# Transitional Constitutionalism and the Case of the Arab Spring

## I. Introduction.

In the past two years Egypt has gone from being a beacon of hope for liberalizing change in the Middle East to a stark reminder of the potentially explosive nature of political reform. Events in Egypt form a microcosm of the broader struggles that appear to be unfolding in the Middle East. A discredited and dictatorial head of state has been removed. Democratic elections have been held. A government was formed following election by a majority. So far these events appear consistent with the pattern of revolution – the removal of an illegitimate leader and his replacement with a democratically elected government that is representative of the people. What happened next, however, demonstrates the complex relationship between law, politics and transition in the Middle East. Eighteen months after the Islamist party of Mohammed Morsi was elected, and following further mass mobilisations that demonstrated the depth of division that existed over the actions of the new government, the government was overthrown in a military coup. While those in charge of the new military government represent themselves as pro-democratic and secularizing, it is hard to escape the irony that the Egyptian people, having overthrown one military dictator, are now being ruled, once again, by a leader installed by the military.

In an attempt to reassure the country as to its intentions, the army presented a roadmap for transition, central to which was the amendment of the constitution enacted by the previous government. In this way the constitution has become the central focal point of the Egyptian transition. The use of the language of transition by the Egyptian government raises interesting questions about the adoption of such a framework. It increasingly appears that the language of transition imports a degree of legal and moral legitimacy to those who claim it, particularly in the eyes of the international community.[1] However in these circumstances it is far from clear that the dominant international understanding of transition fits with the political dynamics on the ground.

This paper seeks to explore the relationship between the framework of transition and the enactment of a new constitution for Egypt. It does so by using the relatively under explored concept of transitional constitutionalism, interrogating some of the key claims on which transitional constitutionalism is based, and questioning their application in the Egyptian context. The article first considers what is meant by transitional constitutionalism and the key features that make the idea of a transitional constitution different from more traditional ideas. It then moves on to address in more detail some of the problems associated with the current model of transitional

[1] See for example the adoption of the label 'Transitional Council' by rebels in Libya prior to the death of Ghadaffi. See Stefan Talmon,' Recognition of the Libyan National Transitional Council' ASIL Insight, June 16, 2011; a similar model has now been adopted in Syria. See 'Syrian Opposition Submits Plan for Transitional Government' Al-Jazeera America, February 12 2014.

constitutionalism, in particular noting the potential for overly legalistic analysis of the role of constitutions and their associated institutions which obscures the transformative potential that is intended to flow from transitional constitutionalism. Finally the article explores some of the primary cleavages whose existence challenge the idea of a one size fits all approach to constitutionalism, and concludes by suggesting that the transformative potential of transitional constitutionalism is being lost as a result of the emphasis placed on liberal frameworks. It advocates viewing international law as a framework to facilitate participation rather than as providing a blue print for constitutional reform that can transcend political conflict. The article draws on the example of Egypt to illustrate some of the assumptions that are made regarding the purpose of constitutionalism and the impact that these assumptions have on the ability of the constitution to deliver transitional aims.

## II. Transition and the Constitutional Moment

The linking of transition and constitutional processes is not unique to Egypt.[2] There is a long history of international assistance for constitutional processes in the aftermath of political change, whether decolonization or following conflict.[3] However recent years have seen the gradual incorporation of principles of constitutionalism into the discourse of transition. Constitutions, it is argued, 'can secure functions of securing and sustaining short term and long term governance, which place [them] within a quintessentially transitional rubric…' [4] While still a relatively under theorized concept, particularly in the legal literature, the idea of transitional constitutionalism, or at least the idea that the constitutional process fits within the normative framework of transition, is increasingly evident in both theory and practice.[5] Similarly there is an increasing trend to view peace agreements that mark the onset of transition as a constitutional moment, thereby making constitutionalism immanent to the concept of transition.[6] There is an inherent expectation that the design of the post conflict state will not only reflect international standards of rule of law and human rights protection, but that these standards will be incorporated into the constitutional framework. [7] This represents a shift away from viewing transition as a purely

[2] See Kirsten McConnachie & John Morrison, 'Constitution Making, Transition and the Reconstruction of Society' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart, 2008)

[3] Vijayashri Sripati, 'UN Constitutional Assistance Missions in Comprehensive Peace Missions: An Inventory 1989-2011' (2012) 19 *International Peacekeeping* 93: Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' (2001) 95 *American Journal of International Law* 583; Yash Ghai, 'Universalism and Relativism: human rights as a framework for negotiating interethnic claims' in William Twining (ed) *Human Rights: Southern Voices* (Cambridge University Press, 2009);

[4] McConnachie & Morrison (n2) 80

[5] See Hallie Ludsin, 'Peacemaking and Constitution Drafting: A Dysfunctional Marriage' (2011) 33 University of Pennsylvania Journal of International Law 239

[6] Christine Bell, *On the Law of Peace: Peace Agreements and the* Lex Pacificatoria (OUP 2008) 392

[7] See Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Situations, (2004) UN Doc S/2004/616 on the use of normative principles to guide transition.

descriptive term, towards its use as a normative concept.[8] In this way the idea of transition presents an alternative model of political change that replaces the spontaneity of revolution with a more gradual approach.

While the concept of transitional constitutionalism may be relatively new,[9] war, revolution, and the founding and re-founding of law are not. The traditional vision of constitutionalism is that it reflects or codifies consensus among the population as to how the state should be organized.[10] This can be contrasted with the idea of constitutionalism in the aftermath of revolution, where rather than reflecting an existing and settled consensus on the constitution, it marks a break or a rupture from what has gone before.[11] The effect of the constitution in these contexts is to constitute the new nation with the authority of the revolution. This model does not necessarily seek to achieve consensus, but rather to enshrine political gains into constitutional law, albeit in the name of the people. Under this model the constitution becomes the necessary and final stage of the revolutions.[12]. However it has been argued that neither of these models, either of classical constitutionalism, or of revolutionary constitutionalism, adequately capture the dynamics of constitutionalism in the context of modern transitions.[13] This is because in many contemporary transitional contexts power has not been seized as the result of a complete revolution or overthrow of a prior regime, but as the result of a negotiated settlement or transfer of power which requires more delicate negotiation of the future of the state. Constitution making in these contexts has therefore been interpreted as playing a more critical or transformative role in that it is 'not only constituted by the prevailing political order but is constitutive of political change'.[14] This suggests that the role of the constitution is to guide such processes of negotiation rather than simply to codify a finalized outcome. A transitional constitution is required to be both backward and forward looking, in that in addressing the future, it must take account of the history of injustice that has given rise to the transition.[15] Now it could be argued that this interpretation suggests nothing new, in that all constitutions will be the result of political and social upheaval. This is as true of modern liberal democratic constitutions as it is for those arising from war or revolution. The re-founding of law will always be intended to mark a break from the past, but will bear within it the traces of that past that have shaped the history and narrative of the state and its

[8] See Ludson (n 5); Vivien Hart, 'Constitution Making and the Transformation of Conflict' (2001) 26 *Peace and Change* 153

[9] The term was first used by Teitel in her 2000 work *Transitional Justice*, but has lain dormant until relatively recently.

[10] Ruti Teitel, *Transitional Justice* (OUP, 2000)

[11] For detailed discussion of the difference between these two models see *ibid* 191-194

[12] Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009, 2055

[13] Teitel (n 10)

[14] Teitel (n 10) 191

[15] McConnachie and Morrisson suggest that the notion that the past must be addressed in a constitutional document has become increasingly mainstreamed since the South African Transition. (n 2) 83

constitution. [16] However the difference that emerges between classical and revolutionary understandings of the constitution and the transitional constitution is the extent to which law is expected to shape rather than reflect that national identity.[17] The underlying premise of the model of transitional constitutionalism is that the constitution itself will provide a focal point around which the citizens of a state can unite, representing the constitution of a nation.

