

Constitutional Reforms in Arab Countries in Transition

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Over the course of the two years following the Arab Spring, numerous States in the region have engaged in processes of revising their constitutions, sometimes even going as far as drawing up an entirely new text. Even countries not having undertaken processes of transition have often been subject to persistent pressure from opposition movements, who demand they grant – if only symbolically – a certain political liberalisation. The contrast with the past is great, since even though nearly all Arab countries had a constitution or a basic law, with the notorious exception of Libya under Gaddafi, the political authoritarianism characterising the entire region entailed a constitutional inertia that had hardly been broken except to allow a president to aspire to additional terms in office or to modify the provisions governing accession to office.

The transitions underway are characterised by the legal and, more specifically, constitutional dimension that the different actors on the political scene lend this political change. Everywhere, the political imperatives have thus crystallised around the constitutional reference. As the legal text containing the basic principles on which the political and legal order of the State rest, the constitution has become a symbol for all political positions. In an attempt to influence the content of the texts being drawn up or revised, the different political forces in play make use of the legal norms to build or strengthen their political legitimacy.

The ability of the different actors to introduce provisions in accordance with their ideology and conception of society is dependent upon the balance of forces involved. By the same token, the constitutional debate impassions the populations that have overthrown their leaders, who appropriate it by organising protests, public debates, conferences, radio and TV programmes or lengthy analyses in newspapers.

The constitutional debate has revolved around the common aspiration of populations for greater democracy. Among the protesters' demands, the points almost all of them had in common were a call for real separation and balance of powers, the expansion and guarantee of individual liberties, the independence of the judiciary branch, free elections and the struggle against corruption. The monarchies seem to have fared better than the republics in the protest and demands movements. Very few of them were faced with demands for the establishment of a constitutional monarchy, let alone a republic, the protesters most often merely demanding a reduction in the sovereign's powers to the benefit of a potential Prime Minister and the strengthening of the legislative branch, until then devoid of any real power.

Though all the States of the Arab world have been confronted with revolutionary movements and calls for reform, the scope of constitutional changes undertaken or underway is variable, and only some of them have initiated a genuine process of constitutional reform. Some of them have done so at the fall of the preceding regime and have embarked upon the development of a new text (Tunisia, Egypt, Libya, Yemen). Others have prudently preferred to begin a process of reform to defuse the risks of political rupture (Morocco, Jordan). In the end, the majority have merely conceded superficial reforms (Oman, Qatar,

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Saudi Arabia, Bahrain, Syria and Algeria, for instance), the majority of oil monarchies using their wealth to buy social peace by redistributing part of it among the population.

Revolutionary Processes and Constitutional Change

Following a revolutionary process having led to the fall of their presidents, certain countries have chosen to break with the preceding regime by abolishing their constitutions and engaging in the process of drawing up a new constitutional text. This is the case in Egypt and Tunisia, as well as Libya and Yemen, who are following or have followed different methods in drawing up their new constitutions.

Different Paces of Progress

Egypt is the farthest along, since it has already adopted and implemented its new constitution. Tunisia has taken a long time to draw up its constitution and its adoption is expected for the autumn of 2013 instead of October 2012. Insofar as Libya and Yemen, who also ousted their presidents, they have merely postulated drafting it. In Libya, a Constitutional Declaration adopted in August of 2011 by the National Transitional Council established a transition period during which an elected assembly, the General National Congress, would appoint a new government and the members of a constituent assembly. The process would conclude with the adoption of the constitution by referendum and the holding of legislative and presidential elections. In March 2012, a constitutional amendment established that the Congress, once elected, would appoint a constituent commission made up of 60 members, with parity between the country's three main regions (Tripolitania, Cyrenaica, Fezzan). But under pressure from the opposition, on 5 July 2012, that is, two days before the legislative elections were to be held, the National Transitional Council decided to modify the August 2011 Constitutional Declaration such that the constituent assembly would no longer be appointed but elected, according to the criteria to be established by the General National Congress (GNC), with respect for the principle of representation of all components of Libyan society in its cultural and linguistic

diversity. Moreover, the assembly would have three months to submit its project. After lengthy debate, on 6 February 2013, the GNC decided not to amend the Constitutional Declaration again but to validate the appointment of Constituent Assembly members by holding an election. The different political forces involved were unable to reach an agreement as to the voting method, so, the GNC designated a committee of three members representing the country's three main regions, which was entrusted with reaching a consensus.

