

The Constitutional Process in Egypt and Tunisia

Written by Lise Storm

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LISE STORM, MAR 8 2014

Nearly all states around the world have a written constitution. A text that that is the foundation for government; a text, which on the one hand empowers, and on the other limits state institutions. Hence, from any given formal constitution, it is possible to say a great deal about the scope for democracy in a particular country – constitutions lay down the rules of the game. In democratic states this means that constitutions significantly impact, among other things, on the quality of democracy, although it does not, of course, function in a vacuum. In non-democratic regimes, on the other hand, constitutions generally serve as a mechanism of regime survival, i.e. institutionalizing authoritarian institutions, thereby preventing democratic transition, while providing a thin democratic veneer (Elkins, Ginsburg and Melton 2009; Ginsburg and Simpser 2014).

Taking the above into consideration, it is hardly surprising that constitutions have taken centre stage in the political debate in and about the Middle East and North Africa (MENA) in recent years. With the advent of the Jasmine Revolution in Tunisia in late 2010, and the subsequent spread across the region of what has become known as the Arab Spring, new constitutions were drafted on a hitherto unprecedented scale in the MENA, that is, of course, save for the immediate post-independence period.[1] While there has been a proliferation of new constitutions in the Arab world from 2011 onwards, the purpose of these texts, and the reason for their revision has varied rather considerably. In North Africa, Morocco introduced a quick and limited revision of its constitution in 2011, in Algeria the constitution will be revised in 2014, but not for reasons to do with the Arab Spring, but in order to enable President Bouteflika to run for a fourth term in office. In Libya, some three years since the fall of the Qadhafi regime, the constitutional process is still very much in its infancy, while Egypt has seen constitutional amendments and two brand new texts since the ousting of Mubarak in 2011, yet the country appears as far from democracy as ever. Tunisia, in contrast, is on the road to consolidating democracy having adopted the country's first post-Ben Ali constitution in January 2014, thereby institutionalizing the democratic institutions created in the wake of the dictator's departure.

The Constitutions of Egypt and Tunisia: Two Opposing Tales

The tales of the post-Arab Spring constitutions of Egypt and Tunisia are very different indeed. Not only in terms of how the constitutional process started out, but also with regard to how it ended up. As discussed in further detail below, in Egypt, the constitutional process most resembled a series of shot-gun weddings that produced – from a democratic point of view – ultimately rushed and undesirable results, even if formally endorsed at the polls by the citizenry. In contrast, in Tunisia, the drafting of the constitution was a drawn-out process involving long-winded negotiations with parties from across the political spectrum, and the subsequent voting on each article in the popularly elected parliament, rather than the text being put to a national referendum. It took Tunisia nearly three years to produce a constitution, while Egypt managed three in the same time-span. How come the processes were so diverse from one country to another? And why did they lead to such different outcomes?

How the Process Started Out: Actors and Objectives

The nature of the actors – and the character of their objectives – undoubtedly shaped not only the constitutional process, but also its outcome(s) in both countries. Whereas in Tunisia the objectives were to ensure that the country would not return to authoritarian rule as well as reaching a broad consensus on the new constitution, the agenda in Egypt was driven by a sense of urgency and the desire to establish strong political leadership and, therefore, stability.

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Having witnessed tremendous violence and bloodshed in the weeks leading up to Mubarak's military-induced resignation on 11 February 2011, the country's new leadership, the *Supreme Council of the Armed Forces* (SCAF) under the leadership of Field Marshal Abdul Fatah al-Sisi, moved swiftly to assert its authority with a view to quell the unrest and cement its leadership in the future. Hence, after a few weeks of internal deliberation, the SCAF made the draft amendments public on 26 February 2011, and set the date for the national referendum to 19 March. The time-scale was, in other words, rather tight and did not leave much room for consultations with stakeholders, whether within political or civil society (Brown and Dunne 2011). Yet, in line with schedule, the Egyptian electorate endorsed the new text in mid-March, as 41 per cent of the registered voters went to the polls, and no less than 77 per cent of these voted in favour of the amendments, which increased the potential pool of presidential candidates, limited the presidency to two terms, restored judicial supervision of elections, and restricted the terms of emergency rule (Brown and Dunne 2011; MacFarquhar 2011).