In this context Teitel suggests that the idea of 'foundation' can bridge the divide between classical and revolutionary understandings of constitutionalism in that by responding to a legacy of injustice, the constitution itself is used to construct a new national identity, and is therefore constitutive rather than reflective of political change.[18] Constitution drafting in this context embodies the goals of peacemaking, such as ending violence and entrenching the rule of law, aimed at responding to past injustices by providing a new liberal framework for the state.[19] By doing this transitional constitutionalism uses the constitution as a tool to deliver peace.

Teitel summarizes the claims made for transitional constitutionalism as follows;

> Transitional constitutionalism provides an alternative paradigm. The paradigm's distinctive paradox is that ... constitutionalism does not stand independently from the political order but is inextricably enmeshed in transformative politics.[20]

The role of a constitution, when viewed through a transitional lens, is not simply to mark a break from the past and found a new legal order, its role is rather to acknowledge that past. As a result, Teitel suggests, 'what is considered constitutionally just is contextual and contingent, relating to the attempt to transform legacies of the past.'[21] To do this, the model of transitional constitutionalism draws on international law to provide a normative basis for reform, grounded in positive law, but also incorporating values associated with natural law.[22] This creates the possibility of a transformative approach to constitutionalism that remains rooted in existing principles of international law.

### A. The Backward Looking Constitution

The primary role of the constitution in transition is to distance a successor regime from an abusive predecessor. The commitment of the new regime to democratic principles is demonstrated through the prosecution of human rights abuses and strict commitment to the rule of law.[23] The way in which the constitutional aspect of

[16] See Jacques Derrida, 'Declarations of Independence' in Elizabeth Rottenbert (ed) *Negotiations: Interventions and Interviews, 1971-2001* (Stanford University Press, 2002) 46
[17] Ludsin (n 5) 264
[18] Teitel (n 10)
[19] Secretary General's report (n 7)
[20] Teitel (n 10) 210
[21] Teitel (n 12) 2057
[22] Teitel (n 10) 21
[23] The Report of the Secretary General (n 7) articulates a common language for justice in these contexts, including a detailed definition of rule of law. It is now this definition that underpins international law and policy in these contexts.

transition has been interpreted has aimed to bridge the divide between ending conflict and delivering lasting political settlement.[24] Rather than simply helping to consolidate an already agreed successor regime, the role of transitional constitutionalism is to shape the very processes and outcomes of transition.

To achieve this, transitional constitutionalism draws on internationalized standards of justice to ensure that the normative goals of ensuring accountability for human rights abuse and ensuring non-recurrence through the entrenchment of democracy are met.[25] In this regard we see the distinction between constitutionalism viewed through a transitional lens and constitutionalism viewed through the lens of international law. International law has traditionally been concerned with constitutionalism as a procedurally defined process.[26] While constitutional reform has often been required or legitimated by international action such as UN resolutions or peace agreements,[27] such documents have to date been silent on the substantive outcome of the process.[28] In contrast, the new transitional model suggests that a particular substantive outcome is necessary to address past legacies of injustice, as a way of overcoming or transcending domestic political divisions.[29]

The transitional constitution will define the boundaries of politics and justice in the new order, and as such does not simply reflect an existing national unity, but rather plays a crucial role in the construction of the new society.[30] It will 'delineate the normative basis for executive government',[31] and will ensure the participation of previously excluded or marginalized political and social groupings. Included within this goal are, for example, the definition of equality provisions and addressing questions of social justice such as the distribution of property and the recognition and entrenchment of social and economic rights.[32] This is seen particularly prominently in the interim constitution of South Africa, for example, where questions of equality were placed at the forefront of the constitution, making a clear statement of a new order.[33] The entrenchment of substantive human rights principles is the way in which

[24] Ludsin (n 5)
[25] Teitel (n 10)
[26] Internationally assisted constitutional processes date back to the process of decolonization. Sripati (n 3). The emphasis of these processes has always been on ensuring participation and local ownership of processes. See Guidance Note of the Secretary General, 'United Nations Assistance in Constitution Making Processes' (April 2009)
[27] See for example UN sponsored constitutional processes in Cambodia, East Timor, and more recently Somalia, all of which were mandated by the Security Council acting under Chapter VII. For a more detailed discussion see Catherine Turner and Ruth Houghton, 'Constitution Making and Post Conflict Reconstruction' in Matthew Saul and James Sweeny (eds) *The Role of International Law in Post Conflict Reconstruction* (Routledge, 2015) (forthcoming)
[28] See Phillip Dan and Zaid Al-Ali, 'The Internationalised "Pouvoir Constituent" – Constitution Making Under External Influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck Yearbook of United Nations Law* 423 on the procedural nature of the process in East Timor. The procedural focus of UN assistance is also evidence in the Secretary General's Guidance note of 2009 (n 26)
[29] See Teitel (n 10); See also Ludsin (n 5)
[30] Teitel (n 12) 2062
[31] McConnachie and Morrison (n2) 79
[32] Aeyal M Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 *Standford Journal of International Law* (n 7) 57; See also Antoine Buyse, *Post Conflict Housing Restitution: The ECHR Perspective* (Intersentia 2008)
[33] See Teitel (n 10)

the constitution responds to a legacy of injustice. However the forward-looking element of transitional constitutionalism also requires that the institutions put in place are stable and capable of preventing the recurrence of violence.

### B. The Forward Looking Constitution: The Constitution and 'The People'

Transitional constitutionalism is increasingly associated with peace and security in international law.[34] Constitutional reform is now seen by the international community as a necessary means of ensuring that a post conflict or post revolution state complies with its international obligations, increasingly interpreted as complying with best practice.[35] Therefore the significance of transitional constitutionalism is not limited to the domestic sphere. While it is ostensibly intended to redress the balance of power within a state, the nature of the constitution remains of great significance internationally. International law exerts an increasing substantive influence on the constitutional process.[36] This has been particularly evident in the case of states subject to administration by international organizations, but remains equally true of states attempting to navigate their own transitions.[37]

International involvement does not begin with the constitution, but rather the substantive content of the constitution will reflect a much longer process of engagement with international law and international actors that serves to frame the constitutional process from the outset. This may begin with a United Nations authorized intervention in a state, as was the case in Cambodia or East Timor, for example.[38] However, more subtly, it may begin with an internationally mediated peace agreement. Often parties to the conflict and peace mediators will draw on international law guidelines, such as UN resolutions, recommendations, treaties, or even established principles of customary international law to frame the process and substance of an agreement.[39] Hay describes how a distinctive feature of internationalized constitutions is their 'normative embedding in the discourse, framework, principles and rules of international law.'[40] These principles will underpin much of the negotiating process, particularly where an international actor such as the UN is involved in brokering the deal. This reflects the increased willingness of the international community to actively oversee and evaluate constitutional processes,

[34] Report of the Panel on United Nations Peace Operations, UN Doc A/55/305-S/2000 reprinted in 39 ILM 1432 (2000) (Brahimi)
[35] See Emily Hay 'International(ized) Constitutions and Peace Making' (2014) 27 *Leiden Journal of International Law* 141; See also Dan and Al-Ali (n 28)
[36] Hay (n 35)
[37] See Noa Feldman, 'Imposed Constitutionalism' (2005) 27 *Connecticut Law Review* 857
[38] See Security Council Resolution 1272 (2002) on East Timor, and Resolution 746 (1992) on Cambodia. For more detailed discussion see Turner and Houghton (n 27)
[39] See Hay (n 35) 145; See also Visar Morsina et al, 'The Relationship Between International Law and National Law: A Constitutional Perspective' (2011) *International Journal of Constitutional Law* 274 on the way in which international law became embedded in Kosovo as a result of the Athissari peace plan; See also Paul Mageean and Martin O'Brien, 'From the Margins to the Mainstream: Human Rights and the Good Friday Agreement' (1998-1999) 22 *Fordham International Law Journal* 1499
[40] Hay (n 35) 145

and with them the emerging governance structures of transitional states.[41] This is particularly true in the areas of human rights and democracy, evident in the incorporation of oversight mechanisms into the substance of peace agreements.[42] It is also reflected in the broader range of issues considered to be of international concerns, for example the inclusion of women within negotiating processes, and the protection of minorities within constitutional settlements.[43]

