



NEW YORK UNIVERSITY

**CENTER ON INTERNATIONAL COOPERATION**

**Understanding the Transition: A Challenge and  
Opportunity for Mediators**

**Nicholas Haysom and Sean Kane**

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## Disclaimer

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## Understanding the Transition: A Challenge and Opportunity for Mediators

The Arab Spring has reminded us of the importance of properly understanding the tasks, pace and sequencing of the political transition that follows the cessation of conflict or collapse of authoritarian regimes. Following the heady days of Tahrir, Egypt became a sobering study of an incoherent transition. To varying extents, Tunisia, Libya, Morocco and Yemen have also faced questions as to the viability and suitability of the choices made in their own transitions.

With their attention captured by the imperative of ending armed conflicts and competing visions of the new state, mediators and stakeholders alike can overlook the importance of the transitional period that forms the bridge between the two. Yet transition is a time of institutional vacuum and great uncertainty – perhaps the most challenging period in the building of a new democracy.

During transition, systemic challenges on the political, security, and economic fronts are likely to coexist simultaneously. At the same time popular expectations of a democratic dividend will be soaring. Moreover many of the key tasks of the transition – such as elections and constitution-making – are inherently controversial and often divisive. It is not surprising then that transitions can easily unravel. The World Bank recently found that the countries most likely to erupt into conflict are those that have just emerged from it.<sup>1</sup>

While much can go wrong in a transition, it is also a time of great opportunity and potential creativity if properly approached. From the standpoint of the mediator, the charge is to avoid conflating the tasks of the transition with the final agreement on the construct of the new state.<sup>2</sup> The eyes of the stakeholders will irresistibly be drawn to the latter, but the job of the transition is more discrete.

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1. See the World Development Report 2011: Conflict, Security and Development. World Bank, April 2011.

2. The clearest example of this conflation in the Arab Spring is in Egypt. Following President Mubarak's resignation, the Supreme Council of the Armed Forces (SCAF) initially tasked a small expert committee to propose a set of amendments to Egypt's 1971 constitution. While some of these amendments focused on election modalities and a possible process for a new constitution, from the outset it was not clear if the exercise was principally aimed at "fixing" the 1971 constitution or, as revolutionaries and reformers demanded, requiring a transition to a new constitution and political regime.

The overriding focus of negotiations on transitional arrangements should be on how they can help secure the conditions of peace (or prevent a return to violence) and how they provide a process to produce a sustainable social compact in a divided society.

The ongoing democratic transitions in the Middle East and North Africa illustrate the complex choices which those negotiating a future Syrian transition may be forced to navigate. Given the regional sectarian overlay to its vicious internal conflict, Syria is likely to face the most challenging transition of them all. The wholesale societal deconstruction that Syria is undergoing means that it will have little margin for error in any transitional agreement. The country will likely be unable to survive the type of haphazard choices that were made in designing the transitions of some of its Arab Spring brethren. In the case of Egypt, as one leading legal commentator summed it up: “the Egyptian transition was not badly designed; it was not designed at all.”<sup>3</sup>

### The Transition as a Bridge

It is rare that the moment of cessation of hostilities in an internal conflict or collapse of the *ancienne regime* is simultaneously the moment at which a new social contract between all the citizens of a country is embraced; and/or a new long-term *modus vivendi* established. It is this period between the end of the old order and the coming into being of the new enduring social contract that we refer to as the transition. Transitional arrangements are the broad ensemble of agreements, practices, undertakings, and laws that govern this interregnum.

It follows that a transition is a bridge between the circumstances which prevailed during the conflict or old order, and the constitutional arrangements which will govern the new state. It is the necessary bridge to paradise, not paradise itself: a bridge with the strength to withstand spoilers and downward sloping to sustain the momentum of the transition.

3. Nathan Brown, “Can Egypt’s Democratic Uprising be Redeemed?,” Carnegie Endowment for International Peace, December 24, 2012. According to Brown, the Egyptian committee charged with proposing amendments to the 1971 constitution claim to have received no instruction or guidance from the SCAF on what to address with their work. The not surprising result was a quite narrow focus to the amendments, with extensive gaps and ambiguities in the resulting transitional roadmap (which the SCAF appeared to belatedly realize and sought to resolve with its first Constitutional Declaration).

This bridge must be structurally sound because transitions are inevitably high-stakes, high-risk, and high-trust ventures. The very temporariness of the transition period is however a real advantage to the mediator in search of creative solutions. It allows for compromise and special rules for participation and decision-making that might not ordinarily be acceptable under electoral democracy. Amidst the fragility and mistrust of post-conflict environments, this flexibility can enable a bias towards inclusivity to buttress the bridge from conflict.

Through this lens, the paramount tasks of transitional arrangements are threefold. Firstly, to hold the society in place and to prevent its disintegration under abnormal, fragile or volatile conditions (e.g. by providing basic security and governance). Secondly, to guarantee the process of transition and render it irreversible. Finally, to complete specific tasks necessary to form the transitional bridge. These will vary from country to country, but may include some or all of the following: national dialogues; holding elections and the drafting a new constitution; return of refugees and exiles; security sector reform; transitional justice; establishment of interim institutions; and a broad leveling of the political playing field. Many of these tasks, such as elections and constitution making will have both nation building moments and points when they polarize society into its factional parts. Handled in the wrong way, the political transition in a divided society can become a polarizing daily referendum on identity.

