of civil society. However, these consultations had little impact on the decisions made by the committees. The consultations were mostly formal and perceived as superficial since the majority's proposals within the assembly predominantly shaped the content of the provisions.

The decision to begin with a "blank slate," as announced by the General Rapporteur of the constitution, hindered the drafting phase of the process. Despite the existence of several pre-existing constitutional projects put forth by political parties, national organizations, and legal experts involved in the revolution, these contributions were largely disregarded. This raised doubts about the participatory nature of the process, particularly since the elected majority within the assembly had the potential to dominate the constituent process, given that the same majority was governing the country at the time,[23] and it was often criticized for not include leaders of the revolution or those who participated in the uprising.

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21 Article 64 of the rules of procedure stipulates: "The National Constituent Assembly shall establish six constitutional committees, each comprising not more than twenty-two members. Each committee shall review the sections of the draft constitution, within its area of responsibility, as set out below:
1. The Committee on the Preamble, Fundamental Principles and Amendment of the Constitution
2. The Committee on Rights and Freedoms
3. The Committee on the Allocation of Powers to the Legislative and Executive Branches and the relationship between them
4. The Committee on Judicial, Administrative, Financial and Constitutional Jurisdiction,
5. The Committee on Constitutional Bodies,
6. The Committee on Regional and Local Communities.

22 In accordance with the provisions of Article 59 of the rules of procedure.

23 After the results of the elections that were held on 23 October 2011 were announced, power was shared between the majority party that won the elections, Ennahda Movement (Presidency of the Government) and its allies in the Troika Coalition, the Congress for the Republic – Al Mutamar (Presidency of the Republic) and the Democratic Forum for Labour and Liberties- Ettakatol (Presidency of the National Constituent Assembly).

Also, the failure to appoint legal experts specialised in drafting constitutional provisions within the thematic committees and the Joint Committee for Coordination and Drafting – despite noting the need to do so – constituted an additional obstacle that demonstrated the adoption of the majority within the National Constituent Assembly of a unilateral approach that did not take into consideration opinions raised outside the assembly.

It can hence be said that the first phase of the drafting process was characterized by the absence of a participatory approach and reliance on a narrow understanding of democracy that is limited to representative democracy as the only means to deliberate on the contents of the constitution. Such understanding disregards the foundations of participatory democracy in contemporary constitution-making processes, which require the constituent body to open up to civil and political organizations and citizens outside parliament, to enable to produce a social contract that enjoys broad public acceptance. However, following the presentation of the first draft of the constitution, the National Constituent Assembly retreated from this approach, henceforward effectively engaging in a participatory process.

The first draft of the constitution[24] was presented without meeting the requirements for presentation at the plenary session. Opinions on the draft were subsequently collected under the framework of a national dialogue organised by the National Constituent Assembly, in which several CSOs participated[25]. The opinions of some legal experts and professional entities were further sought.[26]

In this context, it is worth noting the importance of the transparent approach adopted by the National Constituent Assembly in its work; whether through its openness towards the media and CSOs that accompanied the constituent process and discussed it in the media and in panel discussions, or through the publication of reports on the assembly's website. Such approach allowed citizens and experts concerned with public affairs and the constitution-making process to follow the drafting phase accurately and continuously. This in turn generated a new participatory approach beyond the framework of the National Constituent Assembly, mainly represented in the pressure exerted by the public and civil society organisations for several reforms to be introduced to the various constitutional drafts.[27]

Numerous drafts later, the constitutional bill was issued on 1 June 2013; it was met with reservations from several parties due to its formal flaws and problems in content.[28] This prompted the National Constituent Assembly to adopt a consensual approach that may be described as complicated due to the worsening political situation, which significantly impacted its work.

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24 Draft constitution issued on 14 December 2012.

25 Tunisia: Civil society proposals on the draft constitution, National Constituent Assembly.

26 On this issue, see: Slim Laghmani, "Drafting the Constitution," *Writings on Politics and the Constitution in the Wake of the Revolution*, 2nd edition (Tunis: Nirvana Editions, 2020), 73 ff.

27 Laghmani, 73 ff.

28 All the constitutional law experts detected deficiencies in the draft constitution. For instance, see: Slim Laghmani, "Eight Changes Necessary for the Draft Constitution to Be Acceptable (Without Being Perfect)," *Writings on Politics and the Constitution in the Wake of the Revolution* (Tunis: Nirvana Editions, 2020), 81 ff.

While consensus between the majority and the opposition was reached with respect to some constitutional provisions,[29] a range of issues remained unresolved and caused sharp disputes within and outside the assembly.

Ultimately, consensus imposed itself as an imperative condition for the ratification of the new constitution for a number of reasons, including political confrontation over the sources of the new constitution's provisions inside and outside the assembly, in addition to the political assassinations that targeted the opposition, the victims of which included a member of the opposition in the assembly, the late Mohamed Brahmi. This tense social situation led to several protests and the "departure sit-in" in front of the National Constituent Assembly, the withdrawal of the members of the opposition from the assembly, and the total suspension of the assembly's work by a decision of its President on 6 August 2013. The overall process was under threat of collapse in the absence of a solution to the political crisis. At the time, there was no choice but to conduct a "national dialogue" at the political level[30] and to create a new structure within the National Constituent Assembly to resolve controversial constitutional issues. To this end, the "Consensus Committee"[31] was established; it managed to resolve a set of contentious issues before the draft constitution was submitted to the plenary for approval.

The consensus reached allowed for the approval of the constitution by the assembly, without the need to resort to a referendum that was projected both theoretically and in practice. When voted upon in the plenary, and from the first reading, the draft constitution was approved by 200 assembly members out of 216 – a majority far exceeding the legally required majority for its ratification. As such, it met the conditions to be adopted as a new constitution for the country, as per Article 3 of Constitutional Act No. 6, on the provisional organization of public authorities.[32]

Despite the conflicts, disagreements, and crises that accompanied it, the process of drafting the 2014 Constitution responded to the principles of both revolutionary legitimacy and legal legitimacy. It was based on a participatory and transparent approach and characterized by a consensual nature that enabled the adoption and promulgation of the new constitution.

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29 Fadhel Moussa, «Débat majorité-opposition au sein de la constituante,» ed., Sadok Belaid, *Gouvernement de coalition et enjeux politiques* (Tunis: Association Tunisienne d'Études Politiques, 2012), 17-27.

30 The national dialogue was led by the quartet, which consisted of the Tunisian General Labor Union (UGGT), the Tunisian Confederation of Industry, Trade and Handicrafts (UTICA), the Tunisian Order of Lawyers (ONAT) and the Tunisian Human Rights League (LTDH). This quartet was awarded the 2015 Nobel Peace Prize for its major role in finding peaceful and consensual solutions to the political crisis that Tunisia experienced during the constituent period.
For more on this, see: Hatem Mrad et al., *National Dialogue in Tunisia* (Tunis: Association Tunisienne d'Études Politiques, Nirvana Editions, 2015).

31 The Consensus Committee was established pursuant to the decision of the National Constitution Assembly dated 14 January 2014.

32 Article 3 states: "The National Constituent Assembly must approve the draft constitution, article by article, by an absolute majority of its members. It must then approve it in its entirety by a majority of two-thirds of the assembly members, and, if that is not possible, by the same majority in a second reading within a deadline not exceeding one month from the first reading. If that is not possible, the draft constitution in its entirety must be submitted to a referendum."

II. Rights and Freedoms in the 2014 Constitution: Between Enshrining the Desired and Constitutionalizing the Imposed

The Tunisian revolution was not expected; in fact, it took everyone by surprise. When the revolution erupted, it was not led by organised entities, but was rather the product of spontaneous youth movements that lacked the leadership of civil and partisan organizations. As a result, it failed to present a clear and specific programme setting a future vision and a comprehensive strategy for the required transition; it was simply limited to expressing the rejection of the previous authoritarian regime and its remnants. Intermediary organisations, including national parties and organisations that joined the protests in the first phase, failed to present future practical visions, merely issuing supportive statements.[33] In doing so, they adopted the same popular slogans that were raised, subsequently presenting their visions and projects within the National Constituent Assembly as successive draft constitutions were produced.

In this context, Professor Yadh Ben Achour acknowledges that "the revolution is not necessarily the result of a carefully thought project at the level of partisan organisation or at the level of ideological development. Rather, it can abruptly arise out of protest movements, and then turn into a revolution. A failed uprising is considered a rebellion, while a victorious one can become a revolution. A revolution is the opposite of suffering, and the Tunisian Revolution should be understood within the framework of this model."[34] Indeed, the Tunisian Revolution expressed the economic and political hardship of different social groups and was summarized in shorthand slogans that called for "work, freedom and national dignity" – slogans that "turned words into action," according to some.[35] This placed human rights at the centre of the revolution and of the new constitutional text, for they required to be enshrined in order to be guaranteed and preserved.

In this respect, it can be stated that the 2014 Constitution succeeded in enshrining a human rights system derived from popular aspirations (A). At the same time, the provisions of the constitutional text featured ambiguity and omissions resulting from political conflict over certain areas, which opened the door to interpretation with regard to the constitutional sources that must serve as their reference (B).

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33 Azmi Bishara, *The Glorious Tunisian Revolution: The Structure and Process of a Revolution through its Daily Chronicles* (Doha, The Arab Center for Political Studies and Research), 388 and ff. The appendix to this book contains all the statements issued by the political parties of the opposition between 17 December 2010 and 14 January 2011. These were statements that merely condemned the violence against demonstrators and expressed support for the protesters. The same applies to the statements issued by the the main organizations participating in the uprising, especially the statements of the Tunisian Order of Lawyers and the Tunisian General Labor Union that were issued by some of their regional structures in the same period. The majority were statements of support and calls for a strike. See, for instance, the statement of the national administrative body of the Tunisian General Labor Union issued on 11 January 2011.

34 Yadh Ben Achour, "The Scenography of the Tunisian Revolution," *Tunisia: A Revolution in the Land of Islam*, 83.

35 Mohsen Bouazizi, "Slogans of the Tunisian Revolution: The Language of Freedom and of Words Turned into Deeds," *Bedayat* 1 (2021).

A. Rights and Freedoms, from Revolutionary Slogans to Constitutional Enshrinement: Constitutionalizing the Desired

In order to examine the extent to which the 2014 Constitution responded to the targets and objectives of the revolution, it is necessary to look at the nature of the demands that were raised. The popular demands expressed in the slogans of the revolution were numerous and varied, and both increased in number and evolved as events unfolded. Although they were largely socioeconomic at the outset, they soon turned into political demands aimed at overthrowing and ousting Ben Ali's regime.

It comes as no surprise to those familiar with the slogans that were raised at the start of the revolution that they expressed a desire for a democratic regime. ("Work, freedom, national dignity," "Employment is a right, you band of thieves," "Release your grip over the country, you gang of the corrupt," "Bread and water, not Ben Ali," "Freedoms, freedoms, no presidency for life," and later, "No fear, no terror, power belongs to the people," "*Dégage*,"[36] and "The people want to topple the regime.")

While the constitutional enshrinement of rights and freedoms represents the first of the guarantees needed for the establishment of a democratic regime that responds to people's aspirations, the incorporation of rights into the constitution cannot of itself ensure the effective guarantee of their exercise if it is not accompanied by effective constitutional mechanisms. From this perspective, it can be stated that the 2014 Constitution was characterized by the establishment of a protective human rights system that responded to popular aspirations in terms of consecrating rights and freedoms and the general principles guaranteeing them (1). It further established advanced mechanisms for their protection, compared to those of both the 1959 Constitution and the 2022 Constitution (2).

1. Enshrining Rights and Freedoms and the General Principles Guaranteeing Them

The text that was adopted by the Tunisian Constituent Assembly in 2014 enshrined the entire range of rights and freedoms around which the revolution centred, including social, economic, and political rights, as well as collective and individual freedoms. Rights and freedoms were incorporated into a specific chapter – Chapter Two. The constitution incorporated additional rights elsewhere, such as in the preamble (freedom of association and equality), the chapter on general principles (freedom of conscience and belief), and the chapter on the judicial power (judicial rights).

Indeed, the 2014 Constitution responded to the demand for freedom and dignity by enshrining the relevant rights and principles as follows:

- A general principle requiring the state to guarantee freedoms as well as individual and collective rights to all citizens, and provide all citizens the conditions for a dignified life (Article 21);

[36] This slogan was raised in French and means "leave."

- The right to dignity, which includes the protection of human dignity and physical integrity, the prohibition of torture and of subjecting crimes of torture to any statute of limitations (Article 23) and the guarantee of prisoners' right to humane treatment that preserves their dignity (Article 30); and
- A set of individual and collective freedoms, including the right to privacy and personal information (Article 24), freedom of opinion, thought, expression, information and publication, and the prohibition of prior censorship (Article 31), the right of access to information (Article 32), the freedom to establish political parties, unions, and associations (Article 35), the right to assembly and peaceful demonstration (Article 37), academic freedoms (Article 33), and the freedom of creative expression (Article 42).

The constitution further enhanced the provisions related to political rights by guaranteeing the right to run for office and the right to universal, free, direct, secret, fair and transparent elections. It also stipulated pluralism and the peaceful alternation of power through periodic elections to Parliament and the Presidency of the Republic, whose term duration it rendered unamendable. It also recognised the rights of the opposition represented in Parliament, which represented a qualitative step in the adoption of the basis of a democratic regime, compared to the 1959 Constitution and even to comparative constitutions.[37]

The 2014 Constitution likewise responded to economic, social and cultural aspirations by enshrining a set of socioeconomic rights as required by international treaties. It recognised the right to work and acknowledged that it is a right for every citizen, male and female, requiring the state to take the necessary measures to guarantee work on the basis of competence and fairness, in addition to the right to decent working conditions and to a fair wage (Article 40). It also enshrined trade union rights, extending it to groups that had been denied such rights, as well as the right to strike (Article 36), the right to health care (Article 38), education (Article 39), and culture (Article 42).

The enshrinement of these socioeconomic rights represented a major development in the Tunisian constitutional system, bypassing the debate around the non-justiciability of these rights, which precluded their enshrinement in the 1959 Constitution (with the exception of trade union rights), which merely referred to them succinctly in its preamble.

In this context, it is also important to discuss the constitutionalisation of women's rights in Article 46 of the 2014 Constitution. The enshrinement of women's rights was one of the demands of the revolution. Women's organisations, CSOs and progressive parties sought to achieve it to counter the regressive approach that religious and conservative parties within and outside the National Constituent Assembly tried to impose on the constitution of the revolution by refusing to recognise the principle of equality between men and women.

[37] The 2014 Constitution is one of the rare constitutions in the world, especially in the Arab world, that enshrines constitutional rights for the opposition. Article 60 stipulates the following: "The opposition is an essential component of the Assembly of Representatives of the People. It shall enjoy the rights that enable it to undertake its parliamentary duties and is guaranteed an adequate and effective representation in all bodies of the assembly, as well as in its internal and external activities. The opposition is assigned the chair of the Finance Committee, and rapporteur of the External Relations Committee. It has the right to establish and head a committee of enquiry annually. The opposition's duties include active and constructive participation in parliamentary work."

The demonstration that was held on 13 August 2012, in which thousands of Tunisians expressed their commitment to women's gains in rights and the need to consolidate them, was a major turning point in the enshrinement of women's rights as a constitutional principle.

The provisions enshrining rights and freedoms in the 2014 Constitution represented a major constitutional gain that the Constitution of 25 July 2022 generally preserved.[38]

The 2014 Constitution was also characterised by the incorporation of a set of general principles relating to the functioning and organisation of state institutions aimed at preventing the abuse of power. These principles were the legal translation of popular aspirations related to ending the system of corruption and tyranny and ensuring justice between the regions. The incorporation of provisions related to the issues that were overlooked throughout the period of oppressive rule and which had not been enshrined in the 1959 Constitution was a step towards the strengthening of the rule of law. The following provisions can be highlighted in this respect:

- The provisions of the preamble on the necessity of "breaking with injustice, inequity, and corruption" and building a "republican, democratic and participatory system, in the framework of a civil state founded on the sovereignty of the people and the peaceful alternation of power through free elections and the separation of powers, which guarantees the freedom of association in conformity with the principles of pluralism, an impartial administration, and good governance … the supremacy of the law and the respect for freedoms and human rights, the independence of the judiciary, and the equality of rights and duties between all citizen".
- The provisions of Chapter I on the general principles related to citizenship, the will of the people and their sovereignty in a civil state, and the adoption of principles of good governance and combating corruption (impartiality of public administration in conformity with the rules of transparency, integrity, efficiency and accountability (Article 15), the proper use of public funds and the prevention of corruption (Article 10) and achieving social justice, sustainable development, balance between regions, and the adoption of the principle of positive discrimination (Article 12).
- The transitional provisions through the adoption of the "transitional justice system"[39] (Article 148, paragraph 9) in order to ensure accountability and prevent impunity, the repetition of past crimes and the return of tyranny.

It should be noted in this regard that these general principles were not enshrined in the 2022 Constitution.

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[38] Regarding the enshrinement of rights and freedoms in the 2022 constitution, see: Mouna Tabei and Ikbal Ben Moussa, "A Preliminary Reading of the New Draft Constitution," *Dustour Talk*, 14 July 2022.

[39] The National Constituent Assembly adopted Organic Law No. 53 of 2013 on 24 December 2013, on establishing and regulating transitional justice, Official Gazette of the Republic of Tunisia No. 105 of 31 December 2013, 4343-4335. Article 1 of the law defines transitional justice as "an integrated process of mechanisms and methods used to understand and deal with past human rights violations by revealing their truths, and holding those responsible accountable, providing reparations for the victims and restoring their dignity in a way that achieves national reconciliation, preserves and documents collective memory, guarantees non-recurrence of such violations and transitions from an authoritarian state to a democratic system that contributes to the consolidation of human rights."
In accordance with the provisions of the law, the Truth and Dignity Commission was established and tasked with implementing the transitional justice process in Tunisia. However, the work of the commission was stalled and rather difficult.

2. Enshrining Mechanisms for the Protection of Rights and Freedoms

The 2014 Constitution represented a major development at the level of the incorporation of mechanisms to protect rights and freedoms as demanded by CSOs. These mechanisms were largely enshrined in Article 49, related to the limitations and restrictions that can be imposed on the exercise of rights and freedoms, as well as in the establishment of new constitutional institutions. Various human rights organizations and experts worked to enshrine these mechanisms in order to ensure the effective respect of rights and freedoms and to include them at the highest normative level to make them binding on the authorities.

With regard to defining the limitations and conditions for the restriction of rights and freedoms, Article 49 constituted a key mechanism to prevent the abuse of power when restricting rights and freedoms. The adoption of a comprehensive restrictive article was a demand that CSOs, especially the Tunisian Association of Constitutional Law, worked on enshrining in the 2014 Constitution.[40]

Establishing conditions and limitations restricting the authority of the legislator when regulating constitutional rights is crucial to ensure their effective guarantee. Article 49 of the Constitution defined a set of conditions that the authorities had to follow when restricting constitutional rights and freedoms. It required that said restrictions be established by law, necessary to a "civil and democratic state", put in place to achieve a specific constitutional objective, and based on proportionality. Additional guarantees included the incorporation of the principle of non-retroactivity of the gains in the field of rights and freedoms and entrusting the task of looking into violations to the judicial authorities.[41]

Thus, Article 49 was a major improvement in comparison with Article 7 of the 1959 Constitution, which enabled the legislative authority and the general regulatory authority to adopt legal provisions that restricting public rights and freedoms in a way that prevented their effective exercise. One can refer, for instance, to Law No. 4 of 1969 relating to public meetings, processions, parades and demonstrations, as well as the list of circulars that deprived people of their freedom, such as the circulars on the prohibition of wearing the hijab, closing cafes during Ramadan, and choosing the names of children ...

> It must be noted that the enshrinement of Article 49 in the 2014 Constitution and the adoption of the proportionality principle to determine the legality of the restriction enabled the Tunisian judiciary to establish a jurisprudence championing rights and freedoms. While Article 55 of the 2022 Constitution preserved the comprehensive limitations and conditions for the restriction of rights and

[40] See the proposal submitted by the Tunisian Association of Constitutional Law.

[41] Regarding Article 49 of the constitution, see the series of practical guides issued by the International IDEA, including: Mouna Tabei, *Civil Society's Guide to Implementing Article 49 of the Constitution* (Stockholm: International IDEA, 2021).

freedoms,[42] most of the other institutional guarantees that were enshrined in the 2014 Constitution were dropped.

As regards institutional guarantees, the 2014 Constitution entrusted the judiciary with protecting rights and freedoms and guaranteeing the supremacy of the constitution and the rule of law. The constitution enshrined several guarantees to establish a judiciary that is functionally and structurally independent from the legislative and executive authorities, thus addressing the loopholes and shortcomings of the 1959 Constitution. The provisions of the constitution generally responded to the demands of CSOs that submitted proposals in this regard to the National Constituent Assembly and lobbied for their inclusion in the constitution.[43] They also entrusted the task of seconding, transferring and disciplining judges to a specialised entity – the Supreme Judicial Council.

The 2014 Constitution also established constitutional institutions that were not enshrined in the 1959 Constitution. These institutions were supposed to have a major and effective role in preserving the gains made by the revolution and the democratic transition process; however, they were never established. The constitution established a Constitutional Court, further introducing the possibility for citizens to challenge the unconstitutionality of the laws in force. It also established five independent constitutional bodies intended to support democracy[44] and regulated matters that the previous regime had to sought to control and manage through the executive authority. Thus, the constitution entrusted the organisation of elections to the Independent Higher Authority for Elections, which is the only constitutional body that was effectively established out of the constitutional bodies stipulated in the constitution (the Human Rights Commission, the Audio-Visual Communication Commission, the Good Governance and Anti-Corruption Commission, and the Commission for Sustainable Development and the Rights of Future Generations). Failure to establish those bodies led to failure in guaranteeing the constitutional system that was embedded in the 2014 Constitution, as discussed under Part III of this paper.

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42 Article 55 of the 2022 Constitution stipulates: "No limitations shall be imposed on the rights and freedoms guaranteed in this constitution except by law, and only for reasons necessary to a democratic system and with the aim of protecting the rights of others or based on the requirements of public security, national defense or public health. Such limitations must not compromise the essence of the rights and freedoms guaranteed in this constitution and must be justified in their objectives and proportionate to the objective sought. No amendment may undermine the human rights and freedoms guaranteed in this constitution. Judicial authorities shall protect these rights and freedoms from all violations."

43 For instance: the statement of the Tunisian Magistrates Association issued on January 14, 2014 on Article 103: https://nawaat.org/2014/01/15/%D8%AC%D9%85%D8%B9%D9%8A%D8%A9-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A9-%D8%A7%D9%84%D8%AA%D9%88%D9%86%D8%B3%D9%8A%D9%8A%D9%86-%D8%A8%-D9%84%D8%A7%D8%BA-%D8%A7%D8%B6%D8%B1%D8%A7%D8%A8-%D9%84%D9%85%D8%AF/

44 Article 125 stipulates: "The independent constitutional bodies act in support of democracy; and all institutions of the state must facilitate their work."

B. The Duality of Constitutional Sources in Determining Some Constitutional Provisions: Constitutionalizing the Imposed

One of the main criticisms that were directed against the 2014 Constitution[45] was that it was based on consensus and a duality of sources, and that its provisions contained a series of contradictions. This constitutional issue cannot be understood without taking into consideration the impact of the political conflicts that surrounded the drafting process, or the balance of power within the National Constituent Assembly. Although the slogan "The people want to topple the regime" expressed the prevailing desire to break with the regime, there was no consensus on the elements of the desired state under the new constitutional system.[46] This led the political parties involved in the constituent process to present mostly differing visions and perceptions.

The identity of the state and the question of constitutional sources became a real problem during the drafting process, even though they had not been raised during the revolution. The country experienced great ideological and political polarization of these matters, resulting in several sharp conflicts between conservative Islamists and their vision of the new state, and progressive modernists. The conflict erupted before the National Constituent Assembly elections, continued during the drafting period,[47] and deepened with the results of the elections to the assembly, which produced an Islamist majority that had not participated in the revolution on the ground. The conflict worsened due to the Islamist-leftist alliance during the Troika rule and their attempt to deviate from the basic demands of the revolution for freedom and impose the hegemony of Islamism within the constitution.

The demands and slogans raised during that period shifted from social justice, freedom, and equality to the question of identity. On the one hand, there were demands that focused on the need to establish a secular state, which was considered a guarantee for all rights and freedoms and for the achievement of the revolution's goals in accordance with the expressed aspirations. On the other hand, there were demands for the establishment of an Islamic state, which the previous regime had prevented, while persecuting its supporters. The conflict turned from a political confrontation between the parties within the National Constituent Assembly into a deep societal conflict that was amplified with the emergence of new organisations that Tunisia had not witnessed before the revolution, such as Salafist movements and religious parties that reject democracy, such as Hizb ut-Tahrir.[48] The conflict subsided once

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45 See: Slim Laghmani, "Critical Thoughts Regarding the Constitution of 27 January 2014," *Writings on Politics and the Constitution in the Wake of the Revolution*, 51-70.

46 Following the downfall of Ben Ali's regime on the night of 14 January 2011, the political scene was dominated by conflicting visions and differences over the mechanisms for achieving the desired transition (amending the 1959 Constitution or adopting a new constitution/establishing a national unity government or a technocratic government to run the transitional period).

47 Moussa, "The Era of the Constitution," 22-24.

48 The conflict between the supporters of the establishment of a secular state those of an Islamic state led to several demonstrations, sit-ins, and confrontations, where the slogans raised differed from those raised during the first phase and contradicted each other. For instance, slogans like "yes to secularism, no to a Muslim Brotherhood constitution," were raised against others like "people want the Caliphate back" and "There is no god but God, and secularists are the enemies of God".

agreement was reached to keep Article 1 of the 1959 Constitution ("Tunisia is a ... state. Its religion is Islam"[49]) and to adopt Article 2 that enshrined the "civil dimension of the state."[50] But the constitutional problem persisted, and the consensus that was reached was considered "a consensus that upheld the contradictions" and postponed their resolution. While the agreement was praiseworthy from a political perspective, from a legal point of view, it raised problems concerning the constitutional text.

Indeed, the 2014 Constitution did not resolve the issue of constitutional sources with respect to the determination of the content of rights and freedoms, even if it enshrined the principle of the civil dimension of the State and guaranteed the supremacy of international treaties supremacy over ordinary laws, which were placed below the constitution.[51] As such, the matter remained open to interpretation. In contrast, the constitutional sources of the 1959 Constitution were clear, as Article 5 explicitly stipulated: "The Republic of Tunisia shall guarantee fundamental freedoms and human rights in their universality, comprehensiveness, complementarity and interdependence. The Republic of Tunisia shall be founded upon the principles of the rule of law and pluralism …" As for the 2014 Constitution, despite the advanced and diverse of rights and freedoms it enshrined, lacked such clarity, enshrining substantively conflicting provisions. For example, the preamble, which was an integral part of the constitution, stated the following: "Expressing our people's commitment to the teachings of Islam and its aims characterized by openness and moderation, and to the human values and the highest principles of universal human rights ..." Article 1 (under General Principles) stated: "Tunisia is a free, independent and sovereign state; its religion is Islam."[52] In turn, Article 2 stipulated that "Tunisia is a civil state based on … the supremacy of the law".[53] Both articles were unamendable. Chapter 6 explicitly enshrined this contradiction by stating: "The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices ... The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof ...." Article 39, which deals with education, although based on the normative content of the right as enshrined in international law (compulsory, free, of high quality), adds the following: "It [the state] shall also work to consolidate the Arab-Muslim identity and national belonging in the young generations ...."

49 On 20 March 2012, the head of the Committee on the Preamble suggested to adopt the Sharia as a source of legislation; demonstrations supporting and opposing the idea took place shortly after. The constituent assembly of the Ennahda Movement resolved the issue by considering that Article 1 of the 1959 Constitution was sufficient and should be considered a non-amendable provision.

50 Added to the draft of 22 April 2013.

51 Article 20 of the of the 2014 Constitution stipulates that " International agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws and inferior to that of the Constitution." However, it does not make establish them as a reference for the assessment of the legitimacy of laws.

52 Article 1 of the 2014 Constitution stipulates: "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended."

53 Article 2 of the 2014 Constitution stipulates: "Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law. This article might not be amended."

Such wording is subject to many interpretations, tying human rights to the balance of power at the political level and to the judge's will in determining their constitutional content. It grants great discretion to the decision-maker to pick the most appropriate reference based on their personal beliefs. It should be noted that the protection of rights and freedoms must be primarily based on the concept of rights and freedoms held by international law in a way that guarantees their application to everyone, regardless of and individual's ideological and religious affiliation. This must be properly addressed at the level of the constitutional text, so as not to leave ample room for the interpretation of the content of a right from a purely religious perspective.

This duality of constitutional sources turned the religious issue into a priority and main focus of political competition between the candidates for elections under the political system in place, expelling the economic and social problems that triggered the revolution from the societal debate.

In this context, it is worth mentioning the report of the Individual Freedoms and Equality Committee[54] and the controversy it generated on how to interpret the constitution's provisions on rights and freedoms on the one hand, and how electoral victories were prioritised over legal reform on the other hand. The report included several legislative proposals and amendments in line with the constitution and international human rights law (abolition of capital punishment, decriminalization of homosexuality, turning equality in inheritance into a legal principle[55]...). However, the publication of the report politically and socially polarized people on the extent to which the proposals were aligned with the teachings of Islam, leading to the organisation of defamation campaigns against the committee and its members, who were accused of being non-believers (*kuffar*). This prevented the Presidency of the Republic to submit a bill in this respect, to preserve interests and prepare for the 2019 legislative and presidential elections.

Relatedly, it should be noted that the constitutional sources of the 2022 Constitution reference are not clear either; if anything, they seem more complicated, for the constitution, did not include a reference to the principle of the universality of human rights. It further let go of the concept of a civil state and of the wording of Article 1 that was included in previous constitutions. Instead, Article 5 referred to achieving "the goals of true Islam in preserving life, honour, money, religion and freedom."

It can be generally acknowledged that the 2014 Constitution responded to the revolution's goals by strengthening constitutional rights and freedoms and stipulating mechanisms for their protection. However, it also enshrined extraneous issues that were not raised in the revolution but imposed by the dominant Islamist party at the political level and within the constituent assembly. As a result, it contained a dual reference, which opened the door to multiple interpretations and pushed the parties to politically compete on that matter, instead of proposing reformist electoral

54 The late former President of the Republic, Beji Caid Essebsi, created a committee that worked on introducing the legislative reforms necessary to comply with the new constitution's requirements with regard to equality and individual freedoms.

55 The report is published on the website of the Presidency of the Republic: https://www.carthage.tn/.

programmes. Even so, the real problem lay in a lack of commitment to the full implementation of its provisions.

III. The Implementation of the 2014 Constitution: Selective Implementation and Imposed Reality

The constitutional system enshrined in the 2014 Constitution differed from the provisions of the 1959 Constitution in terms of the nature of the political system, the institutional framework, and rights and freedoms. It was meant to break with the authoritarian practices that Tunisia had known before the revolution, but no matter how developed a constitution's provisions are, they cannot achieve the desired goals if the leaders are not committed to respecting their requirements and putting in place the necessary legislation and institutions to ensure their proper implementation. The implementation of the 2014 Constitution was characterised by its selective nature and the authorities' failure to properly implement its requirements.

Between the entry into force of the 2014 Constitution and its replacement following the referendum on the Constitution of 25 July 2022, the country went through two electoral cycles[56] before the state of constitutional exception was imposed on 25 July 2021 and the Assembly of the Representatives of the People was suspended. Each cycle witnessed several political crises and successive government changes, which resulted in a selective implementation of the 2014 Constitution. As regards the legislative enforcement of constitutional provisions, despite the adoption of new legislation, the process was partial (A). As for the exercise of power, a fait accompli policy was imposed through selective interpretation and amidst the lack of establishment of the Constitutional Court (B).

A. Partial Implementation of the 2014 Constitution Provisions

In implementation of the 2014 Constitution, it was expected that the entire legislative framework would be reviewed to guarantee the new constitutional rights and freedoms, amend laws that contradicted them, and put in place new laws to guarantee the revolution's goals. However, the legislative authority did not keep up with the required pace, despite the successful drafting of important new laws.

Indeed, the Assembly of Representatives, elected in October 2014, adopted a number of protective laws in implementation of the constitution's provisions related to rights and freedoms. The following are the most important ones:

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56 First- The 2014 legislative and presidential elections resulted in the election of a majority from the Nidaa Tounes party, followed by the Ennahda Movement in the legislative assembly and of Beji Caid Essebsi, head of the Nidaa Tounes party, as President. Early presidential and legislative elections were held in 2019 after the death of Beji Caid Essebsi; they gave rise to a majority by the Ennahda Movement and the Heart of Tunisia Party in the legislative assembly, and Kais Saied, the independent candidate, was elected as President.

- Law No. 58 of 2017 related to the elimination of violence against women: It criminalised all forms of violence against women, established comprehensive preventive and procedural mechanisms, and created a national observatory to combat violence against women.
- Law No 61 .of 2016 on the prevention of trafficking in persons :It was created by the National Commission for Combating Trafficking in Persons ,which worked to monitor violations and develop a national strategy to combat trafficking in persons.
- Law No 22 .of 2016 on the right to access information :It affirmed the right of everyone to access information before all official entities and established the Information Access Authority ,granting it quasi-judicial powers to guarantee that right.
- Law No 54 .of 2017 on the establishment of the National Council for Social Dialogue :It provided a framework for dialogue between the government ,trade unions and custom unions ,and deliberation on development and economic rights issues.
- Law No 49 .of 2015 on partnership contracts between the public sector and the private sector ,a new Investment Code updated by Law No 71 .of ,2016 and Law No 47 .of 2019 on improving the investment climate ;these instruments support an economic liberal approach and encourage private initiative.
- Law No 10 .of 2019 on the creation of a social security programme aimed at advancing poor and limited-income groups and achieving social justice.

In general, most of the institutions necessary to enforce these laws, especially those related to the economic and social fields, were not created, and even those that were established remained incomplete.[57]

In the second parliamentary term, unenforceable laws were approved. These were aimed at quelling the anger of the marginalised classes, especially the unemployed, amidst deepening poverty, unemployment[58] and ongoing sit-ins and protests under the slogan "The revolution continues." This was for instance the case of Law No. 2020-38 of 13 August 2020 on exceptional recruitment measures in the public sector. The law allows holders of higher degrees to join public office without having to participate in a recruitment competition if they have been unemployed for 10 years or have reached the age of 35 without having started a job. It also guarantees the employment of one member of every family of unemployed persons and imposes the allocation of no less than 5% of annual assignments to public office to persons with disabilities. Regardless of the issue of the constitutionality of the law, its provisions were inapplicable, due on the one hand to the inability to approve more assignments to public office after those who benefited from the general amnesty were assigned, and, on the other hand, to the inability to issue the regulations required for its enforcement.

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57 For more details, see: Wahid Ferchichi and Muhammad Anwar Al-Zayani, "Five Years of the Work of the Assembly of Representatives of the People in Tunisia, 2014-2019: What Legislative Outcome in the Field of Rights and Freedoms?" *The Legal Agenda*, 27 March 2019.

58 On the decline in development indicators and statistics, see: Sara Yerkes and Zeineb Ben Yahmed, "Tunisia's Revolutionary Goals Remain Unfulfilled," *Carnegie Endowment for International Peace*, 6 December 2018.

Many constitutional provisions remained without new legislation in line with their contents, as competent authorities failed to enact basic laws related to political parties and associations, freedom of the press and audio-visual communication, which are still regulated in accordance with the decrees of the transitional period, although the provisions of the 2014 Constitution stipulated the adoption of new basic laws to guarantee those freedoms. In this context, it should also be noted that a number of rights and freedoms remained unregulated, including the right to strike, and many laws that contradicted the 2014 Constitution remained in force being amended, such as the law regulating the right to peaceful assembly and demonstration, some provisions of the Penal Code and some provisions of the Personal Status Code.

The exercise of power following the constitution's entry into force did demonstrate a desire to adapt the new legal provisions, especially those relating to the electoral law.[59] The law preserved the same voting system enshrined in the electoral decree, as well as the gains related to the conduct and organisation of elections and those related to vertical parity between women and men in electoral lists. However, when the bill was discussed within the National Constituent Assembly, the majority refused to include horizontal parity between women and men for the heads of electoral lists,[60] as most parties still consider that politics are primarily the affair of men.

Following its entry into force, the law was subject to successive and repeated amendments aimed at serving the electoral interests of those in power. A case in point was the proposed amendment of the 2019 electoral law, which was aimed at changing essential electoral provisions two months before the legislative elections, in violation of international standards guaranteeing the integrity of elections, which impose a one-year limit for the adoption of such changes.[61] Nonetheless, the Assembly of Representatives at the time approved the amendment, and the constitutionality of the provisions was confirmed by the temporary body charged with controlling the constitutionality of draft laws. However, it did not enter into force because the President did not sign it.

In similar fashion, the President of the Republic changed the provisions of the electoral law after dissolving the Assembly of Representatives and declaring a state of exception, despite an explicit provision in the 2014 Constitution that electoral matters cannot be regulated by decree. Still, the President adopted a number of decrees that amended the provisions of the electoral law during a period in which he was not entitled to do so, and this was in order to hold the referendum on 25 July 2022.[62]

As mentioned above, the 2014 Constitution established a number of constitutional bodies in Chapter VI that the

59 The National Constituent Assembly approved a new electoral law following the entry into force of the 2014 Constitution (Organic Law No. 16 of 2014, of 26 May 2014, on elections and referendum).

60 Moussa, "The Era of the Constitution".

61 This amendment suggested changing a number of fundamental issues related to the inclusion of the threshold and adding new restrictions on candidacy requirements. For more, see: Salwa Hamrouni, Mouna Tabei et Meriem Aguerbi, « Chronique de la Tunisie ,» *A.I.J.C.* 35 (2019) : 1002-1008.

62 Moussa and Tabei, *Tunisia- Referendum on the New Constitution.*

old constitutional system had not known. Although the transitional provisions of the constitution stipulated that the provisions related to independent constitutional bodies would come into force following the election of the Assembly of the Representatives, these were not created, except for the Independent Higher Authority for Elections, whose establishment was necessary to ensure the alternation of power. The other constitutional bodies remained unestablished because politicians did not believe in their necessary role in consolidating democracy. They also undid the progress that was made with the Independent Higher Authority for Elections by imposing a fait accompli policy that altered its composition in violation of the 2014 Constitution.

B. Selective Implementation and Imposed Interpretation: The Absence of the Constitutional Court as Example

In our view, the failure to establish the Constitutional Court was the biggest challenge that the implementation of the 2014 Constitution faced, and the main reason that led to its termination. The disruption of the court's establishment is the biggest proof that those who reach power were not committed to upholding the constitution.

The 2014 Constitution granted the Constitutional Court[63] broad powers, giving it the exclusive competence to oversee the constitutionality of draft laws, constitutional amendments both procedurally and substantively, international treaties, the rules of procedure of the Assembly of Representatives, and laws referred to it by the courts (Article 120). It also granted it other powers that allow it to supervise the executive authority through resolving conflicts of jurisdiction between the President of the Republic and the Head of Government (Article 101), to bring to an end the President of the Republic's term for a grave violation of the Constitution (Article 88), and in the event of the position of President of the Republic becoming temporarily vacant to meet and declare the temporary vacancy of the office (Article 84), and verify whether the circumstances having been considered exceptional remain so (Article 80). In this way, the 2014 Constitution broke with the political conception of oversight that the Constitutional Council had previously exercised under the 1959 Constitution, and introduced a model that was more akin to the model established in democratic countries.

According to the 2014 Constitution, the Constitutional Court is placed at the top the institutional and legal structure. As stipulated in Article 1 of the Organic Law on the Tunisian Constitutional Court,[64] it is the "guarantee of the constitution's supremacy and protector of the democratic republican system, rights and freedoms," and all public authorities must abide by its decisions. It was meant to constitute the basis of the rule of law-based state and act as the sole and official interpreter of the 2014 Constitution. In its absence, the interpretation and implementation of the 2015 Constitution[65] become a purely political matter devoid of rule of law guarantees.

63 The 2014 Constitution, in its fifth chapter on the judicial authority, devoted a second section to the Constitutional Court.
64 Organic law No. 2015-50 of 3 December 2015 on the Constitutional Court.
65 On the Constitutional Court, see: Salsabil Klibi, "The Constitutional Court in the Tunisian Constitution of 27 January 2014," In *A Collection of Works Dedicated to Dean Mohammad Saleh Bin Issa* (Tunis: University Publishing Center), 107-134.

The constituent authority granted the Constitutional Court a vital role. Despite the tension and conflicts that characterised the discussions regarding its composition within the National Constituent Assembly, constitutional guarantees for its independence were approved, including a distribution of the power to appoint its twelve members, whereas 4 members were to be appointed by the President of the Republic and 4 by the Supreme Judicial Council, and 4 were to be elected by the Assembly of Representatives. The organic law regulating the Constitutional Court completed the constitutional provisions related to the election of the court members and stipulated that they be appointed successively, beginning with the members elected by the Assembly of the Representatives first on the basis of a two-thirds majority.[66]

The transitional provisions of the constitution required the authorities to establish the Constitutional Court within a year, at the latest, from the date of the legislative elections. The National Constituent Assembly created a temporary body to monitor the constitutionality of draft laws[67] and oversee draft laws until the establishment of the Constitutional Court.

However, the assembly elected in October 2014 started to interpret the constitution's provisions politically, paving the way for the postponement of the establishment of the Constitutional Court. The ruling majority at the time considered that the deadlines enshrined in the constitution were nothing but "indicative deadlines" and were not binding on the assembly. This interpretation, which struck at the foundations of the mandatory nature of the constitution, led to the justification of its violation.

During the first and second parliamentary terms, the assembly was unable to elect the members of the Constitutional Court due to a disagreement on the candidates. The parliamentary blocs wanted to control the Constitutional Court by appointing members who would be loyal to them and they did not select competent candidates. The first parliamentary term ended with the election of but one of the four members after multiple sessions.

Due to the lack of consensus among the members of the assembly on the nomination of the court members in the first parliamentary term, the organic law of the Constitutional Court was amended in the second parliamentary term, and the required majority for the appointment of members was reduced from 145 votes to 131 votes. The amendment was approved on 25 March 2021. Its adoption reveals parliament's political use of the legal system its interest in the establishment of the Constitutional Court in circumstances marked by tense relations

66 Article 11 of the Constitutional Court Law states: "The Assembly of Representatives of the People appoints four members as follows: Each parliamentary group in the Assembly of Representatives, or each group of deputies who do not belong to any parliamentary group whose number is equal to or exceeds the minimum required to form a parliamentary group, has the right to nominate four candidates for the plenary session, provided that three of them are law specialists. The Assembly of Representatives elects the four members by secret ballot and by a two-thirds majority of its members. If the candidates do not get the required majority of votes after three consecutive sessions, the nomination period will be opened again to present a new number of candidates according to the remaining available number of seats, taking into account whether they are law specialists or not. In the event of equality in the number of votes obtained, the eldest is declared the winner".

67 Organic law No. 14 of 18 April 2014, on the Provisional Instance to Review the Constitutionality of Draft Laws.

with the Presidency of the Republic. However. the President did not sign the amendment to the law but returned it to parliament. In doing so, President Kais Saied offered his own interpretation of the transitional provisions, considering that the failure to establish the Constitutional Court within a year from the date of the election of the Assembly of Representatives prevented its subsequent establishment. He thus flouted the constitution and deemed himself solely responsible for its interpretation. The President insisted on not signing the amendment to the law after the temporary body charged with overseeing the constitutionality of draft laws refrained from ruling on the matter not due to the absence of a majority of its members,[68] which, in turn, impeded the establishment of the Constitutional Court.

The lack of establishment of the Constitutional Court led to the absence of effective oversight over the constitutionality of the laws that were adopted, the exacerbation of political crises between the Prime Minister and the President of the Republic in the absence of an arbitrator between them, and constitutional crises for lack of an interpreter of the provisions of the constitution. It made it possible to govern under the fait accompli policy and in accordance with the balance of power rather than on the basis of the constitution. The problem stemmed from parliament's desire to administer power through the Prime Minister it appointed and determine the meaning of the constitution according to the numerical majority in parliament. The elected parliaments tilted the system of government toward a parliamentary system that lacked balance between the powers and ended with the President of the Republic declaring a state of exception with no oversight, which allowed him to dissolve the elected parliament and existing political institutions and monopolize power, ultimately imposing the abolition of the 2014 Constitution.

CONCLUSION

We have offered a brief overview of the stages of constitution-making and subsequent enforcement of the constitutional rules that resulted from the revolution, which expressed a yearning for freedom and social justice, and a will to shift to an effective democratic system that guarantees a decent life for all. We are led to conclude that the post-revolutionary rulers turned the revolution into a struggle to gain power and hold on to it, both by contravening the provisions of the constitution and failing to establish the institutions guaranteeing its supremacy.

[68] Decision of the Provisional Instance to Review the Constitutionality of Draft Laws No. 1 of 2 June 2021, on the amendment of Organic Law No. 50 of 3 December 2015, on the Constitutional Court, Official Gazette of the Republic of Tunisia No. 49 of 9 June 2021.

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Constitution-Making during Political Turmoil and Change: Egypt 2011-2014

Dr. Ahmed Morsy *

ABSTRACT

Constitutions are inherently political as much as they are regulatory charters that are supposed to reflect power and state-society dynamics. They must perform two functions well, but they seldom do. First, a charter must reflect to an extent the distribution of existing political powers and their social representation or else it would stand only a slim chance of ratification and acceptance. The second function is its ability to accommodate future changes in the distribution of political power and societal change / evolution, or else it would unravel in short order.

The already challenging dual-gaze balance in drafting constitutions becomes even harder to maintain during periods of political transition and polarization. Political flux in the wake of an autocratic collapse or revolutionary fervor means it is not yet possible to gauge the weight and power of the various political factions. And the rush to straitjacket a changing political environment into a body of rules unavoidably privileges some factions at the expense of others, deepening the transition's instability and aggravating the charter's fragility.

The challenges to drafting constitutions during times of uncertainty and political fluidity were on display in Egypt's 2012 and 2014 Constitutions. The former was scrapped just 7 months from adoption after the removal of President Mohamed Morsi from office and the latter underwent significant amendments in 2019 – only five years after its ratification. This paper focuses on the process of constitution-writing in Egypt in 2012 and 2014. It is not an analysis or judgement of the constitutional articles or a comparative study of what these two constitutions failed to accomplish. It contends that each of the charters came into existence as a compromise among particular political coalitions. Over time, and given the nature of political-transition periods, some factions in these coalitions gained political power as others diminished. Compromises become untenable, whereby the ascendant more powerful group(s) forced a revision of the rules, and the weaker factions were unable to deter opportunism.

Keywords: *Egypt, constitutions, politics, revolutions, 2011, MENA, Constitutional Law, Arab World*

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INTRODUCTION

> Constitutions are not just about restraining and limiting power; they are about the empowerment of ordinary people in a democracy and allowing them to control the sources of law and harness the apparatus of government to their legitimate aspirations. That is the democratic view of constitutions, but it's not the constitutionalist view.[1]

For over a decade since 2010, several Arab countries witnessed a mix of revolutions, counterrevolutions, civil wars, displacement, and destruction on a scale not seen before. Some, if not all, are still reeling from these consequences in varying degrees. Nonetheless, one of the main common denominators for the mass uprisings that swept the Arab world at different junctures during the past decade has been the authoritarian/top-down policies of the ruling regimes. These were clear in many political and socio-economic outcomes – from the different laws that suppress freedoms, control public space and debate, and justify tyranny under the name of security, to the economic policies that widened the wealth gap, created monopolies and oligarchs, and impoverished most people rather than creating social safety nets and welfare systems. While the regional experiences differed in their processes and outcomes of the uprisings and calls for change, they all included some form of constitutional amendments (Morocco and Jordan for example) or "newly" written charters (Tunisia, Egypt and Syria) to appease the people post-uprisings.

Egypt is arguably the country with the most constitutional declarations, amendments and charters issued in the region (and particularly between 2011 and 2019). Afterall, 100 years have passed since the promulgation of Egypt's first constitution on 19 April 1923. The period between 2011 and 2019 witnessed significant constitutional changes in Egypt, reflecting the complex and changing political landscape in the country. These changes were driven by a series of events, including the Arab uprisings, the rise and fall of the Muslim Brotherhood, the weak civilian opposition, the outsized role and power of the military, and the subsequent consolidation of power by President Abdel Fattah El Sisi. Nonetheless, these different attempts at overhauling the higher legal framework and principles of the state do not seem to have pushed the country toward a more inclusive, representative, and rights-based governance. In fact, there is enough evidence, particularly in the past decade, showing authoritarian backsliding, cementing one-man / single institution rule and continued disregard to the freedoms and rights approved in the constitution.

The constitution-drafting process, even 100 years ago, was mired by the power dynamics among the different political forces and elites inside and outside government, with limited regard for what citizens think. For example, the first version of the 1923 constitution submitted by the drafting committee at the end of 1922 was vetoed by the King and replaced by a watered-down version that maintained some powers in the hands of the monarchy (like dismissing parliament). Despite hailing its liberal and progressive nature, the writing of the 1923 document was top-down through a committee of elite politicians, parliamentarians, and legal scholars, which was boycotted by the *Wafd* Party (the biggest party in parliament and most popular at the time). The Wafd cited two reasons.

[1] Jeremy Waldron, *Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016), 43.

The first was not being allocated enough seats on the drafting committee and the second was the party's preference that the constitution be drafted by an elected constituent assembly. The latter reason was likely political, based on their popularity and believing that an elected committee would give them control of the drafting process against the influence of monarchy at the time.

The brief example from the 1923 constitutional drafting raises many questions about how and by whom the constitution should be written; what the political dynamics at play are, how to account for them and how they influence the process; how inclusive and representative should the process be and what are the different ways to engage the public. These questions and more remain a central issue in constitution-making today and the answers differ from one experience to another, but it is clear that scholars agree in principle that the more time is taken to build bottom-up consensus and overcome prior blunders (especially under authoritarian rule and in diverse / sectarian societies), the higher the likelihood that the charter will be respected and relatively followed.

This paper focuses on the process of constitution-writing in Egypt in 2012 and 2014. It is not an analysis or judgement of the constitutional articles or a comparative study of what these two constitutions failed to accomplish. It contends that each of the charters came into existence as a compromise among particular transient political coalitions. Over time, and given the nature of political-transition periods, some factions in these coalitions gained political power as others diminished. Compromises become untenable, whereby the ascendant more powerful group(s) force a revision of the rules and the weaker factions were unable to deter opportunism. The challenges to drafting constitutions during times of uncertainty and political fluidity were on display in Egypt's 2012 and 2014 Constitutions. The former was scrapped just 7 months from adoption after the removal of President Mohamed Morsi from office and the latter underwent significant amendments in 2019 – only five years after its ratification.

The paper is divided into an introduction, two main sections, and a conclusion. The first section provides a brief and general overview of the different meanings and drafting process of a constitution (I), while the second looks closely at Egypt after 2011, highlighting the political dynamics and changing environment influencing the constitution-writing process (II). The discussion and narrative blend academic arguments and realpolitik, emphasizing the critical role coalitions and compromises play in constitution-making and their potential long-lasting consequences on the legal and political structures of the state. It is a reminder that constitutions, as the highest law of the land, should not be rushed, must be consultative, cognizant of the existing political dynamics, and offer room for future engagement and changes as societies evolve.

I. Constitution: Meaning and Process

A. The Different Meanings of Constitution

The word *Constitution* has two uses and meanings according to Hanna Pitkin. The first is used as "the sense of composition or fundamental make-up" as building blocks of something including its framing and characteristics. This can work for both the individual level (the physical make-up and temperament for example) and the community level (nature and ethos of the people and the outcome of social conditioning and history). In essence, this becomes more of a description of who and what we *Are* rather than what we *Have*.[2]

In a sense, this is what Pitkin thinks Aristotle meant and showed in his work *Constitution of Athens*, where he produced a history of the city highlighting the shared social and political way of life, not just a set of fundamental laws. Not surprisingly then, that the Egyptian renowned judicial figure and scholar Tarek El Bishry shares a similar view. He believes that constitutional law is the closest and most intertwined form of law with politics and political life. He argues that political engagements and power dynamics are what *constitute* the legal frameworks of nations.[3]

The second meaning is more functional than descriptive, as the "action or activity of constituting – that is, of founding, framing, shaping something anew." It is what we do or can do "to innovate, to break the causal chain of process and launch something unprecedented." In that sense, written constitutions should be seen as "human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose."[4]

Constitutions (or Basic Laws in some countries) are inherently political as much as they are regulatory charters that are supposed to reflect state-society dynamics and the social contract. They are regarded as higher laws that "describe the basic principles of the state, the structures and process of government and the fundamental rights of citizens."[5] While the content, nature, and process of developing these documents vary, they are broadly expected to be binding on/to everyone; legitimized by broad public support; describe the state structure, its institutions, and their relationship; difficult to change unilaterally; and enshrine democratic principles, representativeness, and human rights. It is indeed an uphill battle.

The constitution is expected to perform two functions well, but it seldom does. First, it should reflect to an extent the distribution of existing political powers and their social representation or else it would stand only a slim chance of ratification and acceptance. The second function is its ability to accommodate future changes in the

2 Hanna Fenichel Pitkin, "The Idea of a Constitution," *Journal of Legal Education* 37, no. 2 (1987): 168.
3 Tarek El Bishry, "The Constitutional System between Politics and Law," *Constitutionalism* 4, no. 9 (2006): 27.
4 Pitkin, "The Idea of a Constitution."
5 Elliot Bulmer, *What is a Constitution? Principles and Concepts,* International IDEA Constitution-Building Primer 1 (Stockholm: International IDEA, 2017).

distribution of political power and societal change/evolution, or else it would unravel in short order and become relatively irrelevant. The role of a constitution becomes more important in post-conflict and during transitions. It can be a tool to advance national reconciliation, especially in states suffering from decades of authoritarianism, socio-economic injustices and inequalities, and underrepresented minorities.[6]

However, the already challenging balance in drafting constitutions becomes even harder to maintain during periods of political transition and polarization. Political flux in the wake of an autocratic collapse or revolutionary fervor means it is not yet possible to gauge the weight and power of the various political factions. The rush to straitjacket a changing political environment into a body of rules unavoidably privileges some factions at the expense of others, deepening the transition's instability and aggravating the charter's fragility. In short, challenges are multiplied during transitions and revolutionary moments, especially when there is no consensus and/or societal dynamics are fragmented. The situation is far from optimal during these times.

B. Constitution Design and Drafting

"Constitutions are made, not found." Hanna Pitkin.

Constitutional design in its contemporary understanding is associated with the move from customary (and arbitrary) forms of rule to a written form, which is conventionally linked with nation-state building – particularly experiences like the United States and France. The political philosophers at the time thought of codified charters as a tool to manifest and channel self-interest into larger public ends.

But it is a misunderstanding to believe that constitution-writing is or could be a technocratic exercise that aims to get the right and best results, right away. The term constitutional design itself is contested, implying "a technocratic, architectural paradigm that doesn't easily fit the messy realities of social institutions, especially not the messy process of constitution making."[7] The process, even with the best of intentions, is influenced by self-interests, cognitive biases, and emotions, and "most constitutional designs fail on the throes of unanticipated consequences, unforeseen external events, and new information revealed by counterparties."[8] The decades of studying constitutions and political institutions are still limited and inconclusive to prepare scholars and politicians alike to understand how institutions, individuals and particular social practices will operate within certain environments and contexts.

Constitution drafters are mostly non-experts but expected to produce a document that structures the creation of rules and the functionality of government and expresses fundamental values. There is also another implicit belief

6 Zaid Al-Ali, *Egypt's Third Constitution in Three Years: A Critical Analysis* (Stockholm: International IDEA, 2013).
7 Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), 1.
8 See: Ginsburg (ed.), *Comparative Constitutional Design,* 2; Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009).

that they (and the charter) will find enduring solutions to political conflict.[9] They sometimes base their work on speculations of how the different institutions will function and engage with the polity, which is most of the time being developed in heated and challenging political environments that render compromise inevitable. As John Elster concludes, "There are very few instances of either constitutional conventions or constituent legislatures deliberating "*à froid*," in the absence of any internal or external crisis … It seems to be a near-universal rule that constitutions are written in times of crisis and turbulence."[10]

The questions of who should control the drafting process is debatable. Constitutional scholars have argued for disfavoring legislatures as constitution drafters to minimize self-dealing and biases, and instead increase public participation in the process. However, the available data do not seem to support the hypothesis that either arguments would necessarily provide for a better constitution. The problem usually stems from the fact that constituent assemblies have a mixed bag of participants, from legal experts and special interest groups to politicians and community representatives. While diverse voices and representation is critical, it ends up being a challenge since each member (or group) becomes only focused on advancing their group's (usually narrow) view and would be content to see it documented in one of the constitutional articles. But they contribute very little to the overall debate and tend to forget about incorporating enforcement mechanisms. This was the case in Egypt, where the constitutional drafters focused more on petty political rivalries and gave limited attention to accountability and enforcement. In essence, the constitution became a tool to settle political conflicts instead of a document that creates inclusive processes and rules for all.

Egypt's experience with constitution-drafting is mixed at best. Throughout its history, there were generally three different ways in which Egypt drafted its constitution. The first is through a top-down appointed committee, which usually included a majority of legal experts, politicians and intellectuals (like in 1923); the second is through a slightly more representative committee whose members are selected and/or nominated from different segments of society for wider inclusivity, but where the process is still controlled and appointed by the executive branch (like in 2013); and the third is a committee that Parliament chooses from among its members (like in 1971) or elects using a set of requirements to minimize bias and ensure wider representation (like in 2012). There has been another modality that included a two-tier drafting process, where a small group of legal experts prepare the essential core articles of the constitution, which is then referred to a wider committee for reviews and debate before submitting it to a referendum. Usually, this latter method is used for constitutional amendments since they are limited in number and follow a top-down approach where the President (or his parliamentary supporters) put a request for these amendments. This was the process in 1980, 2005, 2007 and 2019. Despite all these different ways to draft and amend a constitution, it is clear that none of them really made Egypt's rulers more democratic, accountable, and respectful of the people's rights.

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9 Ginsburg (ed.), *Comparative Constitutional Design*, 4.

10 Jon Elster, "Legislatures as Constituent Assemblies," *The Least Examined Branch: The Role of Legislatures in the Constitutional State,* ed. Richard Bauman and Tsvi Kahana (New York: Cambridge University Press, 2009), 185.

Successful democratic transitions are a product of the balance of power between opposing groups, but such balance should include space for erstwhile regime members to play a role in the new order. Susan Alberts, Chris Warshaw, and Barry R. Weingast, "point out that constitutionalization can facilitate credible commitments to dictators, and hence induce them to step down."[11] This assumes that rising democratic powers can win the transition – that might otherwise not happen – by crafting solutions that minimize fears as opposed to alienate the former powerholders. This is a view that is nearly accepted in political transitions literature that democratic transition is only possible when pacts are struck between the old regime and the rising political elite.[12]

There is so much emphasis on constitutions as instruments of democratization, separation of powers, protection of human rights, social welfare, and security of the people. Ginsburg explains this by highlighting the difference between and potential outcomes of good and bad constitutional designs:

> Good designs can facilitate democracy and tame religious radicals; they can encourage executive turnover and promote responsible adjustment to new circumstances through constitutional amendments. Bad designs, on the other hand, can exacerbate intercommunal conflict and perpetuate unjust outcomes for women; they can block transitions to superior institutions; and they can clog channels of citizen redress through the courts.[13]

Nonetheless, experience shows that it is not as simple as a good or bad design. Democracy is a practice and not just rules, which even with the best intentions and politicians, can backslide and be turned over. As Jose Cheibub highlights in his analysis, there are unobservable deep structures in societies that may in the end be what determines outcomes, rather than any consciously designed process or institutions.[14] Al-Ali confirms this view by pointing out that Egypt has always had a list of rights and freedoms as well as separation of powers articles but the "problem was that the mechanisms for enforcement of these rights were completely inadequate."[15]

In short, many factors play a role in constitutional design and process. Context in terms of power dynamics and overall social environment, timing, and drafters are all critical components that need to be considered and understood. This becomes more important during revolutionary times, which are euphoric with high hopes but also extreme anxiety and apprehension. Managing perceptions and expectations is usually difficult and it is even harder when societies are coming out of decades of authoritarian rule, closed public space and marginalization. In Egypt (and other similar contexts), the victors usually end up drafting the constitution and outlining the rules, which end up as ink on paper with limited to no application. They are also the first to both use the constitution to consolidate their powers and to break its principles under different guises.

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11 Ginsburg (ed.), *Comparative Constitutional Design*, 6.
12 Barbara Geddes, "What Do We Know About Democratization After Twenty Years?," *Annual Review of Political Science* 2, no. 1 (1999): 115-144.
13 Ginsburg (ed.), *Comparative Constitutional Design*, 10.
14 Jose Cheibub, *Presidentialism, Parliamentarianism and Democracy* (New York: Cambridge University Press, 2007).
15 Al-Ali, *Egypt's Third Constitution in Three Years.*

Egypt has a history of using constitutions for political rhetoric rather than empowering institutional independence, separation of powers, creating oversight and accountability, and respect for the rule of law and human rights. The second section looks at the context and background of the constitution-drafting process in 2012 and 2013, highlighting some key events, actors, and implications for Egypt's political and legal framework.

II. Egypt: Revolutionary Times, Tumultuous Times

> By a political revolution I mean a time of rapid, often erratic, change in the relative power of social classes, ethnicities, regions, political parties, legislatures, military groups, royal or noble lineages, and so on ... For such instability of relative power to continue, different groups and people have to have different estimates of how it will all come out; otherwise, they would make deals in light of who was going to win and so produce stability.[16]

By the time President Hosni Mubarak stepped down on February 11, 2011, the 1971 Constitution had been the law of the land for over 40 years. Among the first orders of the Supreme Council of the Armed Forces (SCAF) that took over from Mubarak, was suspending the 1971 Constitution, which was thought to be providing the authoritarian framework of the regime.

Between 2011 and 2019, Egyptians went to the polls to vote on an interim charter (2011), the 2012 Constitution, the 2014 Constitution, and the 2019 constitutional amendments. These different texts kept to a varying degree the fundamentals of the 1971 Constitution, notably a strong executive/presidency, limited accountability and oversight over government and governance, a shielded and outsized role of the military in public life, and a list of freedoms that are restricted by legislation.

These different experiences did not take place in a vacuum or peaceful social and political environment. They were developing during high levels of polarization, grievances and changing power dynamics. Even the 1971 Constitution, that lasted four decades, was developed during a critical power consolidation time. Back then, President Anwar El Sadat used an alleged coup attempt by some of Gamal Abdel Nasser's holdovers to announce a "corrective revolution" – in May 1971 – that would slightly open the public and political spaces and draft a new permanent constitution. The three times the 1971 Constitution was amended reflected the power dynamics and the mostly top-down process, which remained consistently in the hands of the President. The different proposed amendments also highlight political calculations on behalf of the executive – for instance, in 1980, President Anwar al Sadat introduced a change to Article 2 to make *Shari'a* source of legislation in a bid to appease the growing Islamist currents; and in 2005, President Mubarak introduced the multi-candidate presidential elections amendment because of some outside pressures, a modicum of domestic contestation, and to open the door for his son Gamal Mubarak to run when the time comes.

[16] Arthur Stinchcombe, "Ending Revolutions and Building New Governments," *Annual Review of Political Science* 2, no. 1 (1999): 51.

A. The 2011 Uprising and Ensuing Power Dynamics

> Despite its flaws, the epoch of despotism's 1971 constitution has many articles preserving several rights and liberties; torture was hardly a constitutional act. Nonetheless, this constitution did not protect the people from the violation of their rights and the divestment of their liberties. We must ask, then: what is the value of a constitution drafter without real popular participation? Even if it is an ideal constitution, it remains ink on paper if there is no balance of forces activating and protecting it.[17]

The January 25 uprising was fueled by widespread dissatisfaction with corruption, economic inequality, and political repression under Mubarak (and his predecessors). The uprising resulted in a power vacuum and fluidity and created opportunities for different political forces to compete for influence, namely the Muslim Brotherhood and the military generals.

The longstanding tactics of Egypt's regimes from Nasser to Mubarak (and now) to stoke fear and animosity among different groups and in the public remained a central issue in post uprisings politics. Polarization and mistrust between the different groups and factions in Egypt started early-on with each side believing they could outmaneuver the others – or at best align, albeit tacitly, with one side over the others. Different groups ebbed and flowed depending on the context and juncture from within the state apparatus or from civil society and collectives of youth and revolutionaries, but the military and judiciary (from within the state), and the Islamists and non-Islamists (both broadly defined) were the main groupings locked in a power contestation.

As a disciplined hierarchical state institution that enjoyed a positive stance among the public as well as monopoly over the use of force, the military was the coveted partner to side with, or at best neutralize and not antagonize, despite what some of the groups and politicians publicly displayed. This created a vicious circle of mistrust and fear among all the civilian factions and would play out across all junctures between 2011 and 2014, culminating with Abdel Fattah El Sisi's election in 2014. On one hand, the Islamists, particularly the Muslim Brotherhood, were fearful of an alliance between the non-Islamists (liberals) and the military that would violently subdue and imprison them; while on the other, the non-Islamists believed they were being manipulated by a military alliance with the Islamists to share power. Both sides had reasons to believe they would become victims of a ploy but could not find a way to break the mistrust and bridge the growing divide. And eventually, both were played by the coercive arms of the state – military, judiciary, and police.

The SCAF generals believed they were above the fray of politics and civilian bickering, and that they would be able to steer and manipulate the transition. In other words, they had reasonably estimated "that with strong international backing, and a generous fund of public goodwill, they would manage a transition to a contained democracy and be lauded as enlightened modernizers."[18] Nonetheless, the generals did not expect that during the 16 months of the

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17 "Let's Write Our Constitution" campaign flyer, quoted in Mona El Ghobashy, *Bread and Freedom: Egypt's Revolutionary Situation* (Stanford: Stanford University Press, 2021), 141.

18 El Ghobashy, 125.

transition to an elected president, they would face multiple close calls to a full rebellion against their rule, like the one that took down Mubarak. The SCAF always pointed to the bogeyman (*al-taraf al-talet)* lurking in the shadows and sought to divide the country. In the words of the late Assistant Minister of Defense and former Minister of Military Production, Mohamed al-Assar, after the Maspero massacre, "The army's principles have not and will not change, what has changed is that there are enemies of this nation, and enemies of the revolution for whom it important to obstruct the transition to democracy."[19]

The distrust between Islamist and non-Islamist (liberal / secular / revolutionary) groups and parties reigned in and increased over time. The Islamists saw themselves as the most prepared and strongest group as opposed to the weaker and fragmented liberals. The Muslim Brotherhood, specifically, had strong mobilization networks and saw the post-Mubarak era as their time to rule after decades of ostracization and marginalization. They also had a legacy of providing social services and filling the gaps left by limited state support, particularly in marginalized communities and underprivileged neighborhoods and sectors like health and education.

The non-Islamist groups were fragmented, lacked a real cohesive message and a plan and were relatively elitist – not only on a social level but also in their rhetoric. They mostly saw the Muslim Brotherhood's quick embrace of the SCAF's views as betrayal to the revolution, particularly during the campaign supporting the March 2011 referendum. The younger "revolutionary" elements were relatively shunned from playing a serious role in the process, which prompted them to resort to the streets to build networks and alliances with like-minded groups, including some Islamist youth groups. Street protests and politics were the only tool left to the youth and other interest-based groups to vent their frustrations with all sides – Islamists, non-Islamists and the 'deep state' embodied in the security services.

B. 2011-2012: Whose Rules and Whose Constitution

On 13 February 2011, the SCAF issued a constitutional declaration suspending the 1971 Constitution and appointed an eight-member committee of legal experts to amend a handful of articles from the 1971 Constitution that notably focused on presidential candidacy, term limits, judicial supervision of elections and restricting the use of the state of emergency.[20] Signs of the schism between the different political forces became visible as early as the SCAF called for a referendum on these constitutional articles. It is important to note, however, that Mubarak's transfer of power to the SCAF was already in violation of the 1971 Constitution, which lays out the steps to be followed when a president is incapacitated. Additionally, the SCAF was never a formal body, and it came into existence as a spur of the fluid early days of protesting Mubarak and the regime. But the revolutionary fervor swept away any adherence to rules and norms in the hope of building a 'new Egypt'.

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19 The Maspero building massacre took place on October 9, 2011, when thousands, mainly Coptic Egyptians, marched to protest the demolition of St. George Church in Aswan. See: https://www.hrw.org/news/2011/10/25/egypt-dont-cover-military-killing-copt-protesters and https://timep.org/2018/10/09/fact-sheet-the-maspero-massacre-seven-years-on/. Quoted in El Ghobashy, 120.

20 Michele Dunne and Mara Revkin, "Overview of Egypt's Constitutional Referendum," *Carnegie Endowment for International Peace*, 16 March 2011.

The time between the SCAF appointment of the legal expert committee and the referendum was a little over a month. The Islamist forces mobilized and campaigned for a 'yes' vote, while the broadly non-Islamist forces – particularly some revolutionary groups and liberal figures – were not supportive. The latter groups called for drafting the constitution before any elections, noting that the proposed amendments were done in haste and did not go far enough after the uprising. Their reasoning was that the constitution would lay the ground rules for the elected institutions and the drafting process was likely to be more inclusive and representative when the playing field would no longer be hierarchical or mired with tension and mistrust. The Muslim Brotherhood, on the other hand, saw the referendum from a narrow political lens. They believed it was a chance to show their mobilization power and grassroots support and by supporting the SCAF plan, they sought to get to elections sooner, which would allow them to manage the political transition process.

The referendum took place on 19 March, with about 77 percent of voters approving the amendments. The SCAF piggybacked on this popular approval to issue on March 30, a 63-article Interim Constitution (the public did not deliberate or vote on) that effectively kept all powers in the hands of the SCAF until the election of both the parliament and a president. It was surreal to see some of the interim articles copied verbatim from the disbanded 1971 Constitution. The most notable article with regards to next steps in constitution-drafting was number 60 that outlined the procedure for electing a 100-member Constituent Assembly (CA) by the incoming Parliament but left the criteria that members had to fulfill open to interpretation.

With growing tensions, protests, and violence in the second half of 2011, and as Egypt got closer to the scheduled parliamentary elections in November 2011, the SCAF tacitly pushed for and endorsed the "Declaration of the Fundamental Principles of the New Egyptian State."[21] The 22-article document was presented by deputy Prime Minister Ali al-Silmi to highlight the basic rights that would be enshrined in a new constitution. The document included detailed criteria for the make-up of the CA, which divided the committee along corporatist lines, with 80 seats allocated to non-political parties and parliamentarians. The allocation included seats for the judiciary, professional, labor, and farmers unions, religious groups, state institutions (including security services), youth, civil society, and women. The document, which was soundly rejected because of Article 9 that gave the SCAF expanded powers and shielded it from any accountability, was an attempt to set the criteria in advance to limit the influence of elected parliamentarians and political parties over the composition and give the SCAF veto powers and the ability to form a new assembly if Parliament failed.[22]

[21] An English translation of the document is available at: https://constitutionnet.org/vl/item/egypt-draft-declaration-fundamental-principles-new-egyptian-state-november-2011-english.

[22] The same controversial articles empowering and legalizing the role of the armed forces were later codified in both the 2012 and 2014 Constitutions.

C. Parliament, the Constituent Assembly, and the Courts

The seating of Parliament appears to be the culmination of fierce debates and mobilization campaigns that aim to garner and win people's votes. As a result, there is an expectation that in the immediate aftermath social pressures and criticisms will abate and likely shift elsewhere; some might call it the "honeymoon" period or the "wait and see" moment. As Guillermo O'Donnell and Philippe Schmitter observe, "one of the primary motives of transitional authorities in convoking elections for significant governmental positions may well be to get that multitude of disparate and remonstrative groups 'of their back.'"[23]. But Mona El Ghobashy provides a different view to this notion by arguing that the elections and parliament they produced in 2012 were "not a step on the path to pacification but as a new arena for multiple conflicts over state powers."[24]

The very existence of the newly elected parliament in Egypt with its historically excluded majority raised questions and concerns from both the old powerful vested interests and some of the new political groups and social movements and propelled them to act – sometimes against the common threat or against their best interest. As Sidney Tarrow observes:

> One group's actual seizure of some portion of state power, furthermore, immediately alters the prospects for laggard actors, who must immediately choose among alliance, assault, self-defense, flight, and demobilization. Consequently, rivalries, coalition making, and defensive action all spiral rapidly upward.[25]

The parliament had a supermajority of 72 percent Islamists ,but not acting as a united front ,with the Muslim Brotherhood's Freedom and Justice Party (FJP) as the plurality group with 45 percent and the Salafi al Nour party at 22 percent. The new composition automatically triggered fears on both sides: the non-Islamists feared they would be sidelined from the CA and the drafting process, while the Islamists feared the creation of a military-judiciary alliance that would impede the transition and constitutional writing process.

With these fears in mind, the Islamist-dominated Parliament rushed the process of forming the CA in three weeks, although they had up to 60 days to deliberate on the membership of this critical body. In the process, the FJP reneged on an agreement with non-Islamists to distribute the CA membership into 40/60 parliamentarians to non-parliamentarians, likely due to Salafi pressures, and a 100-member CA was elected out of 2078 candidates. The majority Islamist (64 members) assembly started hemorrhaging members as soon as the results were announced, citing lack of representation and inclusivity – or, as Zeyad Bahaa Eldin, former parliamentarian and a former deputy Prime Minister, put it, "where is Egypt in this composition?"[26]

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23 Guillermo O'Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986), 57.

24 El Ghobashy, Bread and Freedom, 131.

25 Sidney Tarrow, *Strangers at the Gates: Movements and States in Contentious Politics* (Cambridge: Cambridge University Press, 2012), 129.

26 Ziad Bahaa-Eldin, "When Boycott Becomes Necessary", *Al-Shorouk*, 27 March 2012.

The CA was effectively stillborn from its inception and the doubling down from both sides only exacerbated the crisis, eroded conditions for compromise, increased distrust and opened the door for the awaiting judiciary and military to intervene.

> In this heritage of political action, admitting mistakes means weakness, hesitation, and loss of control leading to more concessions… What makes the matter graver, however, is the sense that parliament and the whole constitutional experience is being ambushed, by those hoping for the collapse of the whole process in favor of a direct military rule.[27]

In less than two weeks from the first CA meeting, a ruling from the Supreme Administrative Court (SAC) on April 10, dissolved the CA citing a 1994 ruling by the Supreme Constitutional Court (SCC) that parliamentarians cannot elect themselves and that the CA membership should be conformed exclusively of non-parliamentarians.[28] The court's intervention was just the beginning of a series of judicial challenges that plagued and weaponized the transition, which eventually saw the SCC take the decision to dissolve the elected parliament just two days before the scheduled presidential elections run-off between Ahmed Shafiq, Mubarak's last Prime Minister, and Mohamed Morsi, the Muslim Brotherhood's candidate.[29]

To assuage critics and adhere to the SAC ruling, the Parliament formed a second CA, on June 7, that was broader in its representation of political currents. The Muslim Brotherhood thought they could satisfy all groups by giving each something in the constitution, which would show their pragmatic and consensus-building approach, especially after the fiasco of the first CA formation. This relative concern about their public image, especially at the time, is likely the reason why the MB members tolerated more debates and discussions in the assembly as an attempt to appease the non-Islamist groups and intelligentsia whose skepticism of the Brotherhood's modus operandi and sense of exclusion were growing. The behavior of the Brotherhood, nonetheless, angered their Salafi allies and gradually increased the intra-Islamist rift.

Mamdouh Shahin, the assistant Defense Minister for Legal Affairs, was a critical figure in the transition period and continuously looked for ways to maintain the SCAF's superior position and role in the process. Shahin was monumental in drafting language and pushing legal texts to that effect and finding "rational" and "logical" explanations to the military's superiority. The tumultuous period, missteps by some of the political forces, and the populations' frustration gave the SCAF opportunities to manipulate the process. The SCAF believed it was above all institutions despite attempts to portray themselves otherwise. A clear indication of such positionality was the claim by Mamdouh Shahin after the SCC disbanded the elected parliament in June 2012. Shahin came out clearly to illustrate that the generals are the *constituting* authority in the country, allowing themselves the power to make and break the state institutions and constitutional framework of the state. In his words:

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[27] Ziad Bahaa-Eldin, "Alternatives to the Deadlock in the Writing of the Constitution," *Al-Shorouk,* 3 April 2012.
[28] "The Judiciary Aborts the Constituent Assembly," *Al Shurouq,* 11 April 2012.
[29] Ahmed Morsy, "On the Eve of Pivotal Supreme Court Rulings, All Scenarios Point to Turmoil," *Atlantic Council, 13* June 2012.

> We have three powers: constituent power (*al-Sulta al-Ta'sisyya*), which is SCAF. What is constituent power? That which generates all state institutions. If there is no parliament, it brings parliament, it organizes matters until there is a parliament. There is no president until it brings a president. There is no constitution until it brings a constitution. When these state institutions are constituted, the founding power's work is considered completed.[30]

The first six months of 2012 witnessed a lot of critical junctures in Egypt's transition: the seating of the bicameral parliament, the rushed election of a constituent assembly that the court disbanded, the first democratically elected President, and the dissolving of the House of Representatives by an SCC decision. These incidents highlighted the continued public and private struggle and mistrust among the generals in power, a fractious Islamist force, and the weaker divided non-Islamist/liberal groups. The fluidity of these times created opportunities for some while exacerbating the threatened mindset of others. In essence, the state's newly elected institutions were fragile and nonstrategic compared to the deeply rooted and activist military and judiciary. Mona El Ghobashy provides a spot-on summary:

> Political fear of the ancient regime's resurgence impelled parliamentarians to hastily pass a dubious lustration law; a loudly assertive parliament reawakened judges' belief in their supralegislative status as guardians of the constitution, motivating them to check and ultimately dissolve the new parliament; uncertainty about the future wracked prochange voters as they contemplated dismal options; aversion to being governed by a disciplined ideological party drove prostability voters to cast their lot with the ancient regime; fear of repression and an opportunity for international recognition shaped the calculations of Egypt's largest political organization; outrage at their sidelining in the constituent process motivated minority parties to pursue permanent opposition, leaving an opening for the generals to reassert their power and autonomy in ways that had failed only months earlier.[31]

D. 2013-2014: Military Ascendence and a New Roadmap

Despite the controversies of the constitution-drafting process, the lawsuits and some alarming authoritarian tendencies by the new president Mohamed Morsi, the Muslim Brotherhood and its allies portrayed the new constitution as a democratic progression from the country's dictatorial past. A constitutional referendum took place in December 2012 and was approved by a 63.8 percent and turnout of 32.9 percent of the electorate.[32]

About two and half years since the ouster of Mubarak, Egypt was on the verge of descending into complete chaos due to continued stubbornness of all actors that stemmed from built-up animosity and the allure of realizing all interests. It is important to recognize the unfortunate reality that not all political situations and crisis end peacefully, and that compromises are only viable when the contending parties believe that concessions will yield better outcome than not. However, when the conditions of such solutions "are highly uncertain each party will be better of seeking a full realization of its interest, that is, seeking to assert itself over other by whatever means."[33]

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30 Shahin was speaking at a press conference. Quoted in El Ghobashy, *Bread and Freedom*, 160.
31 El Ghobashy, 164.
32 "Egypt's Constitution Passes with 63.8 percent Approval Rate," *Egypt Independent*, 25 December 2012.
33 Adam Przeworski, "Democracy as a Contingent Outcome of Conflicts," *Constitutionalism and Democracy,* ed. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), 65.

By June 2013, there was open hostility between state institutions like the judiciary and police and the Muslim Brotherhood. While the President attempted to mitigate the growing polarization, he was not able to distance himself from his fellow Brotherhood members; in the meantime, the National Salvation Front (NSF), an eclectic front of liberal and leftist parties, politicians and intellectuals, had clearly made up its mind to use any support to change the situation. The mistrust and backroom deals (both domestically and externally) culminated in mass protests against the Muslim Brotherhood that called for early presidential elections, just one year into Morsi's tenure. The Muslim Brotherhood mobilized their supporters and sympathizers and established sit-ins in Cairo, calling for abiding by the legitimacy of the elected president. By the end of June, it was too late to seek a resolution and the crescendo (orchestrated by the military) led to the SCAF intervening to overthrow Morsi under the guise of saving Egypt from descending into a civil war and with the civilian blessing of the NSF and the Salafi al-Nour party.

On 3 July 2013, Defense Minister Abdel Fattah El Sisi ousted President Morsi, suspended the short-lived 2012 Constitution, installed the chief justice of the SCC as interim president, and commenced a crackdown on the Muslim Brotherhood and other Islamists. On 8 July, the new authorities announced a constitutional declaration to regulate the governance of the country and provide the framework to return to normal politics, including the amendment of the constitution and the presidential and parliamentary elections timelines.

E. Back to the Future: Exclusion and Power Consolidation

On 20 July, the interim president appointed a 10-member committee of senior judges and constitutional law professors (C-10) to propose amendments to the 2012 suspended constitution within a 30-day period. This technical expert committee would then refer the amendments to an appointed 50-member Constituent Assembly representing diverse social, professional, and demographic groups as outlined in a presidential decree on 8 August 2013. The appointed committees and the process was a clear 'back to the future' sign and a reminder of the old regime top-down approach to constitutional drafting. The main difference is that in 2013, the context and Egypt's polity was very different and more tense than under the pre-2011 regimes.

To get around the representation question, the new government resorted to the corporatist criteria it knows well and was previously outlined (and rejected) in the Ali al-Silmi basic rights and foundational declaration from 2011. With a dissolved parliament, the solution was to request each state and religious institution, syndicates and unions, and national councils to nominate their representatives, have the cabinet nominate public figures, and have the presidency appoints the selected members. Within 30 days of its appointment, the technical C-10 submitted a 198-article draft document that was mainly based on the 2012 Constitution with some adjustments reflecting the new power dynamics and coalition of convenience between the military on one side and the civilian groups on the other side.[34]

[34] An unofficial translation of the proposed amendments is available online at: https://constitutionnet.org/vl/item/proposed-amendments-egypts-constitution-2012-english.

This saw the removal of any excessive references and definitions of *Shari'a*; stripped Al-Azhar's capacity to veto legislation not in-line with Islam; shielded the military from any accountability, while empowering the presidency and returning to the old parliamentary system of first-past-the-post for individual seats and winner-takes-all for party lists.

The draft document was left with the 50-member CA that was appointed on 1 September by the President.[35] The appointed committee had 60 days to prepare the new draft constitution, which were to be followed by 30 days for public debate before a general referendum. While the committee composition reflected a cross-section of Egypt's society, it was hardly a representative one. One clear example is the missing representation of a political group that had claimed two-thirds in the last parliamentary elections. With the full exclusion of the Muslim Brotherhood, political Islam was represented with only one seat for al-Nour party. The relative homogeneity of the CA members meant limited serious disagreements and a far freer hand – not tied by ideologies or interests – when debating general matters and some of the rights provisions, acting as motivation to outperform those stipulated in the 2012 charter. The overall rushed timeline did not allow much time for any meaningful public debate beyond some limited events or media appearances by certain committee members to assure and encourage Egyptians to vote for the amended charter. Additionally, keeping the roadmap's timeline short including the constitutional framework served as a legitimation tool both internally and externally, and eased Western and some of the international criticism triggered by the overthrow of the elected president.

The constitutional procedural and drafting processes took place during a backdrop of an overall culture of fear, chaos, and uncertainty – the most inconducive time to build confidence and restitch the social fabric. This was clear in the growing terror attacks in Northern Sinai, state crackdown, arrests, the infamous massacres at both al-Nahda and Rabaa squares sit-ins, and the banning of the Muslim Brotherhood and its affiliate organizations.[36] Despite numerous assurances by the state, including from the presidency, to not use "exceptional measures" against anyone,[37] the Defense Minister called on Egyptians in a 24 July speech "for a popular mandate to confront violence and terrorism."[38] The SCAF was looking for ways to legitimize their anticipated intervention against the pro-Muslim Brotherhood and the ousted president protesters. In that, the generals used mixed approaches from backchannel messages and pro-stability street mobilization to media incitement and the wrath of the judiciary and use of force. As observed by Abdullah Al-Arian, "The relentless show of force displayed that day [August 14] was intended to discredit the notion of mass mobilization writ large in a country where a *milyoniyya* (million-person protest) had become a commonplace occurrence since the uprising first took root on 25 January 2011."[39] It also played a decisive role in consolidating power into the hands of the generals under the pretext of saving and protecting the nation.