This can be read as a gradual reformulation of traditional understandings of legitimacy in international law,[44] now increasingly evaluated with reference to the concerns of the international community and modern ideas of domestic constitutionalism as the benchmark of a modern state.[45] What this makes clear is that post conflict constitutionalism can no longer take place in a vacuum. Even where a state attempts to negotiate its own political transition, as is currently occurring as part of the Arab Spring, constitutional processes and outcomes will inevitably be evaluated on the extent to which they comply with or even prioritize international law.[46] As a result those drafting a constitution must increasingly take account not only of domestic political priorities, but of the interests of the international community in such a process. In this way the internationalized discourse of transition brings an external force to bear on local and domestic constitutional processes. In particular what this international framework presents is a checklist of indicators whose presence can be taken to indicate the success or otherwise of transition.[47]

Thus it becomes apparent how the response to past injustice, the so-called backward looking element of transitional constitutionalism, is translated into an emphasis on ensuring meaningful liberalising change, on creating a bounded political space, rather than reflecting any existing consensus or re-establishment of sovereignty of the people.[48] The past history of injustice serves to legitimate this process and a constitutional document that enshrines these liberal principles of democracy and human rights is evidence that 'transition' has in fact occurred[49] As Gross suggests in the context of constitutionalism, the analytical tool of transitional justice becomes 'a normative tool for evaluating change and the degree of commitment to correcting injustice.'[50]

## C. Law, Politics and the Incomplete Revolution

[41] Turner & Houghton (n 27)
[42] See Sripati (n 3) 94
[43] Spripati (n 3)
[44] Hay (n 35)
[45] Morsina et al (n 39) 279
[46] See for example Amnesty International. 'Egypt's new constitution limits fundamental freedoms and ignores the rights of women' 30 November 2012, criticizing the Egyptian constitution for failing to provide for the supremacy of international law over national law. Available at http://www.amnesty.org/rn/news/ (Accessed 31 August 2014)
[47] Hart (n 8), 157 suggests that this view of constitutionalism views the constitution as a completed map of conflict resolution rather than simply a landmark along the way.
[48] Teitel (n12); Ludsin (n 5);
[49] Teitel (n 12) 2079
[50] Gross (n 32) 50

There is a risk that an emphasis on the principles of liberalism, and indeed an expectation that a constitution can mark the end of transition will undermine the potential of transitional constitutionalism to deliver a meaningful response to conflict. The manner in which new social protections are to be achieved under the transitional model of constitutionalism is through the 'superentrenchment' of norms that are intended to guide the state's liberal democratic identity.[51] These norms, it is claimed, do not necessarily represent or express existing consensus, but rather underpin the transformative purpose of the constitution through entrenchment of normative standards in terms of the protection of rights.[52] However the adoption of a very normative vision of law in contexts of deep political division can in itself exacerbate tensions. Hart describes how 'employing the language of law affects not only the form of constitution making and the range of considerations reviewed, but also the possibilities and models of participation in the process.'[53] This also brings into sharp focus the tension between the role of constitutionalism as reflecting national identity and the possibility of constitutionalism as forging national identity.[54]

More recent work in the field of transitional constitutionalism has sought to problematize the traditional model of the constitution as negotiated by elites and given to the people.[55] It has instead sought to re-locate sovereignty in the people rather than in the state. This analysis sees grass roots involvement as the key to legitimate constitutional transformation.[56] Ultimately what is sought is to reconstitute the sovereignty of the nation that has been lost in the course of war or revolution.[57] This creates a tension at the point of delivery between the more absolutist claims for strict enforcement of international legal standards that would lend legitimacy to the state and those who advocate a more grass roots and process oriented vision of transition resting on notions such as participatory democracy and local empowerment.[58] When examined in the context of Egypt, the capacity of law to effect transformative change, as well as the question of who constitutes the nation reveal the limitations of the current transitional model of constitutionalism. In the case of Egypt, and the Arab Spring more generally, this model may assume the possibility of political unity that does not exist.

## III. Claiming the Legacy of the Past: Revolution and Constitution in Egypt

[51] Teitel (n 12) 2063
[52] Teitel (n 12) 2070
[53] Hart (n 8) 159
[54] Ludsin (n 5) 264
[55] McConnachie and Morrison (n 2); Kieran McEvoy, 'Beyond Legalism: Towards a "thicker" understanding of transitional justice' (2007) 34 *Journal of Law and Society* 411
[56] This brings the idea of transitional constitutionalism back into line with the procedural model of constitutional assistance that has existed until recently.
[57] For a more detailed theoretical exploration of this dynamic in the context of Tunisia see Ilan Rua Wall, 'Tunisia and the Critical Legal Theory of Dissensus' (2012) 23 *Law and Critique* 219
[58] Ludsin (n 5)

In 2011 the Arab world was rocked by events in Tunisia which ended in the toppling of President Ben Ali. Shortly afterwards, protests began in Egypt. What began with a small number of protesters grew into a mass movement protesting against President Mubarak and demanding the fall of the regime.[59] The protests received significant coverage in the Western media, and came to be known as an 'Arab Spring', which in itself was significant in that it suggested an awakening, the beginning of a move towards enlightenment in Arab politics.[60] The protests, which culminated in the removal of a number of heads of state, were widely characterized as having been the response to decades of repressive rule under a rigid and unresponsive political system.[61] They were represented by commentators as the culmination of a decade of protest in the Arab world.[62] The frame, it was suggested, was 'clearly that of a universal secular call for freedom and justice'.[63] The protests appeared to be driven by young educated activists who became the face of the uprising in the Western media. A large part of their success lay in their ability to communicate through the media, both online social media and mainstream outlets, their aspirations for a secular and liberal Middle East that appealed to a Western audience.[64] The youth of Tahrir Square sought to claim the mantle of revolutionary legitimacy and, as one commentator suggests, 'place themselves above the political fray as its soul and spokesmen.'[65] This was a crucial part of the success of the protests in toppling Mubarak, for in order for the protests to be successful it was necessary to present a unified narrative of revolution. It appeared that the inevitable outcome of the protests would be a swift transition to liberal democracy.[66] However, even an outsider could see that far from being a unified demand, one that embodied the spirit of the revolution, this was only one among many visions of the new Egypt.[67] Once the initial fervour of revolution had died down, the question of who could claim to speak with the authoritative voice of the revolution remained contested.[68] While public opinion may have coalesced for a brief moment in history, unified by the demand that Mubarak should go,[69] this cannot be read as the existence of a unified body politic within Egypt. Indeed to read the