### Who Supervises the Transition?

The starting question for any transition is: who should be responsible for managing the process? Moreover, do these same authorities also implement the transitional roadmap or is that responsibility delegated to another body such as an interim government? There is no right answer to this foundational choice, and the decision taken will naturally depend on the circumstances of the country in question. But guidance may be suggested by strategic thinking as to which route maximizes the irreversibility of the transition. There are no clear-cut templates given the fluidity of most transitions, but our experience suggests a continuum with three broad categories.<sup>4</sup>

4. In any scenario, a legal instrument should provide for certainty as to who can legitimately

The first approach empowers the existing authorities to implement the transition. This route has the potential benefit of expediting the transitional process by placing responsibility for it with those actors who have both the capacity to implement and can be held accountable by the international community. But this choice runs the risk of transferring legitimacy to the old order without diminishing its control. Historically successful in the first phase of South Africa's democratic transition, this approach has largely been rejected by popular movements during the Arab Spring. While not necessarily making a deliberate choice to do so, Egypt came closest to this model.<sup>5</sup> Authorities in Bahrain and Syria have also cynically and unsuccessfully made cases for government-managed transitions.

To maintain credibility this route normally requires another powerful and credible mechanism to supervise the implementation by the old order, otherwise it runs the risk of simply being empty regime-led or military-managed reform.<sup>6</sup> Initially hailed as a "third way" between tumultuous popular revolutions and violent crackdowns by authoritarian regimes, the top down constitutional reforms granted by King Mohammed VI of Morocco in response to the wave of citizen protests sweeping North Africa in early 2011 is now increasingly subjected to this charge. Morocco's new constitution does on paper increase the role of its prime minister and elected parliament. But the new constitutional and political order is also criticized for coopting nascent political parties and not touching the paramount powers of the king or by extension the "old guard" networks that surround him.<sup>7</sup>

In contrast, the power-sharing approach prefers the immediate participation in government of factions hitherto excluded on account of the conflict by the previous regime. This route places a premium on immediate and visibly inclusive interim institutions with

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exercise power.

5. In Egypt, the pre-existing government of Mubarak appointees continued administering Egypt until Parliamentary elections in November 2011. Meanwhile what was arguably the second most powerful institution in the Mubarak regime, the SCAF, supervised the Egyptian transition until June 2012. Other holdover elements of the state apparatus such as the judiciary also played prominent roles in transitional politics and actively sought to influence the constitutional drafting process.

6. In South Africa this role was performed by an inclusive all party "Transitional Executive Council."

7. See for example Daley, Suzanne, "Moroccans Fear that Flickers of Democracy Are Fading," New York Times, 10 December 2012.

the parties generally forced to take joint responsibility for managing the transfer of power. But this type of transition may be immobilised because of the need to arrive at consensus in decision-making. The clearest example of this approach during the Arab Spring is Yemen, where during the transition period the interim cabinet is evenly divided between the government and the opposition and decisions by the parliament are required to be taken by consensus. The Action Group for Syria's Geneva Communiqué on principles for Syria's political transition also calls for the formation of a neutral transitional authority that "could include" members of the present government, the opposition and other groups based on mutual consent.<sup>8</sup>

The third approach would insist on the expulsion of incumbent leaders and vetting of the government bureaucracy for ties to the former regime. It usually follows an unambiguous military defeat or overthrow of the old order and places the responsibility for implementing the transition on entirely new, neutral or even insurgent leaders. This approach can provide a "clean break" with the past, but is often polarizing and can undermine governing capacity if implemented in an indiscriminate or partisan fashion (as with Debaathification in Iraq). The Action Group for Syria seems to be attempting to avoid a recurrence of this in post-Baathist Syria, calling for a "continuity of governmental institutions and qualified staff" during the transition (albeit under transitional leadership along with accountability for past crimes and future performance that adheres to human rights).

Elsewhere in the Arab Spring, authorities in Libya and Tunisia most closely followed the route of seeking to remove the old order.<sup>9</sup> The picture has proved more complicated in Egypt,<sup>10</sup> while the "de-Salehification" of the military and

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8. See Action Group for Syria, "Final Communiqué," June 30, 2012. The Action Group includes the UN, League of Arab States, European Union and permanent five members of the UN Security Council.

9. In Libya, the General National Conference passed a "Political Isolation Law" that contained 23 broad categories of persons barred from public positions and electoral office for a period of five years. In Tunisia, Decree No. 35 of 2011 dissolved former President Ben Ali's Rassemblement Constitutionnel Démocratique Party and barred former members of his governments from running in the 2011 parliamentary elections. Individuals who had previously publicly asked the former President to run for the presidency in 2014 were also banned.