At the time when the voters went to the polls in March 2011, it was already apparent that they would soon have to return to cast further votes, not only in legislative and presidential elections, one of which had to be held no less than 60 days following Mubarak's exit, but also for a new constitution. The 2011 amendments were, in other words, a very temporary measure aimed at setting the new institution-building process in motion (Brown and Dunne 2011). Following delayed legislative elections held over three rounds between November 2011 and January 2012, which saw a victory for the so-called 'Democratic Alliance for Egypt', headed by the Muslim Brotherhood's Freedom and Justice Party (FJP) and the Islamist bloc headed by the *al-Nour* party, presidential elections followed in May and June of 2012. Again, the country's Islamists were victorious, with the Muslim Brotherhood's Mohamed Morsi narrowly beating former prime minister and *ancien régime* profile Ahmed Shafiq to the post (Kirkpatrick 2012). The new Muslim Brotherhood regime soon initiated a constitutional reform process, which was heavily dominated by the Islamist segment of the political landscape given their recent victories. Consequently, the constitutional reform process was fraught from the outset as the country's secular actors felt side-lined and grew increasingly wary of what implications majority rule by Islamists at such a crucial point in Egyptian history could have of implication for the future. In the end, the draft of the 2012 constitution, which was finally made public on 1 December, constituted somewhat of a patch-work, introducing some significant positive changes if compared to the 2011 constitution, but also some set-backs, although the latter were not Islamist-flavoured as feared by some. On a positive note, the 2012 constitution, which was approved by a majority of 64 per cent of the valid votes cast on 15 and 22 December[2], reduced the powers of the military, the Muslim Brotherhood's main political rival and old arch-enemy. In fact, rather than focusing on pushing for Islamization of the country through the constitution, the Muslim Brotherhood – undoubtedly confident given its recent performance at the polls – centred its attention on drafting and passing a constitution that would see the establishment of a very powerful executive, and a particularly strong president. Hence, the 2012 constitution rather worryingly vested sweeping powers in the office of the president, thereby effectively paving the way for the survival of authoritarian rule (Albrecht 2013).[3]

And this is exactly what happened. Insisting on exercising his constitutionally vested powers, Morsi effectively ruled the country on his own accord and, thus, came under increased attack from the secular opposition. From early spring onwards, several opposition profiles held secret talks with the military, plotting how to overthrow Morsi (Levinson and Bradley 2013) as he continued to resist power-sharing, and only reluctantly agreed to engage with ill-equipped hand-picked technocrats (Chulov and Kingsley 2013). Over the summer months, the protests against Morsi's rule grew, and on 30 June 2013 the *Tamarod* movement – a body with alleged ties to the Mubarak regime and the military – successfully mobilized millions of Egyptians, who took to the streets and demanded Morsi's departure, echoing the event that saw Mubarak's downfall only two years earlier (Maqbool 2013). In the wake of the protest, the military moved swiftly. On 3 July 2013, President Morsi was ousted in what can only be described as a military coup, spearheaded once again by Field Marshal al-Sisi (Chulov and Kingsley 2013).

A new regime for Egypt, a new constitution for Egypt. That is how the story appears to go in the wake of the Arab Spring. With the military back in full control, having placed Morsi under arrest, the administration suspended the 2012 constitution. As the parliament had been dissolved by the courts already in 2012, there was no preventing the new regime from drafting a text to its liking. Furthermore, unlike Morsi, the military appeared to be riding on a wave of popularity. Prominent members of the opposition praised the military for toppling Morsi (Judis 2013), and el-Sisi and his inner circle of confidantes made a point of rewarding select profiles from the opposition in superficial power-

