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Protests and Reform: Ten years ago, millions of protesters in over a dozen Middle Eastern and North African countries took to the streets to demand radical change. In many cases, their purpose was to force longstanding dictators from office and to establish a democracy. In others, they demanded reform and clear action against corruption. Each country set a path of its own, but if there was one point of agreement between all actors it was that constitutional reform was an absolute necessity. What followed was the greatest concentration of constitutional reform efforts in the world since the end of the Cold War. Through this process, twelve out of the region’s twenty countries either replaced their constitutions or amended them within just a few years, some more than once. In some countries, dictators who were about to be toppled promised constitutional reform, before ultimately ceding power to allow others to manage that process on their own. In others, chief executives organized constitutional reform efforts themselves, always carefully framing the scope of reform to a few limited issues. In addition, at least two other countries were deeply impacted by the protest movement and seriously contemplated constitutional reform efforts of their own.

Focus on constitutions: It is not immediately obvious why there should have been such wide agreement between virtually all actors on the need for constitutional reform. In nondemocratic settings, constitutions are not irrelevant but they play very particular roles. Nathan Brown convincingly established two decades ago that in Arab countries constitutions serve several important purposes, including to project state power and to organize the relationship between state institutions (which itself reflected the elite pact through which many countries were governed). Since then, Nimer Sultany

has added that the texts of the constitutions also “expanded the political horizon” by “augment[ing] political culture.” But the question nevertheless remains: In countries where the general population has very little connection with their respective constitutions, why was there consensus in favor of amending or replacing them altogether? The explanation may simply be that national constitutions are closely associated with specific forms of rule to the extent that when those regimes are challenged it becomes inevitable that the constitution itself must be changed. After all, all states in the world, including those of the nondemocratic kind, seek to burnish their internal and international legitimacy by projecting a commitment to the law, of which constitutions are the most important element. Chief executives and senior state officials are expert at arguing that they are simply bound by the constitution and the law every time they engage in behavior that the general population finds abhorrent. The opposition to the pre-2011 constitutions was so prevalent that very few actors dared argue that they should be maintained or only slightly amended for fear of being labeled counterrevolutionary.

Outcome: The end result has been at best mixed. Some countries saw immediate improvements, others descended into war, while in others very little changed. In five out of the twelve processes, the former chief executive was forced out of office, leaving the new constitution to be negotiated through a political process that involved rival camps. In Tunisia and Sudan, the protests and subsequent negotiations yielded major changes to the system of government, but both countries are struggling in their efforts to stabilize their respective situations, while the general population’s economic situation continues to deteriorate. In two cases, Libya and Yemen, the constitutional processes ended without having any impact. Meanwhile, Egypt has reverted to a form of rule that is similar to the pre-2011 period. In the remainder of cases, the new constitutions were drafted by appointed committees that preserved the same system of government with just a few differences, some of which have concentrated power even further in the hands of the chief executive. In Lebanon and Iraq, both of which experienced major uprisings of their own in 2019, the governing class has been broadly incapable of presenting any meaningful solutions, despite promises of wholesale reform, including constitutional amendment.

Impact: The impact on the general population of these countries has been dramatic. Ten years after the start of the 2011 uprisings, all of the circumstances and factors that encouraged the millions of protesters to take to the streets are

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still in existence. In some cases, the negative trends are even more acute than they were in 2011. In virtually all countries, inequality continues to increase. Even in Tunisia, which has made the most progress, regular bouts of protest and rioting take place in the peripheral parts of the country, which is where the uprising started in 2011. Official ceremonies to celebrate the adoption of the 2014 Constitution were boycotted by the unemployed. In other cases, living standards, such as they were, have collapsed. Meanwhile, thousands of young men and women still venture out to sea every year in an effort to reach Europe. Libya, Syria, and Yemen have endured years of brutal conflict, leading to millions displaced, famine, disease, and an unending list of other calamities with no end in sight. In Lebanon and Iraq, basic services such as electricity production, medical care, and education are collapsing. Demographic trends, the absence of macroeconomic reform, the general state of lethargy in government, and the prolonged period of nonreform are all pushing the region as a whole in a negative direction that is hard to ignore.  