10. Former President Mubarak's National Democratic Party was dissolved, but the Higher Administrative Court allowed its former members to participate in the 2011 parliamentary elections as independents. In addition, the Supreme Constitutional Court ruled against a Political Isolation Law passed by the new Parliament that would have banned senior members of the former regime from running in the 2012 Presidential elections (a former Prime Minister under Mubarak eventually narrowly lost the Presidential run-off vote).

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civilian structures in Yemen risks degrading the elite power sharing agreement underpinning its transition.<sup>11</sup> In Libya especially, the most significant political fault line in the transition is now between those presenting themselves as revolutionaries seeking root-and-branch removal of the political and business elite and a heterogeneous camp of establishment and conservative forces seeking to draw a line under the period of revolutionary upheaval and prevent further loss of influence.<sup>12</sup> This competition played out most dramatically in early May 2013, when the interim legislature adopted a “Political Isolation Law” whilst several government ministries were surrounded by armed groups demanding the exclusion of former regime officials from the new government.

In any of these three broad approaches, transitional arrangements may make a distinction between the authorities who will govern, i.e. implement the transition, and the authorities or mechanisms which supervise those governing. This can be addressed by providing for an inclusive committee of “supervision” comprised of a broad range of actors. Such an inclusive supervisory mechanism can allow for necessary amendments to the agreed arrangements – an important consideration. This was successfully accomplished in the first phase of the Tunisian transition through the formation of a “High Commission for the Realization of Revolutionary Objectives, Political Reforms and Democratic Transition” that included all major political parties, civil society representatives, participants in the revolution and non-voting expert technical advisors. In Egypt, the establishment of an interim presidential council and a consensual, non-partisan governing authority was reportedly mooted on early in the transition but instead near absolute authority was given to the Supreme Council of the Armed Forces (SCAF) – possibly a key missed opportunity.

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11. See April Longley Alley, “Triage for a Fracturing Yemen,” *Foreign Policy Online*, October 31, 2012.

12. See Wolfram Lacher, “Fault lines of the Revolution: Political Actors, Camps and Conflicts in the New Libya,” *SWP Research Paper No. 4*, May 2013.

## The Pace of Transition

The next critical question is whether the transition should be fast-forwarded to expedite elections even if proper normalization of the security and political environment – establishing a level playing field for elections – has not been achieved. The generic dilemma is that early elections are likely to favour both old regime incumbents and the best-organized opposition under the old regime while late elections delay the injection of popular legitimacy into the new order and potentially allows the provisional government to entrench itself.<sup>13</sup>

For example, in order to achieve the irreversibility of the transition from military rule in the late 1980s, Chilean democrats accepted a general election under imperfect conditions. It was this election that paved the way for a change in the balance of power and societal normalization through the demilitarization of the institutions governing public life. This approach was followed however because there was confidence among Chilean democratic forces that they had organizing power among the grassroots but no purchase on existing state institutions.

In the bottom-up “people power” uprisings of the Arab Spring, there has also been a popular push for early elections. This has primarily been motivated to replace self-appointed interim institutions with bodies that enjoy popular legitimacy. But there have also been sharp debates, especially in Egypt and Tunisia,<sup>14</sup> reflecting fears among some stakeholders that their countries were being propelled into early electoral contests favoring established Islamist opposition parties and “remnants” of the previous regimes before new political actors were able to organize and the political playing field had been leveled.

Contrary to the Chilean approach, in the South African transition there was a relatively lengthy overhaul of public

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13. See Brendan O’Leary, “Elections and the Management of Conflict” in Gareth Stansfield (ed.) *After the Arab Spring: Reconstruction and State-Building* (Witan Press, United Nations Association of the UK, Nov 2012). Tunisia and Libya sought to address concerns over transitional authorities entrenching themselves by requiring interim leaders to pledge not to run in the first set of new elections.

14. In Egypt, “constitution-firsters,” mostly liberals and leftists, argued that there was little sense in quick elections for parliament and a president when a new constitution was likely to require new elections within as little as a year. Behind their procedural argument was a desire to have more time to organize politically and a fear that Islamist parties would do well in early parliamentary elections (thereby securing the largest say in shaping the constitution). See Michele Dunne, “Egypt: Elections or Constitution First?” *Carnegie Endowment for International Peace*, 21 June 2011.

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institutions and laws prior to the country holding its first democratic national election. But this patience was only possible because the major players had confidence in the irreversibility of the transition and due to the existence of a credible all party monitoring and supervisory committee. Similarly, in Tunisia, the formation of the High Commission for the Realization of Revolutionary Objectives was a critical political pre-condition for delaying the first set of parliamentary elections on technical grounds. Confidence was not as widespread in Egypt and Libya in the inevitability of the move towards democracy and the willingness of interim actors such as SCAF and National Transitional Council respectively to give up power. These perceptions helped to drive these two countries' relatively rapid election timetables.

### Sequence of the Transition

Trust, tradition and context determine whether any particular transition will allow for a few "wise men" to be appointed to quickly write a new constitution. This was the method used in Morocco, where King Mohammed VI outlined guidelines for the new constitution in a televised speech and the new charter was then quickly written by a commission of experts appointed by the Palace (rather than by an elected constitutional assembly).<sup>15</sup> While through this approach Morocco was able to avoid the unrest seen elsewhere in the region, the international tendency is in the opposite direction – towards respect for a process that provides for direct participation of the citizenry. This has the effect of stretching the transition and bringing to the fore the question of how elections and constitution drafting should be sequenced during this period.

