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ERECTING NEW CONSTITUTIONAL CULTURES: THE PROBLEMS AND PROMISE OF CONSTITUTIONALISM POST-ARAB SPRING

JOHN LIOLOS*

Abstract: Constitutions contain two types of elements: functional and aspirational. The functional elements establish the institutions that comprise the state and the pragmatic rules of governance—the “constitution in practice.” Aspirational elements articulate the nation’s commitment to the higher principles and ideals it seeks to attain. In a well-ordered state, a constitution’s aspirational elements provide the true north for the nation’s compass, and the functional elements adequately pursue those ends. If the functional components of a constitution cannot or do not adequately pursue the nation’s stated aspirations, the constitution, the government, and the rule of law are in jeopardy. The recent upheaval in the Middle East, known as the Arab Spring, provided three nations (thus far) with the opportunity to erect new constitutional cultures: Tunisia, Egypt, and Libya. For these countries, adequately concretizing revolutionary aspirations in their new national constitutions, while also providing functional elements and institutions to reinforce these aspirations, is vital to establish secure and legitimate constitutional orders. This Note explores these ideas of constitutional theory universally and applies them to the particular situations in these Arab Spring nations.

INTRODUCTION

A paramount task of a democratic nation’s constitution is to effectively prescribe the supreme law of the land derived from the consent of the governed.¹ A constitution seeks to fulfill important legal functions, including organizing political power within a state, establishing

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¹ See Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHL-KENT L. REV. 89, 97 (1988).

government institutions, and providing administrable laws.² A constitution, and its surrounding culture of constitutionalism, is often also a statement of a nation's commitment to the ideals it values most highly and aspires to attain.³ A constitution contains two types of elements: functional and aspirational.⁴ The functional elements of a constitution establish the institutions that comprise the state and the pragmatic rules of governance—the “constitution in practice.”⁵ Aspirational elements, by contrast, articulate the nation's commitment to higher principles, such as social justice or democracy.⁶ In short, aspirations manifest the national ideals at the time they are realized.⁷ In a well-ordered state, the aspirational aims of a constitution provide the true north for the nation's compass and determine policies the functional provisions should implement to achieve the legitimacy of the laws and promote a perpetually progressing society.⁸ If the functional components of a con-

² See, e.g., Surya Deva, *The Constitution of China: What Purpose Does It (Not) Serve?*, 2 JINDAL GLOBAL L. REV. 55, 59 (2011); F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 663 (2009) (noting that the gap between a constitution in theory and a constitution in practice is driven by administrability); see also Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1254 (2008) (“Constitutionalism entails a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation.”).

³ See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 49 (1992) (“Writing a constitutional text offers an opportunity for a victorious movement to make a collective effort both to frame their fundamental principles and to mobilize broad popular support for their crucial initiatives.”).

⁴ See Richard Albert, *Counterconstitutionalism*, 31 DALHOUSIE L.J. 1, 36 (2008); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 698 (2011); Jon Mills, *Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FLA. J. INT'L L. 115, 116 (2004).

⁵ See, e.g., Albert, *supra* note 4, at 36–37 (“[T]he pragmatic model [of constitutionalism] creates manageable expectations of rights within the rule of law”); Levinson, *supra* note 4, at 700 (quoting ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 38–47 (2009)); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 924 (2006) (providing examples of constitutional text prescribing rules and limitations for organs of government); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103 (2010) (“Various political institutions implement constitutional provisions . . .”).

⁶ See Albert, *supra* note 4, at 36.

⁷ See Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1634–35 (2009).

⁸ See Levinson, *supra* note 4, at 663; J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 256 (1999); see also, e.g., U.S. CONST. art. I, § 8, cl. 8 (presenting an example of a

stitution cannot adequately pursue its aspirational goals, the constitution and government will lose support and lack legitimacy.⁹ Such a disconnect could result in social strife and political unrest.¹⁰

The recent upheaval in the Middle East and North Africa, popularly known as the Arab Spring, has resulted in three nations toppling their old regimes thus far.¹¹ In Tunisia, Egypt, and Libya, the overthrow of the former governments provided the opportunity not only to draft a new constitution, but also to cement the revolution by framing constitutional principles in a way to mobilize broad support.¹² These uprisings were organic movements comprised of frustrated citizens demonstrating against their tyrannical governments for freedom, greater representation, and economic opportunity.¹³ Often, frustrations arose when the functional provisions in the former constitutions did not effectively implement some express aspirational commitments, contributing to social unrest and constitutional hypocrisy.¹⁴ Now that the people of these nations have successfully overthrown their governments, the question remains whether they can create constitutions that successfully

constitution providing an institution with the power to fulfill an aspiration); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 171 (Donald A. Cress trans., 1987) (“What makes the Constitution of a state truly solid and lasting is that proprieties are observed with such fidelity that the natural relations and the laws are always in agreement on the same points, and that the latter serve only to assure, accompany and rectify them.”)

⁹ Cf. Levinson, *supra* note 4, at 678 (providing an example of disenfranchised masses pressuring elites for political reform with the threat of revolution); Dankwart A. Rustow, *Transitions to Democracy: Toward a Dynamic Model*, in *TRANSITIONS TO DEMOCRACY* 14, 19 (Lisa Anderson ed., 1999) (discussing the importance of observing social and economic conditions when considering a political state).

¹⁰ Cf. Dorf, *supra* note 7, at 1639 (“Entrenched structural rules also can preserve democracy against prospective tyrants.”); Levinson, *supra* note 4, at 663 (concluding that government institutions risk subversion if they are not relatively stable).

¹¹ Betsy Hiel, *Arab Spring Uprisings Have Now Toppled Three Governments*, *PITTSBURGH TRIB.-REV.* (Oct. 23, 2011), http://www.pittsburghlive.com/x/pittsburghtrib/news/s_763372.html.

¹² See ACKERMAN, *supra* note 3, at 49, 53 (describing the advantages of creating a constitution during the period immediately following revolution when societies are amenable to constitutional change).

¹³ See Mohamed Younis & Ahmed Younis, *Opinion Briefing: Egyptians on the Arab Spring*, *GALLUP* (Feb. 22, 2012), <http://www.gallup.com/poll/152879/Opinion-Briefing-Egyptians-Arab-Spring.aspx>; *Arab Spring Is Human Awakening*, *TWOCIRCLES.NET* (Feb. 15, 2012, 8:42 PM), http://twocircles.net/2012feb15/arab_spring_human_awakening.html.

¹⁴ Cf. Albert, *supra* note 4, at 36–37 (noting that the constitutional text should render aspirations practically achievable); Levinson, *supra* note 4, at 663, 678 (providing an example of disenfranchised masses pressuring elites for political reform with the threat of revolution). Compare *CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT*, arts. 47, 48, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, *available at* <http://www.constitutionnet.org/files/Egypt%20Constitution.pdf> (granting freedom of expression and freedom of the press), *with* Younis & Younis, *supra* note 13 (articulating that inspirations for the Arab Spring included freedom of expression).

incorporate the people's aspirations to capitalize on their revolutionary moment.¹⁵ Entrenching some central revolutionary aspirations in the new constitution is necessary to preserve the progress made before the galvanizing effects of revolutionary fervor recede to the constitutional inertia of ordinary times.¹⁶ To adequately pursue the revolutionary goals, political actors must ensconce these aims into their new constitutions as practically achievable aspirations.¹⁷

Part I of this Note provides a background on the Arab Spring revolutions, past areas of the relevant nations' constitutional hypocrisy, and their present constitutional situations. Part II discusses a key difference between a true revolution and mere coup, invoking Dankwart A. Rustow's model for democratic transition to situate the current movements. It also highlights particular constitutional tensions that must be resolved going forward, namely the role of Sharia law, the developing democracy, and human rights protections. Part III analyzes these tensions in relation to the new national constitutions, and articulates the components of constitutional aspirations capable of adequately addressing these and other similar struggles in order to establish a legitimate and lasting democratic constitution. The Note concludes by articulating some universal criteria for aspirations, and summarizing its contribution to constitutional theory both in the abstract, as well as in the particular context of the Arab Spring.

I. BACKGROUND

A. *Tunisia*

The Arab Spring ostensibly began in Tunisia on December 17, 2010, when a street vendor lit himself ablaze in a desperate act of frustration with the country's economic and political condition.¹⁸ This act galvanized many Tunisians of similar sentiment into political action and protest against President Zine al-Abidine Ben Ali's regime, demanding

¹⁵ See ACKERMAN, *supra* note 3, at 3, 49, 53; Hiel, *supra* note 11; see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 239 (J.P. Mayer ed., George Lawrence trans., 1969) (1835) ("There can be no doubt that the moment when political rights are granted to a people who have till then been deprived of them is a time of crisis, a crisis which is often necessary but always dangerous.").

¹⁶ See ACKERMAN, *supra* note 3, at 49, 53.

¹⁷ See *id.*; Dorf, *supra* note 7, at 1634–35.

¹⁸ Julian Borger, *Crackdown Threat in Tunisia After Graduate Protests*, *GUARDIAN* (London), Dec. 30, 2010, at 22; Robert F. Worth, *How a Single Match Can Ignite a Revolution*, *N.Y. TIMES*, Jan. 23, 2011, at WK4.

economic, political, and social change.¹⁹ As the protest movements grew, President Ben Ali responded with force and offers of political concessions in order to preserve the regime.²⁰

Ben Ali originally assumed power in a bloodless 1987 coup d'état.²¹ Because he gained power in a succession that was technically constitutional, his government ostensibly retained the Tunisian Constitution of 1957.²² Over the course of his rule, however, Ben Ali did not implement certain constitutional promises effectively in practice.²³ For example, Article 8 of the contemporaneous Tunisian Constitution protected the freedoms of speech and press, Article 5 protected certain human rights and human dignity, and Article 12 forbade arbitrary detentions.²⁴ Yet throughout his rule, Ben Ali had a long record of human rights violations, such as arbitrary detentions, stifling of the press, and other such authoritarian behavior violating Tunisia's constitutional provisions.²⁵ Thus, his government as a functional entity failed to give force to many of the express aspirational commitments of the Tunisian Constitution.²⁶ Such constitutional failings and quashing of human rights contributed to the building strife that surfaced in the 2011 Arab Spring protests with calls for true change.²⁷ The pressure from Arab Spring protestors ultimately proved overwhelming, and Ben Ali dis-

¹⁹ Yasmine Ryan, *Tunisia's Bitter Cyberwar*, AL JAZEERA (Jan. 6, 2011), <http://www.aljazeera.com/indepth/features/2011/01/20111614145839362.html>.

²⁰ See Borger, *supra* note 18.

²¹ See EMMA C. MURPHY, *ECONOMIC AND POLITICAL CHANGE IN TUNISIA: FROM BOURGUIBA TO BEN ALI* 77–78 (1999) (describing the events leading to Ben Ali's assumption of power).

²² See *id.*

²³ See *id.* at 217–20 (providing examples of Ben Ali acting contrary to constitutional provisions); Ryan, *supra* note 19 (noting the Ben Ali regime censored the press and hindered free expression).

²⁴ CONST. OF TUNIS., 25 July 1957, ch. 1, arts. 5, 8, 12, available at <http://confinder.richmond.edu/admin/docs/Tunisiaconstitution.pdf>.

²⁵ See MURPHY, *supra* note 21, at 217–20; Ryan, *supra* note 19; *Two International Organizations Protest Ongoing Harassment of Tunisian Journalist*, HUM. RTS. WATCH (Apr. 5, 2000), <http://www.hrw.org/en/news/2000/04/04/two-international-organizations-protest-ongoing-harassment-tunisian-journalist> [hereinafter *Organizations Protest Ongoing Harassment*].

²⁶ See MURPHY, *supra* note 21, at 220; cf. Albert, *supra* note 4, at 36–37 (noting that the constitutional text should render aspirations practically achievable); Levinson, *supra* note 4, at 663, 678 (providing an example of disenfranchised masses pressuring elites for political reform with the threat of revolution).