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35 "Members of Constitutional Committee of 50 Announced," *Egypt Independent*, 1 September 2013.
36 Patrick Kingsley, "Muslim Brotherhood Banned by Egyptian Court," *The Guardian*, 23 September 2013.
37 *Al-Ahram Newspaper Headline,* 18 July 2013.
38 *Al-Ahram Newspaper Headline,* 25 July 2013.
39 Abdullah Al-Arian "The Lasting Significance of Egypt's Rabaa Massacre," *Middle East Report Online,* 23 August 2022.

The Committee of 50 continued its work despite the gloomy and dreadful climate, eagerly debating some of the articles among its members who represented a wide array of state institutions with strong egos and opinions. Nathan Brown observed that "With these institutional interests strongly represented but generally focusing on distinct clauses, a dynamic exists for most of them to get what they want – perhaps making the constitution more like a Christmas tree on which everyone hangs his or her favorite ornament than a comprehensively-designed sculpture.[40]

Whereas the majority Islamist 2012 drafters were motivated to preserve their position at the heart of the new political system, assuming their continued domination of electoral politics, they chose to increase the parliament's power and concede on some of the demands of the Salafis and military. The 2013 committee members, on the other hand, shared a common tacit desire to limit any role of political Islam and the Muslim Brotherhood in the future. Hence, the final text saw a reversal to a powerful presidency and further independence and empowerment of the military. On December 2, the committee overwhelmingly voted to approve the final 247-article draft document and refer it to the presidency to call for a referendum.

Public consultations on the new draft were selective to nonexistent, and no pluralistic referendum campaigns were tolerated. The government campaigned heavily in favor of the draft charter, framing it as a necessary step towards stability and security. Those attempting to campaign for a 'no' vote were intimidated, and some were arrested for exercising a right to a different opinion. In such a stifling environment, Egyptians were called to the polls on 14-15 January and the constitution was eventually approved by 98 percent of the voters and a turnout of 38.6 percent.[41] The results effectively paved the way for Sisi's presidential bid.

Conclusion

Challenges are multiplied during revolutions and transitions, especially when there is fragmentation and no consensus. The situation is far from optimal for any state-building or constitutional drafting during these times. Egypt's transition experience is not unique or exceptional. It shares similarities with many other cases, some of which succeeded while others did not. The bottom line is that the process is inherently political and about power, and it is reflected in the constitutional, electoral, and socio-economic processes and management of the country. This is by no means an underestimation of the sincere and genuine efforts segments of the population have put into propelling change and offering an opportunity to imagine a new Egypt.

The Islamist-majority parliament, constituent assembly composition and debates, and the narrow victory of Morsi activated longstanding fears not only in the non-Islamist groups but also the unelected military and judiciary who believe in their constituent powers and sovereignty over certain state matters. The literature on revolutions points out

40 Nathan J. Brown, "Egypt's Daring Constitutional Gang of 50," *Carnegie Endowment for International Peace,* 20 September 2013.

41 Patrick Kingsley, "Egypt's New Constitution Gets 98% 'Yes' Vote," *The Guardian,* 18 January 2014.

to the existence of dual or multiple sovereign powers that play a role in the post-revolutionary processes. In that sense, we can see how the parliament (later President Morsi), the SCAF and the judiciary claimed such power and played a clear role in undermining directly and indirectly the whole transition process at different times. This essentially proves that during these relatively fluid times, in the words of Arthur Stinchcombe, no rules or agreements, even constitution-drafting, are irreversible.

The democratic transition literature highlights the critical role a sovereign or powerful entity plays claiming a perpetual right of overrule. As outlined by Adam Przeworski, "The crucial moment in any passage from authoritarian to democratic rule is not necessarily the withdrawal of the army into the barracks or the opening of the elected parliament but the crossing of the threshold beyond which no one can intervene to reverse outcomes of the formal democratic process."[42] This is the role that the SCAF inherently believes it possesses, which was clear throughout the transition, and articulated by Mamdouh Shaheen days before the elections of the President in 2012. In other words, the military was keen to find a way to "slow down rates of change of relative power and decrease uncertainty about who, and what policies, will rule in the near and medium- range future."[43]

The constitutional changes and drafting processes in Egypt between 2011 and 2014 were emblematic of a tumultuous period in the country's political history. They reflected deeper divisions, hidden below the surface, within Egyptian society, and the struggle to balance competing ideologies and interests. The period remains a subject of ongoing debate, highlighting the complex nature of democratic transitions and the challenges faced in post-revolutionary societies, and serves as a reminder of the importance of inclusive and participatory processes.

Both the 2012 and 2014 Constitutions were drafted during socio-economic and political polarization and upheaval that had a renewed focus on social justice, fair representation, rights, and freedoms. State failures over the years created deep social injustices from limited employment and socio-economic mobility to inadequate access to healthcare and education. The drafters of both charters were less focused on a real discussion on how the constitution and the process could guide the transition period and rebuild a state that serves all citizens, and more interested in rushing the process, settling scores, and reinforcing longstanding fears and victimization. As Al-Ali observes, "both documents [2012 and 2014 Constitutions] were drafted in a context of severe and widening distrust between rival political camps and were both used a means for parties to reinforce political alliances and to seek to further extend their advantage over rivals."[44] Unfortunately, the revolutionary environment did not lead to any revolutionary politics or constitution.

42 Przeworski, "Democracy as a Contingent Outcome of Conflicts," 65.
43 Stinchcombe, "Ending Revolutions," 54.
44 Al-Ali, *Egypt's Third Constitution in Three Years*.

The 2012 Constitution, with its Islamist tilt, sparked protests and intensified divisions within Egyptian society. The 2014 Constitution, while aiming to restore stability, raised concerns about the concentration of power, the erosion of civil liberties, and the weakening of checks and balances. It is safe to say that both constitutions failed to guarantee fundamental rights, including freedom of expression, assembly, and association as there was no mechanism for these rights to be enforced and keep state institutions accountable. They also highlighted the exclusion of certain political and social groups from the drafting process and the lack of mechanisms for meaningful public participation ahead of the public referendums. As Al-Ali concludes, "without democratic, effective, transparent and accountable institutions to enforce rights, they will remain just as theoretical as they did under the 1971 constitution, which is something that Egypt can ill afford today."[45]

Finally, if constitutions drafted during transition periods must be judged on how far they helped or hindered democratic transitions, then both failed. The more immediate reason for failure of the 2012 charter was the mistrust and unwillingness among the civilian parties, politicians, and coalitions, particularly the Islamist, to come together to chart the next phase of Egypt's transition. There is also the Muslim Brotherhood's rush in fear of losing control of the process and the inability to build solid bridges with their challengers and opposition. This left the door open for the activist judiciary and military to scheme and to intervene, which increased the gap of animosity, victimization and confirmed biases among all parties involved. The 2014 Constitution failed because the balance of power in the coalition that created it was lopsided in favor of counter-revolutionary forces and the security service apparatus, and time made the imbalance worse, as a deteriorating law-and-order situation allowed the executive to obtain even more powers using both legal and extra-judicial tactics.

[45] Al-Ali.

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The Lebanese Constitution: A Hampered Transition from the Rule of Sects to the Rule of Law

Mireille Najm-Checrallah *

ABSTRACT

Lebanon's key features that distinguish it from neighbouring countries are embodied in its constitution: secularism, pluralism, and liberalism. The Lebanese Constitution sought to bring together the various religious sects under a single entity – a state that stands at an equal distance from them all. A "consensual democracy" was established, whereby positions within the central government are distributed along sectarian lines, and personal status laws are placed under the jurisdiction of the various religious sects. However, Lebanon's recent crisis has revealed the failure of the post-civil war political system to reconfigure the state and to consolidate the rule of law in a way that guarantees the basic rights of citizens and secures political and social stability. The question that ensues is whether the Lebanese Constitution is still a sound framework for the country to transition from a state controlled by sectarian logic to the rule of law.

The social contract between the various historically recognized sects was embodied in constitutional guarantees at the level of their participation in the central government and in their right to self-manage. However, the initial concept of a state superseding the religious sects declined with time. The idea of a state that fosters sectarian pluralism gradually transformed into a state subjected to the logic of sects and their leaders' factional interests. This eroded its authority, effectiveness, and sovereignty, and undermined what is supposed to be a direct relationship between the state and the citizen (I).

However, the Lebanese Constitution is built on principles and objectives that are compatible with the promotion of the rule of law. It lays the foundations of a civil, non-religious state whose sovereignty transcends its components, and guarantees basic rights and public freedoms, the scope of which was broadened through the constitutional amendments of 1990. It carries a promising vision that is embodied in the abolition of political sectarianism as a primary objective. It also includes social and economic objectives, enshrined in the principles of social justice and balanced development between the regions (II).

Keywords: *Lebanon, pluralism, secularism, political sectarianism, personal status, Constitutional Council, basic freedoms and rights, social justice, decentralization, balanced development between the regions.*

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CONTENTS

Introduction

It may seem strange to consider the impact of the Arab Spring on the constitutional trajectory of Lebanon, as the country initially appeared as a mere observer unaffected by the upheavals and transformations taking place around it. However, it was inevitable that the repercussions of those popular protests would eventually surface in Lebanon, manifesting in various stages in the following years. They materialized through timid protests in the years 2012 and 2015, leading up to the popular movement that erupted following the severe financial and economic crisis that struck the country in October 2019. This protest movement transcended regions and sects and had a distinct youthful and female component. Lebanon, albeit belatedly, joined the caravan of countries that experienced what came to be known as the Arab Spring. This unequivocally indicates that Lebanon indeed has an "Arab identity and belonging," as stated in Paragraph (B) of the preamble of the constitution, in addition to being a founding member of the Arab League. It is organically linked to Arab states due to its geographical location, linguistic affiliation, and cultural ties. Lebanon is affected by the transformations the Arab states experience – whatever their nature – and interacts with them. There is no doubt, for example, that the Palestinian question and the Syrian war have directly impacted and continue to impact Lebanon's internal stability across its political, security, and economic dimensions.

However, Lebanon has distinct characteristics that differentiate it from neighbouring countries, which are reflected in its constitution. These can be summarized in three points: Lebanon is primarily a secular state, meaning that the state is not characterized by a religious nature. It has a pluralistic society and a liberal system. The Lebanese Constitution was built around the idea of religious and sectarian pluralism in its societal composition, bringing together various religious communities under a single entity. The state maintains a neutral and secular stance, keeping an equal distance from all religions and sects without adopting or endorsing the doctrines of any of them. The Lebanese Constitution was further drawn from Western liberal principles, particularly those of the Third Republic in France.

It is important to note the composition of Lebanon's multi-sectarian Christian-Muslim society, which forms the fundamental basis for the distribution of powers and governs all aspects of decision-making in the country. Lebanese society is composed of eighteen recognized religious sects, divided into twelve Christian sects, five Muslim sects, and one Jewish sect.[1] Religious affiliation plays a central role in Lebanese life, as personal status laws govern various aspects of the life of a Lebanese individual from their birth to their death, including marriage, divorce, and all matters related to personal status. It is worth noting that the Lebanese Constitution does not adopt a single term to refer to the religious groups that make up Lebanese society. Instead, it uses different designations in various articles,

[1] The number of members of the Jewish community residing in Lebanon has become minimal.

such as "sect" or "sects" (Articles 10, 19, 24, 95(b))[2], "denominations" (Article 9), "communities" (Article 9), and "spiritual families" (Article 22) – all of them terms that were adopted in different historical stages.[3] It is worth noting that the constitution does not specify the recognized religious sects in Lebanon, but it can be inferred from Article 19 that certain constitutional rights are limited to "the sects recognized by law," leaving it to the legislator to recognize and regulate such sects, which are granted constitutional rights. The concept of "sect with a personal status system" was defined in Article 1 of Legislative Decree No. 60 of the Lebanese Republic, issued on 13 March 1936, as follows: "The sects recognized by law as sects with a personal status system are the historical sects whose organization, courts, and laws have been defined in a legislative instrument."[4] Lebanon has a central government based on the sectarian distribution of power, which is referred to as a consociational democracy. Father Georges Hobeika describes the sectarian system in Lebanon as "an inclusive system for heterogeneous components that have agreed to live peacefully together in the concord of diversity."[5]

The recent crisis in Lebanon has revealed the failure of the system of government since the end of the civil war in 1990 to rebuild the state, its institutions, and its judiciary, and to establish the rule of law, ensuring the basic rights of citizens and securing political and social stability for the Lebanese people. There is no doubt that the country's social, financial, and economic deterioration has multiple causes that cannot be dismissed in the context of this study. However, in terms of constitutional law, the current governance crisis raises several questions about Lebanon's consociational system of government, which was consolidated after the Taif Agreement and the constitutional amendments that followed in 1990, and its suitability. Our starting point is the concept of constitution as embraced by modern political societies, where the constitution is considered the founding act of the state. We also adhere to the theory that the constitution is not merely a set of legal rules that govern the organization of government and the relationship between public authorities, but that it encompasses, in its provisions and spirit, philosophical dimensions that express the values and principles of a society. Additionally, it carries within it a vision for a specific society.

All this leads us to formulate the question that is currently on the minds of many Lebanese: Does the Lebanese Constitution still represent the reality of Lebanese people? Does it genuinely reflect their aspirations and interests through the goals it set?

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2 Article 95(b) of the constitution states: "The principle of sectarian representation is abolished, and expertise and competence shall be the basis for public office, the judiciary, military and security institutions, and public and mixed institutions, in accordance with the requirements of national consensus, and with the exception of Grade One positions or their equivalent. These positions shall be divided equally between Christians and Muslims without allocating any position to a specific sect, while adhering to the principles of expertise and competence."

3 Some of these terms were adopted upon the adoption of the constitution in 1926 and some others were introduced in 1990 following its amendment as per the Taif Agreement.

4 These sects were enumerated in Annex 1 of Decree No. 60, and recognition was later granted to the Protestant sect in 1938 and the Coptic Orthodox sect in 1996. The constitution also refers to the "abolition of political sectarianism" (Paragraph (H) of the preamble and Art. 95) and a "non-sectarian national election law" (Art. 22) that is placed "outside the sectarian framework" (Art. 24). Additionally, "sectarian representation" is mentioned within the two major religious groups: Islam and Christianity (Art. 24 and Art. 95).

5 Father Georges Hobeika, "Greater Lebanon and the Philosophy of Harmonizing Differences," *Nida Al Watan*, 25 June 2021.

Put differently, the question is whether the constitution requires reconsidering, or whether it continues to provide a sound framework for transitioning from a state controlled by sectarian logic and sectarian leaders to a state based on citizenship and the rule of law, where the recognition of sects is not exploited to undermine the state and restrict freedoms.

To this end, Part I of this paper will address the social and philosophical dimensions of the Lebanese Constitution, which represents a social contract between the religious sects. In turn, Part II will examine the pillars and objectives established by the Lebanese Constitution, which may serve as a supportive framework for transitioning to a state governed by the rule of law.

I. The Lebanese Constitution as Expression of a Social Contract between Religious Sects

The social contract between the historically recognized sects was reflected in the constitutional safeguards they were granted at the level of the central government and in the administration of their own affairs (A). However, the concept of a state that is supportive of religious sects has diminished in practice, resulting in a state that has retreated from regulating its relationship with them (B).

A. Constitutional Guarantees for Religious Sects' Rights at the Political and Social Levels

Renowned scholar Maurice Hauriou proposes the idea of the existence of two constitutions within a single text. The first is the political constitution, which concerns the organization and functioning of public authorities. The second is the social constitution, which reflects the political philosophy of a society, through the values, principles, and rights and freedoms of citizens it guarantees.[6] Looking back to the year 1926, we observe that the fundamental contract that emerged among the Lebanese prior to the adoption of the constitution, and that evolved over time until the 1990 Constitutional Amendments, revolved around the pluralistic sectarian reality in both its political and social dimensions. On the political level, it manifested itself through the distribution of public power and administrative, judicial, and security positions on a sectarian basis. On the societal level, it materialized through the recognition of sectarian components, granting them legislative and judicial authority in personal status matters, while ensuring their right to self-administration (Article 9) and the establishment of their private schools (Article 10).

6 Maurice Hauriou, Précis de droit constitutionnel (Paris : Dalloz, 1929), 624.

1. Distribution of Positions of Power among Religious Sects ("Political Sectarianism")

Going back to the adoption of the Lebanese Constitution on 1 September 1926, it can be stated that it was primarily promoted by the French Mandate authority, six years after the establishment of "Greater Lebanon" with its current borders.[7] This is evidenced by the fact that the majority of its provisions are derived from the French constitutional laws of 1875, which governed the Third Republic at the time of the French Mandate. Furthermore, the constitution was originally drafted in French and later translated into Arabic. However, the 1926 Constitution is not limited to this Western influence as its provisions blend with the foundations and principles that uphold the country's specificity and its pluralistic societal structure. The Mandate Charter issued by the League of Nations obligated France to establish a judicial system that "ensures respect for the personal status system and religious interests of all inhabitants, regardless of their religious communities."[8] A drafting committee was formed for that purpose, composed of twelve members from the Representative Council at the time, and chaired by the President of the council, Moussa Nammour. The committee conducted consultations with the heads of the religious communities, as well as a number of influential figures and representative intellectual elites.[9] It directed a set of questions to them.[10] From these questions,[11] which mainly revolved around the system of governance and the sectarian distribution of positions, we can infer that the social contract on which the 1926 Constitution was based is a "contract between religious sects," with a predominance of Christian sects under French sponsorship. It is worth noting that, at the time, a segment of the Lebanese people, especially Muslims, rejected the new Lebanese entity and demanded to join Syria, which explains why some of these entities refrained from answering the questions directed to them. Despite the fact that the new constitution did not enjoy the support of all the Lebanese at the time, its Articles 9, 10, 24, and 95 embodied the country's specificity. The Lebanese Constitution, as initially adopted in 1926 under the French Mandate, enshrined sectarian representation in public office and in the formation of the Council of Ministers in its sixth chapter entitled "Final and Temporary Provisions".

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7 Some constitutional scholars have compared the making of the Lebanese Constitution to a constitution granted by the French state ("octroi" model). See, for example, Zuhair Shokr, *Al-Waseet fi al-Qanun al-Dusturi al-Lubnani*, Vol. 1 (Beirut: 2006), 184. However, we sustain that the Lebanese Constitution was not granted in the classical sense commonly accorder to it by constitutional law, especially because it was adopted by the Lebanese Representative Council.

8 Article 6 of the Mandate Charter, which was approved by the Council of the League of Nations on 24 July 1922, stipulated the following: "The Mandatory State in Syria and Lebanon shall establish a judicial system that fully safeguards the rights of foreigners and nationals alike, and also ensures respect for the personal status system and religious interests of the inhabitants, regardless of their religions or sects. The Mandated State, in particular, shall monitor the administration of endowments in accordance with the provisions of religious laws and the intentions of the donors." Furthermore, Article 9 of the Charter prohibited the Mandatory State from interfering in the administration of religious communities, their affairs, and their places of worship, which remained under their previous "immunities" explicitly guaranteed.

9 Those used to constitute "symbolically important forces in the country" as expressed by one of Parliament's members, Sheikh Youssef Khazen.

10 Rapport de Chebl Dammous, contenant le résumé des réponses au questionnaire adressé par la Commission de la Constitution aux notables et à l'élite intellectuelle du Liban, *in* Annex No. 7, Antoine Hokayem, *La génèse de la Constitution libanaise de 1926* (Antélias : Les Editions Universitaires du Liban, 1996), 342.

11 Especially Question 6: "Should sectarian representation be adopted in the distribution of seats in Parliament?" and Question 12: "Should sectarian parity be adopted in public positions, especially in the formation of the Council of Ministers?"

As for the sectarian distribution of seats in the upper chamber, it was defined in Article 96 of the constitution, which was swiftly abolished a year and a half after the adoption of the constitution (on 17 October 1927), reducing Parliament to a unicameral chamber – the Chamber of Deputies – which remains so to the present day.[12]

Although the Lebanese Constitution did not express the will of all Lebanese in 1926, political and constitutional developments led to a state of "negative coexistence" among all these components during the Mandate era, as expressed by Dr Zuhair Shokr.[13] Over time, the sense of belonging to the nation and recognition of its definitive entity[14] grew amongst most Lebanese, especially after independence and the National Pact that resulted from it in 1943, up to the adoption of the Document of National Accord (known as the Taif Agreement), which led to the 1990 Constitutional Amendments.

In its current formulation, the system of government in Lebanon is based on a sectarian power-sharing arrangement at two levels: equal power-sharing between Muslims and Christians and proportional representation amongst the various sects within each of these two major groups. As such, seats in Parliament are primarily distributed based on equal representation between Muslims and Christians, and secondarily in relative proportion among the different denominations within each of these two groups (Article 24 of the constitution). The sects must also be fairly represented in the formation of the Council of Ministers, as stipulated in Paragraph (A) of Article 95 of the constitution. The principle of sectarian representation is applied to Grade One positions in the state (and their equivalent), which are equally divided between Muslims and Christians. However, no position is allocated to a specific sect, and the principles of expertise and competence must be adhered to, in accordance with Paragraph (B) of Article 95. Furthermore, the sectarian distribution of the three presidencies in the state was consolidated through an informal, unwritten agreement in the period following independence. These presidencies are distributed among the three major religious denominations in Lebanon, whereby the President of the Republic is from the Maronite sect, the Speaker of Parliament is from the Shiite community, and the Prime Minister is from the Sunni community. It is worth noting that the Taif Agreement of 1989, along with the subsequent constitutional amendments of 1990, adopted rules that had been established through political practice, and which, according to some historians, have their roots in the National Pact of 1943,[15] and enshrined them in constitutional texts. However, no amendment was adopted to explicitly mention

12 Knowing that Article 22 of the Constitution, as amended by Constitutional Law No. 18 of 21 September 1990, states: "Upon the election of the first Chamber of Deputies on a non-sectarian national basis, a new Senate shall be established, in which all spiritual families are represented, and its powers shall be limited to existential issues." However, no Senate has been established to this day.

13 Shokr, *Al-Waseet*, 203.

14 This is expressed in Paragraph (A) of the preamble, which was added in 1990: "Lebanon is a sovereign, free, and independent homeland. A definitive homeland for all its sons, unitary in terms of land, people, and institutions, within its boundaries as provided in this constitution and recognized internationally."

15 The term "National Pact" refers to the oral agreement reached between Bechara El Khoury and Riad Al Solh on the eve of independence in 1943. Narratives differ regarding the content of the agreement, which is said to have laid the foundations for Lebanon's independence from the French Mandate, its Arab identity, and coexistence among its communities. The debate remains ongoing regarding the issue of the sectarian-based distribution of public positions mentioned in it.

the distribution of the three presidencies on a sectarian basis – this has remained an unwritten, informal agreement continuously upheld since independence to the present day.

It is further worth noting that the concept of justice and equality among sects, in the context of the prevailing sectarian social reality at the time of the drafting of the Lebanese Constitution in 1926, undoubtedly competed with, if not overshadowed, the concept of equality among individuals in its narrow Western sense. This led to a blending of the concept of individual equality, in its limited Western conception, with the principle of justice among religious sects and equality among their members, creating a certain tension between the two. It is important to emphasize in this respect that the guarantee of the rights of the sects, beyond their proportional representation at the level of the central government, is embodied in the self-autonomy they enjoy in managing their personal affairs and freely practising their religious rites.

2. Guaranteeing Religious Sects' Right to Manage their Own Affairs and Practise their Rites

Following the fall of the Ottoman Empire and the end of the French Mandate, Lebanon inherited a dual system at the legislative and judicial levels. The duality manifested itself in the coexistence of modern civil laws applied by state courts and religious laws applied by religious or spiritual courts in relation to personal status matters. The autonomy of the sectarian components materialized through the recognition of their legal personality and their granting of legislative and judicial authority in personal status matters, while ensuring their right to manage their own affairs (Article 9) and establish their own schools (Article 10).

A. The Recognition of the Historical Sects and the Guarantee of their Rights

The constitution recognizes the sects as religious entities with rights and guarantees. Article 9 of the constitution guarantees their freedom to practice religious rites under its protection, provided that public order is not disturbed. Additionally, Article 10 guarantees freedom of education, from which the right of religious sects to establish their own schools is derived. However, such schools must operate in accordance with the general regulations issued by the state regarding public instruction. It should be noted that all these guarantees and rights remain subject to the law and their exercise is limited by the compliance with public order by the religious sects, which is determined by the judiciary, including both the judicial and administrative courts.

Legislative Decree No. 60, issued on 13 March 1936, during the Mandate period, and which included the "recognition of the sectarian system," served as the cornerstone for the relationship between religious sects and the state. This decree is considered the law that complements the constitution,[16] and can be viewed as the "second constitution"

[16] As also indicated in one of its provisions, which states: "Based on Chapter II, Article 1 of the Lebanese Constitution issued on 23 May 1926."

of the Lebanese state. It acknowledged the legal personality of the historical sects listed in its annex and recognized their members' rights to fulfil their religious obligations, establish their own personal status system, and form their councils.

B. The Allocation of Legislative and Judicial Powers to the Religious Sects under Legislative Decree No. 60/1936

As mentioned above, the religious sects were entrusted with the authority to establish their own sectarian courts and legislate in all matters falling within their jurisdiction under Legislative Decree No. 60. However, the significance of this decree lies in the fact that it established a sect subject to civil law for personal status matters, allowing citizens to opt for that civil law instead of belonging to one of the religious sects recognized by the state. It distinguished between sects governed by personal status law and sects subject to ordinary law. This differentiation angered the Islamic sects at the time, prompting the High Commissioner to suspend its effects on Muslims (under Decree No. 53, dated 30 March 1939). This suspension marked the first instance of the state yielding to the pressures of religious authorities.

B. The State's Withdrawal from Regulating its Relationship with the Religious Sects

Since 1926, the Lebanese Constitution, complemented by Legislative Decree No. 60/1936, has regulated the relationship between the state and the religious sects, with the understanding that this relationship operates under the auspices and sponsorship of the state. However, over time, practice has revealed the retreat of state authority before sectarian authority, both in the realm of personal status matters and in terms of central governance.

1. The State's Failure to Regulate Personal Status Matters

Alongside the guarantee of the rights and self-autonomy of religious sects, the constitution recognizes absolute freedom of conscience for individuals (Article 9) and places it at the forefront of public liberties (along with freedom of opinion in its preamble, Paragraph (C)). Legislative Decree No. 60/1936 further guarantees freedom of belief for citizens, particularly concerning their personal status matters. With respect to Articles 9 and 10 of the constitution, it is evident that sectarian affiliation is a voluntary choice linked to the age of maturity and not a mandatory imposition by birth. It ensues that it is up to citizens to voluntarily express their affiliation to a particular sect.

Despite the fact that Legislative Decree No. 60/1936 recognized the possibility for individuals in Lebanon to not belong to a given sect, the state has failed to enact civil legislation that regulates personal status matters and that would cater to such individuals. This has placed individuals in Lebanon under the control of the religious sects, given the legislative authority granted to them in personal status matters, denying them individual existence outside of their sect, except in the event they contract civil marriage outside Lebanese territory. However, as previously mentioned, the application of Decree No. 60/1936 was suspended for Islamic sects, marking the state's first retreat before religious authorities.

Although Lebanese law guarantees the individual's freedom to change their religion,[17] due to ongoing pressures exerted on the state by religious and political authorities, the state has thus far been unable to introduce a number of laws that complement the rules established by Decree No. 60/1936. There follow a few examples:

- Failure to issue a unified civil code for inheritance that applies to the entire Lebanese population: The negotiations conducted between 1949 and 1959 with the Islamic religious authorities and the strike conducted by the Beirut Bar Association as the draft legislation was tabled prevented the promulgation of a unified civil code that applies to all Lebanese. Instead, the 1959 law that was adopted only applies to non-Muslim confessions – this is the Inheritance Law for Non-Muslims.
- The state's non-recognition of civil marriages concluded between two Muslims overseas (Article 79 of the Code of Civil Procedure[18]), which violates the principle of equality between these couples and others of different or mixed confessions.
- The state's lack of oversight over the functioning of Sharia and religious courts or their adopted court procedures to ensure the minimum standards of a fair trial for citizens.
- The state's incapacity to establish an optional civil marriage system that applies to all Lebanese people (noting the attempts that had been made in this regard: Brigadier General Raymond Eddeh's initiative and President Elias Hrawi's draft law).
- The crisis of civil marriages concluded before notaries public in Lebanon, which the Ministry of Interior and Municipalities currently refuses to register.

According to the constitution, the country's democratic parliamentary regime is founded on the principles of equality and social justice. It is worth noting that the principle of equality, guaranteed by the Lebanese Constitution, is of the utmost importance in the French constitutional system. It is considered a key element of the "French constitutional identity," and according to Ferdinand Mélin-Soucramanien, one of the main pillars of the state based on the rule of law (*État de droit*).[19] Maurice Hauriou further asserted that the principle of equality among individuals was "the driver" behind the French Revolution of 1789.[20]

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17 The freedom to change one's religion was enshrined by virtue of Legislative Decree No. 60/1936, as well as by the law governing the personal status registry in 1951. Article 41 of the law stipulates the following: "Any request pertaining to a change of sect or religion should be sent to the personal status registry for the correction of the record. This request must be supported by a certificate from the head of the sect or religion that the applicant intends to embrace, including the applicant's signature. The official of the personal status registry summons the applicant and in the presence of two witnesses, asks whether the applicant insists on the request. If the request is affirmed, a record is prepared on the same request, and the record is corrected accordingly."

18 Article 79 of the Code of Civil Procedure (Legislative Decree No. 90/1983): "The Lebanese courts examine disputes emanating from civil marriages concluded in a foreign country between two Lebanese citizens or a Lebanese and a foreigner according to the law of that country, while the Sharia and Druze courts apply the provisions of the Sharia Law to settle disputes between Muslim couples with at least one Lebanese citizen."

19 Ferdinand Mélin-Soucramanien, «Le principe d'égalité dans la jurisprudence du Conseil constitutionnel. Quelles perspectives pour la question prioritaire de constitutionnalité ? «*Cahiers du Conseil constitutionnel* no. 29 (2010) : 89-100.

20 Maurice Hauriou, *La science sociale traditionnelle* (Paris : Larose, 1896), 80.

The Decree that was adopted on 4 August 1789 to abolish the privileges of the nobility, followed by the Declaration of the Rights of Man and the Citizen a few weeks later, were the force that led to the abolition of the old monarchy that existed before the Revolution. This also explains the position that equality holds in the slogan adopted by the French Republic: "Liberty, Equality, Fraternity" (stipulated in Article 2, paragraph 4 of the 1958 Constitution). In contrast, the principle of equality among citizens seems to be a long way from occupying the same status in Lebanon, despite being enshrined in the Lebanese Constitution, for the above-mentioned reasons. The main dilemma stems from the incompatibility between the need to reconcile the principle of equality among individuals and the rights of the sects.

In addition to this failure to govern the relationship between the state and its sectarian components in a way that guarantees the freedom of individuals to choose a civil personal status system and establishes a direct link with the state in this regard, the state's authority also waned at the level of the central government, leading to an almost complete collapse of the state and its institutions.

2. The Decline of the State's Authority at the Level of the Central Government

We need to return to the circumstances surrounding the Taif Agreement in 1989. The majority of its terms was reflected in the constitutional amendments that followed in 1990. At the time, the aim was to find a framework that would end the war that had ravaged the country, establish security and stability, and reunite its citizens. In the period that followed the year 1990 however, the rule of leaders with factional and sectarian interests overpowered the logic of the rule of law. Instead of strengthening the state's institutions and their effectiveness and enhancing judicial power and its independence, quotas, nepotism, and clientelism prevailed over the rule of law, institutions, and equality among individuals.

The post-war period saw long eras of governmental obstruction and vacuum. The extension of Parliament's term three consecutive times between 2013 and 2017 was a reflection of the central state's inability to impose its authority on its own territory. Moreover, the constitution appeared incapable of resolving these crises over the years, which may be due in part to the ambiguity or gaps in the text.[21] It is therefore necessary to address the shortcomings of the constitution in terms of mechanisms that can solve crises and situations of vacuum that often obstruct and paralyze

[21] The presidential vacuum Lebanon has been witnessing since 31 October 2022, when President Michel Aoun's mandate ended, is sufficient proof. This was preceded by failed attempts to form a government with full powers since Prime Minister Mikati's government became a caretaker government following the last parliamentary elections of 15 May 2022 as per Article 69 of the Constitution. Some of the issues that have arisen in this context and for which the constitution does not provide a clear answer include: the complexity of the government formation process, which is not regulated by deadlines and timeframes; the ambiguity surrounding the process for the election of the President, with no texts requiring that one present themselves to that election as candidate, or specifying the majority required for their election in a second voting round; and the functioning of the Council of Ministers amid a presidential vacuum and the questions that raises (Can a caretaker government replace the President of the Republic? Do presidential decisions taken by the Council of Ministers require being adopted unanimously? Who issues laws, signs decrees, and publishes them in the Official Gazette? Can the Council of Minsters reject a law or challenge its constitutionality before the Constitutional Council, when exercising the competences of the President of the Republic in light of the provisions of Article 62 of the Constitution?).

the functioning of constitutional institutions. These mechanisms require an in-depth examination that cannot be included in the scope of the current study. However, it must be said that any technical constitutional amendment shall remain ineffective and insufficient as long as the political will does not prioritize public interest. To summarize, since the creation of the State of Greater Lebanon until this day, political practice has favoured factional interests over public interest in various degrees over the years, under the pretext of preserving the rights of the religious sects.

It would seem then that the idea of a state that fosters multi-sectarianism has gradually transformed in practice into a state that submits to the will of the sects and the factional interests of their leaders at the expense of public interest, preventing it from imposing its own authority, performing its duties, and bolstering its legitimacy through a direct relationship with citizens. This begs the question of whether the Lebanese Constitution can still be considered an appropriate framework to reconfigure authority, considering it carries within it the components and pillars that foster the rule of law.

II. A Constitution that Embraces the Rule of Law

The Lebanese Constitution includes pillars and components that may be suitable to build upon and transition to the rule of law (A). Its provisions also carry prospects that may be promising for Lebanon, in the form of main objectives, particularly those introduced in 1990 (B).

A. The Pillars and Components of the Lebanese Constitution

The Lebanese Constitution set the pillars of a secular civil state whose sovereignty rises above all other components (1). It further guaranteed fundamental rights and public freedoms and expanded their scope through the 1990 Constitutional Amendments (2).

1. The Secular State and its Superiority with respect to its Sectarian Components

The constitution laid the foundations for an authority that is based on a set of fixed and inclusive rules and guaranteed the sovereignty and unity of the state. The state takes the form of a unitary state, meaning that citizens are subject to one authority, that of the state. The constitution emphasizes the unity of Lebanon and its territories in multiple passages, affirming that it is not permissible to fragment or divide them. Under the constitution, the President of the Republic is the symbol of the unity of the state and is tasked with its protection and the protection of the constitution itself (Article 49 – Head of State and Article 50 – Oath). At the internal level, the most important manifestation of state sovereignty lies in its authentic and comprehensive legislative authority.[22]

[22] Article 27 of the Lebanese Constitution, as amended by the constitutional amendment laws of 17/10/1927 and 21/1/1947, stipulates: "A member of the Chamber of Deputies represents the entire nation. No restriction or condition may be imposed upon his mandate by his electors."

The constitution stipulates that the regime in Lebanon is that of a democratic, parliamentary republic based on the separation of powers. The state is impartial towards all its sectarian components and stands at an equal distance from them all. This was elucidated by Chebel Dammous, the Rapporteur of the constitutional drafting committee in the session that was held on 20 May 1926, during which the Representative Council promulgated Article 9 of the Constitution. When asked by a member of parliament, "What does the sentence 'The State performs its duty of homage to Almighty God' mean?" Dammous replied: "It means that the country comprises a group of religions and all of them are minorities and the state does not belong to any of them but is "secular" and respects them all". This was the difference between the Lebanese State and the Ottoman State for instance, as the Sunni Hanafi sect was the state's adopted religion and it was the general law that applied to all subjects of the Sultanate, with the exception of the privileges that were granted to other religious confessions. The Lebanese State does not differentiate between sects. It guarantees their rights equally in the management of their own affairs. However, the authorization given to the sects to adopt their own laws and regulations is not absolute. Their adoption and implementation remain under the supervision of public authority and the protection of the law, as explicitly stated in Article 2 of Legislative Decree No. 60.[23]

Furthermore, Article 27 of the constitution states that members of parliament represent the entire nation. Based on this constitutional rule, the electoral system adopted the principle of one electorate only, through which the Lebanese elector has the right to vote for all candidates within an electoral district, regardless of the number of parliamentary seats they are running for according to their sect. Some of the recent electoral draft laws that proposed to limit the vote for candidates from a certain sect to the people of that same sect within an electoral district, thus excluding electors from other sects, were dismissed as they clearly and explicitly contradict the constitutional rule contained in Article 27 of the constitution. Lebanese law further found a way to mitigate the sectarian distribution of parliamentary seats for minorities by giving candidates the right to run in any district they desire, allowing minorities to be represented in Parliament, regardless of their district.[24]

2. The Guarantee of Fundamental Rights and Freedoms and the Expansion of their Scope along with the Establishment of the Constitutional Council

The Lebanese Constitution guarantees many fundamental rights and freedoms for the Lebanese people. Their scope was expanded with the reference to the Universal Declaration of Human Rights that was included in the preamble of the constitution. These rights and freedoms were further guaranteed through the establishment of the Constitutional Council.

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23 Article 2 of Legislative Decree No. 60: "The legal recognition of a sect with a personal system has the effect of giving the text defining its system the force of law and placing this system and its implementation under the protection of the law and the control of the public authority".

24 Issam Suleiman, "Political, Economic, and Social Rights from a Constitutional Perspective," *Yearbook of the Constitutional Council* 4 (2009-2010): 416.

A. The Constitutional Guarantee of Fundamental Rights and Freedoms

The Lebanese Constitution mandates the guarantee and safeguard of public freedoms in its preamble and first chapter. Article 7 stipulates that "All Lebanese shall be equal before the law. They shall equally enjoy civil and political rights and shall equally be bound by public obligations and duties without any distinction." Paragraph (C) of the preamble places the freedoms of opinion and belief at the forefront of the rights and freedoms guaranteed by the constitution, while Article 9 grants freedom of conscience absolute value. This means it cannot be limited and that the state guarantees the right of individuals and groups to enjoy this freedom and to exercise religious rites under its protection and within the limits of public order. Moreover, Article 10 of the Constitution guarantees the right to education, along with a number of fundamental rights and freedoms cited in the second chapter of the Constitution, entitled "The Lebanese: Their Rights and Obligations," that were put under the protection of the law,[25] including personal freedom and the principle of legality for crimes and punishments (Art. 8), the principle of equality in holding public office (Art. 12), freedom to express one's opinion orally or in writing, freedom of the press, freedom of assembly, freedom of association (Art. 13), the inviolability of the place of residence (Art. 14), and private property (Art. 15).

The reference made to the 1948 Universal Declaration of Human Rights and its relevant covenants in the preamble was one of the most important amendments that were introduced by the Taif Agreement to the constitution in 1990 in terms of promoting fundamental rights and freedoms. This declaration holds special significance for Lebanon as the Lebanese Charles Malek was a member of its drafting committee chaired by Eleanor Roosevelt at the time.

B. The Role of the Constitutional Council in the Protection of Fundamental Rights and Freedoms and the General Constitutional System

The Constitutional Council, established in 1990 under Article 19 of the Constitution, made giant strides toward the realization of the rule of law. Since it became operational at the beginning of the nineties, it established its role in protecting liberties, consistently adopting in successive rulings, similarly to its French counterpart, the principle of "constitutional bloc". It thus affirmed that the preamble, including the Universal Declaration of Human Rights and the international covenants explicitly mentioned therein, constitute an integral part of the constitution and have constitutional status. The jurisdiction of the Constitutional Council thus extends to the public freedoms and fundamental rights that are directly enshrined in the preamble,[26] as well as those that are contained in the international

[25] Chapter 2 of the Constitution entitled "The Lebanese: Their Rights and Obligations," guarantees a number of fundamental rights and freedoms, such as personal freedom and the principle of legality for crimes and punishments (Art. 8), the right to education (Art. 10), the principle of equality in holding public office (Art. 12), the freedom to express one's opinion orally or in writing, the freedom of the press, the freedom of assembly, and the freedom of association (Art. 13), the inviolability of the place of residence (Art. 14), and private property (Art. 15), and places these rights and freedoms under the protection of the law.

[26] The first decisions to acknowledge the constitutional value of the preamble: Constitutional Council Decision No. 4/96 of 7/8/1996 (Law No. 530/1996 of 11/7/1996 on the amendment of the provisions of the parliamentary elections law of 26/4/1960) and Decision No. 1/97 of 12/9/1997 (Law No. 654 of 24/7/1997 on extending the mandate of municipal councils and municipal committees).

covenants and conventions that are explicitly referred to in the preamble, which the council has considered principles with a constitutional value.[27] Moreover, the council stressed that general constitutional principles must be applied in the absence of a clear constitutional text,[28] and that constitutional laws enter into force and are applicable upon their promulgation. It conscientiously emphasized the importance of public freedoms and fundamental rights by introducing the principle of the "ratchet effect," which forbids any restriction on these fundamental rights or freedoms when enacting new legislation or amending existing legislation.[29] As such, the council has guaranteed numerous principles and objectives with a constitutional value, despite its limited powers, especially after being stripped of its authority to interpret the constitution as was explicitly stated in the National Accord Document.

In addition to its role in protecting fundamental rights and freedoms, the Constitutional Council is first and foremost the entity that ensures the constitutional system is respected and the balance between authorities upheld.[30] It has consistently stressed the importance of the principle of the separation of powers as a main pillar of the democratic system, specifying in many of its decisions the duties of each of the public authorities and their obligation to remain within their jurisdiction and not overreach. The council also defined the concepts of balance and cooperation between public authorities[31] and endorsed the principle of reserved jurisdiction, which stipulates that certain matters figuring in the constitution fall under the exclusive competence of Parliament, such as nationality and public freedoms in general. Competences related to reserved matters cannot be delegated to another authority, especially the executive authority.[32]

The Constitutional Council affirmed the principle of the sovereignty of Parliament and the principles of comprehensive competence and a general legislative mandate that derive thereof, and what this entails with regard to the regulation of the affairs of religious sects. The council further addressed the relationship between the state and the religious sects as legal entities in a number of its decisions and affirmed that Article 9 of the constitution stipulates the separation of

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27 Decision No. 2/2001 of 10/5/2001 (Request to annul paragraph 2 of the new Article 1 of Law No. 296 of 3/4/2001 on amending some of the provisions of the law put into effect by Decree No. 11614 of 4/1/1969: The law of acquisition by foreigners of real estate in Lebanon). In this decision, the council ruled for the first time that the international covenants explicitly mentioned in the preamble of the constitution form an integral part of the constitution.

28 Decision No. 1/2001 of 10/5/2001 (Law No. 295/2001 of 3/4/2001 in merging, dissolving, and forming ministries and councils).

29 See: Constitutional Council Decision No. 2/95 of 25/2/1995 (Law regulating the Sunni and Jaafari judiciary), Decision No. 1/99 of 23/11/1999 (Law establishing the Board of Trustees for Druze Endowments), Decision No. 5/2000 of 6/8/2005 (Law No. 679 of 19 July 2005 on postponing the examination of reviews before the Constitutional Council), and Decision No. 23/2019 of 12/9/2019 (the 2019 general budget and supplementary budgets)

30 As expressed by French jurist Pascal Jan: "*Or le Conseil constitutionnel est une juridiction, dotée de nombreuses attributions, qui répondent au concept classique de la juridiction, mais également à celle dégagée à l'instant. C'est là son originalité et celle de l'instance ouverte devant lui, en clair le procès constitutionnel si l'on veut bien donner à ce terme une dimension purgée de toute référence aux juges ordinaires. Que le juge constitutionnel statue sur une demande contentieuse ou non contentieuse (gracieuse) n'a pas réellement d'importance dès lors que, dans les deux hypothèses, sa mission est de garantir le respect de l'ordre constitutionnel.*" Jan, Pascal, *Le procès constitutionnel*, 2ème éd. (Paris : L.G.D.J., 2010), 25.

31 Constitutional Council Decision No. 2/2012 of 12/17/2012, annulling Law No. 244/2012 regarding the promotion of inspectors in the General Directorate of Public Security.

32 Constitutional Council Decision No. 1 of 31/1/2002.

the state from religion while guaranteeing the autonomy of religious sects in managing their own affairs and religious interests. It also endorsed the principles of legislative sovereignty and a deputy's representation of the entire nation, drawing the boundaries of the autonomy of the sects. It affirmed that Parliament has a right to legislate regarding the organization of the affairs of the sects, considering its sovereignty and its general legislative mandate, within the limits set by the constitution, and without infringing on the autonomy of the sects, or replacing them, in the management of their own affairs.[33] It considered the state's right to legislate a sovereign right deriving from the people and applied by the state through its constitutional institutions on its territories and their residents. It limited legislative power to Parliament in many of its decisions, considering that it is a true and absolute power attributed by the constitution to a single body – Parliament – as per Article 16 of the constitution.[34]

As such, the Constitutional Council put a clear end to the sects' tendency to encroach on the powers of the state, recalling Parliament's sovereignty and general legislative mandate, even with regard to personal status affairs, while setting regulations to maintain a certain balance between the competences of the state on the one hand, and its obligation to respect the rights of the religious sects on the other, which are also guaranteed by the constitution.

All these pillars and constitutional principles that are stipulated in the Lebanese Constitution, and have been further consolidated by the Constitutional Council, form the pillars and components upon which the rule of law is built. In addition, the constitution defined a number of principles and key objectives that can be drawn from the preamble that was added in 1990 and other constitutional articles that could further reinforce the rule of law in the future.

B. Future Constitutional Objectives and their Potential to Reinforce the Rule of Law

The Lebanese Constitution carries in its fold a future project reflected in the objective stipulated by Paragraph (H) of the preamble (the abolition of political sectarianism) and Articles 22, 24, and 95 of the constitution (1). It also

[33] Constitutional Council Decision No. 2 of 8/6/2000 stating: "Whereas the state's right to legislate is a sovereign right drawn from the people and applied by the state through its constitutional institutions on its territories and their residents. And whereas legislative power is a true and absolute power limited by the Constitution to a single body, Parliament (Article 16 of the Constitution). And whereas Parliament has the right to legislate regarding the organization of the affairs of the sects, considering its sovereignty and its right to a general legislative mandate, within the limits set by the constitution, and without infringing on the autonomy of the sects, or replacing them, in the management of their own affairs." Similarly, Decision No. 1 of 1/2/2000 and Decision No. 1 of 31/1/2002, stating: "Whereas the Constitutional Council had also previously decided that Parliament enjoys a general legislative mandate as per Article 16 of the constitution, which means that its jurisdiction is not limited to the matters explicitly set by the constitution, but that it has the right to legislate in terms of any subject it wants through a law issued by its members, on the condition that it is in compliance with the provisions of the constitution and the general principles of constitutional value, even if it the subject pertains to a regulatory matter, …."

[34] See Constitutional Council Decision No. 3/95 of 18/9/1995 (request to annul certain articles of Law No. 453 of 17/8/1995 amending some of the provisions of the law regulating the Sunni and Jaafari judiciary) and Decision No. 2/2000 of 8/6/2000 (request to stop the implementation and annul Law No. 208 of 26/5/2000 on the organization of the Unitarian Druze Community).

includes other social and economic objectives that are rarely mentioned, by guaranteeing social justice and balanced regional development as general principles that were transferred from the Taif Agreement to the preamble (2).

1. The Abolition of Political Sectarianism: A Realistic or Fictional Goal?

Paragraph (H) of the preamble states a main national objective, the abolition of political sectarianism, to be achieved according to a gradual plan. This objective is also included in Articles 22, 24, and 95 of the constitution. In parallel, the constitution reinforced the sectarian system of government, with Articles 24 and 95 stipulating the sectarian distribution of seats within Parliament, the government, and Grade One positions in the state or their equivalent, noting that it rendered this distribution exceptional and temporary. Despite the fact that the Taif Agreement set the abolition of political sectarianism as a main, national objective, to be achieved gradually, it did not specify a timeframe for the process. It also failed to address the personal status system which requires the establishment of a unified civil system for all Lebanese nationals, even if optional, in order to guarantee the freedom of belief and build a direct relationship between the state and its citizens in this regard.

In fact, it is evident that political practice has gone in an entirely opposite direction from the gradual plan stipulated by the constitution, further embedding the rules of sectarian distribution upon which the Lebanese system still stands on paper and in practice. Political sectarianism has been strengthened, while the country has failed to enter into a transitional phase towards the abolition of sectarianism, deemed a national priority by the constitution. This leads us to raise the question of whether the system based on political sectarianism is temporary and could therefore disintegrate or, whether, on the contrary, it is embedded and rooted in the Lebanese regime, in which case the French proverb applies: Only the provisional lasts.

In this context, we need to go back in time to 1926 to recall the reply of the Patriarch Elias Hoayek and the Synod of the Maronite Church to the sixth question posed by the drafting committee of the constitution at the time: "Should parliamentary representation be sectarian or not? And why?" To which the reply was: "The country comprises different sects. Not only are they different from one another in terms of religious belief, but also in social traditions, norms, ethics, and opinions. Electing on a sectarian basis allows for these sects to be represented to a certain extent in this council. They meet, unite, and each one of them compromises something in favour of a give and take dynamic, which gradually leads to unifying politics. Abolishing the sectarian basis at this time would end such balance and allow for one sect to outweigh the other, resulting in envy and hate. For this reason, we believe representation must be on a sectarian basis."[35] Patriarch Hoayek's answer so clearly echoes Article 95 of the constitution and the gradual plan mentioned therein to achieve the abolition of political sectarianism. Perhaps the wisdom of the Maronite bishops of the past could be an intimation that the time has not yet come and that cohesion and harmony between the various segments

[35] The Documents of Patriarch Elias Hoayek, Document 46 A, File 45 (mentioned in: Hobeika, "Greater Lebanon and the Philosophy of Harmonizing Differences").

of society must be reinforced with shared values and goals, set by those in charge of public affairs who must actually work on achieving them. This leads us to the other objectives set by the constitution.

2. Building Foundations Based on the Principles of Social Justice, Balanced Regional Development and Expanded Administrative Decentralization

The Lebanese Constitution includes an economic roadmap based on the principles of social justice and balanced regional development, in parallel with the principle of individual initiative and the right to private property, as well as a project for expanded decentralization, which was listed among the main reforms of the Taif Agreement.

A. An Economic Roadmap Based on Social Justice and Balanced Regional Development

Since the 1950s, the Lebanese system has been based on the idea of economic liberalism, as per Paragraph (F) of the preamble, which stipulates that "The economic system is liberal and guarantees individual initiative and private property." The severe financial and economic crisis of the past three years in Lebanon has certainly shown the limitations of this unrestrained, liberal economic model. It has also revealed a pressing need for state intervention in financial, economic, industrial, and other productive sectors to, at the very least, regulate them to forestall the risks resulting from favouring factional interests over public interest. It has uncovered the need to adapt the tax and fiscal policy and develop medium and long-term government development plans to encourage individual initiative and investments and promote the considerable capacities of the private sector. It has further revealed that intervention is necessary in vital sectors such as health, education, housing, transportation, and others to guarantee fundamental economic and social rights that ensure a decent life for the people in Lebanon. It is interesting to note that there are laws regulating rent for instance in countries that are considered models of liberalism, such as the United States, and particularly in New York among other states. Both the executive and legislative powers in Lebanon have failed to achieve, or even attempt to achieve, these objectives, which has led to an unprecedented economic, financial, and social crisis that is ongoing since 2019. These two authorities have exhibited remarkable inaction in developing public financial, social, and health plans and policies that can achieve social justice and balanced regional development, such as housing, which is an objective with a constitutional value, as ruled by the Constitutional Council in its Decision No. 6/2014,[36] as well as public transportation, pensions, and hospitalization, among others. The Constitutional Council's recent decision on the 2022 Budget Law and the two violations contained in it, reported by two of its members, have all indicated the gravity of the situation when the executive and legislative powers do not ensure the submission of the financial accounts for every year, contrary to Article 87 of the constitution. This has been happening since 2004 and it reflects a disregard for the simplest rules of credibility and transparency regulating financial laws.[37]

[36] Constitutional Council Decision No. 6 of 6/8/2014 (Rent Law).
[37] Constitutional Council Decision No. 1/2023 of 5/1/2023 (Law no. 10 of 15/11/2022: The 2022 Budget Law), published in the Official Gazette No. 49 of 15/11/2022.

This role of the state is consistent with the vision drawn up by the constituent authority in 1990, whereby the principles of social justice and balanced regional development[38] were erected as two pillars of the democratic system and the unity of Lebanon, alongside the rights of private property and individual initiative as constitutional principles. The Constitutional Council had already addressed the concepts of social justice and balanced regional development and linked them together in its Decision No. 6/2014 on the aforementioned Rent Law. It considered that "Democracy is not limited to political and civil rights and its realization also requires the realization of the economic and social rights of citizens," and that "the aim of balanced regional development is to achieve social justice and provide decent living conditions for all citizens." In this decision, the council highlighted the state's duty to provide housing, considering it an objective with a constitutional value.[39]

However, the 1990 Constitutional Amendments did not mention expanded administrative decentralization, which was listed among the necessary reforms of the Taif Agreement.

B. The Ambiguous Expanded Administrative Decentralization Project

The Taif Agreement mandated the adoption of expanded administrative decentralization across all smaller administrative units (districts and below) by electing a council for each district, chaired by a district administrative officer (*kaymakam*), to ensure local participation.[40] The idea of decentralization was thus linked to the concept of balanced regional development, as the agreement stipulates in the same paragraph the need to "adopt a comprehensive, unified development plan for the country, capable of developing Lebanese regions economically and socially."

The idea of administrative decentralization is not new and is currently being applied in Lebanon on a municipal level. However, the Taif Agreement affirmed in its articles on reform to an "expanded administrative decentralization" project. The term "expanded" is ambiguous. To some, it is aimed at expanding the scope of jurisdiction of the

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38 Paragraph (G) of the preamble stipulates: "The balanced development of regions at the cultural, social, and economic levels is a cornerstone of the unity of the state and the stability of its system". See also Constitutional Council Decision No. 6/2014 of 6/8/2014 (Rent Law).

39 The aforementioned Constitutional Council Decision No. 6/2014.

40 Paragraph (a) of Article 3 of the Taif Agreement stipulates the following:
"III. Other Reforms: A- Administrative Decentralization:
1. The State of Lebanon shall be a single and united state with a strong central authority.
2. The powers of the governors and district administrative officers shall be expanded and all state administrations shall be represented in the administrative provinces at the highest level possible so as to facilitate serving the citizens and meeting their needs locally.
3. The administrative division shall be recognized in a manner that emphasizes national fusion within the framework of preserving common coexistence and unity of the soil, people, and institutions.
4. Expanded administrative decentralization shall be adopted at the level of the smaller administrative units [district and smaller units] through the election of a council, headed by the district officer, in every district, to ensure local participation.
5. A comprehensive and unified development plan capable of developing the provinces economically and socially shall be adopted and the resources of the municipalities, unified municipalities, and municipal unions shall be reinforced with the necessary financial resources."

relevant local authorities, while to others it refers to the geographic dimension of decentralization, which should not exceed the boundaries of the district, to avoid the fragmentation and classification of local units on a sectarian basis. The latter interpretation seems more likely as it aligns with the idea of the unity of the territory and the people, which was certainly a concern in 1990.

In contrast, the idea of balanced regional development was not associated with administrative decentralization in the constitution, but with the concept of "the unity of the state and the stability of the system," considering balanced regional development a pillar of such unity and stability. The terms "administrative" or "financial" were not used in Paragraph (G) of the preamble, which refers to balanced development across regions at the "cultural," "social," and "economic" levels. It therefore becomes clear that the constituent authority was aware of the need to establish balanced development across the various Lebanese regions to achieve the desired unity, while avoiding the use of the term "administrative decentralization." The reason for not introducing decentralization by way of the 1990 Constitutional Amendments would seem to be a concern with promoting the unity of the people and of the state and its territories, and fear that the idea of expanded decentralization would be considered from a divisive perspective. It was thus left out of the constitution.[41] This was confirmed by a number of parliamentarians who participated in the drafting of the Taif Agreement and the subsequent 1990 Constitutional Amendments.

In all cases, the idea of expanded administrative decentralization has returned to the foreground recently and it is time to rediscuss this project seriously, especially that the recent crisis has made it clear that local authorities must assume greater responsibilities and exercise broader powers than those enjoyed by municipalities at present.

Conclusion

I conclude with a question: Does Lebanon still stand as a project for a state based on consensus power-sharing and coexistence?

The pillars and principles mentioned in the constitution and discussed in this paper constitute solid foundations for the rule of law, if only there were a political will for its establishment. It would be unfortunate for those gains and components to go to waste, should we fail to optimize and promote them to build the state we aspire to have: a unified state, capable of asserting its sovereignty over all its citizens, components, and territories, and of providing social and economic stability, as well as a decent life for its citizens. The question is whether the rule of law can be achieved by maintaining the sectarian foundations of the system of government while introducing appropriate corrective mechanisms, as proposed by theories based on consensus democracy, or by abolishing political

[41] One must recall the circumstances under which the Taif Agreement was adopted to end the war that had been raging in Lebanon since 1975, dividing the state, its territories, and its capital Beirut on a sectarian basis.

sectarianism, through the mechanisms stipulated by the constitution, or according to other formulas. Only the future can tell. However, any constitutional amendment would, without a doubt, require broad consensus, or even unanimity, among the ruling political powers. The constituent authority opted for a rigid constitution, rendering the amendment process complicated. In all cases, any serious constitutional amendment process must be widely participatory and transparent, extending beyond the active political powers to comprise all segments of society, including professional and trade unions, civil society organizations, and the wider public. These stakeholders must all be parties to the discussion on crucial matters for the constitution to represent a genuine social contract among all citizens, and to realize their hopes and dreams of a better future.

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The Effectiveness of Algeria's Constitutional Amendments

Dr. Zahia Aissa *

ABSTRACT

Constitutions are established on the basis of the different realities and circumstances that a country may experience. The nature of these circumstances varies from one country to another, including political, economic, social, security-related and other circumstances requiring necessary reforms that begin with a reconsideration of the content of the state's constitution.

Most Arab countries experienced major historical upheavals during the so-called Arab Spring ,which resulted in the need to adapt to new realities ,namely by introducing constitutional amendments to address them .Algeria experienced that period in a particular manner due to the different internal factors that led to constitutional reform.

This research paper sheds light on Algeria's constitutional amendments ,with a special focus on the 2016 constitutional amendments ,as well as the 2020 constitutional amendments ,given the qualitative changes they introduced ,be it at the formal level ,that is ,in terms of the division of topics in the constitution ,or at the substantive level.

Keywords: *constitutional amendment, constitutional institutions, organization of powers, Constitutional Court, Parliament.*

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CONTENTS

Introduction

A number of Arab countries experienced political transformations imposed by popular uprisings aimed at achieving decent life under a strong state endowed with robust institutions, a strong economy and security, with internal, regional, and international standing. Accordingly, these countries began to develop a strategy to overcome this major historical challenge by responding to popular aspirations through the adoption of deep political reforms.

Each of these countries introduced these reforms differently due to their specificities and the historical experiences their citizens went through, which gave some of them the ability to deal with political crises in a way that would avoid slipping away from the popular aspiration of building a strong country where justice, security and stability prevail. Algeria is one of these countries whose people acknowledged the need to cope with and overcome these crises with vigilance, given the difficult periods that the Algerian people have lived through when peacefully calling for change.

Since gaining its independence on 5 July 1962, the People's Democratic Republic of Algeria has known the following constitutions: the 1963 Constitution,[1] the 1976 Constitution,[2] the 1989 Constitution,[3] and the 1996 Constitution,[4] which was amended in 2002, 2008, 2016, and, most recently, in 2020. It is worth noting in this respect that the constitutional tendency is to consider that constitutional amendments submitted to a popular referendum produce a new constitution, whereas amendments submitted to a representative body, that is, parliament, are considered an amendment to the preceding constitution.

Compared to previous constitutions, the 1996 Constitution was characterized by a set of features that enhanced the process of building a state based on the rule of law. These include strengthening the principle of separation of powers and the promotion and development of political action by intorducing partisan pluralism. While the latter term appeared for the first time in the 1996 Constitution, it already featured in the 1989 Constitution in the form of associations of a political nature, the promotion of rights and freedoms, and the enshrinement of guarantees for the independence of the judiciary.

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1 Constitution of the Republic of Algeria (1963). The constitution was ratified by the National Assembly on 28 August 1963, submitted to referendum on 8 September 1963, and published in the Official Journal on 10 September 1963. Algeria's legal texts can be consulted on the website of the Official Journal: www.joradp.dz.

2 Presidential Decree No. 76-97 dated 30 Dhuhlqahdah 1396 corresponding to 22 November 1976 promulgating the Constitution of the People's Democratic Republic of Algeria, Official Journal, No. 94 of 2 Dhu al-Hijjah 1396 corresponding to 24 November 1976.

3 Presidential Decree No. 89-18 of 22 Rajab 1409 corresponding to 28 February 1989, relating to the publication of the text amending the constitution approved in the referendum of 23 February 1989, Official Journal of the Republic of Algeria, No. 9 of 23 Rajab 1409 corresponding to 1 March 1989.

4 Presidential Decree No. 96-438 of 26 Rajab 1417 corresponding to 7 December 1996, relating to the issuance of the text amending the constitution approved in the referendum of 28 November 1996, Official Journal of the Republic of Algeria, No. 76 of 27 Rajab 1417 corresponding to 8 December 1996.

Several amendments were made to the 1996 Constitution in two ways that were adopted and settled on in its successive amendments. Upon the President of the Republic's initiative, it is possible to amend the constitution either by submitting it to a popular referendum, or without doing so if it obtains the votes of three quarters of the members of the two chambers of Parliament.[5] The President of the Republic entrusted the final approval of the constitutional amendment to Parliament in the years 2002, 2008, and 2016,[6] whereas the 2020 constitutional amendment was submitted to a popular referendum.

Amendments to the 1996 Constitution began in 2002[7] by including Tamazight as a national language for the first time in Algeria. Then the 2008 amendment[8] introduced some changes regarding the organization of the executive authority and the possibility of re-electing the President of the Republic for an unlimited number of terms instead of only two, while also promoting women's political representation in elected councils. The 1996 Constitution was subjected to another amendment in 2016,[9] which amended and intorduced new provisions that we will outline in detail in this paper.

This research paper provides a comprehensive overview of the circumstances behind the 2016 draft constitution and the procedures followed in preparing it (I). It then considers its content and the novelties it introduced in response to popular demands (II), as well as its subsequent amendment in 2020 (III).

I. The Specificity of the 2016 Constitutional Amendment Initiative

Several Arab countries witnessed popular movements demanding deep political reforms, which led in some places to overthrowing the regimes in place. Those revolutions were referred to as the Arab Spring given the aspirations of the peoples for a politically and economically better tomorrow that guarantees the citizens of those countries a respectable and decent life, beginning in the Republic of Tunisia – the cradle of popular revolutions – and followed by the Arab Republic of Egypt and Libya.

Unlike the popular revolutions witnessed by those countries during the Arab Spring, change under the 2016 constitutional amendment in the Algerian Republic had a certain specificity. No revolution took place in Algeria

5 Articles 174, 175 and 176 of the Constitution of Algeria (1996) correspond to Articles 208, 209 and 210 of the 2016 constitutional amendment.

6 For more details in this regard see: Zahia Aissa, "An Analysis of the Opinions of the Constitutional Council Related to the Draft Laws Including Constitutional Amendments for the years 2002, 2008, and 2016," *Algerian Journal of Legal, Economic and Political Sciences* 53, no. 1 (2016): 109-119.

7 Law No. 02-03 dated 27 Muharram 1423 corresponding to 10 April 2002 amending the constitution, Official Journal of the Republic of Algeria, No. 25 of 1 Safar 1423 corresponding to 14 April 2002.

8 Law No. 08-19 of 17 Dhuhlqahdah 1429 corresponding to 15 November 2008, including the constitutional amendment, Official Journal of the Republic of Algeria, No. 63 of 18 Dhuhlqahdah 1429 corresponding to 16 November 2008.

9 Law No. 16-01 of 26 Jumada al-Awwal 1437 corresponding to 6 March 2016, including the constitutional amendment, Official Journal of the Republic of Algeria No. 14 of 27 Jumada al-Awwal 1437 corresponding to 7 March 2016.

during that period, given the Algerian people's past experience under a period that threatened the country's security and tought them to deal with political crises in a way that averts any security drawbacks that may adversely affect the country's stability. Accordingly, the grounds for the 2016 constitutional amendment (A), as well as the procedures followed in adopting it (B), will be outlined in this section.

A. Grounds for the 2016 Constitutional Amendment

The socio-economic and political crisis that began in 2011 constituted the key trigger for the adoption of constitutional amendments in response to popular demands. This took place in 2016, after the project was postponed several times. The 2016 constitutional amendment was characterized by the fact that it was based on a set of successive consultations during the years 2011, 2012, and 2014. It was preceded by the issuance of major organic laws in 2012 in support of political reforms, including the Electoral Law, the Law on Associations, the Law on Political Parties, and the law related to the enhancement of women's opportunities in representative institutions.

The distinctiveness of the 2016 constitutional amendment manifested itself through the involvement of various parties in the consultations on the draft constitutional amendment, including the political class, national experts and figures, as well as civil society representatives. This was preceded by a major debate in the political arena on the method to be followed in preparing the draft amendment to the constitution, which featured mixed opinions on whether or not to appoint a constituent body or assembly for that purpose. As per the statement issued by the Council of Ministers following its meeting on 2 May 2011, this was settled by the President of the Republic appointing a specialized committee that was tasked with developing a draft while taking into consideration the suggestions, proposals and consultations with political parties and national figures to incorporate political reforms into the constitution.[10]

The preparation of the 2016 draft constitutional amendment had a consensual character in that it expanded the scope of consultations through the participation of multiple parties, in a manner that was not common in previous amendments.[11] The specialized committee prepared the draft and submitted it to the President of the Republic.

B. Procedure for the Adoption of the 2016 Constitutional Amendment

The 2016 constitutional amendment was adopted in accordance with Chapter IV of the 1996 Constitution, which stipulates, in Article 174, that a constitutional revision may be decided on the initiative of both the President of the Republic and Parliament. Pursuant to Article 176, the President amended the constitution by submitting it to Parliament without subjecting it to a referendum. Indeed, the President was entitled to amend the constitution in two ways: either by submitting it or without submitting it to a popular referendum.

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10 Nafissa Bakhti, "The Content of the 2016 Constitutional Amendment in Algeria," *Journal of Research in Law and Political Science* 2, no. 4 (2016): 96.

11 Abbas Ammar, "Political Reforms Initiative," *Parliamentary Thought Journal* 27 (2011): 78.

Where no popular referendum is required, the institutions involved in the amendment procedure include the President, the Constitutional Council, and Parliament. In such case, the procedure can only be initiated by the President, who can directly promulgate the law pertaining to constitutional revision without submitting it to a popular referendum if it obtains the votes of three quarters of the members of the two chambers of the Parliament. However, this procedure needs to meet a set of conditions, mainly represented in the requirement of submitting the draft constitutional amendment to the Constitutional Council. The latter must issue a reasoned opinion regarding the amendment, in which it considers whether the draft amendment infringes on the general principles governing Algerian society, human and citizen's rights and freedoms, or whether it affects, in any way, the fundamental balance of powers and institutions. If the Constitutional Council determines that there is no violation of these provisions, the President may present the draft constitutional amendment to Parliament for its final approval without submitting it to a popular referendum.[12]

The 2016 constitutional amendment was adopted accordingly; the President sent the Constitutional Council a notification on 1 Rabih al-Thany 1437 corresponding to 11 January 2016, which was registered in the General Secretariat of the council on the same date under No. 16/01. The notifcation contained a justified opinion on the amendment of the preamble to the 1996 Constitution, seventy-five articles of it, in addition to thirty-seven repeated articles.[13] This highlights the size and importance of this amendment.

Following this notification, the Constitutional Council issued opinion No. 16/01/RTD/CC/ dated 18 Rabih al-Thani 1437 corresponding to 28 January 2016.[14] The two chambers of Parliament met on 7 February 2016 and approved the 2016 draft constitutional amendment, which obtained 499 votes in favour, two against, and 16 abstentions.[15] The constitutional amendment was then published in the Official Journal pursuant to Act No. 16-01 of 26 Jumada al-Ula 1437 corresponding to 6 March 2016, containing the constitutional amendment (Official Journal of the Republic of Algeria No. 14 of 27 Jumada al-Ula 1437 corresponding to 7 March 2016).

The final approval of the constitutional amendment by Parliament may have generated criticism for not constituting a direct expression of popular will, but it was voted on by the representatives of the people, whereby introducing

12 Corresponds to Article 210 of the 2016 constitutional amendment

13 It should be noted that the phrase "article...bis" was not mentioned when Law 16-01 containing the 2016 constitutional amendment was issued. Rather, Article 2 stipulated that the publication of this law should take place after coordinating and renumbering its articles in the Official Journal, thus dispensing with the phrase "bis", so that the text of the constitution is numbered on a regular basis from Article 1 to 218. This was a good choice, given that the number of repeated articles was considerable, and the constitution required structuring.

14 Opinion of the Constitutional Council No. 01/16/R T D/CC/ of 18 Rabih al-Thani 1437 corresponding to 28 January 2016, Official Journal, No. 6 of 24 Rabih al-Thani 1437 corresponding to 3 February 2016. For more details on the opinions of the Constitutional Council on the constitutional amendments for the years 2002, 2008, and 2016, see: Zahia Aissa, "An Analysis of the Opinions of the Constitutional Council".

15 Maamari Nasreddin, "An Analysis of the 2016 Constitutional Amendment," *Journal of Arts and Social Sciences* 17, no. 2 (2020): 85.

amendments through Parliament may be required in urgent cases. Indeed, such method helps avoid the lengthy procedures involved in scheduling a referendum and announcing its results, while also avoiding the mobilisation of costly human and material means for its organization.

Furthermore, the requirement for the Constitutional Council to issue an opinion to determine the admissibility of the content of the draft amendment in accordance with the constitution and in line with the main principles and foundations on which the state is based, constitutes a guarantee for the legitimacy of the amendment, given that the Constitutional Council is a key institution in the hierarchy of the state's constitutional institutions and its opinions are binding to everyone.

The chapter relating to constitutional amendment is one of the few chapters that remain unamended since the adoption of the 1996 Constitution, except for the fact that the 2020 amendment replaced the Constitutional Council with the Constitutional Court. It should also be noted that the principled actions of both the Constitutional Council and Parliament in the course of amending the constitution without a referendum, constitute the main factor in earning this method acceptance among popular circles.

II. The Effectiveness of the 2016 Constitutional Amendment

The 2016 constitutional amendment included a set of provisions whose importance manifests itself through the additions, amendments, or omissions contained therein on several issues, including those related to strengthening the rule of law and promoting citizens' rights and freedoms (A), as well as those related to constitutional institutions (B).

A. The Effectiveness of the Amendments Related to Strengthening the Rule of Law and Promoting Citizens' Rights and Freedoms

The 2016 constitutional amendment included a set of provisions aimed at consolidating the rule of law. The latter is mentioned in every section of the constitution, from its preamble to its four titles to its interim provisions.

Paragraph 9 of the preamble to the constitution emphasized the renunciation of violence and encouraged dialogue by stipulating that: "The Algerian people shall be determined to keep Algeria immune from sedition, violence and all forms of extremism by establishing their spiritual and civilisational values which call for dialogue, reconciliation and fraternity within the framework of respect for the constitution and the laws of the republic.»

One of the major changes introduced by this amendment to Title I regulating the general principles governing Algerian society, is the inclusion under Chapter I for the first time of the Amazigh language as an official language, as part of the national identity that the state seeks to promote by establishing bodies for this purpose.[16]

[16] Article 4 (1) of the 2016 constitutional amendment.

This amendment also purported to strengthen the rule of law by embodying the principle of separation of powers in Article 15, under the chapter regulating the functioning of the state. In order to reinforce democracy, the 2016 constitutional amendment established a fundamental principle, which is the principle of alternation of power at the highest level by imposing a two-term presidential limit and introducing an absolute and categorical prohibition to amend that limit by rendering the provision establishing it unamendable, unlike in past constitutions.[17] It should be noted that the 1996 Constitution stipulated a two-term presidential limit, while the 2008 constitutional amendment carried no term limit. However, the two-term limit was re-introduced in 2016 alongside the prohibition of amending it.

The 2016 constitutional amendment further expanded and promoted rights and freedoms, as new provisions were introduced, including with regard to political, social and economic rights, which are intended to guarantee a decent life for citizens.

Among those provisions was strengthening the democratic process, political freedom, transparency, justice, promoting parity between men and women in assuming jobs, freedom of opinion, freedom of expression, freedom of peaceful assembly, and freedom of the written, audiovisual and electronic press. Such freedoms are inscribed within the limits of not prejudicing the dignity, freedoms and rights of others, while ensuring that information, ideas, pictures and opinions are freely published within the framework of the law and respect for the nation's fundmentals and its religious, moral and cultural values. Furthermore, press misdemeanors may not be subject to a penalty of deprivation of liberty, which reinforces the constitutional protection of freedom of the press.[18]

Other rights that were not included in previous constitutions were further incorporated, including the guarantee of the acquisition and transmission of information, documents and statistics to citizens. The exercise of such right shall not infringe on the private life and the rights of others, and on the legitimate interests of businesses, as well as the requirements of national security.[19]

The constitutional amendment also enhanced important principles in the economic and social fields by protecting and developing the national economy through the establishment of freedom of trade and investment, consumer protection, equality in taxation, protection of private property, protection of water resources and agricultural lands, and through penalizing any breach that may affect the national economy such as tax evasion and illegal competition.[20] Concerning the social field and the protection of citizens, the constitutional amendment strengthened and affirmed their social status through the protection by the state of the family and the child and the provision of adequate living conditions through multiple rights, including the right to a healthy environment.[21]

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17 See Articles 88 and 212, last paragraph, of the 2016 constitutional amendment.
18 See Articles 34, 35, 36, 48, 49, and 50 of the 2016 constitutional amendment.
19 Article 51 of the 2016 constitutional amendment.
20 This protection is mentioned in several sections of the constitution, including the preamble and the chapter on public rights, freedoms, and duties. For more details, see Articles 8, 9, 18, 19, 20... of the 2016 constitutional amendment.
21 Articles 68, 72 and 73 of the 2016 constitutional amendment.

It should be noted that the most important constitutional guarantee contained in the 2016 constitutional amendment regarding the protection of rights and freedoms was incorporated into Article 188(1), which made it possible for the first time to notify the Constitutional Council of a plea of unconstitutionality pursuant to a referral by the Supreme Court or the Council of State when one of the parties in a trial claims before the court that the legislative provision upon which the issue of litigation relies may adversely affect the rights and freedoms guaranteed by the Constitution.[22]

B. The Effectiveness of the Amendments Related to the Regulation of Constitutional Institutions

The 2016 constitutional amendment addressed constitutional institutions by including new provisions regarding the regulation of powers (1). It also amended some provisions regarding oversight institutions and integrated new advisory bodies (2).

1. Changes to the Organization of Powers under the 2016 Constitutional Amendment

In order to enhance the status of the executive authority, new provisions were enacted regarding the conditions of eligibility for the Presidency of the Republic in Article 87, as follows: ensure that the candidate did not acquire a foreign nationality, certify the native Algerian nationality of the father and mother, prove the exclusive native Algerian nationality of the spouse, and justify a permanent residence only in Algeria for a minimum of ten years preceding the submission of the candidacy. These conditions of eligibility for the Presidency are meant to demonstrate the candidate's patriotism and sense of belonging necessary to assume such task.

Additionally, to guarantee the principle of alternation of power, the presidential term shall be five years, and the President may only be re-elected once, with no possibility for said limitation to be amended under an unamendable provision.[23]

The reorganization of the executive authority through the 2016 constitutional amendment was characterized by the promotion of the status of the government through consultation with Parliament to appoint the Prime Minister, as well as the requirement for the government to present its action plan to Parliament for approval in order to carry out its functions. The amendment also enhanced the status of the Prime Minister in the executive field by conferring upon them the right to sign executive decrees without the approval of the President.[24] This differed from the previous constitutional amendment of 2008, which required the President of the Republic to outline their programme, while further requiring their approval to sign executive decrees.

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22 This possibility gives citizens indirect induvial access the Constitutional Council to plead the unconstitutionality of laws that affect their rights and freedoms.

23 Articles 87, 88, and 212, last paragraph of the 2016 constitutional amendment.

24 Articles 91(5) and 99 (4).

Regarding the legislative authority, it can be noted that the 2016 constitutional amendment sought to upgrade the status of this authority and frame its political action. In this regard, two important articles must be mentioned.

Firstly, Article 114, which confirms the status of the opposition in parliament by stipulating that: "The parliamentary opposition shall have rights enabling effective participation in parliamentary activities and in political life, including:

1. The freedom of opinion, expression and assembly;
2. The benefit of financial aid granted to the elected members of Parliament;
3. The effective participation in legislative activities;
4. The effective participation in monitoring the Government's action;
5. An appropriate representation in the organs of both Chambers of Parliament;
6. The referral to the Constitutional Council in accordance with the provisions of Article 187 (paragraphs 2 and 3) of the Constitution, concerning the laws passed by Parliament.»

Secondly, Article 117, which prohibits elected members of the People's National Assembly or the Council of the Nation affiliated to a political party, to change their political affiliation: Members who voluntarily change the affiliation on the basis of which they were elected, shall forfeit their electoral mandate as of right. The legislator did well in moralizing political action. These articles are major guarantees in the opposition's exercise of its legislative function.

The status of Parliament was further reiforced by restricting the ability of the President to legislate through decrees to urgent matters only, in accordance with Article 142. Moreover, according to Article 187(2), referral was extended to fifty deputies and thirty members of the Council of the Nation.

It is clear from the above that the constitutional amendment sought to strengthen the position of the executive and legislative authorities in a manner consistent with the political process during that period.

It remains that, in many cases, the legal texts are formulated in a way that seeks to achieve the goals with which the amendments were adopted. However, it is practice alone that can prove the effectiveness of said amendments. With regard to the legislative authority, its performance still fails to meet the desired aspirations. This is due to the poor performance of the political class on the ground through the limited action of political parties. Such action is limited for two reasons, the first being the large number of parties competing for power,[25] and the relative effort they put into seeking to effectively implement the programmes on the basis of which they are elected.

[25] This is confirmed by the professionalism of political action in some countries where political competition is limited to three or four political parties.

2. Changes to the Organization of Oversight Institutions and Advisory Bodies under the 2016 Constitutional Amendment

The most notable change introduced by the 2016 constitutional amendment concerning oversight institutions is the enhancement of the status of the Constitutional Council by expanding its composition, membership conditions, and term of office, and introducing the constitutional oath.

The number of Constitutional Council members was increased from 9 to 12 members, through which the constitutional, executive, legislative and judicial authorities were equally represented, with four members each. In terms of age, it was set at forty upon appointment or election day, for the wisdom and pride that this age entails, especially that the revelation descended upon the Prophet Muhammad at the age of forty. This is also the age of candidacy for the Presidency of the Republic, which is related to the presidency of the state on the part of the President of the Constitutional Council in the event that both the position of the President of the Republic and the President of the Council of the Nation become vacant. It is logical for the age required for the position of interim head of state to correspond to the age required for the President of the Republic.

The relevance of this amendment was also evident in terms of the requirement to have a professional experience of at least fifteen years in higher education in legal sciences or in the judiciary, or as a lawyer before the Supreme Court, at the Council of State, or in a high position in the state, for membership in the Constitutional Council, as well as in terms of establishing jurisdictional immunity in criminal matters for members of the council, and by extending their term to eight years. All these fundamental amendments reinforce the status and work of the Constitutional Council and ensure that it issues quality opinions and decisions that reflect the status it enjoys in the constitution.[26]

In order to guarantee the integrity of the elections, the 2016 constitutional amendment established, under Article 194, the High Authority for Election Monitoring, tasked with ensuring the transparency of the presidential, legislative and local elections, as well as referendums. It weas also tasked with ensuring the supervision of the revision of the voting lists by the administration, the preparation of recommendations to govern the electoral process, in addition to the organization of civil training courses for the benefit of the political parties on the monitoring of elections and the filing of appeals.

In the field of advisory institutions, the 2016 constitutional amendment integrated several new institutions, including the National Council of Human Rights, the High Council of Youth, the National Organ for the Prevention and Fight against Corruption, and the National Council for Scientic Research and Technology. The Social and Economic National Council was also constitutionalized.[27]

[26] Articles 183-185 of the 2016 constitutional amendment.
[27] Articles 198-207 of the 2016 constitutional amendment.

Based on the above, it is evident that the legislator sought, through the new provisions contained in the 2016 constitutional amendment, to support building the state based on the rule of law with the aim of meeting popular demands. However, in many cases, the effectiveness of these amendments on the ground is questioned. It is clear that the matter is not limited to the quality of legal texts, as these may be of excellent quality. Rather, their effectiveness can only be guaranteed through implementation. We believe that successful implementation is everyone's responsibility. No country can succeed in its political reforms without the involvement of all parties: the government, the people, individuals, bodies and institutions. Civil society may play a major role in raising political, cultural and security awareness in this regard, while political parties and associations, considered close to citizens, may be the real key to raise awareness and prioritize national interests over individual interests. Th lack of effective implementation led the people to call for the continuation of the reform process to embody the popular demands made in 2019.

III. The Impact of the Authentic Popular Movement on the Adotpion of Additional Constitutional Amendments

The outbreak of the peaceful popular movement witnessed by Algeria on 22 February 2019, through the authentic Hirak movement, gave a lesson to all peoples in the maturity and awareness of the proud Algerian people who called for change in an unprecedented civilized and peaceful manner, proving their high morals. In view of their demands to strengthen the rule of law, it was necessary to amend the constitution. The constitutional amendment was introduced on the initiative of the President of the Republic and adopted after being submitted to a popular referendum in accordance with Articles 8, 91(6), and 208 (3) of the 2016 Constitution.

The referendum on the constitutional amendment took place on Sunday, 1 November 2020 by virtue of Presidential Decree No. 20-251[28] dated 15 September 2020, including the call of the Electoral Commission for the referendum related to the constitutional amendment. The constitution was promulgated by Presidential Decree No. 20-442 of 30 December 2020,[29] introducing new developments, both in terms of structure (A) and content (B).

A. The New Structure Introduced by the 2020 Constitutional Amendment

The 2020 constitutional amendment included the preamble, which is an integral part of the constitution, as per its last paragraph.[30] It is considered a key entry point into the constitution, with its reference to important historical

[28] Presidential Decree No. 20-251 of 27 Muharram 1442 corresponding to 15 September 2020, including the call of the electoral commission for a referendum in the constitutional amendment, Official Journal of the Algerian Republic No. 54 of 28 Muharram1442 corresponding to 16 September 2020.

[29] Presidential Decree No. 20-442 of 15 Jumada al-Awwal 1442 corresponding to 30 December 2020, concerning the issuance of the constitutional amendment, ratified in the referendum of 1 November 2020, in the Official Journal of the People's Democratic Republic of Algeria, Official Journal No. 82 of 15 Jumada al-Awwal 1442 corresponding to 30 December 2020.

[30] Paragraph 27 of the preamble to the 2020 constitutional amendment.

milestones that Algeria has experienced. It also included the aspirations of the Algerian people and the foundations upon which the People's Democratic Republic of Algeria is based.

The 2020 constitutional amendment included six titles, unlike the 2016 constitutional amendment, which only had four. This new division was adopted to further detail some of the contents of the constitution previously included in unified titles. It was decided that dedicating separate titles to some of these contents was necessary due to their importance. Accordingly, the titles of the 2020 constitutional amendment were detailed as follows: Title I on the general principles governing Algerian society – maintained by the majority of the constitutions of the republic. Under the 2020 constitutional amendment, it contained only three chapters through which it organized Algeria, the people, and the state.

Title II regulating fundamental rights, public freedoms and duties is a new title in terms of the formal division of the constitution, as the rights and freedoms in previous constitutions were included in Title I on the general principles governing Algerian society. Under the 2020 amendment, it is contained in a separate title, which is divided into two chapters: Chapter I relating to fundamental rights and public freedoms and Chapter II relating to duties.[31]

Title III of the constitution deals with the organization and separation of powers. It should be noted that the term "separation of powers" was added to the constitution with this amendment.[32] The terms executive, legislative, and judicial authority in the headings of its chapters were replaced by the following institutions: the President of the Republic in Chapter I,[33] the government in Chapter II (which is a new chapter given that the government was included in all previous constitutions in the chapter on the executive authority), Parliament in Chapter III, and the judiciary in Chapter IV.[34]

In order to emphasize the new structure of the 2020 constitutional amendment,[35] Title IV regulating oversight institutions from Articles 184 to 205 was added and divided into four chapters. Chapter I included the Constitutional Court, which is considered the main achievement brought by the 2020 constitutional amendment, Chapter II contained the Accountability Council, Chapter III contained the independent National Independent Election Authority, which was constitutionalized by virtue of this amendment, and Chapter IV included the national High

31 This title extends from Article 34 to Article 83 of the constitution. Regarding the protection of rights and freedoms in the Algerian Constitution, see: Kamal Fneish, "The Role of the Algerian Constitutional Council in Guaranteeing the Rights and Freedoms of Citizens," *Journal of the Constitutional Council* 15 (2020): 11-23.