The debate over sequencing often turns on how the legitimacy of the new constitutional order can best be secured.<sup>16</sup> Writing a constitution prior to elections entrusts the drafting process to an unelected and perhaps not wholly trusted transitional authority. But with the political

strength of various actors unmeasured by elections and uncertainty as to who will hold office in the future, founding fathers and mothers may be more likely to establish early institutions that provide meaningful checks and balances on the exercise of power. A "constitution-first" sequence is suggested in the Action Group for Syria's communiqué, which proposes that a review of Syria's "constitutional order and legal system" occur in a neutral environment prior to multi-party elections being held under a new constitutional order.

In contrast, having constitution-making conducted or supervised by an elected body ordinarily provides a substantial boost of popular legitimacy and accountability to the drafting process. In Iraq, Grand Ayatollah Ali al-Sistani famously prevailed on the U.S.-led Coalition Provisional Authority that elections had to be held prior to a new constitution being written. More recently, this type of sequence was followed in Egypt, Libya and Tunisia. Among the often divided societies present during transitions, this route therefore assumes a substantial sense of national responsibility on the part of the electoral victor. In the Arab Spring, such a spirit of political generosity has been more visible in Tunisia for example than Egypt. Although even in Tunisia sharp polarization has developed following the political assassination of a prominent secular opposition leader and critic of the Islamist-led government in February 2013.<sup>17</sup>

On this score, there is often concern that the winning party or group may rather act in an unbridled fashion and dominate the coming into being of a new social contract. In the Arab Spring, this concern was particularly acute in Egypt where a group of "constitution-firsters" (liberals, civil society and those concerned about continued rule by the Supreme Council of the Armed Forces) argued that the drafting of the constitution could be made more participatory and representative of Egyptian society if it were supervised by an appointed and inclusive interim council. Behind this proposal was the likelihood of a

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15. The Moroccan process from start to finish was wrapped up in a tidy three-month period. The drafting was followed by one day of public consultations held immediately prior to a popular referendum on the new charter (which returned a 98% approval vote). This was followed shortly thereafter by Parliamentary elections held under the new Constitution.

16. For more on the sequencing of constitutions and elections see Gluck, Jason, "Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia," United States Institute of Peace, Peacebrief No. 92, April 29, 2011.

17. The electorally victorious Islamist Ennahda party was initially hailed for entering into a coalition government with non-Islamist parties in 2012 and showing willingness to compromise by omitting references to Sharia in the country's constitutional declaration. After the February 2013 assassination of Chokri Belaid, Ennahda was sharply criticized by Tunisia's secularist leaders for not seriously addressing or being complicit with the security threat posed by hard-line Salafi militants. Ennahda has however thus far maintained its promise on omitting references to Sharia in draft versions of the Constitution and undertook a cabinet reshuffle in March to increase the number of independent ministers.



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strong Islamist performance in Parliamentary elections and a fear among liberals that the new legislature would subsequently sideline them in decision-making on key constitutional issues. Islamists meanwhile argued that the constitution would be more legitimate if supervised by an elected Parliament. Egypt's inability to resolve this tension led to virtually every step in the latter half of its transition being contested, including the dissolution by court order of the lower House of Parliament and the first Constituent Assembly it appointed.<sup>18</sup> Following this tortured process, the Egyptian transition ultimately culminated in a hostile rather than confirmatory referendum. In a relatively homogenous country, the text received less than two-thirds support nationwide with only one-third of eligible voters turning out (the lowest participation in any of Egypt's post-revolution elections).

Most transitions are guided by the logic that an enduring social contract, mainly its new constitution, should be popular and legitimate. This usually implies an elected constitutional assembly and a process that is of sufficient duration to enable *broad* consultation, *informed* deliberation, *patient* negotiation and *inclusive* agreement. Hasty processes involving non-inclusive quick fixes can have long-term disastrous consequences (as seen in post-2003 Iraq). Tunisia and Yemen seem to have internalized this. Tunisia's constituent assembly will likely take almost two years to produce a constitution. Yemen has meanwhile preceded its three-month constitutional drafting period by launching a "make or break" six-month National Dialogue that involves 565 delegates and sixteen political factions debating key national questions such as southern and Houthi separatism, powersharing and transitional justice.<sup>19</sup> In contrast, Libya's original roadmap provided only 60 days total for drafting its new constitution. This was subsequently expanded to 120 days – still a very tight timeline for allowing meaningful public consultation – and is likely to be extended still further.

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18. For those trying to track the twists and turns, the Egyptian transition includes: a snap popular referendum on constitutional amendments held only weeks after Mubarak's fall, four subsequent Constitutional Declarations, a failed attempt by the ruling military council to introduce "supra-constitutional principles," and both parliamentary and presidential elections. The first Constituent Assembly chosen by Parliament to draft the Constitution was dissolved by the courts. Subsequent to that, the lower house of Parliament which appointed the second Constituent Assembly was itself also dissolved by judicial ruling.