[59] For an overview of these events see Jeremy Bowen, *The Arab Uprisings* (Simon & Schuster, 2012)
[60] See Nathan Brown, 'Egypt's Failed Transition' (2013) 24 *Journal of Democracy* 45
[61] Michele Penner Angrist, 'Morning in Tunisia: The Frustrations of the Arab World Boil Over' *Foreign Affairs*, January 16 2011; Richard Haas, 'Reflections on the Revolution in Egypt' *Project Syndicate*, February 13 2011
[62] Lin Noueihed and Alex Warren, *The Battle for the Arab Spring: Revolution, Counter Revolution and the Making of a New Era* (Yale University Press, 2012), 4; Marc Lynch *The Arab Uprising: The Unfinished Revolutions of the New Middle East* (Public Affairs, 2012) 63
[63] Slavoj Zizek, 'For Egypt, this is the miracle of Tahrir Square' The Guardian, Thursday 10th February 2011
[64] Lin Noueihed and Alex Warren (n 62) 6; See also Statement of President Barak Obama on Egypt, February 10, 2011 <http://www.whitehouse.gov/the-press-office/2011/02/10/statement-president-barack-obama-egypt > accessed 17 October 2013
[65] Lynch (n 62) 72
[66] David E Sanger, 'Obama Presses Egypt's Military on Democracy' New York Times, February 11 2011. Sanger demonstrates the way in which the protests in Tahrir Square were characterised to fit within an overarching narrative of non-violent protest and unequivocal moral force which set Egypt on a path of genuine democracy.
[67] Brown (n 60)
[68] Jack Shenker, 'The Struggle to Document Egypt's Revolution' The Guardian, Friday 15th July 2011
[69] Lin Noueihed and Alex Warren (n 62), 105

protests in Egypt as a unified and coherent narrative of popular uprisings over simplifies the struggles that lie beneath the surface.[70]

Within months of Mubarak's departure the struggle to claim the revolution had begun.[71] Despite the prominence of young, liberal activists at the forefront of the revolution, it was the Supreme Council for the Armed Forces (SCAF) that assumed executive power and declared the beginning of a transitional period in Egypt.[72] Their first transitional act was to hold a referendum to ratify amendments to the constitution that introduced new eligibility requirements for presidential candidates and limited the term of office for future presidents.[73] These amendments were made in anticipation of presidential elections, however the precise sequencing of these events became less clear in the months following the revolution.[74] Less than a year after Tahrir Square a more complex picture was emerging. Polls revealed a degree of support for the Muslim Brotherhood,[75] but also a tacit desire to get on with formal politics, proceeding with the transition as a means of normalizing politics – removing the military by election rather than by protest on the streets.[76] However as the 'transition' stalled, renewed protests against the SCAF grew in size and intensity, dominated by Islamists who posed a direct challenge to liberal ideals and to those who sought to limit the role of religion.[77] The relationship between revolution and constitutionalism was suddenly thrown into sharp focus.

As discussed, traditional understandings of revolutionary constitutionalism cast the constitution as the end point of a revolution, the victory of revolutionary ideals that will be enshrined into the new order.[78] Similarly in transitional contexts the historical narrative of injustice will shape the outcome of the constitutional process. The struggle over who controls the revolution is therefore crucial. For whoever can claim ownership of the revolution claims the transition and therefore the power to define the future shape of the state.[79] This was clearly demonstrated in Egypt in the actions of both the SCAF and the subsequently elected Morsi government. The fact that under the SCAF proposals a constitution was to be drafted within a short space of time, and preceding presidential elections, was read as an attempt by the armed forces

[70] Lin Noueihed and Alex Warren (n 62) 6
[71] One commentator suggests that "an intense struggle over narratives and legitimacy have defined post revolutionary politics" Lynch (n 62) 72; Similarly Abou-El-Fadl writes that competing visions fro the transition have emerged, some more conservative than others. Reem Abou El FAdl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will (2012) International Journal of Transitional Justice 1, 6
[72] Abou-El-Fadl (n 71)
[73] Brown (n 60)
[74] See Carnegie Endowment, 'Court Decision on Presidential Election Law: Road Block or Minor Speed Bump for the Military?' http://egyptelections.carnegieendowment.org/2012/01/24/court-decision-on-presidential-elections (Accessed 17 October 2013)
[75] The Muslim Brotherhood's Freedom and Justice Party achieved 47.2% of the vote. http://www.bbc.co.uk/news/world-middle-east-16665748
[76] See Brown (n 60) 47
[77] Lin Noueihed (n 62) 118-119; I am indebted to Reem Abou-el-Fadl for her insights into the course of events during this period.
[78] See Ludsin (n 5)
[79] See Catherine Turner, 'Deconstructing Transitional Justice' (2013) 24 *Law and Critique* 193; See also Shenker (n 68)

to secure their own role within the system.[80] However the election of a new government over a six week period in late 2011 introduced a new dynamic into the debate. The first task of the newly elected government, headed by Mohamed Morsi of the Muslim Brotherhood, was to establish a constitutional assembly to draft a new constitution. Following a particularly divisive drafting process, discussed in more detail below, the constitution was put to the Egyptian people in December 2012.[81]

The response to the draft constitution revealed the polarization caused by a constitution drafted without genuine political engagement. Mohyeldin describes clashes between Islamist forces who supported the constitution on one side, and secular and liberal forces who opposed it on the other.[82] Particular cleavages emerged over specific provisions that suggested a more prominent role within the state for a strict interpretation of religious law that was not necessarily shared by more progressive Muslims..[83] Division was manifest on key questions such as the role of religion in the constitution, and the perceived failure to include adequate protections for human rights, including freedom of expression, freedom of religion and women's rights.[84] In particular the actions of the Morsi government have been criticized as seeking to shift the political discourse in Egypt towards including Islam as the key referent, the effect of which was to marginalize alternative perspectives from the political left or the liberal opposition.[85] One key feature that unified commentators, however, was that the draft constitution was rushed through by a Committee that was not representative of the population, without proper consultation, and that as a result there was no national consensus on its provisions.[86] This attempt to rush through a constitutional document that lacked popular support revealed the ongoing nature of the struggle for the revolution.

A similar dynamic emerged following the removal of Morsi from power in July 2013. This time the military seized power in response to another wave of protest on the same scale, if not bigger, than those that had toppled Mubarak in 2011. The seizure of power was initially justified as necessary to restore order and democracy in light of the perceived failure of the Morsi government to oversee an effective transition. Just as the protests in Tahrir Square were represented as a response to the

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[80] Carnegie Endowment (n 74)

[81] See Zaid Al-Ali 'The New Egyptian Constitution: an initial assessment of its merits and flaws' International IDEA, 25 January 2013

[82] Ayman Mohyeldin, "Who's Afraid of the Egyptian Constitution?" < http://ideas.time.com/2012/12/05/viewpoint-whos-afraid-of-the-egyptian-constitution/> (Accessed 17 October 2013)

[83] Al Ali (n 81)

[84] Human Rights Watch, "Egypt: New Constitution Mixed on Support of Rights" November 30, 2012 http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights (Accessed 17 October 2013)

[85] Reem Abou-el-Fadll, 'Mohammed Morsi Mubarak: The Myth of Egypt's Democratic Transition' *Jadaliyya* (11 February 2013) available at http://www.jadaliyya.com/pages/index/10119/ ; See also Michel Rosenfeld, 'Editorial: On constitutionalism and the paradoxes of tolerance: Reflections on Egypt, the US and beyond' (2013) 11 *International Journal of Constitutional Law* 835,

[86] Mohyeldin (n 97); Ashraf Khalil "Egypt's Constitutional Endgame: Where confusion is the Rule" http://world.time.com/2012/12/04/egypts-constitutional-endgame-where-confusion-is-the-rule (accessed 17 OCtober 2013); See also Brown (n 60)

illegitimate rule of Hosni Mubarak, so too was it necessary to be able to discredit the elected government of Mohamed Morsi to justify the seizure of power. The struggle over who speaks with the true voice of the revolution continues, with two sides competing to claim the mantle of legitimacy for themselves. On one side the removal of Morsi was justified on the basis that his government had failed to bring about significant change in Egypt. The vilification of the Muslim Brotherhood plays an important role in establishing the legitimacy of the action taken by the army. This narrative presents the army as the defenders of democracy, protecting freedom and delivering a democratic and progressive Egypt.[87] On the other hand, supporters of the Morsi government argue that a democratically elected government has been overthrown, and that far from defending democracy and rights, the army has subverted the democratic will of the people and that supporters of the deposed president are being marginalized.[88] This narrative presents the behaviour of the army as no less repressive than that which it claims to be combatting. Rather than engaging in the political process, the army has constructed a narrative of revolutionary legitimacy designed to appeal to those for whom religion and politics presents a dangerous combination.[89] During this most recent stage of political developments in Egypt, the constitution has played a central role in this struggle for legitimacy.[90] What can be seen from this cycle of allegation and counter-allegation is the way in which both sides are accused of having marginalized opposition voices and sought to entrench their own preferred model of governance, whether religious or secular into the constitutional structure of the state, without taking into account the preferences of the national constituency and the demands of the revolution.[91] Therefore the question that underlies recent developments is 'who are the people in whose name the constitution is being drafted'?