In Yemen, a National Dialogue Conference bringing together the different political groups has been in session since 18 March 2013 under the auspices of the United Nations in order to draw up a new constitution and prepare legislative and presidential elections, to be held in 2014. Yemen has requested France's support in the process of drawing up its new constitution.

Similarities in Transition Phase Management

In Egypt, the 1971 Constitution was suspended in February 2011 by the Supreme Council of the Armed Forces (SCAF), to which President Mubarak had just transferred his powers, and has never been reinstated. In Tunisia, the decision to suspend the 1959 Constitution did not come until March 2011, after presidential powers had been temporarily attributed to the President of the Chamber of Deputies, as constitutionally stipulated in the case of a definitive vacancy of the office of President of the republic. It was definitively abolished in December 2011 by the constitutional law on the provisional organisation of the government. In both countries, a provisional text has been adopted to regulate the transition period. In Egypt, it was the armed forces that drafted this document, under particularly obscure, chaotic conditions. Hence, after having taken power in the most perfect illegality, since, according to the 1971 Constitution, the President of the Lower House of Parliament should have taken the office of interim President and not the SCAF, the latter appointed a revision committee and on 19 March 2011, submitted a dozen constitutional amendments to referendum vote, essentially relative to electoral processes, which were adopted by an overwhelming majority of 77.2%. But on 30 March 2011, the 1971 Constitution, which had been suspended and just amended,

was replaced by a Constitutional Declaration proclaimed by the SCAF, which included some fifty stipulations from the 1971 Constitution as well as the amended articles that had been adopted by referendum. This document, however, was not submitted to a referendum by the people.

In Tunisia, the preparation of a text designed to govern the transition period was at first – in January 2011 – entrusted to the High Commission for Political Reform and Democratic Transition, a technical body comprised by experts that, renamed as of February 2011 as the “High Commission for the Realisation of the Goals of the Revolution, Political Reform and Democratic Transition,” passed a decree-law in March 2011 on the provisional organisation of the government designed to regulate the transition period. Then, in December 2011, the constituent assembly replaced said text by a constitutional law on the provisional organisation of the government, dubbed the “Little Constitution,” which established the organisational principles of the State’s political administration during the transition period.

In Egypt as in Tunisia, the opposition attempted, in vain, to limit the powers of the future constituent assembly by adopting a text of a “supra-constitutional” nature containing a certain number of safeguards. In Egypt, the army, supported by the liberal and left-wing parties, twice attempted – in July and November of 2011 – to impose a declaration of principles establishing guidelines for the future constituent assembly by proclaiming, in particular, the “civilian” nature of the Egyptian State, freedom of religion and gender equality, and guaranteeing the armed forces an important role. But in the face of protest by Islamist parties, the SCAF backed down and cancelled the text. In Tunisia, it was the High Commission that adopted a Republican Pact on 1 July 2011, containing a number of fundamental principles such as Article 1 of the former constitution, relative to the role of Islam, the separation of politics and religion, the freedom of conscience and religion, the principle of the equality of citizens, the preservation of the acquis of Tunisian women in the sphere of personal status or the separation of the legislative and executive branches, and the independence of the judiciary (and prohibiting any normalisation of relations with Israel). However, this text not being adopted by referendum, the constituent assembly considered it had no binding legal effect.

Differences in the Drafting Process of the New Constitutions

Egypt and Tunisia diverged insofar as the stages of the institutional transition process. Should the people or the institutions be changed first? The Egyptian Constitutional Declaration of 30 March 2011 was particularly ambiguous on this point and its interpretation entailed conflicts, at times even violent ones, between the different forces involved. The decision was finally made to hold legislative and then presidential elections before appointing a constituent assembly and drafting a new constitution. Tunisia made an intermediate choice and started with the drafting of a constitution by electing a provisional Parliament and President to exercise power until the adoption of a new constitutional text and the organisation of elections within six months. In any case, both countries chose to entrust the drafting of the constitution to an assembly composed of elected members.