²⁷ See MURPHY, *supra* note 21, at 220; Worth, *supra* note 18; Younis & Younis, *supra* note 13.

solved his government, relinquished his power on January 14, 2011, and subsequently fled to Saudi Arabia.²⁸

Though protests initially continued over the presence of Ben Ali supporters and party members' sustained involvement in the government, the interim government made a concerted effort to move toward democracy and the establishment of a new constitution.²⁹ In October 2011, Tunisians voted to establish an assembly that would draft a new constitution and form a new government in the first elections since Ben Ali's demise.³⁰ This assembly has the opportunity to entrench key aspirations of the revolutionary period into the new national constitution, and thereby truly break from the old regime and fulfill the potential of the revolutionary moment.³¹

B. *Egypt*

The revolutionary fervor that began in Tunisia quickly spread to Egypt as a political awakening began to grip the wider Arab world.³² Inspired by the success of Tunisian revolutionaries, Egyptians with similar grievances took to the streets against their government and its leader, Hosni Mubarak.³³

Mubarak, sitting as vice president in 1981, assumed power constitutionally when President Anwar el-Sadat was assassinated by militants.³⁴ Though Mubarak's government officially held authority under the Egyptian Constitution of 1971, his government failed to implement many of the constitutional commitments present in the text.³⁵ Throughout his rule, Mubarak relied heavily on repressing political sen-

²⁸ *Tunisia: Ex-President Ben Ali Flees to Saudi Arabia*, BBC News (Jan. 15, 2011, 2:08 ET), <http://www.bbc.co.uk/news/world-africa-12198106>.

²⁹ *See Tunisia Interim Leaders Dissolve Secret Police Agency*, BBC NEWS (Mar. 7, 2011, 12:11 ET), <http://www.bbc.co.uk/news/world-africa-12669461>; *Tunisian Prime Minister Resigns amid Renewed Protests*, CNN (Feb. 28, 2011, 11:15 GMT), <http://edition.cnn.com/2011/WORLD/africa/02/27/tunisia.government/>.

³⁰ *See* David D. Kirkpatrick, *Tunisians Vote in a Milestone of Arab Change*, N.Y. TIMES, Oct. 24, 2011, at A1.

³¹ *See* ACKERMAN, *supra* note 3, at 5–6, 49; Albert, *supra* note 4, at 36–37.

³² Ishaan Tharoor, *Top Ten World-News Stories: The Arab Spring Blooms in Tunisia and Egypt*, TIME (Dec. 7, 2011), http://www.time.com/time/specials/packages/article/0,28804,2101344_2101368_2101659,00.html.

³³ *Id.*

³⁴ LISA BLAYDES, ELECTIONS AND DISTRIBUTIVE POLITICS IN MUBARAK'S EGYPT 196 (2011).

³⁵ *Compare* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 3 ("Sovereignty is for the people alone; they are the source of authority."), *with* BLAYDES, *supra* note 34, at 164–66 (describing Mubarak's regime frustrating free elections).

timent and maintaining a “permanent state of emergency” to assert authoritarian control.³⁶

Attempting to maintain his regime amid the growing 2011 protests, Mubarak made political concessions and promised reforms.³⁷ Yet he simultaneously utilized the military to police protests, and manipulated access to the internet and social media websites that were driving the revolution.³⁸ There was even speculation he may have ordered soldiers to fire on peaceful protestors, or at least remained complicit in the killings.³⁹ The revolutionaries would not be deterred, however, and Mubarak finally ceded power on February 11, 2011.⁴⁰

After Mubarak relinquished power, the Egyptian military assumed control of the nation, and the Supreme Council of the Armed Forces (SCAF) governed.⁴¹ SCAF worked to establish order following the protests and fall of Mubarak, and pledged to meet “the legitimate demands of the people for a true democratic environment.”⁴² It accordingly established a timetable for elections and the transition to a more democratic government.⁴³

Despite SCAF’s pledges, however, many Egyptians felt the transition to democracy was not sufficiently expedient, and thus continued to protest against the military’s control of government.⁴⁴ On November

³⁶ DINA SHEHATA, ISLAMISTS AND SECULARISTS IN EGYPT: OPPOSITION, CONFLICT, AND COOPERATION 33–34 (2010).

³⁷ See generally Alexandra Dunn, *Unplugging a Nation: State Media Strategy During Egypt’s January 25 Uprising*, FLETCHER F. WORLD AFF., Summer 2011, at 15 (providing an account of Mubarak’s manipulation of Egyptian media during the uprising); Anthony Shadid, *Obama Urges Faster Shift of Power in Egypt*, N.Y. TIMES, Feb. 2, 2011, at A1 (describing Mubarak promises for political concessions and reforms).

³⁸ See sources cited *supra* note 37.

³⁹ See *Egypt’s Military Ruler Denies Order to Shoot*, AL JAZEERA (Oct. 3, 2011), <http://www.aljazeera.com/news/middleeast/2011/10/2011102233119313815.html>. Egyptian authorities later convicted Mubarak of complicity in the killing of protestors during the uprising, and was sentenced to life in prison. See David D. Kirkpatrick, *Despite Life Sentence, Mixed Mubarak Verdict Brings Turmoil to Egypt*, N.Y. TIMES, June 3, 2012, at A1.

⁴⁰ See *Hosni Mubarak Resigns as President*, AL JAZEERA (Feb. 11, 2011, 16:39 GMT), <http://www.aljazeera.com/news/middleeast/2011/02/201121125158705862.html>.

⁴¹ Heather Murdock, *Mubarak’s Resignation Sparks New Day for Egypt: “He’s Gone!”*, WASH. TIMES, Feb. 11, 2011, <http://www.washingtontimes.com/news/2011/feb/11/crowds-rejoice-egypts-mubarak-steps-down/>.

⁴² *Egypt’s Supreme Council of the Armed Forces: Statements and Key Leaders*, N.Y. TIMES, Feb. 14, 2011, <http://www.nytimes.com/interactive/2011/02/10/world/middleeast/20110210-egypt-supreme-council.html?ref=middleeast>.

⁴³ See David D. Kirkpatrick & Steven Lee Myers, *U.S. Hones Warnings to Egypt as Military Stalls Transition*, N.Y. TIMES, Nov. 17, 2011, at A1.

⁴⁴ See David D. Kirkpatrick, *Egypt’s Cabinet Offers to Resign as Protests Rage*, N.Y. TIMES, Nov. 22, 2011, at A1 [hereinafter Kirkpatrick, *Egypt’s Cabinet Offers to Resign*].

22, 2011, the military announced that it had struck a deal with the Muslim Brotherhood, an influential political party, to speed the transition to civilian rule, with a presidential election to be held by late June 2012; but this still did not abate the public's demands for the military to leave power.⁴⁵ Some viewed the military council as acting with the same disregard for civilian demands as Mubarak had in his attempt to maintain power nine months earlier, and as seeking to palliate unrest through false promises of a slow transition to democracy.⁴⁶ Indeed, after meeting with the military rulers, former U.S. President Jimmy Carter stated that he doubted SCAF would "fully submit to the authority" of the planned civilian democratic government.⁴⁷ Subsequently, Mohamed Morsi was democratically elected President on June 30, 2012, and has worked to gain power by forcing some generals into retirement, but SCAF continues to maintain a presence in the government's affairs.⁴⁸

Although Egypt has a provisional constitution and has made some progress toward democracy, there is still much to be done.⁴⁹ If the military does not abide by its promises, it risks perpetuating the similar hypocrisies of the previous regime.⁵⁰ Further, the revolutionary fervor could subside before the revolutionary aspirations are adequately entrenched in a new legitimate constitution.⁵¹ Thus, Egypt's future will rest heavily on the ability of its new constitutional drafters to cement the revolutionary aspirations into its new constitutional culture.⁵²

⁴⁵ David D. Kirkpatrick, *Deal to Hasten Transition in Egypt Is Jeered at Protests*, N.Y. TIMES, Nov. 23, 2011, at A1 [hereinafter Kirkpatrick, *Deal to Hasten Transition*].

⁴⁶ See *US Urges Quick Transition to Democracy in Egypt*, BOSTON.COM (Nov. 25, 2011), http://www.boston.com/news/nation/washington/articles/2011/11/25/us_urgues_quick_transition_to_democracy_in_egypt/.

⁴⁷ David D. Kirkpatrick, *Carter Says Egypt's Military Is Likely to Retain Some Political Powers*, N.Y. TIMES, Jan. 12, 2012, at A14 [hereinafter Kirkpatrick, *Egypt's Military Likely to Retain Powers*]; Ashraf Fahim & Sherine El Madany, *Carter Says Egypt Army Unlikely to Give Up All Powers*, REUTERS (Jan. 12, 2011, 6:58 PM), <http://www.reuters.com/article/2012/01/12/us-egypt-usa-carter-idUSTRE80B1YM20120112>.

⁴⁸ See Kareem Fahim, *Egyptian Leader Pushes Generals Into Retirement*, N.Y. TIMES, Aug. 13, 2012, at A1.

⁴⁹ See *Constitutional Declaration 2011*, EGYPT'S GOV'T SERVICE PORTAL, <http://www.egypt.gov.eg/english/laws/Constitution/> (last visited Feb. 7, 2013) [hereinafter *Constitutional Declaration 2011* (Egypt)]; see also, e.g., Kirkpatrick, *Egypt's Cabinet Offers to Resign*, *supra* note 44 (demonstrating unresolved violence, uncertainty and political tumult); Fahim & El Madany, *supra* note 47 (showing the difficulty posed by military power).

⁵⁰ See Fahim & El Madany, *supra* note 47; Shadid, *supra* note 37.

⁵¹ See ACKERMAN, *supra* note 3, at 49, 53.

⁵² See *id.* Egypt has since adopted a new constitution by referendum, signed into law by sitting President Morsi on December 26, 2012. See Salma Abdelaziz, *Morsy Signs Egypt's Constitution Into Law*, CNN (Dec. 26, 2012, 15:28 GMT), <http://www.cnn.com/2012/12/25/world/africa/egypt-constitution/index.html>. Although it is early to offer a full analysis, there

C. Libya

The political discontent that began in Tunisia and continued in Egypt eventually spread to Libya by February 2011.⁵³ Similar to the protestors in the other two nations, Libyans took to the streets in search of greater economic opportunities and political freedoms.⁵⁴ Libyan ruler Muammar Gaddafi responded to the uprising like Ben Ali and Mubarak, with both threats and actual use of the military to quell protestors.⁵⁵ Unlike Ben Ali and Mubarak, who both realized the strength of the tide against them and accepted the need to step down, Gaddafi defiantly imbedded his government through the use of force.⁵⁶

are many critics of the constitution and it appears to succumb to several different challenges discussed in this Note's inquiry. See Shahira Amin, *Amid Orthodox Christmas, Egypt's Christians Fear for Their Rights Under Islamist Government*, CNN (Jan. 7, 2013, 4:00 PM), <http://religion.blogs.cnn.com/2013/01/07/amid-orthodox-christmas-egypts-christians-fear-for-their-rights-under-islamist-government/>; Cynthia Schneider, *U.S. Gets It Wrong on Egypt Again*, CNN (Jan. 25, 2013, 16:07 GMT), <http://www.cnn.com/2013/01/24/opinion/schneider-egypt/index.html>. For instance, some dissenters argue the constitution, in addition to other defects, is not a product of national consensus and was disproportionately influenced by Islamist parties. See David D. Kirkpatrick, *Despite "Mistakes," Morsi Says Constitution Fight Was Democracy in Action*, N.Y. TIMES, Dec. 27, 2012, at A8; David D. Kirkpatrick, *Egyptian Islamists Approve Draft Constitution Despite Objections*, N.Y. TIMES, Nov. 30, 2012, at A6. Other commentators argue the military retains much of its power. David D. Kirkpatrick & Mayy El Sheikh, *Egypt Opposition Gears Up After Constitution Passes*, N.Y. TIMES, Dec. 24, 2012, at A10. Some also note that the constitution does not adequately address the role of Islamic law, but merely adopts Islamic law and leaves the particulars to the political process. David D. Kirkpatrick, *A Vague Role for Religion in Egyptian Draft Constitution*, N.Y. TIMES, Nov. 10, 2012, at A4. In the wake of the new constitution, Egypt's citizens remain unsatisfied and the country suffers continued unrest. See Tarek El-Tablawy & Salma El Wardany, *Mursi Declares Emergency in 3 Egyptian Provinces amid Unrest*, BLOOMBERG (Jan. 28, 2013, 2:02 AM), <http://www.bloomberg.com/news/2013-01-27/egypt-s-mursi-declares-state-of-emergency-amid-mounting-unrest.html>.

⁵³ See Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 157–58, 162–63 (2012); *Egypt-Inspired Protests Spread to Libya*, CBS NEWS (Feb. 16, 2011, 10:56 AM), <http://www.cbsnews.com/stories/2011/02/16/501364/main20032155.shtml>.