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sharing arrangements, with the West's darling Mohamed el-Baradei being appointed interim prime minister, and the head of the Constitutional Court, Adly Mansour, made interim president. Not long after taking up his new role as head of state, Mansour appointed a 50-member constitutional committee (dictated by el-Sisi) encompassing party leaders, heads of trade unions, religious leaders, representatives of the police, the military and various ministries. It is worth highlighting that the committee of 50, which only had a mandate to discuss a constitutional draft drawn up by a select 10-member committee also appointed by Mansour and dictated by el-Sisi, included members of the Islamist segment of the political elite, but no Muslim Brotherhood profiles. The Islamists were all defectors from the Muslim Brotherhood or Brotherhood rivals such as e.g. Mohammed Mansour of the *al-Nour* party, which supported the 3 July *coup d'état* (Khalil 2013). Unquestionably as a consequence of the procedures surrounding its appointment as well as, of course, its composition, the third post-Arab Spring constitution^[4], which was adopted with an overwhelming majority of 98 per cent in a popular referendum on 14 January 2014, sadly left many issues of dispute up to interpretation, and vested significant powers in the military, although formally guaranteeing civilian rule in the preamble (Parolin 2014).^[5]

How It Ended Up: Prospects for Democracy

Both Egypt and Tunisia have had quite a tumultuous few years following the eruption of the Arab Spring, their experiences have been markedly different, and the two countries appear to be *en route* to two very diverse destinations. It is difficult to argue against the reality that Egypt seems to be steadily heading further down the authoritarian path with its second military coup in three years, and Field Marshal el-Sisi set to become the next Egyptian president^[6], regardless of the competition that is going to be fielded on polling day, and despite the promises of a return to civilian rule in the 2014 constitution.

In Tunisia, the situation is markedly different. Despite a difficult few months, which saw the democratically elected government forced to resign and hand over power to a technocrat care-taker government as the opposition capitalized on the Islamist fear, the country adopted its first post-Arab Spring constitution in January 2014- a text hailed as one of the most liberal in the Arab world – and is now heading for legislative and presidential elections, which should assist in institutionalizing the fragile Tunisian democracy further, and hopefully in its consolidation (Associated Press 2014). There is, of course, no denying that the quality of democracy in Tunisia could be better at present. The incumbent government is not based on the results of the legislative elections of 2011, the constitution was not sent for public approval, and the incumbent president is indirectly elected. That said, unlike Egypt, military rule or the return to a police state does not appear to be on the cards in Tunisia. In fact, authoritarian regression is not even on the horizon. What makes the emerging Tunisian democracy so fragile is the fact that it is unquestionably civilian, and the reality that there is no strong-man and no party big enough to dominate politics entirely. Adding further to the fragility, while at the same time increasing the prospects for democracy, are the character of the country's party system and the electoral system, which together make coalition government the most likely order of the day in the (near) future. Furthermore, powers in the new constitution are very much separated, with some vested in the president, but many more in parliament (and to some extent also in the judiciary). Hence, as of the adoption of the 2014 constitution, Tunisia has a semi-presidential system which, although theoretically less stable, acts as a good safeguard against the breakdown of democratic rule.^[7] In Tunisia, the electorate may, in other words, be heading to the polls more frequently to elect a new parliament and/or a new president, and the legislative process is likely to be more fraught and slow than in Egypt, but it will, at least, be much more democratic and true to the spirit of the Arab Spring. In Tunisia, there has been genuine regime change, while Egypt has merely witnessed a series of rotations of authoritarian leaders badly masking themselves as democrats.

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[1]For more on Arab constitutions, see Brown (2002).

[2]Please refer to <http://www.electionguide.org/elections/id/201/> for more details (page last visited 3 March 2014).

[3]It is worth noting that these measures, although sweeping, were paired down compared to previous drafts as a consequence of civilian unrest directed against Morsi in November 2012.

[4]The full text (unofficial translation) is available at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf> the page was last visited on 4 March 2014.

[5] For the results of the referendum, please see <http://www.electionguide.org/elections/id/2444/> (page last visited 3 March 2014). It is worth mentioning that the share of registered voter was higher than in the previous two referenda, as was turnout at 38 per cent.

[6]See, for instance, <http://www.bbc.co.uk/news/world-middle-east-26434540>.

[7]For the full text of the Tunisian constitution of 2014 (in English), see http://www.constitutionnet.org/files/2014.01.26_-_final_constitution_english_idea_final.pdf (page last visited 4 March 2014).

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