

# Constitutional Models vs Political Reality: The making of Arab Constitutions after the Uprisings

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The 2011 uprisings in the Arab world have triggered a wave of constitution-making, although not necessarily of democratisation. Morocco, Tunisia and Egypt have adopted new constitutions – with Egypt actually enacting one full-fledged constitution and several constitutional proclamations before finally adopting the current charter in January 2014. Even Syria was given a new constitution in 2012; written by a committee appointed by the President, it protected his position and power, although ostensibly it opened the way for competitive presidential elections. Libya and Yemen have also been trying to reach an agreement on new constitutions, although the process has stalled in both countries.

A constitution is essentially an agreement among important political actors in a country about the principles and rules to be respected in governing. A constitution thus reflects the balance of power among political groups and their preferences – the ancestor of all constitutions, the *Magna Charta*, reflected the balance of power between crown and barons. But in the contemporary world the constitution-making process cannot completely ignore ordinary citizens and has to incorporate them and their demands in some form – even if this only means allowing the general public to vote in a referendum. Furthermore, at present, constitutions are seldom drafted through a purely domestic process, as the US constitution was drafted, for example. Drafters of modern constitutions are expected to observe internationally accepted principles as well: constitutions, like elections or, in a different realm, goods sold on the

market, should meet international expectation and live up to international standards.

The post-uprising Arab constitutions have been shaped by the three imperatives of bowing to power, addressing public expectations, and conforming to international standards sufficiently to avoid censure. This means that constitutions are not only normative or aspirational documents, but also a map of power relations in each country.

## Examining the Three Imperatives

The three imperatives – respecting international standards, satisfying domestic constituencies, and accommodating powerful actors – affect constitution-making everywhere. It is also normal for them to conflict with each other. For both reasons, they merit further discussion.

### *Respect for International Standards*

In its essence, a constitution should be an agreement among citizens of a country on how to govern themselves and which principles to uphold in doing so. Ideally, the writing of a constitution should thus be a domestic process and in fact successful constitutions usually owe little to foreign pressure. The long-surviving American constitution was the result of bargaining among the political elites of the original thirteen states. More recently, South Africans in the early 1990s wrote their constitution after discarding reams of models proposed by experts and disregarding the conflicting advice offered from different directions. On the other hand, the first post-colonial African constitutions were drafted by experts in London and Paris and did not survive for long; and Iraq is still struggling under a constitution that reflects

what the United States hoped to accomplish rather than an agreement among Iraqis.

Despite the evidence that constitutions need to reflect domestic agreement in order to last, countries in the process of writing constitutions are bombarded with advice from international experts anxious to inject in the document international standards, 'lessons learned,' or their pet theories.

"Constitutions are now being framed in an age when the dispersal of norms and of the principles of good governance is fairly widespread in all the continents of the world... Declining levels of violent conflict between states have also catalysed international dialogue on shared values, such as human rights, the rule of law, freedom, constitutionalism, justice, transparency and accountability – all of them important ingredients of any constitutional system. Shared values permit organisations such as the African Union and the Organization of American States to be stakeholders of constitutional governance in their member states, which may legitimately intervene when constitutions are not respected, for instance in the holding and transfer of power after free elections."<sup>1</sup>

The existence of such shared values and norms, and the recognition of the right of international or regional organisations to intervene when they are violated, is still more contested than the above statement admits. The widespread 1960s' contention that democracy was a Western concept and the United Nations so-called universal declaration of human rights an attempt to impose Western values on the rest of the world appeared to be waning in recent decades. But it is reappearing with increasing frequency, and not only in countries like China or Saudi Arabia that never embraced democracy and human rights. The official post-coup 2013 Egyptian narrative, for example, claims the country experienced not one but two democratic revolutions (in January 2011 and again in July 2013). Nevertheless, during his election campaign President Abdel Fattah al-Sisi openly declared democracy to be a luxury the country could not afford for another 25 years, even refusing to share his

election platform with the voters because it would create unnecessary controversy (<http://america.aljazeera.com/articles/2014/5/8/egypt-s-sisi-tellsmediantopushfreedoms.html>). Many Muslim countries, and most Islamist movements and parties, refuse to accept the principle of separation of state and religion as incompatible with Islam. And few countries outside Europe, the United States and Canada are willing even to discuss the idea that protection of human rights should be extended to gays and lesbians, let alone transgender individuals.

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Even more important than the direct challenge to the universality of principles of human rights and democracy is their de facto violation in many countries that enshrine them in their constitutions. To be sure, there are grey areas and battles in all countries concerning the balance between individual rights and national security – a problem unlikely to ever be clearly and permanently resolved. But the most serious problem is constitutions' inclusion of principles the government has no intention of respecting, but incorporated in the charter simply to satisfy international expectations. It is open to debate how much international expectations have contributed to making countries more democratic, but they certainly contribute to making constitutions more hypocritical.