19. Deutsche Welle, "National Dialogue to make or break Yemen," April 8, 2013.

At the same time, it is difficult for any country to continue for a year or more with an unelected, interim governing authority while the constitution is being written. These competing imperatives are usually met by broad-based agreement on interim constitutional and electoral rules to enable the election of an interim legislative body. This body typically also serves as a constitutional assembly or is given the power to appoint an independent constitutional commission.<sup>20</sup> Once the final constitution is adopted, fresh elections can be held, or the previously elected assembly is installed as the new legislature under the new constitution. Concerns about a tyranny of the newly elected majority can be at least partially ameliorated by transitional agreements providing guidance on how constitution drafters are selected by the elected assembly, decision-making rules that favor consensus over straight majority decision-making and pre-agreeing broad principles that the future constitution must respect (these points are discussed in greater detail in subsequent sections).

How much do sequencing and "process" choices actually matter? In the Arab Spring context, process choices over divisive transitional tasks have carried the potential to either mitigate or excite underlying societal tensions. Once again, in Egypt, the first Constitutional Declaration failed to clearly set out the sequence of drafting the constitution and presidential elections to replace the SCAF. Once it became apparent that presidential elections would be held prior to the constitution being completed, there were perverse incentives for the ruling military council to continually rewrite the rules to maintain a decisive say over the drafting process.<sup>21</sup> The net result was uncertainty, political polarization, damaging accumulation of power in one branch of government and the setting of a dangerous precedent where the executive branch unilaterally changes the rules of the political process.<sup>22</sup>

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20. Underscoring the range of options available, Yemen recently took the innovative approach of injecting legitimacy into the government by holding within 90 days an uncontested elections for a new President to oversee the transition, with the opposition and government pre-agreeing to back the same candidate (the sitting Vice-President).

21. SCAF's first attempt to do so, through floating "supra-constitutional principles" prior to Parliamentary elections in November 2011 produced what were at the time the worst street protests and violence since the original revolution. Its second attempt, through issuing a second Constitutional Declaration after the polls closed in the presidential run-off vote on 17 June 2012, was likened by some to a "legal coup" and was abrogated in a third Constitutional Declaration issued by newly elected President Mohammed Morsi in August 2012.

22. This precedent was followed by the elected President Mohammed Morsi in his constitutional

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## What should a Transition Agreement Address?

In the preceding sections we have argued that optimally transitional agreements should specify who supervises the process and clearly set out the pace and sequence of key transitional events such as elections and constitution making. To varying extents the Arab Spring countries passing through political transitions have from the outset suffered from a lack of clear visions and informed choices on these scores, complicating and in some cases imperiling their democratic development.

With this in mind, we now attempt to suggest issues other than those dealt with above that a model transition agreement might ordinarily address.<sup>23</sup>

### A Timebound Roadmap

A transition agreement's particular contribution to securing the conditions of peace is to set out a time bound roadmap for the process. It is very often the case that the urge to continue in conflict is difficult to remove until there is an agreed roadmap; otherwise there are simply too many unknowns and every incentive for 'the street' or armed groups to engage in the name of protecting the revolution. A transition agreement should provide a degree of certainty about the future and a sequence to the process, as well as clear and appropriate timelines by which elections are held and a final constitution would be drafted, negotiated and adopted.

It is striking how often Arab Spring transitional agreements did not take up this fundamental task. The Yemeni and Libyan agreements did contain specific roadmaps, but formal timelines have generally been absent in constitutional declarations in Egypt and Tunisia.<sup>24</sup> For the

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declaration of 22 November 2012 which essentially put his decisions above judicial review. In the face of sustained public protest in Cairo, President Morsi subsequently cancelled elements of this decree on 9 December 2012.

23. There is of course no universal prescription which can be offered, but a mediator or negotiator involved in developing a transition agreement could use this basic structure to try to help the stakeholders arrive at a common and workable vision for this vital bridging period. Of the Arab Spring countries, Yemen's internationally brokered Implementation Mechanism for the Gulf Cooperation Council Initiative most closely embodies these features. It had the vision of trying to avoid civil war through there being "no victor, no vanquished" and creating on paper a carefully sequenced framework for a more inclusive and participatory brand of politics (See "Triage for a Fracturing Yemen"). This may reflect the expert international expert advice available to the parties through the United Nations Special Envoy to the process.

24. In the Egyptian case, the first set of constitutional amendments in March 2011 only implied a sequence of elections and described a process by which a new constitution could be written

legitimacy of the process, it is also vital that the transition follow the agreed rules and timeframes. A constitution-making process which arbitrarily deviates from its agreed rules may subvert its own standing, and to some extent this has been the case in two very different recent transitions: Iraq and Egypt.