⁵⁴ See Ibrahim Sharqieh, *The March for Freedom in Libya*, BROOKINGS, (Feb. 22, 2011, 11:47 AM) <http://www.brookings.edu/blogs/up-front/posts/2011/02/22-libya-sharqieh>.

⁵⁵ See Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶¶ 2, 12, 14, 17, 20, 27 (May 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf> [hereinafter Prosecutor's Warrant Application for the Situation in Libya]. The spelling of Muammar Gaddafi's name varies widely among publications; the spelling throughout this piece remains consistent with the ICC warrant. See *id.*

⁵⁶ See David D. Kirkpatrick & Mona El-Naggar, *Qaddafi's Forces Strike with Fury as Unrest Grows*, N.Y. TIMES, Feb. 22, 2011, at A1.

Gaddafi gained power in a bloodless coup in 1969.⁵⁷ As head of the Revolutionary Command Council, Gaddafi continued to assert his power until he consolidated his control over Libya by 1971.⁵⁸ Gaddafi's revolutionary manifesto, the *Green Book*, detailed his social and political philosophies, thereby articulating the aspirations for his state.⁵⁹ While the Quran was officially the supreme law of the land in name, Gaddafi's personal will operated as such in practice.⁶⁰ Throughout his rule, Gaddafi repressed and even executed some of his own people, stifling freedoms and germinating the strife that ultimately led to the Arab Spring protests.⁶¹

When the protests erupted in 2011, rather than address the people's demands, Gaddafi allegedly ordered the systematic use of force against the protesters, resulting in violent clashes and civilian deaths.⁶² Gaddafi's violent crackdown then inspired protestors to take up arms, and a violent civil war ensued.⁶³ As the government continued to assault civilians, the United Nations Security Council passed a resolution authorizing a no-fly zone to protect the Libyan people,⁶⁴ and the North Atlantic Treaty Organization intervened to implement it.⁶⁵ With the aid of the no-fly zone, the Libyan rebels fought a grueling civil war.⁶⁶ They

⁵⁷ DIRK VANDEWALLE, *A HISTORY OF MODERN LIBYA* 79 (2006).

⁵⁸ See *id.* at 82; see also GEORGE TREMLETT, *GADDAFI: THE DESERT MYSTIC* 145–50 (1993) (displaying a chronology of Gaddafi's consolidation of power); JOHN WRIGHT, *LIBYA: A MODERN HISTORY* 243 (1982) (providing an example of Gaddafi's authoritarian control over the oil industry).

⁵⁹ See VANDEWALLE, *supra* note 57, at 6–7, 97–138 (detailing the political and economic philosophy contained in Gaddafi's *Green Book*).

⁶⁰ See *id.* at 97, 126; see also Prosecutor's Warrant Application for the Situation in Libya, *supra* note 55, ¶¶ 2, 12, 14, 17, 20, 27 (providing examples of Gaddafi's willed illegal acts against civilians).

⁶¹ See Ian Black, *Libya: Inner Circle: Brutal Enforcer: Gaddafi's Most Trusted Aide and Right-Hand Man*, *GUARDIAN* (London), Feb. 23, 2011, at 5.

⁶² Prosecutor's Warrant Application for the Situation in Libya, *supra* note 55, ¶ 2.

⁶³ Joseph, *supra* note 53, at 163.

⁶⁴ S.C. Res. 1973, ¶¶ 6–12, U.N. Doc. S/RES/1973 (Mar. 17, 2011); see also Press Release, Security Council, Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

⁶⁵ *Libya: US, UK and France Attack Gaddafi Forces*, *BBC NEWS* (Mar. 20, 2011, 4:20 ET), <http://www.bbc.co.uk/news/world-africa-12796972>; Press Release, Security Council, *supra* note 64.

⁶⁶ See Simon Jenkins, *Comment: By Merely Bolstering the Weaker Side, We Are Prolonging Libya's Civil War*, *GUARDIAN* (London), Apr. 1, 2011, at 33.

ultimately emerged victorious, capturing Tripoli in late August and killing Gaddafi on October 20, 2011.⁶⁷

Following Gaddafi's fall, Libya subsequently began its transition to democracy.⁶⁸ The temporary National Transitional Council (NTC), which ruled during the civil war, held successful elections in July 2012 for a national assembly that must establish a constitutional assembly to draft a new national constitution.⁶⁹ As in Tunisia and Egypt, there is still much work to be done in Libya.⁷⁰ For instance, many of the revolutionary militias refuse to give up their arms in an effort to influence political decisions as self-proclaimed "guardians of the revolution."⁷¹ Thus, just as in Tunisia and Egypt, Libyans have the opportunity to design a functioning constitution and to progress to a thriving state, but they must adequately discern common national aspirations and design them in a manner that is practically achievable.⁷²

II. DISCUSSION

A. *True Revolution?*

A revolution is defined as "a fundamental change in political organization" and "a fundamental change in the way of thinking about or visualizing something: a change of paradigm."⁷³ Conceptualizing a rev-

⁶⁷ Kareem Fahim & Rick Gladstone, *Libyan Rebels Clarify Steps to New Rule*, N.Y. TIMES, Oct. 4, 2011, at A10; Sam Greenhill, *Gaddafi's Killers Will Be Put on Trial over Mob Execution, Vow Libya's New Rulers*, MAIL ONLINE (Oct. 29, 2011, 5:43 EST), <http://www.dailymail.co.uk/news/article-2054344/Gaddafi-dead-Mob-killers-trial-vow-Libyas-new-rulers.html>.

⁶⁸ *Libya's Transitional Leader Declares Liberation of His Nation*, TOLEDO BLADE (Oct. 23, 2011), <http://www.toledoblade.com/World/2011/10/23/Autopsy-shows-Gadhafi-killed-by-head-shot-official-says>.

⁶⁹ See David D. Kirkpatrick, *In Libya, Fighting May Outlast the Revolution*, N.Y. TIMES, Nov. 2, 2011, at A4 [hereinafter Kirkpatrick, *Fighting May Outlast the Revolution*]; *Libya's Election*, N.Y. TIMES, July 10, 2012, at A20.

⁷⁰ See David D. Kirkpatrick, *Fate of Dictator Places Focus on Arab Spring's 'Hard Road'*, N.Y. TIMES, Oct. 21, 2011, at A1 [hereinafter Kirkpatrick, *Arab Spring's Hard Road*] (describing the "hard road ahead" for these nations); *Libya's Election*, *supra* note 69; see also *supra* text accompanying notes 29–31, 47–50.

⁷¹ Kirkpatrick, *Fighting May Outlast the Revolution*, *supra* note 69.

⁷² See Albert, *supra* note 4, at 31–33 (recognizing the importance of the state's economic ability to achieve aspirations); Rustow, *supra* note 9, at 34 ("The transition to democracy . . . may require some common attitudes . . . on the part of the politician and of the common citizen.").

⁷³ MERRIAM-WEBSTER 1068 (11th ed. 2012); see SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 264 (1968) ("A revolution is a rapid, fundamental, and violent domestic change in the dominant values and myths of a society, in its political institutions, social structure, leadership, and government activity and policies.").

olution as a fundamental shift in the political paradigm is helpful in attempting to understand the aspirations of many of the Arab Spring protesters and activists.⁷⁴ Rather than a continuation of the status quo, or a simple legal revolution that establishes a new source of laws but may not achieve a revolutionary break from the old regime,⁷⁵ the intention of the Arab Spring movement remains revolutionary by definition.⁷⁶ In the past, some Arab leaders and intellectuals tried to legitimize the abandonment of democracy and individual freedoms by arguing that autocratic regimes were necessary to strengthen economic development and national sovereignty.⁷⁷ This argument resonated with prior regimes, but the Arab Spring demonstrates the people deemed the need for repressive autocracy has passed.⁷⁸ The focus of the Arab Spring was to break from these tyrannical political paradigms of the past and concretize a revolution with greater democracy, economic opportunity, and personal freedom in a new state.⁷⁹

A coup d'état, in contrast to revolution, is defined as "a sudden decisive exercise of force in politics; especially: the violent overthrow or alteration of an existing government by a small group."⁸⁰ In a coup, there is no fundamental change in the political paradigm.⁸¹ Coups usually constitute a mere change in the regime and source of legal sovereignty, without structural changes to the legal system or the social and economic elements accompanying a full-fledged revolution that estab-

⁷⁴ See ACKERMAN, *supra* note 3, at 5–6.

⁷⁵ See Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 332–33 (2005).

⁷⁶ See MERRIAM-WEBSTER, *supra* note 73, at 1068; *Egypt Rallies Mark Anti-Mubarak Uprising Anniversary*, BBC NEWS (Jan. 25, 2012, 7:24 ET), <http://www.bbc.co.uk/news/world-middle-east-16711302> (stating that, one year later, the protestors still aim for true change, to bring down military rule, and that they will not be silenced).

⁷⁷ See NAJIB GHADBIAN, *DEMOCRATIZATION AND THE ISLAMIST CHALLENGE IN THE ARAB WORLD* 13 (1997).

⁷⁸ See, e.g., Ryan, *supra* note 19; Shadid, *supra* note 37; *Arab Spring Is Human Awakening*, *supra* note 13.

⁷⁹ See, e.g., Ryan, *supra* note 19; *Arab Spring Is Human Awakening*, *supra* note 13.

⁸⁰ MERRIAM-WEBSTER, *supra* note 73, at 286 (emphasis omitted). *But see* Ozan O. Varol, *The Democratic Coup d'État*, 53 HARV. INT'L L.J. 291, 293–308 (2012) (arguing for a new conception of a democratic coup d'état as precipitating a fundamental change in governance and the establishment of democracy).

⁸¹ See MERRIAM-WEBSTER, *supra* note 73, at 286, 1068. *Compare* DAVID HEBDITCH & KEN CONNOR, *HOW TO STAGE A MILITARY COUP: FROM PLANNING TO EXECUTION* 9–10 (2005) (describing a coup d'état as simply regime change), *and* HUNTINGTON, *supra* note 73 at 264 ("A coup d'état in itself changes only leadership and perhaps policies . . ."), *with* Green, *supra* note 75, at 332–33 ("[R]evolution [is] a break in the continuity of the legal order . . .").

lishes a new constitutional order.⁸² Though the citizens of Tunisia, Egypt, and Libya have successfully deposed their former rulers, the full spectrum of revolutionary change may remain elusive.⁸³ If the revolutionary aspirations of the Arab Spring are not captured and implemented in the subsequent legal order, all of their efforts could amount to a mere coup, without the fundamental changes originally sought.⁸⁴

Central to achieving this fundamental paradigm shift that breaks from the past regimes' failings and achieves the goals of revolution is the need to establish a legitimate constitution.⁸⁵ In order to do so, each nation must come to some consensus about its identity and aspirational goals to mobilize the broad support necessary to articulate these aims in the constitution and implement them in society, thereby achieving stability and the rule of law.⁸⁶ Indeed, one scholar notes that "[d]emocratization is held back in the Arab world by the unresolved conflict over collective identity."⁸⁷ Thus, one important element for the success of the Arab Spring revolutions is to achieve widespread consensus on the aspirational aims of the nation to effectively support and implement them functionally and thereby attain lasting stability and constitutional order.⁸⁸

It may be the case after a period of revolution, that the revolutionaries with the aspirational visions which originally sparked the uprising are not the only interest group holding power.⁸⁹ Indeed, in Egypt, the

⁸² Cf. HANNAH ARENDT, ON REVOLUTION 34 (1963) ("[R]evolutions are more than successful insurrections and . . . we are not justified in calling every *coup d'état* a revolution . . ."); Green, *supra* note 75, at 332–33; Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45, 62–68 (2011) (discussing the nature of legal change and the establishment of legal norms that affect structural changes on the laws).

⁸³ See ACKERMAN, *supra* note 3, at 5, 46, 49, 53 (indicating that the opportunity to constitutionalize revolutionary principles is fleeting); see also Kirkpatrick, *Arab Spring's Hard Road*, *supra* note 70 (demonstrating the difficult road ahead to achieve stability).

⁸⁴ Cf. MERRIAM-WEBSTER, *supra* note 73, at 286, 1068 (presenting a coup as merely the alteration of the existing government); Green, *supra* note 75, at 332–33 ("[R]evolution [is] a break in the continuity of the legal order . . ."). The continuing strife in Libya presents the possibility that violent militias will maintain an inordinate amount of influence in government, impeding true civilian control. See Kirkpatrick, *Fighting May Outlast the Revolution*, *supra* note 69.