32 Title III extends from Article 84 to Article 183.

33 This chapter contains Articles 84-102. It includes a sub-heading related to exceptional circumstances.

34 The government is regulated in Articles 103-113, and Parliament in Articles 114-162, at an average of 49 articles. This chapter entails the largest number of articles in Title III, which highlights the importance of the Parliament within the constitution. A sub-heading related to the Supreme Court of the State was included in Chapter IV relating to the judiciary, and the judiciary-related chapter was regulated in the 2020 amendment in Articles 163-183.

35 It should be noted that Titles IV and V were merged into one title in the 2016 constitutional amendment regulating oversight and advisory bodies, which explains the doubled number of titles of the 2020 constitutional amendment.

Authority for the Prevention and Fight against Corruption, which was upgraded from an advisory institution[36] to an oversight institution due to the importance and specificity of its competence.

Title V of the Constitution covered advisory bodies, which were detailed in the form of sub-headings, unlike the previous titles, which were divided into chapters. These sub-headings included important advisory bodies; some were present in the previous constitutional revision, some existed and were amended, and some were established for the first time, which is a major gain brought about with this amendment. These bodies are, respectively, the High Islamic Council, the High Council for Security, the National Economic, Social and Environmental Council (the environment was added to this council in this amendment), the National Council for Human Rights, the National Observatory of Civil Society (which is the largest gain in the 2020 constitutional amendment in the field of advisory bodies), the High Council of Youth, the National Council for Scientific Research and Technology, and finally the Algerian Academy of Sciences and Technologies, a new body that highlights the importance attached by the legislator to scientific research.[37]

Title VI is the last title of the 2020 constitutional amendment before the interim provisions. It included provisions on constitution amendment and its procedures, as well as unamendable provisions. The content of this title remained intact, with the exception of the replacement of the Constitutional Council with the Constitutional Court, and the incorporation of a number of unamendable matters (integrating among others the prohibition of undermining the Republican character of the state, Tamazight as a national and official language, the national flag and national anthem as symbols of the glorious revolution of November 1954 , the republic and the nation, and finally the prohibition against holding more than two consecutive or discontinuous presidential terms of five years each).[38]

The 2020 Constitution concludes with interim provisions (Articles 224 and 225), to the effect that institutions and bodies whose legal system has been amended, changed or abolished shall continue to perform their functions until they are replaced by new institutions and bodies within a maximum period of one year from the date of publication of the constitution in the Official Journal. Laws that must be amended or abolished in accordance with the provisions of the 2020 Constitution shall also remain in force until new laws are enacted or amended within a reasonable period. These interim provisions can be deemed to have been well drafted, whether in determining the period for the establishment of new bodies as not exceeding one year from the date of publication of the constitution in the Official Journal, which is a reasonable timeframe, or by not specifying a timeframe while emphasizing a reasonable period for the laws that require amending or abolishing, as the amendment and reformulation of laws requires lengthy procedures.

36 This institution was mentioned in Title III of the 2016 constitutional amendment under Articles 202 and 203 of Chapter III regulating advisory institutions under the name of the National Organ for the Prevention and Fight against Corruption.
37 These bodies are regulated in Articles 206- 218 of the 2020 Constitution.
38 This title contains Articles 219- 223 of the 2020 Constitution.

B. Substantive Changes under the 2020 Constitutional Amendment

The 2020 constitutional amendment included several provisions aimed at building and strengthening the rule of law, which was as a fundamental demand raised by the original Popular Hirak on 22 February 2019. These provisions can be found in multiple parts including the preamble, as well as the titles on strengthening the principles governing Algerian society, promoting rights and freedoms (1), organizing authorities, and strengthening government institutions through the establishment of new oversight institutions and advisory bodies in support of the establishment of a state based on the rule of law (2).

1. Key Constitutional Principles under the 2020 Constitutional Amendment

These principles were reinforced in Title I on the general principles governing Algerian society, as well as Title II on fundamental rights, public freedoms, and duties. The constitution proudly acknowledged the Algerian people's historical commitment to reflecting its roots through noble values that call for freedom, unity, progress and the building of a strong, democratic and prosperous state. The Algerian Constitution opens with the greatest sentence: "The Algerian people are a free people; and they are resolved to remain so." This was proven through all the sacrifices the Algerian people made to earn their freedom and independence from their brutal colonizers, thanks to the Glorious Revolution of 1 November 1954, which is a historical milestone highlighted in the preamble of the constitution.

To do justice to the sacrifices of this people through the authentic popular Hirak that called for change, the movement of 22 February 2019 had to be immortalized and highlighted in the preamble, recognizing it as a distinct historical milestone that proved the awareness, maturity, and high morals of the Algerian people.

The preamble also stressed the need to involve citizens and civil society, including the Algerian community residing abroad, in managing the public affairs of the state, strengthening national bonds, guaranteeing democratic freedoms for citizens, combating all forms of corruption, building a state based on the principle of separation and balance of powers, the independence of the judicial system, legal protection, the accountability of public authorities, and the guarantee of legal and democratic security.

On the international level, Algeria is proud of its identity, which is Islamic, Arab, Amazigh, African and Mediterranean. The country is committed to preserving peace, respecting human rights and working on development. Its foreign policy aims at strengthening its presence and influence in forums of nations through partnerships based on mutual interests and fully consistent with its national political, economic, social and cultural choices, while respecting the goals and principles of the United Nations, the African Union and the League of Arab States. Perhaps the most significant characteristic of the 2020 amendment at the international level was Algeria's possible participation in peacekeeping operations within the framework of the United Nations, the African Union, and the Arab League, and in full compliance with their principles and goals.[39]

[39] Article 31(3) of the 2020 Constitution.

The 2020 Constitution was characterized by the promotion and protection of citizens' fundamental rights and public freedoms; this was reflected in Article 34 which, unlike other articles, was included at the beginning of Chapter I on fundamental rights and public freedoms under Title II, to emphasize first all the authorities and bodies' obligations in terms of fundamental rights and public freedoms, as stipulated in its first paragraph: "Constitutional provisions regarding fundamental rights, public freedoms and guarantees apply to all public authorities and institutions." This is a significant constitutional guarantee for the protection of rights and freedoms. The same article restricts fundamental rights and public freedoms for logical reasons mentioned in the second paragraph: "Any restriction of rights, freedoms and guarantees may only be imposed by legislation and for reasons related to maintaining public order and security, as well as those necessary to vouchsafe other rights and freedoms protected by the constitution."

This limitation was linked to the condition that these restrictions do not prejudice the essence of rights and freedoms, according to the third paragraph 3 of Article 34: "In all cases, these restrictions shall not prejudice the essence of these rights and freedoms." The article stipulated also a basic guarantee in the field of rights and freedoms, which is the state's obligation to guarantee legal security in implementing legislation relating to rights and freedoms by ensuring the readability, accessibility and stability of legal texts.

On the one hand, including this article at the beginning of the title on fundamental rights and public freedoms guarantees their protection. On the other hand, by restricting them, the article guarantees the continuity of the state that is above these rights and freedoms in some cases, as well as the interpretation that some rights and freedoms may be given and the difficulty of keeping it in accordance with the specificity of the Algerian state and its society.

Among the benefits of the constitutional amendment that included revising or adding numerous rights and freedoms, were the protection of the national economy while achieving social and economic balance, the protection of the environment, fighting corruption, the protection of private life and honor, consumer protection, freedom of expression, the right to education, the right to establish political parties and trade union right among others. Substantial additions were also made in various areas, including the guarantee of freedom of assembly and freedom of peaceful demonstration, and the right to establish associations. These rights are exercised by simply declaring them, and associations are not dissolved except by virtue of a judicial decision. Details were added on the content related to the freedom of the press, and perhaps the most important thing mentioned in it was the prohibition of publishing discrimination and hate speech, which, in our opinion, could have been generalized to include all individuals and institutions, not just all types of press. The constitutional amendment also forbade the interruption of journalistic activity except by virtue of a judicial decision. Consumer protection was also detailed, ensuring the neutrality of educational institutions and preserving their educational and scientific character, in order to protect them from any political or ideological influence. Additional new provisions included stipulating that "any person arrested must be informed of the reasons for their arrest" and that "medical examination shall be mandatory for minors" when the term of custody expires.[40]

[40] See, for example, Articles 21, 24, 26, 27, and in terms of rights and freedoms Article s 34, 37, 38, 44, 45, 47, 50, 51, 52, 53, 54, 55, 57, 62, 65 69... of the 2020 Constitution.

Among the most important improvements of the 2020 constitutional amendment in terms of fundamental rights and public freedoms is the strengthening of the state's protection of women from all forms of violence in all places and situations in the public, professional, and private spheres. It also guaranteed victims' access to shelter and care facilities, appropriate appeal methods, and legal assistance.[41] This addition deserves appreciation and respect for surrounding women with protection in all circumstances, whether they are staying at home or working, and regardless of their social or political status.[42]

In order to enhance the government's proximity to citizens in managing their affairs and protecting their rights, Article 77 stipulated: "All citizens have the right to present to the administration, individually or collectively, petitions in order to present questions of general interest or infringements to their fundamental rights. The concerned administration must inform the petitioners, within a reasonable time period, of the response committed to their demands."

2. The Status of Constitutional Institutions under the 2020 Constitutional Amendment

The 2020 constitutional amendment included new provisions regarding the organization of power. Concerning the requirements of the candidates to the Presidency of the Republic, the amendment stated that the candidate shall be at least 40 years of age on the day of submission of their candidacy request, not on election day. Some provisions that were stipulated in previous election laws were also added to the constitution, mainly relating to giving proof of the fulfilment of the military service or of any other legal motive of its non-fulfilment. We believe that including this requirement in the constitution was necessary; in fact, we consider that fulfilling the military service is an essential condition for assuming the role of President of the Republic so that the person in this position is at least aware of the fundamentals of defending the homeland and the integrity of the national territory.[43]

In addition to that, as previously mentioned, the presidential mandate was limited to two mandates (five years each); it was made clear that the two terms could be consecutive or discontinuous, and that in the case of interruption of the mandate for cause of resignation of the President of the Republic in exercise, that mandate would be considered completed.[44] There was no consensus on whether or not to limit the mandate, due to the fact that the authority that determines the mandates of the President of the Republic is the people; it is up to them to choose to renew or not the President's mandate in the elections, given that the main condition for staying in power is competence in the broadest sense.

41 Article 40 of the 2020 Constitution.

42 See: Ghanem Ahsan, "Women's Political Rights in Arab Maghreb Countries – A Comparative Study," (thesis submitted for a PhD degree in Public Law, Faculty of Law, University of Algiers 1, 2019-2020).

43 It should be noted that the Military Service Law is applicable to both men and women, as it addresses the citizens concerned with the service without discrimination. In practice, however, it is compulsory for men, whereas women have not joined it yet.

44 Article 88 of the 2020 Constitution. The President of the Republic cannot remain in their position for more than two mandates of five years each, as per Article 223(10), which lists the matters that cannot be amended.

Among the changes brought by the 2020 constitutional amendment regarding the Presidency of the Republic is that when the President of the Republic, because of a serious and lasting illness, is totally unable to perform their functions, the Constitutional Court shall propose to Parliament, by a three-fourths majority of its members, to declare the state of impediment,[45] contrary to what was in force in 2016, which was that the Constitutional Council had to propose to Parliament to declare the state of impediment on a unanimous basis. Perhaps the most important point mentioned in this regard in Article 94(1) of the 2020 Constitutional Amendment, is the addition of the sentence "The Constitutional Court shall meet by force of law and without a deadline." If it is impossible for the President of the Republic to exercise their duties due to a serious and chronic reason, the Constitutional Court might raise this situation with full responsibility and independence.

One of the improvements of the 2020 constitutional amendment regarding the exercise of the President of the Republic's powers in terms of legislating on urgent issues, is that the President must notify the Constitutional Court to look into the constitutionality of their decrees and decide on the matter within a maximum period of ten days.[46] This provision was very beneficial as it guaranteed compliance with the constitution. Additionally, under exceptional circumstances, the President of the Republic's declaration of the state of emergency and the state of siege was restricted to a maximum period of thirty days, and the state of exception to a maximum period of sixty days, with the possibility of extending it with the approval of the Parliament.[47] The time restriction and the involvement of Parliament in approving any extension were not included in previous constitutions; this strengthened Parliament's position under the constitution and created balance in the distribution of powers among the authorities.

As for the government's leadership, the constitution listed two possibilities: It is either held by a Prime Minister when a presidential majority results from the legislative elections, or by a Head of Government when a parliamentary majority results from the legislative elections.[48] Due to this differentiation, the applied programme will be the programme of the President in the event of appointing a Prime Minister, who makes their proposal for the government to the President and prepares an action plan to implement the presidential programme. In case of appointing a Head of Government, the applied programme is that of the parliamentary majority; the Head of Government undertakes the formation of their government and prepares the programme for the parliamentary majority. This distinction gives the parliamentary majority[49] the opportunity to prove itself.

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45 Article 94(1) of the 2020 Constitution.

46 Article 142(2) of the 2020 Constitution.

47 "The duration of the state of emergency or siege may only be prorogued after the approval of the majority of the members of Parliament, convened in a joint session of both chambers." (Article 97(2), and "The duration of the state of exception may only be prorogued after the approval of the majority of the members of the Parliament, convened in a joint session of both chambers (Article 98(5)).

48 Article 103 of the 2020 Constitution. Algeria has known the duality of executive authority since the 1988 amendment, which created the position of Head of Government alongside the President of the Republic. The Prime Minister's position was introduced by the 2008 constitutional amendment. Both positions were included in the 2020 Constitution, whereby the title to be adopted varies according to the results of the legislative elections.

49 Article 105 and Article 110(1) of the 2020 Constitution.

Concerning Parliament, Article 114 of the constitution stipulates: "The legislative power is exercised by a Parliament, composed of two chambers, the National People's Assembly and the Council of the Nation." Bicameralism was thus affirmed. The distinguishing feature of the 2020 amendment with regard to Parliament is that it limited the parliamentary mandate to only two consecutive or discontinuous terms.[50] This seems logical, given the broad range competencies within Algerian society that could be represented in Parliament. It also gives the opportunity for new members of political parties to become members of parliament.[51] Efforts to reinforce Parliament's status through this amendment were evident.

The 2020 constitutional amendment further strengthened oversight by creating new oversight institutions and upgrading advisory bodies to oversight institutions. Perhaps one of the most prominent new oversight institutions is the Constitutional Court, to which a separate chapter was allocated (Chapter I under Title IV concerning oversight institutions, Articles 185 to 198). The Constitutional Court is composed of 12 members: 4 designated by the President of the Republic including the President of the Court; 1 elected by the Supreme Court from among its members, 1 elected by the Council of State from among its members; 6 elected by suffrage from among the professors of constitutional law. The President of the Republic determines the conditions and modalities of election of these members.

According to Article 187, the elected or designated members of the Constitutional Court must be already 50 years of age on the day of their designation or of their election, enjoy a professional experience of at least 20 years in law and have followed a training in constitutional law, enjoy their civic and political rights and not have been convicted of a penalty involving the deprivation of liberty, nor belong to a political party. Article 108 also stipulates that the President of the Constitutional Court must fulfill the conditions stipulated in Article 87 (conditions to run for the Presidency of the Republic) of the constitution, except for age. We consider this logical, since the President of the Constitutional Court assumes the Presidency if the position of President of the Republic is vacant.

Unlike previous constitutions where the executive, the legislative and the judiciary authorities were represented in the formation of the Constitutional Council, the 2020 constitutional amendment did not include Parliament as a represented body in the Constitutional Court. Perhaps the objective was to limit the political nature of the court's membership, which was further reinforced through the the condition of non-adherence to a political party. Although the number of representatives of the judiciary was reduced from four to two members, the judiciary is actually represented in two ways: directly, through the election of two court members, and indirectly, through the role that the judiciary plays when a plea of unconstitutionality is made before it for referral to the Constitutional Court.

50 Article 121, last paragraph of the 2020 Constitution.

51 Before limiting the number of parliamentary mandates, the Algerian Parliament had witnessed the same persons from several political parties repeatedly running for elections and winning seats.

There were changes too to the composition of the Constitutional Court. For the first time in Algerian constitutional history, the constitution explicitly acknowledged the importance of the elite in the legal field, requiring that 6 members be elected from among the professors of constitutional law. Presidential Decree N° 21-304 of 25 Dhu al-Hijjah 1442 corresponding to 4 August 2021 was issued, specifying the conditions and modalities for electing professors of constitutional law as members of the Constitutional Court.[52] Article 3 of the allocated two seats for each of the Regional Conferences of Universities, the Center Conference (based at the the University of Algiers 1), the West Conference (based at the University of Oran 2), the East Conference (based at the University of Sétif 1).[53] The elections are organized under the supervision, management and control of a National Electoral Committee established at the level of the National Conference of Universities.

Article 9 of the decree stipulated the conditions for candidacy to the Constitutional Court, requiring the candidate to:

- be over 50 years old on election day,
- have the rank of professor,
- be a professor of constitutional law for at least 5 years and have scientific contributions in this field,
- be active in higher education institutions at the time of candidacy,
- have at least 20 years of experience in law in a higher education institution,
- enjoy full civil and political rights,
- not to have been convicted of a custodial penalty for a crime or offence and not have been rehabilitated, with the exception of unintentional offences, and
- not to be affiliated with a political party at least during the 3 years preceding the election.

With this decree, the President of the Constitutional Council issued Resolution No. 1 of 6 Muharram 1443 corresponding to 15 August 2021, that included the call for professor voters to elect professors of constitutional law as members of the Constitutional Court.[54] We believe that bringing in specialists in the field of constitutional law and under the above-mentioned conditions, will support the efficiency of the Constitutional Court in discharhing its mandate, while guaranteeing compliance with the constitution.

In addition to the changes brought to the composition of the Constitutional Court, its powers were expanded, including the power to determine the compatibility of laws and regulations with treaties. It was further stipulated that the authorities specified in Article 193 (the President of the Republic, the President of the Council of the Nation, the President of the People's National Assembly, the Prime Minister or the Head of Government, depending on the case, 40 deputies,

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52 Presidential Decree N° 21-304 of 25 Dhu al-Hijjah 1442 corresponding to 4 August 2021 was issued, specifying the conditions and modalities for electing professors of constitutional law as members of the Constitutional Court, Official Journal of the Republic of Algeria No. 60, 26 Dhu al-Hijjah 1442 corresponding to 5 August 2021.

53 See the annex to Presidential Decree 304-21.

54 Resolution No. 1 of 6 Muharram 1443 corresponding to 15 August 2021, that included the call of professor voters to elect professors of constitutional law as members of the Constitutional Court, Official Journal of the Republic of Algeria No. 63, 6 Muharram 1443 corresponding to 15 August 2021. According to this resolution, election day was set on 14 October 2021.

or 25 members of the Council of the Nation)[55] may notify the Constitutional Court of conflicts that may arise among the constitutional powers. These authorities may request the Constitutional Court to provide an interpretation of a constitutional provision or provisions, and the Constitutional Court shall issue an opinion in this regard.

In addition, the court's oversight is no longer limited to legislative text, but further include regulations, which is considered a significant gain in terms the guarantee of rights and freedoms. Concerning legislation on urgent issues, the 2020 constitutional amendment added the obligation for the President of the Republic to refer it to the Constitutional Court to determine its constitutionality. The court has to decide on the constitutionality within a maximum period of ten days; this in itself is considered an important gain that guarantees compliance with the constitution and the protection of fundamental rights and public freedoms.

Among the additions brought by the 2020 Constitution is the constitutionalization of the Independent National Authority of Elections,[56] the mandate of which is to prepare, organize, administer and supervise the presidential, legislative, and local elections as well as referendums. Among the most important functions of this authority is the registration of electoral lists and their revision, as well as the preparation of the electoral process,[57] voting, counting of votes and deciding on electoral disputes.

Ordinance No. 21-01 of 26 Rajab 1442, corresponding to 10 March 2021, on the organic law relating to the electoral system, determined the composition of this authority, which consists of a deliberative body represented by the Council of the Independent National Authority of Elections (consisting of 20 members appointed by the President of the Republic from among independent personalities, including 1 from the Algerian community established abroad), and an executive body represented by the head of the council of the authority. The authority also has extensions at the provincial and municipal levels and diplomatic and consular representations abroad. It is appointed for a six-year non-renewable term.[58]

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55 The number was reduced compared to the constitutional amendment of 2016, which, according to Article 187(2), required a minimum number of 50 deputies, or 30 members of the Council of the Nation to seize the council.

56 This authority was entrusted with the mission of organizing the 2019 presidential election before its constitutionalization in 2020, in the wake of the application of Article 102 of the 2016 constitutional amendment and the postponement of the organization of the presidential election to 18 April 2019, the termination of the duties of the head of the Independent High Commission for Election Monitoring by virtue of Presidential Decree No. 19-93 of 11 March 2019, and the repeal of all presidential decrees containing the appointment of members of the commission by virtue of Presidential Decree No. 19-94 of 11 March 2019. The Independent National Authority for Elections was created according to Organic Law No. 19-07 of 14 September 2019, which also resulted in the amendment of the electoral law according to Organic Law No. 08-19 of the same date. For more details about this authority, see: Faisal Dhaimi, "The Reform of the Electoral Legal System and its Role in Ensuring the Integrity of the Electoral Process" (thesis submitted for a PhD Degree in Constitutional Law, University of Algiers 1, 2019-2020).

57 These competencies were exercised by the administration represented by the Ministry of the Interior, and in this way the constitution has separated the administration from the elections to ensure greater integrity.

58 Ordinance No. 21-01 of 26 Rajab 1442 corresponding to 10 March 2021 on the Organic Law relating to the electoral system, Official Journal of the Republic of Algeria No. 17 of 26 Rajab 1442 corresponding to 10 March 2021. One of its distinguished features is that it brought together all the previous laws related to elections, namely Law No. 16-10 amended by Organic Law No. 19-07, the Organic Law on the Independent National Authority of Elections, and Organic Law No. 12-03 on ways to increase chances of access as representatives to elected assemblies. It also introduced, for legislative elections, the open list ballot with preferential voting and without panachage. This type of voting is one of the most important achievements of the new electoral law, which is a positive outcome of the 2020 Constitution.

In order to enhance oversight, an advisory body in the 2016 constitutional amendment was upgraded to an oversight institution in 2020, represented by the High Authority for Transparency and to Prevent and Combat Corruption. This new status is appropriate, as preventing and combating corruption falls more is more of a supervisory than an advisory function. Articles 204 and 205 of the constitution stipulated the role and functions of the High Authority for Transparency and to Prevent and Combat Corruption.

As for the constitutional advisory bodies, their role was reinforced through the creation of a very important observatory – the National Civil Society Observatory. Among the tasks assigned to this observatory, according to Article 213 of the constitution, is to present opinions and recommendations related to the concerns of civil society. It also contributes to promoting national values, democratic practice and citizenship, and participates with other institutions in achieving national development goals.

It was also decided that the National Economic, Social and Environmental Council had to look into issues in the environmental field in addition to all the other fields it operates in. Another body was created in the field of scientific research, the Algerian Academy for Science and Technology, which is an independent constitutional institution of a scientific and technological nature. This reflects the importance that the constitution grants to scientific research.[59]

The above shows the importance of institution building in the 2020 constitutional amendment, whereby institutions were reorganized and their powers redistributed, and the role of oversight institutions and advisory bodies was reinforced.

Conclusion

Important historical milestones constituted the decisive factor in the need to proceed with constitutional amendments in response to popular demands and to keep up with the developments that Algeria had witnessed, whether on the political, social or economic levels. The 2016 constitutional amendment addressed the organization of power and the protection and promotion of rights and freedoms. However, the people were not satisfied with these amendments and called for reforms at an important historical milestone in 2019, which led to the need to adopt additional constitutional amendments to responds to those demands.

This was done in 2020, through a constitutional amendment that affected the entire content of the constitution, from the preamble to the general principles governing Algerian society, to the organization and separation of powers, oversight institutions, advisory institutions, constitutional amendment and interim provisions.

[59] Articles 209, 210, and 211 of the 2020 Constitution.

Less than a year had passed since the issuance of this constitutional amendment, when the state proceeded to establish the new bodies introduced by the constitution. This can be considered a successful step, given that all the constitutional institutions were activated in pursuit of the goals set by the 2020 constitutional amendment.

Ultimately, the success of any project to build a state based on the rule of law and endowed with strong institutions depends on the concerted efforts of everyone to achieve this goal, including the state, the people, individuals, bodies and institutions, because this is everyone's responsibility. Achieving this goal depends on several principles and foundations, the most prominent of which would be achieving security at large, social solidarity, political maturity, awareness and scientific progress, citizenship and a sense of responsibility, and sustainable development. The fulfillment of these objectives is everyone's responsibility, because an integrated effort is needed from the authority and the people, which is not impossible for Algeria, a country based on strong institutions and rich in competencies that can be relied upon in all circumstances, to lead the beloved country to even more progress and prosperity.

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Syria: The Constitution of the "Crisis" or the Crisis of the Constitution?

Dr. Ibrahim Daraji *

ABSTRACT

The adoption of the Syrian Constitution of 2012 was a significant milestone in the trajectory of the Syrian crisis, which escalated into a multifaceted armed conflict of regional and international dimensions. It was viewed as a potentially important and influential step towards mitigating the profound deterioration that the country was experiencing at that time.

According to its supporters, the Syrian Constitution served its intended purpose by meeting popular demands and introducing radical amendments to the political system. It introduced political pluralism and, for the first time since the country's independence, established a mechanism for the direct election of the President by the people.

At the same time, the constitution faced significant criticism from its opponents, who argued that it did not adhere, either formally or procedurally, to the standards of transparency, popular participation and social inclusion that should be respected for any constitution to be deemed democratic. They also claimed that it did not bring anything new or different from what was already present in previous constitutions. Furthermore, they asserted that it failed to effectively implement the few new provisions it introduced, as subsequent constitutional, legislative, or practical measures rendered those new provisions devoid of substance, hindering their ability to bring about any meaningful change in the political landscape in Syria.

This paper seeks to address the above-mentioned political viewpoints surrounding the adoption of the Syrian Constitution from a constitutional perspective. It begins by analysing the circumstances under which the Syrian Constitution was adopted and the procedural mechanisms that were followed for its enactment. It then compares the provisions of the new constitution with those of the preceding constitution to determine the extent to which

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the former actually incorporated new constitutional provisions. Finally, it looks into the implementation of those new constitutional provisions, to determine the degree to which they have been effectively applied in practice, a full decade since the constitution came into effect.

The paper presents the contradictory viewpoints of both the supporters and opponents of the Syrian Government in a neutral manner. Regardless of the author's personal agreement or disagreement with these opinions, the goal is to provide the opportunity and space for the presentation and analysis of divergent perspectives in a calm manner. It is an attempt to foster a culture of "accepting differing opinions" despite not approving of them and regardless of one's stance, which is currently lacking in Syria across various domains, including the constitutional discourse. This has been the author's experience as a member of the Syrian Constitutional Committee representing the civil society bloc.

Keywords: *The Syrian Revolution, the constitutional crisis, public participation, implementing mechanisms, women's rights, new constitutional provisions, elections, constitutionality of laws.*

CONTENTS

INTRODUCTION

The constitution appears to be closely linked to all the crises that the Syrian State has experienced since its modern formation after separating from the Ottoman Empire following the Great Arab Revolt. Indeed, the majority of Syrian constitutions were drafted under extraordinary circumstances to address different crises faced by the nation – whether resulting from external occupation or internal coups d'état.

Modern Syrian history began with the collapse of the Ottoman Empire. On 2 July 1919, the Syrian Congress convened and adopted a resolution it addressed to the American Inquiry Commission. In it, it demanded that Syria's system of government be monarchical, civil, and parliamentary, that its provinces be governed on the basis of broad decentralization, and that the rights of its minorities be guaranteed. Then, on 6 March, the congress adopted a resolution to determine the state's form and establish a constitution. However, the Syrian Congress was unable to proceed with its mission, as Syria was placed under French Mandate. During that period, several constitutional projects were proposed, only some of which were implemented.

After gaining independence, the country entered a prolonged period of successive military coups, which had clear constitutional implications and repercussions. These coups resulted in the "suspension" of constitutional provisions on multiple occasions and the "tailoring" of constitutions to serve specific individuals or agendas.

Syrian constitutional history clearly reveals the extent of "military intervention," whether through direct coups or indirect rule through political and constitutional processes. It demonstrates that the Syrian State has a long history of "unlawful" interference of the military in constitutional and political matters. Such interference has sought to justify the unjustifiable and shape constitutional systems to fit the ruler's whims, preferences, and personality. Throughout its modern constitutional history, the country witnessed various constitutional projects, including the 1949 Constitution following Husni Al-Zaim's coup, the 1950 Constitution following Sami Al-Hinnawi's coup, and the 1953 Constitution following Adib Al-Shishakli's coup. In 1958, the governments of Egypt and Syria signed an agreement that lay the foundations of unity between the two countries, and Syria became subject to the Constitution of Unity. After the separation in 1961, the country adopted a new interim constitution, coinciding with the rise of the Arab Socialist Baath Party to power. This period witnessed the adoption of several constitutions that marked a new stage and a partial departure from the concept of Western public law towards socialist political systems. The country was successively governed by the 1964 Constitution, the 1969 Constitution, the 1971 Constitution, and the controversial 1973 Constitution (given the manner in which it was enacted, its espousal of the ideology of the ruling Baath Party, its violation of the principle of separation of powers, and its effective elimination of political life in Syria by installing the ruling Baath Party as the "leading party of the state and society"). Amending its provisions, whether wholly or partially, became one of the main demands of the popular protests that began in 2011.

The current Syrian Constitution, which was adopted in 2012, does not deviate from the intertwined relationship between the constitution and crises in Syria. Its enactment is closely linked to the events that have unfolded in the country since March 2011, when the protests began as a popular movement and quickly escalated into an armed conflict of regional and international dimensions. The repercussions of these events are still ongoing, even after over a decade has gone by since they began.

This paper analyses and assesses the Syrian Constitution that was adopted less than a year after the beginning of the protests in Syria, with the aim of addressing the crisis that the country was facing. Its purpose is to determine whether the new constitution served indeed as an instrument and means to resolve the Syrian crisis or if it constituted an additional factor complicating the crisis and pushing it towards the trajectory it followed after the constitution was adopted.

To attempt to answer this fundamental question and clarify whether the Syrian Constitution of 2012 served as a tool to resolve the Syrian crisis or as an additional factor complicating it, this paper will first delve into the circumstances and context in which that constitution was issued. It will then analyse its content and compare it to the preceding constitution. Lastly, it will examine the implementation of the new constitution and explore the reasons for its success or failure after more than a decade since its adoption.

This paper relies on a range of relevant sources from that time period, in addition to interviews conducted with individuals associated with and involved in that period. It seeks to offer a balanced presentation of various opinions and perspectives while conducting an objective critical evaluation of the events that took place at the time. The descriptive approach is followed to describe the events that occurred during that period to allow for a thorough analysis. The legal analytical approach is further employed to analyse different legal opinions and perspectives and evaluate them objectively.

I. Assessment of the Compliance of the Syrian Constitution of 2012 with the Principles of Legitimacy and Public Participation

For many decades and on a global scale, constitutions remained "elitist" documents issued by the governing authority for the people to comply with and submit to without any discussion or participation, and often without any public knowledge of the content of their rules and provisions.

This "top-down" approach to constitution-making conflicts with the very essence and purpose of a constitution, understood as a social contract that regulates the relationship between the components of the nation, as well as between the state and its citizens and residents.[1] As a result, subsequent political, democratic, and human rights

[1] Ibrahim Daraji, *Constitutional Options for Syria* (Beirut: ESCWA, 2017), 75.

developments broke with that approach, such that constitution-making ceased to be the prerogative of the ruler, or a task reserved for parliaments, constituent assemblies, constitutional jurists, or the state. Rather, the participation of various societal forces in constitution-making has become a reality imposed by an expanded understanding of the content and scope of the democratic rights of the people, as an international right recognized by international law, and an ethical duty for both citizens and state officials.[2]

In the following subsections, we will discuss the extent to which the drafting and adoption of the Syrian Constitution of 2012 took into account the principles of legitimacy and public participation.

A. The Establishment of the Committee for Drafting the Constitution

In response to the demands of the protesters (according to government supporters) or with the aim of circumventing those popular demands (according to its opponents' conviction), the President of the Republic issued Presidential Decree No. 33 on 15 October 2011, establishing the National Committee for Drafting a Constitution for the Syrian Arab Republic, in preparation for its approval in accordance with constitutional rules. The decree specified a period of four months from its issuance date for the committee to complete its work. The decree initially listed the names of 29 individuals, including only three women, but the number was later reduced to 28 due to the withdrawal of one of its members upon their appointment. Human rights lawyer Mazhar Al-Anbari was appointed as the chairman of the committee.

The criticism by the opposition and independent human rights organizations focused on the method of appointing the committee that drafted the constitution. According to their viewpoint:

> As a matter of principle, the constitution should have been drafted by an elected constituent assembly representing various political orientations, economic and social groups, and diverse segments of Syrian society. This would ensure that the constitution caters to the interests and aspirations of everyone. This assembly would lay the foundations of the constitutional project and then appoint a committee of experts, academics, and legal professionals to draft and prepare it. Subsequently, after a sufficient period of dialogue and discussion, it would be put to a popular referendum.[3]

However, this is not how the Syrian Constitution was drafted. It was drafted by a committee appointed by the President, consisting solely of loyalists, the majority of whom represented a single segment of society. Consequently, the opposition Coordination Body,[4] for example, considered the constitution to have been written "... without the participation of any of the numerous political forces in the country, except for the experienced followers of the regime in the Progressive National Front, and without the involvement of any nationally respected and trusted

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2 Yasmine Farouk Abou El-Enein and Nadia Abdel-Azim, *Participation and Building Community Consensus in the Constitution-making Process* (Cairo: Social Contract Center, 2013), 5.

3 Hussein Oueidat, "On the Syrian Constitutional Draft," *Al-Bayan*, 25 February 2012.

4 Coalition of nationalist, socialist and communist parties in Syria led by the Arab Socialist Baath Party.

public figure with a general human rights background."[5] However, there were some who were of the opinion that the committee did include certain individuals who were outside the official ruling system and some figures referred to at the time as the internal national opposition, specifically the "National Front for Change and Liberation," which formed an alliance between the People's Will Party and the Syrian National Socialist Party.

One of the appointed members of the committee tasked with drafting the constitution – human rights lawyer Abdulhay Al-Sayed – was of the former opinion. He submitted his resignation immediately upon his appointment to the committee. In a handwritten letter addressed to the committee's chairman, he stated, "I learned about my appointment as a member of the National Committee for Drafting the Constitution of the Syrian Arab Republic through the media," further adding, "Considering the importance of the constitution as a fundamental document that regulates public life in the country, especially at the current phase, as a legal professional, I believe that the optimal way to draft the constitution is through deliberation in a constituent assembly, as Syria has known in different constitutional periods. Based on this, I excuse myself from participating in its work."[6]

It is worth noting that there are other opinions sustaining that there are two globally accepted and practiced methods for drafting a constitution. The first method involves the election of a constituent assembly to draft the constitution. The second method involves the selection of legal experts to prepare the initial draft of the constitution, which is then submitted to a general referendum. According to this viewpoint, the first method is undoubtedly more democratic, but it is not necessarily the best, as the election of a constituent assembly may result in the formation of an assembly composed of individuals who are not legal experts and may be lacking in independence and objectivity, especially in developing countries where personal criteria may outweigh objective criteria. In contrast, the second method is less democratic but more effective in the Syrian context, particularly if the members of the drafting committee are renowned for their objectivity, independence, and legal expertise, provided that there is a public discussion of the constitutional provisions before they are put to a referendum.[7]

In summary, according to its critics, the constitution-making process was not based on transparent participation. It was based on a presidential decree that completely disregarded the existence of other social, political, trade union, and professional forces that have a role and interest in participating in the drafting of a genuine constitution that determines the state of the country as a whole, and not just the state of the ruling authority.

As for the supporters of the constitutional process as it was carried out, there is no official narrative justifying it. However, the monitoring and analysis of the official handling of how the committee was established and the announced positions of the participating entities in the constitution-making process indicate that "participation"

5 Statement issued by the National Coordination Body on the "referendum on the alleged new constitution," Executive Office, Damascus, 26 February 2012.

6 Letter submitted by human rights activist Abdulhay Al-Sayed to the President of the Constitution Drafting Committee, Mazhar Al-Anbari, two days after he was appointed a member of that committee.

7 Moussa Mitri, "Legal Observations on the Draft Constitution", *Baladuna*, 15 February 2012.

was considered to have been achieved. This is because the majority of the real stakeholders effectively participated in the process, as civil society "is not limited to non-governmental organizations and human rights groups alone." It also includes trade unions, professional associations, and political parties. All of these entities participated in the drafting committee, which included representatives of the ruling Baath Party and other allied parties within the Progressive National Front, as well as representatives of the Bar Association, Farmers' Union, Syrian Workers' Union, and the head of a civil society organization.[8]

This "quasi-official" narrative affirms that several criteria were considered in selecting and appointing the members of the drafting committee, including "expertise and pluralism." The committee included independent individuals as well as representatives of existing political parties and those allied with the ruling Baath Party. The fact that the majority of committee members were affiliated with the ruling Baath Party was deemed "natural and logical" due to the party's strength and widespread presence in the Syrian political arena.[9]

However, this opinion is contradicted by other human rights perspectives that assert that the constitution-making process was not participatory at all. They argue that it was carried out through a presidential decree without taking into consideration the existence of other social, political, union, or professional forces that have an interest in participating in the formulation of a genuine constitution that determines the overall state of the country and not just the state of the ruling authority.

Those opinions argue that civil society played no role, either in the drafting of the 2012 Constitution or of the preceding constitutions, due to the absence of a "real civil society in Syria over the past fifty years." This is attributed to the fact that "the Law on Associations in Syria prohibits and imposes restrictive and impossible security conditions on the establishment and formation of a genuine civil society, merely allowing for associations playing service, medical, and social roles linked to specific entities or religious institutions such as mosques or churches to exist."

This also applies to political parties, as their establishment was not permitted, and their existence limited to the ruling Baath Party, which was considered "the leader of the state and society," in addition to a restricted number of parties affiliated with it under the umbrella of the Progressive National Front.[10] Consequently, licensed political parties respond to specific criteria that are measured by the scale of power rather than the actual needs of civil society and the Syrian society as a whole. Therefore, one cannot speak of independent political parties with an agenda or programme that is independent of the "security apparatus."

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8 Association of Syrian Economists, represented by its president who previously held the positions of Minister of Planning and Minister of Higher Education in previous Baath Party governments.

9 Unpublished meeting between the author of this paper and some of the members of the 2012 Constitution Drafting Committee.

10 The formation of the Constitution Drafting Committee was preceded by the adoption of a new law for political parties in 2011, shortly after the beginning of the protests in Syria. However, the opposition considered that "the new parties that were subsequently licensed are mere façades and affiliated with the authorities, despite claiming to be independent".

As for the participation of lawyers, judges, and media professionals, the opposition holds that, while the Constitutional Drafting Committee included individuals exercising those professions, these were selected by the Executive rather than by the legal, judicial, or academic institutions. There was no "conviction, desire, or capability" on the part of these individuals to construct a truly participatory and democratic constitution. It should be noted that during the process of drafting the constitution, there was no communication with any opposition figures or independent individuals "operating outside the official governmental or security frameworks."

It should further be noted that various Syrian opposition factions had previously refused to participate in the Constitutional Drafting Committee upon its formation. From their perspective, the committee was carrying out its mission under extremely unfavourable and unhealthy conditions, amidst the remnants of thousands of victims, tens of thousands of detainees and displaced persons, and the presence of the army, armed forces, and security forces in the streets of Syrian villages, towns, and cities. They anticipated that the regime would insist on shaping the constitution according to its own interests.[11]

An objective evaluation of that period requires asking whether the **opposition could have possibly accepted, at that time, participation in the Constitutional Drafting Committee had it been invited to. It also requires assessing whether the opposition was right in boycotting the process and whether, had it participated in it, it would have been capable of bringing about real change in the constitution and the subsequent course of events.**

There is no definitive answer to these questions, given that during that period, in the fall of 2011, there was a significant division and hardening of positions on both sides. The authorities did not want to involve anyone in a meaningful and influential way, avoiding any real change, even at the level of the procedural mechanisms of the constitutional process. Some who claimed to represent the political opposition were unwilling to negotiate or engage in dialogue at that stage unless they were handed power outright. There was a conviction that the opposition would have rejected participation in the constitutional process if invited, due to the manner in which the Constitutional Committee was formed and the procedures followed in drafting and approving the constitution, as well as the violent response of the government to the popular protests. This leads us to emphasize that the matter would have required an environment and preparations that were not in place, alongside a trust-building climate that was absent then and continues to be absent in Syria today.

B. Assessment of the Extent of Social and Public Participation in the Drafting of the 2012 Constitution

As previously mentioned, even if governments resort to the option of "appointing" legal experts to draft the initial draft constitution before submitting it to a general referendum instead of "electing" a constituent assembly, this

[11] Oueidat, "On the Syrian Constitutional Draft."

requires, in addition to selecting, drafting committee members who are renowned for their objectivity, independence, and legal expertise, a public discussion of the constitutional provisions before they are put to a referendum.[12] This embodies the concept of "public participation" and transparency considerations in constitution-making. Unfortunately, these aspects were not taken into account in the drafting of the current Syrian Constitution.

Indeed, criticism of the 2012 Syrian constitution-making process has focused on the absolute absence of public participation and transparency. The process itself was conducted in secret and strict confidentiality, "despite the appointment of an official spokesperson for the committee." Additionally, there was no publication of the minutes of the meetings and discussions that were held by the drafting committee, either during the drafting phase or following the adoption of the constitution. Despite nearly a decade having passed since its adoption, "there has been no public debate on the constitution in the media, cultural institutions, universities, or other public forums to assess its merits and drawbacks before the public."[13] Contrary to the internationally adopted practices in constitution-making, which require subjecting the draft and its projects to discussions and dialogues conducted by media outlets, journalists, cultural forums, professional and labour unions, civil society organizations, and various relevant entities, the Syrian process did not follow these steps. There was no thorough study, dialogue, or public discussion that involved feedback from these various sectors. As a result, a clear understanding of the constitution and its content was not achieved among the electorate. This prevented the people from expressing their genuine opinions during the referendum, whether in favour or against, based on informed and objective assessments. Most, if not all, countries have adopted these contemporary phases and practices. However, in Syria, "according to its critics, the government limited itself to publishing the text of the constitution and promoting praise and accolades in favour of it, without providing an opportunity for comprehensive public engagement and scrutiny."[14]

In contrast, some parties involved in the constitution-making process believe that the standards of transparency and public participation were indeed met during that stage. They argue that:

> The referendum was accompanied by an extensive awareness-raising campaign and the active dissemination of information. However, it is acknowledged that not all Syrians had access to the information due to security and logistical reasons. Furthermore, there were individuals who were not directly involved or interested in the constitutional process. This observation aligns with a pre-existing phenomenon in Syria, characterized by a decline in public engagement and interest in public affairs and elections. In fact, voter turnout in some regions before the war did not exceed 5%.[15]

12 Mitri, "Legal Remarks on the Draft Constitution."
13 Statement issued by the National Coordination Body on the "referendum on the alleged new constitution."
14 Oueidat, "On the Syrian Constitutional Draft."
15 Unpublished meeting between the author of this paper and some of the members of the 2012 Constitution Drafting Committee.

At any rate, during that period, "general public sentiment" considered talk of "public participation" in 2012 "unrealistic," as no one was concerned with such participation. Rather, for the people, violence had already begun, and their focus was on how to stop or mitigate its risks.

C. The Adoption of the Constitution and Public Participation therein

The criticism directed at the 2012 Constitution was not only limited to how the drafting committee was established but also extended to the circumstances and timing of the "referendum" itself. After the committee completed the drafting of the new constitution and handed it over to the President, Presidential Decree No. 85 of 2012 was issued, setting Sunday, 26 February 2012 as the date for the referendum on the draft constitution of the Syrian Arab Republic.[16]

The opposition forces at that time rejected the official call for the constitution referendum, and similar calls were made by opposition forces and some civil society organizations, both inside and outside Syria, to boycott the referendum process. For example, the statement issued by the General Authority of the Syrian Revolution – Revolutionary Council on 25 February 2012, stressed that "the General Authority of the Syrian Revolution calls on the Syrian people to boycott the farce of the constitution referendum out of respect for their intelligence," and it urged citizens to "completely boycott and not go to the polling centres." Similarly, the Executive Office of the Syrian National Coordination Body for Democratic Change in Damascus issued a statement on 26 February 2012, regarding the referendum on the "alleged" new constitution, stating that "... the draft constitution is being put to a referendum while the country is boiling politically, explosions are occurring in many areas, tanks, armoured vehicles, and soldiers are deployed everywhere, and the sounds of bombs, shells, and machine guns overshadow any other sound in numerous cities, towns, and villages from Horan in the far south to Aleppo in the far north." The statement concluded that "the Syrian people ... are not concerned with the farce of the referendum on a supposed new constitution that will be nothing more than words that are not worth the ink they were written with."[17]

The opposing opinions concluded that "setting a date for the referendum while killings, arrests, and sieges of cities continue is a clear message that opinion will be under the dominance of cannons, bullets, the torture of detention, and the need to address basic human needs."[18]

16 The Ministry of the Interior indicated that the number of citizens eligible to vote, born on or before 1 January 1994, amounts to 14,589,945 citizens of both genders across various governorates. The ministry announced the allocation of 14,185 polling centers to conduct the voting process, urging citizens to exercise their right to vote at these centers.

17 Statement issued by the National Coordination Body on the "referendum on the alleged new constitution."

18 Anwar Al-Buni, "A Critical Reading of the New Syrian Draft Constitution," 9 September 2011.

However, the referendum on the new constitution took place on 26 February 2012, as scheduled, and at the end of that day, the Minister of the Interior announced that the percentage of those who approved the new constitution reached 89.4% of the total number of voters.[19] It is worth noting that the opposition, naturally, cast doubt on this percentage and pointed out that "all these numbers are certainly questionable as the opposition, in all its factions, boycotted the constitutional project, and various media outlets reported significant low turnout and participation in the vote on the constitution."[20]

Following the referendum, the President issued Decree No. 94 of 2012 to make the new constitution enter into force on 27 February 2012. The procedural path that was followed to draft and adopt the Syrian Constitution in 2012, along with pre-existing political positions and the general climate during that period, led to the opposition's refusal to engage in the process, depriving the constitutional process of the element of "participation." Additionally, citizens' disinterest in the process further diminished "public participation," ultimately resulting in the formulation of a constitutional text based on reactionary logic. Consequently, the constitutional text did not meet popular aspirations, demands, or rights.

Indeed, the trajectory of the process revealed that disregarding inclusiveness and downplaying the significance of public participation could only lead to further chaos and undermine the legitimacy of the constitution.

II. The Extent to which the 2012 Syrian Constitution Addressed Popular Aspirations and Demands

It becomes evident from reviewing the course of events experienced by the country beginning in March 2011 that the constitution was one of the key drivers of the popular demands that sparked those events. Therefore, it was hoped that the 2012 Constitution, which came as a response to those popular demands, would fulfil them and reflect them through clear constitutional provisions reassuring the protesters that their voices had been heard and that their demands were on the path to being realized.

Did the 2012 Constitution fulfil this task? Was it successful in achieving it? Did it include provisions that differed from those of preceding constitutions? These questions will be addressed in the subsections below.

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19 Daraji, *Constitutional Options for Syria*, 59.

20 See: *A Democratic Transition Plan for Syria* (Washington: Syrian Expert House and the Syrian Center for Strategic and Political Studies, 2013), 46.

A. Popular Demands and the Constitution

The constitution is closely linked to the popular protest movement that began in 2011, as many of its demands were due to clear "constitutional deficiencies and flaws." These reveal:

- **Either a glaring deficiency in the constitution in place**, such as the demands for political pluralism, as expressed by the wide-ranging popular calls to repeal Article 8 of the constitution,[21] which entrenched the Arab Socialist Baath Party as the "leader of the state and society".
- Or **the lack of implementation of numerous constitutional texts and principles**, such as the "demands for freedom, accountability, and justice." Such demands revealed that many of the rights and guarantees enshrined in the constitution were effectively frozen or legally trumped, making it easier to violate and infringe upon them.

It should be noted that all these demands echoed rights that were contained in the constitution. If the constitution had been effective and its provisions and guarantees had been respected, there would have been no need for popular protests to demand the practical implementation of constitutional rights that remained theoretical.

The National Coordination Body for Democratic Change inside Syria held its first founding conference in Damascus at the beginning of the events on 30 June 2011. It considered that one of the main requirements for ending the crisis was the recognition of the need to repeal Article 8 of the constitution – identified with despotism – and a public call, within a short period of time, to convene a general national conference with the objective of laying the foundations for drafting a constitution establishing a parliamentary system and submitting it to a general referendum for approval.[22]

The relationship between the constitution and the crisis is also evident in the final statement of the Consultative Meeting of the National Dialogue, sponsored by the Syrian Government, which took place in Damascus from 10 to 12 July 2011. The majority of the official opposition forces, both inside and outside the country, boycotted the meeting, which was limited to a group of politicians, intellectuals, members of society, and young activists. Regarding the constitution, the statement mentioned that "the consultative meeting discussed the constitution and the discussion reflected different healthy and national perspectives, including with respect to Article 8 of the constitution. It found that amending it necessitates the amendment of several constitutional articles, as well as the preamble. Therefore, it

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21 The article states: "The Arab Socialist Baath Party is the leading party in society and the state, leading a progressive national front that works to unify the energies of the masses of the people and place them in the service of the goals of the Arab nation." Opposition groups have considered, for decades, that this provision had negative consequences on Syrian society, as it led to the abolition of political pluralism, enshrined the principle of revolutionary legitimacy, established legal discrimination between citizens based on their political affiliation, led to the monopolization of power, and contributed to corruption. Furthermore, it completely reversed the relationship between the party, the state, and society. Instead of the party serving the state and society, the state and society became hostages to the party that leads them in accordance with the constitution. See: Razan Zaitouneh, "The Democratic Constitution and the Syrian Constitution," *Al-Adab*, 10 November 2008.

22 National Coordination Body for Democratic Change, *Political Statement*, 25 June 2011.

recommended the establishment of a legal-political committee to review the entire constitution and provide proposals allowing for the drafting of a modern and new constitution for the Syrian Arab Republic, which guarantees political pluralism, social justice, the rule of law, and fundamental human rights, empowers women and preserves their role, protects the rights of children, and defines the rights and duties of citizens on an equal basis for all."

This clearly reveals that the deficiencies and impediments that were present in the constitution in place were one of the reasons that led the country to its current state.[23] It was also hoped that the constitution could serve as a tool for resolving and overcoming the crisis.

B. Analysis of the New Constitutional Texts

The Syrian constitutional experience in drafting the 2012 Constitution reveals that there was no genuine and rights-based discussion regarding the dialectics and philosophy of its formulation, given that the government undertook the process in isolation after the opposition boycotted both the drafting and the referendum stages. As a result, the new constitution largely maintained the provisions of its predecessor, with some amendments aimed at appeasing the protesting public, such as the introduction of political pluralism, or the modification of the mechanism for electing the President, and the specification of the presidential term. However, apart from these changes, many of the texts from the previous constitution were repeated verbatim.

It becomes evident, when comparing the texts of the 2012 and 1973 Constitutions, that the similarities between the two primarily concern the following fundamental issues:[24]

- The mechanism by which the constitution was adopted: Both the 2012 and the 1973 Constitutions were adopted via a constitutional referendum.
- The nature of the system of government: Both constitutions establish a republican democratic system of government, emphasizing the national character of the state.
- The form of the system of government: Both constitutions establish a system based on a dual executive power (President of the Republic and Council of Ministers), while granting the President the upper hand. The President is granted extensive powers that extend beyond the conventional boundaries of executive authority in Western countries and surpass the powers of a President in a presidential system. Additionally, parliamentary membership and ministerial positions can be combined.

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[23] One cannot ignore the fact that the causes and factors that contributed to the country's current state cannot be attributed solely to internal reasons and the accumulated practices of the ruling authority over decades. There are also external causes and factors that are no longer hidden, especially after a number of statements that were made by several politicians who held official positions in countries of relevance to the Syrian crisis. Those statements revealed the extent of foreign intervention and its role in pushing the country towards its current unfortunate fate.

[24] Hassan Al-Bahri, "The Constitution of the Syrian Arab Republic: A Comparative Study of the 1973 and 2012 Constitutions," *Damascus University Journal of Economic and Legal Sciences* 34, no. 2 (2018): 14-27.

- The establishment and powers of the Council of Ministers: There are no differences between the two constitutions regarding its establishment. Likewise, its powers remained unchanged in the 2022 Constitution.
- Rights and public freedoms: The content of both constitutions does not differ regarding the rights and freedoms enjoyed by Syrian citizens or the obligations they have towards the state.
- The powers of the People's Assembly: These remained unchanged in the 2012 Constitution, except with regard to the mechanism for the election of the President of the Republic. The People's Assembly no longer elects the President as it did under the 1973 Constitution, a shift having been effected from a referendum, as per the 1973 Constitution, to a general election by the people under the 2012 Constitution.
- The Presidency of the Supreme Judicial Council: In both the 1973 and 2012 Constitutions, the President of the Republic heads the Supreme Judicial Council.

Both constitutions also adopted the idea of prohibiting constitutional amendments regarding term limits. They also recognized the legal value of the preamble of the constitution, while adopting unified amendment procedures. Furthermore, they are both written or codified constitutions that are rigid rather than flexible.

As for the extent to which the 2012 Constitution met the demands and aspirations of the people, we will refer to the perspectives of both the government and its opponents on this matter as follows.

1. The Perspective of Government Supporters

Legal experts who participated in the process of drafting the constitution consider the 2012 Constitution a "natural and logical response to popular demands." They argue that the majority of the popular delegations that the President met with personally after the protests began called for political and economic reforms. Their main demands focused on political reforms such as the recognition of political pluralism, the end of one-party monopoly on power, and the amendment of the mechanism for electing the President to provide for a direct election by the people. As such, the crucial text back then was Article 8 of the constitution. Consequently, the opinion of numerous human rights and political figures was sought to assess whether it was possible to annul Article 8 alone. The consensus was that a significant number of other articles in the constitution were interconnected with Article 8, which required a complete constitutional amendment. Additionally, there was a conviction that the chapter on rights and freedoms had to be modified and expanded as it was no longer appropriate decades after its adoption in the 1973 Constitution. As a result, the leadership in Syria, represented by the President, the leadership of the ruling Arab Socialist Baath Party, and the leadership of the Progressive National Front, agreed that there was a need for a comprehensive amendment of the Syrian constitution. This has already been accomplished.[25]

[25] Unpublished meeting between the author of this paper and some of the members of the 2012 Constitution Drafting Committee.

Here, reference is made to several principles and provisions included in the new constitution, as opposed to what was stated in the 1973 Constitution, with the primary aim of responding to and meeting popular demands. Examples include:[26]

- **The form of the political system of the state:** The 2012 Constitution established a political system based on political and party pluralism, as stipulated in Article 8 thereof. In doing so, it differed from the previous Constitution of 1973, which was based on the principle of the Baath Arab Socialist Party as the leading party of the state and society, in accordance with Article 8 of that constitution.

- **The method of electing the President of the Republic:** According to Article 85 of the 2012 Constitution, the President of the Republic is elected by the people through direct general suffrage in a single round. This is different from the method followed in the 1973 Constitution, which was based on a popular referendum on the sole candidate proposed by the People's Assembly upon the recommendation of the leadership of the Baath Arab Socialist Party. The 2012 Constitution, which introduced a new provision regarding the election of the President, explicitly stipulated for the first time in modern Syrian history following independence the need for the President to be directly elected by the people, in accordance with the principles of competitive pluralistic elections.

- **The term of the President of the Republic:** Although both constitutions granted the President of the Republic a term of seven years, the 2012 Constitution explicitly limited the number of terms. It stated that the President of the Republic cannot be re-elected except for one consecutive term, meaning that a maximum of two terms is allowed. This stands in contrast with the 1973 Constitution, which placed no limit on the number of terms, thus making it possible for the President to be re-elected for an unlimited number of terms.

- **Electoral disputes:** The 1973 Constitution distinguished between the examination of the validity of the election of members of the People's Assembly and the final decision on the validity of their membership. It granted the investigative power to the Supreme Constitutional Court, while exclusively assigning the People's Assembly the power to make the final decision on the validity of membership. This provision attracted numerous criticisms for contradicting the principles of independence and impartiality that should be upheld. It was thus rectified in the 2012 Constitution, which entrusted the Supreme Constitutional Court with the task of considering and making the final decision on the election of members of the People's Assembly.

- **The Supreme Constitutional Court:** The 2012 Constitution expanded the jurisdiction of this court beyond what was provided for in the 1973 Constitution. It granted it the authority to oversee the constitutionality of circulars and regulations, in addition to laws, and legislative decrees, as well as the supervision of the presidential election, the interpretation of constitutional texts, and the consideration of the loss of eligibility conditions by the President or a member of the People's Assembly. Additionally, the 2012 Constitution reduced the percentage of members of the People's Assembly who have the right to

[26] Al-Bahri, "The Constitution of the Syrian Arab Republic," 27-38.

challenge the constitutionality of laws before their enactment, from one-fourth as stipulated in the 1973 Constitution to one-fifth. Finally, the 2012 Constitution authorized individuals, under strict procedural conditions, to indirectly challenge the unconstitutionality of laws and legislative decrees, which was not possible under the 1973 Constitution.[27]

Hence, supporters of the 2012 Constitution conclude that it represents "the beginning of a new phase, a pivotal turning point in Syria's political life and contemporary history, a significant step towards democracy, and the establishment of a pluralistic representative democratic foundation for the Syrian political system, as well as a serious starting point for achieving political, economic, and social reforms in various aspects of Syrian life."[28]

2. The Perspective of Government Opponents

In contrast, the 2012 Constitution has faced significant criticism and accusations from opposition forces. The majority of the criticisms levelled against the new constitution can be summarized as follows:

- **The extensive powers of the President**: Most of the criticism directed at the constitution focused on the very broad powers of the President. The constitution, in essence, was a reflection of the position of the regime and the President, incorporating their desires and safeguarding their interests. Consequently, it gave the President as many powers as those included in the previous constitution. In fact, it conferred upon them absolute powers that the president of no other state enjoys. These powers utterly contradict the principle of separation of powers, effectively neutralizing the provisions of the constitution concerning democracy, pluralism, and other such principles.[29]

  According to these views, the new constitution upheld the full powers of the President, who remained in control of every executive prerogative (appointing the government and shaping its policies, serving as the Commander-in-Chief of the army and armed forces, appointing officials, concluding agreements and treaties, declaring a state of war or peace, and possessing absolute powers during crises). Additionally, the President retains control over the legislative authority (issuing laws and legislation) and the judicial authority (as the head of the Supreme Judicial Council). In doing so, the constitution concentrated powers that are meant to be distributed according to its own provisions. [30]

  Furthermore, despite the theoretical independence that the judiciary is supposed to enjoy, the President of the Republic chairs the Supreme Judicial Council (Article 133/1), and it is the President who "ensures" the independence of the judicial authority "with the assistance of" the Supreme Judicial Council (Article 132). Even if the vague meaning of "ensures" and "with the assistance of" is accepted,

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27 On the changes that were introduced to the Constitutional Court, see: Ibrahim Daraji, *The Constitutional Court in Syrian Constitutions: A Comparative Historical Legal Reading* (London: Legitimacy and Citizenship in the Arab World Programme, Conflict and Civil Society Research Unit, LSE, 2020), 63 and ff.

28 This opinion is referred to in: Oueidat, "On the Syrian Constitutional Draft."

29 Oueidat, "On the Syrian Constitutional Draft."

30 Al-Buni, "Critical Reading of the new Syrian Draft Constitution."

the fact remains that the President heads the Supreme Judicial Council, and the constitution does not specify the composition or mode of appointment of the council, which are left for the law to determine (Article 133). Similarly, the appointment, discipline, and removal of judges are left to the law rather than being determined by the constitution (Article 136). Given the powers of the President regarding judicial matters, these provisions are not sufficient to guarantee the independence of the judiciary.[31]

The President also has the authority to issue decrees when the People's Assembly is in session ,and even when it is not in session ,in cases of" absolute necessity) "an undefined term) (Article .(113 While the People's Assembly has the right to repeal any law enacted by the President ,it can only do so by an absolute majority vote of its members – a requirement that does not apply to the enactment of ordinary legislation by the People's Assembly .Furthermore ,even if the assembly manages to repeal the decree ,such a repeal does not have a retroactive effect ,meaning that the President is granted unrestricted authority to issue temporary legislation [32].Furthermore ,Article 113 grants the President of the Republic broader legislative powers compared to those granted to the People's Assembly ,which is uncommon in most constitutions around the world ,except in exceptional and emergency situations where it is not possible for parliament to meet .The People's Assembly only convenes for a limited period during the year ;as stated in Article ,64it is called upon to convene for three regular sessions per year ,totalling no less than six months. This grants the President of the Republic legislative powers during the period where parliament is not in session ,resulting in a sustained practice whereby many laws are issued through decrees during the recess periods ,in the absence of any urgent need .As such ,the legislative authority's task is reduced to approving the President's decisions after they have been issued and have come into effect[33].

- **The limited powers of the People's Assembly**: Criticism has also been directed at the "limited powers" granted to the People's Assembly. For example, Article 75 states that the assembly has the right to discuss the ministerial statement, but it does not give it the authority to approve or consent to it. This means that the People's Assembly lacks the power to choose the Prime Minister and ministers. Consequently, it merely approves bills prepared by the government, which gives rise to the possibility of it rejecting bills on the basis of a majority that is not represented by the government, leading to a genuine political crisis. It should be noted that in democratic countries, the government obtains the confidence of parliament by having its statement approved by it, thereby reflecting the will of the majority elected by the people. Therefore, it was necessary to amend this article to grant the People's Assembly the right to approve or reject the ministerial statement, thereby rejecting the government appointed by the President, who should be required to pick the Prime Minister and ministers from the elected majority.[34]

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31 *Syria: Options for a Political Transition (*unpublished study by the Carter Center, August 2014 draft), 12.
32 *The New Syrian Constitution: An Assessment* (Constitution Net, 2012).
33 *A Democratic Transition Plan for Syria*, 46.
34 Mitri, "Legal Remarks on the Draft Constitution."

At the same time, in those instances where the constitution granted the People's Assembly additional powers, this sparked controversy and criticism, for "despite the fact that the constitution recognizes popular referendums, it has given the People's Assembly the power to amend their results in clear disregard for popular will.[35]

- **Limited human rights:** The current constitution lacks a clear affirmation, typically found in the preamble, of the status and role of human rights and public freedoms in shaping the political, economic, and social framework for the Syrian society it addresses. Such omission deprives the text of one of the fundamental requirements placed on constitutions, which is the protection of an issue deemed necessary for their existence. Moreover, the regulation of these freedoms is left outside the framework of the international standards subscribed to by the state through its accession to relevant international treaties, or by virtue of international customary law and binding rules in this field. This deficiency runs contrary to what many constitutions around the world have embraced.

  The new constitution failed to mention numerous rights, and no reference was made to fourth generation rights. The current text was unable to draw clear boundaries between direct political action (parties and political associations) and civil society, which seeks, through pressure groups, to collaborate with the ruling authority to advance individual rights. In this respect, Article 10 did not deviate from what was previously in effect, stating that "popular organizations, professional unions, and associations are bodies that bring together citizens to develop society and achieve the interests of their members. The state guarantees their independence, their exercise of popular oversight, and their participation in the various sectors and councils established by law, in those areas that achieve their objectives, and in accordance with the terms and conditions stipulated by the law."

  In addition to the above, the right to form associations and unions is restricted by the requirement that they be based on "national foundations," which leaves the definition of what is to be considered national open to interpretation. Furthermore, while freedom of belief is enshrined, the freedom to practice one's beliefs is not (Article 42).

- **Religion and the civil nature of the state**: Article 3 of the constitution, which deals with "the religion of the President of the Republic" in its first paragraph and "the personal status of sects" in its fourth paragraph, has sparked a lot of controversy and debate. The main criticism directed at this article is that it discriminates among citizens based on identity (and not religion), because it suffices for the civil registry to indicate that a person's religion is Islam for them to be eligible to become President, whereas individuals whose religion is not Islam are excluded. The question is not a question of faith; what matters is the religion stated in the civil registry, regardless of whether the President is a believer or practices religious rituals. As for the fourth paragraph of the same article, it refers to the protection of the personal status of sects. However, it is high time to eliminate any reference to laws and ideologies based on sects and religions, especially considering the current events

[35] Al-Buni, "Critical Reading of the new Syrian Draft Constitution".

taking place in Syria and the Arab world, driven by religious and sectarian ideologies. The time has come for a civil state to be established, but this was ignored by the new constitution.[36]

- **The neglect of women's rights:** An objective comparison of the majority of the provisions related to women's rights in the current 2012 Constitution and the previous 1973 Constitution reveals that the two are "almost identical." They share the same gender-related deficiencies and shortcomings, both in form and substance. Indeed, they subject women to multiple religious systems and generalize conservative constitutional values, they empty women's rights of their content through referral to legislation that contradicts them, and they disregard the inclusion of necessary provisions to safeguard women's rights. Furthermore, both constitutions resort to general phrases that are not accompanied by specific implementation mechanisms, creating "ambiguity" regarding women's enjoyment of specific rights. Despite some differences in the numbering of the articles and their linguistic formulation, the content is the same.

  This led the "Coalition of Syrian Women for Syrian Democracy " to affirm in its evaluation of the 2012 Constitution that, despite addressing civil, political, social, economic, and cultural rights, as well as the right to live a life free from violence, the protection of motherhood, adequate housing, and state assistance in caring for minors, the elderly, and persons with disabilities, the constitution lacks specific provisions to address the significant gender gap in enabling women to exercise and enjoy these rights. This absence perpetuates unequal relationships within the structure of the family as a major factor in depriving women of their theoretical "rights."[37]

- **The lack of implementing mechanisms in the constitution**: The new constitution superficially emphasizes a number of important principles but fails to provide any specific mechanisms to ensure the respect of these principles in actual practice. For instance, the judicial system is declared to be independent in name (Article 132), yet it is the President of the Republic who presides over the Supreme Judicial Council (Article 133/1). As a result, the judiciary is effectively under the control of the executive authority represented by the President. Similarly, the constitutional provisions relating to the rights and freedoms that are outlined in the second chapter of the new constitution are formulated as ambiguously as in the previous constitution, under which numerous infringements occurred. Article 43 of the new constitution (which is nearly identical to Article 38 of the 1973 Constitution) illustrates this point by stating that the state "shall guarantee the freedom and independence of the press, printing, publishing, and media within the limits of the law." The problem with this formulation is that it does not provide any indication of the types of restrictions that the law may impose, thereby leaving the mentioned freedoms susceptible to any form of constraints desired by both the executive and legislative authorities.[38]

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[36] Mitri, "Legal Remarks on the Draft Constitution". On religion and the constitution, see also: *Constitutional Revival: Tunisia and Egypt Rebuild Themselves*," (United Nations Development Programme Publications, 2011), 27 and ff.

[37] Sawsan Zakzak, Faek Hwajeh, and Maya Al-Rahbi, *Toward a Gender-sensitive Constitution and Lessons Learned from Constitution-building Processes in the Middle East and North Africa Region* (Coalition of Syrian Women for Syrian Democracy, 2014), 21.

[38] *The New Syrian Constitution: An Assessment.*

The principles of accountability and transparency are also among the standards by which one can measure the degree of democracy in a constitution. These principles are neither mentioned nor adopted as fundamental principles in the Syrian Constitution.

There are additional criticisms that have been directed at the constitution that cannot be ignored, such as the issue of Arabism in the constitution, which stems from the ideology of the ruling party, and has an impact on the principle of state neutrality towards nationalities. Consequently, it fails to build a state that respects all its ethnic and minority components and does not overlook the rights of non-Arab populations, as was also the case under previous constitutions. Furthermore, the constitution should have addressed the role of security agencies and their obligation to abide by the provisions of the law and respect human rights. The same applies to the army, which should explicitly be subjected to civilian oversight in any democratic constitution.

There is also the issue of the absence of several fundamental constitutional provisions, such as the principle of the supremacy of international human rights agreements over domestic legislation, the criminalization of discrimination between citizens, detailed guidelines with respect to how rights and freedoms can be restricted, and the conditions for implementing a state of emergency, particularly bearing in mind that the misuse of emergency powers in Syria over the past decades effectively suspended the constitution.

Based on all of the above, the opponents of the 2012 Constitution conclude that it "did not bring anything new except for the attempt to replace expressions of monopolization, control, and autocracy with ambiguous terminology,"[39] making it an undemocratic constitution that does not comply with any internationally recognized standards. They further assert that it failed to meet the popular demands raised by the mass protest movement during that period, occasionally attempting to circumvent them by merely symbolically referring to them without ensuring their effective implementation.

III. The Degree of Success and Efficiency of the 2012 Constitution at the Implementation Level

As discussed in the sections above, the 2012 Constitution did not bring about revolutionary provisions from a constitutional standpoint. Instead, it limited itself to reproducing the majority of the previous constitutional provisions, while introducing amendments with respect to limited issues, the most important of which were the following: the change in the mechanism for the election of the President of the Republic, the recognition of political pluralism, and the broadening of the powers of the Supreme Constitutional Court. In this section, we will assess the degree to which these new provisions have been effectively implemented, while trying to determine the reasons behind their success or failure.

[39] Al-Buni, "Critical Reading of the new Syrian Draft Constitution."

A. The Degree of Compliance with the New Constitutional Provisions

Based on the new provisions of the constitution, a new electoral law was enacted, under which several presidential, parliamentary, and local elections were held. Individuals also resorted to the Constitutional Court to challenge the constitutionality of some laws that were issued in accordance with the new provisions of the constitution.

1. Conducting Pluralistic Presidential Elections Based on the Provisions of the New Constitution

As previously mentioned, the most significant development in the 2012 Constitution was the amendment of the mechanism for electing the President of the Republic, who is now directly elected by the people in a single round. Under the 1973 Constitution, the sole candidate proposed by the leadership of the Arab Socialist Baath Party was subjected to a popular referendum. It is worth noting that, for the first time in contemporary Syrian history since independence, the 2012 Constitution stipulated the necessity of directly electing the President by the people, in accordance with the principle of competitive pluralistic elections.

Based on the new provisions, the President was directly elected for the first time in the presidential election of 2014 and again in the presidential election of 2021.

- **Presidential Election – 2014:** The presidential election, which took place on 3 June 2014, was the first multi-candidate election in decades. Based on the provisions of the new constitution and the current electoral law, a total of 24 candidates, including two women and a Christian, submitted their applications to the Supreme Constitutional Court for the presidency. Out of these candidates, only three fulfilled all the necessary conditions for candidacy, as stipulated in the constitution and the general electoral law, including obtaining support from 35 members of parliament. The candidates who met these requirements were President Bashar Al-Assad, Hassan Abdullah Al-Nouri from the National Initiative for Administration and Change in Syria, a member of parliament from Damascus, and Maher Abdulhafiz Hajjar, a former leader in the People's Will Party and a member of parliament from Aleppo.

  On Wednesday, 4 June, the Supreme Constitutional Court announced that the voter turnout in the elections reached 73.42%. The number of voters was reported as 11,634,412 out of a total of 15,845,575 eligible Syrian citizens. On the same day, the Speaker of the People's Assembly announced the preliminary results, indicating that the candidate from the Baath Party, President Bashar Al-Assad, received 92.20% of the votes, while his competitor Hassan Al-Nouri received 4.47%, and the other competitor Maher Hajjar received 3.33%. On 16 July 2014, President Bashar Al-Assad took the constitutional oath for a seven-year term.

- **Presidential Election – 2021:** The presidential election, which took place in May 2021, was the second election following the adoption of the 2012 Constitution. On 18 April 2021, the Speaker of the People's Assembly announced the opening of the candidacy process for the presidential election in accordance with the provisions of the constitution. Subsequently, it was announced that the Supreme Constitutional Court had received 51 presidential candidacy applications from the People's Assembly.

On 29 April 2021, the Supreme Constitutional Court received a box from the People's Assembly containing the written endorsements of assembly members for their respective candidates to the presidential election. The court was tasked with sorting and deciding on the candidacy requests within five days. On 3 May 2021, the President of the Supreme Constitutional Court announced in its initial statement that the court had decided to accept the nominations of Abdullah Saloum Abdullah, Bashar Hafez Al-Assad, and Mahmoud Ahmed Marai. The remaining candidacy applications were rejected due to their failure to meet the constitutional and legal requirements.

The results of the presidential election were announced in a press conference by the Speaker of the People's Assembly. They revealed that the candidate from the Baath Party, President Bashar Al-Assad, obtained 95.19% of the votes, while his competitor Mahmoud Merhi received 3.31% and the other competitor Abdullah Saloum Abdullah received 1.50% of the votes.

Those elections, in both their 2014 and 2021 editions, faced numerous criticisms, whether regarding the conditions set forth by the electoral law and the provisions of the new constitution, or due to the timing of the elections and the circumstances under which they took place.

Regarding the eligibility criteria for the position of the presidency of the Syrian Arab Republic, those conditions stipulate that the candidate must be a "resident of the Syrian Arab Republic for a period of not less than ten years of continuous permanent residency at the time of submitting the candidacy application." This provision has led to the exclusion of opposition members from participating in the electoral process, as the majority of them live outside the country, depriving many Syrians of the opportunity to run for the presidency, and contradicting the constitution, which states that citizenship is a fundamental principle encompassing rights and duties enjoyed and exercised by every citizen in accordance with the law. Moreover, citizens are declared equal in rights and duties, and discrimination based on gender, origin, language, religion, or creed is forbidden.[40] As discussed above, the discrimination among citizens in running for this position is also observed in the requirement that the presidential candidate must be a "Muslim," thereby depriving non-Muslim Syrians of the right to run for the presidency.

Additionally, according to the provisions of the constitution, a candidacy application for the position of the presidency of the Syrian Arab Republic is only accepted if the applicant obtains written endorsement of their candidacy from at least 35 members of the People's Assembly. Members of the People's Assembly are not allowed to endorse more than one candidate. This procedural mechanism has faced criticism due to the fact that the ruling Arab Socialist Baath Party holds a wide and comfortable majority within the People's Assembly. This means that candidates for the presidency will inevitably be from the leadership of the ruling Baath Party, or the parties allied with it, as it is easier for them to obtain the required written endorsements from assembly members. Moreover, this requirement has the effect of excluding opposition figures and political leaders, whether inside or outside the country.[41]

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[40] For more details, see: Nael Gerges, "Observations on the General Elections Law in Syria: Elections under Unfair Standards," *The Legal Agenda*, 22 April 2014.

[41] Hassan Al-Bahri, *Elections as a Means of Assigning Power in Democratic Regimes: A Comparative Analytical Study* (publisher, date, and place of publication not provided), 131-132.

These elections have also faced criticism from the countries supporting the Syrian opposition, who announced their boycott of these elections. Criticism has focused on the conditions and timing of the elections amidst the ongoing war in the country, the opposition's boycott of the elections, and the millions of Syrians taking refuge outside the country. They have also warned against the elections conflicting with the political process led by the United Nations to resolve the Syrian crisis. For this reason, several countries have prohibited the organization of these presidential elections within their territories.

2. The Adoption of the Electoral Law on the Basis of the Provisions of the New Constitution

In accordance with the provisions of the 2021 Constitution, a new electoral law was adopted – the General Elections Law No. 5 of 2014 – to regulate the election of the President of the Republic, the members of the People's Assembly, and the members of the local administration councils, as well as the organization of popular referendums.

In order to ensure the integrity and independence of the elections, the law stipulates the establishment of a judicial committee called the "Supreme Judicial Committee for Elections," headquartered in Damascus. This committee is responsible for the administration of elections and referendums, as well as full supervision over the election of the members of the People's Assembly and the local administration councils. It is tasked with taking all necessary measures to guarantee the freedom, integrity, and safety of the electoral process.[42]

In addition to establishing the Supreme Judicial Committee for Elections to replace the Ministry of the Interior in supervising the electoral process since 2011, several amendments were also made to the electoral law. As a result, members of the police and military were granted, for the first time, the right to vote (wherever they are in the country) in legislative elections, after it had been prohibited for a long time with the purpose of preventing military officers from interfering in these elections. Voters were allowed to use their personal or military identification cards instead of the electoral cards that were introduced in 1998, which had become the only accepted official document for voting since 2003.[43]

The law faced numerous criticisms.[44] In addition to the criticism of the above-mentioned requirements placed on presidential candidates, there have also been concerns regarding the handling of presidential elections. The law grants the Supreme Constitutional Court the authority to oversee presidential elections, handle appeals related to them, and declare their results. However, the members of this court are appointed by the President of the Republic before they take their oath of office, which undermines their independence and neutrality as they are beholden to them.

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42 Fourth Regular Report submitted by the Syrian Arab Republic, International Charter of Political and Civil Rights, Paragraph 103 and ff. See: UN Document CCPR/C/SYR/4 (27 May 2022).

43 Ziad Awad and Agnès Favier, *Elections in Wartime: The Syrian People's Council (2016-2020)*, translated by Maya Sowan (Fiesole: Middle East Directions, Robert Schuman Institute for Advances Studies at the European University Institute, 2020), 7.

44 For more details ,see :Gerges" ,Observations on the General Elections Law in Syria."

The criticisms also extended to the manner in which the "Supreme Judicial Committee for Elections" is formed, as it has been pointed out that the provision proclaiming its independence does not make it effectively independent. This is due to the fact that the judiciary is headed by the President, who guarantees its independence, while the majority of judges belong to the Baath Party, which renders the mentioned committee non-neutral.

Criticism was further levelled at the fact that governors appointed by the government were granted the authority to "form election committees in each electoral centre from among the civil servants in the state" to manage the electoral centre. This grants the government control over the electoral process and its outcomes, in the absence of an impartial entity overseeing this process.

Likewise, critics targeted the division of electoral districts into two sectors, with 50% allocated to workers and farmers, and the remaining 50% to other segments of the population. This division is slippery and blurs the distinction between the two groups, making it easily to manipulate. Moreover, the provision stating that a referendum is considered successful if it receives an absolute majority of votes cast means that the referendum can be deemed successful even if fewer than 5% of eligible voters participate. Additionally, the law allowed the Ministries of Local Administration and Interior to appoint a number of employees to work under the supervision of the election committees throughout the electoral process. This may lead these employees to interfere in the electoral process in favour of the government's interests.

After the adoption of the 2012 Constitution, legislative elections were held in 2012, 2016, and 2020. Additionally, elections for local administration councils took place in 2018 and 2022.

These elections reveal that the new constitution, enacted in February 2022, and the new laws concerning political parties (2011) and general elections (2011 and 2014) had no tangible impact whatsoever. Indeed, the division of electoral districts, the number of seats in each district, and the 50% quota for "workers and farmers" remained unchanged. Furthermore, the Baath Party leadership continued to play a significant role in shaping the electoral lists, despite losing its status as the ruling party of society and the state in the new constitution.[45]

Despite the adoption by the electoral law of the principles of individual voting, individual candidacy, and individual vote counting, followed by the announcement of results for each candidate separately, the Baath Party, as it had done before, issued lists of candidates under the Progressive National Front. Starting from the 2012 elections, the Baath Party leadership changed the name of its candidate lists from "Progressive National Front lists" to "National Unity lists," implicitly suggesting that "the nation is going through a crisis that requires national unity." The "National Unity" lists included affiliated candidates from the front as well as independent candidates in most provinces, in numbers equal to the remaining seats. Conversely, the Baath Party left some open independent seats in other districts, without pre-determination, theoretically allowing room for competition. As a result, all candidates from the "National Unity" lists won, indicating that they underwent a merely formal vote on election day after being selected by the Baath Party leadership.

[45] Awad and Favier, *Elections in Wartime.*

As a result of the elections, the number of members of the Baath Party in the People's Assembly actually increased from 136 in the 2007 general elections to 168 out of 250 seats in 2016. The party thus maintained its dominance (over 67% of the seats) in the assembly. It is worth noting that among the ten new political parties,[46] two candidates affiliated with the recently established People's Party won after running as independents. At the same time, some of those parties boycotted the elections. In the legislative elections of 2020, the list of successful candidates included 166 members from the ruling Baath Party, representing 66.4%, and 17 members representing the Progressive National Front parties (excluding the Baath Party), representing 6.8% of the assembly. Independents accounted for 67 members, representing 26.8% of seats.

This also applies to the local administrative elections, where the elections resulted in the victory of "National Unity" lists, the majority of which were Baathist. The Baath Party continues to maintain its dominance over the administrative units' councils; it controls their executive offices, and all the governors belong to the party.[47]

3. Enabling Individuals to Challenge the Constitutionality of Laws before the Supreme Constitutional Court on the basis of the Provisions of the New Constitution

As previously mentioned, the 2012 Constitution provided for indirect individual access to the Constitutional Court, granting the court jurisdiction to pronounce itself on the claim of the unconstitutionality of a law. It stipulated that the court's jurisdiction in this respect is exercised when, in the course of appealing a court ruling, one of the parties to the case submits a challenge against the constitutionality of a legal provision that was applied by the court who issued the ruling. If the court of appeal deems the challenge to be serious and necessary for the resolution of the case, it shall suspend proceedings and refer the challenge to the Supreme Constitutional Court. The Supreme Constitutional Court is then required to decide on the challenge within a period of thirty days from the date of its submission.[48]

Following the adoption of the 2012 Constitution, a new law regulating the Supreme Constitutional Court was enacted in 2014, including detailed mechanisms regarding how individuals can exercise indirect access. These mechanisms were effectively implemented, allowing the Constitutional Court to exercise its jurisdiction in several cases. In most of these cases, the court rejected the challenge on procedural grounds. However, there was one case where the court initially accepted the challenge on procedural grounds but later rejected it on substantive grounds.[49]

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46 The ten parties that competed in the 2016 general elections outside the Progressive National Front are: Al-Tadamun (Solidarity), Syria Al-Watan (Syria the Nation), Al-Tali'a Al-Dimuqratiya (Democratic Vanguard), Al-Dimuqrati Al-Souri (Syrian Democratic), Al-Tadamun Al-Arabi Al-Dimuqrati (Arab Democratic Solidarity), Al-Tanmiyah Al-Wataniyah (National Development), Al-Shabab Al-Watani Al-Souri (Syrian National Youth), Al-Shabab Al-Watani Lil Adalah wa Al-Tanmiyah (National Youth for Justice and Development), Al-Irada Al-Shaabiya (People's Will), and Al-Sha'b (The People).

47 *The Regime's Management of Local Elections: What Do the Results of the Local Administration Elections Tell Us?* (Omran Center for Strategic Studies, 2018), 9.

48 Constitution of the Syrian Arab Republic (2012), Article 147(2)(a)and(b).

49 Daraji, *The Constitutional Court in Syrian Constitutions*, 69.

While this mechanism was effectively implemented in conformity with the new constitution, it is worth recalling that it was deemed flawed form the outset and was subject to criticism. Although the possibility of challenging the constitutionality of laws was granted to individuals, it was only granted at the appeal level, not during the original lawsuit. This limits individuals' access to the Constitutional Court, which also lacks the ability to initiate constitutional review on its own initiative. Instead, it is necessary for one of the parties to raise the matter before the court considering the case, be it a civil, criminal, or administrative court. It is a prerequisite for this court to be a second instance court, meaning that the referral must be submitted in the course of an appeal, which renders any referral invalid if it is submitted before a court of first instance.[50]

The Syrian Constitution further imposes a number of conditions on the possibility of exercising the right to referral, including that the challenger must be a party to the case, meaning that they must have a personal interest and direct stake in the lawsuit, and the provision being challenged as unconstitutional must directly affect them. This prevents ordinary citizens or legal entities such as associations, unions, or civil society organizations from pre-emptively challenging a legal provision they believe to be in violation of the constitution. Additionally, the second instance court that considers the case is granted discretionary authority to determine whether the referral is serious and necessary for resolution. This means that the second instance court can decide to dismiss the challenge to the constitutionality of the legal provision, thereby blocking its referral to the Supreme Constitutional Court. This closes the only indirect gateway for individuals to access the Constitutional Court. As a result, the challenge to the constitutionality of laws is not dealt with as a matter of public order. If one of the parties raises it, the assessment of its seriousness is left to the absolute discretion of the court of appeal, leading to divergent judicial interpretations. What one court considers a serious challenge, another court may not, even if it concerns the same legal provision.[51]

B. The Degree to Which the Gains and the New Constitutional Provisions Were Reversed

Based on the above, it cannot be claimed that there were genuine, significant, and impactful political or constitutional gains achieved by the 2012 Constitution that were later reversed. It is worth noting that the only observable change was the recognition of political pluralism and the abolition of Article 8, which was the most prominent article in the previous constitution, referring to the Baath Arab Socialist Party as the leader of the state and society. However, this constitutional change did not have a major impact in reality. Apart from the change in the names of party and front lists in the elections (from Progressive National Front lists to National Unity lists) and the granting licenses to some new parties that did not have any tangible impact on the ground, no other significant changes can be identified.