In Libya, the delineation of a sequenced roadmap in Article 30 of its Constitutional Declaration may have been pivotal in ending its internal conflict. In early drafts of the Declaration, the interim and self-appointed National Transitional Council (NTC) proposed that it would remain in place for the entire two-year transitional period. In western Libya, the NTC was seen as dominated by figures from the eastern city of Benghazi, where the revolt against the Qaddafi regime had began. In this context, the NTC's Tripoli representatives and their contacts in the still regime-held capital instead pushed for an early date for national elections to replace the Council, partially in order to gain a stronger western foothold in the new political process. Ultimately, it was only after this condition was met in the Constitutional Declaration of August 3rd, 2011 that Tripoli subsequently rose against the regime on August 20th.<sup>25</sup>

### Decision-Making

Negotiators of transitional agreements have at their disposal a wide range of options with respect to decision-making rules on a wide variety of matters during the interim period. Transition agreements might typically consider ways in which formerly excluded groups can participate in foreign policy, national security, and development decision-making in ways that would not normally be open for participation on a non-elected representative basis. The very rationale for this lies in the overriding consideration of promoting stability and inclusivity pending final arrangements and the fact of their temporary nature.

However, one of the ever present dangers in the transitional process is that joint decision-making can result in gridlock,

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(without clearly requiring that this happen).

25. Author's conversation in December 2012 with Dr. Peter Bartu, UN Political Advisor in Benghazi, Libya during the summer of 2011.

especially if consensus or special majorities are required for key decisions. Careful consideration should be given to decision-making formulae so that they reflect the need for consensus between major actors without allowing one, perhaps minor, player to hold the process ransom.<sup>26</sup>

### Deadlock Breaking

Transition agreements often also anticipate some form of deadlock-breaking mechanisms in the event of a failure to find agreement during constitutional negotiations, including international or joint mediation or arbitration. The Yemen agreement for example envisions an Interpretation Committee to which the government and opposition agree to refer any disputes over interpretation of the agreement.<sup>27</sup> Tunisia has meanwhile extemporaneously sought to overcome gridlock on choice of the new political regime in its final constitutional draft through a series of national dialogue meetings that include the President, Prime Minister, Speaker of the Constituent Assembly, all political parties and civil society representatives such as major trade unions.<sup>28</sup>

It also needs to be borne in mind that there may also be a need to amend the roadmap and the transitional agreement during the course of the transition. For example, the Libyan Constitutional Declaration could be amended by a two-thirds majority of the National Transitional Council, but providing for this possibility is often overlooked.<sup>29</sup>

Finally, in order to forestall deadlocks, there is also benefit to proactively considering how to sequence critical and divisive issues. There may be value in deferring issues that the parties are simply incapable of agreeing at the outset. In our experience, parties cannot be expected to

find each other completely at the outset of a transitional period. Interim arrangements may make use of joint expert, or international expert or advisory bodies to assist in preparing options on these issues.<sup>30</sup>

### Pre-agreeing Outcomes

In highly polarized societies, transition agreements may need to guarantee broad but fundamental principles that will govern the transitional process. This would typically take the form of expressing a common denominator of values and outcomes on which all social players can agree. These statements of principles can serve as a confidence-building device to allow previously conflicting parties and the general public to see that their basic anxieties and aspirations are acknowledged and addressed in advance. Indeed, minority groups as well as some combatants may be unwilling or lack the trust to commit to an open-ended transition process in an uncertain or possibly insecure environment.

For example, in Tunisia, the elected National Constituent Assembly took the step of pre-publishing the Preamble of the new Constitution ten months ahead of the expected completion of the actual text. This was part of an effort by the Islamist-led majority coalition in the National Constituent Assembly to convince various elements of Tunisian society as to the non-radical nature of its political programme. In contrast, liberal groups loudly and unsuccessfully sought similar some form of assurances on key constitutional issues in Egypt prior to parliamentary elections.

### Composition of Constitution-Making Bodies

In several Arab Spring countries, the composition of constitution-making bodies has emerged as a key point of contention in the transitional period. While taking the form of technical and procedural battles, these disputes are irreducibly political in nature because they determine who holds the pen that draws up the new political, social and governing framework. The likely battle lines to be formed on this issue are over whether the ordinary procedures of

26. The use of a formula known as 'sufficient consensus,' in Northern Ireland and South Africa is one approach that has been utilized to address this concern.

27. To date however, the Interpretation Committee, which represents one of the few checks on the power of the President during Yemen's transitional period, has not been formed.

28. While some opposition parties and unions boycotted the latest national dialogue session in April 2013, as of writing the mechanism does appear to have been successful in brokering agreement on the constitution enshrining a mixed system of government. (The electorally victorious Islamist Ennahda party had favored a parliamentary system with the secular opposition generally favoring a strong presidential system.)

29. The ability to amend the Constitutional Declaration has been passed on to the elected General National Conference (GNC) that replaced the National Transitional Council after Libya's first elections in June 2012. This provision thus has the side benefit of allowing for debate on the organization of the transition by elected members of the GNC rather than Libya being stuck with an inflexible roadmap written by its self-appointed transitional authorities.

30. Such bodies have the added value of allowing the parties to consider proposals which do not emanate from the other side, and hence risk less loss of face by the parties considering them.

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majoritarian democracy are sufficient to guarantee the full representation of diverse societies in the “once in a generation” task of drafting a new constitution.