This struggle over the narrative of the conflict demonstrates that the idea of a constitution as a static marker of transition is problematic. Far from representing a unified body politic, a constituency which can simply ratify the principles of the revolution, the constitution must be able to accommodate divergent aims and aspirations for the new state.[92] In this sense a transitional model that relies on unified narratives of injustice is no less problematic than the traditional model. As noted, traditionally understood, constitutionalism proceeds on the basis that there is a shared understanding of the purpose of the revolution and the principles to be enshrined into the new constitution.[93] Usually these principles will consist of certain principles of

[87] See Ian Black and Patrick Kinglsey, 'Egypt clashes continue amid faltering efforts to forge new government' *The Guardian*, 8 July 2013
[88] See Patrick Kingsley and Martin Chulov, 'Mohamed Morsi ousted in Egypt's second revolution in two years' *The Guardian*, 4 July 2014
[89] There are differing interpretations within Egypt on the extent to which Islam is or should be enshrined into the constitution. See Al-Ali (n 81)
[90] Zaid Al-Ali, 'Egypt's draft constitution: an analysis' International IDEA, 09 November 2012
[91] Abou-el- Fadl (n 85); Rosenfeld (n 85) 837; Brown (n 60)
[92] Hart (n 8)
[93] Ludsin (n 5) 264

justice in relation to human rights and popular sovereignty.[94] Under this conception the constitutional document represents the entrenchment of existing agreed principles – those embodied in the revolution.[95] Where it is suggested that transitional constitutionalism diverges from this model is in the idea that, regardless of popular consensus, there is a normative framework for transition that determines the shape of constitutional reform. This is the contextual and contingent element of transitional constitutionalism whereby the constitution plays a role in transforming legacies of the past. However this approach proceeds on the assumption that the implementation of specified liberal principles of governance will become the framework for solving the problems of transition and indeed supplants the need for a unified political constituency. In effect the constitutional document is intended not to reflect but to bring into being a new and liberal body politic. In the case of Egypt, the struggle to claim the mantle of revolutionary legitimacy demonstrates the highly partial way in which law operates in these contexts.

## IV. Liberal Constitutionalism and the Politics of Transformation

The underlying premise of the model of transitional constitutionalism is that the constitution itself will provide a focal point around which the citizens of the state can unite, representing the constitution of a nation. Through the liberal emphasis on the guarantees of human rights and the rule of law, whereby power is constrained within the new constitutional framework, it is intended that the constitution will provide a unifying focal point for a previously fractured polity. The underlying premise is that the constitution can replace politics with law, transcending political divisions with an impartial legal framework. In the case of Egypt, and the Arab Spring more generally, the assumption that law has the power to unify a fractured political community is belied by the deeply political struggle that is waged over the ownership of the revolution, and consequently of the constitution itself in Egypt.[96]

### A. The law and politics of 'transition'

The transitional model assumes that law will be enough to deliver a new beginning in a linear progression from authoritarian rule to freedom and democracy. It also assumes that these features will be capable of securing the confidence and allegiance of the population. In this regard the Arab Spring presents both a challenge and an opportunity to engage with the concept of constitutionalism in transition. If the aim of transitional constitutionalism is to create mechanisms and processes that can assist with the management of violent conflict, a rush to closure that sees a the constitution as a substantive outcome to be achieved rather than an ongoing opportunity for the

[94] Jacques De Ville, 'Sovereignty Without Sovereignty: Derrida's Declarations of Independence' (2008) 19 *Law and Critique* 87
[95] Teitel (n 12)
[96] Brown (n 60)

mediation of political conflict risks undermining the goal it seeks to secure.[97] Ludsin suggests that while the process of establishing a national identity does not require homogeneity, weak consensus could actually entrench rather than overcome existing ethnic, cultural or religious divisions.[98] This appears to be borne out in the Egyptian context where division over the constitution appears to derive more fundamentally from disagreement over the conduct of the process rather than over the terms of the constitution itself.[99] However in addition to the negatively focused idea that failure to ensure consensus perpetuates division, a compelling argument is also made that taking greater account of participation and representation in a transitional constitutional process can actually help to deliver the goals sought. Basing her conclusions on an extensive empirical study of post conflict constitutions, Samuels suggest that:

> The more representative and more inclusive constitution building processes resulted in constitutions favouring free and fair elections, greater political equality, more social justice provisions, human rights protections and stronger accountability mechanisms.[100]

While critiques have emerged of the dominance of legalism in transitional justice,[101] it can be argued that the concept of transitional constitutionalism remains rooted in a particular political construct of justice, human rights and political transition. [102] Whereas transitional constitutionalism is an ostensibly consensual process, one in which justice and reconciliation are framed as part of an apolitical project that contributes to the creation of a political community based on adherence to shared norms,[103] and based on the foundation of the rule of law,[104] certain normative assumptions are made surrounding the nature and function that law should play.[105] The subject of these assumptions – namely philosophical conceptions of law and society – are themselves the subject of considerable political contest.[106] This tension is not generally acknowledged. Rather the 'transitional lens' tends to obscure the inherently political nature of this choice, representing it as an objective and value neutral vision of legality that can transcend politics and mediate political choice.

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[97] See Kristi Samuels, 'Post Conflict Peacebuilding and Constitution Making' (2006) 6 *Chicago Journal of International Law 663*

[98] Ludsin (n 5) 264

[99] Brown (n 60)

[100] Samuels (n 97) 668

[101] See eg Colm Campbell and Catherine Turner, 'Utopia and the Doubters: Truth, Transition and the Law' (2008) 23 *Legal Studies* 374; McEvoy (n 55)

[102] Derek Powell, 'The Role of Constitution Making and Institution Building in South Africa's Transition' (2010) 4 *International Journal of Transitional Justice* 230, 233

[103] Bronwyn Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 *Human Rights Quarterly* 95, 105

[104] The rule of law for these purposes being defined in the 2004 Secretary General's Report (n 7)

[105] In particular the model of transitional constitutionalism put forward by Teitel assumes a transition towards liberal democracy, thereby limiting the transformative potential of constitutionalism to the liberal framework. See Gross (n 32) 50

[106] See for example Catherine Turner, 'Political Representations of Law in Northern Ireland' [2010] *Public Law* 451; in the Egyptian context see Reem Abou-el-Fadl (n 71)

### B. Ownership and political community

Rather than encouraging a genuine exchange of ideas, the need for a unified narrative of injustice results in a struggle to claim ownership of the idea of justice, to be able to speak with the one 'true' voice of the revolution.[107] The backward looking aspect of transitional constitutionalism that draws on historical narrative to frame the new constitution becomes a double edged sword. Because it is the history of injustice that will legitimate constitutional reform in transition, disparate voices must jostle to establish a dominant narrative of the injustice that led to the revolution that will justify the overthrow of the existing authority and shape the new constitution.[108]