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In Tunisia, the members of the assembly were elected by universal suffrage. Thanks to the parity principle, women obtained approximately a fourth of the seats. In Egypt, the 100 members of the Constituent Assembly were appointed by the Legislative Assembly that had just been elected, but their designation gave rise to heated debate, once again due to the ambiguity of the Constitutional Declaration of 30 March 2011. A first Constituent Assembly with an Islamist majority was elected in March 2012 but declared unconstitutional by the State Council a month later because half its members had been chosen within the Legislative Assembly. The second Constituent Assembly, appointed in June 2012, had more than 60% Islamists and only seven women. A number of pleas of unconstitutionality were filed against this Assembly

with the Supreme Constitutional Court, but President Morsi passed a constitutional decree on 22 November 2012 prohibiting the constitutional judge from examining them. Although the Supreme Court had decided not to abide by this injunction and to meet anyway on 2 December 2012 to make a decision on this matter, Islamist protesters surrounded the Court premises, preventing the judges from entering and meeting there. The Court protested, denouncing such “psychological and material” pressure, and decided to go on strike. Whereas the constitutional decree of 22 November had likewise granted the Constituent Assembly a supplementary period of two months in addition to the initial six established, the constitution was finally adopted in haste on 30 November, submitted to referendum on 15 December 2012 and adopted by a majority of approximately 64% with a turnout of 33%. The drafting process was so controversial that the constitution had hardly been approved before a revision committee was set up to centralise amendment proposals for the text that had just been voted in. In June 2013, the Supreme Constitutional Court finally declared unconstitutional the law organising the Constituent Assembly, but the validity of the constitution was not challenged, due to its approbation by the people in the referendum.

In Tunisia, the Constituent Assembly, which in principle was to have completed its work in a year, i.e. by October 2012, is taking much longer. This difference in pace vis-à-vis Egypt can be attributed in particular to the fact that the Tunisian Constituent Assembly chose to make a clean sweep with the past and draw up an entirely new text, whereas the Egyptian Constituent Assembly was deeply inspired by the 1971 Constitution. Another reason for Tunisia’s delay was that the Tunisian Constituent Assembly has also assumed the functions of a legislative assembly and is thus likewise in charge of drafting legislation and supervising the government’s actions. The last draft of the constitution, which was made public on 1st June 2013, is far from achieving unanimity even within the Constituent Assembly and sixty of its members have signed a declaration expressing their opposition to the draft. The “Little Constitution” establishes that it will be submitted to referendum if it fails to pass by a two-thirds majority in the Constituent Assembly.

Controversies on the Role of Religion and the Status of Women

The rise and coming to power of political forces of an Islamic nature are clearly a particularly important trait of constitutionalism in Egypt and Tunisia, since it is the first time these parties have been offered the opportunity to draft a constitutional text and set down their vision of society.

In Egypt, as in Tunisia, stipulations on the role of religion and the status of women brought tensions to the surface both inside and outside the Constituent Assembly, revealing the absence of consensus in these societies on the definition of a set of common values. While in Egypt a consensus eventually emerged on preserving Article 2 of the 1971 Constitution making Islam the religion of the State and Islamic sharia the main source of legislation, in Tunisia, Ennahda’s proposal to introduce a similar stipulation into the new constitution led to such an uproar that the article was finally removed in March 2012. The current draft constitution retains the formulation of the 1959 Constitution, according to which “*Tunisia is a free, independent and sovereign State; its religion is Islam, its language Arabic and its regime a republic.*” Though this article was the object of consensus basically due to its ambivalence (is Islam the religion of the State or the nation?), the opposition accused Ennahda of having betrayed their agreement by introducing a new provision, according to which no constitutional revision can undermine “Islam insofar as it is the State religion.”