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50 Jamila Al-Charbaji, "The Role of the Supreme Constitutional Court Role in Supervising the Constitutionality of Laws in the Syrian Arab Republic in the 1973 and 2012 Constitutions," *Damascus University Journal for Economic and Legal Sciences* 29, no. 3 (2013): 132.

51 Hassan Al-Bahri, Constitutional Courts: A Comparative Study, 1st ed. (2017), 169.

There has not been a genuine implementation of the provisions related to political pluralism, which should have expanded the base of political participation for licensed parties. For example, the internal regulations of the People's Assembly should have been amended to enable these parties to establish parliamentary blocs within the People's Assembly, enhancing the assembly's performance and encouraging initiatives from all represented parties, rather than restricting them mostly to the party with the parliamentary majority. Additionally, it is important to include opposition parties within the democratic process, thereby organizing political and social activism among various political and social currents in the country.[52] Furthermore, there is a need to reconsider the mechanism for party licensing and the decisions regarding their dissolution, as stipulated in the current Parties Law issued in 2011, which places the Ministry of the Interior as the guardian overseeing all stages and processes of that procedure.

Similarly, the dominance of the executive authority over the legislative authority persisted, despite the constitutional priority given to the latter in the Syrian Constitution. In fact, the constitution did not explicitly adopt the principle of separation between the executive and legislative authorities in the traditional sense of the word. Upon closer examination of the relationship between the People's Assembly and the executive branch, it becomes evident that the balance clearly tilts in favour of the latter.[53] Despite the constitution's emphasis on diversifying the sources of legislative drafts and achieving harmony between the executive and legislative authorities, constitutional studies that have analysed the performance of the People's Assembly in its legislative function confirm that the executive authority dominated, and continues to dominate the legislative process through the bills it prepares and submits to the People's Assembly, as well as through legislative decrees issued by the President of the Republic in accordance with their constitutional powers as specified in Article 113 of the constitution. The legislative performance of the People's Assembly is thus characterized by the fact that its outcomes are predetermined in favour of passing policies desired by the government, despite the formal legislative process through which bills or legislative decrees are submitted to the assembly.[54] As for parliament's oversight role, the current status quo confirms beyond any doubt that the assembly does not fulfil this role except under very limited constraints. It is more akin to protocolary procedure or parliamentary tradition than to effective parliamentary oversight.[55]

The failure to implement constitutional provisions can be attributed to various reasons, the most important of which is the nature of the constitutional provisions themselves. They are not "revolutionary constitutional provisions" in the true sense of the word, as they maintain the structure and content of the previous constitutional text, except for the limited changes mentioned earlier. This has resulted in a lack of substantial change because nothing significant in the constitution was altered. In addition, many constitutional provisions refer to legal texts that render them devoid of substance, especially in the absence of an effective mechanism to ensure the amendment of legal texts

52 Ahmad Mohammed Tawzan, *A Post-War Parliament in Syria: A Vision for Assessing and Developing the Legislative and Oversight Performance of the People's Assembly* (Damascus: Damascus Center for Research and Studies, 2018), 14-16.
53 Tawzan, *A Post-War Parliament in Syria*, 8.
54 Tawzan, 7.
55 Tawzan, 23.

that violate constitutional provisions. Indeed, the constitutional provision requiring the nullification of all legal texts that contradict its provisions within a maximum period of three years has never effectively implemented.

It is also important to acknowledge that the Syrian situation, with all its complexities and challenges over the past decade, does not allow for an objective assessment of the actual implementation of those constitutional provisions. The ongoing war and its enduring political, human rights, economic, and social repercussions have hindered the ability to effectively implement both constitutional and legal provisions. Consequently, they impede any objective evaluation of their implementation.

C. The Relation between the Form of Government in Syria and the Constitutional Choice that Was Made

Finally, regarding the relationship between the form of government in Syria and the constitutional choice that was made, as well as the success or failure in implementing the constitutional amendments, it is worth noting that the constitutional history of modern Syria clearly reveals that there was no genuine opportunity to adopt a constitution that fully respects human rights and democratic principles, whether in terms of the process by means of which it was adopted or in relation to its content. Throughout recent history, the Syrian people have witnessed several and divergent mechanisms for drafting their constitutional documents:

- Appointed or elected constituent assemblies
- Constitutions imposed by an individual leader, a military council or political parties
- Constitutions that came into force via referendum or in the absence thereof

Overall, the Syrian people have not truly been able to engage in a genuine constitutional process that aligns with the required democratic standards, particularly in terms of respecting the principles of inclusivity, transparency, and necessary societal participation. This applies to the process of drafting the constitution, discussing it, and conducting a referendum on it. It should be noted that if only some criteria are met, while the rest are disregarded, the constitution does not come into effect or does not last for long.

The 2012 Constitution did not depart from this context. Instead, it reflected the nature of the political system in terms of monopolization, exclusivity, and lack of pluralism. This was evident at the level of both the process that was followed for its adoption and its content.

Procedurally, the adoption of the 2012 Constitution involved the appointment of a committee with a single political orientation, which operated in a manner that did not uphold the required standards of transparency. There was a lack of genuine public and societal participation, making the process more akin to a formal referendum for the purpose of approval. There were no objective discussions or mechanisms ensuring that feedback from the people reached the committee members responsible for drafting the constitution.

The nature of the political system also exercised its influence on the content of the constitution, specifically in the provisions concerning the President of the Republic and his powers, as mentioned earlier. Furthermore, there was a disregard for the principle of separation of powers, with the executive branch encroaching upon the role and powers of the legislative authority, including its inherent right to legislate. It can be said that this constitution in reality does not constitute or establish a political system that is supposed to be built upon its provisions. Instead, it provides a constitutional framework for an existing political system, enhancing its powers, safeguarding its position, and legitimizing its dominance, thereby perpetuating the characteristics of previous constitutions.

Conclusion

It is evident from all of the above that the Syrian Constitution of 2012 was drafted and adopted under extraordinary circumstances witnessed by the Syrian State, which still persist. It was intended to be one of the key steps contributing to the resolution of the Syrian crisis. However, it is abundantly clear that it failed to achieve this goal, turning instead into a new reason for the crisis rather than a tool for its resolution. This is evidenced by the violent course Syria experienced after its adoption, as well as the formation of the current Syrian Constitutional Committee under the auspices of the United Nations, which is currently working on adopting constitutional texts that are different from the provisions of the current 2012 Constitution.

The previous pages revealed numerous flaws that accompanied the drafting of the 2012 Constitution, both in form and content. The procedural democratic standards that must be abided by in constitution-making were not entirely respected, particularly in terms of public and societal participation and transparency during the drafting and adoption phases. Furthermore, substantively, it did not adequately address the popular demands and genuine needs of all segments of the Syrian population, encompassing their various components and political stances.

The lesson learned, in this context, is that for those who aspire to draft a genuine constitution for the country and all its citizens, it is not sufficient to rely on and justify the opposition's preconceived refusal to participate in the process. Instead, genuine efforts must be made to create suitable conditions for the opposition and all representative forces of the people to participate. It is not merely about formally inviting the opposition and waiting for their rejection to proceed independently with the process. What is required is the "creation of a conducive environment" for the opposition to accept to participate in the process, enhancing its legitimacy and inclusiveness. This necessitates practical and legal measures to foster an atmosphere of trust and demonstrate a genuine commitment to embracing participation.

The Syrian constitutional experience clearly reveals that periods of crisis and conflict do not favour constitution-making. Even if the constitution itself is one of the causes of wars and conflicts, it is necessary to explore "temporary" constitutional options until suitable conditions arise for drafting a genuine constitution that enables

inclusivity and meets the requirements for an environment conducive to public participation, which has become a legitimate source for constitutions.

Lessons should be drawn and applied to the process of drafting a future constitution for Syria. Despite the importance of the constitution, rushing through the adoption of a final constitution should be avoided. The constitution should be drafted by an elected body, or a body derived from an elected body. The drafting process should resemble a building process, in the sense of erecting a conceptual and rights-based system, rather than the mere drafting of rigid texts that only allow for narrow interpretations. It should be noted that the purpose of adopting this approach is that inclusivity, public participation, and civil society activities require time and a free and secure environment. They should not be subject to the influence of armed groups or the desire for revenge and exclusion. None of this can be achieved during times of war and conflict.

Syria's current situation also reveals a general attitude of distrust towards any legal or constitutional texts that are formulated. The country has witnessed a history of unreliable processes of drafting and implementing legal and constitutional provisions. This has led the majority of Syrians to lose interest and refrain from participating, driven by the belief that either pre-determined and detailed texts will be formulated to serve specific political agendas, or that "good texts" will be produced but not applied or implemented properly. This has resulted in a state of negativity and indifference that will persist in the future unless serious actions are taken to change this perception through tangible practices on the ground.

One of the lessons learned, from a legal perspective as well, is the continued ability of national laws to undermine the constitutional provisions by rendering them devoid of substance and value. It is expected that the opposite should occur, given that the constitution is the "supreme and highest law of the state" to which all other national legislation should adhere. However, in reality, the Syrian Constitution refers many of the rights it stipulates to national legislation that contradicts its provisions. This should be avoided in any subsequent constitutional formulations.

The Syrian constitutional experience clearly reveals that the most important lesson to be drawn from the 2012 Constitution is that a true constitution, deserving of the Syrian people and in line with international standards and comparative experiences, requires a genuine cultural and constitutional "revolution." It does not appear that "everyone, both supporters and opponents" is currently prepared to accept and participate in such a constitution. It necessitates the resolution of contentious issues that have not yet been settled (such as matters of religion, secularism, legislative sources, the nature of the political system, and the form of the state), as well as the adoption of new principles that have not been addressed previously (such as issues of citizenship and minorities, gender equality, cementing the concept of opposition and its rights, power sharing, and subjecting security forces and the military to constitutional legitimacy). This requires genuine and arduous work involving everyone.

The cultural space did not allow for the discussion of these contentious issues throughout the decades, especially during the years of war in which the 2012 Constitution was drafted. Some of these issues were considered "taboos,"

and submission to the dominance of others became an accepted norm. As a result, the cultural space was absent and neglected for a very long period, and it did not contribute to the formation of a pressure force or momentum to assert specific rights and defend specific interests.

One of the lessons learned from the experience of the 2012 Constitution is that the entire society has borne the cost of the absence of civil society in Syria during the previous decades, which resulted in its ineffectiveness and the paralysis of its ability to change the course of constitutional and field events.

It is necessary here to grant clear rights and sufficient freedoms to civil society organizations by amending all legislation related to their work and abolishing the imposed guardianship authority, in order to enable them to play a genuine enlightening role in raising awareness levels. It should be noted that there are many issues that need to be addressed to restore unity and solidarity in the fragmented society and to restore civil peace. Civil society organizations should fulfil this role, provided that their independence is guaranteed, and they do not have political orientations and objectives that serve one party or another, which would alter their nature as civil society.

For the future, it is hoped that genuine lessons will be learned from past mistakes in order to work towards adopting a new constitutional document and a different constitutional social contract. This should be the result of a true national and popular dialogue, not only between the government and its opponents, but also among all of the Syrian people, without any exceptions, exclusions, or discrimination.

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Yemen's Constitutional Process after the 2011 Revolution

Dr. Abbas Mohammed Zaid *

ABSTRACT

This paper focuses on the constitutional process that Yemen embarked on following the 2011 Revolution. It examines its achievements, the historical stations it experienced, and the reasons it stumbled. The paper is divided into three sections.

The first section focuses on the extent to which public participation was taken into account in the constitutional process. It compares the 1994 war and the 2015 on-going war, by looking into their causes and consequences, as well as the political and constitutional process that was proposed at the time with the aim of building a state based on the rule of law and achieving broad power and wealth-sharing. It further examines the manner in which the members of the Constitution Drafting Committee were selected, to assess the extent of public participation in the constitutional drafting stage. Lastly, it turns to the Constitution Drafting Committee that was established in Yemen following the 2011 Revolution, revealing the multiple stages it went through and its traits. It concludes that the committee acted as both a political and a technical body.

The second section assesses the extent to which the Yemeni draft constitution meets the aspirations and demands of the people. In this regard, the concept of overthrowing the regime – the slogan that was raised during the revolution, and across most of the governorates of the Republic – is explored both organically and substantively. In addition, the key constitutional guidelines that resulted from the National Dialogue are addressed, namely, comprehensive change and the establishment of a civic and federal state.

The third section examines the extent to which the Yemeni draft constitution could be effectively implemented, highlighting the features that distinguish it from the current constitution. It further outlines the objections that were directed at the draft constitution, such as the rejection of the federal state by the same actors who demanded its establishment, as well as the rejection of comprehensive change by some political actors who had previously called for such change. These objections are addressed and clarified.

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The paper concludes that the key to the solution in Yemen is to end the war, establish comprehensive peace, and seriously endeavour to build a civic and federal state that guarantees broad power and wealth-sharing, as per the draft constitution, which no political faction should be allowed to violate in the future. Peace in Yemen hinges upon building a new state that accommodates and protects everyone.

Keywords: *Political process, change, peaceful solution, devastating effects of the coup against the peaceful solution.*

CONTENTS

Introduction

A constitution embodies the essential rules in the absence of which no contemporary political system can exist. While some constitutions consist of a set of customary norms rooted in the public and private consciousness for many generations, most contemporary countries have written constitutions that differ in the way they are developed, adopted, and amended, keeping pace with generational developments and changes of era. Western philosophers hold different views regarding the legal value of constitutional rules; some consider the constitution to be a political document, while others consider it a supreme legal norm that should not be violated. Each view is supported by different arguments, but the fundamental difference is that those who hold that the constitution is a political document do not consider it to be binding. In other words, they believe public authorities are allowed to change it whenever they desire to and in the manner they deem appropriate. Meanwhile, jurists who view the constitution as a binding legal document – or even as the supreme legal norm whose provisions must not be violated – have seen their position reinforced through the imposition of specific sanctions for non-compliance with the provisions of the constitution, thus affirming its legally binding nature that requires punishing those who violate it and declaring any legislation or action contrary to it null and void. This is achieved through the establishment of two forms of constitutional oversight: political and judicial. Such oversight is exercised by constitutional councils or supreme/constitutional courts, whose main role consists in reviewing the constitutionality of subsidiary legislation and annulling any provisions that contradict the constitution.[1] The above applies to Western-style constitutions that are in place in most contemporary countries. However, the analysis of how Arab constitutions are drafted and the extent of popular participation in adopting and amending them requires a separate, detailed study of the constitutional process behind each of them.

In Yemen, no written constitution was adopted prior to the revolution of 26 September 1962. All the written constitutions that followed were enacted by virtue of decisions issued unilaterally by the President every so often, in the form of constitutional declarations, until the permanent constitution of the Yemen Arab Republic was enacted in 1970. This constitution was suspended several times by unilateral decisions and subsequently revoked with the establishment of the Yemeni unity at the beginning of 1990, when the Constitution of Unified Yemen was adopted in 1991.[2] This was the first constitution to be adopted by a referendum, amid religious opposition to it, which deemed its approval an overt act of disbelief. However, such opposition was met with an alternative religious discourse that approved of the adoption of the constitution and called for addressing constitutional issues that are of interest to the public, instead of focusing on the identity of the state, which, they argued, must be civic.[3]

1 Abbas Mohammed Zaid, *Reviewing the Constitutionality of Laws* (Cairo: Dar Al-Nahda Al-Arabiya, 2008).
2 With regard to South Yemen, there was the amended constitution adopted on 21/09/1978 by the Supreme People's Council, which represented the Socialist Party as the only political force under the totalitarian system that ruled both sides at the time.
3 Abbas Mohammed Zaid, *The Role of Religious Discourse in Shaping Yemeni Constitutions* (Beirut: Arab Association of Constitutional Law, 2017).

The Constitution of Unified Yemen was issued in a democratic climate and amid unprecedented freedoms. However, soon after, a civil war erupted between the ruling parties that had achieved Yemeni unity. As a result, the unity constitution was amended by Parliament in accordance with its own provisions. The state's identity, structure, and economic system changed under the slogan of "the Islamization of the Yemeni Constitution," which had been described as an infidel constitution prior to its amendment. This (Islamic) constitution, which emerged after the amendment of the Constitution of Unified Yemen at the beginning of 1994, was also amended by a referendum at the start of 2001. The main purpose of those constitutional amendments was the recurring renewal of the President's term, which is explicitly defined in the constitution. As such, public authorities repeatedly amended the constitution without engaging the public in any discussion or explaining the nature of the amendments, and without allowing any participation from outside the ruling party. The ruling party limited itself to justifying the amendments and using all the means available to pass them.

The abovementioned events occurred before 2011 – that is, before the outbreak of the widespread protests which turned into a revolution that ousted the decision-makers at the time and replaced them with others. The revolution was attacked by the authorities, who committed massacres against protesters in public squares and carried out arrests (which are still ongoing to this day). However, the revolution eventually managed to achieve its goal of overthrowing the heads of the previous regime one after the other. The purpose was to establish a constitutional foundation for the peaceful transition of power which had long been circumvented by the authorities. The revolution also sought to broaden the scope of the people's demands, by calling for the recognition of rights and freedoms that were absent under the previous regimes, and to demand participation in power and wealth distribution. "When people demand freedom, dignity, equality, social justice, the end of tyranny, and the departure of tyrants, these slogans are first and foremost related to the constitution. If existing constitutions had stipulated these rights in theory and ensured their practical implementation, there would be no need for revolutions, protests, and all the violence and destruction that have afflicted the countries of the region."[4] One of the prominent demands raised by the protesters was the establishment of a civic state.

All of these demands should have been enshrined in any constitutional document drafted at the time. However, their mere inclusion cannot be deemed sufficient in the absence of broad participation by the Yemeni people in setting the goals and identifying the key guidelines to be adopted by the constitutional legislator, as well as a clearly drafted and detailed constitutional text, which should also be approved by the Yemeni people.

This is what we aim to address in the present paper, which will shed light on the historical context in which the Yemeni constitutional process unfolded following the 2011 Revolution. We will attempt to answer a set of related questions, the most important of which are the following: What is the extent of public participation in drafting and adopting the Yemeni Constitution? Did the new draft constitution include the demands expressed by the people during the revolution? Will there be any significant differences between the current constitution and the new draft constitution, in case the latter is adopted? Accordingly, the study is divided into three sections.

4 See the introduction of the Arab Association of Constitutional Law's programme on the constitutional process.

The first section examines the extent to which the constitutional process that was followed in Yemen has enabled public participation. Under this section, we address several questions, including how the members of the Constitution Drafting Committee were selected and appointed, how the Yemeni draft constitution was developed, and what the proposed mechanisms for adopting it are (I). The second section looks into the extent to which the Yemeni draft constitution meets the people's aspirations and demands (II). Lastly, the third section considers the extent to which the Yemeni draft constitution can be effectively implemented. Under this section, we address the following questions: What are the new 'revolutionary' provisions contained in the draft constitution? How likely is the draft constitution to be adopted and effectively implemented? What are the risks and challenges that may hinder its future approval? (III)

The present study addresses the above questions, as well as other questions related to the constitutional process that Yemen has embarked on. The paper draws on historical testimonies, especially since the author is a member of the Constitutional Drafting Committee and is familiar with most of the events that have taken place. Indeed, those events continue to unfold, and the draft constitution, which was developed under challenging circumstances, continues to draw political attention ahead of its political and popular approval.

I. The Extent to which Yemen's Constitutional Process Has Enabled Public Participation

To determine the extent to which the constitutional process that was followed in Yemen after the 2011 protests adheres to the principles of legitimacy and public participation, it is necessary to answer several questions, the most important of which are: Has the principle of public participation and societal dialogue been taken into consideration in the ongoing constitutional process? Does the current process differ from previous ones that were followed to issue constitutions or constitutional amendments in Yemen? In order to address these questions and identify the features of the current process and how it differs from previous processes, it might be useful to compare it briefly to the events that occurred in 1994 after the establishment of Yemeni unity in 1990. This was the result of an agreement between the ruling parties in the north and south to achieve integrated unity and adopt the Constitution of the Republic of Yemen. Prior to that, several negotiations took place over a period of approximately ten years between the authorities of both regions (the Yemen Arab Republic and the People's Democratic Republic of Yemen).

The political crisis between the two ruling parties (the Socialist Party and the General People's Congress) escalated after the results of the 1993 legislative elections were announced. King Hussein of Jordan intervened as a regional intermediary, and a political dialogue took place between the political elites in Aden. The agreement that was reached was signed in the Jordanian capital, Amman, in the presence of Yemeni and regional representatives, and it was named the Document of Pledge and Accord.[5] Afterwards, the North Yemen authority,[6]

[5] The Document of Pledge and Accord included several constitutional amendments, the most important of which was calling for the establishment of a federal system, reforming the military, and guaranteeing the peaceful transition of power.

[6] The forces loyal to former President Ali Saleh and his ruling party at the time.

along with the Yemeni Congregation for Reform (Al-Islah Party),[7] waged war. Following the end of the war, the Document of Pledge and Accord signed by all political factions was violated. The ruling party did not only breach its provisions and disregard the constitutional reforms outlined in the document, but it also sought to discredit those who upheld it, leading to the trial of some leaders of the Socialist Party who had signed the document.

It is worth mentioning in this context that the political dialogue at that time was limited to the leaders of political parties and prominent political figures within the government and the opposition, where the number of participants was 80 or so. However, following the 2011 Revolution, public participation in the political dialogue expanded significantly, involving more than 560 individuals. The dialogue included young people and women from various political movements, and it encompassed participants from both the government and the opposition. Furthermore, the political process was not limited to the National Dialogue; it was preceded by a Technical Committee tasked with preparing for dialogue and then followed by the establishment of a committee tasked with drafting a new constitution. This process, which we discuss in detail in subsequent sections, would amount to a multi-phased constitutional process. Before doing so, it is worth to highlight the main characteristics, similarities, and differences between the pre-1994 dialogue and the dialogue that took place before the 2015 war.

- The dialogue that preceded the outbreak of the 1994 war took place among political elites from various currents and active political entities at the time, as well as political and social influential independent figures (such as tribal leaders and party leaders). However, the number of participants did not exceed 80 individuals, and as a result, no youth, women, or civil society representatives participated. On the other hand, the National Dialogue Conference held in 2013 included political elite leaders, young revolutionaries, and women, where the number of participants reached 560.
- Both the exclusive dialogue process of 1994 and the inclusive one of 2013 have advantages and disadvantages that cannot be fully listed here. Therefore, we will only highlight some of them. One of the significant advantages of the inclusive dialogue was the emergence of prominent figures who were brought to the forefront through the 2013 National Dialogue Conference. These figures did not have political parties or platforms supporting them; rather, they rose to prominence as a result of their active participation in the National Dialogue at its various stages. They played a role in advocating for change, as evidenced by the presence of figures such as the Minister of Foreign Affairs, the Prime Minister, and others from the political and military circles from all parties. Furthermore, the process provided an opportunity for the emergence of female political leaders and enabled some of them to hold decision-making positions.
- Below is a table outlining the main features of the dialogue processes of 1994 and 2011.

[7] A tribal gathering of Sunni scholars and the Muslim Brotherhood in Yemen.

	Event	1994	2011
1	*Political crisis*	Between the Socialist Party on one hand and the General People's Congress and the Al-Islah Party on the other	Crisis leading to the 2011 Revolution and clashes between the Joint Meeting Parties and the General People's Congress, as well as the youth taking part in the protests
2	*Regional mediation*	Mediation by King Hussein bin Talal of Jordan	Mediation by King Abdullah bin Abdulaziz Al Saud of Saudi Arabia
3	*National dialogue*	Dialogue in Aden among political elites at the time	National Dialogue in the capital city of Sanaa involving political elites, independent youth, active women's participation, and representatives from civil society
4	*Signing an agreement*	The agreement was signed in Jordan on 18 January 1994 after the dialogue in Aden.	The Gulf Initiative was signed in Riyadh on 3 April 2011, followed by dialogue in Sanaa and the endorsement of the outcomes of the National Dialogue.
5	*A declared war after signing the agreement in alliance with an Islamic movement*	The war took place between the army loyal to Ali Abdullah Saleh, the Al-Islah party, and the Salafists against the Socialist Party in the south.	The war took place between the army loyal to Ali Abdullah Saleh and the Houthis (Ansar Allah) against the Al-Islah party and the south.
6	*Exclusion and monopolization of power*	Exclusion of the Socialist Party, which signed the unity agreement	Exclusion of all political forces participating in the National Dialogue
7	*Condemnation of the national document and denunciation of its proponents as traitors*	Undermining of the Document of Pledge and Accord	Undermining the Gulf Initiative, discrediting the outcomes of the National Dialogue, condemning the constitution, and persecuting those who endorsed it
8	*Monopolization of power and the army*	The monopolization of power by the General People's Congress and the Al-Islah Party, followed by the exclusion of the Al-Islah Party and the subsequent monopoly of power by the General People's Congress	The monopolization of power by Ansar Allah (the Houthis) and the Saleh faction, followed by the exclusion of Saleh and the subsequent monopolization of the army and popular committees by Ansar Allah (the Houthis)

The events leading to the Document of Pledge and Accord and those leading to the National Dialogue are strikingly similar.

It is worth noting that similar events took place following the signing of the Peace and National Partnership Agreement in 2014. After the formation of the government resulting from this agreement, half of the government ministers and the President, Abdrabbuh Mansur Hadi, had their freedoms restricted by Ansar Allah (Houthis) and security and political forces loyal to the former President, Ali Abdullah Saleh. Similarly, following the agreement between the General People's Congress, loyal to Saleh, and the Houthis, and the formation of the Supreme Political Council in 2016, a coup took place against the agreement, leading to a war between the former allies.

This conflict resulted in the Ansar Allah group (Houthis) reneging on their partnership with Saleh and subsequently monopolizing power. As a result, the equation shifted in favor of the party that managed to gain control, which changed the course of events and further complicated the situation. The main reason for these coups against the agreements and understandings reached was the lack of national and legal guarantees or regional and international guarantees, not to mention the ambiguity in the agreements themselves.

It is essential to emphasize the need to preserve the value of collective work, which are oft lacking in developing countries. The essence of the problem lies in the ability of every movement – and even every individual – to grant themselves the right to impose their own vision on others, even if this means resorting to the use of force if they are capable of doing so. Hence, any collective work that may require months or years to achieve in order to avoid the exclusion that affects everyone and causes suffering for all is disregarded. The failure to recognize the value of collective work leads to several problems, including:

- Non-compliance with contracts and agreements
- Violation of accords made between parties
- Breaking any agreement simply for having the power or authority to do so or due to a change in position, stance, or the ability to engage in treachery and betrayal
- Describing collective work with inappropriate characteristics, discrediting it, treating it with disdain, and waging media wars against it, which is known in Islamic jurisprudence as "Irjaf" (false rumours)

Collective work may be criticized for requiring time that can vary depending on the level of patriotic sentiment and the willingness to reach agreements and make concessions in order to accept the other and their differences.

We will now attempt to answer the remaining questions under this section. Did the method used to formulate and adopt the draft of the new constitution enhance the legitimacy of that draft in a way that counters the disadvantages of preceding stages? How was the committee responsible for drafting the new constitution formed in 2014? Was it appointed or elected? Did it represent all segments of society? Was the participation of women ensured?

To answer these questions, it is necessary to explain the method used to select the members of the Constitution Drafting Committee and to assess the extent to which societal and public participation were taken into account during the Yemeni constitutional process. This can be done by reviewing the affiliations and qualifications of the committee members.

A. The Method Used to Select and Appoint the Members of the Constitution Drafting Committee

The method that was followed to select the members of the Constitution Drafting Committee was unique. It combined the advantages of election while avoiding the drawbacks of appointment. It was neither through direct election nor solely through appointment. Instead, the selection was based on consensus among the members of the

Guarantees Committee on the eve of the final day of the comprehensive National Dialogue Conference on 20 January 2014. The consensus reached among the Guarantees Committee members was to ensure equal representation of all political parties, political factions, and participants in the National Dialogue Conference. The calculation was made based on the participating factions and entities in the National Dialogue Conference, which resulted in 17 political factions, including representatives of civil society, women, and the youth. In fact, a representative from each party was selected regardless of whether the party had representation in Parliament or not. This was based on the fundamental principle that all participants emerged from a popular revolution against all authorities, primarily due to the absence of genuine representation of political factions in the elected and appointed state authorities.

Moreover, the principle of equality in representing political factions was a significant step towards achieving the highest level of diverse representation for all regions, political factions, and religious sects. As a result, representation was based on equality, regardless of whether a party had visible and widespread popular representation or not, since the work assigned to the committee was primarily technical, even though it had political implications. More importantly, the principle of equality was absent during the period prior to the 2011 Revolution; the opportunities for political party work were uneven, transparency was lacking, and public funds were misused, favoring certain parties over others. Some parties faced political persecution and were targeted, in violation of the law, and authorities waged wars based on sectarian or political considerations, resulting in a lack of equality and equal opportunities. In response, the participants in the Guarantees Committee at the National Dialogue Conference adopted the principle of equal representation, whereby each political component was required to nominate experts and specialists from various professional backgrounds to ensure that the composition of the committee was suitable for its assigned work. This approach aimed to achieve broader representation of the Yemeni people, encompassing all political factions and regions.

As such, each political component had a representative in the Constitution Drafting Committee, which allowed members from various age groups and experts in law and Sharia, both among those in power and those in the opposition, to participate in the committee. Academics from various Yemeni universities were further involved, making the composition of the committee diverse. In addition, women's representation in the committee exceeded 24%.

After the political forces independently selected their representatives, without interference from public authorities, they submitted their nominations to the Secretary General of the National Dialogue. These nominations were then referred to the former President of the Republic, who issued the decision to establish the Constitution Drafting Committee but lacked the power to select its members. Rather, the President's role was limited to formally appointing the members on the basis of the nominations submitted by the participating political forces. As such, his decision merely reflected the nominations of the political forces involved in the National Dialogue.[8]

The representatives of the youth, women, and civil society were nevertheless excluded from this nomination process; these were instead nominated by the Secretary General of the National Dialogue Conference based on criteria

[8] Presidential Decree No. 27 of 2014 establishing the Yemeni Constitution Drafting Committee.

established by members of the National Dialogue Conference, specifically representing the women, youth, and civil society components.[9]

The above serves as an attempt to determine the extent to which the Yemeni constitutional process enabled community and public participation. A brief overview of the composition of the Constitution Drafting Committee and the political, academic, and regional backgrounds of its members helps confirm the matter.

1. Regional composition

North		South	
Ismail Al-Wazir	Sanaa	Ahmad Bamtref	Hadhramaut
Dr. Olfat Dabei	Taizz	Dr. Ahmad Attieh	Shabwah
Dr. Intilak Moutawakel	Amran	Jaafar Basaleh	Hadhramaut
Dr. Mohammad Al-Amri	Al Bayda	Dr. Jaafar Chawtah	Aden
Marwan Naaman	Taizz	Dr. Said Al-Skouti	Hadhramaut
Dr. Moeen Abedlmalak	Taizz	Randa Salem	Aden
Dr. Abbas Zeid	Sanaa	Dr. Najim Chmairy	Aden
Dr. Abdelrahman Al-Mokhtar	Hajjeh	Dr. Nihal Al-Awlaqi	Shabwah

Dr. Abdel Rachid Abdel Hafez (joint administration regions)

2. Professional background

Some believe that the process of drafting a constitution only requires legal specialists and jurists, but this belief is mistaken. A constitution governs all members of society; it should be easily understood by everyone, and its provisions should be clear to all citizens. Therefore, it is essential to involve experts from various fields and scientific and practical specializations in the drafting and formulation of its provisions. It is in the interest of every citizen to be aware of the essential provisions contained in the constitutional text, not to mention specialists and intellectuals in the humanities and applied sciences. Therefore, the participation of experts from the humanities and applied sciences in developing the draft constitution brings added value to the drafting committee, especially since drafting a new constitution often encompasses various interconnected topics requiring expertise in different fields, including the humanities and applied sciences.

The committee effectively required all that expertise and specialized knowledge, whether in sociology, engineering, languages, or gender studies. The committee's composition facilitated the participation of a larger number of academics, most of whom work in various Yemeni universities, reaching a total of 12 academics.[10]

[9] The nomination of representatives of civil society, women, and the youth was controversial. This is understandable, as any nomination, appointment, or even election mechanism is bound to be questioned. Controversies even took place within parties, which is logical given the large number of people that could have assumed the role.

[10] Several academics and professors from Sanaa University, Aden University, Hadramout University, Taiz University, Hodeidah University, Dhamar University, and other private universities took part in the Constitution Drafting Committee.

While the expertise of some non-academic members exceeded others, particularly in the field of constitution drafting, experience has demonstrated that all specializations are beneficial. The only shortage of expertise in the committee was in the field of economics, which was addressed by seeking the assistance of economic experts, both national and international, specialized in the fields of economics or public finance. This was necessary because the constitutional draft addresses economic and financial issues, especially since it adopts a federal system that specifically requires clear provisions regarding public finance, resource and revenue allocation among the different levels of government.

The table below outlines the specializations of the members of the Constitution Drafting Committee.

Specialization	Number
Law	12
Sharia and Law	1
Islamic Studies	1
Sociology	1
Civil Engineering	1
Languages (Gender Studies)	1

3. Country of education

The Constitution Drafting Committee stood out for the diverse educational backgrounds of its members. The countries that the members received their education in varied, spanning several Arab and foreign countries. This provided a special advantage to the drafting committee in terms of the variety of schools and different specializations in the fields of humanities and applied sciences. It enriched the committee with a wide range of knowledge and diverse perspectives, without implying that all its members were exceptional. Yemen possesses a wealth of expertise, but the selection of committee members by different political factions ensured the diversity of their specializations, which added value to the committee rather than weakening it. While membership in the committee was politically disputed within the different factions due to the existence of several cadres for each political movement, as well as qualified independent cadres, the participation of Professor Ismail Al-Wazir as Chairman of the drafting committee was the subject of consensus and agreement by all.[11]

[11] Professor Ismail Al-Wazir was supported by all parties, as he is a renowned jurist, invariably resorted to by Yemeni legislators for the drafting of constitutions and laws. He is a key authority on all of Yemen's republican constitutions, and contributed to drafting most Yemeni laws currently in force.

The table below provides an overview of the countries of education of the members of the Constitution Drafting Committee.

Arab	Foreign
Yemen	UK
Egypt	Russia
Syria	The Netherlands
Iraq	France
Morocco	United States of America
Sudan	
Jordan	

4. Participation in the National Dialogue

One of the advantages of the establishment of the Constitution Drafting Committee is that the political factions who participated in the National Dialogue were not required to nominate their representatives in the committee solely from among those who participated in the dialogue. Rather, they were given the opportunity to choose experts regardless of whether they had participated in the National Dialogue or not, providing an opportunity to enrich the committee with specialists. This led to the inclusion of new elements that were not involved in the conflicts that occurred during the National Dialogue, allowing for the consideration of new options in discussions regarding power vacuums and gaps that were not covered in the outcomes of the National Dialogue. It also led to finding alternative solutions from different perspectives, especially in areas where disagreements had reached an impasse.

The presence of participants from the National Dialogue – including some members from the previous Technical Committee of the National Dialogue – was also an important source of information for the drafting committee, as it allowed the members to be aware of all the discussions and disagreements that took place during the National Dialogue and within the Technical Committee. This is another significant advantage that ensured most members of the Constitution Drafting Committee were familiar with the political process, represented by the Technical Committee, followed by the National Dialogue, and culminating in the Constitution Drafting Committee. It enabled the members of the drafting committee to have a comprehensive understanding of everything discussed during the National Dialogue and to benefit from the transfer of expertise that occurred outside the framework of the National Dialogue Conference. Having said that, the table below classifies the members of the Constitution Drafting Committee based on their participation or non-participation in the National Dialogue and the Technical Committee.

From the National Dialogue	From outside the National Dialogue
Ahmad Attieh	Ahmad Bamtref
Olfat Dabei	Ismail Al-Wazir
Intilak Moutawakel	Jaafar Basaleh**
Mohammad Al-Amri*	Jaafar Chawtah
Moeen Abedlmalak	Marwan Naaman
Abdel Rachid Abdel Hafez*	Said Al-Skouti
Randa Salem	Abbas Zeid
Nihal Al-Awlaqi	Abdelrahman Al-Mokhtar
	Najib Chmairy

** Participated in the Technical Committee, the National Dialogue, and the Constitution Drafting Committee.*

*** Participated in the Technical Committee, resigned from the National Dialogue, but participated in the Constitution Drafting Committee.*

After reviewing the composition of the Constitution Drafting Committee, we now turn to the more important question regarding the proposed method for adopting the new constitution and the extent to which the public was involved in it. Answering this question requires discussing Yemen's overall constitutional process, which we will do in the section below.

B. Yemen's Constitutional Process

In order to discuss the method for the adoption of the new constitution, it is necessary to examine the constitutional process since the start of the 2011 Revolution. The process underwent multiple stages, starting with the signing of the Gulf Initiative, which established the roadmap for the transitional period and the National Dialogue.[12] These stages aimed to halt the conflict, end the military division, and lead to the approval of the draft constitution. The Constitution Drafting Committee chose to have the constitution approved through a general referendum, where Yemenis would decide on the fate of their state, its structure, identity, and the political and electoral system put forward by the Constitution Drafting Committee on the basis of the outcomes of the comprehensive National Dialogue. To summarize these stages, we will discuss the constitutional process as follows: The process, which began following the 2011 Revolution, was characterized by multiple stages and historical milestones. It involved a diverse range of participants and comprised various bodies, each with specific roles and responsibilities. These bodies are outlined below.

First Stage: The Gulf Initiative

The constitutional process, and its related bodies was launched with the signing of the Gulf Initiative, which was a result of the consensus reached among the conflicting parties in Yemen. The initiative outlined the transitional

12 The Gulf Initiative was signed in Riyadh on 23 November 2012.

period, starting with a peaceful and smooth transition of power, followed by the formation of a national unity government, the establishment of a National Dialogue, and the adoption of a new constitution. The initiative also emphasized the need to involve emerging forces in the National Dialogue, such as Ansar Allah (the Houthis) and the Southern Movement, and ensure the active participation of youth and women, alongside the warring parties that shared power during the transitional period.

Second Stage: Communication Committee

Although the committee's mandate was brief and its role ended shortly after its formation, it marked a significant stage in the process. Most of its members were leaders of the parties that had signed the Gulf Initiative in coordination with the representative of the Secretary-General of the United Nations. It was tasked with determining the Technical Committee's composition and nominating its members.[13] There was a Mediation Committee tasked with identifying and nominating the members of the Communication Committee.[14] However, the Mediation Committee excluded some of the political forces that signed the Gulf Initiative from the Communication Committee.[15] It also took on the responsibility of selecting youth, women, and civil society representatives in the Technical Committee, which we will touch upon briefly. The Communication Committee's role ended shortly thereafter.

Third Stage :Technical Committee

The Technical Committee is considered to be the instigator of the National Dialogue and its outcomes. It was known as the Technical Committee in Charge of Preparations for the Comprehensive National Dialogue Conference, whose scope of work included specifying:

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13 The decision of the President of the Republic to form the Communication Committee stipulates as follows: Article (1)
(a) For the purposes of involving all parties in the dialogue process, a Communication Committee shall be formed, comprising:
1- Dr. Abdul Karim Al-Iryani
2- Mr. Abdul Wahab Ahmed Al-Ansi
3- Dr. Yassin Saeed Na'aman
4- Mr. Jaafer Saeed Basaleh
5- Major General Hussein Mohammed Arab
6- Major General Abdul Qadir Ali Hilal
7- Lawyer Raqia Abdel Qader Humaidan
8- Ms. Nadia Abdul Aziz Al-Saqqaf
(b) The Committee shall appoint a Chairman from among its members during its first meeting.

14 The Mediation Committee was formed in coordination with Jamal Benomar, representative of the Secretary-General of the United Nations. Its task was to identify the members of the Communication Committee based on political criteria in order to convince them to participate in the National Dialogue. Its work ended after the decision to form the Communication Committee was issued.

15 The Secretary-General of the Al-Haqq Party was excluded from the Communication Committee despite being a signatory of the Gulf Initiative. The Al-Islah Party (Yemeni Congregation for Reform) also excluded any representative of the Joint Meeting Parties (Al-Haqq, the Nasserist Party, and the Union of Popular Forces) and only included the representative of the Socialist Party because they represent the south more than the Socialist Party.

- The composition of the National Dialogue Conference
- The topics of the National Dialogue
- The National Dialogue working groups and the decision-making mechanism.

The decision to form the Technical Committee was issued on 12 July 2012, and the committee included 32 members.[16]

Fourth Stage: Comprehensive National Dialogue

The Comprehensive National Dialogue is considered one of the most important stages in the transitional period,[17] and it included 565 members. The Technical Committee in Charge of Preparations for the National Dialogue Conference was responsible for determining the number of participants and the quota of each political faction. Since deciding on the number of members and the quota of each faction is one of the most important and sensitive issues, the committee tasked the Special Envoy of the Secretary-General of the United Nations with doing so. The Special Envoy took into account the approval of the various forces and the ruling political parties at the time, which emerged from the power-sharing arrangement as a result of the Gulf Initiative. He took on this historic responsibility, with the approval of the members of the Technical Committee, and each member ensured the active participation of the political faction they represented at the time. The table below shows the number of seats distributed among the parties that participated in the National Dialogue Conference.

Political Actors	Number of seats
General People's Congress and its allies	112
Yemeni Congregation for Reform	50
Yemeni Socialist Party	37
Nasserite Unionist People's Organization	30
Four parties in the government (Yemeni Unionist Assembly, Union of Popular Forces, National Council of the Peaceful Revolutionary Forces, and Al-Haqq Party)	16
Peaceful Southern Movement	85
Houthi Movement	35
Youth	40
Women	40
Civil society organizations	40
Other actors: Al-Rashad Union (7), Justice and Construction (7), President's list (62)	80
Total	**565**

The members were distributed among nine working groups, which agreed on the outcomes that later became the national reference for the different political factions. The main warring political factions controlling the Yemeni scene all claim that their revolutions, coups, military efforts, and political struggles are primarily aimed at

16 Presidential Decree establishing the Technical Committee No. 30 of 2012, which included 25 members and was later expanded to include 32 members.

17 Presidential Decree establishing the National Dialogue No. 11 of 2013. The dialogue began on 18 March 2013.

implementing the National Dialogue outcomes. Recently, groups have emerged that disavow these outcomes, some openly and others in secret,[18] due to changes in their military and field positions.[19]

The National Dialogue outcomes reached on the basis of the discussions held by the various working groups represented one of the most important sources for the provisions of the draft constitution. In fact, the outcomes of the State-Building Working Group and the Rights and Freedoms Working Group represent more than 80% of the provisions of the draft constitution, while the remaining outcomes resulting from the primary issues discussed by the other working groups represented the remaining share of the constitutional draft. These included the outcomes on the issue of southern Yemen (which was resolved by the establishment of a federal state), the Saadah issue (which was the foundation for the provisions on peaceful coexistence), the prevention of the glorification of war, the adoption of dialogue as a means to resolve all political differences, the constitutional emphasis on the importance of preventing political and sectarian groups from possessing weapons and restricting the possession of weapons to the state, the National Reconciliation and Transitional Justice Working Group, the Development Working Group, the Working Group on Building the Foundations for the Security and Military Institutions, and the Good Governance and Independent Agencies Working Group.

We have an ethical historical responsibility, as witness to these past events, to respect the intellectual rights of the first person to discuss the constitutional foundations required to achieve the revolution's demands for comprehensive change and overthrowing the regime: the martyred professor, Dr. Ahmed Charafeddine.[20] Dr. Charafeddine actively voiced before the Technical Committee the need to discuss these constitutional foundations at the National Dialogue – a demand supported by the majority of the members of that committee. We will touch upon some of these foundations in our present study. The martyred professor outlined these constitutional foundations in a detailed proposal that was presented before the State-Building Working Group. The proposal was aimed at achieving the aspirations of the people for the establishment of a civic and federal state, as well as a specialized judicial authority, a constitutional court, and an administrative judiciary to put an end to the encroachments of the legislative and executive authorities. He was the first to develop a vision showing the need for comprehensive change in all these areas.[21]

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18 The President of the General People's Congress Ali Saleh officially declared the "death" of the National Dialogue outcomes in early 2015, and the Southern Transitional Council publicly rejected the outcomes of the National Dialogue after being empowered by some provinces of the south. The Southern Transitional Council is seen as the main proponent for the separation of the south from the north, despite its current participation in a presidential council that includes the components of what is known as the "internationally recognized and legitimate authority." It is also a participant in the "legitimate" Riyadh Agreement government.

19 The Houthi revolution had specific demands, including the implementation of the outcomes of the National Dialogue, the overthrow of the Peace and National Partnership Agreement government due to corruption, and revoking the decision to lift oil subsidies. Currently, all their movements and rhetoric are opposed to the outcomes of the National Dialogue.

20 Dr. Ahmed Charafeddine participated in the Technical Committee and the National Dialogue on behalf of the Houthis, and he presented an integrated civic and federal vision with the approval of Houthi leaders. He was among the first to call for Yemeni unity, in addition to being a main founder of Al-Haqq Party and drafting the party's objectives and internal regulations. He retired from political work in 1994 and was martyred on the last day of the National Dialogue, where he was treacherously assassinated while on his way to sign the outcomes of the National Dialogue on 21 January 2014.

21 See: https://www.youtube.com/watch?v=yc0MNmbR6EU.

The rest of the political factions and independent participants of the State-Building Working Group also put forward their visions on all these constitutional issues, which included: identity of the state; structure of the state; judicial system; political system; electoral system; and administrative system.

These are the most important pillars of the draft constitution, which is supposed to effect comprehensive change and achieve the aspirations of the Yemeni people.

The reason it is important to highlight Professor Dr. Ahmed Charafeddine's role in defining the axes and constitutional issues to be addressed by the National Dialogue is that a dispute emerged after former President Ali Saleh stepped down from his position and transferred power to his former Vice President, Abdrabbuh Mansur Hadi, in accordance with the Gulf Initiative. Two political paths emerged. The first was content with overthrowing the regime's main figures and transferring power from the President to the Vice President and considered this an achievement of the revolution of Yemen's youth and people. The proponents of this approach argued that "the dysfunction was due to the bus driver and not the bus itself," so it was sufficient to remove the former President from his position. This discourse represented most politicians in Al-Islah party, who were content with the organic overthrow of the regime. Meanwhile, Dr. Charafeddine highlighted the importance of fulfilling the demands of young people and respecting their struggles and sacrifices on the streets of Yemen by substantively transforming the constitutional system and addressing the constitutional dysfunction in order to build a federal civic state that protects everyone, ensures the participation of all, and achieves security and stability. The faction that was content with the organic overthrow of the regime drew a series of hard lines in the dialogue, including the "inviolability of the republican system and of Islamic Sharia" (in reference to Article 3 of the current constitution) and the concept of "unity" (a centralized and integrated form of unity). Even though the participants in the dialogue all agreed on the need to preserve the republican system, they disagreed on other constitutional issues, hence the emergence of these hard lines based on the principle that the "dialogue is open and limitless" and that the revolution's objectives should be achieved at the substantive level and a new constitution should be drafted.

Fifth Stage : Constitution Drafting Committee

The Constitution Drafting Committee was formed to ensure the equal representation of all the political forces that took part in the National Dialogue, and it consisted of 17 members.[22] The members were entrusted with translating the National Dialogue outcomes into constitutional provisions, drafting constitutional provisions to address the gaps in the outcomes of the National Dialogue, and implementing the National Dialogue recommendations relevant to drafting a new constitution for a federal civic state with a presidential system. The establishment of the committee and the nomination of its members was discussed above, including the details pertaining to their specializations and affiliations. Presidential Decree No. 26 of 2014 on the establishment of the Constitution Drafting Committee and its working mechanism outlines the committee's main powers as follows:

[22] Presidential Decree No. 27 of 2014 establishing the Constitution Drafting Committee.

1. Drafting a new constitution for a federal state consisting of six regions
2. Adhering to the National Dialogue outcomes
3. Benefiting from previous local and international experiences
4. Participating in public events to explain the contents of the draft constitution
5. Presenting the draft constitution to the public and receiving, examining, and taking their observations into consideration

Based on the above, it appears that the first three main tasks are relevant to the constitutional drafting phase, while the remaining tasks are relevant to the post-drafting phase that precedes the final adoption of the constitution by the people. As such, the committee was entrusted with drafting the constitution and explaining its contents to the people, who hold the power to either accept or reject the draft constitution.

The Constitution Drafting Committee successfully finalized the initial draft of the constitution in accordance with its legal mandate. However, it was unable to fulfil its remaining legal obligations when it comes to explaining the content of the draft constitution, due to the military coup that suspended the political and constitutional process. The committee drafted a constitution for a federal state consisting of six regions. It proceeded as follows:

The first step it took, as part of its efforts to translate the National Dialogue outcomes into constitutional provisions, was to classify these outcomes into constitutional recommendations that can be included in a constitutional document, recommendations that can be included in legislation, and recommendations that can be included in detailed regulations. In terms of integrating the National Dialogue outcomes into the draft constitution, it proceeded as follows:

1. **Literal adoption** of some texts from the National Dialogue outcomes, such as the ones related to the civic state and the sources of legislation, along with the article related to the number of regions and their administrative divisions.
2. **Re-organization and re-drafting** of several outcomes, especially those related to rights, freedoms, as well as economic, social, and cultural principles, as they are interlinked and repeatedly mentioned in the National Dialogue outcomes.
3. **Limited discretion** in codifying the recommendations of the National Dialogue outcomes, especially those related to the division of powers between the central government, regions, and local authorities.
4. **Broad discretion** in filling the gaps, as the National Dialogue outcomes lacked certain recommendations that are considered necessary and constitutional by nature, such as the number of members of legislative councils at each level of government and how to select and elect the heads of regions.

In doing so, the Constitution Drafting Committee acted both as a political and technical authority.

Sixth Stage: The National Body for Monitoring the Implementation of the National Dialogue Outcomes

This stage relates to the National Body for Monitoring the Implementation of the National Dialogue Outcomes, which stemmed from the National Dialogue Guarantees Document. The decision to form this body was made after the National Dialogue Conference was concluded. It was entrusted with many tasks, such as monitoring the expanded partnership government. However, overseeing the establishment of a modern state was its most important task, as it was entrusted with monitoring the draft constitution and assessing the extent to which it took the National Dialogue outcomes into consideration.[23]

The idea of establishing a body including all the traditional and emerging forces to monitor the draft constitution was among the propositions approved by the Guarantees Committee emanating from the National Dialogue.[24] A dispute arose at the time over the authority or body entrusted with overseeing the draft constitution from a political point of view, as some leaders of the ruling party against whom the revolution erupted, demanded that the House of Representatives – where it held a comfortable majority – be the legislative authority in charge of monitoring the draft constitution. One of the causes of the revolution was that the House of Representatives had failed to monitor the work of successive governments to whom it gave its vote of confidence, to the dismay of the forces of change and the rising revolutionary forces. This is why the idea of establishing a separate National Body for Monitoring the Implementation of the National Dialogue Outcomes was put forward and accepted. Its members were chosen from among the members of the National Dialogue Conference, which involved all political movements and currents. This body was entrusted with monitoring the work of the Constitution Drafting Committee. Unfortunately, this was the stage where military action obstructed the political process. As a result, the National Body was prevented from monitoring the draft constitution. Yemen was fragmented by the war, and the concept of state was eroded.

Final Stage: Public Referendum

Based on the above, one can conclude that the constitutional process in Yemen has undergone many stages and seen the involvement of many figures. This includes all those who signed the Gulf Initiative, the members of the Communication Committee, the members of the Technical Committee who set the framework for the National Dialogue, the members of the Comprehensive National Dialogue Conference, and the members of the Constitution Drafting Committee. It is worth noting that the members of the National Body for Monitoring the Implementation of the National Dialogue Outcomes were also meant to be part of the constitutional process. The final say, however, remains with the Yemeni people, who are entitled to a referendum on the draft constitution in accordance with the provisions of the law.

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[23] Presidential Decree establishing the National Body for Monitoring the Implementation of the National Dialogue Outcomes No. 30 of 2014.

[24] This idea was proposed by the martyred professor Dr. Ahmed Charafeddine in a paper he submitted on the constitutional process, after he modified it due to severe opposition even from some individuals affiliated with him.

Indeed, the final decision-makers are the Yemeni people, in all their diversity. The draft constitution itself specifies that it must be approved by a popular referendum.[25] The proposal for approving the draft constitution by political consensus between the parties to the conflict was rejected, although no popular referendum can take place without the approval of the warring parties. The party that refuses to build a state that accommodates everyone is the main reason preventing the people from exercising their right to express their opinion through a referendum on the draft constitution, which seeks to build a civic and federal state; enshrines a wide range of rights and freedoms to be enjoyed by all; establishes equality among citizens; and ensures the effective participation of women by approving a women's quota of at least 30% in all institutions, in accordance with the Comprehensive National Dialogue outcomes.

II. The Extent to which the New Yemeni Draft Constitution Meets the People's Aspirations and Demands

The most important popular demands raised in the 2011 Revolution can be summarized as overthrowing the regime and comprehensive change. Under this umbrella, politicians at the National Dialogue Conference adopted several demands, reflected in the list of National Dialogue outcomes that were incorporated into the draft constitution. In order to determine the degree to which the revolutionary slogans and demands for change in the aftermath of the 2011 Revolution were met, it is necessary to compare the dialogue outcomes – especially those of the Working Group on State-Building and the Working Group on Rights and Freedoms – with the provisions of the draft constitution, to determine the extent of convergence or divergence between the two, as well as to assign responsibilities accurately. Although the list of National Dialogue outcomes is long, three main principles can be highlighted:

- Comprehensive change
- Establishment of a civic state
- Establishment of a federal state

Since overthrowing of the regime takes precedence over all other demands, it is outlined separately below.

A. The Concept of Overthrowing the Regime

This slogan raised by the people was copied literally from the protests that erupted first in Tunisia and then in Egypt. Those protests forced Tunisian President Ben Ali to flee the country and ousted Egyptian President Hosni Mubarak, following which a military council was formed to manage the country's affairs. This is what encouraged young people in Yemen to raise the bar on the street to achieve radical change.

[25] The President of the Republic's decision to form the Technical Committee and to determine its jurisdiction stated that the Technical Committee shall set the rules and decision-making mechanism of the National Dialogue and the mechanism for holding the referendum on the new constitution.

As a result, some parties – which have international reach and relations with regional powers – took advantage of the youth's revolution, which demanded comprehensive and radical change, and adopted the demands of all political parties that were affected by the previous regime, summarizing all those demands under a single slogan: overthrowing the regime. Some consider the participation of a military faction (First Armoured Division, which is affiliated with the Muslim Brotherhood) in the protests and its control of public squares as a military coup and a distortion of the civil and peaceful revolution that was launched by the youth and was later supported by political parties.

There are two aspects to overthrowing a regime: the first is organic, while the second is substantive.[26] The organic aspect consists of overthrowing the head of state and his senior aides in the various authorities, while the substantive aspect requires changes in the political and constitutional system that governs public authorities. If overthrowing a regime means the ousting of heads of state from decision-making positions, this was achieved in Tunisia, Egypt, Libya, and Yemen, and later in Sudan, even though the circumstances differed in each country. However, the substantive replacement of a regime is broader and consists in transforming the identity of the state identity and the political, judicial, administrative, and constitutional systems. This has not happened in Yemen so far. The current constitution is still the political and legal document on which all internationally recognized and non-recognized de facto authorities depend, although practically everyone's actions are unconstitutional.

In terms of the National Dialogue outcomes, they do call for comprehensive change, and this is reflected in the draft constitution, which is in line with the revolutionaries' ambitions and demands. However, various circumstances prevented the holding of a referendum on the draft constitution, and the political process was obstructed by the coup, which led to the outbreak of a war that is ongoing to this day. Below is a brief overview of the National Dialogue outcomes that were achieved and included in the draft constitution.

B. Contents of the Draft Constitution

1. Comprehensive change

Based on the principle of comprehensive change included in the National Dialogue outcomes, some of the constitutional and legal provisions that were adopted at the National Dialogue Conference and that were included in the draft constitution are worth mentioning, such as:

- Changing the electoral system from a single electoral district system to a proportional list system
- Expanding the scope of women's rights and their effective participation and establishing a quota system for women in all state institutions
- Changing the political system from a hybrid system – tilted towards placing decision making control in the hands of the President while marginalizing the role of the government – to a clearly defined presidential or parliamentary system.

[26] We have already discussed briefly the disagreement over the organic and substantive overthrowing of the regime as a way to achieve the goals of the revolution.

- Protecting state media, the civil service, and endowments from government control, making them independent bodies, and integrating provisions on the Bureau of Grievances into the constitutional document.
- Changing the judicial system from a unitary judiciary unable to carry out its duties to a specialized judiciary that is better placed to face the endless stream of cases, including the establishment of an administrative judiciary and the guarantee of the constitutional court's independence to protect constitutional provisions against any violation.

Among the principles of comprehensive change contained in the National Dialogue outcomes was the transformation of the identity of the state and its structure, which is clearly stipulated in the draft constitution. Both of these aspects are addressed below.

2. Federal state

Since the unification of Yemen on 22 May 1990, several events have shaken the belief in centralized unity, under which, contrary to expectations, the economic situation deteriorated instead of improving. During the 1994 war, forces loyal to former President Ali Saleh and the Islamic forces allied with him invaded the south, seeking to control it militarily, and ousted the Socialist Party – the main partner in achieving unity –resulting in the exclusion of a key national component. Over time, power became completely centralized in the hands of the President, and this transformation had a significant impact on the adoption of several fundamental constitutional changes, including the transition to a unified state constitution, the transition from a parliamentary system to a hybrid (hyper-presidentalist) system, and the transition from a collective leadership represented by a presidential council that guarantees a certain level of power-sharing to a system with a single, unconstrained ruler. In addition, the identity of the state and its economic system were transformed, as outlined below.

These changes prompted many political actors to reject the centralized model in favor of a federal state, as well excessive centralization, which failed to properly manage the state. This was exacerbated by the 2011 Revolution, which spread across the country's northern and southern governorates. The establishment of a federal state was the middle ground between the excessive centralization that failed and the division of Yemen into several smaller, warring and unstable states. We will not list the reasons for adopting the National Dialogue outcomes on the new structure of the state (i.e., federalism) or clarify the source of the provisions on the state's regions, which was integrated into the draft constitution.[27] (These provisions were taken literally from the outcomes of the Regions Committee). The idea of transitioning to a federal state was endorsed by most political factions in the National Dialogue Conference. There were disagreements on the form and number of regions, but not on the structure of the new state.[28] It is necessary to explain some the most important issues that were raised in this regard, which the public is entitled to learn about.

27 Decision No. 3 of 2014 of the Regions Committee on the designation of regions, annexed to the National Dialogue outcomes.
28 It is important to mention that the martyr Dr. Ahmed Charafeddine defended and justified the establishment of a civic and federal state from a patriotic perspective. He was known as an Islamic and a constitutional jurist.

- The presidential decree that established the Constitution Drafting Committee tasked it with drafting a constitution for a federal state made up of six regions. In accordance with this text, the political factions submitted their candidates for the Constitution Drafting Committee, did not object to the number of regions, and participated through their committee members.
- The presidential decree that established the National Body for Monitoring the Implementation of the National Dialogue Outcomes tasked it with monitoring the Constitution Drafting Committee, including its commitment to the National Dialogue outcomes and to drafting a constitution for a federal state consisting of six regions. The factions that participated in the National Dialogue only objected to their representation quotas in the National Body for Monitoring the Implementation of the National Dialogue Outcomes and to the violation of some of the provisions of the decree establishing that body, namely the Guarantees Document.
- The decree establishing the Regions Committee was issued before that of the Constitution Drafting Committee, and the outcomes pertaining to the regions, which determined the number of regions and their administrative divisions, were issued a year before the draft constitution was signed.
- The provisions contained in the draft constitution were not developed by the Constitution Drafting Committee; rather, they were already contained in the outcomes of the Regions Committee. A full year had passed between the adoption of the outcomes of the Regions Committee and the inclusion of those provisions in the draft constitution.
- The establishment of a federal state, as mentioned in the outcomes of the National Dialogue, requires two chapters to be included in the draft constitution related to the division of powers and financial aspects respectively. However, there was no text in the National Dialogue outcomes containing the relevant details. These two governing principles (i.e., the distribution of powers and wealth) were at the root of the problem that called for the National Dialogue and were at the centre of its discussions and disagreements.

3. Civic state

The identity of the state was discussed at length during the National Dialogue, and the participants agreed that it should be civic. The Constitution Drafting Committee adhered to the provisions of the State-Building Working Group of the National Dialogue Conference. Since the concept of civic state is very complex, the draft constitution had to outline the rights and freedoms that all citizens should enjoy equally in a civic state, as well as the guarantees of those rights and freedoms against any violation. For that reason, the establishment of the national Human Rights Commission, the ordinary and administrative judiciary, and the constitutional court was stipulated in a way that guarantees their independence.

III. The Extent to which the Yemeni Draft Constitution Can Be Implemented

It is necessary here to discuss the challenges that the constitutional process in Yemen has faced, examine the objections made against the draft constitution, and present a forward-looking vision of the extent to which there are opportunities for the adoption and implementation of the draft. But before that, it is important to address the question of what the "revolutionary" constitutional provisions included in the draft constitution are, as well as the likelihood of their adoption and implementation in Yemen.

A. Differences between the New Draft Constitution and the Current Constitution

Dr. Ahmed Charafeddine, Professor of Public Law at Sanaa University, explained the differences between the National Dialogue outcomes and the current constitution in a statement describing the constitutional provisions listed in the State-Building Working Group report, which were also included the National Dialogue outcomes document. These were later included in the foundational provisions of the new constitution by the Constitution Drafting Committee. The statement he made is quoted below: [29]

We developed new texts and provisions regarding the identity of the state. We formulated new provisions and a new system of governance. We developed a new system and form for the state. We developed a new electoral system. What matters the most is that if, God willing, this report is implemented, and this is what we hope, it will transform Yemen into a very advanced country, and will contribute to ending the disparities that currently exist on the Yemeni scene, whether intellectually or practically.[30]

The table below helps show the extent of the comprehensive changes that the draft constitution promises. It compares the number of articles in the current constitution with those in the draft constitution regarding fundamental topics to show the extent of the positive changes contained in the new draft.

Constitutional topic	Article Number (from – to)	Number of articles in the current constitution	Numbers of articles in the draft constitution	Number of articles in the new draft constitution	Remarks
Political foundations	1 - 6	6	1 - 14	14	
Economic foundations	27 - 32	17	15 - 42	28	
Social and cultural foundations	24 - 35	12	43 - 71	29	
Rights and freedoms	41 - 61	20	72 - 137	66	The current constitution refers to rights and obligations, with no mention of freedoms.
Legislative Power	62 - 104	43	138 - 178	41	
Central Executive Power	105 - 144	39	179 - 205	27	
Judiciary	149 - 144	6	206 - 229	24	
Local authorities	145 - 148	4	230 - 263	34	
Sanaa and Aden authorities		N/A	263 - 281	18	

The table reveals a greater degree of attention paid in the draft constitution to core issues. While the current constitution is brief, as its provisions establish a unitary, centralized state, the draft constitution is more extensive as it seeks to respond to the demands of the people and because the National Dialogue outcomes included the

[29] See: https://www.youtube.com/watch?v=ajVx8tx78uQ.
[30] See the statement of the martyred Prof. Dr. Ahmed Charafeddine on evaluating the work of the State-Building Working Group via the link above.

establishment of a federal state. As a result, the draft constitution goes into additional detail to distribute powers among the different levels of government. It further develops the system of rights and freedoms, which lies at the heart of the Yemeni people's demands during the 2011 Revolution.

The current constitution establishes centralization in its most intense form, as demonstrated by the higher number of articles regulating the competencies of the executive branch as well as the House of Representatives. This numerical superiority can be observed in the comparison above, not to mention the great weight given to both authorities at the level of the constitutional text and in practice. This was one of the key reasons for the revolution, which demanded that centralized power be limited in favour of lower levels of government. While the draft constitution details the powers of the regions and local authorities, this is completely absent in the current constitution.

The contrast is also evident in the articles of the draft constitution related to the judiciary. The current constitution does not place much focus on the judiciary, which is unitary. This prevents it from carrying out its duties in achieving justice due to the unlimited flow of civil, personal, criminal, and commercial cases, at a time when people are demanding more justice. The participants in the dialogue had to come up with a system for the establishment of a specialized judiciary under the new constitution, including an administrative judiciary to deal with administrative violations, as well as the establishment of a specialized constitutional court to prevent any legislative violation of constitutional provisions.

As for the provisions on local authorities contained in the draft constitution, the main reason for their inclusion was that the draft incorporated the outcomes of the National Dialogue, including the establishment of a federal state to put an end to extreme centralization under the previous regime, both at the constitutional level and in practice. Goven the failure of the highly centralized model in Yemen, the only solution was to move toward the establishment of a federal state – the alternative being separatism and the establishment of smaller states in perpetual conflict along sectarian, racial, and regional lines.

In summary, what distinguishes the draft constitution is the fact that it the first constitution in the history of Yemen or even the Arab region to mention and codify certain issues such as:

1. Women's rights, imposing a female quota of at least 30% in all institutions, explicitly stipulating that the term citizen means every male and female citizen, and explicitly stipulating special rights whose inclusion in the constitution is a victory for feminist demands in Yemen.
2. The rights of young people and the need to ensure their active participation, and the rights of marginalized and other vulnerable groups.
3. Transitional and social justice.
4. The significance of the civic state and making it a constitutional requirement.
5. Elaborating on children's rights in detail.

This raises the following question: What are the conditions for the successful adoption of the new Yemeni draft constitution and for its subsequent implementation? What are the risks and challenges it will face?

This question is addressed in the third section of this paper, which assesses the potential success of the Yemeni constituent power in adopting the draft constitution. The constituent power in this respect refers to the Yemeni people, who are the final decision-makers, having been given the power to accept or reject the draft constitution. The Yemeni people come before the leaders of armed groups and decision-makers at all levels of the de facto and official powers, who must prioritize national interest, stop their futile wars, and put an end to the country's fragmentation into smaller states that do not fulfil the conditions for survival and that instead carry within them the seeds of annihilation and endless conflict. It can be said in all certainty that the only solution for the Yemeni people is to adopt the basic guidelines contained in the new draft constitution, which are the establishment of a **civic state** that rejects sectarian and religious discourse and protects religious rights, as well as the establishment of a **federal state** that preserves the unity of the Yemeni people, consolidates the principle of equality among citizens, and promotes power and wealth-sharing.

Even when all political factions become convinced that only with the establishment of a **federal civic state** can the killing of Yemeni citizens end and the interests of Yemenis achieved, they will still have to rely on the draft constitution's provisions related to state-building, rights and freedoms, and the division of powers based on broad power and wealth-sharing, even if they might require to be amended to achieve public interest.

As for the main risks that might hinder the building of a modern Yemeni state that protects and accommodates everyone, these include:

- The public and some leaders of armed groups remained uninformed of the new constitutional foundations.
- Monopolization of power by any armed group and the abolition of power-sharing.
- The existence of sectarian and regional armed groups, regardless of their orientation or sect.
- Regional and international intervention in Yemeni affairs, which has transformed the conflict into a series of regional conflicts and turned the war into multiple wars.

We have previously mentioned the available solutions and stressed that if the cause of the disease is known, so is its treatment.

In addition to what was mentioned in previous sections, the challenges that the draft constitution and political process face will be summarized here by explaining the reasons for which the armed groups rejected the draft, including the objections they made against it.

B. Objections against the Draft Constitution

The main objections made against the draft constitution are two-fold:

1. Refusal to specify the regions in the draft constitution

It has already been mentioned that the participants in the National Dialogue Conference reached a consensus on the principle of a federal state, and this principle was agreed upon by most of the active political factions in Yemen. There was disagreement on the number and form of the regions to be adopted in the constitutional document rather than on the principle of the federal state. The State-Building Working Group and the Southern Yemen Working Group worked on this fundamental issue, and the two groups concluded that the desired form of the Yemeni state is federal (this text is taken literally from one of the outcomes of the State-Building Working Group). However, the details were entrusted to the Southern Yemen Working Group that formed a sub-committee later known as the Committee of 16, where eight members were from the north and eight from the south. They studied all federal systems to come up with the methodology and the standards that would be used to define the regions, their numbers, and their boundaries.[31] A proposal to form the Regions Committee emerged from the Committee of 16, and a presidential decree was issued after that to form the Regions Committee, which included all the active political groups at the time, primarily the representatives of the General People's Congress Party, Al-Islah Party, the Southern Movement, Ansar Allah (Houthis), and others.

This working group reached the decision to establish between two and six regions, and in a plenary meeting, the National Dialogue Conference tasked the President of the Republic to determine the number of regions where "the President of the Republic and the President of the Comprehensive National Dialogue Conference shall form a committee chaired by him, with the authorization of the National Dialogue, to determine the number of regions and whose decision shall be definitive. The committee shall consider the option of establishing six regions – four in the north and two in the south – or the option of establishing two regions, as well as any option between these two which achieves consensus."[32] The Regions Committee convened and proposed five regions, but the representative of former President Ali Saleh, the late Sheikh Yasser Al-Awadi, stated that he would only accept political and administrative division if the federal state consisted of six regions. Since the approval of the General People's Congress Party was important, and because the six regions were one of the proposed options, six regions were agreed upon, and the Regions Committee issued its decision on 10 February 2014. This decision was later referred to the Constitution Drafting Committee to be included in the draft constitution.

31 The sub-committee of the Southern Question Working Group was formed on 10 September 2013 to develop a vision for all political factions. See the National Dialogue Outcomes Document, Final Report on the Southern Question, 37.

32 See the Comprehensive National Dialogue Outcomes Document, Final Report on the Southern Question, Paragraph (c), 40.

As stated above, the Constitution Drafting Committee was only formed after the Regions Committee issued its decision to divide the centralized state into six regions with specific administrative boundaries, while giving the elected legislative power the power to review those regions after two electoral cycles in accordance with the provisions of the constitution. When the members of the Constitution Drafting Committee were about to sign the final minutes as the committee concluded its work, directives were issued by the alliance between Ansar Allah (Houthis) and former President Ali Saleh to the Houthi representative in the committee urging him to refrain from signing the minutes of the final session, despite him having signed the minutes of all the previous sessions. He proceeded to do so in compliance with the wishes of Ansar Allah (Houthis) and the former President Ali Saleh.

A media war was then waged against the Constitution Drafting Committee by former President Ali Saleh and the Houthis, although it was President Saleh's personal representative in the Regions Committee who had insisted on establishing the sixth region. The two aforementioned political and military factions not only objected to the six regions, but they also went as far as opposing the principle of the federal state in general; they even opposed the concept of civic state and the demands for comprehensive change at certain times. They made political accusations against the members of the Constitution Drafting Committee, described them as traitors, and accused them of seeking to divide Yemen into smaller states and undermining its sovereignty. However, they forgot in the process that they were the first to propose the adoption of the federal state principle during the Technical Committee stage.

We must make certain clarifications to dissipate those accusations of treason, especially since they caused harm to some members of the Constitution Drafting Committee, leading to insults being directed at them. Some were even fired from their jobs and their homes were broken into and looted.

- Ansar Allah (Houthis) is one of the most prominent political factions that proposed the establishment of a federal state even before the National Dialogue began and since the formation of the Technical Committee.
- Before the 2011 Revolution, there was an alliance of opposition political forces represented by the Joint Meeting Parties, which expanded the front of the opposition to the regime of former President Ali Saleh by adopting an expanded National Dialogue which included independent political figures, sheikhs, social movements, and a representative of Ansar Allah (Houthis), in addition to the Joint Meeting Parties. They issued a document known as the National Dialogue Document in 2010 in which constitutional reforms were proposed, the most important of which was the transformation of Yemen into a federal state consisting of five regions, each of which must have a maritime port. The Houthis participated in this coalition through a representative who signed that document. Therefore, the idea of transitioning to a federal state in order to preserve unity under a different form was proposed before the youth revolution in 2011, since the Document of Pledge and Accord, signed in Jordan in 1994, which called for abandoning centralization and moving towards building a federal state.
- During the National Dialogue, the representative of Ansar Allah (Houthis) explained in detail to the State-Building Working Group the need to abandon excessive centralization and the justifications for the

establishment of the federal state. (A copy of this important historical document drafted by the martyred Dr. Ahmed Charafeddine, who presented it on behalf of the (Ansar Allah) faction after the Houthi leadership approved it verbatim is annexed to this paper.)

- Regarding the Southern Question Working Group, Mahmoud Al-Junaid, the Houthi representative in the Committee of 16, agreed on the principle of establishing different regions and on tasking former President Abdrabbuh Mansur Hadi to form the Regions Committee to specify a number between two and six regions. The Regions Committee reached this consensus without pressure from anyone. Al-Junaid later participated[33] in the Regions Committee, covering for the absence of the head of the Ansar Allah Political Council at the time, Saleh Habra.

- The aforementioned representative of Ansar Allah in the Southern Question Working Group presented his party's vision, drafted by the Political Bureau of Ansar Allah. The Political Bureau assigned its aforementioned representative to present it publicly and officially to the Southern Question Working Group as a vision for resolving the South Yemen question. In explicit detail, they expressed the need to divide the centralized state into several regions, rejected the option of the two regions, and justified this by the need to distribute **centralized power** so that each region has its own executive, legislative, and judicial powers. A copy of this historical document is also annexed to this paper, given that it can be useful to advocate for the need to establish a federal state if and when Yemeni parties agree to stop the bloodshed in their country.[34]

- In the Constitution Drafting Committee, the representative of Ansar Allah[35] insisted on the establishment of six regions early on, during the drafting of the provisions on the establishment of the Federal Council for the future state. He had insisted that the establishment of six regions was agreed upon and not disputed. When the time came to sign the minutes of the final session of the Constitution Drafting Committee, directives were issued to prevent him from signing, although he had signed all the previous minutes of the committee meetings.

- Article 141 of the draft constitution stipulates that "**The Federal Council shall consist of 84 members; 12 from each region, 6 members representing the city of Sanaa and 6 members representing the city of Aden. The members are to be elected through general, free, secret, direct, and equal vote under the proportional list system in each of the regions."** Based on this text proposed by some members of the Constitution Drafting Committee, the issue of the six regions was settled. However, there was another proposed version of the same article, which read as follows: "**The Federal Council**

[33] Mahmoud al-Junaid was appointed as a member to represent Ansar Allah (Houthis) at the National Dialogue and served as Vice President of the Houthis. He is currently Deputy Prime Minister in the Houthi-controlled Sanaa government. See the following link for the document submitted by them: https://www.youtube.com/watch?v=6eH6uC4g3-E.

[34] See: https://www.youtube.com/watch?v=6eH6uC4g3-E.

[35] The representative of Ansar Allah (Houthis) in the Constitution Drafting Committee was Abdul Rahman Al-Mukhtar. He adopted the Houthis' positions with former President Ali Saleh during the last days of the committee's work.

shall consist of 12 members from each region, 6 members representing the city of Sanaa and 6 members representing the city of Aden." This text does not specify the number of regions, whereby in the event of political consensus to change the number of regions or to merge the authorities of two regions into one, it would not require to be amended. An objection was made against the first text and referred to a sub-committee formed of six members of the Constitution Drafting Committee, including a representative of Ansar Allah. However, the representative of Ansar Allah insisted on passing the first text and rejected the open version, stressing that the Ansar Allah leadership had agreed to establishing six regions. This position, as well as the position that we will refer to later, indicates that the objection to the six regions was a new development, because the approval of the text on the formation of the Federal Council was agreed upon a month and a half before the adoption of the last articles of the draft constitution, which were pending approval until the last meeting of the Constitution Drafting Committee, and the representative of Ansar Allah signed the minutes of the meetings during which all matters related to the Federal Council were approved.

- It later turned out that the political factions that were planning to undermine the draft constitution and to subvert the entire peaceful political process deliberately let the proposal of the six regions reach its final stages to use it as a justification to undermine the entire process. The members of the Constitution Drafting Committee were betrayed, and Yemen became what it is today: scattered, war-torn, devastated, and destroyed, even at the level of social relations.[36]

- During the work of the Constitution Drafting Committee, the German Berghof Foundation invited a group of high-ranking political leaders to a multi-day seminar in Addis Ababa in May 2014. The aim of this meeting was to present a proposal that would be submitted to the Constitution Drafting Committee, outlining the division and distribution of power across different governmental levels, in accordance with the National Dialogue outcomes. That proposal was presented to the members of the Constitution Drafting Committee, and one of the participants of the seminar was tasked with explaining it to the committee members. The document was presented under the title "The Structuring of the Federal State," wherein power was divided among **six regions**. Several senior politicians from Ansar Allah, led by Abdul Malik Al-Ajri, attended this seminar.[37]

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[36] These positions were mentioned not in defense of the six-region proposal, but in defense of the members of the Constitution Drafting Committee who were betrayed and wrongly accused. The text of the article on the regions existed before the formation of the Constitution Drafting Committee, and the author of this paper, although a supporter of the federal form of state, does not believe that the six-region proposal is the only viable one. However, from the author's point of view, a higher number of regions in the design of the federal state is better than one with less regions. The author believes that this text will be open to discussion and to consensus among the political factions if and when the war leaders decide to start the peace-building process.

[37] Ali Saif Hassan, Director of the Foundation, visited the Constitution Drafting Committee and asked one of the participants to explain the contents of the Federal State Structuring document and the contents of the division of the centralized state into six regions. Berghof was the only foundation that was allowed to present its vision to the Constitution Drafting Committee, because the document was issued as a consultative tool drafted by senior politicians, led by the Houthis, to help members of the committee.

- On the day that the Constitution Drafting Committee was to submit the draft, on 17 January 2015, in accordance with the provisions of the law requiring it to submit the draft to the President of the National Body for Monitoring the Implementation of the National Dialogue Outcomes (the late Dr. Abdul Karim Al-Iryani), and in the presence of the Constitution Drafting Committee members, the National Body members, and the former President of the Republic, the Secretary-General of the National Dialogue Conference and Director of the Office of the President of the Republic[38] was kidnapped. The representative of Ansar Allah (Houthis)[39] in the National Body objected to the submission of the draft and withdrew from the meeting, along with the rest of the members representing Ansar Allah and supporters of former President Ali Saleh. Their withdrawal came after the former President, Abdrabbuh Mansur Hadi, had announced in front of everyone that:

  > The draft is not the Quran, and the Houthis and President Saleh's representatives have the right to request that it be amended as they deem appropriate, especially with regard to the regions. An amendment was suggested on the basis of their previous request to give the Hajjah Governorate a seaport and transfer this Governorate to the Azal Region were fulfilled, as should be the case with respect to any new demands.

However, all the representatives of Ansar Allah and President Saleh insisted on withdrawing even after they were offered the option to amend the draft and the regions for the sake of the public interest. The offer was to no avail, as the decision to take military action against the entire political process had already been made by those objecting to the draft constitution.[40]

- It becomes clear from the above that the Regions Committee report was signed on 10 February 2014, the Constitution Drafting Committee, in which the Houthis participated, was formed in March 2014, and the decision to establish it explicitly included the drafting of a constitution for a state consisting of six regions. The deadline for the committee to complete its work was 1 January 2015, and the date of submission of the first draft to the National Body for Monitoring the Implementation of the NDC Outcomes was 17 January 2015. The Peace and National Partnership Agreement was signed on 21 September 2014, while the Constitution Drafting Committee was conducting its work. This agreement did not include any explicit provision regarding the revision of the principle of the regions; on the contrary, it stressed that the National Body for Monitoring

38 Dr. Ahmed Awad bin Mubarak was a member of the Technical Committee and was elected as Secretary-General of the National Dialogue Conference. The martyred Dr. Ahmed Charafeddine sought to nominate him as Prime Minister in the broad partnership government. When the decision was issued to assign him as Prime Minister, there was overwhelming opposition from the movement of former President Ali Saleh and the Houthis, and he was finally appointed Director of the President's Office after he refused the position of Prime Minister. He currently holds the position of Minister of Foreign Affairs, and before that he was Ambassador of Yemen in Washington.

39 At that time, Hamza al-Houthi was the Houthi representative in the National Body, and he strongly objected and withdrew with the rest of the members of the Houthi component and supporters of President Ali Saleh. The Houthi representative to the Constitution Drafting Committee was excluded from attending this historic meeting based on a decision from the movement.

40 See the published phone conversation between the official spokesman of Ansar Allah (Houthis) to the National Dialogue Conference and the former president, confirming that the incident that occurred on the day of the submission of the draft was a joint action taken by Saleh's and the Houthis https://www.youtube.com/watch?v=0z0cQWAxFeg.

the Implementation of the National Dialogue Outcomes should only review the principle of the regions with the Constitution Drafting Committee. Where and when did the objection to the principle of the regions arise after all that time had passed? How could the Constitution Drafting Committee be accused of issuing the decision to establish six regions? The committee was implementing previous decisions that faced no objection from any party, with no alternative having been presented to date. If there were to be any objection to the principle of the federal state, knowing that no other alternative was proposed, then those objecting to that principle, who were the ones to present the vision of a federal state at the National Dialogue Conference in the first place, bear responsibility for the devastation and destruction that Yemen has witnessed.

- I must bear witness to history and state that I asked the leaders of Ansar Allah (Houthis), while I was working as part of the Constitution Drafting Committee, to present their vision of the article relating to the regions. I had also asked them in November and December of 2014, through my martyred brother Hassan Zaid, to submit any proposal they might have regarding the objection to the six regions. Just before reaching consensus on all the provisions of the draft constitution, and after I had demanded the submission of an alternative during the drafting of the constitution, everyone refused to make any comment on the article related to the six regions. Why, then, did their national fervour arise after that? Why did they decide to object to a done deal that should not under any circumstances have caused such turmoil, especially since they could have easily reviewed the article and presented an alternative? And where is the alternative text or solution that they have provided to date?
- We conclude from all the above that the objections against the Constitution Drafting Committee's work, although ostensibly aimed at the text related to the six regions, in fact targeted the entire draft constitution, the entire political and constitutional process, and the very effort to build a modern Yemeni state that accommodates and protects everyone.

While any citizen or politician has the right to criticize all the provisions of the draft constitution and demand to discuss or amend them, this right cannot be given to the same political factions that had initially contributed to the adoption of the principle of the federal state. These factions did not make any objection to the article related to the six regions, and all their political documents and public positions bear testament to the fact that they expressed their approval of this principle,[41] especially since they did not provide an alternative that could be agreed upon.

Lastly, we must once and for all dispel the accusations that the draft constitution divides Yemen. The federal state certainly does not entail the division of the country, but rather distributes central power, reduces excessive centralization, and establishes local authorities at various levels represented by the centre, region, governorate, and locality, as shown in a separate study.[42]

41 Sami Al-Sayyaghi, "The Option of Federalism in Yemen and its Six Regions is a Fatal Remedy," *Muqarabat siyasiyya* 2 (2017): 47-87.

42 Abbas Mohammed Zaid, *Federalism: the European Union and the Arab League* (Cairo: Institute of Arab Research and Studies, 2017).

2. Rejection of the draft constitution by certain armed groups

As we have seen in previous sections, the goal was not only to condemn the establishment of the six regions, but to condemn the draft constitution entirely and the principle of the federal state, which the political factions had agreed upon, including those that publicly reject it today. While their reasons may differ, they employ the same means. In the first place, the draft constitution is rejected by the forces that demand separation, reject the principle of establishing a federal state, and reject unity in all its shapes and forms. In the second place, the establishment of a federal state is rejected by totalitarian political forces in order to maintain excessive centralization.

The common means employed by these two factions is that they both reject the establishment of a civic and federal state that accommodates all parties, where everyone participates in building and managing it while benefiting from the country's wealth, and by promoting the principle of equality among citizens.

Once the forces rejecting the draft constitution asserted themselves following their coup against the political process, the draft constitution could no longer be approved, because it opposes both excessive centralization and separatism. However, the only solution is for Yemen to adopt a new constitution for a "new form of state, a civic state that protects religious rights," [43] and a federal state that guarantees power and wealth-sharing, to the benefit all and without monopolization.