And yet this may not be an accurate representation of the political forces at play in transition. For while the model of transitional constitutionalism assumes the impartiality of the liberal framework as between competing accounts of the nature of the state, in practice it rarely operates as the neutral arbiter it purports to be. The liberal framework which underpins transitional constitutionalism fails to take into account competing visions of law and society that influence the extent to which constitutional norms will become internalized. Indeed the short term focus of using a constitution as a tool of peace making, intended to end a conflict, risks simply entrenching the preferred outcome of those who enjoy the political upper hand at that point in time rather than providing an ongoing forum for negotiation of the constitutional future of the state.[109]

The ability to point to internationalized best practice in terms of transition removes the need to engage with domestic political concerns, focusing instead on an international audience. In the Egyptian context this limitation has been highlighted by Abou-El-Fadl, identifying the shortcomings of the transitional justice framework for addressing the concerns of the Egyptian people. In particular she singles out the inability of transitional justice as currently defined to address legacies of external involvement in Egyptian politics, and blindness to social and economic injustices as key reasons why transitional justice may not be an appropriate framework for Egypt.[110] The question of who is represented in the process has been identified as the most important element in determining whether or not a population will accept a constitution,[111] and the Egyptian case provides clear evidence of this dynamic.[112]

Of course war, revolution, and the re-founding of order are not new phenomena. History is replete with newly won political concessions being enshrined into law.[113] The temptation in the post revolution phase is to have concession inscribed into law not simply as a means of expressing consensus on new norms, but as a means of protecting them from the cut and thrust of democratic process. In

[107] Brown (n 60)
[108] In Egypt it has been suggested that some groups reject the idea of revolutionary legitimacy altogether and insist instead that power should be decided through the ballot box. Lynch (n 62) 73
[109] Brown (n 60)
[110] Abou-el-Fadl (n 71)
[111] Ludsin (n 5) 276
[112] Brown (n 60)
[113] Conor Gearty describes this as the campaigning jackpot of legal implementation. Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006) 62

essence the demand for the entrenchment of certain norms represents an attempt to determine the rules of the democratic game - whether this is entrenchment of conservative religious principles, or entrenchment of secular liberal principles. This is evidenced in the desire to have constitutional processes completed within short time frames.[114] This reflects the core underpinnings of transitional constitutionalism in that the entrenchment of constitutional principles is seen as a means of safeguarding a civic, liberal state from 'democratic' pressures. The short-term goal of the constitution in shaping a bounded political space becomes clear with this example. The purpose of the constitution is viewed as securing the boundaries of legitimate politics, shaping the outcome of the transition by narrowing the range of permissible interpretations of justice.[115] And yet the introduction of prescriptive concepts such as democracy, civil society and human rights may do little to increase participation and legitimacy in the eyes of the majority.[116]

The effect of the need to construct the myth of the revolution which presents a dominant or unified narrative is exclusionary. It encourages the drawing of boundaries around the political constituency to ensure a continuing unity. This carries the risk that there will be sections of the population who will feel marginalised or excluded from the new order.[117] The revolutions that swept the Arab world in 2011 are represented as a response to the suppression of political dissent in the interests of security and order. What is to be avoided, therefore, is the replication of these political, and more significantly legal, structures that similarly serve to stifle political difference with the aim of presenting a unified narrative of the new order.[118] However, identifying a tension between the idea of an internationalised transitional constitution and the goal of establishing political unity is not intended to dismiss the idea that international law has any role to play in transitional constitutionalism. Rather what will be explored in the next section are the ways in which international law can facilitate transitional constitutionalism without imposing rigid legal frameworks that undermine principles of participation.

## V. International law and the constitutional process

Lerner suggests that the process of drafting a constitution is an 'attempt to identify and articulate the fundamental norms and values that are shared by the people in

[114] See eg Rubin R Barnett, 'Crafting a Constitution for Afghanistan' (2004) 15 *Journal of Democracy* 5; See also Ludsin (n 4) 263 suggesting that both short and long term goals of peacemaking are now based on the finalization of a new constitution; Brown (n 60)

[115] To paraphrase Michael Ignatieff's famous suggestion that the role of truth commissions was to "narrow the range of permissible lies". See Michael Ignatieff, 'Articles of Faith' (1996) 25 *Index on Censorship* 110

[116] See Walid Kazziha, 'The Fantasy of Arab Democracy Without a Constituency' in Nathan Brown and Emad El-Din Shahin (eds) *The Struggle over Democracy in the Middle East: Regional Politics and External Policies* (Routledge, 2010) 42, 46

[117] See Turner (n 79) on the ways in which the language of transition perpetuates violence and exclusion

[118] Abou-El-Foudl (n 71) highlights the difference between reform and transformation in Egypt. The call for the fall of the regime should be read not as a call for reform of existing structures, but for a re-thinking of the way in which the state has been shaped.

which name and for whom the constitution should be drafted.'[119] While to try and neatly characterize the cultural diversity of any state or political community will inevitably result in an oversimplification, it is suggested there are three significant potential cleavages that must be addressed in any transitional constitutional process. These are ideology, culture and religion. Each of these factors will bear significantly on constitutional processes and the ultimate success of transitional constitutionalism. All three are also areas where extant international law potentially provides a framework for participation as well as providing guidance on how divisive political and social issues can be addressed. In this way international law can be used to guide rather than to foreclose debate on these issues.

### A. **Ideology**

Despite apparently living in a post political, post ideological world, it would be foolish to assume that ideological differences will not play a significant part in constitutional negotiations. As outlined above, the model of transitional constitutionalism is rooted in the principles of liberalism.[120] This embeddedness in political ideology tends to distort our vision of the potential of transition. Rather than looking at the political dynamics that exist within the transitional state, what tends to happen is that the 'problems' to be dealt with in transition are defined by how outsiders view the state or society in question. This is symptomatic of the increased international involvement of international actors in transitional constitutional processes. However the consequence that potentially flows from this is that external actors, or an international system that conditions legitimacy on certain benchmarks of liberal democracy 'can distort the constitutional process in favour of concerns that are completely foreign to the relevant country.'[121] So for example the characterization of the Arab uprisings as fitting within an overarching narrative of justice and democracy [122] demonstrates how they are framed as expressions of how the international community views the problems in the Arab world.[123] This view may or may not coincide with how participants themselves saw events, [124] but will nevertheless continue to shape international responses and will have a profound

[119] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011) 30; See also Samuels (n 97) on the importance of participation.

[120] Hay (n 35) 149 describes as the 'less visible' aspect of internationalised constitution making the assumption that self determination in these contexts will be take the form of liberal democracy.

[121] Dan and Al-Ali (n 28) 461

[122] See Sanger (n 66) on Obama's response to the uprising in Egypt

[123] Steven Heydemann, 'Embracing the Change, Accepting the Challenge? Western Response to the Arab Spring' in R Alcaro and M Haubrich-Seco (eds) *Re-thinking Western Policies in Light of the Arab Uprising* (Edizioni Nuova Cultura 2012) 22

[124] For a detailed breakdown of the diversity of issues that drove the protests in Egypt see Jeroen Gunning and Ilan Zvi Baron, *Why Occupy a Square? People, Protests and Movements in the Egyptian Revolution* (Hurst 2013) This analysis demonstrates that the reporting of the uprisings in the West may have overplayed the significance of democracy and largely ignored the significance of demands of social justice, for example.

impact on the direction of transition.[125] The application of the framework of transition assumes that the desired outcome of transition is liberal democracy.[126] There is little room, if any, for alternative outcomes.