In Egypt, by the same token, opposition parties accused the Muslim Brotherhood of betraying the general consensus by introducing Article 219, under pressure from the Salafists; an article aiming to define the concept of “the principles of Islamic sharia” making recourse to highly technical notions of theology and traditional Islamic law whose exact meaning only a few insiders are able to grasp. It defines the principles of Islamic sharia as being the scriptural sources of sharia, that is, the Quran and the Sunnah; the principles of *Usul and Fiqh*, that is, the major principles that can be surmised from the works of specialists in the science of the sources of *Fiqh* (Islamic jurisprudence) and the replies given by Muslim jurists or Ulama; as well as sources recognised by Islamic Schools of Law. By adopting a very broad concept of “the principles of Islamic sharia,” Article

219 aims to bind the legislator and thwart the modernist interpretation of Article 2, passed by the Supreme Constitutional Court. Note that in Libya, the Constitutional Declaration of 3 August 2011 likewise established sharia as the main source of legislation. Egypt has introduced a stipulation on blasphemy in its constitution. Any insults or attacks against God's messengers are henceforth prohibited; legislators will have to define the concept more precisely and determine the sanction. An analogous stipulation prohibiting violation of the sacred was finally removed from the draft constitution of Tunisia.

In any case, the fact that Islamist parties have agreed to become political parties and run in elections demonstrates that they agree to enter the realm of democratic and constitutional legitimacy

Stipulations on the status of women have likewise been the object of intense polemics in both countries. In Egypt, the Constituent Assembly took up an article from the 1971 Constitution requiring the State to ensure gender equality, without violation of the rules of Islamic law. In the face of reactions of protest by feminist NGOs, the article was eventually removed. Another article entrusting the State with ensuring the compatibility of women's duties toward her family with her work that was also in the 1971 Constitution likewise raised major concern but was not removed. In Tunisia, the draft constitution of August 2012 contained an article according to which the State was to ensure the protection of women's rights under the principle of complementarity to men within the family. Strong protest by the opposition and feminist organisations managed to have this article removed from the draft constitution.

In any case, the fact that Islamist parties have agreed to become political parties and run in elections demonstrates that they agree to enter the realm of democratic and constitutional legitimacy. They are putting their efforts into winning elections and controlling the process of drawing up the new norms and not into reinstating a model of Islamic constitutionalism where the law could only be the expression of the

will of God, the norms established in mosques would arise from doctrine, the power would be in the hands of the "holder of authority" and there would be no concept of State. In Egypt and Tunisia, it is in the constituent assembly, an institution unknown to Islamic law, that the parties of political Islam are struggling to pass new texts likely to strengthen the normative value of sharia. Though their programme and discourse is far from being liberal, they do seem to accept the rules of the game of democracy and have not as yet advocated the subordination of the political sphere to the religious one.

The Tunisian draft constitution has also moved towards a mixed regime, but where significant power is withdrawn from the President of the Republic to be placed with the Prime minister.

Granted Constitutional Changes and Reform of the Political System

In the face of popular demand for democratic liberalisation and the risks of political rupture threatening those in power, other countries in the Arab world have succeeded in defusing protest movements by following alternative routes towards democratic transition. They have succeeded in avoiding the escalation of protest to revolution by passing reforms while retaining control of power. This is the case in Morocco and Jordan, where shortly after the onset of demonstrations, the sovereigns adopted safety measures by modifying the constitution. These reforms, of variable scope, have allowed them to consolidate their power while protecting themselves from the fate of the Tunisian and Egyptian leaders. They were granted by the sovereign, who retained control of the entire revision process. Whereas in Jordan, reform was limited to introducing amendments into the constitution in force, in Morocco a new constitutional text replaced the 1996 Constitution.

Constitutional Reforms Granted by Sovereigns

In both Morocco and Jordan, it was the king who took the initiative of revising the constitution and unilaterally appointing the members in charge of drafting a preliminary text, likewise establishing the lines of reform. In Morocco, it was in a speech on 9 March 2011 that King Mohammed VI announced the implementa-

tion of a constitutional reform and appointed a reform commission in charge of drafting a draft in close collaboration with the political parties, labour unions and cultural and scientific associations. On 17 June, the King made public the main details of the draft constitution and a referendum was held on 1 July 2011. A veritable plebiscite for the text as well as for the King, the draft constitution garnered more than 98% of votes in favour, with a turnout of 72%, and was passed into law on 29 July 2011 by the King.

In April 2011, the King of Jordan also announced the appointment of a royal commission in charge of revising the constitution with the aim of re-establishing a balance of powers, allowing parliament to wholly independently carry out its legislative role and supervisory role over the executive branch and strengthening the independence of the judiciary branch. The commission submitted its report in August 2011 and a month later, the two chambers passed some forty or so constitutional amendments.