Inevitability: There was nothing inevitable in this outcome. There was a period of time in all of the countries that were impacted by the 2011 uprisings where everything was possible. State officials who temporarily held the reins of power in 2011 and 2012 played a major role in shaping the transition. All were forced to improvise policies and transition roadmaps based on close to no planning or personal experience in the matter. A number of their decisions were very poorly considered, sometimes taken very quickly and unthinkingly, partially because they greatly underestimated the risks. They were also very uncertain of themselves, and often reversed themselves on major policies in response to relatively minor pressure. Often, they acted against their own personal interests without anyone forcing them to, and would only realize that they had done so months or sometimes years later. At the same time, individuals and groups who should have known better let their guard down at crucial moments, allowing these processes to veer off track right from the start. The result was that key legal documents, including interim constitutions, rules of procedure, etc. were rushed and poorly drafted. Some inexplicably left major areas untouched and unresolved, which allowed emerging powers in the years that followed to fight out a solution. The constitutional negotiations themselves, when they did take place, focused almost exclusively on how power would be shared between different factions. Barely any time was dedicated to the rights of the individual, or to the general population’s clearly

3 See, for example, Intissar Fakir and Isabelle Werenfels, ‘In Morocco, Benevolent Authoritarianism Isn’t Sustainable’, Carnegie Endowment for International Peace (July 29, 2020).
expressed desire to see social justice established. There is good reason to think that circumstances could have evolved very differently had a different set of decisions been taken, and if greater effort had been made to impose an agenda on the negotiations.

The Future: Given the circumstances set out previously, the phenomenon of mass protests in the region is very likely to continue in the years to come. Amid deteriorating socioeconomic circumstances on the ground, the level of political activity in each of these countries and the general population’s own ambitions for themselves as individuals and as a society have only increased. Whatever mass protests or uprisings take place in the future may not coincide in the way that they did in 2011, but the second wave that took place in 2019 (which impacted Algeria, Sudan, Lebanon, and Iraq) demonstrates that they do not take place in isolation from each other. However, when they do take place, whether it be on a regional scale on an individual country, it is vital that the lessons of the post-2011 transitions be learned and be translated into a clear set of objectives that all progressive forces should strive to achieve. This book offers one perspective on what that may look like: a call to translate the clearly expressed desires of millions of protesters into constitutional principles that any constitutional reform effort should be built around; focusing constitutional negotiations not around power-sharing but around the relationship between the individual and the state, with a view to encouraging circumstances that individuals need to flourish; ending hyper-presidentialism, and introducing elements within the system of government that are designed to increase direct contribution of the individual; framing the constitutional reform effort around the need to avoid majoritarian outcomes; and finally structuring international assistance so that it properly responds to the needs of each specific country.

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Terminology: I should offer some explanation of the book’s title. The book is almost entirely inspired by the constitutional advisory work that I have been doing in the past fifteen years. From 2005 to 2010, I focused almost all of my time on Iraq, and from 2011 to 2020 I expanded to more than ten different countries. All of the countries that I have worked in since 2005 are bound together by several elements, one of which is that the majority of the people of each of those countries are Arabic speaking, and that the language of the legal

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4 See Elena Ianchovichina, Eruptions of Popular Anger: The Economics of the Arab Spring and Its Aftermath, World Bank Group (2018), at 120.
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community is Arabic. Regrettably, over the past century, political movements have mobilized parts of the population under their control using racial politics, and politicized the word “Arab” in the process. To be clear, I categorically reject any ideology that is based on race or on the exclusion of the other. Very large numbers of people in all of these countries do not speak Arabic as a mother tongue, and many do not speak it at all. However, constitutions, legislation, and court decisions in all of these countries are all drafted in Arabic, which has made cross-border learning and comparisons from one country to another extremely fluid, and which has made it possible for me to work in all of these places without difficulty. Naturally, each country’s history is unique, but there are a number of common features that bind all the countries that this book discusses together, including their Islamic and Ottoman heritage (with the exception of Morocco, which was never under Ottoman control), their colonial histories, and the manner in which all of these countries have been administered in the postcolonial period. Naturally, very many other countries in the world share some of these legacies and characteristics. However, it is the particular balance that exists in these countries that make them worthy of joint study and analysis.