⁸⁵ See ACKERMAN, *supra* note 3, at 49–50; William Partlett, *Making Constitutions Matter: The Dangers of Constitutional Politics in Current Post-Authoritarian Constitution Making*, 38 BROOK. J. INT'L L. 193, 199 (2012) ("[F]or the people to truly act, they must do so outside of the ordinary, pre-existing rules or institutional subdivisions inherited from the old regime.").

⁸⁶ See ACKERMAN, *supra* note 3, at 49, 67; GHADBIAN, *supra* note 77, at 11–12.

⁸⁷ GHADBIAN, *supra* note 77, at 12.

⁸⁸ See ACKERMAN, *supra* note 3, at 49, 67; GHADBIAN, *supra* note 77, at 11–12.

⁸⁹ See ACKERMAN, *supra* note 3, at 67; Rustow, *supra* note 9, at 30–31.

military, and not the protestors, assumed power after Mubarak stood down.⁹⁰ Following the regime changes in Libya and Tunisia, the ruling councils did contain civilian members; nevertheless, they were still comprised of social and political elites.⁹¹ These groups of political leaders will negotiate and compromise over the aspirational aims of their entire respective nations, thereby influencing the character of the new constitutions.⁹² The ideals and concerns of these post-revolution leaders, however, often differ from aspirations central to the revolutionary protestors who began the movement.⁹³ For the nations to achieve true revolution and establish themselves on a path to stability and progress with broad popular support, these leaders must arrive at aspirational aims that their nations can identify with—aims that are not disproportionately oriented toward the leaders' own personal concerns.⁹⁴ If they fail to do so, they risk wasting the potential of the Arab Spring's revolutionary moment through either the perpetuation of past failures, or drafting new constitutions without accurate national aspirations.⁹⁵ The people of these nations did not defy guns and bullets for a mere coup d'état—or even a legal revolution that simply changes the source of the laws—but rather for tangible change and true democracy.⁹⁶ The protestors of the Arab Spring aspire to full national revolutions that break from the past regimes; arriving at accurate consensus about the nations' aspirational goals is paramount in this endeavor.⁹⁷

⁹⁰ See Murdock, *supra* note 41.

⁹¹ See Kirkpatrick, *Arab Spring's Hard Road*, *supra* note 70; Kirkpatrick, *Fighting May Outlast the Revolution*, *supra* note 69.

⁹² See Kirkpatrick, *Arab Spring's Hard Road*, *supra* note 70; Kirkpatrick, *Fighting May Outlast the Revolution*, *supra* note 69.

⁹³ See *Egypt Rallies Mark Anti-Mubarak Uprising Anniversary*, *supra* note 76.

⁹⁴ See GHADBIAN, *supra* note 77, at 12; Rustow, *supra* note 9, at 30; see also Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 376–82 (1995) (discussing the various interests inherent in the constitution drafting process).

⁹⁵ See ACKERMAN, *supra* note 3, at 3, 5, 46; David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. (forthcoming 2013) (manuscript at 32–33), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011440 (describing the problems resulting in constitutional assemblies pursuing factional interests and failing to accurately define the nation's fundamental identity).

⁹⁶ See, e.g., Jay Deshmukh, *After the Arab Spring, Dreams of Democracy*, MAIL & GUARDIAN (Jan. 1, 2012), <http://mg.co.za/article/2012-01-01-after-the-arab-spring-dreams-of-democracy>; Younis & Younis, *supra* note 13.

⁹⁷ ACKERMAN, *supra* note 3, at 49, 69; GHADBIAN, *supra* note 77, at 12; Younis & Younis, *supra* note 13.

B. A Model for Democratic Transition

One of the Arab Spring revolutionaries' primary goals was to establish governments that are more democratic, representative, and responsive to the concerns of the citizenry.⁹⁸ The Arab Spring nations have taken strides in this direction, but more must be done to forge stable and lasting democratic institutions and cultures.⁹⁹ In order to break from the past regimes and achieve the goals of revolution in the momentum of the revolutionary moment, the current political actors must establish well-written constitutions.¹⁰⁰ Establishing well-written constitutions and corresponding constitutional cultures with clear, attainable aspirations and institutions oriented toward those goals is an important component of increased democratization.¹⁰¹

To more fully understand the burgeoning democratic and constitutional developments in the Arab World, it is helpful to invoke renowned political theorist and sociologist Dankwart A. Rustow's model of democratic transition.¹⁰² Rustow's revolutionary model of democratic transition identifies a background precondition and three subsequent phases deemed integral to establishing a lasting democracy.¹⁰³ Within this model, there is arguably a key moment for national consensus on aspirational constitutional aims wherein a constitution may succeed.¹⁰⁴ Tunisia, Egypt, and Libya are currently situated in the midst of this transition, and identifying their aspirations and instituting them at the proper time is central to the success of their democratic experiment, as the model demonstrates.¹⁰⁵

The first stage in Rustow's model of democratic transition is the necessary background condition of national unity.¹⁰⁶ Rustow asserts that, "no minimal level of economic development or social differentia-

⁹⁸ Deshmukh, *supra* note 96; *Arab Nations Need to Ensure Sustainable Transition to Democracy—UN Rights Chief*, UN NEWS CENTRE (May 30, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38541&Cr=protests&Cr1=#>.

⁹⁹ See Kirkpatrick, *Arab Spring's Hard Road*, *supra* note 70.

¹⁰⁰ See ACKERMAN, *supra* note 3, at 49–50, 61, 69.

¹⁰¹ See *id.* at 61, 69; *cf.* Albert, *supra* note 4, at 36 (stating the scope of aspirations should be attainable).

¹⁰² See GHADBIAN, *supra* note 77, at 10; Rustow, *supra* note 9 at 14–41.

¹⁰³ See generally Rustow, *supra* note 9 (articulating Rustow's theory for democratic transition).

¹⁰⁴ See *id.* at 30–32 ("The decision phase may well be considered an act of deliberate, explicit consensus.").

¹⁰⁵ See *id.*; see also GHADBIAN, *supra* note 76, at 12; Kirkpatrick, *Arab Spring's Hard Road*, *supra* note 70.

¹⁰⁶ Rustow, *supra* note 9, at 25.

tion is necessary as a prerequisite to democracy.”¹⁰⁷ Thus, although economic and social factors may contribute to democratic transition, a pervasive sense of national unity is the only necessary prerequisite to begin the transition.¹⁰⁸ Signs of national unity are present in the Arab Spring nations, suggesting that Rustow’s model may be applicable.¹⁰⁹ Expectedly, there are some dissenters, such as those seeking autonomy in eastern Libya.¹¹⁰ Yet Tunisia, Egypt, and Libya all survived the tumult of political revolution intact and are moving toward new governments with some sense of national unity.¹¹¹ The fact that these three nations survived political crises and emerged whole is itself a testament to national sentiment.¹¹²

The second stage in Rustow’s model is the preparatory phase.¹¹³ In this phase of democratic transition, factions advocating conflicting ideals emerge and battle over both their principles and political control of the institutions of government.¹¹⁴ Rustow acknowledges that the groups that comprise these competing factions may vary greatly from nation to nation.¹¹⁵ In the context of the Arab Spring, a clear battle emerged between the ruling elite and a mobilized citizenry seeking greater freedom, economic opportunity, and true change.¹¹⁶ The battle of the preparatory phase poses danger to the democratic transition, as Rustow acknowledges that the protagonists may grow weary and the issues may fade without the emergence of a lasting democratic solution.¹¹⁷ This danger may affect the Arab Spring, particularly with the military presence in Egypt, but there are significant domestic and international

¹⁰⁷ *Id.* at 26–27.

¹⁰⁸ *Id.*

¹⁰⁹ See Nayan Chanda, Op-Ed., *Power of New Nationalism*, TIMES INDIA, Feb. 19, 2011, http://articles.timesofindia.indiatimes.com/2011-02-19/edit-page/28614957_1_arab-nationalism-tunisian (providing an example of the presence of new nationalism among youths in the Middle East).

¹¹⁰ Suliman Ali Alzway & David D. Kirkpatrick, *Eastern Libya Demands a Measure of Autonomy in a Loose National Federation*, N.Y. TIMES, Mar. 7, 2012, at A6.

¹¹¹ See, e.g., Chanda, *supra* note 109; Mansour Moaddel, *In Arab Spring, Nationalism Trumps Religion*, NEW STRAITS TIMES (Malay.), Jan. 6, 2012, <http://www.nst.com.my/opinion/columnist/in-arab-spring-nationalism-trumps-religion-1.28631>.

¹¹² See, e.g., Chanda, *supra* note 109; Moaddel, *supra* note 111.

¹¹³ See Rustow, *supra* note 9, at 27.

¹¹⁴ *Id.* at 27–29 (providing specific examples of conflicting political movements struggling to assert their own interests).

¹¹⁵ *Id.*

¹¹⁶ See *id.*; Worth, *supra* note 18; Deshmukh, *supra* note 96; Younis & Younis, *supra* note 13.

¹¹⁷ Rustow, *supra* note 9, at 29.

pressures intent on continuing the push toward democracy.¹¹⁸ The preparatory struggle of democratic transition is well underway in these three nations, and may have passed its apex.¹¹⁹

The third and most critical phase to aspirational constitutional consensus is the decision phase.¹²⁰ In this phase, political actors make the conscious decision to institute democracy and shape the future of the state in accordance with national consensus.¹²¹ This is the vital period where aspirational constitutional values are discerned, articulated, entrenched in a constitution, and hopefully inculcated in the institutions of government.¹²² It is evident that universal consensus on aspirational aims is practically impossible, and that dissenting factions will remain present in any nation.¹²³ In fact, in order to make revolutionary aspirations politically and practically achievable, many of them may need to be mitigated to an extent.¹²⁴ Nevertheless, achieving consensus on the nation's aspirational aims to mobilize support and implement these goals is vital to the success of the democratic constitution and should take place during the decision phase.¹²⁵ By successfully articulating an aspirational vision for the state, mobilizing support for that vision, and orienting government to achieve it, these fledgling democracies can create and maintain stability for decades to come.¹²⁶

The revolutionary quest for political and social stability cements in the final stage: the habituation phase.¹²⁷ The central component of this phase is that both citizens and political actors become familiar with, and habituated to, democratic government.¹²⁸ Though there will certainly be backlash to the democratic process of problem solving—which entails compromise and less-than-perfect results for all parties—citizens must become familiar with and accept this method of political compromise during habituation.¹²⁹ Once this widespread acceptance of

¹¹⁸ See Fahim & El Madany, *supra* note 47.

¹¹⁹ Compare Rustow, *supra* note 9, at 27–29 (detailing the conditions observed in the preparatory phase), with Kirkpatrick, *Fighting May Outlast the Revolution*, *supra* note 69 (demonstrating the factional struggle consistent with the preparatory phase of Rustow's model).

¹²⁰ See Rustow, *supra* note 9, at 29–31.

¹²¹ See *id.* at 30–32.

¹²² See ACKERMAN, *supra* note 3, at 3, 46, 49, 53; Rustow, *supra* note 9, at 30–31.

¹²³ See Rustow, *supra* note 9, at 21, 31–32.

¹²⁴ See Albert, *supra* note 4, at 32–33 (noting the importance of qualifying aspirational rights by the resources available to satisfy them).

¹²⁵ See ACKERMAN, *supra* note 3, at 49, 67; GHADBIAN, *supra* note 77, at 12.

¹²⁶ See ACKERMAN, *supra* note 3, at 3, 5, 49–50; Rustow, *supra* note 9, at 32.

¹²⁷ See Rustow, *supra* note 9, at 32.

¹²⁸ See *id.*

¹²⁹ *Id.* at 32–33.

democratic norms takes place, the democracy should be solidified and the transition to stable democracy complete.¹³⁰

For the fledgling democracy to ossify into a stable and lasting state during this final phase, however, the established government must be able to effectively implement the aspirational constitutional elements in practice.¹³¹ If the people are adversely affected by a vast disconnect between constitutional aspirations and their functional reality, there will undoubtedly be civil strife and government instability, as many will not accept the government's legitimacy.¹³² Thus, it is essential for the functional constitutional elements to be adequately oriented toward attainable aspirations for democracy to flourish and citizens to become habituated.¹³³

As it presently stands, Tunisia, Egypt, and Libya seem to be nearing the end of the preparatory phase and moving into the decision phase, taking concrete steps toward democracy.¹³⁴ Though nations will develop at differing paces and in different directions, the Arab Spring nations are commonly faced with the challenge and promise of drafting a new constitution to cement true change.¹³⁵ As Rustow's model demonstrates, arriving at some consensus and then moving toward functional implementation of this consensus during the habituation phase is central to cementing a revolution and developing a stable democracy.¹³⁶

C. Aspirational Flashpoints

In discerning the aspirational ideals for the new constitutions and the future of the Arab Spring nations, the people must grapple with

¹³⁰ *Id.* at 32–35.