Democracy Strengthened

In both countries, the powers of the sovereign have diminished to the benefit of the government and Parliament. In Morocco, the king made significant concessions. Hence the new constitution for the first time requires him to choose the head of government from the members of the political party having won the most votes at the elections and no longer allows him to preside over the ordinary sessions of the Council of Government. The head of government gained new prerogatives, including the power to dissolve Parliament, which was previously the exclusive prerogative of the King, and his/her power to appoint officials to civilian or public positions was enhanced. The constitution now distinguishes between the King as Head of State and the King as religious leader (commander of the faithful). The notion of the “sanctity” of the monarch was replaced by that of the “respect” due him. Moreover, the new constitution steps up the power of parliament by expanding the sphere of legislation, even if the executive branch remains the legislator, in principle, and continues to determine the agenda for Parliamentary sessions. A constitutional court has also been created to replace the constitutional council.

In Jordan, a constitutional court has likewise been created, as has an independent electoral commission. Certain powers held by the King have been

curbed, in particular his right to pass decree-laws under exceptional circumstances or in case of the absence of Parliament, and he can no longer indefinitely postpone legislative elections. Individuals' rights and liberties have been strengthened and torture of any sort forbidden.

Yet the King Remains at the Core of Institutions

In both Morocco and Jordan, however, the democratisation is of a limited nature and has not affected the core of the King's powers. The monarch's status is not really affected by the restructuring of the different institutions and he continues to play a central role in the political regime. The King remains the true holder of power, especially in Jordan, where he retains significant prerogatives, including the right to appoint the Prime Minister, without being constrained to select him or her from the members of the majority party. In Morocco, the King remains the commander of the faithful and a significant actor in the executive branch. The government has had its powers stepped up, but cannot exercise them independently of the sovereign. In both countries, the King retains control of the different levers of power. Though neither of the two countries has truly instituted a constitutional monarchy, where the king would rule without governing, they have at least given the opposition more space. The legitimacy of the monarchy and the King's place at the core of the institutional edifice were never questioned by the protest movements, which did demand greater political liberalism, but within the framework of the existing monarchic regime.

Constitutional Adjustments of a “Window Dressing” Nature

And finally, other countries in the Arab world have undertaken constitutional adjustments that serve primarily as window dressing, without their having any real democratic effect nor restricting the sovereign's powers. In the majority of cases, it is the Head of State himself – the sultan, emir or king – who has granted these reforms, without even appointing a committee to flesh them out. Sultan Qaboos of Oman thus passed reforms in October 2011 amending the fundamental law of the sultanate to strengthen the powers of parlia-

ment, which will now be referred bills of law by the Council of Ministers for their examination and revision before they are transmitted to the sultan, will examine the annual budget and proposed development plans and will intervene in the procedure of choosing a successor to the throne if the ruling family cannot reach an agreement. Bahrain ended up making several concessions, though at first it had refused to make any political concessions and responded by armed force in March 2011 to protesters demanding a constitutional monarchy. In a speech to the nation on January 2012, the King called for a constitutional reform in order to balance out the powers by strengthening the authority of parliament and "opening new horizons for [Bahrain's] democracy." The chamber of representatives and the consultative council drew up the required amendments, which the King promulgated in May 2012. The chamber of representatives' power of supervision over the government was increased. Thus it can now pose questions to the ministers and withdraw its confidence from them, in which case the conflict will be submitted before the King, who will choose whether or not to depose the Prime Minister. The chamber can also decide to create an investigative commission. Moreover, before dissolving it, the King will now have to consult the President of the chamber as well as those of the consultative assembly and of the constitutional court, whereas before, only the Prime Minister was consulted. The government is required to obtain the approval of the chamber of representatives on its programme. It will now be the President of the chamber of representatives and not the President of the consultative assembly who will transmit the bills of law that both chambers have approved to the Prime Minister for their promulgation. In August 2012, the constitution was again amended to authorise the members of the chamber to question the ministers in plenary sessions and no longer only during commission meetings. In Qatar, the emir announced in November 2011 that legislative elections to elect two-thirds of the consultative assembly, stipulated by the 2003 Constitution and endlessly postponed since then, would finally be held towards the end of 2013. Insofar as Saudi Arabia and other Gulf countries, they succeeded in buying social peace by granting material advantages funded by oil revenues, again launching social aid and development programmes and raising salaries to ease the pressure without making political concessions.