Once everyone becomes convinces of the need to establish a that accommodates everyone, politicians and the public will find the draft constitution to be the only foundation to build upon, with the possibility to discuss and amend its provisions, so that everyone can live safely in a stable and secure state in which the rule of law is entrenched and the principle of equality among citizens is promoted. We thus conclude our study of the constitutional process in Yemen, in the hope that other researchers can answer the many questions we raised to complete the picture. No one possesses the ultimate truth, and everyone is subject to error and forgetfulness, and Allah alone knows the intention behind one's deeds.

[43] See the lecture of the martyred Dr. Ahmed Charafeddine on the justifications for the establishment of a civic and federal state annexed to this paper.

ANNEXES

A. Ansar Allah's Vision on the Form of the State, presented to the National Dialogue's State-Building Working Group

State Form

The unity agreement between the Yemen Arab Republic and the Democratic People's Republic of Yemen was signed in 1990. As a result, a new state called the Republic of Yemen was established as a new international entity. Accordingly, the two international entities of the two former republics disappeared, and the new state took a simple form. The local administrative divisions of the two previous states were maintained, and some amendments made to the administrative division later on, bringing the total number of governorates in the Yemen Arab Republic to 21, six of which are the governorates of the former Democratic People's Republic of Yemen, and the rest are those of the former Yemen Arab Republic, with very slight overlaps between the two former states.

Before 1994, the new state order was not adequate, because the process of achieving unity was hasty, and innumerable problems arose immediately after the unification, gradually worsening until they resulted in a severe political crisis which required a new formula for the state. The Document of Pledge and Accord of 1994 was the solution agreed upon between the two political partners of unity, the General People's Congress and the Yemeni Socialist Party. This document addressed the tense situation by reconsidering the state's form and rebuilding it on another basis by dividing the country into autonomous or semi-autonomous regions. As a result, this document was the first glimpse of the idea of a (composite) federal state instead of the simple state form mentioned in the agreement to declare the Republic of Yemen.

Hence, we can say that the agreement to establish the Republic of Yemen as a simple state was amended by the Document of Pledge and Accord of 1994. The previous unilateral actions taken by the partners in unity and the outcomes of victory of one partner over the other, the most important of which was the elimination of South Yemen from the political equation, do not affect the basic form of the Yemeni state in accordance with the contents of the Document of Pledge and Accord. As such, the following can be noted:

1. The legitimacy of the simple Yemeni state has been modified by the Document of Pledge and Accord; therefore, the restoration of the status quo ante is ill founded.
2. All the developments that took place after 1994 contrary to this document, including the general elections, the amendment of the administrative division, etc., are illegitimate.
3. The document offered an adequate basis for the establishment of a composite state, but this has yet to be achieved.

4. In practice, and over the course of more than twenty years since the establishment of the integrative unity, the simple state has failed to maintain the country's unity and to carry out its assigned duties.

5. The geographical, cultural, demographic, and civilizational factors in Yemen are all in favour of a composite state, not a simple one.

6. The Yemeni unity of 1990 was a voluntary unity established by an agreement between its components, resulting in the establishment of a simple state. This state form has been voluntarily modified by another agreement. Subsequently, the choice of whether the original or modified form of the state will be maintained should also be voluntary. This should be decided by the National Dialogue Conference, which officially recognized the existence of two equal parties (North and South), and this was reflected in the distribution of the membership quota equally among the two parties.

Based on the above, we believe that the future form of the state should be as follows:

The establishment of a composite (federal) state, the details of which will be determined by the National Dialogue Conference by consensus.

B. Lecture by the martyred Dr. Ahmed Charafeddine during the National Dialogue at the "Afham" (Understand) Forum

The main reason that has led Yemen to its current state, in my opinion, is threefold: the religious forces, the tribal forces, and the military forces. These three sides formed alliances with each other and brought the country to where it is now. The problem was not primarily legal, as we had a constitution that addressed many important matters, and we had laws that governed many aspects which we can discuss. We had to some extent an institutionalized system from a legal perspective. However, in practice, this system was absent. This troika controlled Yemen, while the constitution and laws remained mere words on paper. I will not delve into the wrongdoings of these three parties and how they have led us to where we are, as you are all familiar with this. Instead, I will focus on the remedies.

First Remedy:

When we talk about addressing the religious forces, it does not mean that we are not religious. In fact, we may be even more religious than them, and we are more committed to our faith than them. However, religion has been misused in the past, and this was facilitated by constitutional and legal provisions.

To address the religious forces, **we need to build a different kind of state. We need to establish a civic state with no religious discourse, meaning that the state does not adopt a religious discourse and it does not use religious discourse against the people. Religion should belong to the people, and the state should not have a religion, because the state is a moral entity.** This dialectic has been extensively debated by intellectuals, but they have not reached a conclusive outcome. We are now revisiting this dialectic and asserting that

in the present era, the state should distance itself from religious discourse. Why? **Because we have lived under religious states for hundreds of years, and when the state adopts religion, it imposes a specific, dominant sect, eliminating other sects and ideas.** We know that most of the conflicts among Muslims were caused by the religious state. When you establish a religious state, those in power will endorse a discourse from a particular perspective that may not be acceptable to the other party, leading to conflicts. This has been the case throughout centuries, and constant conflicts have erupted for this reason. As you know, Islam has multiple interpretations, not just a single interpretation in terms of behaviours and rituals, let alone in the political realm. There are differences, and it is impossible to satisfy all parties with a single political theory based on a religious foundation.

Therefore, we assert that religion belongs to the people with their diverse sects and denominations, while the state should distance itself from religious discourse. However, it is the duty of the state to safeguard religious rights. This is what we strive for at the State-Building Working Group: to ensure that religious texts guide the people's religious practices, as is the case in many countries around the world, while keeping the state separate from religious discourse. Islam should not be the religion of the state, and the Islamic Sharia should not be the sole source of legislation, including the constitution, because it is the constitution that builds the state. If we include religion within all legislations, this implies that the constitution and the state it establishes should be based on a religious foundation, which leads us back to the previous dilemma we discussed earlier.

Second Remedy:

The influential tribal powers can be addressed through a federal state. When a federal state is established, it will strip these "centres of power" of the influence and capabilities they rely on. Previously, when the state was simple, the decision-making centre was in Sanaa, and the influential tribal powers, which still exist, were located near Sanaa, thus having control over the decision-making process. They extended their influence through financial, commercial, social, and other means, leveraging this centre, which is the state's centre. When we advocate for a federal state, it means that these powers will lose their ability to influence the state's centre. Why? Because they will no longer be able to control anyone thereafter.

Each region of the federal state will have its own separate powers, including legislative, executive, and judicial powers. Each region will have its own constitution, laws, courts, and resources. Consequently, the tribal powers or influential forces existing in the capital or its vicinity will not be able to influence these distant regions. At most, they may have minimal influence on the centre of the federal state. Nevertheless, we demand that the capital be relocated from Sana'a to another city that is far from these centres of power and tribal influences. Additionally, the federal state's jurisdiction will be limited to defence, foreign policy, and finance, which are shared among all regions. However, all other matters will be transferred to the individual regions. **When we advocate for a viable federal state, having two regions or multiple regions in the south and the north**, all of these concepts align with the principle of a federal state. The specifics can be further negotiated and agreed upon.

Here, I would like to highlight an important point regarding extensive or full local governance. In global systems, there is no local governance that has extensive or full powers, nor is there a system that is deficient in powers. Each system has its own foundations and rules, and if these foundations are disrupted, the system deviates from its original form and no longer represents the intended concept. There is no such thing as "extensive" or "full" in an absolute sense. For example, when we talk about administrative decentralization, the concept is well-defined, with its principles, pillars, and established rules. If these principles are violated, the entity ceases to exist as intended. The term "extensive" or "full" in terms of political powers has been used to mislead people. It implies that local governance will have significant powers and complete autonomy, promising certain rights and benefits to the people. However, in reality, it may not lead to the desired outcome because you will still operate within an administrative system.

We are talking about a political system, not an administrative one. We are talking about political decentralization, where all state powers, not just administrative aspects, are distributed. Even if the administrative side is decentralized, the central government still maintains control over these decentralized powers in the regions. At any time, through parliamentary action, the central government can modify this system. We have witnessed numerous amendments to the decentralization system, both in its territorial and regional forms, based on political considerations rather than administrative or developmental ones. Therefore, we seek to curtail the influence of these "second-tier" powers in order to rectify the situation in Yemen.

Third Remedy

We now come to the realm of military power, the forces that have waged wars and have led the state in one way or another. We wish to have a people's army that protects the people and does not wage wars against them. An army whose creed is to protect the people rather than to be harm them, an army that carries a patriotic ideology rather than a religious one. It is unfortunate that when this army engages in warfare, it does so on religious grounds. Wars have been waged on the South under the banner of jihad, claiming that the southerners are fighting against Muslim Yemenis. They waged those wars that you are familiar with. Furthermore, wars have been waged in Saadah under similar slogans, labelling certain groups as apostates or deviants, accusing them of going against the religion. Soldiers are sent to fight while carrying these ideologies.

We want an army built differently; one whose creed is the protection of the people rather than waging war against them. An army whose ideology serves the people's interests and does not harm them, an army that embraces a philosophy that benefits the entire population with its diverse political, sectarian, and religious orientations, rather than being aligned with one group and against another. We envision an army founded on a national creed and built upon national foundations, not on sectarian, regional, or tribal grounds as is currently the case. It should represent all the people, from Saadah to Al-Mahra, and everyone should participate in it. This army would truly embody the entire nation and act as its guardian, refraining from initiating wars against its own people.

In conclusion, if we are able to build the state on these three foundations: a civic state, a federal state, and a national army, we will overcome the troika that has led the country to its current state.

C. "Ansar Allah's Vision to Resolving the Southern Question: An Introduction to the Southern Cause Working Group

In the Name of God ,the Most Merciful ,the Most Beneficent

Ansar Allah's Vision on the Approaches and Guarantees for the Southern Question

Discussing the proper and necessary approaches to any problem must stem from a precise diagnosis of the roots of that problem and its underlying causes. Based on this premise and our analysis of the roots and causes of the Southern Question in our vision, we will attempt to outline our vision to addressing it in these brief paragraphs. We are fully aware of the significant importance of this question and its wide-ranging implications and impacts at the national level as a whole. It necessitates immediate and urgent resolution without any delay, procrastination, patchwork, or fragmentation, as it cannot tolerate such approaches, especially considering that some forces with power and wealth in Sana'a are working to hinder and obstruct any solutions that may deprive them of their privileges and interests.

Furthermore, we emphasize that addressing all national issues, including the Southern Question, requires sincere and serious political will. Without it, no solutions or approaches will succeed. Instead, matters will only worsen and become more complicated than they already are. Moreover, they will collide with the will of the people, who will not allow anyone to subvert their aspirations. We also stress the importance of involving all components of the Southern Movement in addressing the issue.

Firstly, we would like to point out that addressing this issue actually begins with taking urgent measures and actions that can build trust and create a conducive environment for a comprehensive solution. This is precisely what the twenty points presented by the Technical Committee in Charge of Preparations for the Comprehensive National Dialogue Conference and the eleven points demanded by the Southern Question Working Group at the outset of their work represent. In this regard, we express our deep disappointment due to the reluctance and procrastination in implementing these points by one party or the other. This is because their implementation would have had a positive impact on the ground. Therefore, we strongly emphasize the need to immediately implement all the provisions contained in those points as a crucial and important step to address the issue, particularly since many of them relate to various human rights and humanitarian dimensions.

Here, we emphasize that everything related to the Southern Question, including the violations and rights associated with it, must be addressed primarily through the implementation of the thirty-one points and the inclusion of any overlooked aspects. All human rights violations related to the issue since the summer war of 1991 must be

incorporated into the topics of transitional justice and national reconciliation. This entails applying the principles and measures of transitional justice in accordance with international standards to all these violations. It is necessary to acknowledge all crimes and violations without any justification by the ruling powers in Sana'a at that time, to apologize for them, to provide redress and compensation to the victims, and to rectify the institutional structure of the state's bodies and institutions involved in those violations, ensuring the protection of citizens' rights, freedoms, and dignity.

As previously discussed, the roots of the Southern Question lie in the failure to establish an institutional state and the seizure of power by military, tribal, and religious forces in Sana'a. This has undermined the foundations of the state, targeted its institutions, hindered their functions, and fostered a police state mentality which control the situation through crises and wars and takes possession of the country's assets, power, wealth, and authority to serve the interests of influential circles. The transformation of the state from an institutional national project into an authoritarian traditional structure, while superficially maintaining a political and democratic facade, has disrupted the rule of law and violated the rights and freedoms of citizens.

We also consider the summer war of 1991 as the direct catalyst for the emergence of the Southern Issue. The nervous system of the regime in Sana'a was not prepared to transition into a state that could guarantee unity and its preservation. Therefore, the Southern Issue is fundamentally a state-building issue, as the relationship between the two is intrinsic, deep-rooted, and of vital importance.

Therefore, the building of a **modern civic state**, based on a genuine institutional structure that guarantees civil and political rights, enhances social cohesion and paves the way towards the future envisioned by all Yemenis, is the most crucial foundation for addressing the Southern Question and ensuring its non-recurrence. It is essential that all grievances, violations, and transgressions committed against the people of the South are addressed. In this regard, there have been multiple options and proposed approaches by Yemeni political parties to resolve the issue. These options have ranged across four tracks, as follows:

- A unified state with a strong central government, favoured by some political forces in the North, is considered one of the least preferred options. It is particularly characterized by its contradiction with the spirit of the protest movement in the South.
- A unified state with a strong local administration, represented by a simplified state structure with extensive powers delegated to local authorities, has supporters from various political spectrums. However, similar to its predecessor, it does not enjoy any support within the South.

A federal state represented in:

- A multi-regional federal system
- A federal system with two regions: Some view this option as a transitional solution for a period not exceeding four years, after which the people of the South would have the right to self-determination.

- The establishment of an independent, democratic, and federal state on the territory of the People's Democratic Republic of Yemen. Supporters of this option argue that the root of the problem lies not in the current system or state structure but in the dominance of the culture and system of the North.

Given the current complex facts of the Yemeni situation, particularly regarding the Southern Question and its deep connection to the failure of nation-building, it is our opinion that the appropriate form for the state to be built upon is that of a federal state. This would entail a genuine agreement on the form of unity, taking into consideration the intricacies of the Yemeni context.

To ensure its success, this federation should be based on a federal constitution that upholds sound national principles, criteria, and foundations. It should dismantle power centralization and monopolization of wealth, while guaranteeing the right of the people of the South to fair participation in the management of federal institutions. It should emphasize the rights of regions to exercise legislative, executive, and judicial powers, as well as the right of each region to have its own constitution that defines its power structure and authorities within the framework of the federal constitution. The federal system should adhere to democratic principles and good governance, ensuring justice, equality, the rule of law, the independence of the judiciary, the neutrality of the military institution, and the separation of powers. It should also safeguard rights and freedoms. Additionally, there must be a comprehensive strategy for achieving sustainable development, which is another pillar upon which the federal union must be based. This strategy should be actionable, implemented directly, and subject to practical application.

Our inclination towards this option is based on our vision of the desired form of the state, as presented to the State-Building Working Group, which includes the following:

"Since the war of 1991 and the preceding unilateral actions by the unity partners, as well as the subsequent outcomes resulting from the victory of one partner over the other, including the exclusion of the South from the political equation, did not affect the other fundamental basis of the Yemeni state in accordance with the provisions of the Document of Pledge and Accord, we note the following:

1. The legitimacy of the existing simplified Yemeni state has been modified in accordance with the Document of Pledge and Accord, and, therefore, reverting back to the state prior to this document is not based on valid grounds.

2. Any actions taken after 1994 that contradict the provisions of the document, including general elections, administrative division amendments, and others, lack legitimacy.

3. Since the document contained a sufficient basis for establishing a composite state, it is necessary to complete the establishment of this composite state.

4. Practically, over the past twenty years since the integrative unity, it has become evident that the simplified state has failed to maintain unity and fulfil its expected obligations.

5. The geographic, cultural, demographic, and civilizational factors in Yemen all favour the composite state over the simplified state.

6. The Yemeni unity of 1990 was a voluntary unity that arose from an agreement between the two parties, resulting in the establishment of a simplified state. This form has subsequently undergone voluntary modifications based on another agreement. Therefore, the preservation or alteration of the original or modified form of the state must also be voluntary.

Guarantees:

- Any solution must be subject to the satisfaction and acceptance of the people of the South.
- Since the remaining period of the transitional phase is not sufficient to fulfil its obligations, including the drafting of a new constitution, conducting a popular referendum on it, enacting an electoral law based on the new constitution, and establishing a new electoral registry, it is necessary to reach a consensus on a new transitional phase to implement the outcomes of the National Dialogue, particularly regarding the issues of Saadah and the Southern Question, and to build a state based on the following principles:
  - **Issuing a constitutional declaration agreed upon by the political forces represented in the National Dialogue.**
  - **Establishing a transitional legislative council and a national unity government (National Salvation) to oversee the implementation of the outcomes of the National Dialogue, with equal representation from the South and the North.**
  - **Transforming the resolutions and agreements reached into clear constitutional and legal principles and texts to ensure that past events are not repeated.**

May Allah grant us success

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The Libyan Constitutional Narrative Since 2011: Facts, Assessment, and Recommendations

Azza Kamel Maghur *

ABSTRACT

Libya's constitutional history began with the adoption of the independence constitution in October 1951, which was followed by the declaration by the United Nations General Assembly of the country's independence on 24 December 1951. Then, in 1953, a law relative to the Libyan Supreme Court was passed, giving it constitutional jurisdiction and making it one of the first constitutional courts in the Arab region.

Libya's constitutional process was reversed in 1969 after the September coup. During that time, the constitution was ignored, and it was later declared that the Constitutional Declaration of the Revolutionary Command Council would replace it. This marked the end of the constitution that had been in place for sixteen years, and, since then, Libya has not seen the adoption of a new constitution.

During the 2011 Arab Spring uprising, the people demanded a national constitution that guarantees their rights and freedoms and establishes a system of governance based on recognized democratic principles, notably the peaceful transition of power.

Libyans had great hope and believed that the road ahead would be free of obstacles. However, the new regime that came into power after 2011 did not prioritize the drafting of a new constitution. As a result, the constitutional process was delayed and overshadowed by conflict between the post-revolution institutions. By the time the Constituent Assembly was elected to draft the constitution, the country was in a state of war and conflict. Later on, during the constitution-building process, regional and international powers intervened and adopted a parallel and temporary constitutional path under the pretext that it would pave the way for stability. The basis for this new path was the appointment of officials instead of electing them. As a result, no elections have been held in Libya since 2014.

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The Constituent Assembly, which was the first elected constitutional body in the history of Libya, was unable to accomplish its desired mission, due to conflict between its members, which unfolded in public and was deliberated in the courts for years. The Administrative Chamber of the Supreme Court then ruled that the courts, including the administrative judiciary, have no jurisdiction to consider appeals related to the work of the Constituent Assembly and that this falls within the jurisdiction of the Constitutional Chamber of the Supreme Court. However, the Supreme Court suspended its own constitutional jurisdiction, in order to avoid considering appeals related to the legitimacy of the country's governing institutions. This further exacerbated the matter as the members of the assembly resorted to the noncompetent administrative judiciary for years.

On 27 July 2017, a vote on the draft constitution was attended by 44 of the 60 individuals who were supposed to be the members of the Constituent Assembly according to the Constitutional Declaration. 43 of these members approved the 2017 draft constitution. However, in the absence of a consensus and amid disputes that had broad repercussions outside the assembly, the draft was referred, despite the many objections, to the House of Representatives, which then failed to take the necessary steps to put the draft constitution up for a popular referendum and promulgate it.

Meanwhile, at the international level, the United Nations Support Mission in Libya (UNSMIL) decided in 2020 to postpone the referendum on the draft constitution, opting instead for temporary constitutional rules until legislative and presidential elections are held. However, elections were not held on the scheduled date of 24 December 2021 or at any later date.

The Libyan constitutional process is currently in a stalemate, implicitly and indefinitely postponed. There are concerns that the situation will be further complicated if the draft constitution is disregarded and later referred to a new elected legislative council, becoming a cause for further disputes and perpetuating the divisions between the members of the Constituent Assembly, as well as between some of its members on the one hand and the newly elected legislative council on the other. Before holding any future elections, it is important to chart a new constitutional path that would bring about a consensual constitution that establishes national reconciliation and lays the foundation for a peaceful transition of power.

Keywords: Constituent Assembly, Libyan Constitutional Declaration and its amendments, the February Committee to Amend the Constitutional Declaration, Constituent Assembly Election Law, administrative judiciary, House of Representatives, High National Election Commission, referendum, presidential elections law, parliamentary elections law.

CONTENTS

Introduction

It is not possible to delve into the Libyan constitutional path that began with the establishment of the Libyan state, without addressing its cornerstone, which is the Constitution of the United Kingdom of Libya, promulgated on 7 October 1951. Before Libya's independence was declared on 24 December 1951 by a United Nations General Assembly resolution issued on 21 November 1949,[1] a constitution had to be promulgated, bringing the Libyan state to life.

The members of the National Constituent Assembly, equally[2] divided between the country's three provinces (Cyrenaica, Fezzan, and Tripoli),[3] agreed on three main points before proceeding with the drafting of the constitution, in line with the will of Prince Idris As-Senussi at the time. These were as follows:

1. Libya should be a federal state comprised of three provinces, despite a small population spread out across a broad territory.[4]
2. Libya should be a monarchy, and Prince Idris As-Senussi should be accepted as its King,[5] despite the objections of some political leaders, especially from the western provinces of the country.[6]
3. A constitution drafting committee should be appointed based on points 1 and 2 above.[7]

The members of the National Constituent Assembly agreed to appoint a Constitutional Committee consisting of eighteen members (six members from each province). During one of its sessions held on 9 December 1950, the committee decided to maintain a small subcommittee composed of six members (two from each province) as the main task force[8] within the National Constituent Assembly, called the Working Committee. The Working Committee was assisted by experts from the United Nations, including Egyptian expert Omar Lotfy, in addition to the legal adviser of the United Nations Mission, who attended all the committee's sessions alongside other technical experts.[9]

1 Libya shall be constituted an independent and sovereign state not later than 1 January 1952, and a constitution shall be determined by representatives of the inhabitants of the three provinces meeting and consulting together in a National Assembly.
2 Twenty members per region.
3 The appointment of members of the Constituent Assembly was easier in the provinces of Cyrenaica and Fezzan because there were historical leaders in charge of decision-making in each of the two provinces (Prince Idris As-Senussi and Sayyid Hamad bin Saif An-Nasr). However, the selection of members of the Tripolitania province was difficult. For historical context, see: Adrian Pelt, *Libyan Independence and the United Nations: A Case of Planned Decolonization*, translated by Zahi Bashir Al-Mughairbi (Tripoli: Kalam Research and Media- Libya Institute for Advanced Studies, 2020), Vol. II, 527.
4 Pelt, the UN Commissioner at the time, argued that federalism was suitable for Libya as "it had to be less centralized given the geographical and demographic structure of the country, and the conditions were unfavorable for a centralized, autocratic form of government." Pelt, Vol. III, 938.
5 Pelt, Vol. III, 844.
6 Adrian Pelt reports in his book that the King's motorcade in Tripoli encountered a crowd of protesters "who demanded the dissolution of the National Constituent Assembly and expressed their hostility towards federalism" and then stated that this incident "showed the level of tension prevailing in the city of Tripoli between supporters and opponents of federalism but also showed a general acceptance of the prince as the embodiment of national unity." Pelt, Vol. III, 933.
7 Pelt, Vol. III, 818.
8 Pelt, Vol. III, 934.
9 Pelt, Vol. III, 935.

As such, the 1951 Constitution incorporated progressive (at the time) and international standards for a fragile and poor country that relied on international aid and the renting of lands for military bases.[10]

In 1953, the Federal Supreme Court Law[11] was promulgated, making it one of the first supreme courts with constitutional jurisdiction in the region.

As such, the promulgation of a constitution guaranteed by a Supreme Court with constitutional jurisdiction spurred the birth of the Libyan state, despite it being young, weak, and poor. This was all thanks to a plan drawn up by the United Nations and the consensus among the leaders of the young state at the time. In this respect, Adrian Pelt, the UN High Commissioner for Libya, who significantly contributed to setting the constitutional course of the Libyan state, would declare the following:

> Libya's constitution upholds the principles of democracy and respects human freedoms. Some may object to the fact that it contains articles that are suited for the most developed democratic countries and are too advanced for the Libyan people at the present stage. I do not agree with those claims, because when a nation that is new to political life is put under democratic rule, it would be prudent to loosen the noose rather than tighten it in the political field.[12]

However, this constitution, which was progressive for its time, was not met by effective public engagement for many reasons, including the illiteracy prevalent in the country at the time, in addition to the fact that the committee that drafted it was appointed, not elected. This constitution did not appeal to the people's conscience, and it was not given enough time to settle and take root. Soon after, the 1969 coup took place. Although military in nature, this coup was widely welcomed by the people for several reasons, including the clear signs of corruption, fraud in legislative elections, the revolutions in Egypt, Iraq and Syria, in addition to the strong nationalist surge at the time and the bitterness felt by many people following the defeat of the Arab countries in the 1967 War.

The leaders of the 1969 coup did not dare abolish the constitution, despite the popular protests supporting them. Instead, they subverted the constitution gradually,[13] first with the announcement of the overthrow of the regime and the abolition of constitutional institutions[14] and then with the adoption of a constitutional declaration[15] regulating the new constitutional process in the country.[16] However, the Libyan Supreme Court soon dealt the constitution

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10 The constitution was amended in 1963 to abolish the federal system and adopt a unitary one instead, and Libya was named "Kingdom of Libya."

11 Federal Supreme Court Law of 1953.

12 Adrian Pelt's article published in the *New Cyrenaica* on 25 December 1953. Quoted in: Abu Al-Qasim Al-Rabu, "Libya: The Search for a Lost Constitution," *Rai Al-Youm*, 23 September 2020.

13 Azza Kamel Maghur, "The State of Lawmaking in the Absence of a Constitution," *Oea*, 2008.

14 The first statement of the revolution declared the fall of the monarchy.

15 On 11 December 1969, the Revolutionary Command Council issued a Constitutional Declaration, Article 30 of which abolished the constitutional order by stipulating that "The constitutional system established by the Constitution of 7 October 1951, its amendments, and its related effects shall be annulled."

16 In the Constitutional Declaration (Article 37), the coup leaders promised to issue a permanent constitution, but it was never promulgated.

a death blow by considering that the constitutional declaration of the new regime was the country's constitution.[17] The second declaration provided for the abolition of constitutional and monarchical institutions.

As a result, Libya has been without a constitution since 1969, and its people still cling to the hope of having a permanent constitution. However, this has not been achieved yet.

After the abolition of the Kingdom's constitution, the republican constitutional declaration did not hold up and faded gradually, without being explicitly revoked through legal means. Instead, this resulted from the political and theoretical opinions known as the Third International Theory of Colonel Muammar Al-Gaddafi,[18] who was described as the "leader of the revolution," and eventually changed the system of government to what was known as the "Jamahiriya" (state of the masses) or the authority of the people under the Declaration on the Establishment of the Authority of the People.[19]

Many developments took place to subvert the constitutional path, as follows:

1. The constitutional jurisdiction of the Supreme Court was abolished by virtue of Law No. 6 of 1982[20] on the reorganization of the Supreme Court,[21] which was one of the oldest constitutional courts in the region.[22]
2. Documents and laws of a constitutional nature were issued containing some provisions on rights and freedoms, and a special system of government was put in place, known as the Jamahiriya" (state of the masses) or the authority of the people.

The deficiency of the new "constitutional" order denied Libya a permanent constitution for years, and the different documents issued by the new regime cannot be properly classified as "constitutional."[23] As a result, one of the

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17 Constitutional Appeal No. 1/12 of 11 January 1970 states: "The first manifesto of the revolution and the second manifesto on the fall of constitutional institutions and the system of government did not revoke the constitution, as the former overthrew the monarchy and the latter abolished the institutions of the previous regime. The abolishment of institutions is very different from the revocation of an electoral law whose constitutionality is challenged." However, the Libyan Supreme Court changed its position and decided on the 1951 Constitution by virtue of Constitutional Appeal No. 4/14, issued on June 14, 1970, stating that "the abolished constitution adopted the theory of the separation of the three powers." The Supreme Court then explicitly called the Constitutional Declaration a "constitution." The Supreme Court also called the Constitutional Declaration the "Provisional Constitutional Declaration."

18 Muammar Al-Gaddafi's Green Book.

19 This declaration was issued on 2 March 1977 as an expression of Colonel Gaddafi's ideology, contained in the Green Book, by what was then known as the General People's Congress (GPC), which was the authority that enacts laws and supreme decisions.

20 Law No. 6 of 1982 regarding the reorganization of the Supreme Court.

21 The constitutional jurisdiction of the Libyan Supreme Court was restored by Law No. 17 of 1994 amending Law No. 6 of 1982.

22 Libya's Supreme Court was established with constitutional jurisdiction in 1953.

23 At the end of 1992, the Libyan Supreme Court issued an unusual ruling in which it criticized the Great Green Charter on Human Rights. Human rights defenders and activists adhered to this Charter and demanded its implementation in the face of violations of human rights and fundamental freedoms. However, the court stated that the principles of the charter are not applicable until they are codified in laws with binding force. Supreme Court, Civil Appeal No. 58/Judicial Year 38, 23 November 1992. This position rendered the charter, which was seen as a lifeline by Libyans, ineffective and turned it into a mere declaration of principles that need to be codified by law in order for its provisions to be implemented. See also the article written by lawyer Azza Kamel Maghur and published in the newspaper Quryna in response to an article by Dr. Rajab Abu Dabbous published in the same newspaper about the nature of the Great Green Charter on Human Rights, which he considered to be a declaration of principles, while lawyer Azza Kamel Maghur defended its constitutional nature, as it relates to rights and freedoms, and demanded its application. January 2009 (hard copy).

most important demands of the revolution in 2011 was the adoption of a rights-based constitution – a demand that human rights defenders and activists,[24] especially within the framework of the Libyan Bar Association prior to the overthrow of the regime in 2011, had consistently called for through a range of human rights activities that elicited no reaction from the regime.[25]

The 2011 revolution revealed the political awareness not only of the elites, but of citizens as well, because the drafting of a constitution was a main popular demand with which they sought to guarantee rights and freedoms, organize the system of government and state institutions, achieve economic justice, and ensure economic development and prosperity. At least that was the promise that seemed easy to achieve and that Libyans felt was within reach, without expecting that the road towards it would be full of hardship, conflicts, and bloodshed.

The 1951 Constitution only lasted eighteen years, and Libyans lived without a constitution for more than fifty years. When they came close to having one, they disagreed over it, and thus continued to live under obsolete provisional constitutional declarations that slowly disintegrated and were replaced by political documents that lack a constitutional character,[26] including provisional agreements under international auspices since 2015.[27]

I. Background to the Formation of the Constituent Assembly for the Drafting of the Constitution

Before addressing the work of the assembly and its outcomes related to the drafting of the 2016 and 2017 constitutions, it is necessary to discuss the path that led to its formation, which mainly involves the preliminary measures associated with the constitution-building process.

A. The 2011 Constitutional Declaration

The first version of the 2011 Constitutional Declaration showed the importance that was given to drafting a constitution for the country in a short period of time (60 days from the date of the first meeting of the Constituent Assembly),[28] indicating a high level of ambition at the time.

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24 Rashid Khashana, "The Awakening of Libyan Civil Society Pits it against the Agencies," *Libya Al-Mustaqbal*, 22 October 2010.

25 "Saif al-Islam demands again the drafting of a constitution ... but the situation in Libya does not seem to be prepared for this shift!" *Swiss Info*, 15 May 2010.

26 While Libya witnessed between 1969 and 2011 the replacement of the Constitutional Declaration (1969) with local documents that lacked constitutional character, starting from 2011 to this day, several documents and agreements have been issued under international auspices which have overshadowed the Constitutional Declaration (2011) and replaced the chapter related to the system of government. However, these documents and agreements also lack constitutional character.

27 That is, the political agreements concluded between the Libyan parties under the auspices of UNSMIL.

28 Article 30, Paragraph 6 of the Constitutional Declaration, before the amendments thereto, stipulated the following: "The General National Congress (GNC) shall, within a period not exceeding thirty days from its first meeting, do the following: 1 [...] 2. Select a Constituent Assembly to draft a constitution for the country to be called the Constitution Drafting Assembly, provided that it submits the draft constitution to the GNC within a period not exceeding sixty days after its first meeting."

However, a main question raised in this regard was: Why was the 1951 Constitution not used with some amendments to it? Why was it not referred to in the Constitutional Declaration itself? And why did it not have any impact on the provisions of the Constitutional Declaration?

This can be attributed to objections and differences within the National Transitional Council.[29] The reason may be that the 1951 Constitution was based on a monarchical system of government, or that the council was not inclined to accept certain provisions, such as the provision that stated that Islam is the religion of the state without mentioning Islamic Sharia as a source of legislation.

Indeed, while Article 5 of the 1951 Constitution stipulates that Islam is the religion of the state, the Constitutional Declaration[30] states in its first article that Islamic Sharia is the main source of legislation,[31] which is a first in Libya's constitutional texts.

Thus, it was that provision, together with those related to the monarchy and its powers, that elicited the opposition of some members of the new regime to reinstate the 1951 Constitution.

While the flag of the Kingdom of Libya was raised in the 2011 revolution and adopted as the flag of the state in the Constitutional Declaration, the 1951 Constitution was completely disregarded and not even referred to in the preamble to the Constitutional Declaration.[32]

Despite these early signs of opposition to the 1951 Constitution, occasional demands still arise, albeit limited in scope, calling for the reinstatement of the 1951 Constitution with an amendment to the system of government, or even the restoration of the monarchy.

B. The Constituent Assembly's Transformation from a Body Appointed by the General National Congress (GNC), to a Body Appointed from Outside the GNC, Similar to the Committee of 60 of 1951, and Finally to an Elected Body Similar to the Committee of 60

The texts relating to the Constituent Assembly in the Constitutional Declaration have been subjected to several amendments, focusing mainly on its composition.

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29 The first body established during the revolution in March 2011, headed by the former Libyan Minister of Justice before and during the revolution, Mustafa Abdel Jalil.

30 The Constitutional Declaration issued on 3 August 2011.

31 Article 1 states: "Libya is an independent democratic state where the people are the source of power. The city of Tripoli shall be the capital of the state. Islam is the religion of the state, and the principal source of legislation is Islamic Sharia. The state shall guarantee for non-Muslims the freedom to practice religious rituals. Arabic is its official language. The state shall guarantee the linguistic and cultural rights for the Amazigh, Tebu, Tuareg, and all components of Libyan society, and their languages shall be deemed national ones."

32 The 1951 Constitution was not even mentioned in the Victory statement of the February 17 Revolution, which was delivered on the radio by the late lawyer Abdul Salam Al-Mismari on 22 February 2011. The second demand in this statement was to develop a constitution that guarantees rights and freedoms, among other constitutional demands.

According to the original Constitutional Declaration of August 2011:

1. Selection of the members of the Constituent Assembly by the General National Congress (the first elected body after the revolution)
2. Drafting of the constitution within 60 days
3. Adoption of the draft by the General National Congress (GNC)
4. Submission of the draft by the GNC to a referendum
5. Ratification of the draft by the Constituent Assembly as the constitution of the country
6. Adoption of the constitution by the GNC[33]

According to the first amendment[34] to the Constitutional Declaration of 13 March 2012: The members of the Assembly are selected from outside of the GNC, and the timeline for drafting the constitution IS increased from 60 days to 120 days. In addition, the legislative authority no longer adopts the constitution, but simply promulgates it.[35]

According to the third amendment[36] to the Constitutional Declaration of 5 July 2012: The Constituent Assembly is transformed into an elected body,[37] with its members being elected from outside the GNC, similar to the Committee of 60 of 1951.[38]

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33 The Constitutional Declaration does not mention the majority required for its adoption.

34 First Amendment to the Constitutional Declaration issued on 13 March 2012.

35 The process is as follows:
1. The members of the Constituent Assembly are appointed from outside the General National Congress similar to the Committee of 60 of 1951.
2. The assembly shall ratify and adopt the draft constitution within 120 days from the date of its first meeting.
3. The draft constitution is submitted to a popular referendum.
4. The assembly shall ratify it as the constitution of the country.
5. The General National Congress promulgates it.

36 This amendment was only for Paragraph 2 of Item 6 in Article 30, to the exclusion of all other paragraphs relating to the referendum and the promulgation of the draft constitution.

37 Elections and regional equality in representation within the framework of the Constituent Assembly were implemented because of pressure from supporters of the federal system in the east of the country and their threat to boycott the first elections after the revolution (General National Congress elections) and close oil ports, by virtue of a constitutional amendment made 48 hours prior to the start of the electoral process. "Libya: Supporters of Federalism Call for Boycotting the Elections," *BBC News*, 6 July 2012.

38 The amendment was as follows: "The election of a Constituent Assembly through free, direct elections, comprised of individuals who are not members of the congress, for drafting a permanent constitution for the country, to be named the Constituent Assembly. It shall consist of 60 members in reference to the Committee of 60 that was formed to draft the constitution of independence of Libya in 1951. The General National Congress shall determine the election criteria and regulations that shall ensure the representation of all segments of Libyan society with special cultural or linguistic characteristics. In all cases, the decisions of the Constituent Assembly for Drafting the Constitution shall be made by a two-thirds plus one majority. The Constituent Assembly shall complete the draft constitution and adopt it within a period of time not exceeding 120 days from its first session." Law No. 18 of 2013 on the rights of cultural and linguistic components was issued a few weeks after the issuance of this constitutional amendment, on 30 July 2013.

In this regard, it should be noted that:

1. A Constituent Assembly was elected for the first time in the history of Libya.
2. It was stipulated that the components of Libyan society with special cultural or linguistic characteristics must be represented.
3. The timeline to draft the constitution remained 120 days.
4. The item relating to the referral of the draft constitution to a popular referendum was retained. This did not change even though the assembly became an elected body.
5. The draft constitution is to be promulgated by the GNC. Here, it should be noted that by establishing the Constituent Assembly similarly to the Committee of 60 of 1951 (in accordance with the first and third amendments), the dominance of the legislative authority over the constitution-building process decreased, and its role was restricted to the promulgation and not the adoption of the constitution, even if it still had the competence to submit the draft to a popular referendum. We will discuss the return of the legislative authority's dominance over the constitution-building process in subsequent sections.

Under the third amendment, it was decided during the transitional period to hold a second general election (Constituent Assembly) that was not foreseen in the original constitutional declaration, with the specific aim of electing a Constituent Assembly to draft a permanent constitution for the country.

The fifth amendment[39] to the Constitutional Declaration of 11 April 2013,[40] did no alter much.[41]

C. Constitutional Appeal No. 28/59 before the Constitutional Chamber of the Supreme Court[42]

On 26 February 2013, following the adoption of the third amendment to the Constitutional Declaration, the late Salwa Bugaighis,[43] in her capacity as the appellants' lawyer, filed a constitutional appeal under No. 28/59 before the Constitutional Chamber of the Supreme Court. The court found that the third constitutional amendment was invalid for procedural reasons related to the majority required for adopting the amendment, ruling that it was unconstitutional.[44] The GNC issued the fifth amendment to the Constitutional Declaration, which was not any different from the previous amendment.[45]

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39 Fifth Amendment to the Constitutional Declaration issued on 11 April 2013.

40 This amendment reads as follows:
Article 3: "Reconstitute the High National Election Commission to elect a constituent assembly, called the Constitution Drafting Assembly (CDA), through direct free elections, comprised of individuals who are not members of the congress, in order to draft a permanent constitution for the country… In all cases, decisions of the CDA require a majority of two-thirds plus one. The constitution shall be drafted and adopted within a maximum of 120 days from the opening of the first session."

41 This provision was drafted in response to a constitutional appeal against the procedures for the approval of the amendment, as discussed below.

42 Ruling on the Constitutional Chamber in relation to constitutional appeal No. 28/59.

43 Khaled Al-Muhair, "General Mood against the Extension of the GNC in Libya," *Al-Jazeera*, 25 December 2013.

44 The appeal was based on the fact that the revocation of the third amendment to Paragraph 2 of Item 6 of the Constitutional Declaration was due to its issuance by the majority of the members of the National Transitional Council present and not by the majority of all its members, in violation of the Constitutional Declaration

45 The reconstitution of the High National Election Commission to elect a Constituent Assembly was added to this text.

When it became clear that the third amendment would be ruled unconstitutional for procedural reasons, the GNC could have rectified the matter and issued a new amendment. However, it did not do so, therefore hampering the birth of the Constituent Assembly.

D. The February Committee for the Amendment of the Constitutional Declaration (2014) and its Legislative and Practical Impact

All these amendments to the Constitutional Declaration related to the Constituent Assembly, in addition to the above-mentioned appeal, the dominance of the legislative authority over the executive authority and the conflict between them, the threats of armed groups[46] to the democratic process, and other problems,[47] as well as the inability of the GNC to operate due to the severe political polarization within it, led to the delay in the issuance of the law on the election of the Constituent Assembly. Thus, the adoption of the constitution, which was supposed to be the main objective and priority of the GNC, was postponed and treated as a trivial issue, and the Constitutional Declaration was considered as sufficient. The focus was placed on the formation of the executive authority, the withdrawal of confidence from it, and interference in its work.

In response to the popular demands for new elections, including presidential elections,[48] the ousting of the GNC, the handover of power to a new legislative authority, and the election of a president, the GNC was led to form a constitutional committee in February 2014 called the February Committee.[49] The purpose behind its formation was to submit proposals to amend the Constitutional Declaration to hold new presidential (for the first time in Libya) and legislative elections, pending the adoption of the constitution, and without prejudice to the independent constitutional process within the Constituent Assembly. During the period in which the February Committee preformed its work, the elections to the Constituent Assembly were held and their results were issued, and the Constituent Assembly convened its first meeting in the eastern city of Al-Bayda.

The February Committee was able to submit its proposal[50] within the prescribed period, but the GNC did not adopt it in full, only approving the legislative elections component. It postponed the decision regarding the presidential election and did not authorize it, leaving it up to the next House of Representatives to decide on it.

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46 Osama bin Hamel, "The Continuation of the Blockade of Libyan Governmental Buildings Raises Questions over Its Goal and Perpetrators," *Anadolu Agency*, 8 May 2013.

47 Imposing the Political Isolation Law. See in particular: Haizam Amirah-Fernández, *Libya and the Problematic Political Isolation Law*, ARI 20/2013 (Madrid: Real Instituto Elcano, 2013).

48 "No to Extension" movement and the November 9 initiative.

49 The Sixth Amendment to the Constitutional Declaration was issued to form this committee with the purpose of drafting a constitutional amendment that guarantees legislative and presidential elections, and on 12 February 2014, the President of the General National Congress issued a decision to name its members.

50 February Committee: The final proposal for the work of the committee to prepare the constitutional amendment proposal and the general elections proposal.

The proposal of the "February Committee" regarding the Constituent Assembly contained a section related to the expiration of the term of the House of Representatives within a maximum period of 18 months from the date of the Constituent Assembly's first session, unless the latter completes the drafting and issuance of the constitution before the expiration of that period.

This meant that the Constituent Assembly was given a very important role whereby its independence was recognized, and it was allowed to keep operating within a separate track that was given priority. Indeed, were the draft it prepared to be adopted as the country's constitution, the elected House of Representatives would be dissolved, and the issuance of the constitution would result in new elections for permanent institutions based on it. At the time, there was still hope that the Constituent Assembly would play its role in producing a constitution that would contribute to the end of the temporary bodies and in achieving stability in a country worn out by revolutions and civil wars.

E. The Election of the House of Representatives and its Consequences

Libya's second post-revolution legislative elections took place in 2014, and the (current) House of Representatives was elected for an interim term ending with the adoption of the constitution.[51]

However, the constitution has yet to be promulgated, the term of the House of Representatives has not been extended by referendum after its 18-month term expired, no elections have been held for the transfer of power, and the House of Representatives remains in place.

After the elections, the country witnessed many events, the most important of which are the following:

- The work of the Constituent Assembly coincided with armed conflict, especially in the cities of Tripoli and Benghazi.
- The interim government moved its headquarters from Tripoli to Al-Bayda due to the armed conflict and the refusal of some members of the GNC to hand over power to the elected House of Representatives.
- Armed conflict in Tripoli and Benghazi (the new seat of the House of Representatives) led the House of Representatives to move to the easternmost city of Tobruk to continue carrying out its work.[52]
- A ruling by the Constitutional Chamber of the Supreme Court was issued on 6 November 2014, declaring Paragraph 11 of the seventh amendment to the Constitutional Declaration unconstitutional. This amendment ratified the February Committee's proposals, including the election of the House of Representatives. As a result of the challenge to the constitutionality of this amendment, there was much confusion, including the claim that the Supreme Court's ruling meant the dissolution of the House of

[51] Article 5 of the February Committee's proposal states: "The term of the HoR starts from the date of its first meeting and ends with the entry into force of the constitution. In all cases, the term shall not exceed 18 months from the date of the first session of the Constitution Drafting Assembly, unless its term is extended through a referendum."

[52] "The Libyan Parliament Holds Its First Sessions in Tobruk," *BBC News*, 4 August 2014.

Representatives.[53] However, the prevailing view was that it did not.[54] Still, an institutional divide took place, and the consequences of this ruling were dire for the democratic process. There are now two legislative authorities: the GNC, which claims legitimacy on the basis of its interpretation of the Supreme Court's ruling, and the House of Representatives, which adheres to the elections that were held on the basis of Electoral Law No. 10 of 2014, which was issued by the GNC itself, and the results of these elections, which were approved by the High National Election Commission.

- The Constituent Assembly was unable to prepare the draft constitution within the period specified in the Constitutional Declaration and was years overdue.
- The constitutional process drifted away from the national Constitutional Declaration and was instead based on political settlements reached under the auspices and supervision of the United Nations Support Mission in Libya (UNSMIL).

F. The International Political Track and the Resulting Political Agreements

Since 2015, UNSMIL has sponsored political dialogues between Libyan institutions and individuals, resulting in the issuance of the following documents:

1. The Libyan Political Agreement in December 2015[55] was issued by the so-called Libyan Political Dialogue and adopted unanimously by UN Security Council Resolution 2259/2015.
2. A set of agreements issued by the Libyan Political Dialogue Forum 2020, namely:
   - Roadmap for the Preparatory Phase of a Comprehensive Solution[56]
   - Chapter on Unified Executive Authority[57]
   - Chapter on Eligibility for Candidacy for the Executive Authority[58]

This international track, led by UNSMIL, has resulted in the following:

- These documents constituted successive "exceptional" executive authorities different in composition and competence from those foreseen in the Constitutional Declaration.[59]
- Retaining the two legislative authorities, the GNC (elected in 2012), which was transformed by the political agreement into the High State Council, and the House of Representatives (elected in 2014).

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53 "The Supreme Court Announces Today its Ruling on the Constitutionality of the Libyan Parliament," *Al-Quds Al-Arabi*, 5 November 2014.
54 Azza K. Maghur, *A Legal Look into the Libyan Supreme Court Ruling* (Washington: Atlantic Council, 2014).
55 Libyan Political Agreement signed on 17 December 2015.
56 Roadmap for the Preparatory Phase of a Comprehensive Solution issued in November 2020.
57 Chapter on Unified Executive Authority.
58 Chapter on Eligibility for Candidacy for the Executive Authority.
59 For example, the provisions of the 2017 draft constitution on the executive authority have no impact on the unified executive authority document issued by the Libyan Political Dialogue Forum.

- These various authorities, including those arising from international agreements, continued to obstruct the holding of elections that would end their term in power. This was owed to several factors: The failure to adopt the draft constitution because of the disputes it generated, the complex system established by UNSMIL through the Libyan Political Dialogue Forum,[60] the failed attempt to hold elections in 2021 even after the process was initiated and the list of candidates was announced, and even after the judicial appeals were submitted to the courts and adjudicated, and, finally, the failure to reach a constitutional basis for the elections, whether in the Libyan Political Dialogue Forum or by virtue of a consensus agreement between the House of Representatives and the State Council.[61]

These documents did not result in constitutional amendments by the House of Representatives, although the latter accepted them and complied with them. While the House of Representatives first rejected the 2015 Political Agreement, it then issued a statement of acceptance in principle and later on accepted the agreement conditionally, sending delegations to participate in negotiating the plan of Mr. Ghassan Salamé, the Special Envoy of the Secretary-General of the United Nations. The House of Representatives later engaged in political dialogue and granted the vote of confidence to the Government of National Unity.[62] Despite these fluctuating and contradictory positions, no constitutional amendments were foreseen in these agreements. In addition, the Constitutional Declaration was not amended accordingly, nor did it reflect the adoption of the agreements.

The House of Representatives did not play its role in this regard, nor did it make any effort to compile, sort, publish, or incorporate these agreements into the Constitutional Declaration.[63] This undermined the democratic and constitutional process and negatively impacted the work of the Libyan judiciary. This was one of the reasons why the Libyan Supreme Court suspended the work of its Constitutional Chamber in 2016[64] and postponed the adjudication of constitutional appeals indefinitely according to its General Assembly Resolution No. 7 of 2016.[65] All this led to the incompatibility and contradiction of these agreements with the Constitutional Declaration and greatly weakened it.

As a result of all these accelerated events since 2014, which is paradoxically the year in which the Constituent Assembly was elected, the constitution has yet to be issued, and the existing institutions have lost their legitimacy as they lack a constitutional basis and are not formally recognized by the Constitutional Declaration. This is exacerbated by the fact that the terms of some of these institutions have expired, while the remaining ones are

60 A strange and hybrid system consisting of: a House of Representatives/State Council (which is the legislative authority prior to the House of Representatives)/a three-member presidential council, and a government.

61 From 2015 to the present day, the two councils have failed to reach a constitutional basis that restores the institutions' lost legitimacy, whether based on political agreement (2015) or on the plan of Mr. Ghassan Salamé, the head of the UNSMIL (2017) and the Roadmap (2020).

62 The House of Representatives withdrew confidence from the Government of National Unity and formed another government in September 2021, which could not assume its tasks, thus causing a new division in the executive authority.

63 The House of Representatives has only issued statements and adopted conflicting positions at times.

64 The Supreme Court reactivated the Constitutional Chamber in August 2022.

65 Al-Budairi Shariha, "Commentary on the Decision of the Plenary of the Libyan Supreme Court No. 7 (2016)," *Itqan*, 28 May 2020.

temporary and based on provisional political agreements. All of these institutions can be described as de facto institutions, operating in a "preparatory phase."[66]

The term "preparatory phase" appears in the roadmap document, and it refers to a situation even less secure than the "transitional phase" that Libya entered into after the revolution and before the erosion of the legitimacy of the current governing authorities since 2014/2016 when their terms ended.[67] The term "preparatory phase" reflects the regression of the Libyan democratic process, as the country went back to a preliminary stage in which constitutional legitimacy is absent and has been replaced by a "political legitimacy"[68] not capable of bringing the country back to a transitional phase without holding elections for new interim authorities, pending the promulgation of a constitution.

Based on the above, the constitution-building process could have advanced the democratic process, blocked off foreign interventions, and mitigated or cooperated with international interference if the GNC (the first elected body after the revolution) had prioritized constitutional affairs, which was its main function. The constitutional process could have also facilitated the elections, which would have avoided the emergence of rivalry, disagreement, and conflict. The GNC should have regulated its relationship with the Constituent Assembly – an elected body with equal standing – before the assembly was elected, in order to avoid any conflict, as well as set rules for the assembly to draft and promulgate the constitution. In addition, there was no vision at the time to make use of the constitution-building process within a comprehensive national reconciliation process. Instead, the GNC headed in the opposite direction, towards political isolation, consolidating the status quo through discriminatory legislation and executive actions.[69]

It is also important to consider the extent to which it was realistic for the Constituent Assembly to complete its work within the prescribed period, which, as we will discuss in the second section of this paper, has not happened yet.

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66 This term is mentioned in Article 1, Paragraph 2 of the Roadmap for the Preparatory Phase of a Comprehensive Solution. For more details, see: Azza Kamel Maghur, "The Fabricated and Expected Constitutional Violations of the Current Stage," *Bawabat Al-Wasat*, 2 December 2020.

67 In 2014, the term of the General National Congress ended with the election of the House of Representatives, and in 2015, the term of the House of Representatives ended in accordance with the proposal of the February Committee.

68 This term can be compared with "constitutional legitimacy," which in itself is an acknowledgement by the international community of the current lack of constitutional legitimacy in Libya.

69 The system of political isolation was eroded by the House of Representatives Law No. 2 of 2015 on repealing the Political Isolation Law and Law No. 6 of 2015 on general amnesty, which were issued amid severe political division. There was also a de facto erosion, as many of the elites from the former regime began to return to positions of governance and decision-making. Some of the laws issued during that period can also be described as discriminatory, having established privileges for the so-called "revolutionaries" against groups that stood in solidarity with the Gaddafi regime, such as Law No. 29 of 2013 on transitional justice and Law No. 1 of 2014 on assisting the families of martyrs and missing persons of the February 17th Revolution.

II. The Constituent Assembly and the Constitution-Building Process: Beginnings and Obstacles

A. The Election of the Constituent Assembly (Constitution Drafting Assembly)[70]

1. Promulgation of the Electoral Law

By virtue of Resolution No. 24 of 2013,[71] the GNC formed a mixed committee, composed of members from inside and outside it[72] to prepare a draft law for the election of the Constituent Assembly that would be in charge of drafting the country's permanent constitution. On 20 July 2013, the GNC issued Law No. 17 of 2013 on the election of the Constituent Assembly in charge of drafting the constitution.[73]

2. Basic Principles of the Electoral Law[74]

- Establishment of a Constituent Assembly of 60 members equally chosen from the three electoral regions of Libya (Western, Eastern, and Southern)[75]
- Electoral System: Adoption of the first-past-the-post system and allocation of 6 seats to women and 6 seats to the cultural minorities (Amazigh, Tebu, and Tuareg)
- Guarantee of the representation of the cultural and linguistic minorities[76] (Amazigh, Tebu, and Tuareg) by allocating 6 seats to them
- A decline in the representation of women, as they were allocated 6 seats (i.e. 10% of the total number of seats), which represents a decrease compared to the representation of women in the GNC with 33 seats (16.5%).[77]
- Setting conditions for voters and candidates: While the conditions for voters were limited to holding the Libyan nationality, being 18 years of age, having legal capacity, and holding a national number, for candidates, other conditions were set in addition to having the Libyan nationality,[78] including meeting

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70 Under Law No. 17 of 20 July 2013 on the election of the Constituent Assembly in charge of drafting the constitution.
71 Resolution No. 24 of 2013 regarding the formation of a committee to prepare a draft law to elect the Constituent Assembly to draft the permanent constitution of the country.
72 It is chaired by a member of the General National Congress and comprises 17 members, including only three women. The mechanism of selection of members was the following: each electoral district would choose one member from outside the General National Congress.
73 Law No. 17 of 2013 on the election of the Constituent Assembly.
74 Azza Kamel Maghur, *Electoral Appeals in Libyan Legislation (2012-2014): Text, Reality, and Assessment* (Tripoli: High National Election Commission), 11.
75 Thus, the three provinces of the 1951 Constitution (Tripolitania, Cyrenaica, and Fezzan) were avoided.
76 This text was preceded by the issuance of Law No. 18 of 2013 on the rights of cultural and linguistic minorities.
77 "Libyan women win 33 seats in the first elections for the National Congress since 1952," *Karama*, 3 September 2012.
78 Article 9 of the law sets 12 conditions.

the criteria for assuming public office in accordance with the Political and Administrative Isolation Law,[79] which prevented many from running for the elections, as this law excluded several segments of society.

3. Constituent Assembly Elections and their Results

On 20 February 2014, elections for the Constituent Assembly were held. On 13 March 2014, the election results were announced by the High National Election Commission.[80]

Voter registration was low, which led to the extension of the registration deadline. Registered voters were almost less than half of the those who registered for the GNC elections[81] (more than one and a half million).[82] The elections were boycotted by the Amazigh[83] who believed that their representation was a mere formality[84] that did not allow for effective participation. There were also security incidents in some areas, the most important of which took place in the Derna sub-district in the eastern electoral region.

The number of members required to be elected to the Constituent Assembly[85] (60 members) was not met at the time or at any later stage.[86]

B. Beginning of the Constitution Drafting Process by the Constituent Assembly

The Constituent Assembly held its first meeting on 21 April 2014 at its headquarters in Al-Bayda, a mountainous city located in the east of the country. The beginning of its works was announced and white pigeons were released as an expression of hope and joy, after the long journey to form it (2011-2014).

On that same day, Dr. Ali Abdul Salam Tarhouni was appointed as Chairman,[87] in addition to the appointment of the Vice-Chairman[88] and Rapporteur of the Assembly.[89] Thirteen members were absent from that meeting.[90]

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79 Law No. 13 of 2013, known as the Political Isolation Law, limited the participation of a certain category of Libyans simply because they held some senior positions during the former regime. This law faced internal and external criticism.

80 *Election of the Constituent Assembly for Drafting the Constitution- Final Electoral Results* (Tripoli: High National Election Commission, 2014).

81 *The 2014 Constitutional Drafting Assembly Election in Libya*, Final Report (Atlanta: The Carter Center, 2014).

82 *The 2014 Constitutional Drafting Assembly Election in Libya*, 4

83 "Libya's Amazigh Boycott the Constituent Assembly for the Drafting of the Constitution and Withdraw from Parliament," *France 24*, 12 July 2013.

84 "Libya's Amazigh Boycott the Constituent Assembly," *Al-Jazeera*, 11 July 2013.

85 That is in addition to the death of some members of the Constituent Assembly, including Abdul Qadir Qaddura (Benghazi) in 2021 and Hamza Abed Rabbo (Tobruk) in 2022.

86 The maximum number reached is 56 members after a by-election. See: Al-Hadi Ali Bouhamra, *The Libyan Constitutional Process (2014-2018)* (Tripoli: Dar Al-Ruwad Publications, 2019), 21.

87 "Al-Tarhouni Elected Chairman of the Libyan Constitution Drafting Authority," *Al-Jazeera*, 22 April 2014.

88 Al-Jilani Abdul Salam Rahuma.

89 The youngest member of the assembly is Ramadan Al-Tuwaijer.

90 The Constituent Assembly was established with 47 members and later expanded to include 56 members, but its seats were never filled in their entirety.

The Constituent Assembly members discussed the vacant seats and came up with the following justifications for moving forward with the assembly's work: What matters it the effective number, not the total number; the exact number is not a condition for the completion of the draft, and it is unrelated to the draft's validity or invalidity; voting is a right and not a duty, and therefore the boycott of elections should not disrupt the constitutional process; the popular referendum is an indispensable condition for the promulgation of the constitution and all the shortcomings related thereto must be resolved.[91]

Vacant seats are not an unusual occurrence in Libya's elected bodies. The vacant seats in both the GNC and the House of Representatives were either due to security reasons that prevented the elections from taking place in certain districts or to the enforcement of the Political Isolation Law and the dismissal of some members or their resignation. However, the boycotting of the Constituent Assembly elections - excepting Derna - had a specific motive and was mainly called for by the cultural minorities, and especially the Amazigh. This did not occur in the other elections.

The Constituent Assembly established its own bylaws. According to Law No. 3 of 2014, assembly members were divided into eight committees based on the chapters of the constitution it outlined.[92]

On 24 December 2014, eight months after it began its work, the Constituent Assembly published the committees' outputs on its official website.[93] Although these outputs did not live up to the expectations and were marred by many shortcomings and errors, their publication generated - to some extent - discussions and social interactions, revealed the political awareness of Libyans, and brought their demands to light.[94]

The members of the assembly went about the drafting process in exclusive fashion. They did not solicit the help of national consultants or experts. The Constituent Assembly monopolized the drafting of the constitution, dividing the work exclusively and through different mechanisms among its members.[95] A committee of advisors could have been formed, for example, to partner with the Constituent Assembly in drafting the texts or providing alternatives in the event of a stalemate. Public meetings were limited due to armed conflict, the deteriorating security situation in the country, and the difficulties and internal crises the Constituent Assembly faced.

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91 Bouhamra, *The Libyan Constitutional Process*, 22.

92 The first committee was in charge of the chapter on the form of the state and its basic components; the second committee was in charge of the chapter on the system of government; the third committee was in charge of the judiciary chapter and the Constitutional Court chapter / the fourth committee was in charge of the chapter on independent constitutional bodies; the fifth committee was in charge of the chapter on the military and the police; the sixth committee was in charge of the chapter on rights and freedoms and the transitional measures chapter; the seventh committee was in charge of the local authorities (local administration) chapter; and the eighth committee was in charge of the financial system chapter and the natural resources chapter.

93 The official website of the Constituent Assembly no longer exists on the Internet.

94 Later on, the Constituent Assembly formed other committees: the first working committee and the second working committee, which are small committees whose members were elected by the Constituent Assembly. Then, after the issuance of the first draft constitution (2016), the Constituent Assembly formed the Consensus Committee by virtue of Decision No. 1 of 2017, based on which the second draft constitution was developed. The results of these committees' work were not published.

95 It reached the point of territorial division (Western Region Committee, Eastern Region Committee, and Southern Region Committee) which fortunately did not work. See Bouhamra, *The Libyan Constitutional Process*, 45.

However, the major blow to the Constituent Assembly was not external, but rather internal. Conflict erupted among its members to the point where accusations were exchanged through the media and even reached the judiciary, in addition to members' boycott of meetings from time to time and for extended periods of time. This not only resulted in delaying the entire process of drafting the constitution, in violation of the deadline set out in the Constitutional Declaration, but it also undermined the members' credibility and revealed the contrast between the Constituent Assembly and the original Committee of 60 (1951), especially since the latter failed to meet Libyans' hopes and aspirations.

There was great hope placed in the Constituent Assembly at the outset, to the extent that, upon its election, demands emerged to have it assume power because it was an elected body, given the political divide and in order to avoid divisions in the legislative authority. However, the Constituent Assembly did not meet these demands. How, then, did the Constituent Assembly transition from being asked to assume power to losing its credibility?

Disagreements regarding constitutional matters were expected[96] and took lace since the beginning (the system of government, the form of the state, its capital, how to adopt Islamic Sharia as a source of legislation, language and the rights of cultural minorities, the nationalization of sovereign institutions, women's rights, nationality, etc.). However, personal disputes, boycotts, failure to attend meetings for extended periods, resorting to the judiciary to settle personal disputes and opposing visions, using media platforms and issuing statements[97] against other members were not at all anticipated.

While some members of the Constituent Assembly [98] attributed their failures to domestic[99] or international factors, it is impossible to disregard the fact that their differences greatly contributed to the obstruction of the assembly's work, even as other general reasons cannot be dismissed.

C. Disputes within the Constituent Assembly

The disputes were diverse, but the most severe of them were those that were taken before the judiciary. The boycott by some members of the assembly's meetings for extended periods of time delayed its work and obstructed its progress. The disputes branched out and affected other institutions, including the House of Representatives, UNSMIL, and the High National Election Commission, which issued an opinion with regard to holding a referendum on the draft constitution. At this point, the Constituent Assembly had become divided, and so the disputes turned into disputes between some of its members and other institutions.

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96 "The Chairman of the Libyan Constituent Assembly Reveals the Points of Disagreement in the Drafting of the Constitution," *Misrawi,* 26 January 2016.

97 Statement by some members of the Constituent Assembly.

98 Conference on "The Constitutional Question and Democratic Transformation in Arab Countries," the Arab Center for Research and Policy Studies of Policy and the Arab Association of Constitutional Law, 25-27 September 2020.

99 Osama Ali, "The Libyan Constitutional Assembly: The House of Representatives Cannot Violate the Draft Constitution," *Al-Arabi Al-Jadeed,* 12 April 2022.

1. Disputes before the Judiciary

Prior to addressing the disputes before the judiciary – except for the first appeal below, given its specificity – which amounted to six appeals, it is important to note that Constituent Assembly members resorted to the administrative courts of appeal[100] to disrupt the work of the Constitutional Chamber of the competent Supreme Court. And although these disputes seemed to have a judicial nature in the form of appeals before the administrative courts, some members used them as a means to obstruct the issuance of the draft constitution due to differences related to the texts themselves and not to the procedures, as was invoked in the appeals. Thus, the purpose of filing these appeals was not due to concerns over procedural aspects but were rather used as a means to obstruct the issuance of the draft constitution because of disagreements over its content.

A. The First Case

The appeal was filed in 2016 against the Chairman by a member of the assembly, demanding the annulment of the decision to elect and appoint him as Chairman.[101] The appellant founded his appeal on the fact that the respondent holds a United States citizenship and is married to a foreigner, which is in violation of Law No. 24 of 2010 on Libyannationality.[102]

However, this law was issued under the previous regime that opposed the acquisition of other nationalities, while in reality the country had witnessed the return of opposition members from abroad, some of whom assumed sensitive positions despite holding other nationalities.

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[100] Libya's Supreme Court has had constitutional jurisdiction since its establishment in 1953, and it has jurisdiction over appeals filed by an appellant with a direct personal interest challenging any legislation that is in violation of the constitution and any substantive legal issue relating to the constitution or its interpretation that arises in a case pending before any court. However, the work of the Constitutional Chamber of the Supreme Court was disrupted, as outlined above, by a decision of the Plenary of the Supreme Court in 2016.

[101] This appeal was filed by a Constituent Assembly member, Daw Al-Mansouri, in early 2016 against its Chairman, Ali Abdel Salam Al-Tarhouni, before the Al-Bayda Court of Appeal (Administrative Chamber) in the case registered under No. 5/2016, challenging the two following decisions:

a. The decision of the High National Election Commission to partially approve the results of the election of the Constituent Assembly by approving the selection of the respondent (Ali Abdul Salam Al-Tarhouni) as a member of the Constituent Assembly.
b. The Constituent Assembly's decision to appoint the respondent as its Chairman.

He demanded the annulment of the aforementioned contested decisions.
On 15 February 2016, the court issued an urgent ruling to suspend the implementation of the two contested decisions.
On 28 November 2016, the court issued its ruling on the matter, which was based on Article 9, Paragraph 7 of Law No. 17 of 2013 regarding the conditions for candidacy. This article stipulated that the candidate must "meet the requirements for assuming public office as per the Political and Administrative Isolation Law." These are the conditions stipulated in Article 128/1 of the Libyan Labor Relations Law No. 12 of 2010. The court considered that the respondent did not meet the conditions for candidacy or even the conditions for voting, as stipulated in Article 5 of Law No. 24 of 2010 on nationality. The court therefore annulled the two contested decisions.
On 20 September 2017, the Supreme Court (Administrative Chamber) issued its ruling ending the litigation regarding the appeal filed by Ali Tarhouni against the ruling of the Al-Bayda Court of Appeal.

[102] Article 5 states: "Anyone who acquires a foreign nationality by choice shall forfeit the Libyan nationality, unless granted permission by the General People's Committee for General Security."

This appeal was not related to the assembly's work or decisions, but rather the Chairman himself.[103]

The Court of Administrative Justice in Al-Bayda issued a ruling in favor of the appellant and against the respondent (the Chairman), where it considered that the latter did not meet the candidacy requirements. The court's judgment was enforced, and the Constituent Assembly Chairman was removed from his position by a judicial ruling.

This revealed the ease with which legal texts can be exploited for personal reasons, in addition to the involvement of the judiciary in disputes between Constituent Assembly members for motives that are not directly related to its work. It also revealed the inability of the Constituent Assembly to come to an agreement while being internally in conflict and, most importantly, the impact of this dispute on the issue of nationality in the draft constitution itself,[104] as there as a clear negative attitude towards holding dual nationalities and its enshrinement in the draft constitution.

B. Cases Filed before the Administrative Court

In total, there were six cases[105] filed between 2016 and 2022. Without going into too much detail, these disputes demonstrated the following:

- The lack of consensus among Constituent Assembly members and the rapid recourse of its members to the judiciary due to the absence of an internal mechanism for resolving disputes
- The public nature of the disagreements among the Assembly's members
- The significant delay in the promulgation of the draft constitution
- The revocation of the decision to refer the first draft constitution[106]
- The frequent appeals by Constituent Assembly members submitted before a non-competent court.[107] In 2018, after years of disputes, the Supreme Court (Administrative Chamber) issued its decisive ruling that

[103] It is well known that the Chairman of the Constituent Assembly was an active member of the opposition against the former regime and he lived for a long time in the United States of America. He is a public figure, and it was no secret that he had acquired another nationality, but rather a logical matter based on his history as dissenter and his long residence abroad.

[104] The draft constitution (2017) reviewed the following articles: 10 (nationality), 69 (prohibition of dual nationality for House of Representatives members), 75 (membership of the Senate), 113 (members of the government), 136 (composition of the Constitutional Court), and 186 (nationality).

[105] Administrative Appeal No. 65 of 2016 Al-Bayda Court of Appeal, 2. Administrative Appeal before Al-Bayda Court of Appeal No. 71 of 2016, 3. Administrative Appeal No. 104/2017, 4. Administrative Appeal No. 81/2017, 5. Appeal before the Supreme Court No. 182/94.

[106] Annulment of the decision issued by the Constituent Assembly during its 68th session on 19 April 2016, in which the draft constitution was adopted, due to the session's invalidity by reason of lack of quorum. A request was made to repeal the amendment of Article 60 of the bylaws of the Constituent Assembly. On 9 May 2016 an urgent ruling was issued to suspend the decision, and on 7 December 2016, the court ruled to annul it.

[107] In 2022, after the Supreme Court limited the administrative judiciary's jurisdiction, two members of the Constituent Assembly filed an appeal (No. 8 of 69) before the Constitutional Chamber of the Supreme Court noting the unconstitutionality of the twelfth amendment to the Constitutional Declaration issued by the House of Representatives on the basis of its violation of the Constitutional Declaration. This case is still pending before the Supreme Court.

the administrative judiciary does not have jurisdiction over cases relating to the Constituent Assembly's work, which meant that valuable time had been wasted in disputes presented before a non-competent court. At the same time, the Supreme Court's decision undermined the Constitutional Chamber and did not leave room for appealing the Constituent Assembly's decisions before the Chamber. This chaotic situation was caused by limiting the jurisdiction of the Supreme Court's Constitutional Chamber.

Given the importance of the Supreme Court's ruling it is outlined below.

C. Supreme Court Ruling Limiting the Administrative Judiciary's Jurisdiction

A member of the Constituent Assembly[108] filed Administrative Appeal No. 81/2017 before the Al-Bayda Court of Appeal (Administrative Chamber) opposing the Constituent Assembly's Decision No. 1 of 2017 to form the Constitutional Consensus Committee.[109] The Al-Bayda Court of Appeal ruled that it lacked jurisdiction to consider the appeal.

The appellant filed an appeal challenging this ruling before the Supreme Court (the Administrative Judiciary Court), which issued Ruling No. 182/64[110] on 14 February 2018, and resolved the issue of the Administrative Judiciary's jurisdiction regarding Constituent Assembly decisions. The court decided that "the Constituent Assembly's work is of a constitutional nature as it relates to the preparation and drafting of the draft permanent constitution, which paves the way for the historic establishment of the permanent modern Libyan state." The administrative judiciary's legal review of the Constituent Assembly's relevant decisions – to examine their legitimacy in terms of their conformity or non-conformity with the law – became irrelevant,[111] and it is not justified to "subject these decisions to reviews regarding their administrative legality."

However, the ruling also noted that "the jurisdiction of the Constitutional Chamber of the Supreme Court is not affected"[112] regarding Constituent Assembly decisions in contravention of the Constitutional Declaration. The court concluded in its ruling that the administrative judiciary has no jurisdiction over those cases.

With this ruling, the Supreme Court settled all the appeals filed by Constituent Assembly members before the Courts of Appeal of the Administrative Judiciary from 2016 until the ruling.

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[108] Ibtisam Buhaih, member of the Constituent Assembly.

[109] It is a committee formed by the Chairman of the Constituent Assembly to reconcile the views of assembly members, identify the points of disagreement among them, and find alternative phrasings to reach an agreement on the constitutional texts.

[110] The issue of administrative appeal No. 64/182 of 2018.

[111] The South Benghazi Court of First Instance adopted the same approach as the Supreme Court in its ruling issued of January 7, 2018, in Lawsuit No. 877/2017 filed by activists, civil society organizations, and political figures, where it delivered it ruling stating that "it does not have the jurisdiction to look into the case" on the basis that "the assembly was established to implement the provisions of the Constitutional Declaration under Law No. 17 of 2013. It is a body entrusted with establishing state authorities and their structures by drafting a constitution to be submitted to a referendum" and "the members of this body are to be directly elected by the people. Based on that, its decisions are outside the judiciary's jurisdiction."

[112] It is the same court which disrupted the Constitutional Chamber. (See above.)

D. Commentary

The series of appeals submitted before the administrative judiciary resulted in delays and the obstruction of the constitution drafting process. They also showed the inability of Constituent Assembly members to reach an agreement and work under a sense of collective responsibility. In addition, the appeals revealed the absence of higher principles that Constituent Assembly members had to adhere to, as the Libyan judiciary is still – in the absence of a constitution – bound by the legislation in force, despite the fact that they were issued during a period that the Constituent Assembly is trying to transition from. How, then, can the Constituent Assembly, which aims to design a path for the future in light of a new spirit and with objectives that differ from those of the previous era, uphold legislation that contradicts its objectives for the development of a new system, even if such legislation remains in force until the constitution is promulgated? The issue here relates to the moral and ethical responsibilities that the Constituent Assembly and its members had to abide by.

Access to the judiciary is a right guaranteed by the Constitutional Declaration, and it was conceivable to resort to the judiciary to preserve the Constituent Assembly's independence or to protect it from interference in its affairs or attempts to influence it.

For the first time in Libya's history,[113] Constituent Assembly members elected by the people were given a valuable opportunity to participate in the drafting of a consensual constitution. They could have taken that opportunity beyond drafting the constitution and towards achieving national reconciliation, while putting an end to the external interference that shaped the transitional period and derailed it from the national path. However, they used the judiciary against one another in order to obstruct each others' decisions, issued by a voting mechanism that did not guarantee consensus.

The Constituent Assembly refused to cooperate with other authorities, and its members were determined to be the sole "authors" of the draft constitution, which caused disagreements and was the main reason for resorting to the judiciary to issue urgent rulings to stop the adoption of the draft constitution. The engagement of experts and community members could have constituted a buffer to prevent direct confrontation between Constituent Assembly members, as well as a softening factor for their rigid positions, especially those related to regional interests, whether with regard to the state structure and its fundamental components or to the system of government. In addition, the involvement of experts could have greatly contributed to advocating for more human rights guarantees or at least adhering to what was stated in the Constitutional Declaration or some texts included in human rights documents issued during the reign of the former regime, considering these guarantees as essential elements that should not be waived or neglected.

[113] A proposal to elect the National Constituent Assembly in 1951, which drafted Libya's constitution prior to the country's independence, was put forward but it was unsuccessful and its members were appointed. Pelt, *Libyan Independence and the United Nations*, Vol. II, 592.

2. Boycott of the Constituent Assembly's Work by Some of its Member

The Constitutional Declaration makes no mention of the suspension of membership in the Constituent Assembly. However, this procedure was widely used in the early days of the assembly's work, since 2015.[114]

Things did not end there, as some members of the assembly[115] boycotted its sessions for more than one year in objection to the adoption of the first draft in 2016 and its referral to the House of Representatives,[116] and they adhered[117] to the ruling of the Al-Bayda Court of the Administrative Judiciary Court invalidating the decision to refer the draft constitution of 2016 to the House of Representatives.[118] The Constituent Assembly's work was disrupted for a prolonged period without adhering to the set timeline. The general rule became that Constituent Assembly members should work within an open timeline without deadlines, which is contrary to the deadlines specified for the assembly's work. The members were also undisciplined with no constitutional, legal, or even regulatory procedure that would regulate or at least justify their conduct. It was also unacceptable to claim that the dates stipulated in the Constitutional Declaration regarding the assembly's work were merely organizational, as some Constituent Assembly members had argued, because anything related to constitutional affairs and established democratic rules, including the peaceful transition of power, can only be peremptory and not merely organizational. The democratic process can only proceed with the promulgation of the constitution, and failure to comply with the deadlines set can have a heavy toll and dire consequences, as has been the case in Libya's nascent democratic experience.

3. The Disagreement between the Constituent Assembly and the House of Representatives

Since the second draft of the constitution was referred by the Constituent Assembly in 2017, a dispute broke out between the members who supported the draft and the House of Representatives, which did not occur when the 2016 draft constitution was referred to the house.[119]

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[114] The first to boycott was by Mohamed Balrouin. It was stated in the news that he did so in an attempt to correct the assembly's adopted course and revise the structure of its chairmanship. He then boycotted the assembly for a second time in April 2016. A statement published by Mohamed Balrouin on his Facebook page indicated that he had suspended his membership of the sessions, activities, and deliberations of the Constituent Assembly in protest against the amendments to the bylaws of the assembly, in addition to other reasons.

[115] Article by a member of the assembly, Al-Badri Al-Sharif, in which he admits that "members representing 50% of the population" boycotted the assembly. Al-Badri Al-Sharif, "On Boycotting the Sessions of the Constituent Assembly for Drafting the Constitution," *Ain Libya*, 30 May 2016.

[116] On 16 July 2016, the 16 boycotting assembly members issued a statement rejecting the 2016 draft constitution, and assembly member Daw Al-Mansouri Aoun stated that this draft constitution "threatens the unity of Libya."

[117] In particular, see this article by member of the Constituent Assembly Salem Mohamed Kachlaf.

[118] The statement of the boycotting members of the assembly on 16 July 2016.

[119] This may be due to the issuance of the rulings of the Al-Bayda Court of Appeal (Administrative Chamber) invalidating the voting and referral procedures for the draft 2016 constitution. See the second and third judicial disputes above.

This disagreement was expected in one way or another, as the amendments to the Constitutional Declaration made the Constituent Assembly an elected body without setting any rules or mechanisms to organize the interactions between the two elected bodies (the Constituent Assembly and the legislative authority), which we previously warned about.[120] The two elected bodies did not develop an agreement or memorandum of understanding to refer back to whenever a dispute occurred.

The situation between the two bodies was exacerbated by the obstructions of the House of Representatives, which did not issue the referendum law on the draft constitution (2017) until almost a year after the draft constitution was referred to it. The House of Representatives also intervened directly by issuing Constitutional Amendment No.10,[121] which made it difficult for the draft constitution to see the light given the prevailing differences.

This can be better understood by highlighting the following aspects:

1. The tenth amendment divided Libya into three regions and required each region to approve the draft constitution on the basis of a 50% + 1 "yes" vote, whereas the Constitutional Declaration required a two-thirds majority of "yes" votes at the level of the entire country (without any region-specific percentages).

2. The amendment gave the House of Representatives, whose role was previously limited to the promulgation of the constitution agreed upon by the people and ratified by the Constituent Assembly, a role it did not have, namely "to adopt the draft constitution."

3. The amendment put the draft constitution in jeopardy when it stated that "the draft constitution loses the confidence of the people if it does not meet all the conditions set forth in the previous article," which meant that the draft would lose its legitimacy if one of the three provinces does not accept it, despite the disparity in their population numbers.[122]

On 31 January 2022, the House of Representatives issued Constitutional Amendment No. 12[123] regarding the Constituent Assembly's work, whereby the House of Representatives formed a joint committee from the Constituent Assembly, the House of Representatives, and the State Council to review the draft constitution (2017). This amendment did not yield any results, as the House of Representatives and other governing institutions had their legitimacy eroded and were divided among themselves or had limited territorial authority. Therefore, handing over power to an elected legislative body was the only option. While these institutions were addressing vital and constitutional matters and issues, they in fact did not have legitimacy to do so, and they decisions were inapplicable.

[120] Azza Kamel Maghur, "The Constituent Assembly for the Drafting of Libya's Next Constitution (Committee of 60: Ideas and Hopes)," *Libya- Al-Mustaqbal*, 29 November 2012.
[121] Tenth and Eleventh Amendments to the Constitutional Declaration issued on 26 November 2018.
[122] Those who support securing a majority in the regions do it out of fear that the absolute majority can be achieved by one region since its population is greater in number.
[123] Twelfth Amendment to the Constitutional Declaration issued on 31 January 2022.

Based on the above, it is clear that the House of Representatives interfered directly in the work of the Constituent Assembly and took control of the draft constitution, claiming to be the only party empowered to proclaim it as the constitution of the country. It also made it very difficult to reach the required threshold by specifying the 50% + 1 rule in each region separately despite the disparity in their populations, and it prevented the referral of the draft constitution back to the Constituent Assembly if it were rejected in the referendum, which was considered the coup de grace for the assembly. Later, the House of Representatives intervened, under the 12th amendment of the Constitutional Declaration,[124] in the composition of the assembly itself and in setting new timelines, and although these measures did not actually take effect, they greatly complicated the constitutional process.

The Constituent Assembly members who supported the draft constitution of 2017 publicly declared that the assembly had exclusive jurisdiction over the draft constitution by virtue of a direct authorization from the people, claiming that the draft "is untouchable and may not be amended, otherwise this is considered a coup against the people's will."[125] They also considered that issuing legislation on the referendum is the duty of the legislative authority and applies independently of whether the draft constitution is referred to it. Lastly, they argued that given that the Constituent Assembly is an elected body, the legislative authority no longer has jurisdiction over the constitutional path, except for legislation regarding the transitional period.[126]

4. The Diverging Positions of the Constituent Assembly Members in Favor of the Draft Constitution and the High National Election Commission

The divergence arose through the following question: Which of the two should come first, an interim constitutional arrangement followed by presidential and parliamentary elections law, or a referendum on the draft constitution and its promulgation?

Some members of the Constituent Assembly who supported the 2017 draft constitution continued to insist and push for the draft to be submitted to a referendum despite resistance from their opposing colleagues and others. In several statements and announcements, the advocates of the referendum objected to UNSMIL's[127] opinion on the matter. Such opinion consisted in agreeing on an interim constitutional arrangement, whether through the National Dialogue Forum, which did not succeed in doing so in 2020-2021, or by referring the issue back to the House of Representatives and the government (these repeated attempts were made in 2017 to no avail[128]) in order to reach

[124] There is no transparency as to the voting mechanism within the House of Representatives, the number of attendees, or the majority required to issue constitutional amendments.
[125] Opinion of Al-Hadi Ali Bouhamra, member of the Constituent Assembly. Bouhamra, *The Libyan Constitutional* Process, 75.
[126] Bouhamra, 77.
[127] "The Libyan Constituent Assembly Rejects the Results of the Work of the Legal Committee Emanating from the Political Dialogue Forum," *Al-Shorouk*, 23 May 2021.
[128] *Action Plan for Libya Submitted by the United Nations Support Mission in Libya, Phase One: Possible Failure and Necessary Reconsideration*, Policy Alternatives (Paris: Arab Reform Initiative, 2017).

consensual constitutional rules that would abolish the current bodies to pave the way for reaching an agreement regarding the constitutional process.

In February 2021, the head of the High National Election Commission[129] announced that it was impossible for the draft constitution referendum process to take place on the specified date (24 December 2021) and that the referendum might not lead to the approval of the constitution by the three regions separately in accordance with the referendum law.

Based on this technical opinion and other reasons, the referendum on the draft constitution was not proposed, and only the presidential and legislative elections laws of the House of Representatives were issued. However, the presidential elections[130] were suspended after voter registration and the acceptance of candidates' applications, specifically during the electoral appeals process.[131]

Thus, the attempt to pass the draft constitution before the elections scheduled for 24 December 2021 failed.[132]

5. The Disagreement between the Constituent Assembly and UNSMIL

Since the direct international intervention in the Libyan constitutional process in late 2014,[133] which resulted in the issuance of the Libyan Political Agreement in 2015 by the Libyan Dialogue Committee formed by the United Nations mission, international attempts to interfere in constitutional affairs began. The first and most prominent of these was the adoption of Articles 47-52 of the Libyan Political Agreement under the title "Constitutional Process". These provisions allowed both the House of Representatives and the High State Council to interfere in the constitution drafting process.[134] However, the Constituent Assembly quickly referred its second draft (2017) to the House of Representatives, thus blocking the implementation of these provisions, without any steps taken by the executive at the time. After that, all the attention was focused on forming the new executive authority and granting it broad powers.

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129 Mohamed Artema, "An Interview with the President of the High National Election Commission, Imad Al-Sayyat," *Anadolu Agency*, 2021.

130 *Report on the Candidates to the Presidential Election* (Tripoli: High National Election Commission, 2021).

131 The United Kingdom, the United States, France, Germany and Italy, "Joint Statement on Libyan Election Process - December 2021," 24 December 2021.

132 This date was set by the Libyan Political Dialogue Forum in the roadmap for the Preparatory Phase of a Comprehensive Solution, Article 3/3.