¹³¹ See Albert, *supra* note 4, at 32–33.

¹³² Cf. MURPHY, *supra* note 21, at 218–20 (demonstrating Ben Ali's regime committing constitutional violations and continuing hypocrisy); Ryan, *supra* note 19 (demonstrating Ben Ali's censorship in response to the people's constitutionally protected political dialogue); *Organizations Protest Ongoing Harassment*, *supra* note 25 (providing an example of the Ben Ali regime's hypocrisy and observers questioning the government's legitimacy).

¹³³ See Mills, *supra* note 4, at 116.

¹³⁴ Compare Rustow, *supra* note 9, at 29–30 (discussing the conditions of struggle typical of the preparatory phase and the transition to the decision phase), with Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45 (displaying evidence of Egypt's move to the decision phase with some steps toward democracy).

¹³⁵ See ACKERMAN, *supra* note 3, at 49 (describing the necessity of constitutionalizing a revolutionary moment); Rustow, *supra* note 9, at 27 (stating that issues and social conditions differ from nation to nation during the transition to democracy); Younis & Younis, *supra* note 13.

¹³⁶ See Rustow, *supra* note 9, at 30–32.

certain divisive issues.¹³⁷ Some troublesome issues are reminiscent of the constitutional hypocrisies of the past regimes, such as adequately fulfilling constitutional promises to protect political and human rights, or the military's role in government.¹³⁸ Other issues concern normative societal values that must be addressed within a larger political system that may contain contradictory norms, such as the place of Islamic law in democracy and the protection of women's rights.¹³⁹ To successfully transition to a thriving democracy, each nation must address these challenges by reaching consensus on accurate definitions for their constitutional aspirations.¹⁴⁰

1. Protecting Human Rights

One potential aspirational issue for these nations in their constitutional transitions is the protection of human rights, as these nations have each had difficulty protecting human rights in the past.¹⁴¹ Despite prior constitutional aspirations to the contrary,¹⁴² the former regimes had a history of repressing their citizens' speech and political activity, drawing criticism from human rights groups for treatment of civilians, and even using deadly force against unarmed civilian protestors.¹⁴³ Respecting basic human rights and political freedoms in practice was a source of difficulty for these nations, and was clearly a failed constitutional aspiration.¹⁴⁴

In their new constitutional declarations, these nations have the clear intent to protect human rights through due process of law.¹⁴⁵ For

¹³⁷ See GHADBIAN, *supra* note 77, at 12.

¹³⁸ See Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L.R. 532, 544–46 (2007) (describing military emergency rule in Egypt prior to the Arab Spring); Fahim & El Madany, *supra* note 47 (noting hypocritical acts of the ruling military council after the Arab Spring).

¹³⁹ See SHEHATA, *supra* note 36, at 57.

¹⁴⁰ ACKERMAN, *supra* note 3, at 49, 67; GHADBIAN, *supra* note 77, at 12.

¹⁴¹ See, e.g., MURPHY, *supra* note 21, at 217–20; Prosecutor's Warrant Application for the Situation in Libya, *supra* note 55, ¶¶ 2, 12, 14, 17, 20, 27.

¹⁴² Cf. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, arts. 45, 47, 48 (presenting various guarantees of personal and political freedoms); CONST. OF TUNIS., 25 July 1957, pmbl. (guaranteeing popular sovereignty and recognizing human rights).

¹⁴³ See Prosecutor's Warrant Application for the Situation in Libya, *supra* note 55, ¶¶ 2, 12, 14, 17, 20, 27; MURPHY, *supra* note 21, at 217–20; *Organizations Protest Ongoing Harassment*, *supra* note 25.

¹⁴⁴ See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, arts. 45, 47, 48, 54 (presenting various guarantees of personal and political freedoms); CONST. OF TUNIS., 25 July 1957, pmbl. (guaranteeing popular sovereignty and recognizing human rights).

¹⁴⁵ See *Constitutional Declaration 2011* (Egypt), *supra* note 49, arts. 8, 9, 11, 13, 16; INTERIM TRANSITIONAL NAT'L COUNCIL, THE CONSTITUTIONAL DECLARATION arts. 7, 14, 15 (2011)

example, the new Egyptian Constitutional Declaration declares that the “life of citizens has a special sanctity protected by law,”¹⁴⁶ and contains various articles that safeguard human rights in a variety of ways, such as by barring unwarranted or undignified detention, and by protecting freedom of religion and assembly.¹⁴⁷ The Libyan Constitutional Declaration states that “[h]uman rights and . . . freedoms shall be respected by the State,”¹⁴⁸ and provides numerous other provisions with detailed protections.¹⁴⁹

Nevertheless, problems in implementing effective and meaningful protections for these rights are already emerging.¹⁵⁰ In Libya, the NTC has faced difficulty protecting loyalist prisoners—and even Gaddafi himself—from abuse, torture, and murder.¹⁵¹ Though the NTC is working to address these issues both domestically and with international aid, protection of basic human rights remains an important aspirational commitment to achieve in a new Libya.¹⁵² Egypt faces similar issues, with allegations of human rights abuses against peaceful protestors by the ruling SCAF.¹⁵³ Thus, these nations face the challenge of implementing their constitutional human rights aspirations.¹⁵⁴

2. Democratic Legitimacy

Along similar lines, these nations face the challenge of providing the democratic legitimacy that was a clear demand of Arab Spring protestors and was subsequently promised in the constitutional declara-

(Libya) [hereinafter LIBYA CONST. DECLARATION 2011], available at http://www.mpil.de/shared/data/pdf/libya_interim_constitution_august_2011.pdf.

¹⁴⁶ *Constitutional Declaration 2011* (Egypt), *supra* note 49, art. 10.

¹⁴⁷ *See id.* arts. 8, 9, 11, 13, 16.

¹⁴⁸ LIBYA CONST. DECLARATION 2011, *supra* note 145, art. 7.

¹⁴⁹ *See id.* arts. 7, 14, 15.

¹⁵⁰ *See, e.g.*, Chris Stephen & Luke Harding, *Amnesty Finds Widespread Use of Torture by Libyan Militias*, GUARDIAN (London), Feb. 16, 2012, <http://www.guardian.co.uk/world/2012/feb/16/amnesty-widespread-torture-libyan-militias>.

¹⁵¹ *See* Kareem Fahim et al., *Qaddafi, Seized by Foes, Meets a Violent End*, N.Y. TIMES, Oct. 21, 2011, at A1; *Libyan Diplomat Omar Brebesh Dies “Under Torture,”* BBC NEWS (Feb. 3, 2012, 6:53 ET), <http://www.bbc.co.uk/news/world-africa-16869659>.

¹⁵² *See U.N. Chief, Libyan PM Meet at Summit, Discuss Detainee Treatment*, CNN (Jan 29, 2012, 11:17 AM), <http://www.cnn.com/2012/01/29/world/africa/africa-un-libya/index.html>.

¹⁵³ *See* David D. Kirkpatrick, *Undercutting Vow of Softer Stance, Egypt Again Defends Office Raids*, N.Y. TIMES, Jan. 2, 2012, at A7; Mai Shams El-Din, *Human Rights Violations Escalate Despite 2011 Uprising*, DAILY NEWS EGYPT, Jan. 24, 2012, <http://www.dailynewsegypt.com/2012/01/24/human-rights-violations-escalate-despite-2011-uprising/>.

¹⁵⁴ *See* GHADBIAN, *supra* note 77, at 12; Amna Guellali, *Political Forces in Tunisia and the Balancing of Rights*, HUM. RTS. WATCH (Nov. 4, 2011), <http://www.hrw.org/news/2011/11/03/political-forces-tunisia-and-balancing-rights>.

tions.¹⁵⁵ For constitutionally legitimate decision-making to occur, these countries must be able to implement the democratic aspirations of their constitutional declarations.¹⁵⁶ For instance, the Libyan constitutional declaration states that “Libya is an independent Democratic State wherein the people are the source of powers,” and that the nation will be governed by a democratic regime.¹⁵⁷ Currently, however, the largely unelected NTC wields power, and some decisions are influenced by violent militias and armed gangs, not primarily by the rule of a democratic majority.¹⁵⁸

Egypt faces similar problems implementing its new constitutional commitment to democracy: though constitutional provisions assert it is a democratic government, the military council refuses to fully relinquish power.¹⁵⁹ Egypt has a long history of military involvement in government; even Mubarak assumed power after extremist members of the military assassinated the prior president.¹⁶⁰ Article 3 of Egypt’s Constitutional Declaration proclaims that “[s]overeignty is from the people only, and the people are the source of authority.”¹⁶¹ Further, Article 53 states that “[t]he armed forces are the property of the people.”¹⁶² Though there have been steps toward democracy in Egypt, the primary locus of power remains in undemocratic hands, and the military refuses to cede power as promised.¹⁶³ Tunisia has proved somewhat more successful at instituting democratic control of the government with elections hailed as legitimate.¹⁶⁴ Regardless of their differing success so far, the Arab Spring nations must similarly implement their democratic aspirations in their coming constitutional processes.¹⁶⁵

¹⁵⁵ See, e.g., LIBYA CONST. DECLARATION 2011, *supra* note 145, pmbl.; Deshmukh, *supra* note 96.

¹⁵⁶ See ACKERMAN, *supra* note 3, at 69; Albert, *supra* note 4, at 32–33.

¹⁵⁷ LIBYA CONST. DECLARATION 2011, *supra* note 145, arts. 1, 4.

¹⁵⁸ See Moni Basu, *Libyans Face Tough Challenges in Building a New Nation*, CNN (Jan. 26, 2012, 2:32 PM), <http://www.cnn.com/2012/01/26/world/africa/libya-challenges/index.html>.

¹⁵⁹ See *Constitutional Declaration 2011* (Egypt), *supra* note 49, art. 3; Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45.

¹⁶⁰ See BLAYDES, *supra* note 34, at 18–20 (describing the military’s influence in Egyptian politics); *Sadat Assassins Are Executed*, GLASGOW HERALD, Apr. 16, 1982, at 4.

¹⁶¹ *Constitutional Declaration 2011* (Egypt), *supra* note 49, art. 3.

¹⁶² *Id.* art. 53.

¹⁶³ See Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45.

¹⁶⁴ See *Polls Open in First-Ever Legitimate Tunisian Elections*, TELEGRAPH (Austl.) (Oct. 23, 2011), <http://www.dailytelegraph.com.au/news/breaking-news/polls-open-in-first-ever-legitimate-tunisian-elections/story-e6freuyi-1226174451783>.

¹⁶⁵ See Deshmukh, *supra* note 96; see also ACKERMAN, *supra* note 3, at 69; Albert, *supra* note 4, at 32–33.

3. The Place of Islamic Law in the New Orders

Another notable flashpoint is the place of Islamic law in the new constitutional order and its relationship with liberal principles and secularism.¹⁶⁶ In both their past constitutions and present declarations, these nations articulate the importance of Islamic law in their constitutional orders.¹⁶⁷ For instance, both the Libyan and Egyptian interim constitutions state that Sharia is the principle source of legislation.¹⁶⁸ Further, recent elections in Tunisia and Egypt demonstrate widespread support for political parties touting Islam's role in state affairs.¹⁶⁹ There are also significant segments of the populations that support secularism and liberal social values, such as women's rights.¹⁷⁰ But how do these aspirations comport with, and contradict, Islamic law?¹⁷¹

There is no established single body of accepted Islamic law, and the term itself is somewhat a misnomer.¹⁷² Sharia, which means divine law or God's law, is often referred to as Islamic law and is a system of rules that God intended for humans, recorded in the Quran.¹⁷³ Scholars interpret the Quran through a process called *ijtihad*, literally translated "exertion," to produce legal doctrine called *fiqh*.¹⁷⁴ By their very nature, religious texts are subject to interpretations that often differ, and scholars' differing interpretations result in differing schools of

¹⁶⁶ See SHEHATA, *supra* note 36, at 119 (providing examples of the relationship between Islamic law and secularism in Egyptian politics).