Arab Spring: I should also clarify that I deliberately avoid use of the terms “Arab Spring,” “Jasmine Revolution” (for Tunisia), or even “revolution” when describing the events that took place in 2011 and the years that followed. While the term “Arab Spring” is widely used both within and without the region, it remains highly imprecise. The term “spring” suggests (to me at least) that the populations of these countries were inactive and suddenly awoke from their slumber in 2011. However, in many of the countries that were affected by the 2011 uprisings, regular bouts of protest took place before 2011 and have continued to take place since. The two factors that made the 2011 uprising unique were that it was a regional movement (that was clearly inspired by the success of the Tunisian protesters) and its magnitude. I am also very uncomfortable with the term “revolution,” mainly because, as I understand it, the term suggests a total reshaping of a country’s system of government. However, for the most part, the systems of government in these countries has not changed considerably. In some cases, longstanding dictatorships were replaced by civil war, the outcome of which is still uncertain at the time of writing. For that reason, to describe the events that took place in 2011, I prefer the far less evocative but I hope more precise term “2011 uprisings,” and avoid characterizing specific constitutional amendments as “revolutionary.” In the case of Tunisia, which is so far the country that has experienced the most change, the term “Jasmine Revolution” is in fact not used officially (perhaps because the Jasmine flower is usually associated with summer recreation
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Geographic Scope: This volume covers the main constitutional developments that have taken place since 2011 in Arab majority countries. It discusses each of the countries that have undergone major constitutional change through political negotiations (Tunisia, Libya, Egypt, Yemen, and Sudan). It also offers a more summary review of the constitutional amendment procedures that took place without political negotiations, all of which are discussed in a single chapter (Morocco, Algeria, and Jordan). The book also includes significant discussion of a number of other countries in its thematic chapters (Part II), including Lebanon, Syria, and Iraq. Post-2011 constitutional developments in those three countries do not merit their own chapters or sections for now, but they do provide important insights that I include in the analysis sections. Importantly, this volume is not a comprehensive review of all of the constitutional changes that have taken place since 2011. Some countries and developments have been omitted for a variety of reasons, some practical and others substantive. Mauritania is not discussed at all (with apologies to Omar Hammady), mainly for lack of time and resources, an omission that I promise to remedy if there is ever a second volume of this book. I also deliberately exclude any discussion of the Gulf countries. New constitutions have been adopted, others have been amended, and new practices have emerged in each of those countries, but political dynamics in that part of the world are too unique to be discussed in conjunction with the rest of the Arab region.

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Outline: This book seeks to achieve two general objectives. First, it seeks to provide a detailed overview of the post-2011 transition processes with a view to providing a factual basis for the analytical sections that follow later on in the book. For all of the countries, the book follows the same general pattern, although the exact outline and focus for each country depends on its specific circumstances. In all cases, I provide a brief historical account of how each country was governed during the precolonial and colonial periods, and explore what impact they might have had on postcolonial governance. The book also describes the main procedural and substantive points of contention that each country had to resolve following the 2011 uprisings, and ends by evaluating the main substantive changes that were introduced in the new constitutional arrangement. Second, the book explores the major flaws in the region’s constitutional frameworks thematically, mainly in order to suggest a path forward for those countries that are still undergoing constitutional reform.
today and those that will do so in the future. For each of these issues, the book explains its importance, explains in analytical form what was done in the post-2011 transitions, and what alternative approach might have been followed. As noted previously, the perspectives that are offered are not intended to be academic analysis, nor are they predictions of what may occur in the future. They are what I consider to be the best path toward resolving the region’s constitutional frameworks if circumstances allow another opportunity similar to that which transpired in 2011.