133 Appointment of Bernardino León as Special Representative of the Secretary-General of the United Nations.

134 Article 51 stipulates the following: "The Constituent Assembly for the Drafting of the Constitution shall consult both the House of Representatives and the High State Council on the drafting of the constitution, immediately after the completion of the final draft and before putting it to a referendum, provided that the written observations of these to councils are sent to the assembly within one month from the date of the reception of the draft constitution."
Article 52: "The work of the Libyan Constitution Drafting Assembly shall continue until 24 March 2016, and in the event that the assembly is unable to complete its task by that date, a committee of five representatives from each of the House of Representatives and the High State Council, with the participation of the Prime Minister's bureau, shall be formed no later than two weeks from that date to deliberate this matter."

However, UNSMIL kept trying to find a way out of the political crisis in Libya through a political settlement involving the House of Representatives and the High State Council involving the amendment of some of the disputed texts of the draft constitution in order to issue it. However, these attempts failed for several reasons, including the resistance of the Constituent Assembly and its objection to UNSMIL's attempts to intervene, considering it a private matter of the assembly that should not be subject to any political settlements.[135] But the most important reason was the failure of both the House of Representatives and the High State Council to reach an agreement on the controversial texts of the draft constitution of 2017.[136]

Eventually, it became clear during the Libyan Political Dialogue Forum in 2020-2021 that the solution to the Libyan political crisis would not be achieved through the draft constitution, and that the most effective and fastest way was to achieve consensus either through the Libyan Political Dialogue Forum on a constitutional rule (which did not happen) or by reaching an agreement between the House of Representatives and the High State Council on a constitutional rule, which remains an ongoing attempt.

If the House of Representatives and the High State Council reach a consensus on a constitutional rule for the next stage which would lead to legislative and presidential elections, they would both cease to exist, as they are interdependent. It is therefore difficult to imagine that they will come to an agreement, except to maintain their existence at the expense of constitutional rule that has long been a topic of discussion but to no avail.

In fact, the United Nations mission, in pushing for the adoption of the 2017 draft constitution as amended by these two councils, is encouraging these two rival bodies to control the process, disregarding the national reconciliation process in favour of a (temporary) political settlement that voids the entire constitution drafting process of its goals and objectives and makes it the antithesis of national reconciliation.

The constitution drafting process surpassed its limits established in the Constitutional Declaration and was derailed. Therefore, it is high time to suspend this process and undertake a comprehensive evaluation by a neutral national body that submits recommendations to relaunch the process within the national reconciliation framework where UNSMIL can play a supporting role, if necessary, without being used in another political experiment that may be prone to failure like many others.

D. Limited and Ineffective Public Participation

First, it is necessary to mention the circumstances surrounding the Constituent Assembly's work, especially the outbreak of armed conflict in Tripoli and Benghazi[137] in 2014 and the resulting political and institutional division, which negatively affected popular participation.

[135] Opponents of the 2016 draft had previously accused the UN mission of being biased, and then supporters of the 2017 draft objected to the mission's position on not adopting the draft and pushing it towards a referendum.

[136] "What Happens After the Failure of the Libyan Constitutional Process in Cairo?" *Al-Arab*, 21 June 2022.

[137] It is worth noting that the headquarters of the Constituent Assembly are located in the city of Al-Bayda, far from the areas of armed clashes.

Although the Constituent Assembly toured several cities and villages,[138] information about these meetings was rare, and the demands that were expressed or the results of the meetings[139] remained unavailable. This made it difficult to evaluate the effectiveness of public participation and the extent to which the texts of the two draft constitutions were affected by it. In reality, these meetings had no practical impact, as they were neither monitored nor examined, and no documents or reports of them[140] were published on the Constituent Assembly's website.[141]

By comparison, the Centre for Humanitarian Dialogue, mandated by the UNSMIL, held popular consultations in Libya during the so-called consultative phase of the National Dialogue Forum, which ended in the submission of its report[142] to the Representative of the Secretary-General and Head of UNSMIL[143] in both Arabic and English. This report documented the discussions and results and it was published on the centre's page.

Nowadays, it is no longer possible to claim that popular consultations were held without publishing their outcomes or documenting their results, or to say that political parties, human rights activists, Amazigh leaders, leaders of the former regime, or civil society organizations[144] were contacted or that proposals and demands were received without actually documenting them and clarifying these demands so that their nature and impact on the texts of the draft constitution can be known. Such disclosure would also to allow us to assess the actual momentum and the percentage of popular participation and to study public opinion.

Simply stating that consultations took place is not enough; it is more important to specify the frequency, quality, effect, effectiveness, results, and impact of these consultations. This would allow us to make an actual assessment of this popular participation and of the Constituent Assembly's work in terms of its responsiveness, interaction, and engagement[145] with the public in drafting the provisions of the constitution.

It is also not enough to say that the assembly's office "archives all opinions shared by citizens, proposals submitted by civil society organizations, and memoranda issued by official institutions"[146] because as long as these are not made available, there is no evidence that Constituent Assembly members have considered and deliberated on them.

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138 The reference to the visit of "more than 60 Libyan cities and villages" is neither accurate nor supported by sufficient evidence to demonstrate popular participation in the absence of any reports. See: Bouhamra, *The Libyan Constitutional Process (2014-2018)*, 30.

139 Facebook publication about a meeting of members of the Constituent Assembly with the coordinating body for political parties.

140 Bouhamra refers to a report of the committee formed by the Constituent Assembly to ensure communication with the different components but does not publish its contents. Bouhamra, *The Libyan Constitutional Process (2014-2018)*, 30.

141 The Constituent Assembly no longer has an official website, but it does have a Facebook page.

142 *The Libyan National Conference Process – Final Report* (Geneva: Centre for Humanitarian Dialogue, 2018).

143 It covered the period from April to July 2018.

144 Many women's civil society organizations moved to the Constituent Assembly headquarters and demanded that it include a text on the Higher Council for Women as a constitutional body, but the draft constitution did not include such a provision. There are no published sources or documentation of these demands, nor are there any justifications for the failure to respond to them.

145 A workshop on women's participation in the Libyan constitution was held on 16-19 March 2015, resulting in a published memorandum, but it received no response.

146 Bouhamra, *The Libyan Constitutional Process (2014-2018)*, 31.

The failure to document this participation counteracts the fact that the Constituent Assembly is an elected body whose members ought to communicate with the voters and open direct channels with them.[147]

It should be noted that some Constituent Assembly members are not open to suggestions submitted to them:

> Constituent Assembly members did not deal with these suggestions in the same way. Some of them believed that it was important to examine them and take them into account, because they express the opinions of the people who have the right to accept or reject what the assembly brings forth in a referendum. Others believed that these suggestions do not reflect the opinions of the Libyan people, but rather that they primarily express the views of political activists who seek to influence the assembly based on their political or ideological beliefs and on the perceptions of influential civil society organizations that are financially supported by various internal or external parties. At this stage, the assembly is obliged to achieve consensus among its members and must focus on the opinions and orientations of the members so that it can reach the quorum necessary to approve the draft constitution.[148]

This illustrates the thoughts and attitudes of some Constituent Assembly members. Although there have been some serious initiatives presented to the Constituent Assembly, such as the initiative presented by the University of Tripoli,[149] there is nothing to indicate that they were discussed or that the assembly members engaged with those submitting them.

E. How Final is the Draft Constitution?

Constituent Assembly members who support the 2017 draft constitution claim that it is ready and only needs to be submitted to a referendum and that the referendum process is the decisive step. But a closer look at the steps outlined by the Constitutional Declaration to promulgate the constitution reveals that they are long and complex. They can be summarized as follows:

1. Issuance of an electoral law for the Constituent Assembly for the Drafting of the Constitution
2. The electoral process
3. Holding the first Constituent Assembly meeting and selection of the assembly Chairman, his Deputy, and the Rapporteur.
4. The Assembly will work for a period of 120 days starting from its first session.
5. Finalization of the draft constitution.

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[147] There was also a disagreement on this subject among Constituent Assembly members, and I consider that the discussions with the voters that came too late were merely a way to procrastinate and delay the process. Bouhamra, 91.

[148] Bouhamra, 31.

[149] Some members of the Constituent Assembly stated that this initiative was an attempt to develop an alternative constitution and therefore competed with their work. I conducted an interview with Ibtisam Buhaih on 13 October 2022 about the initiative of the University of Tripoli submitted to the Constituent Assembly, entitled: The Contribution of the University of Tripoli to Laying the Foundations for the Libyan Constitution / University of Tripoli project on the Libyan Constitution (University of Tripoli constitutional document).

6. Referral of the draft constitution to the House of Representatives to be submitted to a referendum.
7. Issuance of the referendum law by the House of Representatives.
8. Submission of the constitution to a referendum by the High National Election Commission.
9. The Electoral Commission announces the results of the referendum on the draft in each referendum centre separately.
10. The draft constitution gains the confidence of the people if it is approved by a majority of voters (50% + 1) in each region. The results are then referred directly to the Constituent Assembly from each referendumcentre.[150]
11. The draft constitution loses the confidence of the people if it does not meet all the conditions set out above.
12. If the referendum result is positive, the constitution shall be returned to the Constituent Assembly for ratification as the constitution of the country.
13. The constitution is then referred to the House of Representatives for adoption and issuance.

In reference to the above, it took from 2014[151] to 2018[152] to achieve the first seven steps, and there are still at least six steps left. If the result of the referendum is negative, the draft constitution will not be adopted,[153] and in the case of a positive result, the House of Representatives would still have to adopt and issue it.

F. Difference between the Constitution-building Process and the Drafting of the Constitution (Libyan specificity)

The focus has often been on the texts of the two draft constitutions. However, it is necessary to focus on the entire constitution-building process, which involves the steps outlined in the Constitutional Declaration to come up with a "national constitution."

As was explained above, the numerous amendments made to Article 30 of the Constitutional Declaration regarding the Constituent Assembly complicated the constitution-building process, not to mention the differences that arose between some Constituent Assembly members since the beginning and the disagreement between the supporters of the 2017 draft constitution and the House of Representatives. This pressure in favour of the issuance of the referendum law made some members of the House of Representatives wage a sort of "legislative war"[154] against the draft, rendering the chances of its adoption low and even making it impossible to hold the referendum.

150 We must emphasize that some of these steps came from the House of Representatives, which issued them after the end of its term. They reflected multiple conflicts, both within and outside the sssembly.
151 The election date of the Constituent Assembly and the date of its first session.
152 The date of promulgation of the referendum law.
153 Not to mention the most recent amendment to the Constitutional Declaration (No. 12), which constituted a blatant intervention that set the drafting of the constitution on a different path with a new timeline.
154 What is meant is the issuance of amendments to the Constitutional Declaration to undermine the powers of the Constituent Assembly, to extend the House of Representatives' oversight over it, and to restrict its work.

In fact, both the Constituent Assembly and the House of Representatives exceeded their legally established mandated terms under the Constitutional Declaration. It is better for them to stand down and to leave the entire constitution-building process for new members to start their work in better conditions so that this process becomes part of a national reconciliation process.

It is important to make the distinction between the constitution-building process and the drafting of the constitution, because even though the latter is part of the former, most of the attention, debate and disputes are often focused on the texts themselves[155] rather than the constitution-building process.

This was the case in Libya, where the dispute over the texts of the two draft constitutions kept aggravating. If the focus had been on the mechanism itself, the results would have been different, and the matter would have been managed differently through the development of mechanisms that mitigate confrontation and clashes while strengthening local reconciliation methods. This would have involved citizens and integrated them in the constitution-building process, turning it into a reconciliation process that does not allow the eruption of conflicts of the same nature as before. It could have turned into a national celebration rather than a reason for mourning.

Instead of fighting amongst themselves and taking advantage of Libyans' patience, the Constituent Assembly should have had the courage - due to the significance of the task at hand - to dissolve itself and call for the election of a new assembly, a step that would require agreement in itself, which was difficult to achieve. However, the assembly members who supported the 2017 draft constitution insisted on putting it to a referendum in its current state based on the voting mechanism stipulated in the assembly's bylaws.

The constitution-building process in accordance with the current Constitutional Declaration consists of thirteen steps. The Constituent Assembly was able to develop the second draft constitution in 2017, which represents the fifth step, three years after its first meeting. It then referred it to the House of Representatives, and the seventh step was the issuance of the referendum law (subject to an appeal questioning its constitutionality). There remain six steps.

Therefore, the assembly should focus on the entire constitution-building process by providing effective mechanisms to achieve consensus and mitigate conflicts, rather than being driven by mere numbers in a country known for its small population, large territory, and periods of armed conflict.

In addition, the Libyan case has demonstrated that the mechanisms of consensual constitution-building during periods of conflict need to be designed with care to ensure that consensus is reached within the framework of a national reconciliation process, rather than only focusing on achieving results (the text of the draft constitution).

[155] The Constituent Assembly has also been criticized for exceeding its mandate, but not as much as the criticism it received over the texts themselves, and some of its members argued that its deadlines are merely organizational and not binding.

It is not surprising that the members of the Constituent Assembly who support the 2017 draft constitution exerted pressure to submit it to a referendum. There was an important reason to this, which is that submitting the draft to a popular referendum may be used as a tool to correct procedural violations,[156] especially those committed by the Constituent Assembly during the course of its work, including exceeding its mandated term, submitting two draft constitutions, and the disputes that negatively affected the constitutional process in general.

The internal conflicts of the Constituent Assembly weakened it and allowed the House of Representatives to interfere in the constitution-building process in order to obstruct it. The House of Representatives hampered the work of the Constituent Assembly by deciding that a negative referendum result in any of the three regions would put an end to the entire Constituent Assembly. If this were to happen, it would entail serious consequences. What, then, would happen if the most populated region (Tripoli) voted in favour of the draft constitution, while the least populated region (Fezzan) voted against it? Would this not drag the country into another conflict?

In conclusion, the design of the constitution-building process in Libya was unrealistic, and it did not take into account the ongoing civil war that broke out to end the previous political regime. It has also undergone numerous modifications that have made it more complex and delayed it. The flaws and procedural shortcomings in the process left the matter entirely in the hands of the Constituent Assembly without placing any limits on it and without proposing alternatives or supporting popular participation. As a result, Constituent Assembly members believed that they were solely responsible for the process of "writing" the draft constitution, without being aware that the constituent process needed to be built before the draft was produced and that it was an opportunity to achieve national reconciliation which would undoubtedly have contributed to putting an end to the bloodshed and armed conflict, reduced the intensity of foreign intervention in the Libyan crisis, and allowed Libya to benefit from national and international expertise. However, this opportunity was missed, like many other opportunities in Libya's stalled democratic process.

G. Current Situation: Bypassing the Draft Constitution in Favour of an Interim Constitutional Arrangement and an Electoral Law

All these conflicts actually began in 2016 within the Constituent Assembly and then spread out between the supporters of the draft constitution and the House of Representatives. During the sessions of the Libyan Political Dialogue Forum in Geneva 2020-2021, a debate took place on whether to resort to a referendum on the draft constitution or postpone the entire constitutional process and agree to an interim constitutional arrangement on the basis of which to hold the presidential and legislative elections that were scheduled for 24 December 2021. At the time, the second option enjoyed widespread support.

[156] This was explicitly stated by Hadi Bouhamra, a member of the Constituent Assembly: "The Libyan people have the final say, and the result of the referendum must be accepted." Bouhamra, *The Libyan Constitutional Process (2014-2018)*, 22.

However, neither were the elections held on time nor the hoped-for interim constitutional arrangement issued. [157] Meanwhile, the draft constitution was rendered obsolete as events unfolded.

As a result, the international community, and specifically UNSMIL, is no longer supporting the submission of the 2017 draft constitution to a referendum but is instead focused on elections being held on the basis of an interim constitutional arrangement. Its current stance foreshadows the opening of a new, post-election chapter to address the constitutional issue.

Therefore, if the proper foundations for addressing the constitution-building process are not laid before the next "hoped-for" elections, and if the matter is left as it is to the new House of Representatives, it is expected that the dispute will continue between some members of the Constituent Assembly who support the draft constitution of 2017 and demand its submission to a referendum as it is, on the one hand, and the future House of Representatives, which may have another opinion, on the other. In this case, the stalled constitutional process may even turn into a real crisis for the next legislative authority, one which could be a difficult test and a thorny issue for the nascent legislative body to deal with.

The political path cannot move forward with new elections without addressing the constitution-building process. The upcoming elected authorities will promulgate a constitution, on the basis of which new elections will be held in the hope of achieving stability. If the matter is left in the hands of the upcoming elected authorities, the same problem that has persisted since 2012 by delaying the constitutional process in order to maintain power may be repeated. The Libyan experience has shown that it is difficult for elected bodies to stand down and for appointed institutions to comply with set timelines. In short, the crisis lies in the respect of the rules of the peaceful transition of power, which is the core of the democratic process.

III. Two Unfinished Draft Constitutions

A. The Predicament of the Two Draft Constitutions of 2016 and 2017

We have already explained that the Constituent Assembly drafted two draft constitutions, the first of which was referred to the House of Representatives in 2016. However, due to the ruling of the Administrative Court to revoke the referral decision, the boycotting members of the Constituent Assembly resumed their work, and a consensus committee was formed.[158]

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[157] To this day, there are still talks about the agreement of both the House of Representatives and the High State Council to establish an interim constitutional arrangement for the elections, but the referendum on the draft constitution has been forgotten. See the statement of the US Special Envoy for Libya on 10 November 2022, the statement of the German Ambassador to Libya on 10 November 2022, and the briefing of the Head of the Support Mission in Libya to the UN Security Council on 24 November 2022.

[158] Presidential Decree No. 1 of 2017 on forming a consensus committee consisting of six members from among the supporters of the draft and six from among its opponents. Bouhamra, *The Libyan Constitutional Process* (2014-2018), 87.

The consensus committee faced internal disagreements, but nine of its members succeeded in passing their proposal, among several proposals submitted by other members, and it was put to a vote[159] on 27 July 2017.

Even assuming that the 2017 draft constitution is final, the Supreme Court, by ruling that the administrative judiciary lacks jurisdiction to monitor the work of the Constituent Assembly, procedurally brought the first draft constitution of 2016 back to life.

While the second draft overshadowed the first, and the discussion focused on it,[160] it is worth noting that Referendum Law No. 6 of 2018 issued by the House of Representatives did not specify which draft constitution will be referred to the referendum, nor did it clarify the matter in the definitions or in the preamble.

From a procedural point of view, we believe that it is necessary to resolve this issue (the existence of two draft constitutions), especially since the ruling of the Administrative Chamber of the Supreme Court[161] was issued after the second draft was referred to the House of Representatives, which means that the first draft of the constitution is still in place.

In light of all these procedural errors that marred the constitution-building process, the texts of the two draft constitutions are clearly less important than the actual constitution-building process which preceded them and led to their writing in the first place. I believe that the procedural/constitution-building aspect must be analysed in depth and that the substantive aspect has been undermined by procedural flaws and has become fragile and lost its credibility. This opinion is based on the following reasons:

First: The procedural aspect of the constitution-building process revolves around national reconciliation, especially in cases of conflicts and crises. Therefore, simply analysing the texts and focusing on them without discussion previous, concurrent, and subsequent procedures will not give these texts any constitutional value. The procedures of the constitution-building process confer moral value and sanctity on the texts. Public disputes and disagreements, refusal to cooperate, and the lack of transparency limited the Constituent Assembly's ability to produce balanced constitutional texts that protect society from the encroachment of the state or other institutions (religious or supervisory institutions, for example) and from authoritarianism and infringements on rights and freedoms.

[159] According to Bouhamra, "some amendments" were made to this draft, but these are not specified. Bouhamra, 90. The draft received 43 out of 44 votes and was referred to the House of Representatives as a draft constitution. Bouhamra, 91. This shows that the number of assembly members dropped from 60 to 44, and the approving votes dropped to 43. These numbers, which have diminished with time, cannot be underestimated.

[160] Some members of the Constituent Assembly called this a "final draft" (Bouhamra, 85). This description is inaccurate, since this draft and the ones before it are of equal standing, and both decisions referring them are contested. There is nothing in the Constitutional Declaration known as a "final draft," and the Constituent Assembly is not allowed to develop more than one draft except if the first is rejected in the referendum.

[161] On this provision, see: Bouhamra, 20.

Second: The differences between the two drafts are evident with regard to the following: Islamic Sharia as a source of legislation, strictness in nationality laws, punitive policy, transitional justice and its limited measures, as well as referring its regulation to ordinary legislation in the second draft, and the composition of the Senate.

After all the setbacks and the differences between the members of the Constituent Assembly, the second and improved draft was accepted. This involved compromises – especially regarding rights,[162] and replacing consensus over a number of matters with their referral to ordinary legislation – in an attempt to please everyone and maintain harmony among the members boycotting the Constituent Assembly and those who support the first draft.

Although the constitution was written by an elected body, it was not written for them, but for everyone, in order to guarantee rights and freedoms, strike a balance between powers, and establish social justice and other rules. In the Libyan case, to prevent the return of any form of authoritarianism (to avoid replacing one authoritarian regime with another), there is a need to establish rules for transitional justice, achieve social peace, ensure the equitable distribution of natural resources, and respect other local specificities.

Third: As long as there are two draft constitutions referred by the Constituent Assembly to the House of Representatives, and since the two drafts were voted on163 but no consensus was reached on either, there is no difference between them in terms of the mechanism of their adoption. If the first draft had been voted on while the second had received unanimous consensus, the second draft would have naturally taken the lead. However, this did not happen, meaning that there is no way to differentiate between them except on the basis of a valid constitutional procedure. Therefore, this in itself requires a comparison between the two drafts in order to understand the reasons that led the nine members to amend the test. This is a legitimate national demand addressed at the Constituent Assembly due to the existence of two draft constitutions. The voters in favour of the second draft should justify their position in order to dispel several fears, the most important of which is the fact that some texts, when seen together, point to an extremist and ambiguous[164] religious orientation of the draft constitution without limits that govern and interpret it. Such justification should prevent extremist attempts to water down the already deficient human rights guarantees, especially with regard to women's rights.

[162] See: Salah Al-Marghani, "Is it a Serious Review of the Two Draft Constitutions or a Search for Excuses?" *Facebook page*, 12 January 2022.

[163] Curiously, the Chairman of the Constituent Assembly issued a statement on 19 April 2016, describing the first draft constitution as a consensual project, which is not true.

[164] There is nothing in Libyan jurisprudence or in Libyan court rulings that explains what is meant by Islamic Sharia at all, contrary to what is recognized in Egyptian jurisprudence, which defines the principles of Islamic Sharia as follows: "It is not permissible for a legislative text to contradict the peremptory Sharia rulings in terms of proof and significance, considering that these rulings cannot be questioned, because their overall principles are inspired by Islamic Sharia whose fixed principles cannot be interpreted or altered." Lawsuit No. 8 of judicial year 17, Supreme Constitutional Court, referred by the Administrative Court via its ruling in Lawsuit No. 21 of the judicial year 49.

Fourth: The current House of Representatives is no longer competent to deal with the constitutional issue as a whole. It has exceeded its term, failed to hand over power to an elected body, and lost its effectiveness. It should facilitate the transition of power and hand it over to new elected bodies based on an interim constitutional arrangement and electoral laws. The constitutional process needs a new legislature to deal with it.

This also applies to the Constituent Assembly, which has exceeded its mandate and its capacity. Its outcomes are the two draft constitutions that embody the differences that that have afflicted the assembly. The members of the assembly should take responsibility without negative and uncalculated reactions. They have taken advantage of the people's patience, and it is time for others to take over the task through a new constitutional process.

Fifth: The draft constitution failed to pave the way towards national reconciliation; rather, it exacerbated the existing divisions and, through some provisions (e.g. Article 75 on the composition of the Senate), reignited the controversy over the three regions in the legislation issued by the House of Representatives,[165] which had ceased to exist in 1963.[166]

Sixth: Many events have affected the constitutional process, and some in the international community strongly believe that the current situation is not suitable for engaging in that process.

Seventh: It seems that the crisis that took place in the Republic of Tunisia at the political and constitutional levels, in particular since April 2021,[167] has affected the situation in Libya. The dissolution of the Tunisian Parliament and the promulgation of a new constitution cast doubts on the post-Arab Spring constitutional processes and their effectiveness. Many provisions of the two draft Libyan constitutions were influenced by the Tunisian Constitution (2014), including the text of Article 136 related to the establishment of the Supreme Constitutional Court according to political quotas, which was one of the causes of the Tunisian constitutional crisis. This text in itself calls for a serious review of the failed Tunisian experiment, which led to a political/constitutional crisis when implemented.

B. Divisive Issues in the 2017 Draft Constitution

The Constituent Assembly did not clearly and explicitly disclose the disputed articles. However, based on the disputes that came under public scrutiny, it can be concluded that the main points of disagreement were the articles related to: identity and language (Article 2), the capital[168] (Article 3), the state's flag, national anthem, emblems, and

[165] The Tenth and Twelfth Amendments to the Constitutional Declaration of 26 November 2022 and the Referendum Law No. 6 of 2018 on 27 November 2022 issued by the House of Representatives.

[166] The date of the constitutional amendment of the 1951 Constitution declaring Libya a unified state and abolishing the federal system. See footnote 10 above.

[167] The date on which the Tunisian president declared himself Commander-in-Chief of the Civilian Armed Forces (Police, National Guard, and Customs), then the suspension of the work of the House of Representatives in July 2021, and the use of Article 80 of the Constitution to impose exceptional measures. In August 2022, Tunisia's new constitution was promulgated.

[168] See the position of Ibtisam Buhaih, member of the Constituent Assembly, and the position of the late Abdul Qadir Qaddura, member of the Constituent Assembly, who were both elected from the eastern electoral region, the Greater Benghazi electoral district.

official holidays (Article 5), the sources of legislation – "Islam shall be the religion of the State and Islamic Sharia shall be the source of legislation"[169] (Article 6), the system of government (Article 8), the composition of the Senate and its powers with respect to the distribution of natural resources (Article 75), the powers of the Senate (Article 80), the venue and rules for convening the Shura Council (Article 90), the extraordinary sessions of the House of Representatives (Article 92), the mechanism for electing the president by a majority of voters (Article 100), the composition of the government (Article 111), and the issue of nationality (Article 186).

Although they may seem limited in number, these texts are important and require consensus.

C. The Lack of a Civic and Human Rights Dimension to the 2017 Draft Constitution

The analysis of the 2017 draft constitution (2017) reveals several other shortcomings:

1. The conflict between some members of the Constituent Assembly and its Chairman over the issue of nationality is reflected in several texts.

2. Article 1 of the 2016 and 2017 draft constitutions was flawed, due to the lack of reference to the "civic" character of the state and the people as "the source of power",[170] despite the fact that these provisions were included in the Constitutional Declaration.[171] The civic character of the state is mentioned in several texts of the Constitutional Declaration, but it was completely omitted from the 2017 draft constitution, i.e. seven years after the democratic path began in Libya. This omission highlights a deliberate intention to abolish the civic and democratic character of the state in favour of another system. A discussion must have arisen regarding this matter in the Constituent Assembly.[172] This represents a clear departure from a major human rights guarantee provided by the Constitutional Declaration – i.e. the civic state – and from a constitutional and human rights achievement that the Constituent Assembly does not have the right to waive or bypass. In fact, it is required to strengthen this achievement rather than undermine it.[173]

[169] It is important to read Article 6 (which states that the Islamic Sharia is the source of legislation) together with several other articles in the draft constitution related to Islamic Sharia, including Article 136 on the establishment of the Constitutional Court, which stipulates that both the legislative authority and the head of state shall appoint the court's members, of whom 6 must be specialists in Islamic Sharia who are also not members of the judiciary. In addition, Article 161 relating to the Sharia Research Council, which the draft constitution turned into a constitutional body empowered to "express an opinion on the matters referred to it by state authorities to research and form opinions thereon based on Sharia evidence," allows this "religious" institution to interfere in the administrative and political affairs of the state.

[170] Article 190 of the 2017 draft constitution states: "Judicial rulings are issued in the Name of Allah, the Most Merciful, the Most Beneficent."

[171] Article 4 of the Constitutional Declaration issued in August 2011 states: "The state shall seek to establish a political democratic system." Article 1 states that "Libya is an independent democratic state wherein the people are the source of power." Article 9 states: "[…] preserving the civil, constitutional and democratic system, abiding by civil values […]." and Article 17 states:"[…] to build the foundations of a civil, constitutional, and democratic state."

[172] The Constituent Assembly did not publish its minutes or even a summary of them, but rather kept them confidential.

[173] The Constituent Assembly contradicted itself when it stated in Article 195 (Amendment of the Constitution and Related Procedures) that the guarantees related to the rights and freedoms stipulated in the 2017 draft constitution may not be amended except for the purpose of strengthening them, while the Constituent Assembly allowed itself to derogate from the rights and freedoms stipulated in the Constitutional Declaration.

The legal texts are cumulative and should only be strengthened. The Constitutional Declaration[174] addressed popular demands, especially in terms of rights and freedoms, and it was preceded by the statement of the Revolution of February 17.[175] Therefore, the Constituent Assembly needs to abide by both of these requirements.

3. Additionally, the draft constitution makes no mention of the term "democracy," which is repeatedly mentioned in multiple parts of the Constitutional Declaration,[176] in a clear indication of the latter's adherence to a "civic, democratic, and constitutional system."[177] While this expression was mentioned twice in the 2016 draft constitution, but not in the context of the character of the state or its system of governance,[178] it was referred to only once in the 2017 draft.[179] This cannot be justified by the claims of some members of the Constituent Assembly advocating for the 2017 draft constitution, who argue that it does not need to be explicitly mentioned as long as the text is aligned with it.[180] This omission and the presence of provisions that may be interpreted otherwise[181] signal a departure from the basic principles of a civic and democratic state in which the people are the source of power. As stated earlier, the Constituent Assembly is required to preserve and build on these gains, and it does not have the right to backtrack on them.

4. The absence of some of the human rights gains included in the first draft, such as: Libyan women's right to grant the nationality to their children from a foreign spouse,[182] and the right of Libyan women's foreign children to enjoy the same rights as Libyans. The absence of this right from the 2017 draft constitution means that decent life will not be guaranteed for Libyan women or their non-Libyan

[174] It is worth noting that the statement of victory of the February 17th Revolution, issued on 14 February 2011, contained the initial demands of: "Building a unified, free, civil, and fully sovereign Libyan state / drafting a constitution that derives its legitimacy from the will of the people and the victorious revolution of February 17th and is based on respect for human rights and the guarantee of public freedoms…"

[175] "February 17 Revolution ... the people topple the Jamahiriya," *Al-Jazeera*, 23 February 2016.

[176] In the preamble: "in response to the desire of the Libyan people and their hopes to achieve democracy;" Article 4: "The state shall seek to establish a political democratic system;" and Article 9 "preserving the civil, constitutional and democratic system."

[177] See previous footnote.

[178] Article 74 related to the restrictions that can be placed on the exercise of rights and freedoms referred to the "characteristics of a democratic society," a phrase that disappeared from Article 65 of the 2017 draft constitution, as well as Article 50 on "the right to democratic participation."

[179] It was mentioned in Article 42 under the right to participation.

[180] See the TV interview of Al-Hadi Bouhamra, Part II, on Libya's Al-Ahrar TV channel in which he explained the establishment of a civil state under several rules, including "the lack of any indication of a religious state," 29 April 2018.

[181] That is, texts of a religious nature.

[182] Article 12 of the 2016 draft constitution: "Every person who acquired Libyan citizenship in accordance with the applicable laws or born to a Libyan mother shall be Libyan." Meanwhile, Article 10 of the 2017 draft constitution states: "Provisions on naturalization and revoking of nationality shall be regulated by law, taking into account public interest, national security, demographics, and the ease of integration into Libyan society."

children.[183] Further, this draft (2017) left the issue of regulating certain rights and freedoms to ordinary legislation, thus weakening the constitutional text.[184]

5. The shortcomings in Article 49 on Supporting Women's Rights, as the text includes outdated expressions such as "negative culture" and "social customs that belittle the dignity of women" instead of the expressions included in the international conventions to which Libya is a party and which are based on international standards, including the Convention on the Elimination of Violence and All Forms of Discrimination[185] against Women (CEDAW).[186]

6. The text related to the Constitutional Court (Article 136)[187] and the adoption of the principle of quotas, which was one of the causes of the constitutional crisis in Tunisia. This text is in itself sufficient to reconsider this draft, as its application in Tunisia proved that there are many obstacles impeding the establishment of the court. The question is, since Libya has a legacy of a constitutional judiciary since 1953, why adopt the text relating to the establishment of the Constitutional Court from the Tunisian constitution which proved to be inapplicable and triggered a political/constitutional crisis there?

7. The text related to the broad powers of the Audit Bureau (Article 158), which may impede the functioning of the state. This shows an inadequate knowledge of some technical texts and proves that this article came in response to the demands of certain institutions (in this case the Audit Bureau) without sufficient knowledge of the legislation governing them.

8. The serious setback in the provision related to transitional justice (Article 181) compared to the 2016 draft constitution (Article 197).

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[183] The personal opinions of some members of the Constituent Assembly come to light here. Article 58 of the 2016 draft constitution states: "With the exception of political rights, foreign children of Libyan women shall enjoy all the rights that Libyan citizens enjoy."

[184] Article 10 on nationality stated that ordinary laws shall regulate the issue of nationality, without even guaranteeing the non-revocation of this article. The question is, what constitutional value does this provision given that the issue is to be regulated by ordinary law? This is also the case of Article 126 regarding the composition of the Supreme Judicial Council, which shall be decided by law based on the criteria of independence and development. It would have been better to clarify its establishment and ensure its diversity in order to guarantee and consolidate women's right to join the judiciary. This is also the case of Article 49 on supporting women's rights, which does not prohibit the issuance of laws that could undermine the gains made by women, but rather stipulates that "the state shall also take the necessary measures to support the acquired rights of women."

[185] Article 195 on the "National Council for Human Rights" contains a paragraph related to its mandate: "Support women in obtaining their rights established by the constitution and the law and ensure non-discrimination against them." In fact, this replaces women's repeated demands for a Higher Council for Women with a paragraph on the mandate of the National Council for Human Rights which fails to fulfill women's aspirations and hopes or to meet their demands.

[186] The Administrative Chamber of the Tripoli Court of Appeal issued its Decision No. 377 of 2022 on 14 September 2022, annulling a memorandum of understanding concluded between the Libyan government and UN Women, based on the fact that its subject matter is related to Sharia provisions, "as the implementation and enforcement of this agreement contradicts the provisions of the Islamic Sharia, which is the main source of legislation in Libya." In this regard, see the statement of the head of the Benghazi-based Washm Center for Women's Studies regarding the MoU.

[187] Adoption of a tripartite system: with a total of 12 members, 6 of whom are selected by the Supreme Judicial Council, 3 by the President of the Republic, and 3 by the legislative authority.

9. Shortcomings at the level of the phrasing and formulation (for instance, Article 120 on the guarantees for the members of the judiciary,[188] the flagrant contradiction in Article 138 of the 2017 draft constitution regarding the possibility of renewing membership in the Constitutional Court, the stipulation that Arabic is the language of the state instead of the official language[189] (Article 2), the expression "the activation of laws" (Article 60), and the ambiguity of some texts such as the phrase "in so far as this does not contradict the provisions of the constitution" (Article 36) relating to crimes against humanity.

10. The lack of a Supreme Council for Women, despite the demands of civil society organizations,[190] and the establishment of the Sharia Research Council as a constitutional body (Article 161).

11. The text related to Islamic Sharia as the source of legislation, without defining or clarifying the specific meaning of "Islamic Sharia"[191] (Article 6). This text is more ambiguous compared to the first draft constitution.[192] It is also stricter than the provision included in the Constitutional Declaration, as it sets the Islamic Sharia as the sole source of legislation. However, the negative impact of the text contained in the Constitutional Declaration on some court rulings[193] and legislation in Libya is clear, not to mention the consequent loss of women's legislative gains. In this regard, Article 13 titled "International Treaties

[188] "Members of the judiciary may not be removed, dismissed, or transferred from office.... in cases other than *in flagrante delicto*, and procedures that affect rights and freedoms may only be taken against them by authorization of the Supreme Judicial Council." This phrase on preventing measures that affect rights and freedoms is flawed and should not be contained in this text.

[189] This text is vague and inconclusive. It neither satisfies the cultural minorities nor the Arab majority. In this regard see: Jazia Shaiter et al., *Assessment of the Libyan Draft Constitution* (Benghazi: Center for Law and Society Studies, University of Benghazi, prepared by Dr. November 2017, Publications of the Center for Law and Society, 2017), 29. See also the proposal submitted by the University of Tripoli's contributions committee on laying the foundations of the Libyan constitution regarding language, which states: "Arabic, Amazigh, Tuaregi, and Tubu are considered national languages. The state shall take the necessary measures to protect and develop these languages in a manner that guarantees cultural and linguistic diversity. The language of the Holy Quran shall be the official language of the state."

[190] Libyan women organized protests in the east, west, and south of the country to claim this demand, in addition to visits to the headquarters of the Constituent Assembly in the city of Al-Bayda to discuss the Higher Council for Women.

[191] Article 1 of the Libyan Civil Code (1953), for instance, specifies "the principles of Islamic Sharia " as follows: "1. Legislative texts govern all matters to which these provisions apply in letter and spirit. 2. In the absence of applicable legal provisions, the judge shall rule in accordance with the principles of the Islamic Sharia. In the absence of Islamic legal precedent, he shall rule according to prevailing custom, and in the absence of precedents in customary procedure, he shall rule according to the principles of natural law and the rules of justice."

[192] Article 6 of the 2017 draft constitution states: "Islam shall be the religion of the state and Islamic Shariah shall be the source of legislation." Whereas Article 8 of the 2016 draft constitution states: "Islam shall be the religion of the State, and Islamic Sharia shall be the source of legislation in accordance with the recognized doctrines and interpretations without being bound to a particular jurisprudential opinion on discretionary matters. The provisions of the constitution shall be interpreted in accordance with this."
See also the proposal of the University of Tripoli's contributions committee for laying the foundations of the Libyan constitution with regard to Islamic Sharia, in an attempt to reconcile both articles, as follows: "Islam shall be the religion of the state, and Islamic Sharia shall be the source of legislation and the framework under which the provisions of this constitution and the laws of the state are incorporated."

[193] In this regard, see the decision of the Supreme Court (Constitutional Chamber) dated 5 February 2013 declaring the unconstitutionality of the restriction on the right to marry another woman without the consent of the first wife or without the permission of the court.

and Conventions"[194] treats such international instruments as being subordinate to the constitution and stipulates that that they shall be enforced "in a manner that does not conflict with the provisions of the constitution" and within the limits of Article 6, which could be used as a basis for obstructing the implementation of international conventions, especially with regard to rights and freedoms.[195] Although the draft stipulated that the Constitutional Court has the competence to review international treaties and conventions before ratifying them, this review will undoubtedly clash with Article 6, which without judicial precedents that resolve its ambiguities and clarify its meaning may lead to serious setbacks, particularly in terms of human rights.

12. Strengthening the text of Article 6 related to the source of legislation and failing to strengthen texts related to human rights and freedoms amid the lack of provisions guaranteeing them (Article 195). On the contrary, rights and freedoms were only mentioned in broad provisions that can be amended under the pretext of their "enhancement" with no regard to international standards.[196]

13. The issue of the official language of the state and its impact on cultural minorities.

14. The representation of women in legislative authorities and local councils in the two draft constitutions. Article 185 of the 2017 draft constitution[197] stipulates that the electoral system shall guarantee a quota for women of 25% of the total seats in the House of Representatives and local councils for two electoral terms.[198] However, this text has become obsolete, as women were guaranteed no less than 30% of leadership positions in the government in the roadmap issued by the National Dialogue Forum (Roadmap for the Preparatory Phase of a Comprehensive Solution, Article 5, Paragraph 6). Thus, this percentage is considered a gain for women which must be adhered to as a minimum in the draft constitution.

As for the issue of unfairly limiting women's quota in elections to two electoral terms, this represents a noticeable step back from the 2016 draft constitution,[199] which, despite providing for the same percentage, set a time limit of twelve years following the promulgation of the constitution. We cannot but wonder once again what the reason for this setback may be, especially since it undermines women's rights (this is the only text titled "Special Provision forWomen").[200]

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194 Article 13 states: "Ratified international treaties and conventions shall supersede the law but shall be subordinate to the Constitution. The state shall take the necessary measures to enforce such treaties and conventions so as not to conflict with the provisions of this constitution."

195 See footnote 186 above regarding the decision of the Administrative Court / Court of Appeal of Tripoli on the MoU concluded between the government and UN Women and its failure to interpret Islamic Sharia.

196 It is possible to interpret "enhancement" as having the purpose of preserving the status of women in society at the expense of their rights. Who decides what "enhancement" is and what are its criteria? This enhancement, in fact, can be subject to controversy. What some see as enhancement, others may see as undermining rights (for instance, night work for women).

197 Corresponding to Article 205 of the 2016 draft constitution.

198 The text includes women's right to run for the general elections. However, it did not stipulate that women should have the same quota in the government.

199 Article 205 of the 2016 draft constitution.

200 The text of Article 49 is titled Supporting Women's Rights. The draft constitution should have contained a chapter on women's rights.

FINDINGS

The specificity of the Libyan case is largely procedural and related to the constitution-building phase. The outputs of the Constituent Assembly failed to meet the expectations of the Libyan people or to be compliant with international standards, given the difficult constitutional process that the Constituent Assembly was tasked with managing, without forgetting that the assembly itself further complicated the situation. Libyans have waited about half a century in the hope of having a constitution that would achieve stability, growth, and progress and that would, above all, establish a mechanism to protect and guarantee their rights and freedoms.

However, the Constituent Assembly experienced the same bitter reality that Libyans are currently facing. The assembly itself suffered from disagreements, accusations, disputes, and lawsuits that prevented it from reaching consensus on its outputs, since its members mistrusted one another. Thus, two draft constitutions emerged from the same assembly in a clear indication of its internal divisions. Further, the legislative and executive powers in the country were also divided.

The Constituent Assembly missed a golden opportunity for a national reconciliation that Libyan politicians failed to achieve. Had its members avoided disagreements, or at least managed to positively address them, they could have earned the support of Libyans, but their failure to work collectively worsened the already dire situation. Therefore, in light of the circumstances that Libya and its people are experiencing, the constitution-building process can only succeed by achieving national reconciliation or paving the way towards it. The circumstances that Libya has endured since 2011 and the scale of foreign interference do not allow for numerical dominance and discredit the claim that the constitution, regardless of the circumstances accompanying its promulgation, is the "solution".

Supporters of the two draft constitutions[201] claim that if their preferred draft constitution had been issued, Libya would not be under the control of illegitimate authorities that assume power by virtue of political understandings and agreements, and they are right. Nevertheless, it can also be said that had it not been for the delays, stalling, conflicts, divisions, and boycott, the draft constitution would have been issued by now. It is also reasonable to believe that had a constitution similar to the 2017 draft constitution been issued in the absence of an atmosphere of genuine reconciliation, it might have led to violent confrontations between the regions supporting or opposing the draft. At the same time, there is no doubt that the Constitutional Declaration, which is a temporary constitutional document, failed to protect Libya from the numerous political experiences and understandings under international auspices trying to determine the fate of the Libyan people, all of which have been to no avail. Both the Libyan and Tunisian experiences show that the constitution is not enough to guarantee stability. Rather, it may itself be a driver of conflict or a manifestation thereof. The constitution should be effective and include mechanisms that ensure its proper implementation.

[201] "Bouhamra responds to the appeal against the legitimacy of voting on the draft constitution," *Africa News Portal*, 17 August 2017.

We believe that the safest approach is to not only examine the texts themselves (which is an important task) but also to analyse the mechanisms of the constitution building process and the events related to it. The "factory" did not employ the right mechanisms and, above all, was not realistic. The same applies to Libya's democratic path in general since 2011, as it did not take into account that the revolution/popular uprising had another side, which is the armed conflict and foreign intervention whose repercussions are undeniable, and no one can deny such a claim even if they are under the UN umbrella.

The constitutional process was supposed to be purely Libyan, and that was the purpose behind convening the Constituent Assembly's meetings in the mountainous city of Al-Bayda. However, assembly members could not reach consensus.

Libya's constitutional process proved that using the voting mechanism to adopt a draft constitution gives power to one party over another and hampers reconciliation in a conflict-ridden country.

It is necessary to distinguish between the disagreements among the members of the Constituent Assembly, which were largely limited to the rights of the regions according to the abovementioned articles – except for the text on the source of legislation (Islamic Sharia) and the rights of cultural minorities – and the disagreement between segments of society and elites over the draft constitution's provisions, especially those related to rights and freedoms. Indeed, the disagreements between the Constituent Assembly members are not the same as the disagreements between segments of society and the elites. The former are on a much smaller scale than the latter. This means that there are two levels of disagreement on the 2017 draft constitution. The dispute over the text is complex and not limited to the assembly, which is why the 2017 draft constitution in its current state cannot be put to referendum.

Members of the Constituent Assembly did not engage with one another or with the Libyan people in a positive way, as they proclaimed themselves the guardians of the draft constitution, criticized others, and exhibited inappropriate attitudes towards their critics,[202] when they should have accepted different opinions and been open to discussions and participation, considering the many delays and shortcomings in their work.[203] They should have showed patience and openness and encouraged participation. When the Constituent Assembly exceeded its three-years mandate, it should have sought to remedy the situation and restore its legitimacy that had been eroded due to the long delays and the mistakes committed by the members of the Constituent Assembly themselves, rather than call for a referendum on the 2017 draft constitution.

[202] Declared position of Omar Al-Naas, member of the Constituent Assembly, on 18 June 2022. Declared position of Muhammad Al-Toumi, member of the Constituent Assembly, on 4 August 2022, when he stated: "Whoever obstructs the referendum on the constitution has a personal interest in doing so." Declared position of Daw Al-Mansouri on the provisions regarding dual nationals: "They all have foreign agendas. This is the truth that those who reject the draft constitution want to hide from Libyans."

[203] Some considered that the role of Constituent Assembly members was to raise awareness after writing the draft constitution. See the statement of Al-Hadi Bouhamra in his interview on Libya's Al-Ahrar TV, 29 April 2018.

The draft constitution could have led to a process of national reconciliation. In conflict-ridden countries, constitution-building should be part of a national reconciliation project. The constitution-building process in Libya was an opportunity to achieve national reconciliation; however, that did not happen. This might have been due to internal factors related to the assembly itself and its functioning, its inability to attract Amazigh boycotters from the beginning, or its inability to travel smoothly across Libya, which forced 32 members[204] of the assembly to move to the Sultanate of Oman[205] in an attempt to develop a consensual project under the auspices of UNSMIL.[206] This pushed some members to boycott the meetings and thus led to the failure of the first draft constitution; the term "Salalah Constitution"[207] was used by some of the boycotting members of the Constituent Assembly to discredit it as a foreign product.

The main negative factor in the Constituent Assembly's work was that its members were not open to other opinions when drafting the text of the constitution and decided to control the entire process. This harmed its image even though some of its members are human rights experts and law specialists. The assembly did not consult external specialists, as the Committee of 60 did in 1950 when it established a small constitutional committee consisting of six members and some experts from the United Nations.

The Political and Administrative Isolation Law prevented many specialists and experts from running for the Constituent Assembly election for fear of being excluded for having been part of the previous regime. This was a real obstacle that prevented certain individuals from running for the elections and sharing their experiences in the constitutional and human rights fields. As for the voters in the electoral process leading to the establishment of the Constituent Assembly, they largely abstained from voting, which was evident in the very low turnout. This may be due to the failures and the conflicts that stood in the way of the democratic path of the first elected assembly (the GNC) and its negative impact on citizens' lives. Therefore, these elections did not witness real participation, especially compared to the first general elections, where the country witnessed high voter turnout and overwhelming joy.

It is true that the Constituent Assembly initially sparked a great deal of hope, with some even demanding that it assume power and run the country amid the political division in 2014, as an alternative solution until new elections were held. However, as soon as disagreements emerged between its members, some of which took place before the public opinion, the assembly lost its status and symbolism as a historical extension of the so-called "founding fathers" of the Committee of 60. This further complicated the political situation and eroded citizens' trust in the assembly.

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[204] "Report: The Sultanate of Oman hosts consultations for members from the Constituent Commission," *Libya Al Ahrar TV*, 2016

[205] This occurred in March 2016.

[206] Muhammad Al-Bashtawi, "An Interview with the Chairman of the Constituent Assembly, Abdullah Al-Sumat," *Al-Shabeeba website*, 2016.

[207] Abdul Basit bin Hamel, "Al-Mansouri responds to the Bouhamra Article on the Stages of the Constitution," *Africa News Portal*, 6 November 2016.

It is important to note that some members of the Constituent Assembly played a prominent role in defending the 2017 draft constitution,[208] especially in the media. However, they did not voice their concerns with such enthusiasm during the drafting process, as they were preoccupied with their disagreements. Had some members of the Constituent Assembly called for "raising awareness" during the drafting process, as they are currently doing, it would have been more useful and would have played an important role and filled an important gap at the time.

The fact that certain provisions on rights and freedoms were undermined in the second draft is a testament to the negative turn that the Constituent Assembly took, especially regarding women's rights.

Eliminating the concept of a "civic democratic system" is also a negative and dangerous indicator that compromises the civic-democratic character of the state enshrined in the Constitutional Declaration, and it might even give birth to a regime that does not recognize democracy. It also signals a departure from the constitutional instruments that guarantee the civic-democratic character of the state, noting that these instruments provided for the establishment of the Constituent Assembly in the first place.

The Constituent Assembly not only refused to cooperate with other parties, but it also did not meet the necessary transparency standards. In fact, the assembly did not publish the minutes of its meetings, did not update its official page, and was not successful in using electronic communication and providing information to citizens. It did not keep pace with modern digital communication in a country where the youth constitute the majority of the population. Its members monopolized the entire process in traditional and outdated ways, defending the draft constitution and calling for a referendum without publishing the necessary documents, especially the minutes of its meetings or at the very least a summary of these minutes or the outcomes of its first and second working committees and the Consensus Committee. Assembly members thus claimed the exclusive right to interpret the texts (which is not their role) and to prevent others from expressing their opinion on a draft constitution that could decide their fate without even knowing the background and meaning of its provisions. Since some members of the Constituent Assembly who supported the 2017 draft constitution called for putting the draft to a referendum, they ought to have published the minutes of the assembly's meetings before taking any action so that the people can consult the proceedings before voting on the draft. No true referendum can be organized before sufficient knowledge can be obtained on the origins and background of the texts, especially the ambiguous ones.

Conclusion

The constitution-building process is often studied as part of the historical context of a constitution, as the promulgation of the constitution usually overshadows the process due to the heightened focus on the text itself. However, this was

[208] This did not happen after the 2016 draft constitution was issued.

not the case in Libya. The fact that the constitution-building process was interrupted upon the finalization of the draft constitution (which reflected significant differences in terms of building the modern Libyan state after the revolution) raised an important question: Why was the Constituent Assembly unable to complete its work, despite the unlimited period granted to it, its isolation from conflict zones, and the support it received from the Libyan people who had high expectations? The claim that the Constituent Assembly has submitted its draft and cannot proceed with issuing the constitution is not valid or convincing. The draft constitution is not mere ink on paper, but rather a real consensus-building process that must unite people, protect them, and not disappoint them. This may sound unrealistic, but the importance of constitutions does not lie only in the texts themselves, but rather in their moral significance and the respect they command. This can only be achieved through a constituent (procedural) process that guarantees the drafting of texts based on standards that promote national reconciliation, guarantee rights and freedoms, and realize the aspirations of Libyans after more than four decades without a permanent constitution.

In their revolution, Libyans primarily demanded a constitution that guarantees rights and freedoms and establishes a civic democratic system that allows for the peaceful transition of power and the eradication of tyranny. This was reflected in the first constitutional document issued during the revolution by an unelected "revolutionary" authority, which included around 19 articles related to rights and freedoms out of a total of 37 articles. Even the texts related to the regime were drafted in a way that served the texts related to political rights, which meant that most of the texts of the Constitutional Declaration focused on the rights and freedoms that Libyans were demanding.

The constitution-building process is broader than constitution drafting and is an integrated process, and the act of drafting is only part of it. Therefore, it should be evaluated in its entirety and not simply on the basis of its most impactful stage (drafting).

Drafting texts is no longer a difficult task given the constitutional history, previous constitutional instruments, constitutional jurisprudence, and the rulings of the Constitutional Court at the national level, not to mention comparative constitutionalism, especially with neighboring countries. As such, the disagreements between the members of the Constituent Assembly are difficult to justify, especially given their severity, frequency, and extremism. It would have been possible to avoid these shortcomings by learning from comparative experiences.

The texts of the two draft constitutions were evaluated by Libyan and foreign experts, and the core controversial issues were identified. Even if limited in scope, these issues are significant. One example is the chapter on rights and freedoms that basically embodies the demands of the 2011 popular uprising. The uprising managed to achieve some progress in the form of the Constitutional Declaration, and it would be inacceptable to compromise on these gains, especially when it comes to the foundations of a civic and democratic state or the rights of women. In fact, women will only accept what is stated in comparative constitutions regarding equal opportunities, equal rights and freedoms, and the elimination of all forms of discrimination and violence against them, as they have suffered greatly from the armed conflict and have not participated in the unfortunate civil war. The constitution should be

fair to compensate women for their sacrifices, suffering, and pain, and it should acknowledge women's right to a decent life in Libya without having to ask for favours or charity. How can a country in the 21st century adopt a constitution that lacks fundamental principles such as democracy, a civic state, and fails to explicitly recognize that the people are the source of power, and instead includes broad and ambiguous wording?[209]

Neither of the two draft constitutions may see the light unless one of them is imposed by force or pressure by being put to a referendum under the pretext that it is what would save the country from instability, but this may cause more divisions and conflicts and even enshrine them in a constitutional text. There are indicators that this approach will not succeed, and the members of the Constituent Assembly should accept this in order to facilitate a future path. The Constituent Assembly's work should be seen as a "preliminary" attempt undertaken amid difficult circumstances which did not succeed and will not bring stability to the country.

Accordingly, the following recommendations can be made:

1. The current proposition is that the constitution-building process should not be linked to the upcoming elections, long-awaited by Libyans and called for by the international community to renew the democratic process.
2. Based on previous experiences, the constitutional process should be defined before the upcoming legislative and presidential elections. I believe that the upcoming political development (the elections) should take place simultaneously with the development of a roadmap for an amended constitutional process. In this context, it is possible to rely on and develop the texts of the political agreement related to the constitution-building process. Postponing the constitution-building process and referring it to a future legislative council would predestine that council to face an unresolvable crisis, not to mention that it would face opposition from some members of the Constituent Assembly who still support the 2017 draft constitution. Constitutional crises will recur either entirely or partly because of this action. If the elections for the next transitional period are held without finding a solution to the constitutional dilemma, mainly the Constituent Assembly, the constitutional process will turn into a major challenge for the next legislative authority and will be an obstacle to the entire democratic process.
3. A new, uncomplicated mechanism could be suggested for a new constitution drafting assembly that would be either appointed or partly elected and partly appointed. The new assembly members should have relevant expertise, and this can only be guaranteed through appointment.
4. Attention, diligence, and care are necessary to define the constitutional mechanism and to establish the next assembly while ensuring its diversity, specialization, smooth functioning, and effectiveness, as well as to guarantee consensus among its members.
5. The constitution-building process should be transformed into a national reconciliation project that is perceived as a main goal and endeavour.

[209] See: Jazia Shaiter et al., *Assessment of the Libyan Draft Constitution,* 144-151.

6. This process should ensure the highest level of participation, especially by the youth, women, and human rights activists, and it should take the form of a workshop and represent a pleasant occasion free of disagreements, lawsuits, and media campaigns.

7. Despite the challenges that the Constituent Assembly has faced, one cannot deny its efforts, experience, and work in a difficult context; in fact, the two draft constitutions included some advanced provisions that should be preserved and serve as a basis. However, it also included contradictory texts that should be discarded. There is no doubt that these two draft constitutions will be used in the upcoming constitution-building process, as they and other constitutional documents – including the Constitution of the United Kingdom of Libya (1951) and constitutional instruments issued by the previous regime – and even the political agreements drafted under the supervision of the United Nations Support Mission will facilitate the future drafting of a constitution for the country.

8. The Constituent Assembly's outputs should be dealt with in a positive light, whether by the assembly's current or future members, regardless of how they are appointed. Everyone should be aware that the current work of the Constituent Assembly has paved the way for future work, revealed many pitfalls and obstacles, and made the vision much clearer. A new plan is required to continue the process.

9. Despite its failures, the constitution-building process, has raised awareness in Libyan society on constitutional concepts and discussions, deepened people's knowledge, and highlighted the disagreements and their limited scope. Therefore, it can be considered a prelude to a better constitution for Libyans who deserve to see an end to the conflict. It has become clear that there are no winners in this conflict, but only losers (the parties to the conflict) and victims (the people). Therefore, this period should be dealt with positively and considered as part of the building process.

10. Several studies on constitutional matters were issued during the Constituent Assembly's work – although I do not know whether the Constituent Assembly consulted them – such as the remarkable study prepared by the Benghazi Center for Law and Society Studies in 2017[210] and other studies.[211] A parallel draft constitution was also prepared by academic experts from the University of Tripoli.[212] All of these studies constitute a basis for any future work.

[210] Shaiter et al.

[211] Several studies were produced in partnership with the Van Vollenhoven Institute for Law, Governance and Society of the Leiden Law School in the Netherlands, including: Najib Al-Hasadi et al., *Decentralization in Libya (Multidisciplinary Approaches)* (2018); Amal Al-Obaidi, *Libyan Identity - Dimensions and Components (Multidisciplinary Approaches)* (2019), *Solving Real Estate Conflicts in Post-Gaddafi Libya, in the Context of Transitional Justice*, Final Report of A Libyan-Dutch Research Project (Van Vollenhoven Institute for Law, Governance and Society of the Leiden Law School).

[212] The University of Tripoli's contributions committee on laying the foundations of the Libyan constitution, University of Tripoli Project for the Constitution of Libya, Second Edition (2016) Pursuant to Decision No. 1771 of 2014 by the Head of the University of Tripoli to form a committee consisting of a president and eight members of jurists and academics to develop a draft constitution initiative. This contribution is available in a series of posts on the Facebook page dedicated to the Contribution Committee.

Countries in times of conflict can survive with temporary constitutions and temporary settlements in search of a minimum level of stability that would inevitably allow for the drafting of a constitution that will prevent divisions and wars, fairly distribute natural resources, and guarantee respect for human rights and freedoms, instead of turning the constitution-building process into a long tale of conflict and division.

Therefore, while awaiting the completion of the constitution-building process, the most important step currently is to revise the Constitutional Declaration and include the texts of the political agreements that are deemed necessary for the stability of the current and future constitutional process, until a new constitution is issued for the country. It is also necessary to solve the Constituent Assembly problem and complete the constitution-building process through a renewed constitutional process in parallel with the political process.

Libya has come a long way in terms of constitution-building, even if it has faced some challenges, and it is possible to resume the process with wisdom and determination to bring the disillusioned Libyan diaspora back to their country.

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Between Law and Crisis: Creating and Changing the Constitution in Bahrain

Bader Al-Noaimi *

ABSTRACT

This paper draws on the concept of "crisis" – understood as an ever-present phenomenon in constitutionalism[1] – to offer an analysis of Bahrain's constitutional amendments. The persistence of crisis is attributed to the formation of the constitution as a result of a "compromise between disparate forces." The compromise was nevertheless incomplete, leading to certain contradictions under state capitalism, particularly those arising between the "material constitution" that defines social relations and the form of wealth distribution, on the one hand, and the "formal constitution" that organizes the relationship between state authorities on the other.[2] That being said, the term "crisis" in this context does not necessarily refer to a specific moment in time with a defined beginning and end; it is rather a continuous process involving turning points where more severe social conflicts erupt. This paper argues that the relationship between crisis and constitutional amendment is a multi-directional relationship, such that crises drive constitutional amendments, just as constitutional amendments drive crises. It further argues that crises are included in the constitutional provisions because they anticipate the occurrence of additional crises in the future.

The first section offers an overview of the genesis of Bahrain's current constitutional order, as well as its underlying legal principles. It focuses on what the constitutional texts refer to as the "popular will," the "joint will of the King and the people,"[3] and the "moderate approach." It examines their legal and political impact on the form of the constitutional order and further considers them against the concept of "popular constituent power," as defined under the liberal approach to constitutional law. In this first section, the paper raises questions regarding the goal of "reactivating constitutional life" in Bahrain as announced at the beginning of 2001, as well as the internal and external contradictions inherent in that endeavour. It further poses questions about the law's role in dissociating the "constitution" from politics and steering it clear of economic and social matters.

1 Rob Hunter, "Marx's Critique and the Constitution of the Capitalist State," *Research Handbook on Law and Marxism*, eds., Paul O'Connell and Umut Özsu (Cheltenham: Edward Elgar Publishing Limited, 2021), 205-207.

2 Karl Marx, *Marx's Critique of Hegel's Philosophy of Right* (1843) (Cambridge, Cambridge University Press, 1970), 58; Hunter, "Marx's Critique," 197-198.

3 Constitution of the Kingdom of Bahrain (2002), Preamble.

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In the second section, the paper analyses the constitutional amendments that were undertaken during the post-Arab Spring period (particularly between 2012 and 2018) and their similarities in terms of the legal mechanism by means of which they were introduced, their content, and their impact. In particular, it analyses the extent to which they responded to the political parties' aspirations and goals, as well as their impact on the legal and political system as a whole, and whether or not they constituted a turning point in the course of the country's constitutional development.

The paper concludes by considering the current status quo in Bahrain and proposes possible measures to resolve the crisis in the future.

Keywords: *Constitutional crisis, constituent power, critical legal studies, constitutional monarchies, material constitution, formal constitution, popular will, royal will.*

CONTENTS

.twice ,were it as ,occur personages and facts historical-world ,great all that somewhere remarks Hegel"
".farce as second the ,tragedy as time first the :add to forgotten has He

Marx Karl

Introduction

At the end of May 2011, Bahrain's King called for a "national consensus dialogue" with the aim of completing – as he put it – the Crown Prince's initiative during the February 2011 Bahraini uprising in response to the events of the Arab Spring. The purpose was to bring together opposition political associations and their rivals – later known as "Al-Fateh Movement Associations" – around the dialogue table to agree on a roadmap to exit the political status quo.[4] With this announcement, the King reclaimed the role he had created for himself a decade earlier, at the beginning of 2001, as the "Reformist King," when he launched his "Reform Project" by holding a referendum on the "National Action Charter."[5]

Most demands in 2001 called for reactivating the constitution and Parliament following the latter's dissolution and the suspension of some constitutional articles in 1975.[6] In response, the King drafted a new constitution that proved to be a cause of conflict for the following ten years,[7] up until 2011, when the opposition political associations demanded the adoption of a new constitution based on a high-level political dialogue between them and the government. The King called for a dialogue between civil society parties, though the dialogue sessions refrained from discussing profound constitutional reforms.[8]

History repeats itself.

Those who read history books would find many recurring cycles. This is the nature of historical texts; they compare and link events to each other. The contemporary history of Bahrain shows cycles of political crises and popular uprisings erupting on an almost regular basis, every decade or so, since the beginning of the 1920s,[9]

4 Abbas Al-Morshed, *The Wall of Silence: The Collapse of Authoritarianism- A Documented Introduction to the Bahraini Revolution of 14 February* (London: Awal Centre for Studies and Documentation, 2014), 221.
5 Al-Morshed, 239.
6 Elham Fakhro and Bader Al-Noaimi, "Bahrain's Enduring Constitutional Crisis," *Al-Abhath* 70, nos. 1-2 (2022): 26-27.
7 Al-Morshed, *The Wall of Silence*, 81-83.
8 Al-Morshed, 382-385.
9 To learn more about Bahraini political history, see: Al-Morshed, 42-50; Fallah Modayris, *Political Movements and Groups in Bahrain 1938-2002*, 1st ed (Beirut: Dar Al-Kunuz Al-Adabiyah, 2003); Fouad Ishaq El-Khoury, Tribe and State in Bahrain: Evolution of the System of Government and its Implementation, 1st ed. (Beirut: Arab Development Institute, 1983); Abdulhadi Khalaf, Unfinished Business: Contentious Politics and State-building in Bahrain (Beirut: Dar Al-Kunuz Al-Adabiyah, 2004); Abdullah Mutaiweeh, Annals from the History of the Labor Movement in Bahrain, 1st ed. (Beirut: Dar Al-Kunuz Al-Adabiyah, 2006); Muhammad Ali Al-Tajer, 'Aqed Al-Laal Fi Tareekh Awal, 1st ed. (Manama: Al-Ayyam Publishing, 1994); Nasser Al-Khairy, Qalā'id al-naḥrayn fi tārīkh al-Baḥrayn, 2nd ed. (Al-Ayyam Publishing 2015); Abdul Rahman Al-Baker, From Bahrain to Exile, 1st ed. (Beirut: Dar Al-Kunuz Al-Adabiyah, 1965); Abdul Rahman Al-Noaimi, Issues of Political Reform in Bahrain, 1st ed. (Beirut, Dar Al-Kunuz Al-Adabiyah, 2002).

or at least that is how we learned to read Bahraini history. This historical process describes a nation that engages in recurring uprisings, becomes increasingly aware of its situation, and raises the ceiling of its demands with each new cycle of political conflict with the Al-Khalifa family, which has ruled Bahrain since 1783. However, the opposite is also true for the governance approach of the ruling family, which has managed to develop a legal and constitutional system over time in order to confront those popular protests.

This mutual and sometimes confrontational relationship between crisis and law is the primary focus of this paper. The paper seeks to place the concept of "conflict" at the centre of the legal discussion, considering the constitution as a political matter that has been stripped of its political character and codified in order to prevent society from engaging in issues of distribution of power and wealth. Conflict is woven into the fabric of social relations and is a product of social conflict itself.[10] The constitution can be described as the product of a "compromise between disparate powers," albeit an incomplete compromise that constitutes an arena for conflict.[11] This characteristic – that the constitution is a product of the conflicts between parties with disparate interests – is precisely what results in the contradictions that lead to crises.

As a result, constitutionalism becomes a form and expression of social conflict, and not merely a legal instrument designed to manage state powers. Constitutions and laws cannot be removed from the context in which they emerge as a result of the conflicts that revolve around and over them.[12] It is difficult – or rather impossible – for constitutions to represent a complete and unified sovereign unit, as they distribute fragmented and divergent powers among several parties, which in turn leads to the fragmentation of sovereignty.[13]

Drawing upon the interpretation of the constitution and constitutionalism within the framework of social conflict, this paper shows that contradictions between binaries such as the law and politics, constitutionalism and democracy, and politics and economy are also the outcome of conflicts between parties having disparate interests. These contradictions further affect the form of social conflict and the type of political demands, as well as the form of law and the constitution.[14]

The contradictions inherent in constitutionalism and the constitutional state, which provoke on-going and continuous crises,[15] came to light when protests against the rule of the Al-Khalifa family broke out. In this context, crises represent an ever-present phenomenon in constitutionalism, not only theoretically, but also practically. Many constitutional practices (such as the amendment of the constitution and codification of custom) and principles rooted in constitutional theory (such as separation of powers or checks and balances) anticipate the occurrence of crises first,

10 Nimr Sultany, "Marx and Critical Constitutional Theory," *Research Handbook on Law and Marxism*, eds., Paul O'Connell and Umut Özsu (Cheltenham: Edward Elgar Publishing Limited, 2021), 210; Hunter, "Marx's Critique," 195-197.
11 Marx, *Marx's Critique*, 58.
12 Hunter, "Marx's Critique," 190-191, 199-200.
13 Xenophon Contiades and Alkmene Fotiadou, "Models of Constitutional Change," *Engineering Constitutional Change*, ed. Xenophon Contiades (New York: Routledge, 2012), 421.
14 Hunter, "Marx's Critique," 204.
15 Hunter, 205-207.

then develop responses,[16] and may eventually aggravate the situation. This "rationale" of constitutionalism that anticipates the recurrence of crises also pushes us to conclude that constitutional crises are not necessarily an exception, but are rather present in the texts, mechanisms, and ideologies upon which legal remedies are based.

The mechanisms through which constitutions are changed express what can be described as the "identity" of the constitution.[17] We can only understand constitutional change when we take into consideration the historical context of the development of politics and economics.[18] However, defining the "identity" of the constitution is difficult because constitutionalism is built upon abstract principles such as the "constituent power of the people" and "the popular will." In fact, however, and beyond the formal scope of the constitution, constitutionalism is based upon balances of power that form part of the constitutional order. The dominance exercised by the ruling family – for example – over oil revenues may not be "constitutional," but the power it holds owing to its control over such vast wealth has an inevitable impact on the constitution and social conflict. The approach of liberal constitutionalism has been criticized – among other things – for systematically seeking to neutralize issues of social justice and the redistribution of wealth and financial power in politics,[19] by way of avoiding oversight over the power of capital, establishing prescribed forms of private property relations, and shielding illegitimately acquired wealth from oversight. As such, economics are separated from policy options and voided of their political content.[20]

Arab constitutions are often described in theoretical legal studies – mostly conducted by Western scholars – as either instrumental or ideological documents that automatically translate political reality into legal texts with the aim of consolidating a system of government that had existed long before the establishment of the constitution. This proves that the ruling classes do not concern themselves with the constitution or the law except when the latter serve their interests and legitimize their rule. However, these constitutions, though intended to be instrumental, encourage further political competition over the principles that should govern society, especially due to their nature as a product of social conflict and as an incomplete compromise.[21]

By analyzing constitutional amendments as a legal mechanism and as a political phenomenon in the constitutional state, this paper starts out by addressing the concept of "crisis," understood as an ever-present phenomenon in constitutionalism,[22] and explaining that the persistence of crisis can be attributed to the formation of the constitutional state and the constitution as a result of a "compromise between disparate forces," that is, different social classes.

16 Hunter, 204-207.
17 Contiades and Fotiadou, "Models of Constitutional Change."
18 Contiades and Fotiadou, 420.
19 Sultany, "Marx and Critical Constitutional Theory," 209.
20 Hunter, "Marx's Critique," 196-197.
21 Nimer Sultany, "Arab Constitutionalism and the Formalism of Authoritarian Constitutionalism," *Authoritarian Constitutionalism: Comparative Analysis and Critique*, eds., Helena Alviar García and Günter Frankenberg (Cheltenham: Edward Elgar Publishing Limited, 2019), 291-293.
22 Hunter, "Marx's Critique," 205-207.

This compromise, however, remained incomplete, thus leading to certain contradictions under state capitalism, especially those between the "material constitution" that defines social relations and the form of wealth distribution, on the one hand, and the "formal constitution" that organizes the relationship between state authorities on the other.[23] That being said, the term "crisis" in this context does not necessarily refer to a specific moment in time with a defined beginning and end; it is rather a continuous process involving turning points where more severe social conflicts erupt.

The paper enquires about the relationship between the concepts of "crisis," as defined above, and constitutional amendment:[24] Is it a unilateral relationship – meaning that crises lead to constitutional amendments – or is it a bidirectional relationship, in which crises and constitutional amendments are mutually reinforcing?

In methodological terms, the paper follows the approach and guidelines of critical legal studies, which focus on law as a field that is tightly related to politics, society, and economics and cannot be separated therefrom. Accordingly, the paper focuses on political approaches and examines the role played by the law in cases of conflicts over influence and power.

The paper further analyses constitutional development within its historical and political contexts, viewing it as a process rather than an event. It considers the constitution as a product and expression of ongoing social conflicts. It also analyses legal texts in light of the legal and social relations they establish and govern between the "people" and the ruling class, and between the executive and legislative authorities, as well as the conflicts between different legal values.

The first section offers an overview of the genesis of Bahrain's current constitutional order, as well as its underlying legal principles. It focuses on what the constitutional texts refer to as the "popular will," the "joint will of the King and the people,"[25] and the "moderate approach." It examines their legal and political impact on the form of the constitutional order and further considers them against the concept of "popular constituent power," as defined under the liberal approach to constitutional law. The aim is to detect the theoretical and practical defects that have resulted in the establishment of a system described as "liberal authoritarianism" in Bahrain.[26] In this section, several questions are raised: What was the point of "reactivating constitutional life" in Bahrain in early 2001? What were the internal and external contradictions inherent in that endeavour? What role did the law play in dissociating the "constitution" from politics and steering it clear of economic and social matters?

In the second section, the paper analyses the constitutional amendments that were undertaken during the post-Arab Spring period (particularly between 2012 and 2018) and their similarities in terms of the legal mechanism by means of which they were introduced, their content, and their impact. In terms of the mechanism, it raises the following

23 Marx, *Marx's Critique*, 58; Hunter,197-198.
24 Contiades and Fotiadou, "Models of Constitutional Change," 418.
25 Constitution of the Kingdom of Bahrain (2002), Preamble.
26 Khalaf, *Unfinished Business*.

questions: What were the tools that were used to legitimize the constitutional amendments? Did they fall within the context of the state's existing political and legal approach, or did they deviate from tradition? In terms of content: How did the constitutional amendments accommodate the aspirations and objectives of the political parties? In terms of impact: How did the amendments impact the legal and political system as a whole? Did they steer the situation off the traditional course in Bahrain?

The paper concludes by considering the current status quo in Bahrain and proposes possible measures to resolve the crisis in the future.

I. A Flag, A Constitution, and A National Assembly: Their True Meaning Distorted[27]

The inherent contradictions in the concept of constitutionalism result in persistent crises.[28] This is the case in Bahrain, as evidenced by the new constitutional drafting approach that was inaugurated by the King on 14 February 2002, when he issued an amended version of the Constitution of the Kingdom of Bahrain that was contrary to the political understandings reached between him and the political opposition parties. In doing so, he ushered in a period of political conflict that continues to this day.[29]

Why was the new constitution met with such wide-scale objection? Naturally, the political movements of the opposition in particular had political objections to the text, content, and mechanism of approval of the constitution.[30] The paper will delve into the reasons behind this opposition and will shed light on the shortcomings of the adopted constitutional and legal model, as well as the principles established by the constitution.

To offer a valid criticism of the constitutional system established by the 2002 Constitution, a threefold analysis is undertaken:

1. The constitution as "supreme" law that takes precedence over other laws as well as politics
2. The interpretation of the law on the basis of abstract principles such as the "will of the people," which contributes to generating contradictions between theory and practice
3. Focus on detailing the formal and institutional forms of political representation and concealing the informal forms

27 Maruf Al-Rusafi, "I am Knowledgeable of Governmental and Political Affairs." [poem]
28 Hunter, "Marx's Critique," 205-207.
29 Fakhro and Al-Noaimi, "Bahrain's Enduring Constitutional Crisis," 38-39, 44-45.
30 Fakhro and Al-Noaimi.

By analysing the above three aspects, the paper will attempt to answer the following question: How did the legal system contribute to isolating the constitution from politics?

A. The Supreme Law

Faculties of law teach students that the constitution is ranked highest among domestic laws. It constitutes a supreme law that governs the rest of the laws and determines their legitimacy based on the extent of their alignment with its provisions and principles. However, critical legal studies oppose this theory, as they consider that treating the constitution as a supreme law restricts politics, even while the constitution is part of the social conflict and is influenced by politics.[31]

The 2002 Constitution of the Kingdom of Bahrain indicates in its preamble that the amendments made to the 1973 Constitution "achieve for everyone the lofty ideals and the great human principles enshrined in the National Action Charter."[32] The explanatory memorandum that was attached to the constitution also refers in detail to the binding nature of the National Action Charter with regard to the constitutional provisions that emanated from it. The experts of the Advisory Technical Committee for Drafting the Constitutional Amendments focused on carefully defining the relationship between the charter and the constitution. The committee proposed several constitutional amendments that were compatible with the objectives of the charter, but they also contained several legal contradictions that will be explained in the next section.[33]

First, in terms of interpretation, the committee held that the binding force exercised by the charter on the constitution stems from the fact that the former was the outcome of an agreement between "the government and the people."[34] The committee argued that the people had entrusted the Crown Prince with the power to "amend the constitution at his own discretion ... and choose the method he deems best for drafting, approving and promulgating constitutional amendments."[35] This curtailed the people's constituent power, as the committee considered that the referendum that was held on the charter during the founding phase of the constitution served as a waiver of the people's right to self-determination in exercise of their full and unequivocal will and sovereignty. As a result, the people shifted their constituent power of their own free will to the Crown Prince. Consequently, the Crown Prince, before issuing the new constitution, assumed the task of expressing the will of the people who had entrusted him with those powers. In accordance with the "constituent power" theory, the constitution he promulgated is thus a product of the people's constituent power.[36]

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31 Sultany, "Marx and Critical Constitutional Theory," 209-210.
32 Constitution of the Kingdom of Bahrain (2002), Preamble.
33 Decree No. 5 of 2001 on the establishment of a committee concerned with amending some of the provisions of the 2001 Constitution.
34 Explanatory memorandum for the Constitution of the Kingdom of Bahrain as amended in 2002, Section 1, Part 1, "The Binding Force of the National Action Charter."
35 Explanatory memorandum, Section 1, Part 2, "The Means of Amending the Kingdom of Bahrain's Current Constitution in Light of the Charter."
36 Sultany, "Marx and Critical Constitutional Theory," 213-214, 216-217.

Critics of the "people's constituent power" theory argue that it contradicts historical practice: while the people are the ones who possess power, sovereignty, and supreme political will, when the de facto authority establishes a constitution in a specific time and political context, this leads to the restriction of the people's constituent power in the future. The theory erects the constitution as a supreme law that takes precedence over any other law; thus, whoever objects to it is considered to be against the will of the people (constituent power), even if those who object to it are the people themselves.[37]

This is not exactly how the situation unfolded in Bahrain, as the constitutional interpretation created two separate wills (see "Abstract Legal Principles" below). However, this does not exempt the legal theory itself for its role in creating these contradictions.

Secondly, the new draft constitution focused mainly on promoting the principle of "competence" in the production of laws, hence entrusting the processes of legislating, interpreting, and codifying to experts (mainly foreigners who are contracted as advisors to the government).[38] This gives experts a great deal of power in interpreting the law in a manner that serves the interests of the authorities. This "technocratic" approach to dealing with political crises is part of the process of dissociating the constitution from politics and molding political issues into legal frameworks in a way that strips them of their political and social content.[39] The discussion thus shifts from presenting competing political proposals to evaluating the efficiency of implementing ready-made laws and regulations produced by the legal experts hired by the government.

The task of drafting the amendments to the constitution was entrusted to a committee of senior government officials, including the Minister of Justice (committee chairman) and the Minister of Interior, as well as the Chairman of the Shura Council. This committee was formed pursuant to a decree issued by the Crown Prince[40] after the people "entrusted" him with their constituent power to "amend the constitution at his own discretion" to achieve the goals of the Charter. The power to draft, approve, and implement the constitution remained mainly in the hands of government officials (who were subject to severe criticism by the opposition political movements, seeing as they played a direct role in suppressing public freedoms), in addition to the constitutional experts hired by the committee.[41] The role assigned to these legal experts was based on the fact that they supposedly were not affected by local political tensions and adopted a neutral position. However, in reality, they undertook a political function in a field tainted with political and class contradictions in the first place.

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37 Sultany, 232-233.
38 Salma Waheedi, "Constitutional Courts in Arab Gulf States: A Comparative Study of Kuwait and Bahrain," *Al-Abhath* 70, nos. 1-2 (2022): 227-229.
39 Hunter, "Marx's Critique," 195.
40 Decree No. 5 of 2001 on the establishment of a committee concerned with amending some provisions of the 2001 Constitution, Article 2.
41 Constitution of the Kingdom of Bahrain (2002), Preamble.

Moreover, the purpose behind drafting constitutions is at times to maintain the status quo, or to protect certain aspects and prevent their future amendment, especially when there are elements that may cause disagreement or lead to future disputes.[42]

The Bahraini Constitution prohibited the amendment of three elements: 1) the status of the Islamic Sharia as the main source of legislation, the state's religion, and its official language; 2) the monarchy and the principle of hereditary rule; and 3) the bicameral system.[43] Amendments encroaching on the "principles of freedom and equality" were prohibited as well, but these are intangible and abstract principles, as formal constitutional equality does not necessarily mean actual equality.

As for the last prohibition – the prohibition of amending the bicameral system – the Bahraini Constitution sought to consolidate the structure of the new constitutional institutions by forbidding any discussions or amendments related thereto. This became a political matter that confronted the government and the opposition political movements since the establishment of the Shura Council in 1992. In fact, the latter became, by virtue of the constitution, above politics, was stripped of its political role, and was protected by the constitutional principles that depict the constitution as a product of the "joint will of the King and the people." Any attempt to change the bicameral system is considered a breach of "the contractual nature of the constitution."[44]

Tying the bicameral system to the "contractual character" and the "joint will" created a contradiction by considering that the interests of the ruling family (and the King in particular) represent the interests of the "people" as a whole, and concealed the fact that they are narrow factional interests that strengthen the position of one party in the "joint will" equation over the other.

B. Abstract Legal Principles

One of the contradictions in constitutionalism that inherently creates crises is its reliance on abstract legal principles having no specific scope, such as the "people's constituent power" and the "will of the people," which assume that the "people" represent a single unit having common interests.[45] This is why we refer to the constitution as the product of a "compromise between disparate powers," which makes it an incomplete compromise because the conflict over defining its scope and elements is still ongoing.[46]

Where are these principles found in the constitutional texts?

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42 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, 2019), 144-145.
43 Constitution of the Kingdom of Bahrain (2002), Article 120 (c).
44 Explanatory memorandum for the 2012 amendments to the Constitution of the Kingdom of Bahrain, Preamble.
45 Sultany, "Marx and Critical Constitutional Theory," 220-221; Hunter, "Marx's Critique," 205-207.
46 Marx, *Marx's Critique*, 58; Hunter, "Marx's Critique," 197-198.

The term "will" appears in both the National Action Charter and in the preamble to the constitution and the explanatory memorandum. In the first instance, "popular will" is described as being exercised by ordinary citizens in electing members of the Chamber of Deputies and voting in referendums. In the second instance, reference is made to a "royal will" expressed by the King, who may at his own discretion amend the constitution and appoint members of the Shura Council.[47] As such, there are two separate wills that intersect with one another in certain situations and moments, yet they both represent the expression of a "joint will."[48]

There are more than ten references to the "joint will" in the preamble of the National Action Charter. On the other hand, "popular will" and "royal will" are only mentioned three times, indicating how these two wills are intertwined with the "identity" of the new constitution and the main ideas underpinning it.

The constitutional documents formally treat the two wills equally and similarly. However, given the power imbalance and the King's monopoly over political power and the power of capital, the royal will inevitably dominates the political process. This is in addition to founding legal interpretations on principles that benefit "consociationalism" and "political partnership"[49] and advocating for the principle of "efficiency" through the introduction of the bicameral system, to include experts among its ranks.[50] Perhaps one of the most important works that criticized the legal interpretation adopted by the drafting and advisory bodies and committees is *Opinion on the Constitutional Question*,[51] which was authored by a group of prominent Bahraini lawyers in 2002. The book discusses the legal issues related to the procedures that were followed to amend the 1973 Constitution and issue a new constitution in 2002 in a way that violated the provisions of the first constitution. The book refers to it as a "contract" between two parties – the ruler and the people – or, "the ruler and his subjects," as it is often described, where neither of the parties to the "contract" may unilaterally amend its provisions; rather, the amendments must be agreed upon, and the parties have to commit to following the procedures stipulated in the provisions of the constitution itself.[52] However, while considering the constitution as a "contractual" document based on an agreement between two parties regarding their duties and responsibilities towards each other enshrines the principle of a "joint will," which places the will of the people on an equal footing with the will of the King, the reality differs greatly. Seeing as the principle of the "joint will" is essentially an abstract principle employed to describe a series of legal practices based primarily on social conflict, the "joint will" was clearly and controversially embodied in the "contract" theory that

47 Explanatory memorandum for the Constitution of the Kingdom of Bahrain as amended in 2002.
Kingdom of Bahrain's Constitution of 2002, Preamble.
National Action Charter 2001, Preamble.
48 Constitution of the Kingdom of Bahrain (2002), Preamble.
49 National Action Charter 2001, Preamble. Explanatory memorandum for the Constitution of the Kingdom of Bahrain as amended in 2002, Section Two.
50 National Action Charter 2001, Chapter Five.
51 "Section 3: The New Constitution and its Explanatory Memorandum," In *Opinion on the Constitutional Question*, A group of Bahraini lawyers (Beirut: Dar Al-Kunuz Al-Adabiyah, 2002).
52 "Section 3: The New Constitution and its Explanatory Memorandum."

allowed the King to issue the 2002 Constitution in the manner that he did. He justified that by the fact that he held a referendum as a way to consult with the other contracting party, and the latter authorized him to take the procedures he deems appropriate in amending the provisions of the constitution in order to achieve the goals of the National Action Charter, and thus reach the required consensus to achieve the "joint will," despite it contradicting the required amendment procedures in accordance with the provisions of the 1973 Constitution. Those who claim that the 2002 Constitution was issued in violation of the original contract are often faced with responses from the ruling class, which affirm that the King had negotiated with the other contracting party (the people) and reached an agreement with them. The people, in turn, granted the King the power to amend the constitution within the framework of the contractual relationship.