¹⁶⁷ See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 2; CONST. OF TUNIS., 25 July 1957, art. 1; *Constitutional Declaration 2011* (Egypt), *supra* note 49, art. 2; LIBYA CONST. DECLARATION 2011, *supra* note 145, art. 1.

¹⁶⁸ *Constitutional Declaration 2011* (Egypt), *supra* note 49, art. 2; LIBYA CONST. DECLARATION 2011, *supra* note 145, art. 1.

¹⁶⁹ *Egypt Election: Results Show Islamists Taking Two-Thirds of Seats*, TELEGRAPH (U.K.) (Jan. 21, 2012, 7:21 PM), http://www.telegraph.co.uk/news/worldnews/africaandindian_ocean/egypt/9030179/Egypt-election-results-show-Islamists-taking-two-thirds-of-seats.html; *Tunisia's Islamist Ennahda Party Wins Historic Poll*, BBC NEWS (Oct. 27, 2011, 18:57 ET), <http://www.bbc.co.uk/news/world-africa-15487647>.

¹⁷⁰ See SHEHATA, *supra* note 36, at 5–6, 119; *Tunisian President Says Liberties to Be Protected*, REUTERS (Jan. 1, 2012, 3:31 PM), <http://www.reuters.com/article/2012/01/01/us-tunisia-constitution-idUSTRE8000G920120101>.

¹⁷¹ Cf. Michael Wahid Hanna, *A Test for Egypt: Hearing All Voices*, N.Y. TIMES, Jan. 25, 2012, at A29 (providing an example of poor government treatment of a Coptic Christian with pro-Israel beliefs).

¹⁷² See Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 720 (2004).

¹⁷³ *Id.* at 720.

¹⁷⁴ *Id.* at 720–21.

Sharia.¹⁷⁵ Thus, there are many different interpretations of Islamic law that a nation may adopt as its aspirational ideal.¹⁷⁶

Some interpretations of Sharia values are inherently hostile to liberal secular values.¹⁷⁷ For example, some interpretations hold that “one female is not legally sufficient to act as a witness in a court of law while one male is sufficient.”¹⁷⁸ In the past, both Egypt and Tunisia expressed reservations to a non-binding international agreement that mandated equal rights for women in the realm of marriage and family relations, stating that they would not support measures that conflict with Islam’s status as the official state religion.¹⁷⁹ Further, some interpretations of Sharia required death by stoning as a punishment for petty crimes.¹⁸⁰ These and other similar interpretations of Sharia appear irreconcilable with modern liberal notions of human rights and secular culture, which some factions in these nations endorse.¹⁸¹

Nevertheless, some interpretations of Sharia remain compatible with liberal values.¹⁸² Indeed, under Mubarak, the Islamist parties and secular parties worked together at times in pursuit of democracy against the authoritarian regime.¹⁸³ Some interpretations are also more supportive of women’s rights, differentiating between the patriarchal social structure of many Arab nations that tends to demean women and Sharia itself, believing that Sharia alone upholds women’s rights and their dignity.¹⁸⁴ Thus, it is arguably possible to incorporate interpreta-

¹⁷⁵ See Abdullahi Ahmed An-Na’im, *Globalization and Jurisprudence: An Islamic Law Perspective*, 54 EMORY L.J. 25, 43–44 (2005).

¹⁷⁶ See, e.g., Yüksel Sezgin, *Women’s Rights in the Triangle of State, Law, and Religion: A Comparison of Egypt and India*, 25 EMORY INT’L L. REV. 1007, 1012 (2011) (demonstrating that Islamic laws are socio-political constructs developed through interpretation of sacred texts and noting that the laws can be reinterpreted and amended).

¹⁷⁷ See Joëlle Entelis, Note, *International Human Rights: Islam’s Friend or Foe?*, 20 FORDHAM INT’L L.J. 1251, 1270, 1288 (1997) (providing examples of women’s place in Islamic law contrary to international notions of individual liberty).

¹⁷⁸ *Id.* at 1270.

¹⁷⁹ Bharathi Anandhi Venkatraman, Note, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1955, 1959–61 (1995).

¹⁸⁰ See, e.g., Asifa Quraishi, *What If Sharia Weren’t the Enemy?: Rethinking International Women’s Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 234–36 (2011).

¹⁸¹ See Larbi Sadiki, *The Arab Spring: Voting Islamism*, AL JAZEERA (Dec. 7, 2011), <http://www.aljazeera.com/indepth/opinion/2011/12/2011126105646767454.html>.

¹⁸² See Entelis, *supra* note 177, at 1301.

¹⁸³ See SHEHATA, *supra* note 36, at 95.

¹⁸⁴ See Entelis, *supra* note 177, at 1301.

tions of Islamic law that both respect the Quran and provide the tolerance sought by secularists.¹⁸⁵

Though it is clear that these nations value Islamic law by its inclusion in the provisional constitutions, they must decide the form of the law they choose to adopt and implement in their new constitutions.¹⁸⁶ Past interpretations of the Quran are not considered wholly immutable, and the Quran itself discourages blindly following practices of past generations.¹⁸⁷ The Quran holds each nation and each generation responsible for its own beliefs.¹⁸⁸ With both the ability and imperative to interpret the place of Islam in their nations, the Arab Spring constitution-makers must agree upon aspirations that incorporate the Islamist population's wishes, while still respecting other citizens' desires to protect secular, liberal values.¹⁸⁹ Given Islamic law's widespread impact, the constitutional drafters must address its role in the new states in order to move to an era of democratic stability.¹⁹⁰

These aspirational flashpoints of human rights and legal process, the role of democracy and military power, and the place of Islamic law are by no means an exhaustive list of controversial issues facing these three nations' constitutional development.¹⁹¹ Yet, they are important to highlight as examples of the challenges facing these nations that must be addressed in the coming constitutional moment.¹⁹² The next Part will highlight some important criteria to consider when attempting to address these and other aspirational flashpoints.

¹⁸⁵ See *id.*; Sadiki, *supra* note 181.

¹⁸⁶ See Liaquat Ali Khan, *Jurodynamics of Islamic Law*, 61 RUTGERS L. REV. 231, 279 (2009) ("Yet, the Quran holds each individual, each nation, and each generation accountable for its beliefs and deeds. It discourages avoiding reflective responsibility by blindly following the customs and practices of past generations.").

¹⁸⁷ See *id.*

¹⁸⁸ *Id.*

¹⁸⁹ See ACKERMAN, *supra* note 3, at 67; Khan, *supra* note 186, at 279.

¹⁹⁰ See GHADBIAN, *supra* note 77, at 9; Rustow, *supra* note 9, at 30–33.

¹⁹¹ See Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45 (presenting examples of different challenges to address in a new constitution).

¹⁹² See ACKERMAN, *supra* note 3, at 191.

III. ANALYSIS

A. *Criteria for Aspirations*

As illustrated above, constitutional drafters must address numerous concerns.¹⁹³ To adequately fulfill the potential of the revolutionary moment and establish a constitution that will serve as the bedrock foundation of ensuing social progress, the constitutional drafters must carefully craft the provisions they choose.¹⁹⁴ There are many criteria to consider when drafting constitutional provisions, including whether aspirations reflect the nation's collective identity.¹⁹⁵ Also, new provisions must be practically achievable in order to promote the rule of law.¹⁹⁶

1. New Constitutions Must Reflect Collective National Identity

The aspirations the post-Arab Spring drafters seek to include in the new national constitutions should truly reflect the collective national identities of their respective nations.¹⁹⁷ As Rustow's model demonstrates, a conscious choice with at least minimal consensus over the form of the future state is essential.¹⁹⁸ Nevertheless, the constitutional drafters themselves are likely to be comprised primarily of social, economic, and political elites with interests that are not always directly aligned with the majority of the nation.¹⁹⁹ For instance, elites could craft a constitution that cements their economic and social power to the detriment of the rest of the population.²⁰⁰ In this way, the economic and social elites that may have been influential in the past regime may be positioned to perpetuate some constitutional failures and repugnant policies of the past regime, effectively maintaining their unjust dominance.²⁰¹

¹⁹³ See, e.g., ACKERMAN, *supra* note 3, at 46–68 (providing examples of prior constitutional moments and issues nations needed to address); Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45 (noting the tension between the incumbent military council and the Egyptian people's unfulfilled demands).

¹⁹⁴ See ACKERMAN, *supra* note 3, at 26–27.

¹⁹⁵ See *id.*; GHADBIAN, *supra* note 77, at 12.

¹⁹⁶ See ACKERMAN, *supra* note 3, at 49; Albert, *supra* note 4, 32–33.

¹⁹⁷ See GHADBIAN, *supra* note 77, at 12.

¹⁹⁸ See Rustow, *supra* note 9, at 30–31; see also GHADBIAN, *supra* note 77, at 10–12.

¹⁹⁹ Rustow, *supra* note 9, at 29–32; Kirkpatrick, *Arab Spring's Hard Road*, *supra* note 70 (discussing the political elite confronting important national issues).

²⁰⁰ See Rustow, *supra* note 9, at 29–32.

²⁰¹ See, e.g., Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45; Kirkpatrick, *Egypt's Military Likely to Retain Powers*, *supra* note 47.

Examples of the strife resulting from political minorities dominating majorities are currently present within the Arab world.²⁰² In Syria, for example, Sunni Muslims constitute the vast majority of the population,²⁰³ but President Bashar al-Assad, a member of the Alawite minority, violently maintains his authoritarian regime.²⁰⁴ Syria is currently experiencing an armed rebellion that has escalated to full-fledged civil war.²⁰⁵ Further, al-Assad's regime has perpetuated numerous humanitarian crises, including using the military to target civilians.²⁰⁶ Achieving a political solution is difficult, however, because many of the Alawite regime's supporters are Alawite themselves and fear Sunni retribution if they cede power.²⁰⁷ The Alawite support contributes to a corrupt regime clinging to power and the resulting violent suppression of the uprising.²⁰⁸ Such political domination and resulting instability may be avoided in other nations by drafting constitutions that frame fundamental principles in a way that mobilizes broad support.²⁰⁹

Instituting national aspirations that do not reflect the people's desires and that continue constitutional hypocrisy runs the risk of perpetuating the unrest and social strife that contributed to the Arab Spring in the first place.²¹⁰ These revolutions were inspired in part by the lack of democratic participation in the respective governments dominated by the will of autocrats.²¹¹ Failing to fulfill these revolutionary aspirations by providing for democracy may perpetuate social strife,

²⁰² See, e.g., Robert Mackey, *Syria's Ruling Alawite Sect*, N.Y. TIMES: THE LEDE (June 14, 2011, 5:16 PM), <http://thelede.blogs.nytimes.com/2011/06/14/syrias-ruling-alawite-sect/>.

²⁰³ See *Syria: International Religious Freedom Report 2006*, U.S. DEP'T STATE, <http://www.state.gov/j/drl/rls/irf/2006/71432.htm> (last visited Feb. 15, 2013).

²⁰⁴ David Enders & Jonathan S. Landay, *Syria Splits Along Sectarian Lines, Shaking Middle East*, MIAMI HERALD (Mar. 2, 2012), <http://www.miamiherald.com/2012/03/02/2672275/syria-splits-along-sectarian-lines.html>.

²⁰⁵ See Neil MacFarquhar, *Syria Denies Attack on Civilians, in Crisis Seen as Civil War*, N.Y. TIMES, July 16, 2012, at A6.

²⁰⁶ See Wyre Davies, *Syria Refugees Tell of Civilian Misery in Besieged Homs*, BBC NEWS (Feb. 19, 2012, 19:03 ET), <http://www.bbc.co.uk/news/world-middle-east-17090997>.

²⁰⁷ See Tim Arango, *Syria's Sectarian Fears Keep Region on Edge*, N.Y. TIMES, Feb. 29, 2012, at A4.

²⁰⁸ See *id.*

²⁰⁹ Cf. ACKERMAN, *supra* note 3, at 49–50 (discussing the importance of entrenching fundamental principles in the post-revolution constitution in order to mobilize broad support and attain stability).

²¹⁰ See Rustow, *supra* note 9, at 37 (noting that failure to reach adequate consensus can lead to hostility, civil war, or secession); Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45 (displaying civil discontent over SCAF's retaining power and delaying democratic reforms).