The temporary nature and specific tasks of the transitional period suggests that the criteria for selecting a constitutional assembly and its designing procedural bylaws may be distinct from that of the election and operation of a normal Parliament. Indeed, because of a need for inclusivity, constitutional assemblies are often larger than ordinary Parliaments. Transitional agreements may also seek to reassure the full range of local stakeholders by mandating inclusivity in the selection of members of constituent assemblies or, as has been proposed for Syria, reserving seats for ethnic or religious minorities.<sup>31</sup> From another angle, concerns about inclusivity in the constitution-making body can also be addressed by requiring super-majorities to approve draft constitutions (e.g. two-thirds as in Tunisia rather than a simple majority)<sup>32</sup> or requiring a minimum number of provinces around the country to approve a draft charter in a popular referendum as was done in Iraq.<sup>33</sup>

As a general remark, the original transitional mechanisms in Libya, Tunisia and Egypt did not provide guidance or criteria on how constitutional drafters should be selected by newly elected legislatures. This ambiguity perhaps contributed to lurching developments in the Egyptian and Libyan transitions in particular. In the former, the key unresolved debate that animated the transition was whether the constituent assembly appointed by Parliament should mirror the Islamist majority that had been elected or provide extra representation to political and religious minorities.

In Libya, historical differences between the distinct eastern, southern and western regions of the country

led to sharp divisions over geographic representation in constitutional drafting body. The central debate was whether the apportionment of seats in the assembly that would appoint the constitutional commission should be based primarily on population delimited districts (benefitting western Libya and the sprawling capital of Tripoli) or equal geographic representation (giving extra seats to the periphery of eastern and southern Libya). While the allocation of seats in the assembly was ultimately based on a mix of population and geographic factors, federalist groups in eastern Libya threatened to boycott the elections and blockade the borders of the historical eastern region if the elected General National Conference (GNC) were to itself directly appoint the constitutional drafting commission.<sup>34</sup>

### Security and Transitional Justice

There are many important security matters that could require treatment during the transition, from civil-military relations as in Egypt, integrating government and opposition forces as in Yemen, and building trust between the political leadership of opposition groups and local fighters on the ground as was the case in Libya and which will likely also be a challenge in Syria.

One of the principal functions of a transitional period is to build peace and public order for ordinary citizens to exercise their new rights as their country emerges from conflict. In an insecure environment where the state’s monopoly on the legitimate use of violence may just have been shattered, the establishment of basic stability can be *sine qua non* for the transition to succeed. Indeed, security developments have at certain junctures threatened to overwhelm the Libyan and Yemeni transitions and this challenge will likewise exist in Syria.

To some extent, security developments have at certain junctures threatened to overwhelm the Libyan and Yemeni transitions and this challenge will likewise exist in Syria. Even amidst the relative stability of Tunisia, controversial

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31. For example, “The Day After Project” conducting planning for the Syrian transition has proposed reserving 15 seats in the constitutional assembly for the highest polling religious and ethnic minority candidates that fail to get elected. See “The Day After Project: Supporting a Democratic Transition in Syria” at Pgs. 78-81. Available at: <http://www.scribd.com/doc/104151937/The-Day-After-Project-en-Final#download>.

32. In Tunisia individual articles in the draft constitution will be approved by 50 percent plus 1 but the overall charter requires a 2/3 majority to be adopted. If it is not passed after two readings, the Constitution will be submitted to a popular referendum.

33. In Iraq the 2004 Transitional Administrative Law stipulated that even if the draft permanent Constitution was approved by a majority of voters nationwide it would be held as rejected if more than two-thirds of voters in at least three out of the country’s eighteen provinces voted no. This assurance was intended to provide minority Kurds with assurances that Iraq’s Arab majority could not pass a Constitution without their consent.

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34. After some eight months of debate, the GNC decided in February 2013 that it would not select the constitutional drafting body, but rather uphold an amendment to the August 2011 Constitutional Declaration holding that the constitutional drafters would be directly elected through a fresh set of elections that give equal representation to each of Libya’s three historical regions. However, the Libyan Supreme Court subsequently ruled that this amendment was itself invalid, casting the design of the process back into doubt.

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local armed groups such as the “Leagues to Protect the Revolution” have been implicated in political violence and characterized by some as a threat to public security.

The political priority of security arrangements during the transition often relates to the institutional standing and corporate interests of the security establishment. To the extent there is an actual choice, transitional negotiations and agreements should seek to ensure that the supervision of the transition is in the hands of civilian rather than military authorities. The initial year of Egypt’s transition provides a cautionary tale on the latter path.

Depending on the specific circumstances, there may also be an immediate need and political opening for security sector reform. Yemen was the only country in the Arab Spring whose transitional agreement explicitly addressed security sector reform, although in Tunisia the public considers the issue a priority and proposals for reform of the Ministry of Interior have been floated. In general reforms could include a symbolic measure of integration between statutory and insurgent forces, the decommissioning, or alternatively, the warehousing of weapons, seeking to build command and control over diffuse armed groups involved in the recent conflict, appointing new commanders of the armed forces and if conditions permit, vetting all sides for those involved in atrocities against civilians. Failure to lay the groundwork for an all-embracing structure to deal with combatants on all sides, or premature demobilization of fighters (as we know from Iraq), can be disastrous.

