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Constituent Processes and the Role of State Powers in the Transitions in North Africa

Nathalie Bernard-Maugiron

In the three years following the Arab Spring, North African countries have engaged in constitutional-drafting processes. In Morocco (2011), Tunisia (2014) and Egypt (2012 and 2014), the adoption of a constitution has been considered as a central element to complete the democratic transition process and to end revolutionary conflicts. Algeria undertook – so far without success – to revise its constitution and Libya is still struggling to draft its own basic law.

The drafting process and the nature of the constituent body will determine the substance as well as the legitimacy of the constitution. Each of these North African states has followed a different path: some decided to elect the members of their constituent body, while others opted for their appointment by the executive power. Whatever process is chosen, it cannot be successful if particular segments of society use the balance of powers in their favor to control the whole drafting process.

Constitutions Drafted by Elected Assemblies

Tunisia has followed the more democratic process since its 2014 Constitution was drafted by a Constituent Assembly directly elected by the people. The assembly also worked as a parliament, enjoying both legislative and constitutional powers. In Libya, the Constitutional Declaration adopted by the National Transitional Council in August 2011 entrusted a Constituent Assembly appointed by the General National Congress with the drafting of a constitution. Under pressure from the opposition, however, it was decided in July 2012 to elect rather than appoint the Constituent Assembly. The elections took place in February 2014, with a very low turnout. Amazigh decided to boycott the elections, to contest their being allocated only 2 seats. For security reasons, voting could not take place in about 80 polling stations.

In Egypt, the 2012 Constitution was the first to be drafted by an elected body. Previous basic laws had all been written by committees appointed by the executive power. The March 2011 Constitutional Declaration adopted by the Supreme Council of the Armed Forces stipulated that the new constitution would be drafted by 100 members chosen by the parliament. The

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newly-elected parliament nominated the members of the Constituent Assembly in March 2012, dominated by Islamists, to draft the constitution. One month later, the assembly was declared unconstitutional by the State Council because half its members had been chosen within the legislative assembly. A second assembly was elected in June. Out of its 100 members, at least 60 were Islamists. The others were representatives of state institutions, churches, specific groups of society and liberal, leftist or secular parties. Most non-Islamist members withdrew from the assembly to complain against the way preparatory works were conducted. The law organizing that Constituent Assembly was declared unconstitutional by the Supreme Constitutional Court in June 2013, meaning 6 months after the constitution was adopted. However, the Court declared that the validity of the constitution would not be challenged due to its approval by the people in the referendum.

In both Egypt and Tunisia, it was the first time Islamist parties were offered the opportunity to participate in the drafting of a constitutional text and to set down their vision of society. Their acceptance of the supremacy of a higher state norm binding on all legal and political bodies should be underlined, since classical Islamic law does not know the concept of constitution. Law can only be the expression of the will of God and the norms are established in mosques by scholars, and not in parliaments by elected representatives of the people. The mere fact that Islamist groups agreed to become political parties and run in elections to sit in an elected legislative/constitutional assembly demonstrates their readiness to adapt to the new realities. The 2012 Egyptian Constitution did indeed include more provisions referring to Islam and religion than previously. However, it granted sovereignty to the people alone (Article 5) and grounded the political system on the principles of democracy and consultation, citizenship, a multiparty system, peaceful transfer of power, separation and balance of powers, the rule of law and respect for human rights and freedoms (Article 6). In Tunisia, Ennahda ended up making important concessions regarding the status of sharia and Islam and the constitution was adopted on the basis of a broad national consensus. Therefore, the participation of Islamic parties in democratic processes could end in moderating their ideologies and behavior.

Constitutions Drafted under the Control of the Executive Power

In Egypt, the executive power took control of the transition process by acting several times as a constituent body. A constitutional declaration was adopted by the Supreme Council of the Armed Forces in March 2011 to replace the 1971 Constitution and interim president Adly Mansour promulgated a second one in July 2013 to replace the 2012 Constitution. In both cases, the document was drafted in secret and was not submitted to referendum.