²¹¹ See, e.g., Prosecutor's Warrant Application for the Situation in Libya, *supra* note 55, ¶¶ 2, 12, 14, 17, 20; VANDEWALLE, *supra* note 57, at 79; Deshmukh, *supra* note 96.

as shown in Egypt.²¹² Egyptians remain discontented because the SCAF fails to fulfill its promises to fully cede power and institute democratic reforms.²¹³ Thus, constitutional drafters must incorporate collectively identified aspirations from the very heart of the revolutionary movement in order to promote true change, satisfy the discontented populace, and provide the blueprint for social stability and progress.²¹⁴

2. New Constitutional Norms Must Be Attainable to Promote the Rule of Law

In order to promote the rule of law essential to a constitutional society, the aspirations included in the new constitution must be practically achievable.²¹⁵ If an aspiration is included because it is morally admirable, but nonetheless unattainable and unenforceable, it can undermine the very rule of law and the promises of written constitutionalism.²¹⁶ Overly aspirational provisions—such as guaranteeing health care to all citizens when the state lacks the economic resources to deliver it—attempt to articulate a noble future vision of society, but, as a consequence, may commit the state to unachievable contemporary aspirations.²¹⁷ Discrete negative rights such as criminal due process concerns limiting state power may be effectively implemented with some effort and moderate state resources, but an affirmative economic grant of an aspiration like universal health care is another consideration entirely.²¹⁸

The Constitution of Poland, for example, guarantees extensive economic rights to its citizens, including the right to a minimum wage, employment, health care, education, housing, and a healthy environment among others.²¹⁹ The constitutions of Uzbekistan and Belarus

²¹² See Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45; Deshmukh, *supra* note 96.

²¹³ See Kirkpatrick, *Deal to Hasten Transition*, *supra* note 45; Fahim & El Madany, *supra* note 47.

²¹⁴ See ACKERMAN, *supra* note 3, 46, 49; GHADBIAN, *supra* note 77, at 12; Deshmukh, *supra* note 96; Younis & Younis, *supra* note 13; *cf.* Albert, *supra* note 4, at 25 (displaying an example of “counterconstitutionalism” that erects legal barriers that stifle the will of the discontented populace).

²¹⁵ *Cf.* Albert, *supra* note 4, at 32–33. This passage provides the Indian Constitution as an example that makes the aspirational goals contingent on the state’s economic resources. *See id.* If the state cannot fulfill the aspirations, the constitution removes these rights from the purview of the judiciary so that they are not functionally unfulfilled aspirational promises when citizens attempt to pursue them in court. *See id.*

²¹⁶ *See id.* at 28, 32–33.

²¹⁷ *See id.* at 28.

²¹⁸ *See id.*

²¹⁹ CONST. OF THE REPUBLIC OF POL. Apr. 2, 1997, ch. 1, arts. 65, 66, 68, 70, 75; Albert, *supra* note 4, at 28; *see also* RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION

guarantee similar aspirational rights, including paid vacation, health care, and a good standard of living.²²⁰ These guaranteed rights, though noble aspirations, are unattainable for all citizens in practice given the limited resources of the states.²²¹ By enshrining a largely unattainable aspirational right into the national constitution and subsequently failing to provide it consistently in practice, these nations have enabled their citizens to call into question the efficacy of other provisions, which undermines the very promise of constitutionalism.²²²

Nevertheless, the post-Arab Spring drafters should not aim too low in their aspirations, as “[a] constitution is a window into the soul of the citizenry.”²²³ Indeed, an aspiration is a goal to aspire to and a model to achieve.²²⁴ Thus, the provisions must strike a balance between driving the state to a higher level of national achievement and remaining attainable enough to support the nation’s budding culture of constitutionalism.²²⁵

This is a difficult balance to strike, as placing limits on constitutional aspirations can contradict their very essence: an ideal state of being to achieve in the future.²²⁶ Nevertheless, drafters should avoid overly broad and practically unattainable aspirations, so that the law can be enforced as written.²²⁷ As stated above, this may draw the efficacy and legitimacy of the entire constitution into doubt.²²⁸

OF FORMER SOVIET DOMINANCE 149–63 (1996) (discussing the historical context of Poland’s constitution-drafting process and the development of certain fundamental constitutional components).

²²⁰ See CONST. OF THE REPUBLIC OF BELR. 1994, § 1, arts. 41–49; CONST. OF THE REPUBLIC OF UZB., ch. 9, arts. 37–42; Albert, *supra* note 4, at 28–29; see also LUDWIKOWSKI, *supra* note 219, at 95–102 (examining the historical circumstances surrounding the drafting of Belarus’s constitution).

²²¹ Albert, *supra* note 4, at 28–29, 32–33.

²²² *Id.* at 4–5.

²²³ Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 667 (2010); see also ROUSSEAU, *supra* note 8, at 172 (“[The true constitution] is not engraved on marble or bronze, but in the hearts of citizens.”).

²²⁴ See Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT’L L. 689, 755 (1998).

²²⁵ See Albert, *supra* note 4, at 31–32.

²²⁶ See Gordon, *supra* note 224, at 755; Stephen M. Griffin, *Reconstructing Rawls’s Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715, 717 (1987).

²²⁷ See Albert, *supra* note 4, at 28, 31–32.

²²⁸ Cf. William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 78 (noting the textualist argument that a constitution should be enforced as written).

One problem with unattainable aspirational commitments is the use of broad language.²²⁹ Broad provisions like those discussed above in Poland and Belarus can be difficult to define and implement.²³⁰ The meaning of constitutional provisions can differ from person to person.²³¹ To be sure, national courts have been tasked with legally defining constitutional provisions, yet their definitions remain unsatisfactory in some cases.²³² Thus, entrenching broad provisions that may be unattainable in practice can frustrate the purpose of constitutionalism.²³³ The Arab Spring nations are better served by appropriately narrowing the scope of their aspirational commitments so that they still drive their societies in the direction envisaged by citizens and concretized in their constitutions, but not too far that they remain unattainable and undermine constitutionalism itself.²³⁴

B. *Functional Institutions*

Once the language of the aspirational provisions is chosen, these aspirations remain merely words on a page if they are without institutions to implement and enforce their goals.²³⁵ For this reason, the constitution must also establish institutions in order to achieve some of the aspirational commitments in reality.²³⁶

As the form of the constitution reflects national identity, the government it creates should be defined and chosen by the people themselves, with some consensus.²³⁷ Nevertheless, the institutions must be able to implement the aspirational ideals and commitments of the na-

²²⁹ See Albert, *supra* note 4, at 28.

²³⁰ See *id.* at 28, 32–33 (contrasting aspirational bills of rights such as Poland’s and Belarus’s with “pragmatic” bills of rights like India’s, which removes from the judiciary the power to define the scope of certain aspirations).

²³¹ Cf. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 283 (2009) (presenting an example of differing interpretations even within the same intellectual movement).

²³² See Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1199 (1984); cf. Colby & Smith, *supra* note 231, at 283 (noting that two originalist justices arrived at differing conclusions over the constitutionality of the same case).

²³³ See Albert, *supra* note 4, at 31–32.

²³⁴ See *id.* at 26, 28–31.

²³⁵ See Samaha, *supra* note 5, at 915, 917; Solum, *supra* note 5, at 103.

²³⁶ Cf. William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 553–54 (1998) (providing an example of institutions established to implement aspirational aims of providing health care to citizens).

²³⁷ See GHADBIAN, *supra* note 77, at 12; Albert, *supra* note 223, at 667.

tion, or unattainable aspirations may undermine the promise of constitutionalism.²³⁸

For example, in all three Arab Spring nations, there were past constitutional commitments that remained unfulfilled.²³⁹ As articulated, constitutional commitments, such as the previous Tunisian constitution's protections for human rights and human dignity, were not adequately maintained by the functional elements that the constitution established.²⁴⁰ Ben Ali, acting as President, was able to usurp enough power to implement policies contrary to these constitutional aspirations.²⁴¹

Therefore, the drafters of the new national constitution must employ functional provisions that establish institutions capable of implementing the express aspirational commitments in the constitution; the institutions also must sufficiently be checked to limit the possibility of concentrated power and its related tyranny.²⁴² In order to mobilize broad support for constitutional aims, the choice of the form of institutions must invariably be left to the people, as with other important decisions on collective identity.²⁴³ Nevertheless, the people's institutional design must be effective or otherwise risk undermining their own aspirations and the entire constitutional project.²⁴⁴

C. Pitfalls to Avoid

In designing the post-Arab Spring constitutions, there are certain difficult considerations that must be addressed in the drafting process, such as the role of Islamic law and the extent of democratic participation, described previously.²⁴⁵ Tunisia, Egypt, and Libya must adequately address such divisive and problematic areas to achieve a workable con-

²³⁸ Albert, *supra* note 4, at 36.

²³⁹ See *supra* text accompanying notes 23–28, 35–40, 59–63.

²⁴⁰ See *supra* text accompanying notes 21–28.

²⁴¹ See MURPHY, *supra* note 21, at 217–20.

²⁴² See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2348 (2006) (presenting the problem of an institution's power not appropriately checked); Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 139 & n.104 (2011); see also BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 149–62 (Thomas Nugent trans., 1949) (1792) (articulating the dangers of concentrating power in one branch of government and the benefits of separating powers to avoid those dangers).

²⁴³ See ACKERMAN, *supra* note 3, at 49; GHADBIAN, *supra* note 77, at 12.

²⁴⁴ See Rava, *supra* note 236, at 553–54; Samaha, *supra* note 5, at 913; Vladeck, *supra* note 242, at 139 & n.104.

²⁴⁵ See ACKERMAN, *supra* note 3, at 49; GHADBIAN, *supra* note 77, at 12–13; *supra* Part II.C.2–3.

sensus in their constitutional process that lies between imposed uniformity and implacable hostility.²⁴⁶ Without instituting policies that represent consensus and that mobilize broad support, the efficacy of the constitutions and the states' probabilities of stability are in jeopardy.²⁴⁷

Though somewhat anachronistic and culturally removed, the issue of slavery in the United States presents an illustrative example of the detriments of avoiding difficult issues in the constitutional drafting process.²⁴⁸ When the Philadelphia convention met in 1787, its delegates reached lasting compromise on many issues,²⁴⁹ but the issue of slavery remained divisive.²⁵⁰ The delegates did reach a number of compromises on the issue, such as calculating slaves as three-fifths of a person for representation purposes and preventing abolition of the slave trade until 1808.²⁵¹ They failed, however, to arrive at a just and lasting agreement on slavery and other related issues like the procedures for determining whether slavery would be legal in new western territory.²⁵² Instead, the Constitution's drafters left the resolution of this issue to later generations.²⁵³ Despite later attempts at political compromise, these subsequent generations could not resolve the issue, which led to increasing social strife, and eventually, a long and bloody civil war.²⁵⁴

As the American example illustrates, the Arab Spring nations must attempt to adequately resolve the difficult issues they face rather than leave them to future generations and allow for widespread social and political unrest.²⁵⁵ The role of Islamic law in state affairs is one such is-

²⁴⁶ See RUSTOW, *supra* note 9, at 37.

²⁴⁷ See ACKERMAN, *supra* note 3, at 49, 67. *But see* H.L.A. HART, *THE CONCEPT OF LAW* 100 (1961) (arguing that there is no inherent connection between the validity of a law and its efficacy).

²⁴⁸ See, e.g., HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 107–08 (1973) (noting that slavery strained political relations leading up to the Civil War); ROBERT K. WRIGHT, JR. & MORRIS J. MACGREGOR, JR., *SOLDIER-STATESMEN OF THE CONSTITUTION* 36 (2007) (stating that the failure to achieve adequate consensus on the issue of slavery ultimately led to the U.S. Civil War).

²⁴⁹ See, e.g., Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 *NOTRE DAME L. REV.* 1421, 1425–26 (2008).

²⁵⁰ See WRIGHT & MACGREGOR, *supra* note 248, at 36.

²⁵¹ See U.S. CONST. art. I, § 2, cl. 3 (containing the three-fifths enumeration for slaves); *id.* art. I, § 9, cl. 1 (barring Congress from prohibiting slave importation prior to 1808).

²⁵² See HYMAN, *supra* note 248, at 17–18; WRIGHT & MACGREGOR, *supra* note 248, at 36.

²⁵³ See HYMAN, *supra* note 248, at 17–18; WRIGHT & MACGREGOR, *supra* note 248, at 36.

²⁵⁴ HYMAN, *supra* note 248, at 17–20; WRIGHT & MACGREGOR, *supra* note 248, at 36.