#### *Responding to Domestic Constituency*

Like international expert advice, popular input has become a normal feature of present day constitution-making processes, although it is often purely symbolic. Two approaches to incorporating public demands are frequently used: the drafting of the constitution

<sup>1</sup> BÖCKENFÖRDE M., HEDLING N, WINLUCK W., *A Practical Guide to Constitution Building: Principles and Cross-cutting themes*, International IDEA, Stockholm, 2011. [www.idea.int/publications/pgcb/loader.cfm?csmodule=security/getfile&pageid=49280www.idea.int/publications](http://www.idea.int/publications/pgcb/loader.cfm?csmodule=security/getfile&pageid=49280www.idea.int/publications)

by an elected constituent assembly and the submission of the document to a popular referendum. Both were used recently in Arab countries – the referendum in Morocco and Egypt, and the election of a constituent assembly in Tunisia. Both can provide real representation of the public demands or be purely symbolic, depending on how they are implemented.

In Arab countries, a constitutional referendum is usually an empty process. Voters are asked to approve a document that the government has made no effort to publicise and that can even be difficult for voters to access; time for discussion is short, further ensuring that voters will endorse a document without knowing what it entails. Voters who approved the post-coup d'état Egyptian constitution in January 2014 expressed great relief that it superseded the one approved a year earlier when Mohammed Morsi was President and the Muslim Brotherhood governed the country. Very few would have been able to identify accurately the limited differences between the two documents. Even in the more benign political environment of Morocco, voters were more influenced in their decision by the King's call to accept the document – he announced that he would vote 'yes' in the referendum – than by the content, with which most were not familiar.

On the other hand, some countries have a meaningful process of popular consultation without holding a referendum or electing a constituent assembly. The 1993 constitution that put an end to apartheid was written by an appointed body and only approved by the political organisations involved in negotiating the transition. But before final approved, the draft was widely disseminated throughout the country, and organisations and private citizens were invited to submit comments and suggestions. Thousands of submissions were received helping to consolidate support for the new political system and turn the constitution into a living document.

#### *Accepting the Reality of Power*

Constitutions are most often discussed in terms of their normative and aspirational content, rarely as a reflection of the power relations that exist in a country. This is particularly true in the discussion of contemporary constitutions with democratic features. It is widely acknowledged that the US constitution's

acceptance of slavery was an expedient adaptation to the realities of power. There is greater reluctance to read contemporary constitutions as being, at least in part, a map of the existing power distribution in a particular country. In reality, the more a constitution is the outcome of a domestic drafting process, the more it reflects the distribution of power.

Bowing to the reality of power distribution is inevitable. A constitution is nothing but a piece of paper if it is not accepted by those who are in a position to prevent its implementation.

Adapting to the reality of power distribution and to the political calculus of important actors can be subtle or blatant. In the case of recent Arab constitutions, the heated debate on the respective merits and shortcomings of presidential and parliamentary systems – a perfectly legitimate debate from all points of view – also reflected the political calculus of the different parties about their comparative advantage in presidential and parliamentary elections. In other cases, the power play is more blatant: the Egyptian military would not allow itself to be challenged by the drafters of either the 2013 or the 2014 constitution, who were forced to exempt the military from civilian oversight and to put its budget outside parliamentary scrutiny.

#### **Balancing Imperatives in the Post-Uprising Constitutions**

The three constitutions recently enacted in Egypt, Tunisia and Morocco are all shaped, inevitably, by the need to balance the three imperatives. None of the countries could disregard the reality of power distribution; they could not disregard completely the demands of the population and above all of the more mobilised interest groups, although there was also much manipulation of those demands and expectations. Finally, as countries were anxious to maintain good relations with the United States and Europe, and were also in need of foreign assistance, they could not disregard international expectation.

Different factors, however, weighed differently in each country and the mixture produced constitutions with different levels of internal coherence as well as of credibility. These differences reflect the de facto situation in the three countries much more than the skills of the drafters.

### Tunisia

The constitution of Tunisia is the most coherent internally as well as the most credible of the three for two reasons: first, it was not distorted by a lopsided power distribution; and second, it was the object of intense bargaining among all parties, with important civil society organisations such as the labour unions federation and the employers association also weighing in at times.