Syria, though in the midst of civil war, also proceeded to make constitutional amendments. In late 2011, President Bashar al-Assad thus took the initiative to appoint a constitutional commission comprised of loyalists in charge of drafting a new text. The draft was submitted to a referendum in February 2012, while the country was torn by civil war, and officially adopted by an 89% majority with a turnout of 57%. The amendments primarily aimed to introduce a multiparty system by eliminating the stipulation in the 1950 Constitution that made the Baath Party the leader of the State and society, and to limit the president to two seven-year terms (as of 2014), but they maintained the significant prerogatives of the Head of State. The Algerian President also undertook to introduce amendments to the constitution to strengthen democracy and created a constitutional commission in charge of making proposals to the President, but this promise, made in April 2011 and repeated a number of times since then, lacked precision and did not establish a timeline. On 7 April 2013, the President of Algeria appointed the experts of the commission entrusted with developing a constitutional amendment project. The commission's conclusions "will then be submitted to the high appraisal of the President of the Republic," who will then decide "the proposal's final version, which will be subject, according to the nature and importance of the amendments accepted, to the due procedure of constitutional revision." The absence of the President, for health reasons, since April 2013 will probably put into question this reform process.

Conclusion

Though the revision of the constitution can allow a balance of powers to be reinstated, constitutional reform is not always enough in and of itself. The interpretation of the constitution is more decisive than the text itself. Many constitutions in force before the Arab Spring protected human rights on paper, but in practice, these rights were hindered by freedom-restricting laws and were violated on a daily basis. Organic laws, designed to implement the most fundamental stipulations of the constitution, will allow us to determine whether a country is truly undergoing a process of democratic transition. Indeed, the legislation governing political competition and life can be

liberal or restrictive. Heads of State can attempt to control the rules of the electoral game to prevent the rise to power of an opposition political party with an absolute majority. The choice of electoral system, the candidacy conditions and constituency boundaries allow the executive to orient the composition of the parliamentary assembly. Hence in Jordan and Kuwait, the majority of the opposition parties boycotted the last legislative elections in protest against the reform of the electoral system, which they consider prevented what would have been a definite electoral success for them. By establishing the conditions and forms of recognition of new political parties, legislation on political parties can likewise allow those in power to choose their opposition by refusing to recognise political forces that could threaten to take their place. Thus, in Tunisia, it was only in March 2012 that the first Salafist party was recognised. By the same token, the law on the organisation of the judicial branch should provide greater guarantees of the independence of the judiciary, and legislation on the media (including the press) should guarantee equal access for all media. In Morocco, the constitution establishes a constitutional court in charge of examining pleas of unconstitutionality of laws arising during trials before the ordinary courts. But it also stipulates that the specific organisation of the conditions of admissibility of challenges to the constitutional court is governed by an organic law. Everything will thus depend on how liberal or restrictive the content of these criteria of admissibility are. By the same token, the manner in which the stipulations of the constitution regarding religion will be implemented is fundamental. Whereas the religious issue has held great significance in constitutional debates, the real influence Islam will exercise insofar as a State religion, or that sharia will have insofar as a source of law will depend on the manner in which the constitutional norms regarding them are interpreted and applied.

Conversely, certain countries have modified their political laws before amending the constitution or without touching it altogether. Thus, though Libya has not yet adopted its constitution, new laws have been passed since late 2011 to hold legislative elections, establish an independent electoral commission and eliminate the penalty for belonging to a political party. A law on political parties was also passed in April 2012. By the same token, in Sep-

tember 2011 in Saudi Arabia, the king unilaterally modified the law on the organisation of the Consultative Council, deciding to reserve at least 20% of the 150 seats for women. Upon applying this revision, in January 2013, he appointed 30 women to the Consultative Council. He likewise decided that women can vote and be candidates in municipal elections as of 2015.

Though the constitution is a tool for political change, it remains an essentially symbolic document that requires implementation by both legislators and constitutional judges. The creation in numerous States of real constitutional courts is, in this regard, a particularly significant development and an additional step towards strengthening constitutionalism in countries in the region.

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