**Part I**: Eight separate constitutional processes are explored in Part I, although not all to the same level of detail. Five of the processes were characterized by negotiations that took place between political forces, and these are covered in individual chapters, with the exception of Sudan. The three countries where constitutional reform was managed by appointed committees are all covered in the same chapter. Chapter 1 focuses on Tunisia, which is for now the country that has travelled the greatest amount of distance from its pre-2011 era. As the chapter seeks to explain, despite that progress, the transition was not without its difficulties and has left a number of issues unresolved. Chapter 2 discusses Egypt’s turbulent constitutional process, including the adoption of an interim constitution and two permanent constitutions within a three-year period. It explains in some detail how decisions early on in the transition process by actors who probably did not appreciate what they were doing contributed to the chaos that followed in the years that followed. Yemen is covered in Chapter 3, which describes the elaborate process through which the transition was designed, and the faith-based approach that was followed during implementation. Despite deteriorating circumstances throughout the process, national and international officials pressed ahead, only adjusting the transition process by delaying implementation of every stage. Chapter 4 focuses on Libya. It commences with a detailed review of the country’s colonial and postcolonial history, which deeply impacted the post-2011 transition in ways that are not immediately obvious. Aside from trying to recreate the process through which the 1951 Constitution was adopted, the substantive negotiations were also defined by dynamics that were first established in the late 1940s. Ultimately, the post-2011 negotiations that did take place were academic given that they were not supported by some of the country’s main power brokers. Finally, Chapter 5 covers Jordan, Morocco, and Algeria, all three of which carried out limited constitutional changes through processes that were managed by the state. There are some differences between them, and some innovations were introduced in some respects, but generally speaking the chapter seeks to demonstrate that the system of government in all three countries remains unchanged. Chapter 5
also covers Sudan, despite its process standing far apart from the other three countries that are covered in this chapter. Through a planned revolution, an organized civilian movement brought down an Islamist dictatorial regime, and forced a negotiation with the surviving security forces. Sudan is covered in Chapter 5 and therefore in shorter form than the other political processes merely because, at the time of writing, it was still at the start of its transition process, the outcome of which is uncertain. My hope is, if there is ever to be a second edition of this volume, that the transition will have been successfully completed, leading to the adoption of a progressive constitutional document that will contribute to peace and prosperity and which will allow more detailed consideration of the transitional process, hopefully in its own chapter. For now however the discussion on the Sudan is included in the same chapter as Morocco, Algeria, and Jordan even though it has very little in common with those processes.

Part II: The second part of the book is where I attempt to analyze all of these developments around a few themes, all of which are designed to support the argument that real revolution has yet to be achieved, and that reshaping society along more democratic lines is achievable. In Chapter 6, I challenge common assumptions about what a constitution’s purpose should be. Despite the clear call for change that was expressed by masses of protesters in 2011, many decision-makers did not view their constitutions as instruments of transformation. In Chapter 7, I examine what I view as the principle failing point of Arab constitutions, which is the relationship between the individual and the state. Constitutional frameworks in the region were built around the notion that the state must exist for its own sake, and individuals who were not part of the state were treated as virtual nonentities. Post-2011 drafters were aware that the general population demanded change, but enacted only cosmetic changes with only a few exceptions. I offer some thoughts on the main issues that define the current relationship between individual and state and how it could evolve in the future. Chapter 8 examines the system of government and the legacies of the colonial era. The bulk of Arab countries are today hyperpresidential, granting huge powers to the executive without any meaningful accountability mechanisms. The challenge in 2011 and in the future will be to break away from that framework in a way that satisfies the demand for social justice. Chapter 9 discusses process issues, and argues that any negotiation process that is organized in the future must be built around a small number of key principles, including inclusivity that looks beyond politics, consensus building, interim arrangements, and an approach that sets aside faith and approaches developments objectively. Finally, Chapter 10 explores the ways in which international assistance is delivered to constitution negotiation processes and the types of adjustments that could be made to improve its impact.
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What This Book Does Not Cover: This book’s scope is limited. It does not seek to explain all of the circumstances that led to the uprisings, or to describe all the developments that took place during the transitions. Some scholars and analysts have sought to explain why the 2011 uprisings led to a change of regime in some countries, and why the harvest has been more modest in others. For example, it has been argued that regionwide factors, including religious legitimacy and the presence of natural resources, have played determinent roles in the post-2011 transitions. Others have discussed the impact that the 2011 uprisings have had on societies, including discourses on revolt and national consciousness. These questions are beyond this book’s scope for a combination of reasons, including that I am not properly equipped to discuss them. This book also does not posit a detailed or academic explanation of why major constitutional reform is still to be expected. The thesis that is offered is as stated earlier – that significant circumstances are pointing in that direction, and that progress toward democracy is difficult but certainly achievable with the right strategy and preparation.