²⁵⁵ *Cf.* HYMAN, *supra* note 248, at 20–23 (presenting various attempts at compromise over slavery); WRIGHT & MACGREGOR, *supra* note 248, at 36 (showing that failure to adequately address divisive national issues in the constitution can lead to instability and civil war).

sue with competing visions.²⁵⁶ With numerous contending interpretations of not only the role, but the form and substance of Islamic law, this has the potential to be a very divisive issue that must be addressed.²⁵⁷

Different Arab nations have dealt with the place of Islamic law in government very differently—for example, Turkey and Iran represent opposite extremes.²⁵⁸ Since its Islamic revolution in 1979, Iran's legal system has been based on the Shiite version of Sharia law.²⁵⁹ The revolutionaries' institution of this system represented a conscious shift to Islamic law as it displaced a modern system of secular law established by the previous regime.²⁶⁰ The laws in Iran's Islamic system are derived from the Quran, *hadith* (tradition), *ijma* (the consensus of the jurists), and *aql* (reason).²⁶¹ This legal system has been harsh in practice and it often produces results in conflict with more liberal notions of human rights.²⁶² With the displacement of a modern secular system for this Islamic system of heavy reliance on the Quran, scholars' interpretations thereof, and Islamic tradition, post-revolutionary Iran adopted a legal system based extensively on Islamic law.²⁶³

By contrast, Turkey—another Muslim majority nation—embraces secularism and requires a strict separation between religion and state institutions.²⁶⁴ Turkey's adoption of secular principles in everything from law and government to education leaves virtually no role for Islamic law in the workings of the state.²⁶⁵ To be sure, Turkey remains an overwhelmingly Muslim majority nation, with about ninety-nine percent of the population identifying as Muslims.²⁶⁶ Nevertheless, they

²⁵⁶ See Ahmad Ali Khalid, Op-Ed., *The New Politics of Islam*, DAILY TIMES (Pak.), Feb. 28, 2012, http://www.dailytimes.com.pk/default.asp?page=2012%5C02%5C28%5Cstory_28-2-2012_pg3_5; see also GHADBIAN, *supra* note 77, at 12.

²⁵⁷ See Khalid, *supra* note 256; see also GHADBIAN, *supra* note 77, at 12.

²⁵⁸ See Ismet Feyzioglu, *Turkey and Iran: Opposite Regimes, Similar Problems*, ROYAL UNITED SERVICES INST. (July 10, 2009), <http://www.rusi.org/analysis/commentary/ref:C4A57630A8C4EC/>.

²⁵⁹ Sanaz Alasti, *Comparative Study of Cruel & Unusual Punishment for Engaging in Consensual Homosexual Acts (In International Conventions, the United States and Iran)*, 12 ANN. SURV. INT'L & COMP. L. 149, 158 (2006).

²⁶⁰ See *id.*

²⁶¹ *Id.* at 158–59.

²⁶² See *id.* at 158.

²⁶³ See *id.* at 158–59.

²⁶⁴ See Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 TEX. INT'L L.J. 1, 3–6 (2006).

²⁶⁵ See *id.* at 3–5.

²⁶⁶ U.S. LIBRARY OF CONG.—FED. RESEARCH DIV., COUNTRY PROFILE: TURKEY 10 (2006), available at <http://lcweb2.loc.gov/frd/cs/profiles/Turkey.pdf>.

have made a constitutional decision to aspire to secularism and structure their culture of constitutionalism accordingly.²⁶⁷

Other nations fall in between these two extremes of Iran and Turkey, incorporating some elements of Islamic law into the state, yet preserving a role for other law as well.²⁶⁸ For example, Libya has included a constitutional provision maintaining Islamic law as the basis for the laws,²⁶⁹ but maintains that it will be a “moderate Muslim nation.”²⁷⁰ Thus, there is a wide range of ways to approach the issue of Islamic law in state affairs, and the Arab Spring nations must adopt an approach that can mobilize broad popular support for their chosen fundamental principles.²⁷¹

Another important pitfall to avoid is engaging in a campaign of vindictive persecution and corrective justice for political supporters of the former regime.²⁷² To be sure, officials of the old regime that committed crimes against their people or violated human rights should be brought to justice at trial.²⁷³ Indeed, both the International Criminal Court and the Libyans seek to try Said al-Islam Gaddafi for his role in perpetuating human rights violations in response to the Libyan uprising; Hosni Mubarak was tried and sentenced to life in prison for his response to the Egyptian Protestors.²⁷⁴ Even so, some revolutionaries may seek to impose sanctions for individuals’ past political affiliations or denigrate their roles in the future society, rather than focus on the constitutional challenge ahead.²⁷⁵

²⁶⁷ See Wing & Varol, *supra* note 264, at 3.

²⁶⁸ Compare LIBYA CONST. DECLARATION 2011, *supra* note 145, art. 1, and Ben Farmer, *Libya Will Be a ‘Moderate’ Muslim Nation, Country’s Interim Leader Insists*, TELEGRAPH (U.K.), Oct. 24, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8846720/Libya-will-be-a-moderate-Muslim-nation-countrys-interim-leader-insists.html>, with *supra* text accompanying notes 258–67.

²⁶⁹ LIBYA CONST. DECLARATION 2011, *supra* note 145, art. 1.

²⁷⁰ Farmer, *supra* note 268.

²⁷¹ See ACKERMAN, *supra* note 3, at 49; GHADBIAN, *supra* note 77, at 12; Alasti, *supra* note 259, at 158–59; Wing & Varol, *supra* note 264, at 3–6.

²⁷² See ACKERMAN, *supra* note 3, at 69 (“If a revolution is a collective effort to repudiate some basic aspect of the past, then a constitution offers the revolutionary polity a chance to define affirmatively the principles that will mark off the ‘new era’ from the ‘old regime.’”).

²⁷³ Cf. Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT’L CRIM. JUST. 830, 831 n.4 (2006) (providing an example of the idea that officials of a regime liable for war crimes should be brought to trial).

²⁷⁴ See John J. Liolos, Comment, *Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes*, 35 B.C. INT’L & COMP. L. REV. 589, 597–99 (2012); Kirkpatrick, *supra* note 39.

²⁷⁵ See ACKERMAN, *supra* note 3, at 69–70.

Such corrective justice for many otherwise innocent citizens is counter-productive, harmful to social stability, and should be avoided in constructing the future state.²⁷⁶ After the appropriate crimes have been tried, it is much more effective for the nation to focus on future constitutional development.²⁷⁷ Indeed, as Bruce Ackerman stated, “corrective justice is concerned with the past and the need to punish . . . misdeeds; constitutionalism faces the future and the need to make it unlike the past.”²⁷⁸

The Iraqi experience provides instructive wisdom on this matter, though subject to greater international influence and in a less revolutionary setting.²⁷⁹ After the U.S.-led invasion of Iraq toppled Saddam Hussein in 2003, the new Iraqi government instituted a policy of “de-Baathification” to erase all traces of Hussein’s regime and his Baath party in government.²⁸⁰ This prevented most people associated with the Baath political party and Hussein’s regime from participating in elections and the new government.²⁸¹

De-Baathification had three major failings pertinent to analyzing nascent constitutionalism.²⁸² First, many of the people who were members or supporters of the Baath party during Hussein’s reign participated out of fear, or to keep their jobs and benefits for their families.²⁸³ These otherwise innocent people were unnecessarily ostracized and punished in the post-Hussein era.²⁸⁴ Second, this ostracism led to unnecessary divisiveness, often along religious lines, as most former Baath party supporters were Sunnis who could not participate in elections.²⁸⁵ This division led other Sunnis to boycott subsequent elections in 2005, leading to disproportionate representation of Shia and Kurd ethnic groups and an unstable political climate.²⁸⁶ These divisions diverted Iraq from its main task of building a solid constitutional foundation for the future of the state.²⁸⁷ The third way in which de-Baathification failed

²⁷⁶ See *id.* at 69–71.

²⁷⁷ See *id.* at 70–73.

²⁷⁸ *Id.* at 70.

²⁷⁹ See Stephen Townley, Note, *Mosque and State in Iraq’s New Constitution*, 34 DENV. J. INT’L L. & POL’Y 197, 197–99 (2006).

²⁸⁰ Shubra Ohri, *International Legal Updates: After Hesitation, Iraq Election Ban Is Reinstated*, HUM. RTS. BRIEF, Winter 2010, at 45, 45.

²⁸¹ *Id.*

²⁸² Compare ACKERMAN, *supra* note 3, at 69–70, with Ohri, *supra* note 280, at 45.

²⁸³ See Ohri, *supra* note 280, at 45.

²⁸⁴ See *id.*

²⁸⁵ See *id.*

²⁸⁶ *Id.*

²⁸⁷ See ACKERMAN, *supra* note 3, at 70–72; Ohri, *supra* note 280, at 45.

Iraq's democratic transition is evident in that many former Baath party members were important members of society as educators and government administrators.²⁸⁸ Their ostracism deprived Iraq of many well-educated, skilled professionals during a period vital to rebuilding their nation, and may have contributed to the slow pace of its recovery.²⁸⁹

The Iraqi experience provides much wisdom on the detriments of corrective justice in designing a new constitutional order.²⁹⁰ Instead of focusing the limited post-revolutionary political capital on the development of the future state, Iraqis and their American administrators focused on vindictive and divisive retribution, squandering the potential of the moment and harming the future of Iraq.²⁹¹ Indeed, Egypt has taken strides in recognizing and avoiding this problem by pardoning past crimes committed in furtherance of the revolution, and all three Arab Spring nations should continue on this path.²⁹² As Egypt seemingly recognizes, any nation seeking to erect a new constitutional culture after a dramatic regime change should focus its energies on the progress of the future state, and should remember that “[c]onstitutional creation unites; corrective justice divides.”²⁹³

Thus, nations engaged in the process of post-revolutionary constitutional design—such as post-Arab Spring Tunisia, Libya, and Egypt—must address both the difficult and divisive issues present in their politics, and avoid the problems of corrective justice.²⁹⁴ Avoiding these two pitfalls is helpful in moving the nation forward into a new stable social and political culture, rather than needlessly focusing limited energies on the past.²⁹⁵

CONCLUSION

In the recent Arab Spring, the peoples of Tunisia, Egypt, and Libya successfully toppled their old regimes and are now faced with the problems and promise of concretizing their revolutions in new constitutional

²⁸⁸ Ohri, *supra* note 280, at 45.

²⁸⁹ *Cf. id.* (illustrating the damaging effects of de-Baathification, including nationwide tensions).

²⁹⁰ *Cf. ACKERMAN, supra* note 3, at 69–70 (contrasting the purposes of corrective justice with those of constitutionalism).

²⁹¹ *See id.* at 69–72; Ohri, *supra* note 280, at 45.

²⁹² *See Egypt's President Mursi Pardons 'Revolutionaries,'* BBC NEWS (Oct. 9, 2012, 10:09 ET), <http://www.bbc.co.uk/news/world-middle-east-19877428>.

²⁹³ ACKERMAN, *supra* note 3, at 71; *see also Egypt's President Mursi Pardons 'Revolutionaries,' supra* note 292.

²⁹⁴ *See ACKERMAN, supra* note 3, at 69–72.

²⁹⁵ *See id.*

orders. Generally, when facing this task of writing post-revolutionary constitutions, drafters should 1) ensure the aspirational goals are representative of a collective national identity, 2) articulate constitutional aspirations that are within the capabilities of the state and tailored narrowly enough to be practically achievable, 3) provide functional constitutional provisions that both establish and check institutions so they possess powers appropriate to fulfill the nation's aspirations, but not so broad that they undermine those aspirations, 4) address difficult national issues to avoid passing responsibility to future generations and perpetuating the social strife emanating from debate on the issue, and 5) avoid widespread corrective justice aimed indiscriminately against all citizens who supported the old regime.

These considerations are by no means exhaustive, and there are certainly other issues, both abstract and specific, to address when drafting a new national constitution. Nevertheless, employing these universal criteria to the particular normative decisions ahead can help address difficult national issues, such as the role of Islamic law in state affairs or the proper scope of human rights protections. As demonstrated from examples in both history and theory, considering these criteria to address concerns in the constitutional process can be helpful to break from the constitutional hypocrisies of old regimes, entrench the peoples' revolutionary aspirations, and provide social stability as peoples become habituated to their new national constitutional cultures. Accordingly, the drafters of the post-Arab Spring constitutions in Tunisia, Egypt, and Libya should be mindful of these issues so their established democracies may last for years to come.