Transition documents may also be required to address transitional justice issues, including the past behavior of security forces and insurgents, if only to guarantee their later proper treatment once permanent democratic institutions are in place. There can be no quick fixes to the complex and emotive matters of transitional justice and security sector reform. The issue for the transition may therefore be conceived as how to send the right signals and deliver some early tangible results while recognizing the

longer-term task.<sup>35</sup> The failure to do so can lead to popular revenge-taking as witnessed in Iraq and Libya, and which is anticipated in Syria. This may be why the Action Group for Syria’s proposals contain an explicit commitment to accountability as part of national reconciliation, including accountability for “acts committed in the present conflict.”

## Governance and Development

In addition to a possible long list of tasks typically relating to transition not detailed here, there is a general need to establish a workable framework of governance and the delivery of basic services during the transition period. This cannot simply be held in abeyance until the final constitution-making process is completed. To varying extents, Egypt, Tunisia, Morocco and Yemen face situations of economic stagnation that color their transitional politics and governance. In Tunisia it was riots over economic frustration and unemployment that launched the Arab Spring in January 2011 under the slogan of “work, freedom, and dignity.” Almost two years into its transition, economic problems remain one of the biggest potential catalyst for unrest in the country with a trend of widespread labor unrest and growing militant Salafism in poor neighbourhoods.<sup>36</sup>

In the Arab Spring, the particular issue of regime and state corruption has taken on a position of prominence during the transition. Public anger with elite enrichment at the expense of the broader population was a near universal rallying cry in popular protests around the Middle East and North Africa. In Libya, the transitional Ministry of Justice went as far as to elevate the prosecution of corruption to the same level as past large-scale human rights abuses and potential war crimes in draft transitional justice legislation. Civil society proposals have also been made in Tunisia to include so-called economic crimes in transitional justice mechanisms. In both countries, corruption was seen a driving force in motivating the citizen uprisings and beginning to combat corruption has become a populist

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35. Authors’ communication with Ian Martin, former Secretary-General of Amnesty International and Special Representative of the UN Secretary-General to Libya from 2011 to 2012.

36. December 2012 for example saw Tunisia’s underdeveloped interior swept by five days of violent protests over a lack of jobs and demands for increased state investment in which thousands participated and hundreds were injured.

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standard for judging change delivered by the transition (or the lack thereof). While explicit transparency measures and requirements for interim governance arrangements have not traditionally been explicitly elaborated in transition agreements, these dynamics suggest that this may need to change.

More generically the interim period is typically one of economic fragility; subject to competing demands including that of post-conflict reconstruction and development at a time in which there is a deficit of trust. In this setting, an ensemble of ineffective governance structures and poor service delivery can erode public confidence in the transition.<sup>37</sup> Yet it is precisely during the transition period that government will be subject to consensual decision-making. The challenge is to prevent consensual government from resulting in an ensemble of ineffective governance structures that magnify service delivery challenges and investment. If so, the transition runs the real risk of unraveling.

### Permanence of the Temporary

In this article, we have encouraged negotiators and stakeholders to make use of a wider array of governance and decision-making options in developing transition agreements. We are however aware of the dangers of establishing compromised institutions and rules during the period of transition. These relate primarily to the tendency of temporary institutions to become permanent – to insist on their own survival. In this regard we would emphasise that the success of a transition will depend to a large extent on the leadership of the key players. No finely crafted and agreed text can guarantee this.<sup>38</sup>

This is not to say that transition agreements are unimportant. Egypt's confused transition could only have proceeded in a more productive fashion if from the

outset there had there been clarity of vision on a roadmap and the final destination sought. In Yemen, the detailed Transition Implementation Mechanism proved sufficient in 2011 to avert imminent civil war and provided the stakeholders a possible framework and the breathing space to contemplate a different future.

Looking forward, Syria appears to embody almost every conceivable challenge that a transition could encounter. Here it is worthwhile to note that that the issues addressed in transition agreements may often sound technical. However, holding elections, constitution-making, broaching transitional justice and initiating security sector reform are all profoundly political tasks that alter the balance of power in a country. They are matters that will inevitably be sharply contested. The question is whether an agreed set of rules can be developed to politically intermediate this contest. Such agreement is not a sufficient condition for the success of a transition, but it may be a necessary one.

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37. For example, in Iraq, dissatisfaction with persistent electricity shortages became the core of the Iraqi public's lack of confidence in the new authorities and even undermined public perceptions of the effectiveness of a democratic system of government.

38. Looking for example at both Egypt and Tunisia, neither country developed transitional texts with formal timelines for elections or constitution making. Indeed, even though these countries were emerging from long periods of authoritarianism, their constitutional declarations did not clearly define the oversight which interim legislatures had over powerful executives. While this proved severely problematic in Egypt, textual deficiencies were initially surmountable in Tunisia because of the inclusive and participatory nature of the political supervision of its transitional process. Conversely, Yemen probably has the most comprehensive transitional text of the Arab Spring countries, but is nonetheless faced with the specter of civil war and territorial fragmentation.

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