Use of constitutional power by the executive can lead to authoritarian decisions. For instance, in November 2012 President Morsi adopted a constitutional decree where he granted judicial immunity for all his decisions, fired the general prosecutor – though according to the law he could not be sacked – and barred the Supreme Constitutional Court from examining challenges against

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the constitutionality of the Constituent Assembly and the upper house of the parliament. Following this decision, Morsi lost support from a wide range of political groups and entered an open conflict with the judiciary.

Apart from direct intervention in the constitution drafting process, the executive power can keep the drafting process under control by appointing the members of the constituent body. Thus, in Morocco King Mohammed VI announced in March 2011 the implementation of a constitutional reform and unilaterally appointed the members of a reform commission in charge of preparing a draft, on the basis of the lines of reform he established. In the face of popular demand for democratic liberalization and the risks of political rupture, the King succeeded in defusing protest movements by following an alternative route towards democratic transition while retaining control of the entire revision process.

In Egypt, the July 2013 Constitutional Declaration adopted by the interim president after the removal of Morsi established a very innovative but not successful two-step process. A Committee of 10 legal experts – all men – was nominated by interim president Adly Mansour and was given a month to prepare amendments to the 2012 Constitution. The Committee then passed them to a Committee of 50 members, who in practice did not show any deference to the work of the 10 experts and disregarded their recommendations. The 50 members were selected on the basis of opaque criteria and more than two thirds of the seats were allocated to representatives of various institutions within the state apparatus (the judiciary, the army, the police, al-Azhar, churches, and national councils) or close to the state. Only 2 seats were allocated to political Islam, one for a Salafist from the Nour Party and the other for a former member of the Muslim Brotherhood. The prejudice against the representation of Islamists on that Committee echoed the sidelining of secularists, liberals and leftists from the drafting process of the 2012 Constitution. Five women were appointed to that Committee, against 7 in the 2012 Constituent Assembly.

The Committee of 50 was given 60 days – against a 6 month timeframe for the 2012 Constituent Assembly – to draw up the final draft of the constitution. In both cases, the short timing of the constitution-making process did not leave room for debate and consensus building and for the inclusion of opposition views and civil society proposals. The Committee of 50 lacked transparency, the sessions were not open to the public and the media and members were not allowed to give statements to the press, with the exception of the official spokesman. The debates of the 2012 Constituent Assembly, in contrast, had been widely publicized and plenary sessions were broadcasted on television.

Need for an Inclusive Drafting Process

There is no perfect and unique constitution drafting process. Constitutions drafted under the control of the legislative power (e.g. Tunisia 2014) or executive power (e.g. Morocco 2011)

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may be successful as long as they are considered as basic laws for all citizens. In Egypt, both processes failed to build a political consensus. The 2012 and 2014 Egyptian Constitutions, which present strong similarities in their substance, were both rejected by different segments of the society that felt the texts were not representative of their views. The military command, represented by two members in the 2012 Constituent Assembly and by one member in the Committee of 50, played a central role in the constitution writing processes. Islamists perceived the writing of the 2012 Constitution as a means for immediate political empowerment, while the judiciary, al-Azhar and the police pressured the Committee of 50 to serve their own purposes and were granted unprecedented autonomy without real checks on their authority. Revolutionary groups rejected the two documents for allowing military trials of civilians.

Though a constitution should be a compromise document, the product of a negotiation that reflects the interests and powers of the different actors around the shape a given society should take, the drafting process of the 2014 Egyptian Constitution was no more successful than that of 2012 in achieving consensus and deepened political divides. The processes were not inclusive since in both cases a major faction of society was left out. Both documents were used by dominant groups to extend their advantage over their rivals and reinforce their own position in the state rather than to establish rules to regulate the entire political system and draw a plan to achieve democracy in the future. Whatever the substance of the documents, lack of consensus and exclusion of important political and civil forces from the drafting process affect the legitimacy of the basic law, which has become an instrument of power rather than a social contract binding all sectors of society together.

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