In a monarchy, the King rules in the name of his historical dynasty, whereas in the constitutional state established by the 2002 Constitution, he rules in the name of the people. Thus, the people are separated from royal will. Constituent power was granted to the King, who came to rule in the name of the people, and succeeded in restricting the will of the people by virtue of their constituent power, in accordance with a constitution that rises above the people and above politics, despite the fact that the constitution and the constituent power are – in theory – the product of that foundational stage during which the people expressed their will. This is the contradiction produced by merging the two wills into the "joint will," whereby the King rules by his own will but in the name of the people. It is as though the people imposed tyranny upon themselves, and, as a result, they can no longer exercise their will alone but must share their will with the King in his capacity as the other party to the contract by virtue of which the current constitution was established.

There are many examples of contradictory binaries in the Bahraini constitutional system at the level of the formation of institutions and the design of the legal system.[53] What the Bahraini case illustrates is that liberal legal principles can lead to tyranny in a legal form, based on the characteristics of this legal theory, and not necessarily by politically exploiting the law outside the context of legal theory.[54]

C. Between the Formal and the Informal

The constitution plays the role of reconstructing the state and society by focusing on the formal and institutional forms of political representation so as to conceal the informal forms.[55] It is a process based on the authority's monopoly of power and the legitimization of the status quo through the codification and institutionalization of social conflict. Tyranny does not arise out of thin air but is established through the existing legal and political structures. This, by its nature, is a cumulative process, as each new experience builds on the one that precedes it within a continuous social

53 Fakhro and Al-Noaimi, "Bahrain's Enduring Constitutional Crisis," 43-44; Bader Al-Noaimi, "The Political Use of Law... as a Tool for Governance," *Muwatin*, 16 March 2018.
54 Sultany, "Arab Constitutionalism," 291-293.
55 Sultany, 306.

engineering process in which law plays a pivotal role. Thus, constitutions may fail to establish a new political system because this requires a cumulative process, in which elements of the old and new system coexist, known as legal continuity.[56] An example of this in the Bahraini case is the formation of the committee tasked with activating the charter, amending the constitution, and focusing in the explanatory memorandum on achieving the best results in accordance with international experiences, in addition to "fulfilling the aspirations of the King," at the same time as it neglected popular aspirations. Even the Constituent Assembly in 1972 failed to exercise its constituent power freely, as its powers were limited by law[57] to discussing and amending the draft constitution received from the Council of Ministers, after the latter had sought the help of experts from outside Bahrain to produce it. Therefore, its constituent power was restricted and subject to preconceived structures, ideas, and orientations that it had to adhere to instead of being allowed to develop a new system without the intervention of the old one.

The ideologies adopted by institutions represent a major factor, and this paper stresses the importance of examining these ideologies, embodied in institutions and legal interpretations, as well as the frameworks that justify them or protect them from accountability and the political economies that enable them.[58] This ideology is not defined and has a variable impact on the different segments of society, because it takes a hybrid form and combines legal normativity and social compliance. In this case, the constitution is created to protect the status quo, not to change it. The law also played a major role in this process, as legal interpretations dealt with the 1973 Constitution as if it were both present and non-existent at the same time. The government refused to break completely with the previous constitutional system and at the same time wanted to restructure the system by preserving the interests of the old regime in the new constitutional order in 2002, in order to ensure the restructuring of institutions in a manner consistent with the interests of the ruling family such that they adopt its ideology.

II. Constitutional Amendments in the Midst of Crises

In the previous section, we reviewed the genesis of the current Bahraini constitutional order, as well as its underlying legal principles. We focused on what the constitutional documents describe as the "popular will," "the joint will of the King and the people,"[59] and their relation to the concept of "crisis," which critical legal studies consider inherent in constitutionalism in both theory and practice.

This section will touch upon the constitutional amendments initiated during the post-Arab Spring period in terms of the legal mechanism that was employed to pass them, their content, and their impact. It will attempt to identify the sources of the "crisis" from within these amendments.

56 Sultany, "Marx and Critical Constitutional Theory," 228.
57 Decree-Law No. 12 of 1972 establishing a Constituent Assembly to prepare a constitution of the state.
58 Sultany, "Marx and Critical Constitutional Theory," 211.
59 Constitution of the Kingdom of Bahrain (2002), Preamble.

A. The 2012 Amendments

The 2012 amendments are considered the most important of all the constitutional amendments that were made during the past decade for several reasons. They came as a direct reaction to the protest movement in 2011 and to the recommendations reached at the National Consensus Dialogue that was held in July 2011.[60] These amendments can be divided into two types: those affecting the powers of the elected Chamber of Deputies and those affecting the powers of the King. Fourteen constitutional articles affecting the powers of the Chamber of Deputies and the constitutional procedures that regulate its relationship with the Council of Ministers were amended, the most important of which were Articles 65, 67, 85, 102, 109, and 115, which we will comment on subsequently.

1. The 2012 Amendments: Amendments to the Chamber of Deputies' Powers

Article 65 of the constitution granted members of the Chamber of Deputies the right to submit interpellations to ministers, each in their field of their work, requiring at least five members to submit the request for interpellation. However, the constitutional amendment included the phrase, "The interpellation must be conducted in accordance with the terms and conditions determined by the Rules of Procedure of the Chamber of Deputies."[61] According to the amendment of Article 144 of the Rules of Procedure made during the same period,[62] an additional procedure was introduced to the interpellation mechanism, as it was stipulated that the interpellation request should be first referred to the chairmen of the committees to discuss "how serious" it is, after which the opinion of the committee is presented to the chamber to either approve or reject the interpellation procedure by a two-thirds majority, in accordance with Article 145 (bis) (1). This reduced the chamber's oversight powers, as it made the questioning of ministers difficult or even impossible, as it is hardly expected that a two-thirds majority of the members would agree on the interpellation. The rules require the committee's recommendation to approve the interpellation, in addition to the approval by a two-thirds majority of the chamber's members.

It is noteworthy that the requirement of the approval of a two-thirds majority of the members is equivalent to the majority required for approval of the withdrawal of confidence from the cabinet and the issuance of a decision declaring "the inability to cooperate" with the Prime Minister, as well as the majority required to amend the constitution. This made it impossible to question any minister, let alone withdraw confidence from them, since the constitution linked the two tools.[63] Moreover, the requirement of a two-thirds majority is reserved in many constitutional systems for important decisions that require broad political consensus to ensure their sustainability and prevent their abuse, such as amending constitutional provisions.[64] However, Bahrain witnessed an increase in cases where decisions are

60 Fakhro and Al-Noaimi, "Bahrain's Enduring Constitutional Crisis," 47-50.
61 Constitution of the Kingdom of Bahrain (2002), Article 65.
62 Decree-Law No. 41 of 2012 amending some provisions of Decree-Law No. 54 of 2022 on the Rules of Procedure of the Chamber of Deputies.
63 Constitution of the Kingdom of Bahrain (2002), Article 66.
64 "Section 3: The New Constitution and its Explanatory Memorandum," Item 1.

required to be passed by a two-thirds majority, especially those related to exercising political pressure on the executive authority, such as questioning or removing ministers. Notably, the ruling authority considers that removing the Prime Minister or even questioning one of their ministers is as sensitive as amending the constitution.

It is worth noting that the Rules of Procedure of the Chamber of Deputies and the aforementioned amendment, in addition to half of the amendments made to these rules between 2012 and 2020, were made possible through a decree-law.[65] The members of the Chamber of Deputies did not participate in drafting and developing the amendments to the Rules of Procedure governing their work. In fact, the chamber does not have the right to propose amendments to decree-laws, as it only has the authority to issue a decision approving or rejecting them by virtue of Article 123 of the aforementioned Rules of Procedure.

Perhaps the most serious amendment to the Rules of Procedure was made in 2012, as it came in response to a constitutional amendment whose goal was to "increase the scope of features of the parliamentary system" and give "a greater role to the Chamber of Deputies."[66] This raises the question: Where does the dysfunction lie then?

In the introduction of the explanatory memorandum for the 2012 amendments, the following is stated based on the charter's "binding principles ... which may not be violated or amended" and based on the requirement of not deviating "from the clear parameters established by the charter:

> Emphasizing the contractual means by which the constitution was drawn up so that it may only be amended by the joint will of the people and the King. This gives the King and the legislative authority the right to propose the necessary amendments in accordance with the procedures stipulated in the constitution. This also includes the adoption of the bicameral system, such that no amendment may impose a unicameral system.

This indicates that the current constitution and all the constitutional amendments or institutions that have resulted from it are designed to preserve the status quo and to separate certain issues from popular politics. The most important of these issues is the bicameral system introduced in 2002, which was based on the experience of establishing the Shura Council outside the formal constitutional framework in 1992. In addition, the legal interpretation contributed to shaping the bicameral system as a product of the joint will of the people and the King which produced the new constitution, contrary to the opposition's political demands, which focused in particular on abolishing the appointed Shura Council and adopting a unicameral system.

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65 A decree-law is a legislative tool that enables the executive branch to issue legislation that has the force of law during periods when the parliament is absent or not in session, and it must be submitted to parliament for approval once it reconvenes. In case the decree-law is not approved, it ceases to have the force of law.

66 Explanatory memorandum annexed to the 2002 Constitution of the Kingdom of Bahrain Constitution, Preamble.

As for financial affairs, the National Assembly is in charge of approving the draft state budget, which the government submits to it at least two months before the end of the fiscal year.[67] According to the amendment to the Rules of Procedure of the Shura Council and the Chamber of Deputies[68] and the amendment of Article 109 of the constitution, the Financial and Economic Affairs Committees of the Shura Council and the Chamber of Deputies shall meet "in a joint session to discuss the draft budget law with the government," where the two committees submit comments and proposals on the draft budget.[69] The two committees shall submit their report to their respective chamber within a maximum period of six weeks. In the event that the report is not completed within this period, the two chambers may discuss the draft law in the exact formulation in which it was referred to them by the government.

The amendments also gave the power to approve the government's programme solely to the Chamber of Deputies.[70] However, this power was flawed, as it required the issuance of a decision to approve or reject the programme within a maximum period of 30 days from the government's submission of its programme by a majority of members. In the event of its rejection, the government resubmits the programme "after making the amendments it deems appropriate" within 21 days. If the deputies reject the programme for a second time by a majority of members, the government must resign and the King must appoint a new government.

However, Article 46 does not prohibit the King from forming the new government with the same members, as confirmed by the explanatory memorandum attached to the 2012 amendments. The memorandum explains that the constitution "does not require the King to appoint ministers according to the outcome of the parliamentary elections in terms of the number of seats for each bloc or political group. Rather, the King has full freedom to choose whomever he deems fit to be part of the government, in service of the public interest of the Kingdom." The King also has the right to dissolve the Chamber of Deputies if it rejects the new government's programme a second time. According to the constitution, royal decrees cannot be restricted by the decisions of the Chamber of Deputies nor the results of the elections. In addition, the public will to elect members of the Chamber of Deputies is constrained by the King's will to appoint members of the Shura Council, as well as the members and legislative tools of the Council of Ministers, because his will "achieves the public interest of the Kingdom." In fact, in the eyes of the constitution, only the royal will can achieve the "public interest" of the Kingdom. This could also mean that the public will does not achieve the public interest unless it is consistent with the royal will. That is, it has no constitutional value except when it is compatible with the will of the King.

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67 Article 165 of Decree Law No. 54 of 2002 on the Rules of Procedure of the Chamber of Deputies.

68 Rules of Procedure of the Shura Council, Article 138. Rules of Procedure of the Chamber of Deputies, Article 167.

69 The procedures followed prior to the amendment required that the draft law be referred to each chamber separately, and it did not require a joint committee representing the two chambers to meet with the government to discuss it.

70 Prior to the amendment, the procedure did not require approval of the government's programme; it only gave the Shura Council and the Chamber of Deputies the right to comment on it.

Article 67 of the constitution explicitly prohibits the Chamber of Deputies from withdrawing confidence from the Prime Minister: "The subject of confidence in the Prime Minister shall not be raised in the Chamber of Deputies." However, it did not mention the role of the Shura Council in the matter because its composition as a royally appointed council does not allow it to withdraw confidence from the Prime Minister or even question a minister. However, the constitution established a similar mechanism under another name: "the inability to cooperate with the Prime Minister." This article was amended in 2012 by limiting the use of this tool to the approval of the Chamber of Deputies in a two-stage vote. The first vote requires the approval of a majority of the members of the chamber, and the second vote takes place after at least three weeks and requires a two-thirds majority of the members.[71] If the vote is successful, the matter is referred to the King, who either dismisses the Prime Minister and appoints a new government or dissolves the Chamber of Deputies and new elections are held.

2. The 2012 Amendments: Amendments to the King's Powers

Regarding the powers of the King, Article 42 of the constitution was amended, requiring the King to consult the heads of the Shura Council, the Chamber of Deputies, and the Constitutional Court before dissolving the Chamber of Deputies. However, the explanatory memorandum attached to the 2012 amendments indicated that this condition does not apply in the case of the dissolution of the Chamber of Deputies after it rejects the government's programme for the second time or in the event that it determines its inability to cooperate with the Prime Minister, because this is done by virtue of a Royal Decree, as the Prime Minister is one of the parties to the dispute.[72] On the other hand, the Chamber of Deputies can be dissolved during the legislative term for other reasons by virtue of a decree, which means that the cases in which the King consults the heads of the Chamber of Deputies, the Shura Council, and the Constitutional Court are the exception and not the rule, and the explanatory memorandum explicitly acknowledges that "the opinion of these authorities is not binding to the King."[73]

Articles 52 and 53 related to the mechanism and conditions for appointing members of the Shura Council were also amended to provide more details. However, the amendments did not actually reduce or limit the King's powers to freely choose and appoint members of the Shura Council. Indeed, the amendment of Article 52 stipulates that the members of the Shura Council shall be appointed "in accordance with the procedures, conditions, and method defined by royal decree." The amendment sought to codify and regulate appointments, based on the logic that codification is a development in and of itself. However, the amendment's reliance on a royal decree prevented it from effecting any change, because the body that issues the legislation regulating appointments is the same one that issues appointment orders. In other words, the only watchdog over the rules for appointing members of the Shura Council is the King himself.

71 Using the "inability to cooperate" tool required the Shura Council and the Chamber of Deputies to meet under the chairmanship of the Speaker of the Shura Council and the approval of a two-thirds majority of the members of the two councils.
72 Explanatory memorandum annexed to the 2012 amendments of the Constitution of the Kingdom of Bahrain, Preamble.
73 Explanatory memorandum.

Amidst the political crisis and popular demands for reform, the 2012 amendments were first characterized by continued reliance on the centrality of the royal will in the state's legal system. The recommendations of the National Consensus Dialogue were not binding to the King, as he selected what he deemed appropriate and submitted them as proposals for constitutional amendments to the legislative authority for approval. As such, the amendments officially reflected the joint will of the people and the King. However, in reality, they reflected the gap between these two wills.

It is useful to draw attention to the shortcomings of these amendments, such as their lack of any solutions for issues facing the judiciary, the mechanism for forming the Council of Ministers, the King's absolute powers to appoint members of the Shura Council, the electoral system, and social and economic rights, or even the lack of any prohibition of political discrimination.

If we take the judiciary as an example, Article 69 of the Law on the Judiciary states that the Supreme Judicial Council is chaired by the King and includes members of the judiciary and the Attorney General. The article also indicates that "the King may delegate to whomever he deems fit to preside over the council." This means that the King is the original chair of the Council, and any other person appointed to the position shall be considered as the King's deputy.

This system applied to the Supreme Judicial Council until the law was amended in 2013, when the King entrusted "the president of the Court of Cassation with the chairmanship of the Supreme Judicial Council." The amendment seems to imply that the King delegated his powers in the chairmanship of the council to the president of the Court of Cassation. In fact, however, the text specifies that the King "entrusts" the president of the Court of Cassation with the chairmanship, rather than appointing him to the position. It should be noted that the council has the right to propose the appointment of judges and prosecutors to the King, in his capacity as head of state and as the original chair of the council.

This has important implications for the relationship between the judiciary and the executive and for the independence of the judiciary. Article 2 of the Law on the Judiciary stipulates that "judges are independent and answer to no authority in the performance of their jurisdiction but the authority of the law." How can the independence of the judiciary be ensured if the regulation of the judiciary, particularly during the period between 2002 and 2013, limits its independence? The King appoints judges by decree in his capacity as head of state, while at the same time presiding over the executive as well as the Supreme Judicial Council, which is the body responsible for proposing appointments and administering the courts.

In this context, the law was amended several times between 2006 and 2015 to restructure the relationship between the judiciary and the executive. The amendments included changing the authority to which the Attorney General and members of the Public Prosecution answer. This was initially the Minister of Justice, but it was changed to the Supreme Judicial Council. In addition, the Attorney General himself, rather than the Minister of Justice, can now issue decisions to appoint his assistants. As for the swearing-in of the Attorney General and the Senior Prosecutor,

it shall be done before the King only, without the presence of the Minister of Justice. The rest of the members of the Public Prosecution shall take the oath before the Attorney General. Moreover, judges of the Court of Cassation and Supreme Court of Appeal are now sworn in before the King in the presence of the Minister of Justice, whereas other judges are sworn in before the Supreme Judicial Council.[74] Finally, the Supreme Judicial Council was granted an independent budget.[75] The responsibility for preparing the budget was entrusted to the President of the Court of Cassation (before he became the President of the Supreme Judicial Council by virtue of the amendment introduced in 2013), who exercises the powers of the Minister of Finance and the Civil Service Bureau with regards to the implementation of the budget. It should also be noted that the law and most of its amendments were issued by decree-laws during parliamentary recess or when Parliament was absent in order to "expedite the adoption of measures that brook no delay."[76]

3. The 2012 Amendments and Political Reactions

Political forces had varied positions regarding the July 2011 National Consensus Dialogue. In fact, Bahrain's largest political association, the Al-Wefaq National Islamic Society, criticized the mechanisms of the aforementioned dialogue, but it still announced its intention to participate with the aim of adding "an important component of the Bahraini political opposition to a process that could lead to reconciliation and reform ... and that brings about reforms that respond to the legitimate aspirations of the Bahraini people," based on the seven principles agreed upon with the Crown Prince in February-March 2011, the foremost of which was the demand of having an elected government and a parliamentary council with "full powers."[77] Meanwhile, the Progressive Democratic Tribune (*Al-Minbar*) and the Nationalist Democratic Assembly issued a separate statement confirming their agreement to engage in dialogue without preconditions.[78] The National Democratic Action Society (*Waad*) was shut down by a decision of the military prosecutor at the time and was not allowed to resume its official activities until it issued a statement of apology to the army for a statement it issued in April 2011 criticizing its role in suppressing protesters. Therefore, it welcomed the dialogue in the same apology statement and was then allowed to resume its activities.[79] However, the positions and views of these groups converged to a large extent during the dialogue sessions, which focused on demanding a new constitutional formula that establishes a system based on an elected government or a government that has the support of a political majority in Parliament, headed by a person from outside the ruling family, in addition to adjusting the constituencies, amending the electoral law, and reviewing laws restricting freedoms, as well as increasing Parliament's

74 Decree-Law No. 35 of 2010 amending some provisions of the Law on the Judiciary, promulgated by Decree-Law No. 42 of 2002.
75 Decree-Law No. (44) of 2012 amending some provisions of the Law on the Judiciary, promulgated by Decree-Law No. (42) of 2002.
76 Constitution of the Kingdom of Bahrain (2002), Article 38.
77 Al-Morshed, *The Wall of Silence*, 241, 362, 368.
78 Al-Morshed, 363.
79 Al-Morshed, 364-365.

oversight and legislation powers.[80] As for the political groups affiliated with the so-called "Al-Fateh Gathering," they welcomed the dialogue and participated in it, but they disagreed with the views of the opposition groups and rejected the idea of radical amendments to the constitution, particularly the principle of elected government. Instead, they only submitted proposals on partial constitutional amendments in which they focused on increasing some of Parliament's legislative and oversight powers and combating financial and "moral" corruption.[81]

In comparison, the 14 February Revolution Youth Coalition rejected dialogue with the regime as a matter of principle and demanded the "right to self-determination"[82] without any specific political ceiling or form for the state. It stated that it opposed the formula of having an elected government within the framework of a constitutional monarchy, which was accepted by opposition political groups led by "Al Wefaq."

The divergent political positions regarding the constitutional crisis were embodied in the issuance by each coalition of a document expressing its vision for a political solution. Five opposition political groups – al-Wefaq National Islamic Society, the National Democratic Action Society (*Waad*), the Al-Ekha National Society, the Unitary National Democratic Assemblage, and the Nationalist Democratic Assembly – jointly issued the Manama Paper in October 2011. It included six main demands based on the understandings they had reached with the Bahraini Crown Prince during the February 2011 protests. The main demand was to change the constitutional system by establishing an elected government, abolishing the appointed Shura Council, and adopting a single legislative council with full oversight and legislative powers.[83]

Three political groups of the Al-Fateh Gathering issued the "Al-Fateh Document"[84] in November 2011, in which they affirmed their belief in and commitment to the existing constitutional legitimacy. The document included demands related to increasing the oversight and legislative powers of the elected Chamber of Deputies, reforming the judiciary to enhance its independence, nationalizing public and private jobs, implementing the labor nationalizing policy, abolishing institutional duplication outside the framework of the government, and working on Gulf economic integration to achieve Gulf confederacy and unity, in addition to applying the principles of equality, rejecting sectarianism, and rejecting "external interference" in Bahrain's internal affairs. Meanwhile, the National Unity Gathering, which is part of the Al-Fateh Movement, launched a political project that affirmed its vision for establishing a modern democratic civil state based on "the principle of equal citizenship, an accountable and fixed-term government that represents the public will, a fully empowered Parliament, and an independent judiciary," in addition to the right of the Chamber of Deputies to approve the government's programme and amending the mechanism for forming the Shura Council so that it combines indirect election and appointment.[85]

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80 Al-Morshed, 376-377.
81 Al-Morshed, 377-378.
82 Al-Morshed, 368, 372.
83 The Manama Paper: Bahrain's Road to Freedom and Democracy- A joint document by the political opposition groups.
84 Al-Minbar National Islamic Society, Al-Asalah Islamic Society, and the National Constitutional Assembly, "Al-Fateh Document."
85 "The National Unity Gathering Launches Political Project to Build a Democratic Civil State," *Al-Watan*, 28 June 2012.

The 14 February Revolution Youth Coalition issued the "Pearl Charter" in February 2012,[86] in which it affirmed the demand for "overthrowing the regime and the right to self-determination," arguing that "efforts to reform the regime and coexist with it have become impossible."[87] The charter also included general principles and demands, such as affirming "the right of the people to self-determination and their choice of the type of political system that meets their aspirations and ambitions,"[88] as well as the formation of an elected constituent assembly that drafts a new constitution, the dissolution of the security services, the establishment of a security sector that "guarantees the safety and security of citizens," the formation of an independent judiciary, the adoption of a "realistic and fair solution" to the problems of political naturalization, in addition to the fair distribution of wealth, the enshrinement of the principle of separation of powers, the preservation of national cohesion, and the rejection of discrimination.

These different positions are primarily due to disagreements among the political groups as to the method of issuing the 2002 Constitution and its consequences, as well as the political developments that took place after February 2011. In fact, the political opposition rejected the 2002 Constitution from the very beginning, as it did not consider it contractual and deemed it illegitimate, even if it cooperated and participated in the outputs from time to time for pragmatic reasons in an effort to correct the constitution and change the political course of the country. On the other hand, the groups of the Al-Fateh Movement approved the constitution and limited their observations to certain specific details. As for the 14 February Revolution Youth Coalition, which was a new party in the political arena and whose political activity was based more on field mobilization than on institutional political work, it did not recognize the constitution and the existing political system as lawful as a matter of principle.

The bicameral system was established so that, in the event that one of the two chambers disagrees with the government, "the other chamber plays the role of arbiter between them, since by agreeing with one of the parties, it compels the other party to soften its position." Over the span of more than 20 years during which the bicameral system was applied, the Shura Council and the Chamber of Deputies have never stood together against the government, given the mechanism of formation and composition of the Shura Council. The design of the bicameral system in this way reveals the constitutional logic that anticipates the occurrence of crises and tries to design solutions to avoid them. However, the design itself is a source of crises, as it exploits formal representation to cover up informal manifestations of power. The design of the bicameral system also presupposes the existence of two entities that are independent and equal in their roles, powers, and privileges. However, this overlooks informal differences in power, as the composition and mechanism of formation of the Shura Council do not realistically allow it to formulate positions contrary to those of the government. As such, the portrayal of the two chambers as formally equal conceals the difference in power between them. In addition, the hypothesis that the Shura Council could join the Chamber of Representatives' position against the government is also unrealistic, especially since the

86 14 February Revolution Youth Coalition, "Pearl Charter."
87 "Pearl Charter."
88 "Pearl Charter."

conditions for appointing members of the Shura Council are determined by royal decrees. Thus, the bicameral system produces a situation in which the Chamber of Deputies is the weaker party because the government and the Shura Council will band together against it.

Since the constitution and its theoretical interpretation are based on the principle of "the joint will of the people and the King," legal instruments contain phrases to that effect, such as the constitution's adoption of a "middle ground ... as it combines features of the parliamentary system and the presidential system" and seeks to establish a balanced structure that "emphasizes the constitutional political partnership between the people and the government," which was reflected in the objectives of the 2012 amendments to integrate more features of the parliamentary system.[89] However, parliamentary features are still rare and poorly structured. In fact, the 2012 amendments did not seriously seek to address the imbalance of power between the legislative and executive authorities, as they "do not aim to adopt an absolute parliamentary system, but rather to add more features of the parliamentary system," in order to "ensure the unity of the country and the stability of governance" and to avoid the defects of the parliamentary system, according to the explanatory memorandum.[90] What is striking here is that there was no mention of some of the defects of the presidential system, such as the consolidation of the president's authority and centralized political decision-making. Rather, legal interpretations have tended to focus their criticism on the "absolute" parliamentary system demanded by the political opposition groups.[91]

What distinguishes the parliamentary system from the presidential system is its mechanism for government formation. In a parliamentary system, the government emanates in one way or another from Parliament, whether based on the results of the electoral process itself or through internal parliamentary consensus. As such, the government is accountable to one party, which is Parliament. However, Bahrain's constitution gives the King absolute power to appoint the Prime Minister, the ministers are accountable to him and not to Parliament,[92] and the formation of the government is unrelated to the formation of Parliament.

Giving the Chamber of Deputies new oversight powers is not enough to label the current constitutional system "centrist," especially since Parliament's power to give confidence to the government by approving its programme is still limited by the executive authority's dominance over Parliament. Even if the latter unilaterally issues a decision declaring its "inability to cooperate with the Prime Minister," the government remains constitutionally accountable to the King. In addition to that, the amendments did not address one of the main features of the presidential system – that is, the King's exercise of his powers directly and through his ministers, which also gives him the right to veto decrees issued by the Prime Minister. This gives the King direct political power, without any legal

89 Explanatory memorandum annexed to the amendments to the 2002 Constitution of the Kingdom of Bahrain, Section Two.
90 Explanatory memorandum
91 The Manama Paper and the "Pearl Charter."
92 Constitution of the Kingdom of Bahrain (2002), Article 33 (c) and (d).

mechanism to hold him accountable.[93] Thus, the centrist approach means that the head of state exercises his will directly and unilaterally, while the exercise of the will of the people must conform with the will of the head of state. This central position of the King as a major and dominant political decision-maker could explain the frequent direct political clashes between him and opposition groups since the promulgation of the 2002 Constitution and the calls to end the rule of the Al-Khalifa family.[94] The immunity of the bicameral system against constitutional amendments, under the very constitution that was drafted to establish this system officially, reflects the King's unwillingness to compromise on the will that he claims is in the name of the people.

The centrist approach could be strengthened by the adoption of features from the semi-presidential system, in which the government, despite being appointed by the King, is accountable to Parliament, and the latter would have the power to give it confidence or dismiss it.[95] It is worth noting that the legal interpretation focuses on finding a "middle ground" between the parliamentary and presidential systems, while ignoring the semi-presidential model (adopted in a number of countries, including the Kingdom of Morocco), which primarily aims to create a balance between the two systems.

B. The Quasi-Constitutional Amendments of 2014

Although municipal elections are procedurally linked to the elections of the Chamber of Deputies (since they are held at the same time and each voter votes for one parliamentary and one municipal seat within the same constituency), regulating municipal councils through ordinary legislation has made them weak structures, making it easy to amend their provisions and mechanisms through decree-laws in particular. Both the Municipal Law and the law governing the election of municipal councils were promulgated by such decrees.[96]

This distinction made it easier to change the rules for electing municipal councils in 2014, although the change was part of efforts begun in 2002 to expand the mechanisms of political participation. The capital's municipal council (in which the opposition al-Wefaq National Islamic Society held the majority of seats) was abolished and replaced by the Capital Trustees Board formed by royal decree.[97] In addition to that, the boundaries of the electoral constituencies were amended.

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93 Constitution of the Kingdom of Bahrain (2002), Article 33 (c) and (d). Explanatory memorandum for the Constitution of Kingdom of Bahrain as amended in 2002, interpretation of Article 33.

94 14 February Revolution Youth Coalition, "Pearl Charter."

95 Sujit Choudhry and Richard Stacey, *Semi-Presidentialism as Power Sharing: Constitutional Reform after the Arab Spring* (Center for Constitutional Transitions and International IDEA, 2014), 44-50.

96 Decree-Law No. 35 of 2001 promulgating the Municipal Law was amended three times by a law approved by the Chamber of Deputies and the Shura Council. Decree-Law No. 3 of 2002 on the rules for the election of municipal councils was amended four times, twice by decree-law and twice by a law approved by the Shura Council and the Chamber of Deputies.

97 Law No. 24 of 2014 amending some provisions of the Municipal Law promulgated by Decree-Law No. 35 of 2001, Article 1, Article 5 (bis).

Due to calls for a review of the amendment, the King referred the draft law to the Constitutional Court,[98] which ruled as follows:

> The court decided that Article 5 (bis) of the Municipal Law, added pursuant to Article 2 of the draft law amending certain provisions of the Municipal Law, promulgated by Decree-Law No. 35 of 2001, is in conformity with the constitution, with the exception of the phrase: "The mayor of the capital, his deputy, or any of the members of the Capital Trustees Board shall not be removed from office except by decree," contained in Article 2 thereof.[99]

The court's ruling was based on the fact that the constitution did not specify the mechanism by which municipal councils should be formed. Rather, Article 56 of the constitution limited political and civil rights to the election of members of the Chamber of Deputies. The organization of municipal councils was left in the hands of the ordinary legislator, to be decided in accordance with Article 50. The Law on the Exercise of Political Rights also confirmed that the political rights of citizens are limited to electing members of the Chamber of Deputies.[100]

As for the discrimination that this amendment may cause between citizens – given that citizens and residents living in other governorates still have elected municipal councils – the Constitutional Court ruled that Articles 4 and 18 of the constitution, which made citizens equal and forbade discrimination between them on the basis of "sex, origin, language, religion, or belief," do not apply to the amendment, on the grounds that the discrimination intended to be prohibited is arbitrary discrimination, while the amendment did not include such discrimination. Rather, it sought to achieve the "public interest," according to the court, since the capital is the "face of the Kingdom" whose facilities and services benefit "all citizens and residents," including those who do not reside in the capital.[101]

Setting up special regulations for municipal affairs in the capital is not only done in Bahrain. Many countries, including Saudi Arabia, France, Britain, and Jordan, have local regulations that are specific to the capital because of its political, economic, and social importance. However, the court's reasoning that the draft law aims to achieve the "public interest" because a large segment of citizens and residents benefit from the facilities and services available in the capital is not a convincing justification. This is because the amendment stipulated that an individual must reside in the capital if they wish to be a member in the Capital Trustees Board, indicating that its members are local representatives of the capital and not the entire nation.[102]

Moreover, the members of the Capital Trustees Board were not granted any additional powers compared to other municipal councils, and most of this board's decisions are subject to the approval of the Ministry of Works,

98 Royal Decree No. (36) of 2014 referring Article 5 (bis) of a draft law amending some provisions of the Municipal Law promulgated by Decree-Law No. (35) of 2001 to the Constitutional Court.
99 Ruling of the Constitutional Court in Case 2/2014, dated 9 July 2014.
100 Decree-Law No. 14 of 2002 on the Exercise of Political Rights.
101 Ruling of the Constitutional Court in Case No. 2/2014, dated 9 July 2014.
102 Law No. 24 of 2014 amending some provisions of the Municipal Law promulgated by Decree-Law No. 35 of 2001, Article 5 (bis).

Municipal Affairs, and Urban Planning. Although the amendment sought to single out the capital with special regulations, considering its status as the "face of the Kingdom," its municipal council was expected to be given powers that would enable it to play a greater role in the development of services in the capital. However, there is a striking difference between the appointed Capital Trustees Board and the elected municipal councils, which is the requirement for the King's approval of the resignation of members of the Capital Trustees Board,[103] unlike in other municipal councils, where a member's resignation is accepted as soon as the chairman of the council presents the letter to the council in its next session. This indicates that the Capital Trustees Board is subordinate to the King, while the elected municipal councils maintain their independence in this regard.

The Constitutional Court sought to balance the principle of political participation with public interest, but it gave priority to what it considered the public interest over the principle of constitutional political participation on which municipal councils are based. The court's interpretation of public interest was based on the special status of the capital, as it provides various services to all residents of the country, and because its facilities are not exclusively available to the residents of the capital. This seems to imply that the election by residents of the capital of local representatives serves private interests instead of public interest.

It is important to note that the ruling also reflected another legal principle, although it did not directly refer to it: the duality of the people's will and the royal will. In fact, the court justified the royal will by which the members of the Capital Trustees Board are appointed under the pretext of public interest and other principles such as effectiveness and fair and efficient representation. The people's will in the framework of political participation through elections was depicted as the opposite of the royal will. In other words, it was claimed that the people's will represents individual bias, private interest, and ineffectiveness. The ruling also emphasized the fact that the capital is the "face of the Kingdom," which requires that the members of the Capital Trustees Board "be among the elected members of civil society institutions involved in municipal work who have experience and competence" and not among the representatives of political groups who may lack experience and competence in municipal work.

This is also among the legal justifications given to emphasize the advantages of the Shura Council, which is an appointed second chamber of the legislative authority that includes members with experience serving the public interest, away from popular trends and the political interests of political groups.[104] The constitutional system linked the values of experience and competence to the mechanism of royal appointment through royal orders or decrees, which were presented as being free of politicization and representing the public interest.

Al-Wefaq National Islamic Society (which was affected the most by the decision, as it held the majority of seats in the municipal council of the capital, including the presidency) commented:

[103] Law No. 24 of 2014.
[104] National Action Charter, Introduction.

> The decision of the Constitutional Court is not surprising. It is consistent with the regime's tendency to defend the constitutionality of this law, despite the existence of clear and flagrant constitutional issues pointed out by legal advisors in the Chamber of Deputies and confirmed by lawyers and observers, the simplest of which is the discrimination between residents of the capital and residents of other regions in terms of the right to elect their municipal representatives. This official announcement and legislation represented in fact a declaration of the death of municipal representation, after the authority resorted to practicing unjust politics in these councils, tarnishing over the past three years the small margin of representation of the will of citizens. This includes the illegal dismissal of 5 municipal representatives and sets an absurd precedent worldwide.

It also added that the decision had the political motive of "stripping these municipal councils of their essence and service functions that used to benefit citizens."[105]

The difference in the stances of the opposition and the Constitutional Court shows a divergence in the assessment of the legal principles that should govern society; a standoff between the principle of constitutional political participation of citizens and the principle of promoting competence and experience and achieving public interest. Although this controversy is present in liberal democracies, this paper particularly looks into how it is expressed through constitutional and political institutions and in the conflict it creates. Al-Wefaq opposed the decision due to its position within the social conflict, which pushes it to give priority to the principle of political participation, allowing it to redraw the boundaries of the ruling authority. Meanwhile, the Constitutional Court gave priority to the principle of promoting competence and experience, based on the fact that it is a politically conservative judicial body that rarely deals with political and popular issues, in addition to the fact that its institutional composition reflects the same legal understanding that gives priority to promoting competence and experience through royal appointments, shielding politics from accountability, and opposing popular politics as part of an elite ideology that drives the regime's policies and thus works to reproduce this dominant thinking.

C. Amendment of the Military Judiciary in 2017

While the 2012 amendments focused on amending the powers of the legislative authority and the King, the 2017 constitutional amendment aimed at partially amending only one article – Article 105 (b) – regulating the military judiciary and specifying its jurisdiction.[106]

There is a link between constitutional provisions and legislation, whereby the amendment of the former may have a legal impact on the latter. This is what happened after the amendment of the constitutional article related to the military judiciary, which led to an urgent amendment of the provisions of the Law on the Military Judiciary less

[105] "Al-Wefaq Municipal Bloc: Transforming the Capital's Municipal Council into a General Secretariat Undermines the Service and Representation of Citizens," *Bahrain Mirror,* 10 July 2014.
[106] The 2017 amendment of the Constitution of the Kingdom of Bahrain.

than twenty days later.[107] Compared to the amendments made in 2014 to municipal councils and the political rights of citizens, these had a different impact. This time, it was the law that had an impact on the constitution. In the first instance, amendments were made to the Municipal Law through ordinary legislative mechanisms. The dispute over the constitutionality of these amendments stemmed from the link between municipal councils and constitutional rights, especially since they arose within the context of the political project launched in 2002. For this reason, the present paper did not limit its discussion to purely constitutional amendments but sought to expand its scope to include amendments that had an impact on the formal and informal form of the constitution.

In light of the amendment to the Law on the Military Judiciary, two articles were added to give the military justice system jurisdiction over crimes committed by "a person who is not subject to the provisions of this law but who is a perpetrator and accomplice inside or outside the Kingdom," that is, citizens or non-military foreigners.[108] This amendment also gave the Attorney General, with the approval of the military judiciary, the right to refer any of the cases brought before him on the basis of the "Law on the Protection of Society from Terrorist Acts or Any of the Felonies Affecting the State's External or Internal Security" contained in the Criminal Code. In addition, it set the requirement that all cases that have become part of the military judiciary's jurisdiction under the law be referred to it.[109] It is important to note that the Law on the Protection of Society from Terrorist Acts is most commonly used to prosecute those accused of participating in protests against government policies.

Following the amendment, seventeen defendants were tried before military courts for the attempted assassination of the Commander-in-Chief of the Bahrain Defence Force. Two of them were subjected to enforced disappearance for more than a year, and many others were tortured.[110] The court sentenced thirteen people to varying prison terms and revoked their citizenship. Three civilians and one member of the military were sentenced to death, but the King later commuted the sentence to life imprisonment and revoked their citizenship.[111] Bahraini human rights organizations also argued that the amendment contradicts the International Covenant on Civil and Political Rights (ICCPR) because it does not abide by the limits for the duration of pretrial detention, does not guarantee access to a lawyer or communication with the outside world, and does not adhere to the Bahraini Juvenile Law. Therefore, the trials that took place were considered unfair.[112]

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[107] Bahrain Centre for Human Rights et al., "Death or Confession – Bahrain: Secret Military Courts Trying Civilians Whose Confessions Were Extracted Under Torture," December 2017, 4.

[108] It includes the following crimes: felonies against state security, a case of armed terrorism from abroad, or crimes committed in any facilities under the control of the Bahrain Defence Force or the National Guard or against their assets, property, or personnel.

[109] Law No. 12 of 2017 amending some provisions of the Law on the Military Judiciary promulgated by Decree-Law No. 34 of 2002.

[110] "Bahrain's Supreme Military Court revokes the citizenship of 13 citizens and sentences 6 of them to death," *Salam Media*, 25 December 2017.

[111] "Bahrain: King commutes four death sentences to life imprisonment but trials remain nonetheless unfair," *Amnesty International*, 2 May 2018.

[112] Bahrain Centre for Human Rights et al., "Death or Confession," 9-10.

The saga of trying civilians, especially those charged with cases of a political nature, began with the eruption of protests in 2011, when the government tried more than 340 civilians before military courts on charges related to state security and attempting to overthrow the regime. Some sentences amounted to the death penalty, before a re-trial in civil courts was decided, following the criticism that the Bahrain Independent Commission of Inquiry's report[113] contained. At the time, the government justified its failure to adhere to the constitutional guarantee that civilians would not be tried in military courts, except when martial law is declared, by claiming that the trials took place before special courts established by a royal decree, not military courts.[114]

This amendment reflects a long history of dualism in the legal framework with regard to criminal procedures and trials. Since the mid-1900s, Bahrain has relied on civil and security legal references that were developed simultaneously with the eruption of protests. In the 1960s, the authorities dealt with the defendants in accordance with the Code of Criminal Procedure of 1966, in addition to the Public Security Law of 1965. The former was issued by the government to fill a legislative vacuum, while the latter was issued in response to the popular uprising that broke out in March 1965. In the 1970s, the Public Security Law of 1965 was replaced by the Decree-Law on State Security of 1974, which remained in force in parallel with the Criminal Procedure Code until 2002, when both laws were revoked and the "Code of Criminal Procedure" as well as the Law on "Protecting Society from Terrorism Acts"[115] were adopted.

In a comment on the constitutional amendment, the Minister of Justice at the time stated that the purpose of the amendment was to enable military courts to try civilians, claiming that "the military judge is the most capable of adjudicating" cases of terrorism,[116] in reference to the government violating its pledge to implement the recommendations of the Bahrain Commission of Inquiry, especially since that same year it restored the powers of arrest to the intelligence agency, that is, the National Security Agency (NSA), whereas the committee had recommended limiting its role to gathering intelligence only.[117]

Additionally, these amendments and trials took place as part of a government campaign launched against different elements of the political opposition in late-2014, including the dissolution of the "Islamic Action Society (Amal)" in 2012,[118] the National Islamic Accord Association in July 2016, and the National Democratic Action Society (Waad) in October 2017, as well as shutting down the independent Al-Wasat Newspaper in June 2017. Moreover, the authorities launched a campaign of security harassment against human rights activists and civil society institutions and executed the death penalty in January 2017 against political prisoners for the first time since the 1990s, in addition to trying Sheikh Isa Ahmed Qassim, who heads the Shiite religious authority in Bahrain, stripping him of his nationality and sending him into exile.[119]

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113 Bahrain's Supreme Military Court revokes the citizenship of 13 citizens and sentences 6 of them to death." *Salam Media,* 25 December 2017.
114 Bahrain Centre for Human Rights et al., "Death or Confession," 11-13.
115 Al-Noaimi, "The Political Use of Law."
116 "Bahraini Constitutional Amendment Allows Military Trial of Terrorists" (Sky News Arabia).
117 "Bahrain: Arrest Powers Restored to Abusive Agency," Human Rights Watch (01/31/2017).
118 Aref Al-Husseini, "Dissolving the Islamic Action Society (Amal) and Liquidating its Funds," *Al-Bilad,* 10 July 2012.
119 Bader Al-Noaimi, "Political Developments in the Kingdom of Bahrain," The Constant and the Changing 2018: Development in the Periphery of the Gulf, Gulf Center for Development Policies 2018.

D. Amendment to the Parliament's Questioning Mechanism (2018)

Similar to the 2017 constitutional amendment, which led to the amendment of the Military Judiciary Law, the amendment of Article 91 of the Constitution,[120] which was enacted in late 2018, also resulted in the amendment of some provisions of the Rules of Procedure of both the Chamber of Deputies and the Shura Council[121] by virtue of a decree-law. The amendments led to changes in the terms and powers of Parliament's questioning mechanism.

The approval of the decree-law by the Chamber of Deputies spurred widespread criticism, as observers considered that the amendments restricted the powers of deputies to use the Bahraini Parliament's questioning mechanism. The chamber's approval further contradicted the opinion of the Legislative and Legal Affairs Committee, which recommended rejecting the decree-law, despite the fact that the explanatory memorandum122 claimed that the amendment increased the powers of deputies by expanding the scope of the questioning mechanism to include "all members of the Council of Ministers" rather than the ministers only.

One of the main changes introduced by the constitutional amendment, in addition to the amendment of the two chambers' Rules of Procedure, is that it restored to the Shura Council the right to submit questions to the ministers after it was revoked following the 2012 constitutional amendments, which aimed at the time to make political oversight and accountability an exclusive prerogative of the Chamber of Deputies, to the exclusion of the Shura Council. However, the explanatory memorandum stated that "in practice, it appeared that there is an urgent need to establish this right, in order for the members to perform their duties within the framework of the Shura Council's constitutional powers."123 The explanatory memorandum also argued that it is inadmissible to adopt the unicameral system, claiming that the current regulation (that is, revoking the Shura Council's right to submit questions) is aligned with the democratic and constitutional developments "that prevailed at the time of its establishment," in reference to the 2012 amendments enacted in the aftermath of the Arab Spring. However, "the constitution's provisions regarding these two chambers may be reconsidered in line with changes in the political, economic and social conditions."[124] It is worth noting that revoking the right to question from the Shura Council at that time aimed to give the Chamber of Deputies the exclusive right to monitor the government's actions, since the questioning mechanism is one of its key oversight tools. However, the amendment restored this right to the Shura Council with certain limits, whereby "the answers to the questions addressed by the Shura Council only be in written form."[125] The ministers shall not appear before the Shura Council in order to prevent the interpellation

120 Amendment of the Constitution of the Kingdom of Bahrain promulgated in 2018.
121 Decree-Law No. (49) of 2018 amending some provisions of Decree-Law No. (54) of 2002 regarding the Rules of Procedure of the Chamber of Deputies; Decree-Law No. (50) of 2018 amending some provisions of Decree-Law No. (55) of 2002 regarding the Rules of Procedure of the Shura Council.
122 Explanatory memorandum for the Constitution of the Kingdom of Bahrain as amended in 2018.
123 Explanatory memorandum.
124 Explanatory memorandum.
125 Explanatory memorandum

process from turning into a discussion between the member of the Shura Council and the minister. On the one hand, the amendment follows the constitutional process that was approved in 2012 by allocating special oversight powers to the Chamber of Deputies, while on the other hand it prevents the Shura Council from undertaking any actions that might be opposed to or interpreted as criticism of government policies.

Furthermore, the constitutional amendment and the amendment of the Rules of Procedure of the Chamber of Deputies led to eight changes in the questioning mechanism. Of particular importance is the amendment of Article 133 of the Rules of Procedure, which expanded the scope of those who may be questioned, to include all members of the Council of Ministers, while it was previously limited to ministers only. In other words, after the amendment, the interpellation process included the Prime Minister and his deputies in addition to the ministers. This is what is meant by the expression "ministers or other members of the Council of Ministers,"[126] as the amendments aimed to "expand oversight functions" and "create a greater balance between the legislative and executive powers."[127] Accordingly, these amendments are aligned with the same process that led to the 2012 amendments, seeking to restructure the relationship between the two authorities on more balanced grounds. However, the 2018 amendments, similarly to the 2012 amendments, were marred by substantive contradictions, especially since they sought to expand the powers of Parliament and fortify the executive authority at the same time. This is clear in other articles of the decree-law, which specified different procedures for directing questions to the Prime Minister and his deputies, resulting in the establishment of two categories of ministers from a legal perspective. The first category encompasses "ordinary" ministers who may be questioned in writing and requested to appear before Parliament in case they fail to answer in writing to discuss the subject of the question. The second category is related to "members of the Council of Ministers – other than ministers," who may not be summoned to appear before Parliament to answer and discuss the questions. The decree-law specified that "the answer ... in this case may only be in written form." The decree-law also granted the second category the right to postpone the answer for ten days, while granting ordinary ministers a period of only seven days, in order to "preserve effort and time and to achieve the interests of the country and citizens, given the great responsibilities of those included in the amendment."[128]

The explanatory memorandum that was annexed to the 2018 constitutional amendment also stated that the use of the questioning mechanism in the case of the Prime Minister and his deputies "shall not involve any form of accountability" and shall not include "any form of criticism or blame."[129] However, Article 142 of the Rules of Procedure of the Chamber of Deputies links the questioning mechanism and the interpellation mechanism with regard to ordinary ministers as follows: "A questioning procedure may not be turned into an interpellation during

[126] Decree-Law No. 49 of 2018 amending some provisions of Decree-Law No. (54) of 2002 on the Rules of Procedure of the Chamber of Deputies, Article (133).
[127] Explanatory memorandum for the Constitution of the Kingdom of Bahrain as amended in 2018.
[128] Explanatory memorandum.
[129] Explanatory memorandum.

the same session." This is also the case of Article 146, which considers that the person requesting the interpellation waives "any questions they may have previously submitted regarding the same subject of the interpellation." The special procedures specified by the amendment with regard to directing questions to the Prime Minister and his deputies established two concepts for the questioning mechanism – the first involves accountability when directed to ordinary ministers, while the second simply involves inquiry when directed to the Prime Minister and his deputies. The purpose is to grant immunity to the Prime Minister and his deputies against accountability and criticism. It should be noted that the Prime Minister at the time was Khalifa bin Salman Al-Khalifa, who remained in his position from 1971 until his death in 2020. Also, most of the then-Deputy Prime Ministers were members of the ruling family.[130]

The other complex issue is the position of the Crown Prince as a member of the Council of Ministers serving as the First Deputy of the Prime Minister,[131] which granted him executive powers to appoint employees of the rank of directors in all ministries, in addition to chairing the Civil Service Bureau since 2018[132] and the Board of Directors of the Economic Development Board since its establishment in 2002.[133] The explanatory memorandum stated that the Crown Prince is not included in the amendment, "for he is His Majesty the King's deputy, acting on his behalf in his absence."[134] This requires that the Crown Prince not be included in the amendment "when he heads the cabinet or serves as a deputy of the Prime Minister, due to the special status he occupies, in which case he shall not be questioned as a member of the Council of Ministers. As a general principle, the Crown Prince acts on behalf of the King whenever the latter is outside the country."[135] The contradiction that this interpretation creates is that the membership of the Crown Prince in the Council of Ministers is by virtue of his position as the First Deputy of the Prime Minister. The provisions of the constitution stipulate that the Crown Prince deputizes for the King in the event of the latter's absence and not in general, especially since the Crown Prince's position as deputy for the King is dependent on the issuance of a royal order whenever the King is abroad. Accordingly, the Crown Prince's exercise of the King's powers is in accordance with the procedures set in Article 34 of the constitution and by royal order, rather than according to his position as the first deputy of the Prime Minister, even if the period during which he assumes the position coincides with the period during which he is deputizing for the King. This is also confirmed by the explanatory memorandum and the amendments to the Chamber of Deputies' Rules of Procedure, which define the formal and substantive conditions for addressing questions. The amended Article [134] stipulates that the addressed question "shall not be related to any matter that does not fall within the competence of

130 Royal Decree to form the Cabinet, BNA- Bahrain News Agency (04/12/2018).
131 Royal Decree No. 14 of 2013 on appointing a First Deputy Prime Minister.
132 Royal Decree No. 50 of 2018 assigning the First Deputy Prime Minister to enhance the performance of the executive authority bodies.
133 Decree No. 5 of 2002 amending some provisions of Decree No. 9 of 2000 establishing and organizing the Supreme Council for Economic Development.
134 Explanatory memorandum for the Constitution of the Kingdom of Bahrain as amended in 2018.
135 Explanatory memorandum.

the questioned minister or other members of the Council of Ministers." In other words, the amendment specifies that questions must be directed to members of the Council of Ministers based on their powers and responsibilities as members of the Council of Ministers. Accordingly, questions that may be directed to the Crown Prince may not be related to matters outside the scope of the competences that he exercises as a member of the Council of Ministers. This raises questions about the motives behind granting the Crown Prince immunity to the extent that even inquiring with him, as we explained above, constitutes a problem for the legislator, especially since the Crown Prince assumed the position of Prime Minister after the death of former Prime Minister Khalifa bin Salman Al-Khalifa. The explanatory memorandum confirmed his immunization "while he heads the cabinet" as well.[136]

This amendment is also considered an interference by the executive authority in the work of the legislative authority by amending the Rules of Procedure of the Chamber of Deputies and the Shura Council through a decree-law, instead of allowing the legislative authority to amend its own Rules of Procedure. The contradiction is exacerbated by the fact that, according to Article 38 of the Constitution and Articles 123 and 124 of the Rules of Procedure of the Chamber of Deputies (issued themselves by virtue of a decree-law), Parliament cannot amend the texts of a decree-law; rather, it can only issue a decision approving or rejecting this decree. The issuance of the amendment to the Rules of Procedure through a decree-law was also criticized in the report of Parliament's Legislative and Legal Affairs Committee, which recommended rejecting the decree-law because there was no event "that requires expediting the adoption of measures that brook no delay" as per Article 38 of the Constitution. This is in addition to the logical shortcomings that require the approval of the two chambers of Parliament of all legislation. Accordingly, the Shura Council may approve or reject an amendment to the Chamber of Deputies' Rules of Procedure, and vice versa.[137]

The amendments made in 2014, 2017, and 2018 differed from those made following the recommendations of the National Consensus Dialogue in 2012 in terms of their approach, context, and content. However, they all emphasize the central role of the royal institution and the executive authority in leading the course of amendments in light of an intense and ongoing social and political conflict.

To clarify the relationship between the amendments and the concept of "crisis," we recall that crisis is understood as a phenomenon inherent in the concept of constitutionalism and constitutional amendments. The crisis also appears as a continuous process entailing turning points in which the social conflict flares up more intensely. The relationship between a crisis and constitutional amendments is not one-sided – in the sense that the crisis leads to a constitutional amendment – but rather it is a multi-directional relationship in which the crisis is a cause that leads to solutions through constitutional amendments, as was the case with the 2012 amendments. Likewise, a crisis may be the product of constitutional amendments, as was the case of the 2014 and 2018 amendments. The crisis

[136] Explanatory memorandum.

[137] For more on the 2018 amendments, see: Bader Al-Noaimi, "Amending the Questioning Mechanism in the Bahraini Parliament ... Expanding or Restricting Powers?" *Muwatin,* 19 May 2019.

is also a concept embedded in constitutional amendments, since constitutionalism is an approach that anticipates the occurrence of crises in the future, as in the case of the amendments that were made to the 1973 Constitution, culminating in the promulgation of the 2002 Constitution.

III. Escaping the Crisis Labyrinth

The constitutional issue has been absent from the political scene since 2017 due to the significant restrictions on manifestations of political opposition. However, it resurfaced through several political developments on the internal and external levels. Internally, the Bahraini government's decision to sign an agreement to enter into public diplomatic relations with the Zionist entity along with the UAE[138] sparked outrage and condemnation campaigns among Bahraini protesters. This is due to the political, economic, cultural, and security repercussions of the decision. Bahrain's National Initiative against Normalization with the Zionist Enemy – a broad coalition comprising more than 20 civil society organizations including political societies, labour unions, women's and professional associations, in addition to associations supporting the Palestinian cause – was established immediately after the normalization decision was announced. The members of the coalition stressed in their first statement that:

> The normalization decision was taken in isolation from and against the popular will. Therefore, these societies, federations, and bodies have agreed to express their will and their rejection of the steps taken towards normalization with the Zionist entity and the steps intended to be taken in this direction. As such, they have decided to issue this National Document against Normalization, containing the positions below […] Boycotting all forms of economic, cultural, political, social, tourism, or health normalization with the Zionist entity; refraining from purchasing any "Israeli" products by the society for its daily activities; boycotting any civil institution or Bahraini or non-Bahraini figure who deals with or engages with the Zionist entity and undertaking not to invite it to the association's various events and activities; including in the association's internal regulations and bylaws disciplinary procedures against any member who performs any act of normalization or in support of normalization, up to dismissal from the society; continuing to hold anti-normalization activities and programs; expressing supportive stances for the Palestinian people's fight in all local and non-local events and forums as much as possible and within the association's professional and financial capabilities; boycotting official and unofficial events that build bridges of normalization; as well as preventing the participation of Zionist delegations in the meetings of official international organizations and events of an international political nature, and taking stances against such participation."[139]

[138] "Trump supports the signing of the normalization agreement between Israel, the UAE and Bahrain, and promises that other countries will join," *France 24*, 15 September 2020.

[139] "Political associations and the Federation of Trade Unions, along with 20 local organizations, issue a document including steps to oppose normalization with 'Israel'," *Bahrain Mirror*, 12 December 2020.

This statement was followed by several statements and media and field campaigns organized by the initiative, civil society institutions, and opposition political movements that expressed their objection to the government's policy to strengthen coordination and cooperation with influential parties within the Zionist entity, which crystallized in the inauguration of the Zionist entity's embassy in October 2021,[140] the visit of Zionist PM Naftali Bennett to Bahrain in February 2022,[141] and the visit of the Zionist entity's president in December 2022,[142] in addition to the signing a number of memorandums of understanding between Bahrain and the Zionist entity in the fields of health, sports, tourism, trade, security, and others.[143]

This raises questions about the reasons behind the government's violation of the provisions of the constitution and its infringement upon the role of the legislative authority in approving peace and alliance agreements, according to Article 37, which states that "peace treaties, treaties of alliance … and treaties which involve the State Exchequer in non-budget expenditure or which entail amendment of the laws of Bahrain, must be promulgated by law to be valid." This means that the Chamber of Deputies and the Shura Council should have approved the conclusion of the normalization agreement as it is considered a peace treaty. Additionally, the normalization agreement is in contradiction with the 1963 Law on the Establishment of the Israel Boycott Office.[144]

Externally, the repercussions of the Gulf diplomatic crisis are still weighing on Bahrain. Although the other parties to the conflict – Saudi Arabia, the UAE, and Egypt – have unilaterally reconciled with Qatar, Bahrain's repeated requests to the Qatari government for dialogue regarding a set of contentious points have not been met with a clear response from the Qatari side. This has further isolated Bahrain from its Gulf surroundings and from its traditional alliance with both Saudi Arabia and the UAE, according to observers.[145]

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140 "Israeli Embassy Inaugurated in Bahrain," *Al-Watan*, 30 September 2021; "Bahraini National Initiative against Normalization: Occupiers and Criminals Not Welcome," *National Unity Assembly*, 30 September 2021.

141 "Amid Protests against his Visit to Bahrain… Israeli Prime Minister: We Aim to Establish a Regional Structure with Moderate Arab Countries," *Al Jazeera*, 16 February 2022.

142 "The Bahraini National Initiative against Normalization with the Zionist Enemy: We Reject the Visit of the President of Israel (the Enemy) to our Country, Bahrain, and we Consider it a Stab in the Back," *National Unity Assembly*, 12 March 2022).

143 "Four Memorandums of Understanding Signed Between Bahrain and Israel," *Al-Ayyam*, 16 February 2022; "Signing a memorandum of understanding between the Ministry of Municipal Affairs and Agriculture and the Ministry of Agriculture and Rural Development in Israel," *Bahrain News Agency*, 19 October 2022; "Bahrain Exports signs a strategic memorandum of understanding with the IEICE to enhance bilateral cooperation," *Al-Watan*, 31 November 2022; "The Memorandum of Understanding between Israel and Bahrain Establishes Military-Intelligence Cooperation," *Independent Arabia*, 2 May 2022.

144 Ghassan Serhan, "The Bahraini Government Practically and Legally Normalizes Arbitrary Rule," *Palestinian Refugees Portal*, 2 October 2021.

145 "Tensions rising … Bahrain accuses Qatar of ignoring its calls for a 'resolution of outstanding issues' and not taking any step after holding the Al-Ula summit," *Rai Al-Youm*, 22 January 2022; "Why Has Qatar Been Ignoring Bahrain's Demands Regarding the 'Outstanding Issues' for Over a Year and a Half?" *Sputnik Arabic*, 8 September 2022; "Unusual Situation: Bahrain Publicly Urges Qatar to Resolve Outstanding Disputes," *Al-Arab*, 27 January 2023.

The parliamentary and municipal elections held in November 2022, along with the implementation of the so-called "Political Isolation Law[146]" on individuals affiliated with opposition political associations that were dissolved in the past years, marked a new milestone in the ongoing constitutional crisis.[147] The opposition was absent from the elections for the third consecutive time since the decision it took to boycott the 2014 elections in protest of the suspension of dialogue with government representatives.[148] The Bahraini government was making efforts to persuade the opposition to take part in the elections and work from within Parliament, after opposition MPs resigned in protest to the suppression of demonstrations in February 2011. Afterwards, the opposition boycotted the elections in 2014, 2018 and 2022. However, while the government was trying to tempt the opposition by promising concessions and reforms, it was also continuing its repression and security restrictions against members of the opposition. The most recent of these restrictions was the "Political Isolation Law," which is the name given to an amendment made in 2018 to the Law on the Exercise of Political Rights.[149] This amendment prohibits "leaders and members of political associations dissolved by final ruling for serious violation of the provisions of the Kingdom's Constitution or any of its laws" or "anyone who has deliberately harmed or disrupted the course of constitutional or parliamentary life, who has terminated or left parliamentary work, or whose membership was revoked for the same reasons" from running for elections or for the boards of directors of civil society institutions. According to Human Rights Watch, the government implements a policy of exclusion and marginalization of opponents, members of dissolved political associations, and former prisoners by refusing to provide them with the "Good Conduct Certificates" required to complete employment procedures in government institutions and some private sector institutions.[150] Opposition leaders are still in prison, serving long-term sentences, not to mention that some of them were sentenced to life imprisonment.[151] There are also approximately 1,400 political prisoners according to statistics published by human rights organizations at the end of 2021.[152]

In November 2022, some opposition leaders residing abroad held the "Constitutional Declaration" conference in London at the same time as the elections. This came after the "popular referendum" organized by the 14 February Revolution Youth Coalition with each election round, in which it calls for the election of a constituent assembly to draft a new constitution and expresses its rejection of the elections, which it describes as "a mere formality."[153]

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146 "Bahrain: Political Isolation Laws Ban Opposition," *Human Rights Watch*, 13 October 2022.

147 The following associations were dissolved between 2012 and 2017: the Islamic Action Society (Amal), Al-Wefaq National Islamic Society, and the National Democratic Action Society (Waad).

148 "Bahrain's Opposition Announces Boycott of the Legislative Elections," *Al-Jazeera*, 10 November 2014; "Bahrain: Parliamentary elections amid a significant absence of the opposition ... and human rights groups denounce 'political repression,'" *France 24*, 12 November 2022.

149 Law No. 25 of 2018 amending Article 3 of Decree-Law No. 14 of 2002 regarding the exercise of political rights.

150 "Bahrain: Political Isolation Laws Ban Opposition."

151 "Releasing opposition leaders from prison is an 'anticipated step' before the 2022 elections," *Bahrain Press Association*, 1 December 2021.

152 Lisa Barrington, "Bahrain Releases Some Political Prisoners under New Law," *Reuters*, 15 September 2021.

153 "Statement: A Call to Confront the Regime's Sham Elections with Alternative Projects and Programs that Pave the Way for a New Future," February 14 Revolution Youth Coalition (13/09/2022).

In the "Constitutional Declaration," the opposition leaders affirmed the illegality of the 2002 Constitution and all its consequences, including the "sham elections," and called for electing a constituent assembly "under independent local and international supervision; the task of this assembly would be to manage the transitional period and draft a new constitution for Bahrain, in line with the aspirations of our Muslim people who are keen on defending their religion."[154]

Conclusion

Bahrain is facing a series of challenges that are becoming more and more complex with each passing day, especially at the political, human rights, and social levels. Over the past decade, no solutions have led to genuine change. However, these problems are linked in one way or another to the basic constitutional problem, which is why constitutional change is the logical solution. Constitutions alone cannot resolve crises because they themselves sow the seeds of "crisis." Constitutions cannot legitimize a political system; what gives the system legitimacy is democracy, not the constitution or constitutionalism. Democracy and constitutionalism are to be distinguished, as democracy is a value supported by social dimensions that give the people the right to exercise their constituent power at any time, and not only within the framework of establishing a constitution that undermines their constituent power in the future. Constitutionalism can establish tyranny in spite of the lofty values it claims to pursue, and this should be highlighted and emphasized in discussions about the constitution.

In this paper, we discussed the role of the legal system in deviating the constitution from the people's political choices by providing criticism based on three aspects: 1) dealing with the constitution as a supreme law that is above other laws and above politics; 2) founding legal interpretation on abstract principles such as "popular will" and "public interest," which have led to contradictions between theory and practice; and 3) focusing on describing official and institutional forms of political representation and disguising unofficial forms. The paper reviewed the manifestations of these tendencies in the amendments to the Constitution of Bahrain. It tackled a number of questions, including the following: How has the abstract legal interpretation of the "bicameral" system as the "joint will" of the people and the King generalized the interests of the ruling family as being consistent with interests of the people as a whole? How has this interpretation concealed the fact that they are narrow interests that strengthen the position of one party in the "joint will" over the other? How have the new constitutional institutions, such as the Constitutional Court, been founded on an elitist ideology opposed to popular politics and which aims to reproduce the same system through legal means? The paper also showed the divergent positions of political forces (the opposition, the government, the ruling family, and other political currents) in evaluating and contesting the legal principles that should govern society, such as the principle of citizens' constitutional political participation and the principle of promoting competence and expertise and achieving the public interest.

[154] "Bahraini Opposition Issues a Document to Draft a New Constitution," *Al-Mayadeen,* 11 November 2022.

The constitutional system linked the values of experience and competence to the mechanism of royal appointment through royal orders or decrees, which were presented as being free of politicization and representing the public interest, while political participation through election was associated with biased, private political interests, and inefficiency.

The paper also showed that the relationship between constitutional amendments and the concept of "crisis" is not one-sided – in the sense that the crisis leads to a constitutional amendment – but rather it is a multi-directional relationship in which the crisis is a cause that leads to solutions through constitutional amendments. Likewise, a crisis may be the product of constitutional amendments. The crisis is also a concept inherent in constitutional amendments, since constitutionalism is an approach that anticipates the occurrence of crises in the future and tries to address them in the provisions of the constitution. The paper calls for a deeper analysis of the relationship between the "material constitution," which involves social relations and the form of wealth distribution, and the "formal constitution" in legal studies.

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The Shifting Balance between Representative and Post-representative Forms of Governance: Evidence from Moroccan Constitutionalism

Dr. Abderrahim El Maslouhi *

ABSTRACT

Morocco's 2011 constitutional reform and subsequent legislative projects established two different, even inconsistent governance frameworks: representative government and post-representative governance. The first framework refers to the idea of a "single chain of command", that is, a system of democratic delegation from voters to those who govern. It recognizes the importance of election and majority rule as the most legitimate instruments for attaining and exercising power. This is why the lower house, entirely elected by direct universal suffrage, and the majority government, have been granted more weight as representatives of the sovereign nation. On the other hand, the new constitutional architecture has created or reinforced a number of counter-majoritarian institutions and mechanisms that strongly challenge the pre-eminence of the political/representative branches of power. These include strong judicial review of legislation and regulatory governance through bodies better known as "Independent Regulatory Agencies" (IRAs). These non-majoritarian institutions are a by-product of neoliberal constitutionalism, specifically the rule of law and good governance framework. Neither elected nor controlled by elected constitutional bodies, they impose a major challenge on the traditional distribution of power as well as on liberal constitutionalism itself.

Keywords: *Morocco, regulatory governance, counter-majoritarian difficulty, representative government, single chain of command.*

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CONTENTS

Introduction

Recent constitutional developments in the Arab world, including Morocco, have seen the emergence of two divergent lines of reform. On the one hand, constitution-makers showed a greater commitment to representative government. To varying degrees, they have been keen to stress the importance of elections and majority rule as the most legitimate way to gain power and to lend legislatures greater weight as the representative of the sovereign nation. This line of reform, advocated by the literature as well as by many social movements, is an extension of the classical liberal theory of representative government and the single chain of command. On the other hand, they have created a number of counter-majoritarian mechanisms that strongly challenge the pre-eminence of the political/representative branches of power and the single chain of command as a framework principle of legitimation. Among these mechanisms are strong judicial control over legislation and independent regulation by non-majoritarian institutions,[1] better known as "independent regulatory agencies" (IRAs). Early portrayed as an emerging "fourth branch"[2] competing with the three traditional powers, the latter have shaken up the classic approach to the separation of powers, thus fostering discourses in terms of counter-majoritarianism and post-representative politics. This second line of reform is a by-product of neoliberal constitutionalism and more precisely of the rule of law and good governance framework.

The key contention here is that post-2011 Arab constitutions have embarked on the neoliberal paradigm of post-parliamentary governance. Unlike constitutions in Western polities, where majority rule and the representative government model remain essential to the diffusion of power from the people to the state organs, Arab framers have committed the irreparable by lending regulatory agencies an almost unrestricted independence. As the Moroccan case shows, these agencies are neither elected nor subject to scrutiny by elected bodies. As such, they benefit from an organic and functional independence that reduces the political control of their action to its simplest expression. This poses the problem of their connection to the logic of the single chain of command, that is, democratic accountability by officials with democratic credentials. This is what we call "structural tension" within Moroccan constitutionalism.

Admittedly, democratic control over IRAs being set aside by the constitution itself, the fact remains that post-constitutional palliatives are possible to mitigate the impact of such tension. This can be addressed by proactive interpretation of the constitutional text as well as by refocusing the by-laws on the fundamentals of representative government. A first effective remedy can consist in creating new avenues for legislative scrutiny. However, as detailed below, Morocco did not take this route. Neither the Parliament's rules of procedures nor the 2014 Constitutional Council's decision (discussed below) have sought to establish democratic control over these bodies.

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1 Giandomenico Majone, "The Regulatory State and its Legitimacy Problems," *West European Politics* 22, no. 1 (1999): 22; Marc Thatcher and Alec Stone Sweet, "Theory and Practice of Delegation to Non-majoritarian Institutions," *West European Politics* 25, no. 1 (2002); Christel Koop, "Non-majoritarian Institutions: A Challenge for Liberal Democracy?," *Party Politics and Democracy in Europe*, eds., Ferdinand Müller-Rommel Fernando Casal Bértoa (New York: Routledge, 2016), 227.

2 Peter L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," *Columbia Law Review* 84, no. 3 (1984): 573.

Indeed, constitutional judicial review offers a second avenue to put IRAs back under representative politics. This is all the more true since democracy-building in Arab countries can capitalize on the ongoing revival of judicial activism.[3] However, this avenue proved inconclusive; not so much due to the reported disappointments[4] or concerns[5] about the judiciary's independence, but because, as institutional practice in Morocco shows, the constitutional review body chose to adhere strictly and literally to the terms of the 2011 Constitution, thus tipping the scales in favor of post-representative governance.

The interference of the judiciary in setting the balance between Parliament and independent regulatory agencies has largely contributed to asserting global constitutionalism standards over the classical liberal theory of representative government. This should come as no surprise. Long before the 2011 constitutional reform, Morocco showed an active commitment to anchoring the rule of law and governance framework in its legal order, including in the judiciary's legal framework.[6] Urged by its international donors demanding more normative flexibility to break the economic deadlock and opposition parties demanding the restoration of representative democracy,[7] the Kingdom of Morocco has followed a syncretic path. Moroccan constitutionalism can therefore be correctly described as a "combination of global determinism and local contingencies".[8]

Governance and, more broadly, the rule of law are part of the normative discourses promoted by neoliberalism and taken up by some variants of global constitutionalism. Neoliberal normativity, by definition, endorses an instrumentalist rationality[9] that grants more importance to the effectiveness and plurality of legitimacies and procedures. A significant result is that the plurality of protagonists and the subsequent segmentation of policy-making have "residualized electoral representation",[10] thus denying the democratic chain of command and majority rule any precedence in the process of legitimization and constitution-making.

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3 Nathan J. Brown, "Judicial Review and the Arab World," *Journal of Democracy* 9, no. 4 (1998). For Egypt, see: Stephen Gardbaum, "Are Strong Constitutional Courts Always a Good Thing for New Democracies?," *Columbia Journal of Transnational Law* 53 (2015): 300.

4 Clark B. Lombardi, "Constitutions of Arab Countries in Transition: Constitutional Review and Separation of Powers," *University of Washington School of Law Research Paper* 24 (2015): 125, 129.

5 Sujit Choudhry and Katherine Bass, *Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence* (Center for Constitutional Transitions at NYU Law and International IDEA, 2014), 29.

6 Norman L. Greene, "Rule of Law in Morocco: A Journey Towards a Better Judiciary through the Implementation of the 2011 Constitutional Reforms," *ILSA Journal of International and Comparative Law* 18, no. 2 (2012): 455, 469-470.

7 Mohammed Hashas, *Moroccan Exceptionalism Examined: Constitutional Insights Pre- and Post-2011* (Istituto Affari Internazionali, 2013).

8 Following Dupret's depiction, see: Baudouin Dupret, *Positive Law from the Muslim World Jurisprudence, History, Practices*, (Cambridge: Cambridge University Press, 2021), in particular, Part II: "Politics Made into Law: Determinism and Contingency in Moroccan Constitutionalism."

9 Aleksandar Matković and Marjan Ivković, "Neoliberal Instrumentalism and the Fight against It: The "We Won't Let Belgrade D(r)own" Movement," *East European Politics* 34, no. 1 (2018): 27.

10 David Judge, *Democratic Incongruities: Representative Democracy in Britain* (London: Palgrave Macmillan, 2014), 175. See, in particular: Chapter 7: "The 'Problem' of 'Post-': Post-Representative, Post-Parliamentary, Post-Democracy", 172-194.

In this article, I posit that Moroccan framers and, later, the constitutional judiciary and the legislator themselves acted as counter-majoritarian forces, thus paving the way to the entrenchment of post-representative governance in Morocco. To show this, I will first outline how the 2011 Constitution reshuffled the balance of power between the representative branches of government and the rest of constitutional authorities (Part I). The approach taken by the Moroccan framers turns out to be eclectic, even disconcerting. While proclaiming the fundamentals of the single chain of command (the sovereign and its representative), they lend almost unrestricted independence to the regulatory bodies which are, by vocation, simple administrative authorities. I will then examine how statutory legislation and judicial review have failed to reinstate the essential single chain of command (Part II). As the case law studied shows, constitutional interpretation unequivocally dismissed any obligation for IRAs to report to Parliament and the Government, thus taking the side of regulatory independence, much praised by the champions of post-parliamentary governance.

I. The 2011 Constitution and the Elusive Enshrinement of Representative Legitimacy

A. The Constituent Process: Procedural Legitimacy and Aggregation Issues

The Kingdom of Morocco is a constitutional monarchy.[11] The 2011 Constitution emphasizes in its first article both the parliamentary character of the regime and its commitment to the principles of governance. That bears, in our view, a substantial inconsistency. On the one hand, parliamentarism designates a single chain of command, that is to say, a system of democratic delegation from voters to those who govern. On the other hand, regulatory governance is about creating bodies that are unaccountable before the representative branches of government on the grounds of their necessary insulation from day-to-day political pressures.[12]

Representative legitimacy and the primacy of politics are at the center of the democratic chain of command. As identified by Wolfgang et al.,[13] this operates in four distinct steps:

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11 It is noteworthy that Morocco practices another mode of delegated representation prior to and during the constitutional era, which was consecrated under the title of Commandery of the Faithful. Delegation takes place between the nation and the monarch through the traditional *Bey'a*, under which the king has the status of supreme representative of the nation. See : Mohamed Lahbabi, *Le gouvernement marocain à l'aube du XXe siècle* (Rabat : Editions techniques Nord-Africaines, 1958).

12 Martino Maggetti et al., "Introduction to the Handbook of Regulatory Authorities," *The Handbook of Regulatory Authorities*, eds. Martino Maggetti et al. (Cheltenham: Edward Elgar Publishing, 2022), 6. For an example from the Arab world, see: Ahmed Badran, "Revisiting Regulatory Independence: The Relationship between the Formal and De-facto Independence of the Egyptian Telecoms Regulator," *Public Policy and Administration* 32, no. 1 (2017): 66-84.

13 Wolfgang C. Müller, "Parliamentary Democracy: Promise and Problems," *Delegation and Accountability in Parliamentary Democracies*, eds. Kaare Strøm et al. (Oxford: Oxford University Press, 2003), 20.

1. Delegation from voters to their elected representatives.
2. Delegation from legislators to the executive branch, specifically to the Head of Government (the Prime Minister).
3. Delegation from the Head of Government (Prime Minister) to the heads of different executive departments.
4. Delegation from the heads of different executive departments to civil servants.

This ideal-typical pattern is only partially verified in Moroccan constitutionalism. The origin of the tension between representative and post-representative governance lies in the status of popular sovereignty as established by the constitution. On the one hand, national sovereignty is formally celebrated as one of the core principles of the Kingdom's constitutional order. As provided for in Article 2 of the 2011 Constitution, "Sovereignty belongs to the Nation which exercises it directly, by referendum, and indirectly, through its representatives. The Nation chooses its representatives within the institutions elected by way of free, honest and regular suffrage." Moreover, the new constitutional order introduced for the very first time semi-direct democratic mechanisms to foster citizen participation in public decision-making. This includes the recognition of citizens and civil society organizations as stakeholders in the formulation, implementation, execution and evaluation of public policies (Art. 13) and the citizens' right to submit legislative proposals (Art. 14) and petitions to the public authorities (Art. 15). Despite competing stances on the "inclusivity" of the 2013 National Dialogue on Civil Society[14] and the restrictions imposed by the implementing legislation on these prerogatives, the final legal outcome may be seen as a groundbreaking development towards the institutionalization of semi-direct democracy in the MENA region.

On the other hand, the process of making and amending constitutional rules is partially out of the reach of the sovereign nation. Constituent power in its broadest democratic definition - that the sovereign people have the final say on constitutional matters - only applies when it comes to the final adoption of the constitution. While the final adoption of the 1962 Constitution and its successive revisions in 1970, 1972, 1996 and 2011 have constantly been subject to popular referendum in due form, the drafting of constitutional rules has never been the work of an elected constituent body. Rather, these rules have been constantly framed in accordance with the King's constituent initiative, with the support of renowned legal advisers. The 2011 constitution-making process was a particular case. Enacting his right of initiative for constitutional amendment as provided for in Article 103 of the 1996 Constitution, the King appointed a blue-ribbon commission to steer the revision process in an advisory capacity. The specificity of this process lies not only at the substantive level, but also at the procedural level, since the Consultative Commission for the Revision of the Constitution (CCRC) was eagerly expected to consider the legitimizing dimension of the constitutional process by involving as widely as possible the various social and political movements. Arguably, this was the first time that the constituent process in Morocco explicitly and insistently incorporated the sense of procedural legitimacy.

[14] Francesco Biagi, "The 2011 Constitution-making Process in Morocco: A Limited and Controlled Public Participation," *Public Participation in African Constitutionalism,* ed. Tania Abbiate et al. (New York: Routledge, 2017), 55-68.

The CCRC organized around one hundred meetings to enable representatives of the political, civil, union and youth organizations to present their request orally.[15] Only two far-left parties along with some associations and the 20 February Movement failed to respond to the commission's invitation, contending that it lacked democratic legitimacy.[16] The CRCC's deliverables and conclusions were meant to reflect and aggregate disparate demands, the composition of the Moroccan social and political landscape being structurally composite, even miscellaneous. The February 20 Movement alone brought together an ideological spectrum ranging from the extreme left to the most radical Islamism, thus making the aggregation task problematic. The procedural legitimization of the process was first spelled out through the hearings conducted with the participating organizations, but also through the project initiated, but soon abandoned, of an electronic platform set up by the CCRC to facilitate interaction with the unreached public. Parallel efforts were ongoing in the media to publicize the normative contents of the (desirable) constitution to come. In a relative break with their usual selectivity, government-owned media showed a certain permissiveness, thus opening access to activists to voice their views on what should be a democratic constitution in Morocco. The debates were mainly facilitated by four types of speakers: academics, politicians, activists and journalists. It was as if Moroccans were coming to discover the virtues of the public sphere - as defined by Habermas - as a chance to forge a deliberative rationality to consensually define the constitutional project and, hence, the state-society balance.[17] While no party called for a negative vote, opponents of the constitutional project led by the February 20 Movement, campaigned for a boycott of the constitutional referendum. The referendum recorded a turnout of nearly 75%, including 97.58% of positive votes. The new constitution was promulgated by a *dahir* (royal decree) of July 29, 2011, and published in the Official Bulletin the following day.

Although not implemented through an "elected constituent assembly",[18] the 2011 constitution-making process, judging from its procedural dimension, is notable for being more inclusive than past processes,[19] and thus represents an unprecedented exercise in the Kingdom's constitutional trajectory. However, this came at a cost at the substantive level. Moroccan drafters struggled to grapple with such a varied volume of proposals and grievances and to translate them into concurring constitutional standards. In addition to demands for strengthening parliamentary democracy, the drafters were asked to pay regard to the various expectations in terms of the rule of law and governance. Indeed, many civil society organizations in Morocco are connected with global networks and movements familiar with the rule of law and governance rhetoric. For their part, ministerial departments and independent regulators that

15 The constitutional proposals that most political parties sent to the Commission were cast as "vague and politically limited", compared to those of civil society organizations and social movements. See: Mohamed Madani et al., *The 2011 Moroccan Constitution: A Critical Analysis* (Stockholm: International IDEA, 2012), 12.

16 Biagi, The 2011 Constitution-making Process, 60.

17 Allison L. McManus, "Deliberative Street Politics and Sacralized Dissent: Morocco's 20 February Movement and the Jamaa Al Adl Wal Ihsane," *Social Movement Studies* 15, no. 6 (2016): 643, 646.

18 Francesco Biagi, "The 2011 Constitutional Reform in Morocco: More Flaws than Merits," Jean Monnet Occasional Papers, No. 9 (Msida: Institute for European Studies, 2014).

19 Biagi, The 2011 Constitution-making Process, 55.

existed before 2011 had to meet their international undertakings in terms of global standards.[20] Unsurprisingly, the relative inclusiveness of the constituent process turned into a challenge at the substantive level. The entrenchment of the rule of law and governance standards resulted in three sets of normative inconsistencies. In addition to the compatibility issue between human rights international standards and some Islamic precepts, and between the multilevel governance model and that of the central Jacobin state, the parallel and contradictory enshrinement of regulatory governance and representative democracy represents one of the most critical sources of puzzlement.

That goes back to the pre-constituent moment when the King announced in a programmatic speech, on March 9, 2011, a "comprehensive package of constitutional amendments"[21] intended to embed international standards into the constitution. Beyond the commitment to an in-depth rearrangement of the power balance between the branches of government and the King's pledge to reduce his powers in favor of a Head of Government who must come from the parliamentary majority, the reform agenda was committed to strengthening pluralism, rule of law, good governance and human rights. Reference to novel themes that are, to some extent, foreign to conventional constitutionalist terminology, dominated the reform priorities outlined in the King's speech. While very few Western constitutions, if any, refer to governance framework, four out of the seven priorities (1, 2, 6 and 7) stressed in the King's speech were related to the entrenchment of international standards, including the constitutionalization of regulatory bodies in charge of good governance.

B. The New Constitutional Balance: An Underenforcement of Representative Branches?

Three months after the royal speech, the CCRC presented the new draft constitution which was submitted to referendum on July 1, 2011. Despite the reservations variously expressed by critical literature[22] as well as by the February 20 Movement, the new constitution brought a series of unprecedented and significant changes to the old constitutional structure. While the "nation's fundamentals" (Islam, the monarchical form and the unitary character of the state) were essentially spared from any overhaul, the new text enshrined the separation of powers in the sense of an increased "parliamentarization" of the regime. This led to the transfer of certain prerogatives from the King to the Head of Government, such as the possibility of dissolving the lower house of Parliament or the appointment of certain senior civil servants.[23] The Council of Ministers, made up of the Head of Government and the ministers, remains presided over by the King, but the latter can delegate to the Head of Government the presidency of a

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20 *This echoes the model developed by legal theory regarding the diversity of pathways for the proliferation of international standards. See: Stavros Gadinis, "Three Pathways* to *Global Standards: Private, Regulator,* and *Ministry Networks," American Journal of International Law* 109, (2015): 1-57.

21 Greene, "Rule of Law in Morocco," 509.

22 Madani et al., *The 2011 Moroccan Constitution*; Biagi, "The 2011 Constitutional Reform in Morocco"; Driss Maghraoui, "Constitutional Reforms in Morocco: between Consensus and Subaltern Politics," *The Journal of North African Studies* 16, no. 4 (2011): 679-699.

23 "Maroc : La nouvelle Constitution va réduire les pouvoirs du souverain ," *Le Monde*, 17 juin 2011.