Yet the idea of the 'democratization' of Arab states is not a new one. Previous attempts at liberalizing Arab politics reveal some of the tensions inherent in a project of democratization that is closely linked to liberalism. Kazziha describes how previous attempts at democratization had been characterised by incompatible ideological positions, seeing democracy on one hand as liberal democracy that focused on legitimacy and constitutionalism, and on the other hand democracy as economic equality and social justice.[127] This demonstrates that the issue of democracy in transition is not as straightforward as repression versus freedom. There are likely to be competing notions of the relationship between law and democracy and where the division between the two should lie.[128] International interest in the Egyptian 'transition' already reveals some of the blind spots of transitional justice scholarship and practice to this cleavage. In particular, two key areas have been highlighted as absent from transitional justice agendas; 'the accountability of foreign actors and the pursuit of social justice.'[129] While transitional measures are dictated by international agendas they are unlikely to reflect the priorities of Egyptian citizens. Abou-El-Fadl sums this up when she states:

> …the millions participating in the protests of 2011 articulated an emphatically Egyptian conception of their desired transition, opening up possibilities for change that an externally imposed transitional justice framework is likely to smother.[130]

The potentially divisive role of international actors in defining political priorities for Arab states should not be underestimated. Transitional Justice has evolved as a technocratic approach to political reform that denies in most cases socio-economic factors in favor of a liberal political model.[131] However, this is not to say that an Egyptian conception of transitional justice could not be conceptualized in terms of socio-economic justice, particularly where corruption, economic inequality and international exploitation are driving factors for transformation.[132] In this context,

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[125] Heydemann (n 123), 23 suggests that the emerging narratives that define the challenges of the Arab Spring for Western governments may well increase the likelihood that Western responses will reinforce, rather than overcome, longstanding tensions and sources of conflict.

[126] This emphasis on liberal democracy includes facets of internationalization and free trade that had been controversial in Egypt under Mubarak but which looked set to be replicated in Egypt. See Abou-el-Fadl (n 85)

[127] Kazziha (n 116) 48

[128] This tension was identified in UN reports evaluating the lessons of previous post conflict constitutional assistance processes. See Jamal Benomar, 'Constitution Making and Peace Building: Lessons Learned from the Constitution Making Processes of Post Conflict Countries' (UNDP, 2003)

[129] (n 71) 2

[130] *Ibid*

[131] See Paige Arthur, 'How "Transitions" Reshaped Human Rights: A conceptual history of transitional justice' (2009) 31 *Human Rights Quarterly* 321, 339-340

[132] *Ibid* 341; This model of contextualizing international frameworks to fit local priorities was seen in Iraq where the Constitutional Committee's draft contained a well developed section on socio-economic rights, in accordance with Islamic and Arab custom. Dan and Al-Ali (n 28) 440

whereas a very liberal approach may result in an exclusive focus on civil and political aspects of international human rights law, drawing on the existing canon of international law on the protection of social and economic rights can provide guidance on how these issues could be addressed. This is not to say that direct incorporation of these Conventions without dialogue is the solution, but rather to suggest that this body of treaty law provides a clear and accessible framework for further discussion of how the state should be shaped.

### B. **Culture**

Much of the discussion of transitional constitutionalism rests on the capacity of legal principles to bring about transformative change. What is at issue is not simply a universalist versus relativist debate, but a more nuanced approach that seeks ways to contextualize the debate and place it in a cultural context that makes it accessible and acceptable to the citizens of the state itself. Constitutional rights, rather than being an externally imposed framework, should be understood as 'a negotiated understanding of the acceptable framework for coexistence and respect.'[133] This may, for example, require shifting the emphasis towards different conceptions of rights. For example in Egypt it has been suggested that the increasing success of the radical Islamist parties has been their appeal to poor rural voters, particularly men, seeking meaning and dignity in life.[134] As with ideology, the framework of transition must not be allowed to obscure deeper cultural needs that must be addressed in the negotiation of a new constitution. Constitutional processes must therefore work within the local context rather than trying to supplant it with liberalizing norms. This means taking into account the history of political mobilization in the state, as well as the engagement of key players in the political process.

In the Middle East an elite led programme of constitutional reform that remains detached from the rest of society is unlikely to become deeply embedded in the national consciousness.[135] Prior to the uprisings there had been little attention paid in the West to unrest in Egypt, which centred around economic reforms and social justice rather than headline political demands such as those seen in 2011.[136] Elections had been characterized by low turnout and voter apathy, and large sections of the population remain far removed from the urban middle class and elites who are traditionally associated with liberal demands. Therefore while it would be easy to accept the 'retrospective myth making' [137] of the revolution as the inevitable culmination of protests in the Middle East, it was far from certain that the events of

[133] Ghai (n 3) 110
[134] Lin Noueihed and Alex Warren (n 62) 123
[135] Samuels (n 97) 670, suggesting that elite- population division will exacerbate division
[136] Hossam el-Hamalaway, 'Egypt's Revolution has been 10 Years in the Making' *The Guardian*, 2 March 2011; This can be contrasted with the assertion that there was no evidence of effective grass roots mobilization in Egypt prior to the revolution, Kazziha (n 116)
[137] Lynch (n 62) 88

2011 would occur in the way that they have done.[138] In such a context it is clear how an ongoing process of negotiation of the content of constitutional provisions can play a useful capacity building role, either where there is little existing engagement with participatory politics, or where mobilization has been limited to specific sectors of the population.[139] This is not about essentializing populations or attempting to distil certain 'national characteristics' that should be reflected in the constitution.[140] Different groups within the state will emphasise different rights and different interests, depending on their own position.[141] Nor should we assume that all groups within a society hold identical views, or that there is one right interpretation to be arrived at.[142]

Too often in these contexts the debate is dominated by powerful groups who successfully monopolize the reform agenda. This can lead to a polarized debate between powerful players that excludes smaller or disadvantaged groups, particularly non-violent groups who have less bargaining power in peace negotiations.[143] The task of negotiating the constitutional framework should effectively create the space for dialogue between these competing groups and interests without allowing some voices to be marginalized on account of their inability to contribute to a debate whose parameters have already been set. Rather than prioritising abstract and universalized notions of right(s), the debate must be located in the social, economic and political situation of the state itself.[144]

Once again international law, rather than imposing restraints in this regard, provides an enabling framework for participation of marginalized groups. For example Resolution 1325 has long required that women be represented in peacemaking efforts. This provides a clear basis for including women as negotiating partners without necessarily foreclosing debate on the protection of women's rights in the new constitution. Extant international law provides guidance on the question of the rights of ethnic, religious or linguistic minorities.[145] Similarly the United Nations Declaration provides a framework within which questions of culture can be addressed.[146] These frameworks specifically provide for the participation of minorities, without expressly imposing any particular model for that participation.

[138] For evidence of this one need only consult Nathan Brown and Emad El-Din Shahin's 2010 volume *The Struggle Over Democracy in the Middle East: Regional Politics and External Policies* which explores the reasons for the failure of democratisation in the middle east.
[139] Brown (n 60)
[140] Ludsin (n 5) 264
[141] Ghai (n 3) 123
[142] Abdullahi An Na'im, 'Towards a Cross Cultural Approach to Defining International Standards of Human Rights' in Mark Goodale (ed) *Human Rights: An Anthropological Reader* (Wiley-Blackwell, 2009) 19, 38
[143] Ibid 28; Ludsin (n 5) 272
[144] Ghai (n 3) 122
[145] See eg the Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities UN Doc E/CN.4/Sub.2/384/Add.1-7 (1977), regarded as providing an authoritative definition of who could claim to be protected as a minority. See Jeremie Gilbert, 'Constitutionalism, Ethnicity and Minority Rights in Africa: A legal appraisal from the Great Lakes region' (2013) 11 *International Journal of Constitutional Law* 414, 416
[146] United Nations Declaration on the Rights of Persons of National, Ethnic, Religious or Linguistic Minorities UN Doc A/Res/47/135 (1992)

Indeed the provisions of international law have been interpreted and implemented very differently in different contexts, demonstrating how international law can provide a basis for contextualized implementation.[147] In this way international law can help ensure that vulnerable voices are heard by ensuring participation without dictating substantive outcomes.