Methodology: Some of my colleagues who have assisted in the drafting of this book (including Haykel Ben Mahfoudh) have insisted that I offer some thoughts on research methodology in this fast-changing world. I offer this modest contribution in the hope that they may be helpful to researchers who have an interest in the field. In my case, the accounts and insights that I offer in this book are in large part based on my own personal experiences over a ten-year period. Much of what follows assumes that such access is possible. There is little alternative to being in the countries that one is studying and to interacting with principle actors in their own language over a period of years. Having said that, I will mainly focus here on the online tools that I have used during the drafting of this book, and will not focus on traditional research methods.

Primary Material: Collecting primary resource material is now much easier than it was in the past. Many countries in the region now maintain online databases that are easy to search and include each country’s constitutional history, as well as the full catalogue of legal documents (for example www.legislation.tn and http://iraqld.hjc.iq/). For the most part, these exist only in Arabic but some materials are also available in English and French.

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These can be supplemented with other online databases that are maintained by foreign or international organizations (including www.constituteproject.org and http://constitutionnet.org/). Regrettably, for many countries one must now look beyond national legislation and also search through peace agreements and other related documents, for which there are also now increasing numbers of online databases (www.languageofpeace.org and www.peaceagreements.org). For court decisions, the situation is varied. Decisions by constitutional courts and supreme courts are typically published in official gazettes and are usually available online on the courts’ websites (see, for example, www.cour-constitutionnelle.ma, www.sccourt.gov.eg, and www.iraqfsc.iq). Decisions are typically only available in Arabic. Many new websites offer access to searchable databases of court decisions (including https://qanouni.tn/). For lower courts, the situation is far more mixed. Depending on the country and the jurisdiction, some decisions are formally published. For the most part, however, practitioners and researchers have to rely on contacts to obtain decisions.

**Secondary Sources:** For the most part, one cannot rely on primary materials. At times, primary materials themselves only provide a partial picture of the dynamics that were at play, and to rely on them exclusively can lead to serious misunderstandings. The difficulty with secondary material is both access and quality. One of the key lessons that I have learned in writing this book is that one cannot rely on written accounts only, given that in many countries everything that has been published has been authored by one side of the political divide. As an example, a number of detailed accounts have been published by members of Tunisia’s Constituent Assembly. However, to my knowledge, all of them were written in French and by members of the secular camp. Their insights are obviously a treasure but it would be wrong to rely exclusively on their accounts of the drafting process. Much therefore needs to be done to supplement the written account. Throughout the years, I have kept detailed notes of my meetings with negotiators, other officials, and activists, on which I have relied when writing this book. I have also kept my own archive of materials, including all the drafts of constitutions and legislation that I have been able to get my hands on through the years. Some of the drafts were given to me by the relevant actors, others were published in the press or through social media, but keeping a full and easily accessible archive of these materials as they become available is vital because with time they can become nearly impossible to find, which will make the history of events extremely difficult to reconstruct. To the extent that materials that have been published online have not been archived and need to be retrieved, one answer is the internet archive (https://archive.org/web/), which allows users to retrieve much (but not all) of