Council of Ministers on the basis of a specific agenda.[24] For his part, the Head of Government chairs the Council of Government, which deliberates on the general policy of the state before its presentation in the Council of Ministers.[25]

Regarding the Royalty proper, the constitution abolished the sacredness of the King, but his person is inviolable, and respect is due to him.[26] Article 1 states that "Morocco is a constitutional, democratic, parliamentary and social monarchy", the only way to reconcile the demands of all political tendencies. The compromise thus reached led to a monarchical regime where the King will be needing to negotiate major decisions, but which remains an "active" monarchy, insofar as the prerogatives of the King in terms of decision-making, remain relatively important[27] even if they have been reduced compared to the old constitution. This brought about a series of changes, varying in magnitude, in the balance between the King and the representative branches of government. This has made it possible to open up possibilities of "constitutional subsidiarity",[28] allowing the transfer of powers from the King to the Head of Government (countersignature, delegation, consultation). While accommodating the dualistic nature of the Moroccan executive, the said "constitutional subsidiarity" actually aims to further tie the executive to Parliament.[29] The King exercises his powers by *dahir* (royal decree-law). He presides over a series of key institutions including the Council of Ministers and the Supreme Council of the Judiciary. He also wields a supervisory power over both the executive and the legislature since he can dismiss the ministers, either on his own initiative, or on the proposal of the Head of Government, just as he can dissolve the two chambers of Parliament or one of them. At the same time, the King retains a central role in directing and controlling the state apparatus and economy by virtue of his power to appoint and dismiss senior state officials such as the governor of the central bank, ambassadors, prefects and governors, heads of administrations responsible for the Kingdom's internal security, as well as heads of the so-called "strategic" public entities and companies. On the military level, the King, who is the Supreme Commander of the Armed Forces, holds significant power in terms of war-declaration[30] and chairs the Higher Security Council, an advisory body on the country's internal and external security. Correspondingly, great care was taken to preserve the King's prerogatives in religious matters. Not only has the title of "Commander of the Faithful" been maintained as one of the essential attributes of Royalty, but it is also specified that the King exclusively exercises as such legislative powers in religious matters and chairs the Superior Council of *Ulemas* (Muslim jurisconsults). Last but not least, the King has broad discretion in relation to a state of emergency when the integrity of the national territory or the regular functioning of constitutional institutions come to be threatened.

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24 Constitution of Morocco (2011), Article 48(3).
25 Constitution of Morocco (2011), Article 92.
26 Constitution of Morocco (2011), Article 46.
27 Francesco Biagi, "The Separation and Distribution of Powers under the New Moroccan Constitution," *Constitutionalism, Human Rights, and Islam after the Arab Spring*, eds. Rainer Grote and Ali El-Haj (Oxford: Oxford University Press, 2016), 503.
28 Abderrahim El Maslouhi, "Séparation des pouvoirs et régime parlementaire dans la nouvelle Constitution marocaine," *La Constitution marocaine de 2011 : Analyses et commentaires*, ed. Centre d'Études Internationales (Paris : LGDJ, 2012), 91.
29 El Maslouhi.
30 Constitution of Morocco (2011), Articles 49 and 99.

This allows him, notwithstanding constitutional limitations, to take over the functions of the three branches of government, except that, during this period, Parliament cannot be dissolved (Art. 59-2).

There is no doubt that the King's extensive powers mean that Moroccan constitutional architecture still falls under the classic semi-presidential model rather than the purely parliamentary one.[31] However, the fact remains that this very architecture now reserves greater weight for the representative branches of government. On the strength of their electoral legitimacy, Parliament and, through it, the government have gained a considerable role in the conduct of state affairs. First, this translates into the way the Government is appointed. The King still has the power to appoint the Head of Government, but now "within the political party arriving ahead in the election of the members of the Chamber of Representatives, and in view of their results." (Art. 47) Cabinet members are also appointed by the King, but only upon a proposal by the Head of Government. These arrangements, which unambiguously pertain to the parliamentary tradition, also find resonance in the exercise of the legislative power vested in Parliament. Apart from those granted to the King as indicated above, it is Parliament that passes the laws (Art. 70). Its legislative authority has even been subject to a considerable extension under the new constitution. In addition to fundamental freedoms and rights, this includes judicial organization and the determination of offences and penalties, general statute of the public service, electoral regime, tax and customs regimes, family and civil status, regime of the territorial collectivities, health, media, transport, banking and insurance systems, information technology and communication, etc. The accentuation of the parliamentary features of the Moroccan constitutional system can also be discerned in the rebalancing of the bicameral structure of the legislature. In an apparent deference to the logic of representative government, the balance between the two chambers has been slightly shifted in favor of the lower house (the House of Representatives), which is elected by direct popular vote. Previously, the two chambers had symmetrically the same legislative powers.[32] This changed significantly in 2011.[33] The Head of Government presents the governmental programme to both chambers, and it is debated in each chamber but only the House of Representatives votes on it. Similarly, joint meetings between the two chambers are chaired by the president of the House of Representatives (Art. 68). As for legislative authority, the 1996 Constitution imposed recourse to a joint committee in case of disagreement, whereas, under the new constitution, direct electoral legitimacy endows the House of Representatives with a certain primacy that allows it to pass the bill under consideration as a last resort (Art. 84-2). The same goes for the budget bill brought, on a priority basis, before the House of Representatives (Art. 75-1) and the parliamentary subpoena which can only be implemented by the latter (Art. 105-1).

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31 Lukasz Jakubiak, "Constitutional Reforms in Morocco in the Aftermath of the Arab Spring," *North Africa in the Process of Change Political, Legal, Social and Economic Transformations*, eds. Ewa Szczepankiewicz-Rudzka and Aïssa Kadri (Krakow: Archebooks, 2015), 182.

32 James P. Ketterer, "From One Chamber to Two: The Case of Morocco," *The Journal of Legislative Studies* 7, no. 1 (2001): 135-150.

33 Madani et al., *The 2011 Moroccan Constitution*, 38.

The change made to the status of the executive bears a certain deferential attitude towards the idea of representative government. While the executive power remains shared between the Government and the King who still presides over the Council of Ministers, the Prime Minister is raised to the dignity of Head of Government. This marks a turning point if we consider that now he (she) chairs the Government Council, which deliberates on public and sectoral policies, matters related to human rights, public order and appointment to senior positions. Seen as a relative release of the Government from the tutelage of the King,[34] this body, however, deliberates only on an anticipatory basis[35] with regard to a number of strategic issues including general policy, government bills, budget bills and international conventions, (Art. 92). These are subject to final deliberation by the Council of Ministers, which is conclusively responsible for strategic orientations. Suffice to say, the Council of Ministers can veto decisions made by the Council of Government. This applies, for example, to the Head of Government's prerogative to dissolve the House of Representatives (Art. 104), the dissolution decree being subject to formal deliberation by the Council of Ministers, which is chaired by the King.

With regard to the judiciary, the 2011 Constitution seems to endorse a decisive paradigm shift for the definition of the rule of law in Morocco. It was as if the framers sought to alleviate the confusion between "democracy" and "representative politics" and to assert a "new legitimacy" framework, that of the rule of law whereby the law's claim to express the general will only makes sense within the bounds of the constitution, of which the courts are the guardians. While on the agenda even before the 2011 constitutional process,[36] judicial reform reached its formalized elaboration with the new constitutional charter and implemented through the 2013 National Dialogue on Judiciary Reform.[37] As is clear from the new constitution, the drive to foster the rule of law has led to the development of novel avenues to favor the judiciary's interference in the functioning of the other branches. Examples include recurring reference to the rule of law and to standards of transparency, probity and accountability, the increasing role reserved to the courts in reviewing administrative decisions and, most important, the opening of constitutional litigation to individuals. According to this later novelty, if, during a procedure in progress before a court, one of the parties to the dispute maintains that a legislative provision, on which the outcome of this dispute depends, encroaches on one of his (or her) rights and freedoms guaranteed by the constitution, this party may raise an objection of unconstitutionality. If the trial judge is convinced of the seriousness of this objection, he can then refer the matter to the Constitutional Court (Art. 133).

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34 David Melloni, "La Constitution marocaine de 2011. Une mutation des ordres politique et juridique marocains," *Pouvoirs* 145, no. 2 (2013): 7; Jakubiak, "Constitutional Reforms in Morocco, 180.

35 El Maslouhi, "Séparation des pouvoirs et régime parlementaire dans la nouvelle Constitution marocaine"; Ilyas Saliba, "Change or Charade? Morocco's Constitutional Reform Process 2011," *Orient- Deutsche Zeitschrift für Politik* 57, no. 3 (2016): 52, 55; Madani et al., *The 2011 Moroccan Constitution*, 44.

36 Greene, "Rule of Law in Morocco," 469.

37 Bertrand Mathieu, *"L'émergence du pouvoir judiciaire dans la constitution marocaine de 2011,"* *Pouvoirs* 145, no. 2 (2013) : 47.

This upgrading of the judicial function is so explicit in the new constitutional structure that it seems to shake up the long-standing myth of the "passive judge", the mere "mouthpiece of the law"[38] as Montesquieu said. Raised to the rank of "power" whose independence is guaranteed by the King, the judiciary now relies on solid guarantees of independence, impartiality, security of tenure, judicial ethics, freedom of association and freedom of expression of judges (Art. 107 to 111).[39] Thus, whenever he *considers his independence to be* under threat, the judge must, as provided for in Article 109-1, refer to the Superior Council of the Judiciary (SCJ). Conversely, any breach on his part of his duties of independence and impartiality constitutes serious professional misconduct which may lead to sanctions (Art. 109-2). Either way, it is the responsibility of the SCJ to ensure enforcement of such guarantees/duties.[40] The composition of this body that is chaired by the King was rearranged so as to better address the concerns with judicial independence and separation of powers, the Minister of Justice no longer appearing as "vice-president" of the SCJ.[41]

The consolidation of the status of constitutional justice is the other major innovation brought to judicial reform. The Constitutional Council, which has become the Constitutional Court, sees its attributions strengthened to fit better with the rule of law paradigm. In addition to its jurisdiction to adjudicate on electoral disputes, both parliamentary and referendum, the Constitutional Court rules on the conformity with the Constitution of the organic laws and the chambers' rules of procedure before their application (mandatory review), as well as on the constitutionality of laws whenever they are referred to the court by the King, the Head of Government, the President of the House of Representatives, the President of the House of Councilors, or by one-fifth of the members of the House of Representatives or forty members of the House of Councilors (optional review).

The slide of Moroccan constitutional justice towards the post-representative paradigm becomes however more apparent, even irrevocable, with the extension of constitutional litigation to individuals. Under Article 133, the Constitutional Court is competent to hear an objection of unconstitutionality raised during a trial, when it is maintained by one of the parties that the law on which depends the outcome of the dispute violates the rights and freedoms guaranteed by the constitution. Not only is this new arrangement supposed to bring the court's interpretive discretion to its widest extent, but it creates, probably in a more sweeping way than in Western polities, a "counter-majoritarian difficulty".[42] The last say in matters of constitutional interpretation, particularly when it comes to weighing legislation against entrenched rights and freedoms, no longer rests with the representative legislature.

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38 Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, ed. David Carrithers (New York: Routledge, 2009), 438.

39 For further details, see: Mathieu, "*L'émergence du pouvoir judiciaire*," 51-53.

40 It should be noted this Council's decisions are subject to challenge on grounds of *ultra vires*, under the terms of Article 114 of the 2011 Constitution.

41 Mathieu, 54.

42 Since Alexander M. Bickel's classic work, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), there have been countless works on the question. However, it is helpful to cite only the synthetic book edited by Kenneth Ward *and Cecilia R. Castillo, The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory* (Albany : State University of New York Press, 2005). See also: Kenneth Ward, "The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary Constitutional Theory," *Journal of Law and Politics* 18, (2002): 851.

Rather, it is for the court to say ultimately what the constitution says. Most strikingly, the ruling of Morocco's Constitutional Court in that matter has far more sweeping consequences compared to, for example, the American or British model. Whereas in the United States, judicial review generally has only a relative scope (*inter partes* effect) which, in principle, does not affect the formal validity of the law,[43] the British constitutional adjudication model operates on a declarative style. Having regard to parliamentary sovereignty and the long-established tradition of judicial restraint, it barely operates as an "alarm bell",[44] signaling the existence of a normative incompatibility. As the UK Human Rights Act 1998 (HRA) makes clear, the declaration of incompatibility has nothing to do with a judicial invalidation and does not preclude the continuing legality of the legislation considered. At best, it triggers, thanks to its enlightening virtue, the expectation (though not the legal requirement) that incompatible statute be amended or repealed by the legislature.[45]

The same is not true of the Moroccan case. Any declaration of incompatibility necessarily entails invalidating the legislative provision in question. This is unambiguously stated in the draft Organic Law 15-86 laying down the procedure for implementing Article 133 of the constitution. Under this text, the Constitutional Court, seized by the trial court at the request of one of the parties to a dispute, delivers its judgement within 60 days (Art. 22), the declaration of unconstitutionality of a legislative provision entailing its repeal from the date fixed by the court (Art. 23).[46] Admittedly, the organic law on the objection of unconstitutionality has been slow to be enacted, thus causing a stir among justice professionals and human rights defense associations. However, the question arises as to whether the implementation of this legislation will be likely to further stimulate judicial activism in Morocco. There is uncertainty here. Fixed on the paradigm of parliamentary rationalization, the constitutional judiciary in Morocco was more concerned with asserting its function of guardian of the institutional balance of powers, seeking in particular to confine the legislature within its strict constitutional limits, than with playing a role as guardian of fundamental rights and freedoms. With this in mind, one could argue that the rule of law version that the constitutional judiciary defends in Morocco is less that of "individual-rights-promotion" than that of the transition from representative to post-representative governance with the strategic plan of deparliamentarization

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43 *Inter partes*, but because of *stare decisis*, its results are, practically, *erga omnes*. Robert S. Barker, "Constitutional Jurisdiction and Judicial Review: The Experience of the United States," *Revista Jurídica Democracia, Direito and Cidadania* 1, no 1 (2010): 10. See also Burton Caine, "The Influence Abroad of the United States Constitution on Judicial Review and a Bill of Rights," *Temple International and Comparative Law Journal* 2, no. 2 (1987-1988): 59; Favoreu Louis, "Modèle européen et modèle américain de justice constitutionnelle, " *Annuaire international de justice constitutionnelle* 4 (1988): 51, 60.

44 Tamas Gyorfi, "The Legitimacy of the European Human Rights Regime: A View from the United Kingdom," *Global Constitutionalism* 8, no. 1 (2019): 123, 153; Fergal F. Davis, "Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK," *Parliamentary Affairs* 67, no. 1 (2014): 137, 140.

45 Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism," *American Journal of Comparative Law* 49, no. 4 (2001): 707, 743. See also Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011), 48.

46 See draft Organic Law 15-86 setting out the conditions for implementing Article 133 of the Constitution, available in Arabic at: https://www.chambredesrepresentants.ma/sites/default/files/loi/rapport_86.15_0.pdf.

and depoliticization of policy-making. As Part II of this article will show, the nexus between constitutional justice and independent regulatory bodies under the new constitution has been handled within the prospect of uncoupling regulatory governance from the political legislature. The judicial construction of this nexus has been marked by two converging trends which have intensified the degradation of representative government in favor of post-representative governance: first, the recognition of the organic and functional independence of regulatory bodies, and second, the rejection of legislative control over these bodies.

II. Regulatory Governance: The Road to a Post-representative Form of Government?

A. The 2011 Constitution and the Embedding of Regulatory Governance

The Kingdom of Morocco comes out among the first Arab countries to have embarked on a vast process of liberalization since the 1980s.[47] Driven by the country's commitment to the Structural Adjustment Program (1983), the accession to the GATT (1987) and, later, the signing of the Association Agreement with the EU (1995), market and public sector reforms gradually departed from the dirigiste model, thus paving the way for a new public governance paradigm. At that time, the 1972 Constitution did not echo these reforms, though it has been revised twice in 1992 and 1996. The reference text was the 1989 Law on Privatizations and other sector-specific laws.[48] There is a reason for this: Morocco's constitution-making policy stands out for its incrementalism. It is the laws that often nurture the constitution.

This is why it was not until July 2011 that this novel governance paradigm entered the constitutional realm. However, a comparative overview of relevant materials makes it clear that Moroccan framers' commitment to governance policies appears by far the most pronounced compared to their Arab counterparts. This is reflected first of all in the King's speech on March 9, 2011,[49] a crucial road map that paved the way for the constituent process that was to last until July 1, 2011. Three of the seven pillars set out in this speech aimed to affirm the commitment of the Moroccan state to lend constitutional protection to governance standards: the rule of law in line with Morocco's international commitments, accountability and integrity in public institutions and constitutional consecration of regulatory governance bodies, referred to as "institutions concerned with good governance and human rights".[50]

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47 Cameron Khosrowshahi, "Privatization in Morocco: The Politics of Development," *Middle East Journal* 51, no. 2 (1997): 242.

48 These include, for instance, the Stock Market Law of 1993 and the Telecommunications Liberalization Law of 1996. For a retrospective account of liberalization reforms in Morocco, see: Shana Cohen and Larbi Jaidi, *Morocco: Globalization and Its Consequences* (New York: Routledge: 2006).

49 King Mohammed VI's speech to the Nation, 9 March 2011.

50 King Mohammed VI's speech to the Nation.

According to some readings, it is "economic governance"[51] that has been constitutionalized in Morocco. The 2011 Constitution is definitely filled with plans to push the regulatory governance implementation to its widest scope. The list is long: good governance as an underpinning to the constitutional structure,[52] property rights, free competition, equality of opportunity,[53] criminalization of economic and financial crimes, in particular conflicts of interest, insider trading offences,[54] as well as those related to public funds and procurement procedures.[55] The same extends to offences such as influence peddling, abuse of dominant position and monopoly, and all other practices contrary to free and fair competition in economic relations.[56] Furthermore, provisions of operational scope aim to institutionalize and implement these solemn undertakings. In addition to the Economic, Social and Environmental Council (ESEC) and the Court of Auditors (CA) introduced respectively in the wake of the 1992 and 1996 revisions, a whole range of newly created regulatory bodies erupt in the 2011 text.[57] This work was deemed "unconventional".[58] In effect, few constitutions describe in detail markets, governance and institutions. Such a task is usually left to statutory legislation which is responsible for spelling out "the economic dimension" of the rule of law.[59]

As regards regulatory accountability, the examination of relevant provisions points to a contrasting finding. While accountability is presented in the opening lines as one of the constitutional system's keystones, provisions on the functioning of regulatory bodies absolutely avoid reference to their obligation to accountability. On the one hand, Article 1 unmistakably endorses the "correlation between authority and accountability" as a novel pillar of the Kingdom's constitutional framework. A major breakthrough has even been achieved in Article 2 on the delicate nexus between the delegation chain and representative accountability, by tightly linking the exercise of sovereignty to the polls and elected representatives' action. Further, government action and public policy are placed under the scrutiny of the bicameral legislature,[60] which moreover has authority to set up committees of inquiry to investigate alleged mismanagement in utilities, government agencies and state-owned companies.[61] Last but not least, both houses of Parliament are entitled to conduct hearings with heads of administration and government agencies in the presence of and under the responsibility of the ministers concerned.[62]

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51 Henri-Louis Vedié, "Réforme constitutionnelle et gouvernance économique: l'exemple du Maroc," *La Constitution marocaine de 2011. Analyses et commentaires,* ed. Centre d'Études Internationales (Paris : LGDJ, 2012), 298.
52 Constitution of Morocco (2011), 1st preambular paragraph, Article1(2), and Article 157.
53 Constitution of Morocco (2011), Article 35.
54 Constitution of Morocco (2011), Article 36(1).
55 Constitution of Morocco (2011), Article 36(2).
56 Constitution of Morocco (2011), Article 36(3).
57 Constitution of Morocco (2011), Articles 161-170. This regards the Competition Council, the National Anti-Corruption Body, the High Authority for Audio-visual Communication, the Equal Opportunity and Anti-discrimination Authority, the Higher Council for Education, Training and Scientific Research, the Consultative Council on Family and Child affairs and the Consultative Council for Youth and Associative Action.
58 Vedié, "Réforme constitutionnelle et gouvernance économique," 301.
59 Vedié, 300.
60 Constitution of Morocco (2011), Article 70(2).
61 Constitution of Morocco (2011), Article 67(2).
62 Constitution of Morocco (2011), Article 102.

On the other hand, however, not only is the constitution completely silent on the accountability of IRAs, but it also refers to them as constitutionally "independent" of the legislative and executive branches of government.[63] Drawing from the constitution's structure to base full and binding legislative accountability over regulators therefore sounds problematic, at least as required by the delegation chain framework. True, the legislative body has wide discretion to define the scope of regulatory delegation and therefore to shape IRAs' status pursuant to their statutory authority to create public bodies,[64] including those in charge of good governance and regulation.[65] It may moreover wield some say over IRAs' policies and programs when it comes to discussing and voting for the annual budget.[66] The constitution even reserves for both houses an assessment power over sector-specific regulators when debating yearly reports submitted by the latter.[67] However, as can be seen from these prerogatives, none of them allows the legislature to go all the way to compulsory accountability.

B. Parliamentary Rules of Procedure and the Undermining of Regulatory Accountability

Further evidence of this can be gleaned from sub-constitutional legislation. On balance, both the legislator and the Constitutional Court demonstrated a clear deference to the framers' intent to grant IRAs an indeterminate independence. The rules of procedure of both houses simply replicate the list of independent authorities with no further details and in the same order as in the constitution. Going through the parliamentary procedures, it becomes apparent that regulators have no obligation to parliament other than to submit annual reports for debate.[68] This method departs from the consecrated practice that a legislature's rules of procedure may spell out with greater detail the constitution's provisions relating to its functioning.[69] The rules of procedure could, for instance, have invoked the right of each chamber to set up a committee of inquiry to investigate IRAs' officials, or even to initiate proceedings entailing their liability before Parliament. That was not the case. Parliamentary procedures in both chambers fail to specify under what procedural arrangements IRAs could be held accountable to Parliament. At most, lawmakers may request an advisory opinion.[70] It is the same for two other independent bodies, quoted

63 Constitution of Morocco (2011), Article 159.
64 Constitution of Morocco (2011), Article 71.
65 Constitution of Morocco (2011), Article 159.
66 Constitution of Morocco (2011), Article 71(1).
67 Constitution of Morocco (2011), Article 160.
68 See Article 233 of the House of Representatives' rules of procedure, and Article 281 of the House of Councillors' rules of procedure.
69 While it is true that "the Constitution directly imposes, rather than delegating to future legislatures to prescribe", nothing prevents lawmakers from going beyond the constitutional text and creating new norms that are consistent with the spirit of the Constitution. See: Adrian Vermeule, "The Constitutional Law of Congressional Procedure," *The University of Chicago Law Review* 71, no. 2 (2004): 363; Wolfgang C. Müller and Ulrich Sieberer, "Procedure and Rules in Legislatures," *The Oxford Handbook of Legislative Studies*, eds., Shane Martin et al. (Oxford: Oxford University Press, 2014), 311-312.
70 The House of Representatives' rules of procedure, Article 344; The House of Councillors' rules of procedure, Article 359. See, in French: Official Gazette of the Kingdom of Morocco Nº 6880 of 7 May 2020.

separately in the Constitution: The Court of Auditors and the Economic, Social and Environmental Council (ESEC)[71], with, however a slight exception for the latter. In addition to the House of Representatives' authority to discuss ESEC's annual reports, to seek an opinion[72] or to order a policy document[73], members of standing committees of the House are entitled to attend the ESEC's general meeting as observers,[74] and even be heard in that capacity.[75] Furthermore, the House's Speaker has discretion to convene an extraordinary general meeting of thatbody.[76]

As can be observed, none of these prerogatives can be seriously treated as a binding accountability mechanism. The founding statute of every independent body is no exception. As a rule, the posture adopted is content with reporting and technical support whenever it comes to describing IRAs' duties to Parliament and the executive. The possibility of triggering joint or individual liability of those responsible for IRAs does not surface in any of the devolution statutes.[77] Sometimes, it is quite the opposite. Beyond the evident case of the Auditing Court, the statute on the High Authority for Audiovisual Communication (HAAC) seems to symbolically shift the balance in favor of the latter.[78] This body in its capacity as a media watchdog has authority to call Parliament to order with regard to hourly amounts allocated to each political group intervening on public media.[79] It may even constitute an appellate body receiving complaints from Speakers of both Houses in this respect.[80]

C. Judicial Review and the Asserting of Regulatory Independence

Undoubtedly, the affirmation of IRAs' organic and functional independence over their accountability to the representative branches of government is more perceptible in the way the issue has been handled by the Moroccan Constitutional Council. Drawing on bold arguments, the latter went so far as to declare the inapplicability of Article 102 of the Constitution, making it mandatory for all public bodies to submit reports for debate within

71 See, respectively: Article 233 of the House of Representatives' rules of procedure, and Articles 279 and 280 of the House of Councillors' rules of procedure.
72 House of Representatives' rules of procedure, Article 337.
73 House of Representatives' rules of procedure, Article 337.
74 House of Representatives' rules of procedure, Article 338.
75 House of Representatives' rules of procedure, Article 338.
76 House of Representatives' rules of procedure, Article 339.
77 See, in French: Law No. 20-13 Relating to the Competition Council, Official Gazette of the Kingdom of Morocco, No. 6280 of 7 August 2014, 3746-3749; Law No. 11-15 Reorganizing the High Authority for Audiovisual Communication, Official Gazette of the Kingdom of Morocco No. 6522 of 1 December 2016, 1877-83; Law No. 113-12 on the National Anti-Corruption Authority, Official Gazette of the Kingdom of Morocco No. 6388 of 20 August 2015, 3357-3363.
78 For further details on the HACA as a cornerstone for Morocco's media regulatory governance, see: Aarab Issali, "Liberalization of the Moroccan Broadcasting Sector: Breakthroughs and Limitations," *National Broadcasting and State Policy in Arab Countries*, ed., Tourya Guaaybess (London: Palgrave Macmillan, 2013), 131-149.
79 Law No. 11-15 Reorganizing the High Authority for Audiovisual Communication, Article 4(6), Official Gazette of the Kingdom of Morocco No. 6522 of 1 December 2016, 1878.
80 Law No. 11-15 Reorganizing the High Authority for Audiovisual Communication, Article 7(1), Official Gazette of the Kingdom of Morocco No. 6522 of 1 December 2016, 1879.

Parliament's standing committees and in the presence of these bodies' heads and the ministers concerned. Ruling on the constitutionality of the House of Representatives' rules of procedure, the Constitutional Council invalidated draft Article 182 on the grounds of a twofold argument: First, regulators' reporting to Parliament, as provided for in the Article 160, applies to the entire legislature - that is, during a joint session of both Houses - and not to the standing committees.81 Secondly, Article 102 enabling standing committees to request hearings from IRAs chairs in the presence of the ministers concerned cannot apply in this case. Regulatory independence laid down in the constitution precludes any legislative or executive oversight over regulators.[82] That is why the Moroccan legislature still faces barriers in receiving and discussing reports from independent authorities. Not to mention practical hurdles due to the delay in issuing certain regulatory statutes or in assigning chairs and members of the bodies created.

The Moroccan constitutional review body remained consistent with that line of interpretation when considering the draft law on the ESEC. Note that the latter features in a point of the constitutional text (Title XI) other than that dedicated to IRAs (Title XII). It follows that keeping this body away from the logic of the delegation chain was not an easy task, since Title XI of the constitution does not refer to the ESEC as independent. To address this issue, the Constitutional Council elected to draw an analogy with regulatory agencies quoted as "independent" in the following Title. It then builds up on this presumed independence to invalidate Article 29 of the draft law, which grants the Head of Government appointing the secretary general of the ESEC. The review body reasoned that the Head of Government should wield no supervisory authority over this institution,[83] notwithstanding Article 91(1), which expressly enables him to appoint to senior positions in state entities. Under this ruling, Article 91 should not apply in the case in point, since Head of Government's appointment to such a position is likely to hinder the ESEC's independence and distort the advisory mission it has to fulfill with the executive and Parliament.[84] Such prerogative should therefore lie with a "higher authority, in this case the King, Head of State", who also appoints the president of that body.[85]

The method used here bears the traces of a presidentialist bias. The judiciary's interpretation of the constitutional provisions on regulatory governance has not been undertaken through the lens of representative government. The Head of Government, who in fact is none other than the House majority leader—following a plain reading of Article 47 (1), has been ruled ineligible to have a say in appointing regulators' senior officials. The involvement of the parliamentary executive in this process was seen as a politicizing agent and impairment to regulatory independence. Seen from this angle, the Kingdom's legal framework does induce a lopsided balance against

81 See: The Constitutional Council's decision No. 829/2012, Official Gazette of the Kingdom of Morocco No. 6021 of 2012, 655, 661.
82 The Constitutional Council's decision No. 829/2012.
83 See: The Constitutional Council's decision No. 932/2014, Official Gazette of the kingdom of Morocco No. 6229 of 2014, 2535, 2537.
84 The Constitutional Council's decision No. 932/2014.
85 The Constitutional Council's decision No. 932/2014.

legislative accountability. Despite some commitment to bringing the Moroccan polity closer to the Westminster model, as is apparent from constitutional dictates on sovereignty and cabinet formation, the parallel quest to preserve the monarch's prerogatives made the parliamentary form of government unsteady, hybrid and overlapping on many issues with the logic of presidentialism[86] and post-parliamentary governance.

Conclusion

As in most Arab countries in the aftermath of 2011, the process of drafting and implementing the constitution in Morocco took place in a divided, even polarized context, notably opposing parliamentary and counter-parliamentary prospects. It turns out that the operation of the constitutional structure and, in particular, its implementation through statutory legislation and judicial review have tipped the balance in favor of a counter-majoritarian interpretation. Neither the Constitutional Court nor even the legislator considered that non-majoritarian institutions should submit to the chain of command and the representative form of government. The contention in this article was that neoliberalism undermines the very foundations of liberal constitutionalism. Drawing on arguments from good governance, the rule of law and judicial review, neoliberal constitutionalism functions as a counter-majority agent distancing constitution-making processes from the dictates of popular sovereignty and representative democracy. For obvious reasons related to their vulnerability to donor agendas, developing countries seem more exposed than their Western counterparts to the normative and political consequences induced by this formative shift. The Moroccan case is not the only one, but it is very illustrative.

[86] El Maslouhi, "Séparation des pouvoirs et régime parlementaire," 85.

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Jordan's Constitutional Amendments: A Coup against the Parliamentary System?

Omar Atout *

ABSTRACT

This paper provides a comprehensive overview of the constitutional transformations in Jordan following the 2011 protests. Firstly, it assesses the degree to which the process reflected principles of legitimacy and participation. Secondly, it examines the responsiveness of the amendments to popular aspirations and demands. Finally, it evaluates the implementation of the amended constitution on the ground, particularly after the subsequent amendments to the 2011 reforms.

The paper establishes that the Jordanian Constitution defines Jordan as a parliamentary monarchy, with the King serving as the head of state, an elected parliament, and a government that is accountable to parliament. It notes that, in practice, the King does not exercise actual authority, resulting in a system of constitutional monarchy.

The paper then delves into the detrimental constitutional amendments that have been introduced in Jordan since the late 1950s. It argues that these amendments have altered the fundamental nature of the country's parliamentary monarchy by consolidating power in the hands of the King, leading to subsequent demands for their reversal.

The paper analyzes the constitutional amendments that have been adopted since 2011 in two main sections. The first section focuses on the 2011 amendments, which were purportedly a response to the protest movement in Jordan and the wider region. While these amendments appeared positive on the surface, they merely aimed at appeasing public discontent without effecting substantial changes in power dynamics. In practice, most of these amendments were not implemented, and the underlying issues that sparked the protests remained unaddressed, as the King and the state apparatus continued to monopolize power.

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The second section examines the amendments introduced in 2014, 2016, and 2022 respectively. These amendments were primarily intended to consolidate power in the hands of the King, undermining the constitutional authorities and their jurisdiction over both the internal and external affairs of the state. As a result, these constitutional amendments effectively undermined the parliamentary monarchy upon which the Jordanian Constitution was originally based, as detailed in the paper.

Keywords: *Jordan's constitutional amendments, coup against the parliamentary system, presidential monarchy, one-person constitution, unclassifiable constitution, dissociation between authority and responsibility.*

CONTENTS

Introduction

Beginning in 2011, the Arab region witnessed a mass popular protest movement against tyranny, oppression, and the lack of social justice. In Jordan, the authorities adopted constitutional amendments to absorb the anger unfolding on the streets, but without effecting real change, as shall be demonstrated in this paper.

The paper addresses the main themes that relate to the constitutional transformations in Jordan following the 2011 protests by analyzing: the extent to which the constitutional amendments upheld the principles of legitimacy and popular participation; the extent to which the amended Jordanian Constitution meets popular aspirations and demands; and, finally, the practical implementation of the constitution, especially after the amendments that followed those of 2011.

It is important to begin by explaining the characteristics of the Jordanian Constitution of 1952, as it remains in force with a number of amendments. This constitution was promulgated through an agreement between King Abdullah I and the House of Representatives representing the West and East Banks and which resulted from the decision to unite the remaining Arab parts of Palestine after the 1948 War with the Hashemite Kingdom of Jordan.

The Jordanian Constitution adopted a parliamentary system[1] with an immune head of state (the King), an elected parliament, and a Council of Ministers accountable to that parliament.[2] Article 1 of the constitution stipulates that the "ruling regime is parliamentary with a hereditary monarchy," and Article 24 states that "the nation is the source of powers," which means that the people are the source of power and the House of Representatives embodies the will of the people in exercising power. As for kingship, it is hereditary. The King is the head of state, and executive power is vested in him, but he exercises it through his ministers and is therefore protected from all liability and responsibility. His written and verbal orders do not absolve the Prime Minister or ministers of responsibility. Since he reigns and does not rule, the King does not make mistakes. According to Article 40 of the constitution, he exercises his powers through his ministers and his royal decrees, which must be signed by the Prime Minister and the minister(s) concerned.[3] According to this article, a royal decree is a decision taken by the Council of Ministers, which has the confidence of the House of Representatives that embodies the will of the people the source of all power.[4] The Council of Ministers is responsible for administering all internal and external state affairs in the first order followed by all executive bodies; the Prime Minister and ministers are accountable for the state's public policy and the work of their ministries before the House of Representatives, which is elected through direct and general elections. As for the judiciary, the constitution stipulates that judges are independent and subject to no authority other than that of the law and that judicial rulings are issued in the name of the King.

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1 The Jordanian Constitution of 1952 is based on the Belgian Constitution, which in turn is based on the unwritten rules of the British constitutional system.

2 Ali Al-Hiyari, *Constitutional Law and the Jordanian Constitutional System* (Amman: Ghanem Abdo Press, 1972).

3 Sufian Obeidat, "Jordan's 2016 Constitutional Amendments: A Return to an Absolute Monarchy," *ConstitutionNet*, 27 May 2016.

4 Mohammed Hammouri, *Constitutional and Legal Requirements for Real Political Reform: Why and How* (Amman: Wael Publishing House, 2015).

Since the end of the 1950s and after the coup d'état by the royal palace against the only democratic experience in the history of Jordan, several amendments were introduced to the Jordanian Constitution. The coup d'état took place when a partisan coalition government, formed in 1956, tried to govern in accordance with the provisions of the constitution, which grant it general jurisdiction over the country's internal and external affairs. This experience was met with strong resistance from the King as he felt he did not have sole control, which led him to dismiss the government, prosecute many of its members, ban political parties, and declare martial law.[5] Thus began a long series of amendments to the Jordanian Constitution of 1952, all of which were aimed at distorting the parliamentary system and concentrating power in the hands of the King. Since the 1950s, the King has exercised exclusive power in appointing and dismissing Councils of Ministers, ordering the holding and postponement of elections, dissolving the House of Representatives, appointing and dismissing members of the Senate, and, just as importantly, in appointing, dismissing, and subjecting the army commander and the Director of the General Intelligence Department to his will, in contradiction with the country's constitution,[6] which stipulates that all internal and external state organs are answerable to the Council of Ministers.[7]

In this context, the demands raised in the demonstrations and protest movements that took place in the country in early 2011 were different from the slogans raised by the protesters across the region. The former did not call for the overthrow of the regime, but rather centered on the reform of the country's political system. One of those demands was the implementation of constitutional reforms to address the distortions caused by the amendments to the 1952 Constitution introduced during the previous periods, and which included about 20 constitutional articles. These amendments led to an imbalance of power between state authorities, primarily concentrating power in the hands of the King and making him the sole ruler. In addition to the clear demands to reverse those amendments, there were demands for additional amendments, including the establishment of a constitutional court, the restitution of the power to try ministers, giving civil courts the power to determine the validity of the election of members of the House of Representatives, and the enactment of an electoral law and a law on political parties that would set the stage for parliamentary governments.[8]

The following two sections contain an analysis of the constitutional amendments made since 2011. The first section covers the constitutional amendments made during the year of the protest movement that swept the region, including Jordan. Although those amendments seemed positive and reformist in some respects, in practice, they aimed to appease the anger of the people on the streets without effecting any real change in power.

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5 The government of Prime Minister Suleiman Al-Nabulsi was the only party coalition government in Jordan's history that was formed from a coalition of parties that won the elections in 1956 and where the leader of the majority party was appointed, although he himself did not succeed in those elections.

6 Constitution of Jordan (1952, rev. 2011), Article 45.

7 Sufian Obeidat, *A Reading of the Jordanian Constitutional Amendments 2016: Additional Monopolization of Power*, (Doha: Arab Center for Research and Policy Studies, 2016).

8 The National Front for Reform was formed on 21 May 2011 from a group of Islamist, leftist and nationalist parties and adopted in its founding statement the demands of the protesters: https://bit.ly/3t3DsCE.

This effectively led to the non-implementation of most of these amendments and did not effect any real change to the status quo that ignited the protests in first place. As such, the King and the executive bodies of the ruling authority continued to monopolize power.

The second section covers the amendments that took place over in the years 2014, 2016, and 2022. These essentially revealed that the amendments that were made in 2011 did not lead to any real change due to King Abdullah II's lack of desire to effect fundamental changes in the governance and political decision-making patterns and his rejection of the idea of at least partially ceding the power he exercises to a representative government. The subsequent constitutional amendments were made with the aim of concentrating power in the hands of the King at the expense of the constitutional authorities. As such, governments no longer have any actual power or the mandate to manage the internal and external affairs of the state.[9] It can thus be said that the outcome of these constitutional amendments undermines the system and the principles upon which the Jordanian Constitution was based, primarily the parliamentary system, which is addressed in detail in this paper.

I. The Constitutional Amendments of 2011

A. Establishment of the Royal Committee to Review Constitutional Texts and Propose the Required Amendments

At the height of the protest movement in all Jordanian cities, especially in the capital Amman, in April 2011, King Abdullah II formed a committee to review constitutional texts with the aim of proposing constitutional amendments in line with Jordan's present and future needs.[10] The committee was formed under the chairmanship of a former prime minister and with the membership of another former prime minister, former ministers, the Speaker of the Senate, the Speaker of the House of Representatives, and the Chief of the Supreme Judicial Council.

The committee did not take into account the principles of popular participation or the representation of all social groups and political orientations, nor were women represented in it.[11] It further failed to engage in any real or even formal social dialogue before referring its proposed constitutional amendments to Parliament. The committee's deliberations were also confidential. Although some civil society organizations and political parties had submitted proposals to the committee,[12] there was no institutional mechanism available through which the various parties could be consulted regarding the constitutional amendments. The committee was formed according to the previous

9 Article 45(1) of Jordan's Constitution stipulates: "The Council of Ministers shall undertake the responsibility of administering all affairs of the State, internal and external, with the exception of those affairs that were or may be entrusted in accordance with this Constitution or any law to any other person or body".

10 The King's letter appointed Ahmed Al-Lozi as Head of the Committee.

11 Mohammad Al-Najjar, "Formation of a Committee to Amend the Jordanian Constitution," *Al Jazeera*, 27 April 2011.

12 "Memorandum submitted to the Royal Committee in charge of considering the amendment of the constitution," (Amman: Amman Center for Human Rights Studies, 2011).

governing approach, where the King exclusively controls all decisions made at the state level. The committee's members were also chosen from among the same political elites as before, most of whom were responsible for the circumstances that led to the popular protests in the first place. Indeed, the protests confirmed the people's rejection of the adopted approach by which the King unilaterally appointed governments, committees, and councils.

Although the committee included the Speakers of the Senate and the House of Representatives, it should be noted that the members of the Senate are unilaterally appointed by the King, while the mechanism for the election of the members of the House of Representatives does not represent the will of the people. That is due to the systematic tampering with the elections, whether directly or through the adoption of electoral laws that guarantee the results in advance. In fact, the House of Representatives had given the government 110 votes of confidence out of 130 that same year, yet the King was forced to dismiss it a few days later due to the demands and pressure from the people.[13]

As for the process for the approval of the committee's outputs, it can be deduced from a speech delivered by the King during a celebratory event of the committee's work, in which he directed Parliament to complete the approval process of the constitutional amendments in one month, which Parliament committed to do. This confirms the lack of an actual role by the Jordanian House of Representatives, which is supposed to be the authority responsible for approving or rejecting amendments. This also indicates that these constitutional amendments were approved amid a complete absence of popular participation. In other words, the method by which these constitutional amendments were approved in 2011 was identical to the one adopted during the martial law period, without any actual popular participation.

B. The Extent to which the Jordanian Constitution Met Popular Aspirations and Demands after its Amendment in 2011

About 40 constitutional articles covering the following matters were amended:

1. Reversing the constitutional amendments that were adopted during the martial law period between 1958 and 1989

These amendments imposed the executive's dominance over the legislature when it comes to exercising constitutional powers in two main respects: 1) The executive's ability to dismiss the House of Representatives,[14] which represents the power of the people, for indefinite periods due to the King's power to dissolve the House of Representatives and to postpone general elections without any restraints; and 2) the executive's role in issuing temporary laws.

[13] Prime Minister Al-Rifai's government was dissolved due to popular protests on 1 February 2011: https://www.bbc.co.uk/worldservice/news/2011/02/110201_jordan_nh_sl.shtml.

[14] In realistic terms, it is the King's authority, as argued above.

In this context, the following amendments were made:

1. The King and the executive power's ability to postpone the general elections for indefinite periods was restricted,[15] as the government formed after the dissolution of the House of Representatives must now hold legislative elections within four months from the date of dissolution, otherwise the dissolved House of Representatives, by virtue of the constitution, shall assume its full constitutional powers as if the dissolution did not happen and shall remain in office until a new chamber is elected.[16]

   The paragraph that gave the King, based on the government's recommendation, the right to hold general elections in half of the kingdom's electoral districts was also repealed.[17] It had been added following the Hashemite Kingdom of Jordan's occupation of the West Bank in 1967, as half of the electoral districts of the Jordanian House of Representatives belonged to the West Bank at the time. After King Hussein's decision in 1988 to disengage legally and administratively from the West Bank, the text was no longer needed.[18]

2. Another safeguard was put in place through the 2011 constitutional amendments, which appears to restrict the executive power's ability to dissolve the House of Representatives by requiring the government under which the House of Representatives is dissolved to resign within one week from the date of dissolution.[19] If the government dissolves the House of Representatives, it must resign so that another government can hold elections and resort to the people to choose the majority that will govern during the next stage.[20] In the same context, another amendment was made where the head of the resigned government who dissolves the House of Representatives cannot be appointed to form the next government. However, sound practices in parliamentary systems indicate that one of the reasons that push the head of state or the King to dissolution is the dismissal of the majority government, the purpose being to consult the people following such dismissal on their stance.[21] As such, prohibiting the prime minister under whom the House of Representatives is dissolved from forming the next government was solely based on the desire of members of the chamber to restrict the government's ability to dissolve the chamber in order to remain in their positions. The amendment may be perceived as a way to prevent the Council of Ministers from recommending to the King the dissolution of the

15 Amendment of Article 73 of the Constitution by repealing paragraphs 4 and 5 thereof, which gave the King the power to postpone general elections for indefinite periods.
16 Constitution of Jordan (1952, rev. 2011), Article 73(1) and (2).
17 Constitution of Jordan (1952, rev. 2011), Article 73(6).
18 The decision to disengage administratively and legally from the West Bank was a political decision announced by King Hussein in a televised speech on 13 July 1988. The decision followed the Arab summit in Algeria which confirmed support for the Palestinian uprising (*intifada*) that broke out in late 1987 in the West Bank and that the PLO is the legitimate and sole representative of the Palestinian people. The decision violates Article 1 of the Jordanian Constitution that forbids any part of the Kingdom to be ceded.
19 Article 74(2) of the Constitution was amended and now requires the government under which the House of Representatives is dissolved to resign within one week from the date of dissolution.
20 There is no partisan life in Jordan or electoral laws that allow access to such democratic theories of governance.
21 Mohamed Kamel Leilah, *Political Systems: The State and the Government* (Beirut: Dar Al-Nahda Al-Arabiya for Printing and Publishing, 1969).

House of Representatives except for serious reasons. However, while this may be true in theory, in reality, Jordanian Councils of Ministers do not reflect a representative majority but are rather appointed by the King and are subject to him and his own standards.

3. The role of the executive power in issuing temporary laws was restricted in the absence of a House of Representatives (that is, granting the government legislative powers). Prior to the amendments, the government could issue temporary laws if the House of Representatives was dissolved or not in session (ie, in recess). This power was subsequently limited to the event of dissolution of the House of Representatives only.[22] That is a good practice, as it enables the government, by royal decree and at any time, to summon the house that is not in session for an extraordinary session to pass any law. The members of the house can, through a petition signed by an absolute majority, request the convening of an extraordinary session in presence of the King.[23] If we take into account the amendment to Article 74 of the constitution, to which we referred earlier, the government can only issue temporary laws within a four-month limit, given that the House of Representatives may not be absent for more than that period in the event of dissolution.

An amendment was further made to the conditions that must be met to grant the government the power to pass temporary laws if the House of Representatives is dissolved. This amendment stipulates that these laws should exclusively relate to public disasters, war, emergencies, and the need for necessary and urgent expenditures that cannot be postponed. Prior to the amendment, the law stipulated that such temporary laws could be issued with respect to "matters which require immediate measures or which necessitate urgent expenditures that cannot be postponed." However, the amended article remained ambiguously worded, allowing governments to loosely interpret it, especially the phrase "which necessitate urgent expenditures that cannot be postponed."

In any case, these provisions, which give the government the power to issue temporary laws from a theoretical point of view, are based on a false assumption in Jordan resulting from the executive authority's historical practice of dissolving most Houses of Representatives before the end of their term. However, the House of Representatives represents the first pillar of the system of government and therefore must not be absent. Also, the dissolution of the House of Representatives is an exception to the fundamental rule as stipulated in Article 68(2) of the constitution, which requires the holding of general elections during the four months preceding the end of the term of the house. If the elections do not take place by the end of the term of the house or if they are delayed for any reason, the house shall remain in office until the election of the new house.[24] This text is a pillar of the parliamentary system which prevents the absence of any of its constituent elements, especially the House of Representatives.

22 Amendment of Article 94 of the Constitution.
23 Constitution of Jordan (1952, rev. 2011), Article 82 (1) and (2).
24 Constitution of Jordan (1952, rev. 2011), Article 68.

As for the government's claims that it is unfair for deputies to compete with the rest of the candidates while in office, they reflect an understanding of the House of Representatives as a council that provides services; hence, deputies would be better placed to offer such services to their constituents. This perception contradicts the very essence of the parliamentary system, which is based on the fact that the House of Representatives has a legislative, political, and financial function; it is not a local services council, and deputies do not represent their constituency alone, but the whole nation. This is the norm in democratic countries.[25]

In order to better demonstrate that the dissolution of the House of Representatives is an exception to the fundamental rule stating that the absence of the House of Representatives is inadmissible, it is sufficient to review the provisions of Article 74 of the constitution, which requires a valid reason for the decision to dissolve the House of Representatives: "If the House of Representatives is dissolved for any reason, the new house may not be dissolved for the same reason." This constitutional obligation has been violated in most, if not all, the decisions to dissolve the House of Representatives, as they were all issued without any justification.[26]

Another amendment regarding the government's power to pass temporary laws[27] is the enforcement of a time limit for Parliament to approve temporary laws submitted by the government. The time limit is equal to two consecutive ordinary sessions, after which those laws will be annulled.

Despite the previous positive amendments, the constitutional legislator maintained the executive power's fundamentally dominant role over the legislative power regarding temporary laws by enabling the Council of Ministers and the King to decide on the temporary laws that Parliament rejected or that were not approved within the time limit. Indeed, the amended constitution maintained the provisions requiring the Council of Ministers to declare the temporary law null and void and the King to approve that decision in order for the temporary law to be effectively revoked, instead of determining its invalidity from the date of its rejection by Parliament, thus ensuring that the Council of Ministers does not abuse its power by not declaring it null and void or delaying such declaration.

2. Amendments to the Powers of the Judiciary

1. The constitutional amendments returned the power to try ministers to the civil courts.[28] Prior to the amendment, the Jordanian Constitution had created a special court, the High Tribunal, to try ministers for crimes committed in the performance of their ministerial functions. Although the constitution had

25 Leilah, *Political Systems*, 842-844.
26 Decisions to dissolve the House of Representatives in 2016 and 2020.
27 Constitution of Jordan (1952, rev. 2011), Article 94.
28 Constitution of Jordan (1952, rev. 2011), Article 55.

stipulated that the High Tribunal had to include five judges from the Court of Cassation in order of seniority, the presidency of the High Tribunal was held by the head of the state with three Senators as members.[29] Another amendment abolished the status of the House of Representatives as a public prosecutor before the High Tribunal in cases in which ministers are tried before it; instead, the House of Representatives has the right to refer ministers to the Attorney General through a majority vote of its members. In the event that the Attorney General accuses a minister referred to them by the House of Representatives, the said minister shall be suspended from office, and their resignation shall not prevent the institution of proceedings against them or the continuation of their trial.[30]

2. The right of the House of Representatives to decide on the validity of the prosecution of its members was abolished. Previously, any challenge related to the validity of the prosecution of any elected deputy was submitted to the House of Representatives, and the prosecution was not invalidated except by a decision issued by a two-thirds majority of the members of the House of Representatives. This competence was withdrawn from the house and given to the civil courts. Jurisdiction now lies with the Court of Appeal of the electoral district of the deputy whose representation is contested, and its decisions are final and not subject to appeal.[31]

3. One of the most dangerous amendments that have been falsely marketed as a victory for the rights and freedoms of Jordanians is related to the judiciary. Article 101 of the constitution was amended to stipulate that no civilian may be tried in a criminal case where all its judges are not civilians, with the exception of treason, espionage, terrorism, drug crimes, and currency forgery.

4. Although such an amendment could be seen as a guarantee for the rights and freedoms of Jordanians on the grounds that the general rule is that persons should be tried before civilian courts, in practice, the State Security Court has been constitutionalized. This is a military court that does not have fair trial guarantees, despite the fact that it is composed of civilian judges, for the following reasons:

   - The law on the State Security Court32 stipulates that the Prime Minister holds the right to form the court from one or more bodies of civilian or military judges, and military judges are appointed by a decision of the Prime Minister upon the recommendation of the Chairman of the Joint Chiefs of Staff, whereas the Judicial Council designates[33] civilian judges.[34]

[29] Before the amendment of the Constitution in 1958, the President of Jordan's highest civil court was the President of the High Tribunal. Under Article 122 of the Constitution, the High Tribunal interprets the provisions of the Constitution at the request of the Council of Ministers, the House of Representatives, or the Senate.
[30] Constitution of Jordan (1952, rev. 2011), Article 56.
[31] Constitution of Jordan (1952, rev. 2011), Article 71.
[32] State Security Court Law No. 17 (1959), and its amendments.
[33] When Article 101 of the Constitution was amended, the State Security Court Law gave the Prime Minister, upon the recommendation of the Minister of Justice, the right to appoint civilian judges before the law was amended at a later stage.
[34] State Security Court Law No. 17 (1959), and its amendments, Article 2.

- The State Security Court prosecutor is a military prosecutor in all cases, even in civilian trials, where the court's law requires the Army Commander to appoint the Director of Military Justice or one of their military legal assistants as a prosecutor in the court.[35]

- Under the law regulating it, the court was granted[36] broad jurisdiction beyond the crimes of treason, espionage, terrorism, drugs, and currency forgery, including crimes against the state's internal security, public safety, and crimes committed in violation of the provisions of the Protection of State Secrets and Documents Law.

- The constitution referred crimes falling under the Anti-Terrorism Law[37] to the State Security Court. This law includes vague provisions that have led to the trial of dozens of protesters and advocates for political and economic reform before that military court.[38]

- The law regulating the court granted the Judicial Police Corps (members of the Public Security Directorate or General Intelligence Department) broad authority beyond what is applicable in the criminal proceedings of civil courts in accordance with the Code of Criminal Procedure.[39] The Judicial Police Corps (security and intelligence personnel) were granted the authority to retain the defendant for a period not exceeding 7 days[40] instead of the 24 hours mentioned in the Code of Criminal Procedure. Judicial Police Corps are not judicial officials authorized to detain individuals, and Article 9 of the International Covenant on Civil and Political Rights requires that a defendant be brought promptly before a judge or an official authorized by law to exercise judicial functions such as the Public Prosecution, which is considered part of the judicial system in Jordan.

- The court legislation also grants the military Public Prosecution the powers to detain persons accused of misdemeanors for a period not exceeding 15 days renewable for a maximum of two months instead of the seven days renewable for a period not exceeding one month mentioned in the Code of Criminal Procedure.[41] This contradicts the constitutional and human rights principle that every accused person is innocent until proven guilty.

35 State Security Court Law No. 17 (1959), and its amendments, Article 7(1).
36 State Security Court Law No. 17 (1959), and its amendments, Article 3.
37 The Anti-Terrorism Law No. 55 (2006), as amended, is vague in its definition of a terrorist act, whereby acts that are not defined in the Criminal Code or have multiple interpretations, such as causing sedition, disturbing public order, or causing damage to the environment, were considered terrorist acts.
38 Several individuals and partisans have been prosecuted under the Anti-Terrorism Law before the State Security Court under vague charges such as disturbing relations with a foreign country because of social media posts expressing individual opinions on the policies of other countries.
39 Criminal Procedure Law No. 9 (1961) and its amendments.
40 State Security Court Law No. 17 (1959) and its amendments, Article 7(b)(1).
41 State Security Court Law No. 17 of 1959 and its amendments, Article 7(b)(2).

3. Amendments to the general mandate of the government and the House of Representatives' oversight power through the no-confidence mechanism

1. Prior to the amendments, Jordan's Constitution stipulated that the Council of Ministers shall be entrusted with administering all affairs of the state, both internal and external, with the exception of such matters as were or may be entrusted by the present constitution or by any legislation to any other person or body.[42] The amendment replaced the phrase "or by any legislation" with the phrase "or by any law." This meant that the Council of Ministers' jurisdiction may not be withdrawn except under the provisions of the constitution or a law passed by Parliament, rather than under any legislation, which may also include regulations issued by the government.

2. The voting mechanism on the ministerial statement for the government to obtain the House of Representatives' confidence was amended. Originally, the constitution required the issuance of a no confidence vote by the absolute majority of deputies in order for the government to be dismissed. However, after the amendment, the new government had to obtain the confidence of the House of Representatives by an absolute majority of its members. This is a better alternative as the government requires an absolute majority and cannot obtain the vote of confidence by a number of deputies lower than the absolute majority if any deputies abstain from voting for example.[43]

4. Establishment of new constitutional powers under the 2011 constitutional amendments

A. Independent Electoral Commission

An independent electoral commission was established to administer parliamentary, municipal, and any general elections in accordance with the provisions of the law. It also supervises any other elections that the Council of Ministers entrusts the commission to administer or supervise.[44]

The justification for the establishment of the commission was that the formation of an independent and impartial authority to administer parliamentary elections, instead of the government and its organs, would ensure an acceptable degree of integrity and impartiality, especially since parliamentary elections in the country have historically witnessed interference through electoral laws or direct tampering with the ballot boxes. In practice, however, this amendment did not achieve its stated purpose for the following reasons:

42 Constitution of Jordan (1952, rev. 2011), Article 45(1).
43 Amendment of Article 53 of the Constitution.
44 Adding a paragraph to Article 67 of the Constitution which included the establishment of the Independent Electoral Commission.

- The lack of guarantees of autonomy, mainly in the method of appointment.[45] The members of the commission are nominated by a committee chaired by the Prime Minister and which includes the Speaker of the Senate, the Speaker of the House of Representatives, and the President of the Supreme Judicial Council as members. This list is submitted to the King for approval. Since the King appoints three of the committee's members, including the President of the Supreme Judicial Council, this body is de facto linked to the executive power, whose authority and security agencies have been accused of electoral fraud andinterference.[46]

- Since the main reason for establishing an independent commission to supervise and administer elections is to prevent fraud, the fact that it is not given effective powers over the security agencies involved in maintaining electoral security makes the establishment of such a commission in Jordan futile.

- In light of the continued control of the executive power and its agencies over state decisions, the very act of resorting to so-called independent bodies gives cover, if not legitimacy, to the party violating the law by painting a false façade and creating an illusion of democracy and rule of law among the people. For example, the General Intelligence Department gives itself powers beyond the scope of the law, such as issuing "Certificates of Good Conduct" to citizens for work and education paperwork, which is practically a certificate of good political conduct.[47] It also interferes in parliamentary elections by supporting some candidates and opposing others, tampering with the will of voters before and during the electoral process, and influencing deputies' performance and opinions in cases in which the intelligence services seek to achieve certain parliamentary positions to serve a particular direction. This is in addition to the approvals issued by the intelligence services for appointments to governmental and non-governmental positions,[48] including within the Independent Electoral Commission.

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45 The commission shall consist of a chairman and four commissioners selected from a list of nominations drawn up by a committee chaired by the Prime Minister and with the Speaker of the Senate, the Speaker of the House of Representatives, and the President of the Supreme Judicial Council as members in accordance with Article 6 of the law regulating the commission.

46 In light of the subsequent amendments to the Constitution in 2016 and 2022, the King now appoints these members unilaterally without the signature of the Prime Minister and the minister concerned.

47 The General Intelligence Department states on its website that this certificate is issued at the request of some Arab and foreign embassies and bodies in Jordan for the purposes of granting work and residence visas, and that it does not force anyone to obtain it. However, the truth of the matter is that the authority to issue this certificate provides a means for pressuring individuals, because it allows the Intelligence Department to determine an individual's political conduct, which means the department keeps a political criminal record of citizens.

48 Sufian Obeidat, *Security Reform in Jordan: Where to Start?* (Beirut: Arab Reform Initiative, 2009).

B. Constitutional Court[49]

A constitutional court was created for the first time in Jordan, replacing the High Tribunal, which, prior to the amendments, was tasked with interpreting the provisions of the constitution and was considered an independent judicial body.[50]

The constitution defined the jurisdiction of this court, which is to review the constitutionality of the laws and regulations in force,[51] in addition to interpreting the provisions of the constitution if requested to do so by a decision of the Council of Ministers or by a decision of one of the two houses of Parliament by majority.

Although the establishment of the Constitutional Court was considered a step towards fulfilling popular demands, strengthening constitutional control of laws, and interpreting the provisions of the constitution, the following conditions were necessary to achieve the purpose behind the establishment of such a court:

- Ensuring the court's independence. The most important aspect of that independence lies in the power of appointment, dismissal, and conditions of membership, whereby the constitution stipulates that all members of the court, including its president, are appointed by the King. Also, the constitution did not stipulate that the court's judges cannot be dismissed; rather, it referred the method of termination of membership[52] to the law, which specified the instances as follows: either by the expiration of the six-year term, death, or resignation after having received the King's approval, or by royal decree to terminate the service of any member based on the recommendation of six other members exclusively for specific cases.[53]
- Limiting the bodies that have the right to appeal the constitutionality of laws and regulations to those that formulate and approve these laws and regulations, namely the Council of Ministers, the Senate, and the House of Representatives. Also, it is not enough for the court adjudicating a dispute between litigants to be convinced of the seriousness of the motion of the unconstitutionality of a law or regulation in

49 Reviewing the constitutionality of laws was a prerogative given to every judge in Jordan prior to the establishment of the Constitutional Court; however, the review only allowed judges to refrain from applying the law but not to repeal it. Accordingly, judicial review of the constitutionality of laws existed in Jordan prior to this amendment. The amendment limited its exercise to a single body; the Constitutional Court.

50 Article 58 of the Constitution states: "A Constitutional Court shall be established- by a law- the headquarters of which shall be in the Capital; shall be considered as an independent and separate judicial body; and shall be composed of nine members at least inclusive of the President, to be appointed by the King". Article 61 specifies the conditions for such appointment whereby a member must be Jordanian having the nationality of no other country, be fifty years of age, and have served as a judge in the Court of Cassation and the High Court of Justice, or be a university professor of law holding the rank of professor, or be a lawyer who has spent no less than fifteen years in the practice of law, or a specialist to whom the conditions of membership in the Senate apply.

51 Unlike the Moroccan constitutional legislator, the Jordanian constitutional legislator did not grant the court the jurisdiction to consider draft laws or regulations.

52 Constitutional Court Law No. 15 (2012) and its amendments.

53 Article 21 of the Constitutional Court Law specifies cases of membership termination by forfeiture of any of the conditions of membership, including ill health, loss of civil capacity, or the General Board's authorization to prosecute the member for a criminal complaint.

question to refer it directly to the Constitutional Court. This is subject to complex procedures, and the motion must first be referred to the Court of Cassation, which must also agree to refer this motion to the Constitutional Court unless the case is pending before the High Administrative Court, which may refer the case directly.[54]

5. Amendments related to the rights and freedoms of Jordanians

In 2011, several amendments related to the rights and freedoms of Jordanians were made to the Jordanian Constitution, most of which were pro forma and consisted of vague structural texts such as preserving the rights of young people, protecting motherhood, childhood, and the old-aged, guaranteeing the freedom of scientific research, defense of the country, its territory, the unity of its people, and maintaining social peace as a sacred duty of every Jordanian. Overall, these are supreme human values which do not need to be enshrined in the constitution. A paragraph was added to the amendment that criminalized attacks on the rights, freedoms, and sanctity of the private life of Jordanians.[55]

A text was also added preventing any party from restricting the movement of Jordanians. These are all positive texts, but the dilemma remains in the permanent gap between the text and its application. For example, there is a provision in the constitution that has existed since 1952 prohibiting the deportation of Jordanians, yet this did not prevent the government from forcibly deporting Jordanian citizens in 1999.[56]

An amendment was also made by which an article to the constitution was added stating that "The laws issued in accordance with this Constitution for the regulation of rights and freedoms may not influence the essence of such rights or affect their fundamentals."[57] Nevertheless, it is difficult to apply this provision to determine the extent to which many laws regulating freedoms affect the essence of those freedoms, given the complex procedures put in place by the constitutional legislator to appeal against the constitutionality of laws and due to the lack of real independence of the Constitutional Court, as previously indicated.

Since women were not represented on the Royal Committee for Constitutional Review, these amendments also did not explicitly reflect any development regarding women's rights and the prohibition of discrimination against them. Article 6 of Jordan's Constitution since 1952 stipulates in its first paragraph that Jordanians are equal before the law without discrimination in rights and duties, even if they differ in race, language, or religion. Although the term "Jordanians" refers

54 These procedures were amended by the 2022 amendments to the Constitution, whereby the motion is referred directly by the court hearing the case: Article 60(2) as amended in 2022, by the amendment published in Issue 5770 of the Official Gazette of 31 January 2022, and Law No. 22 (2022) mending the Constitutional Court Law.

55 Constitution of Jordan (1952, rev. 2011), Article 7.

56 The government of Prime Minister Abdul Raouf Al-Rawabdeh expelled Khaled Mashaal, head of Hamas' political bureau at the time, and forcibly placed some of the movement's leaders on a plane that came from Qatar to deport them despite the fact that they hold Jordanian citizenship. Bassel Rafaiyah, "Political Crisis between Jordan and Qatar," *Al Jazeera*, 16 June 2001.

57 Constitution of Jordan (1952, rev. 2011), Article 128(1).

to both men and women, there are many laws that still discriminate between them, such as the social security, retirement, personal status, and nationality laws, prompting many civil society organizations to demand the addition of the phrase "even if they differ in race, language, religion, or sex" to Article 6 of the constitution. However, this demand faced strong opposition on many fronts, from within and without the Royal Committee, the government, and Parliament, for fear that this would lead to amendments to the personal status law or that it would affect the demographic composition of Jordan.[58]

II. Three Stages of Constitutional Amendments in 2014, 2016 and 2022

These constitutional amendments have been grouped here together even though they were made over the span of eight years, because for the most part they shared the same objective: to concentrate power entirely and unilaterally in the King's hands at the expense of other authorities, especially the executive and the legislature. Even before these amendments were introduced, the King, contrary to the essence of the constitution, had appointed and dismissed governments, held and postponed elections, dissolved the House of Representatives without stating the reasons for it, and even appointed high-level positions in the state such as the Director of Intelligence, the Army Commander, the Director of Public Security, the Speaker of the Senate and its members, in addition to other sensitive positions. All of this was done of the King's own volition, and the role of high-level officials, from heads of government to ministers, was limited to signatures without any real say in decision-making. However, constitutional formalities at least required the signatures of the Prime Minister and the ministers concerned, which was necessary to preserve the system of government, at least formally, as well as the application of the rule that conjoins authority and responsibility. No system in the world may absolve the person to whom the constitution grants unilateral decision-making powers from liability for their actions and decisions.[59]

But these constitutional amendments gave constitutional cover to these powers, leading to the transfer of significant powers from the government to the King, who holds unilateral power. As a result, we now have to contend with a hybrid constitutional system. The constitutional system in Jordan is no longer parliamentary, because parliamentary systems are based on the separation of the King and government, whereby kingship is inherited and the government's power comes from the people. Because the people in this system are the source of power and they exercise it through a House of Representatives that embodies their will to legislate and exercise oversight, and gives its vote of confidence to a government that exercises executive power as the holder of a general mandate, the King holds no unilateral constitutional power under the parliamentary system, except to halt the amendment of the Constitution.[60]

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58 There are concerns among these parties that the provision relating to equality between men and women in the Constitution will allow women to pass on citizenship to their children, which will increase the percentage of Jordanians of Palestinian origin in the country and will lead to calls for amending the personal status law.

59 Article 30 of the Constitution states: "The King is the Head of State and is immune from every liability and responsibility".

60 Hammouri, *Constitutional and Legal Requirements*.

This is why the King was given immunity against all liability and responsibility. This immunity is protected through the criminalization of insults against the King. As long as the King does not exercise power, there is no fault of him that requires responsibility, based on the rule that states that the King can do no wrong.[61]

All these principles of the parliamentary system were violated by these constitutional amendments. The amendments undermined the very system of government, turning it from a parliamentary hereditary monarchy, into an unprecedented hybrid system that is effectively a return to absolute monarchy.

All these recent constitutional amendments aimed to concentrate actual state powers in the hands of the King, as explained below.

A. Expanding the King's Powers through the Constitutional Amendments of 2014 and 2016

The amendments mainly focused on Article 40 of the constitution, which regulated how the King could exercise his powers. Before being tampered with, this article stipulated that the King exercises his powers by royal decree, and that such decree should be signed by the Prime Minister and the minister(s) concerned, and that the King expresses his consent by affixing his signature above the aforementioned signatures.

This means that even if the King issues an order to his Prime Minister or to a minister and they carry it out, and then it turns out to be erroneous, the King is still exempt from responsibility because the Prime Minister would be held liable as he could have avoided this liability by exercising his right to not execute the order.

In 2014, Article 40 of the constitution was amended whereby a clause was added to it stating that the King exercises his powers by royal decree without the signature of the Prime Minister or the minister(s) concerned when appointing the Chairman of the Joint Chiefs of Staff (Army Commander) and the Director of the General Intelligence Department. In 2016, the King's unilateral powers were expanded by adding a new paragraph to Article 40 of the constitution, which gave him the power to appoint the Speaker of the Senate and its members, the president and members of the Constitutional Court, the head of the Judicial Council, and the Director-General of the Gendarmerie without the signature of the Prime Minister or the ministers concerned.

The amendments also changed the term of the presidency of the House of Representatives, where it became two years instead of one year. An amendment was also made to Article 50 of the constitution which prevented the government from being considered resigned in the event of the death of the Prime Minister. This amendment only suggests a tendency to reduce the regard for and importance of the Prime Minister, who is supposed to be the leader of the majority – that is, if the government were truly a parliamentary government. What if that

[61] Mohammed Hammouri, "Farewell, Constitution of 1952: May God have Mercy on You, the Finest of Constitutions," *Arab Jordan*, 25 April 2016.

parliamentary government is a coalition government, and the Deputy Prime Minister or the most senior minister belong to the minority party participating in a governmental coalition or do not belong to any party? Is it acceptable for the parliamentary government to be headed by a minister from the parliamentary minority or a technocratic minister if the Prime Minister dies?[62]

An amendment to the 2011 Constitution that prevented foreign nationals from holding the position of minister, membership of the Senate, and running for parliamentary elections was reversed, and foreigners were permitted to do so again.[63]

B. Completing the Coup against the Parliamentary System through the Constitutional Amendments of 2022

In mid-2021, King Abdullah II formed a committee called the Royal Committee to Modernize the Political System and entrusted its chairmanship to former Prime Minister Samir Al-Rifai, who was dismissed in 2011 in response to popular movements demanding reform at the time. The King defined the tasks of that committee by reviewing the electoral and political party laws and constitutional amendments exclusively related to those laws. The committee comprised 92 members, and some opposition factions, including Islamists, participated in it. Its functions included making recommendations for the development of legislation governing local administrations, expanding the scope of participation in decision-making, and creating a legislative and political environment that guarantees the role of youth and women in public life.[64] Although the number of women was considered high in comparison to the previous royal commissions (17 women out of 92 members), their representation was on an individual basis, as women's civil society organizations, especially the Women's Union, which dates back to the 1940s, remained absent. The Jordanian Women's Union, as well as the Jordanian National Commission for Women, established by a 1992 decision of the Council of Ministers, and which is considered the official commission for women in Jordan, were also absent. This reflects the lack of seriousness in ensuring the participation and institutional representation of women's demands within the royal committee.

The establishment of the committee was accompanied by the promotion of the idea that these laws will encourage partisan and parliamentary life, leading to parliamentary governments that are supposed to govern through parties or alliances within the House of Representatives and have general jurisdiction over the internal and external affairs of the state.

62 Obeidat, *A Reading of the Jordanian Constitutional Amendments 2016.*
63 Articles 42 and 75 of the Constitution as amended in 2016.
64 "The King Entrusts Al-Rifai with Chairing the Royal Committee to Modernize the Political System," *Royal Hashemite Court Official Site,* 21 June 2021.

All of this rhetoric, of course, is in contrast with the actual practices of the authorities, including the insistence on appointing a president who had been dismissed based on the people's demands for political and economic reform.65

In any case, and since this paper is not related to the outputs of that committee, we found it necessary to provide context for the circumstances that accompanied the recent constitutional amendments in 2022, which came as a result of the committee's work and the King's guarantee of its outputs.

The executive authority and its organs have sought to show that the way in which the constitutional amendments were issued in 2022 was different from all the constitutional amendments that preceded them, given that they were examined and studied by the Committee to Modernize the Political System, which included many representatives of civil society organizations, including some opposition parties, thus suggesting that these amendments were made through reasonable popular participation. However, this narrative does not match the fact that all the amendments proposed by that committee were limited to proposals related to amendments to the electoral and party laws. In addition, the amendments related to promoting the participation of women and youth were vague and did not result in any real changes. Although the composition of the committee appeared pluralistic, the majority of its members were from groups whose interests coincide with those of the executive power. This was later reflected in the appointment of some members of the royal committee as ministers and members of the Senate. In any case, since the recommendations of the committee were approved by the government and referred as part of the same package with the constitutional amendments proposed by the government to Parliament, we will address the most important of these together, as they were issued from a constitutional point of view by one party—the government.

While the government adopted all the recommendations of the Royal Committee to Modernize the Political System, it added a set of constitutional amendments without conducting any real or even pro forma social dialogues prior to referring those amendments to Parliament. The reasons for all the proposed constitutional amendments (including both the recommendations of the Committee to Modernize the Political System and the amendments proposed by the government itself) were expressed as follows:

> "Consolidating the principle of the rule of law, enshrining the principle of separation of powers, and enhancing the autonomy of parliamentary work in a way that ensures the effectiveness of programmatic blocs, guaranteeing the constitutional and oversight role of members of Parliament, developing and promoting legislative performance, and empowering women, the youth, and people with disabilities and enhancing their role and status in society. The amendments also aim to develop the mechanisms of parliamentary work to keep pace with the political and legal developments witnessed by the constitutional system since the issuance of the constitution in 1952. The purpose is to enhance party activity and political life in general, grant members of the House of Representatives the right to choose the Speaker of the house and evaluate their performance annually, grant two-thirds of the members of the house the right to dismiss its Speaker, and grant immunity to political parties, protecting them from any political influences and giving the independent body the jurisdiction to supervise the establishment of parties and follow up on their affairs, in its capacity as a neutral body independent of the government.

65 "The King of Jordan Dismisses Al-Rifai Government," *Al Jazeera,* 1 February 2011.

> This promotes the principles of justice, equality, and equal opportunities, prevents any governmental influence, unifies case law resulting from appeals against the validity of deputies' membership, enshrines the principle of transparency and equal opportunities among candidates to parliamentary elections, prevents conflicts of interest, and tightens restrictions on actions that members of the Senate and House of Representatives are prohibited from carrying out during their term. The National Security and Foreign Policy Council shall be established to handle all issues related to the defense of the Kingdom, national security, and foreign policy."[66]

These amendments, like those of 2014 and 2016, constituted a systematic process aimed at destroying the pillars of the parliamentary system and fully concentrating executive power in the hands of the King while denying the government any role, even a nominal one. As such, Article 40 of the constitution was voided of meaning. This article, which is considered one of the pillars of the concept of constitutional monarchy, had previously stipulated that the King does not exercise his powers except by signing a decree coupled with the signature of the Prime Minister or the ministers concerned, in the sense that all decisions issued by royal decree are actually decisions issued by the Council of Ministers and that the King's signature is merely symbolic, as the absence of ministerial signatures from these decisions renders them null and void.[67]

The most relevant 2022 amendments to the constitution are addressed below:

1. Article 40(2) of the constitution was amended by adding new provisions giving the King the power to appoint both the Chief Justice and the Head of the Judicial Council, accept their resignations and terminate their services, appoint the Chief of the Royal Hashemite Court, the Minister of the Royal Hashemite Court, and the King's advisers, accept their resignations, and terminate their services, without needing the signature of the Prime Minister and the minister(s) concerned on the royal decree.[68]

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66 The reasons given by the government to justify the constitutional amendments can be consulted here: https://bit.ly/3UdRBZU.

67 A decision had been previously unanimously issued by the High Tribunal on 4 January 1956 (Decision No. 1 of 1956, published on page 1149 of the Official Gazette No. 1255 dated 5/1/1956). The High Tribunal had convened in order to interpret Article 34 (3) of the constitution and determine whether it allows the dissolution of the House of Representatives by a royal decree signed unilaterally by the Prime Minister or whether the decree must be signed – along with the King – by the relevant minister(s) in addition to the Prime Minister. The High Tribunal was also required to determine whether a royal decree issued to dissolve the House of Representatives and unilaterally signed by the Prime Minister meets the constitutional requirement. The decision referred to: Article 34 of the Constitution, which relates to the King's power to dissolve the House of Representatives; Article 40, which stipulates that the King exercises his powers by royal decree and that royal decrees shall be signed by the Prime Minister and the relevant minister(s) and that the King expresses his consent by affixing his signature above the mentioned signatures; Article 30, which states that the King is the Head of State and is protected from all liability and responsibility; Article 51, which indicates that the Prime Minister and ministers are jointly responsible before the House of Representatives for the public policy of the State; and Article 49 of the Constitution, which stipulates that the King's verbal or written orders do not absolve ministers of their responsibility. The decision concluded that although Article 34 granted the King the right to dissolve the House of Representatives, Article 40 sets out the manner in which the King exercises that right or any of his other rights related to public affairs by royal decree signed by the Prime Minister and the relevant minister(s). This rule derives from the basic principle that absolves the King from any responsibility and places it on ministers. Since the Council of Ministers, in carrying out its executive power, is responsible for public policy, it must participate in signing the decrees in which the King exercises his powers in order to assume responsibility in accordance with the rules of ministerial responsibility stipulated in the constitution.

68 This amendment was not proposed by the Committee to Modernize the Political System, but by the government.

2. The Independent Electoral Commission was granted the power to consider and decide on applications for the establishment of political parties[69] and other pro forma amendments that do not enshrine any rights and do not result in substantive provisions. These include the amendment of the title of Chapter II of the constitution, which was changed from "Rights and Duties of Jordanians" to "Rights and Duties of Jordanian Men and Women" without it translating into a substantive provision. The amendments also included the state's guarantee of women's empowerment and support to play an active role in building society in a way that ensures equal opportunities on the basis of justice, equity, and protection from all forms of violence and discrimination. The state also ensures the promotion of the values of citizenship, tolerance, the rule of law, and empowering young people to contribute to economic and social life by supporting their capabilities as much as possible.[70]

3. Article 52 of the constitution was amended. It stipulated that the Prime Minister or a minister who is a member of the Senate or House of Representatives holds the right to vote in his chamber and to speak in both chambers. This article also prohibited a minister receiving a ministerial salary from receiving salaries from either of the two chambers at the same time. The Prime Minister, ministers, or their representatives now have the right to speak in the Senate and the House of Representatives and to take precedence over other members in addressing the two chambers.

4. The aim of this amendment is to harmonize this constitutional provision with the amendment to Article 76 of the constitution, which, for the first time, prohibited a person from being simultaneously a member of the Council of Ministers and of the Senate or the House of Representatives.

5. In addition, this amendment further erodes the principles of the parliamentary system, which is basically based on the fact that the party or coalition of parties that achieve a majority in parliamentary elections assigns its president with forming the government while having full jurisdiction to choose its members, whether from within the parliament or not.

6. The mechanism of appeal before the Constitutional Court[71] was amended so that courts of different types and degrees that hear a lawsuit in which the constitutionality of a law or regulation is challenged, have the right to refer it directly to the Constitutional Court without the need for the referral to be made through the Court of Cassation as was stipulated in the previous text.

7. Article 54 of the constitution was amended to prevent the Prime Minister from which the House of Representatives withholds confidence from being tasked with the formation of the next government. This amendment is superfluous, as the House of Representatives holds the power to approve the formation of any new government, whether with or without that same Prime Minister, by submitting a ministerial statement to obtain confidence in any government for the purposes of exercising its work.

69 Article 67 (b-2), of the Jordanian Constitution as amended in 2022.
70 Article 6 (2), (5), (6) and (7) of the Jordanian Constitution as amended in 2022.
71 Article 60 of the Jordanian Constitution as amended in 2022.

8. The age of membership of the House of Representatives was reduced from thirty years to twenty-five years, and a constitutional provision was developed allowing the introduction of additional conditions for membership in the House of Representatives under the electoral law in order to allow parties to participate in parliamentary elections through lists limited to partisans.[72] The term of the presidency of the House of Representatives was reverted to one year as it was in the 1952 Constitution after it had been amended to two years in 2016,73 in addition to giving two-thirds of the members of the House of Representatives the right to dismiss its Speaker.[74] An amendment was made to consider the resignation of a deputy effective from the date of its submission without requiring its approval or its rejection by the house.[75]

9. In relation to the Senate and the House of Representatives' role to oversee the budget of the government and its bodies, Article 112 (1) of the constitution was amended so that the government is obligated to submit a general budget draft which includes the Governmental Units Budgets to Parliament. The text previously required the submission of the Governmental Units Budgets in a separate draft law. Article 119 of the constitution was also amended so that the Senate and the House of Representatives deliberate the report of the Audit Bureau during the same session in which it is submitted or the following session at the latest.[76]

10. The financial oversight role of Parliament does not actually apply to the budget of the Ministry of Defense/Armed Forces, which includes the budget of the General Intelligence Department, because it is listed in the general budget as a closed item and its figures are not discussed.[77] The General Intelligence Law stipulates that the Director of General Intelligence shall inform the Prime Minister only of the estimated annual expenditure and the outcomes of the annual audit report of the General Intelligence, and the General Intelligence budget shall be listed within the state budget as one item only without any details.[78]

11. Under these amendments, the laws governing elections, political parties, the judiciary, the Independent Commission, the Audit Bureau, the Integrity and Anti-Corruption Commission, nationality, and personal status have been fortified, so that the majority required to approve or amend these laws became a two-thirds majority of the members of the Senate and the House of Representatives instead of the majority of the votes of the members present, similar to all decisions of the two chambers regarding other laws. This restricts the role of any future parliamentary majority.

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72 Article 70 of the Jordanian Constitution as amended in 2022.
73 Article 69 (1) of the Jordanian Constitution as amended in 2022.
74 Article 69 (c-3) of the Jordanian Constitution as amended in 2022.
75 Article 72 of the Jordanian Constitution as amended in 2022.
76 Article 119 (1) of the constitution stipulates that: "An Audit Bureau shall submit to the Senate and the House of Representatives a general report containing the irregularities committed, the liability resulting therefrom, its opinions and comments at the beginning of every ordinary session and whenever either House requests it to do so."
77 None of the previous houses of the National Assembly have ever formed a security and intelligence committee as is the case in advanced democracies.
78 General Intelligence Law No. 24 (1964), Article 10.

The most serious amendments to the constitution in 2022 were the establishment of a National Security Council consisting of the Prime Minister, the Minister of Defense, the Minister of Foreign Affairs, the Minister of Interior, the Army Commander, the Director of the General Intelligence Department, the Director of Public Security Directorate, and two members appointed by the King in accordance with the provisions of Article 40 (2) of the constitution (that is, without the signature of the Prime Minister and the minister concerned).[79] This council has been granted powers in security, defense, and foreign policy matters. The council convenes, when necessary and at the request of the King, in his presence or in the presence of his delegate, and its decisions are enforceable upon approval by the King.[80]

This newly established authority transformed the system of government in the Hashemite Kingdom of Jordan into a hybrid constitutional system, and it nullified the principle that the people are the source of power because the people no longer hold any power, as all powers were concentrated in the hands of the King as follows:[81]

- The council was given general jurisdiction over the internal and external affairs of the state by granting it jurisdiction related to security, defense, and foreign policy. The council is not an elected body, neither directly nor indirectly, and therefore the constitutional principles upon which the parliamentary system is based have been eroded. The most important of these principles is that the people are the source of all power and that the House of Representatives exercises power in the name of the people through general elections that embody the people's will.
- The constitution requires the state and all its authorities to implement the decisions issued by the council as soon as they are approved by the King, meaning that neither Parliament, nor the government, nor the judiciary have any power to oppose the decisions of the council.[82]
- This unelected council, which does not embody the will of the people, and which has been granted general jurisdiction over all state affairs, is not accountable because the King appoints the majority of its members, namely the Director of the Public Security Directorate, the Director of the General Intelligence Department, the Commander of the Army, and two members chosen by royal decree without being signed by the Prime Minister or ministers concerned.
- Even if one assumes that the Prime Minister, the Defense Minister (who is usually the Prime Minister),[83] the Foreign Affairs Minister, and the Minister of Interior represent a parliamentary government that has the support of a majority of the members of the House of Representatives, they are still a minority within the council.

79 Article 122 of the Jordanian Constitution as amended in 2022.
80 The amendments issued by the government stipulated that the King presides this Council, but the House of Representatives amended the article as per its current content.
81 This amendment was not part of the recommendations of the Committee to Modernize the Political System; it was added by the government.
82 Article 122 of the Constitution, which was added by the amendments of 2022.
83 From 1972 to the present day, the Prime Minister has held the portfolio of the Ministry of Defense: https://www.pm.gov.jo/ar/CustomPages/SearchGovernment.

Therefore, the result of these constitutional amendments is that the person who exercises absolute rule over all state affairs cannot be held accountable according to the constitution. Paradoxically, all these constitutional amendments aimed to hand the elected governments that the people had demanded for decades the reins of administration without granting them any real power.

Conclusion

During the period that came to be known as the Arab Spring, a Jordanian popular movement emerged with a set of demands. These included turning the Jordanian monarchy into a constitutional monarchy to limit the powers of the King. The people also demanded that governments be representative of a parliamentary majority that embodies the will of the people through a fair electoral law and a transparent election process. The protesters demanded security, political, social, and economic reforms and the establishment of a constitutional court. To calm popular discontent, the King accepted constitutional amendments. But soon afterwards, Jordanians were horrified by the bloody events in Egypt and Syria. This put an end to their movement, and the authorities set up a scenario where they were to implement reform in exchange for security and stability.[84] Consequently, constitutional and political reforms that were possible were no longer pursued, and the principles upon which the Jordanian Constitution was based were eroded.

The Jordanian Constitution lost its identity and stature among the political systems known to the world today. The Jordanian constitutional system cannot be considered a parliamentary system, because the latter is based on the separation of the King and the state, where kingship is rooted in inheritance and government comes from the people, as stipulated in Article 24 (1) of the Jordanian Constitution.[85]

Parliamentary and presidential systems in the world are founded on a fundamental principle that guarantees the of power, which is that authority is synonymous with responsibility. However, the amendments to the Jordanian Constitution have granted the King exclusive powers without making him accountable for their exercise.

In the absence of any theoretical description of the system to which the Jordanian Constitution belongs, one can only conclude that Jordan has become a one-person constitution and a one-person state.

84 Obeidat, *A Reading of the Jordanian Constitutional Amendments 2016.*
85 Hammouri, "Farewell, Constitution of 1952".

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