### C. Religion

Religion is perhaps the most visible of the cleavages that exists in the Arab uprising to date and one which represents a much greater tension in terms of its relationship to international and secularized norms of human rights. However, as Daniel Philpott powerfully states, 'an ethic that claims global relevance ignores religion only to its detriment.'[148] In making this claim he speaks to a tendency to view religion as a source of conflict and therefore something that must be rigorously separated from the public political sphere. The project of liberalism has been rooted in a gradual secularization of the idea of justice and right and this is reflected in the dominant approaches to peacebuilding in the early twenty first century. However, as with ideology and culture, ignoring religion or seeking to deny that it has any role to play in a new constitutional order risks undermining consensus. The relationship between human rights and religion tends to be polarised, with each side tending to dismiss the other as incompatible with their own.[149] Rather than framing religion as undermining secular constitutional principles, the mutually supportive role of the two should be explored. While there is some literature that seeks to demonstrate the ways in which Islamic thought is compatible with the core commitments of human rights and democracy, the line of argument presented is not a simplistic assertion that Islam and international human rights law are inherently compatible, but rather a more nuanced approach that emphasizes the need for internal dialogue on the relationship between the two. The leading scholar in the field, Abdullahi An Na'im, suggests that while religion will not always be the only consideration for believers, it is 'too important for the majority of people for human rights scholars and advocates to continue to discuss [religious considerations] simply as irrelevant, insignificant or problematic.'[150]

This is particularly pertinent in the context of drafting a new constitution. The constitution will define the political shape of the state, and it is the state that will ultimately be responsible for the promulgation of law and policy. It is therefore important that the constitution appropriately acknowledges the context within which it operates, and provides space for a variety of competing claims and interests in relation to the role of religion.[151] This does not mean that the constitution must

[147] See Gilbert (n 161) on how these provisions have been incorporated differently in the post conflict constitutions of Rwanda, Burundi and the DRC

[148] Daniel Philpott, *Just and Unjust Peace: An Ethic of Political Reconciliation* (Oxford, 2012) 8

[149] See Mashood Baderin, 'Human Rights and Islamic Law: the myth of discord' (2005) *European Human Rights Law Review* 165

[150] Abdullahi An Na'im, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 *Proceedings of the Annual Meeting of the American Society of International Law* 95

[151] See Rosenfeld (n 85) 837

inscribe a religious ethos into the state,[152] nor must it necessarily endow one particular religion at the expense of others. Rather a balance must be struck, which requires tolerance of religious difference, preventing the constitutional privileging of religious intolerance such as had been feared in Egypt, but also preventing the entrenchment of a secular intransigence that denies any role for religion.[153] It is suggested that an overly liberalizing constitution that seeks to enshrine universalized principles of human rights and ignores the religious context within which it is to be implemented risks undermining the legitimacy of those rights in the eyes of the population. As An Na'im states,

> In relation to the role of religion in particular, it is imperative to engage in an internal discourse within the framework of the religious community in question, in order to overcome objections to human rights norms.[154]

Therefore rather than seeking to isolate religion from public life and viewing it as a destabilizing force, greater consideration should be given to the role that religion can play in building consensus.[155] This is particularly true in states where religion is a key aspect of identity for the majority of the population. Crucially, however, this must be an internal dialogue and not one which is foreclosed by the promulgation of a constitution that seeks either to enshrine or ignore religion as a means of achieving political gain.

### D. Procedure versus substance

The very existence of these cleavages in any society suggests that a rush to closure on constitutionalism is unlikely to result in stable and enduring institutions of state. This has long been recognized in international policy that saw constitutionalism as a long term procedural process rather than a short term means of ending conflict.[156] Rather than trying to suppress competing or even controversial political viewpoints, the success of a constitutional process will rest on the extent to which it can control competing political forces and construct political agreement based on consensus on the new rules and institutions.[157] This does not mean that what is sought is absolute consensus across political, economic and social issues, but rather that there is consensus on the legitimacy and authority of the institutions put in place to mediate political tensions, as an 'instrument for legally formalising political mediation in a written constitution.'[158] This is not achieved by the imposition of a constitution, no matter how liberalising, that is not rooted in local historical, social and cultural

[152] See generally An Na'im *Islam and the Secular State: Negotiating the Future of Sharia* (Harvard 2009)
[153] Rosenfeld (n 85) 837
[154] An Na'im (n 142) 100
[155] Philpott (n 148) 9
[156] Ludsin (n 5); Samuels (n 97); UN Guidance Note (n 26)
[157] See Andrea Lollini, *Constitutionalism and Transitional Justice in South Africa* (Berghan, 2011) 34 on the success of this project in South Africa; See also Frances Deng, 'Human Rights, Universality and Democracy' in William Twining (ed) *Human Rights: Southern Voices* (Cambridge University Press, 2009) on the need to recognise the existence of disparate groups and provide mechanisms for accommodation within the law
[158] Lollini (n 157 )28; Samuels (n 97)

context. Rather it is achieved by involving all those with a stake in the new society within the decision making process, allowing the meta-debate to take place rather than relying on the rhetorical power of universal human rights to achieve the desired outcome.

## VI. Conclusions

The Egyptian example demonstrates the limits of law, and in particular international law, in providing a neutral framework for constitutional reform. While the temptation for international transitional justice scholars and practitioners may be to import prescriptive lessons for Arab states, a constitution that bears little relation to the political, economic and social context of the state is unlikely to be helpful.[159]

However when international law is viewed as a framework for participation rather than as providing a prescriptive framework for reform new possibilities are opened up to combine the transformative aims of transitional constitutionalism with the more traditional procedural approach of international law. This approach would support the aims of transitional constitutionalism by providing an externalized framework for constitutional reform, while facilitating a domestic re-thinking of how law and politics are regulated within the state. It would also address the context of past injustice in that rather than imposing a model on citizens, it opens up a space for free debate.[160] This is important as the Egyptian experience demonstrates that it is not possible to separate politics from law in transition. Brown highlights how transitions cannot be designed, but rather are shaped by political contests.[161] He states that

'there is no force outside the political process that designs a transition; there is no time out when politics ceases so that political systems can be designed in a pristine atmosphere…'[162]

Therefore what is required is that both the constitutional process and the eventual outcome document are capable of channeling democratic pressures rather than foreclosing debate on the nature of the state and the allocation of power.

Rather than pursuing an elusive goal of political consensus, what is required is a re-thinking of the notion of constitutionalism to reflect more accurately the idea of transitional constitutionalism as transformative- as opening spaces for understanding and dialogue that do not rely on the suppression of alternative (challenging/controversial) voices for its security. The role of the constitution is an important one in regulating law and state. If the transformative potential of a constitution is to be achieved we must remain aware of some of the ideological assumptions that are brought to bear by an internationalized discourse of transition that seeks to use a constitution to embed substantive principles of law and politics.

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[159] See Dann and Al-Ali (n 28) on the extent to which international involvement in constitutional processes should remain procedural and avoid the temptation to import prescriptive lessons.

[160] IN this way it would address what Rosenfeld (n 85) identifies of the paradox of tolerance, whereby responses to intolerance becomes themselves intolerant in their desire to entrench their own interests.

[161] Brown (n 60)

[162] Brown (n 60)