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With a truly pluralistic spectrum of political parties, ranging from the Islamist Ennahda to a wide array of centrist secular parties and a very vocal set of far-left political factions with small electoral support but strong ties to the powerful labour unions, Tunisia was not dominated by any one political force. Ennahda, which received about 40% of the vote in the constituent assembly elections, could not govern alone or impose a constitution of its own choosing. As a result, the only articles that could gain acceptance from everyone, after months of bargaining, were relatively neutral in terms of their political implications, favoring no political party. Thus the constitution lives up to international standards by recognising and defending a broad array of individual rights and freedoms, but without making promises the government could not possibly keep – such as freedom from unemployment or the right to adequate housing. It is a secular constitution in that it does not provide an official role for religious authorities nor recognise a state religion; however, it is not militantly secular, because it acknowledges that Islam is the religion of most Tunisians.

### Morocco

The Moroccan constitution also has a high degree of internal coherence. It balances successfully a degree of commitment to civil and political rights and demo-

cratic processes with the acknowledgment that the King remains the highest and unchallengeable authority, even while accepting to exercise that power through democratic institutions – at least most of the time.

The constitution does not make Morocco into a constitutional monarchy in the classical sense of one where the King rules but does not govern. The Moroccan King has the authority to govern when he wants, but he can delegate that authority when he sees fit. The cabinet can meet and make decisions without the King on ordinary matters, but it can only consider issues of strategic importance when the monarch presides over the meeting. And it is the King who makes the determination of what is and is not of strategic importance. The King may decide not to involve himself directly with issues he considers of marginal importance, but he cannot be kept away from any decision he considers important. In other words, the constitution lightens the King's burden by not requiring him to be in charge of all decisions, without limiting his power by excluding him from anything in which he wants to become involved. The smooth and swift process through which the constitution was enacted confirms that the drafters never confronted, or even intended to confront, the King. They were appointed by the palace, as was a second commission charged with developing consensus around the new charter. By announcing that a new constitution would be prepared before street movements could gain a strong following and issue their demands, the King managed to maintain complete control of the process. The new constitution was approved by a large majority of those voting in the referendum and even gained some praise by the international community, although in fact it changed little in the way Morocco is governed.

A potentially controversial aspect of the constitution, that it de facto withdrew the promise of regional autonomy for the Western Sahara by subsuming into a project of countrywide administrative decentralisation, slipped by unnoticed, or at least undiscussed, not only at home but also abroad. Yet, Morocco's annexation of the Western Sahara has not been officially accepted by any country or international organisation.

### Egypt

The Egyptian constitution is the least consistent internally and the least credible of the three and it is

thus no surprise that many of its provisions, particularly on rights and liberties, are constantly violated. The drafters faced an impossible task: to write a document that appeared to respond to the demands for democracy of Egyptians that has rejected the Mubarak regime as too authoritarian; to convince the United States and Europe that Egypt was not turn into a military dictatorship, and thus deserved military and economic assistance, despite the coup d'état of July 2013; and to provide the military a constitutional guarantee of complete autonomy. The result is a constitution that is extravagant in terms of the promises it makes about protecting rights and liberties, outlines a normal democratic system of government, but undermines the democratic façade and blatantly violates democratic government by giving the military complete freedom from accountability. The constitution exempts the military budget from parliamentary scrutiny and gives the military sole authority to appoint the Minister of Defense. Exemption from civilian oversight was justified, according to the official line, by the exceptional nature of the Egyptian military and its role in the country and its history. According to this narrative, the rejection of civilian oversight was natural, while its imposition would have been an aberration.

It is worth noting that another institution that has played an abnormally important political role since 2011 and continues to do so, the judiciary, also tried to gain the same freedom from oversight as the military, but only partially succeeded. It demanded, unsuccessfully, that its budget should also be exempted from parliamentary supervision. Nevertheless, the judiciary has gained recognition in the constitution as an institution that is subordinate to no authority except the law and is self-regulating. The independence of the judiciary is of course a fundamental tenet of democracy, but in the case of the highly politicised Egyptian judiciary, the principle of judiciary independence also enshrined the lack of accountability of a major political player.

### **The Viability of the Post-revolutionary Constitutions**

The viability of any constitution depends to a large extent on how well it serves the needs of a country's

citizens and above all of its major political actors. Constitutions that survive for long periods are those that serve, or can be made to serve, the needs of public and power players alike. Such constitutions are rare. The longevity of constitutions is generally tied to that of specific political regimes. And even in politically stable countries, constitutions need to be reinterpreted and amended in order to accommodate changing circumstances.

The post-revolutionary constitutions are no exception. Their longevity will depend on the stability of the staying power of the regimes that have emerged from the upheaval.

The Tunisian constitution, the politically neutral end result of much haggling and compromise, has some chances to prove viable if the parliamentary and presidential elections scheduled for the late fall prove successful. Any possible coalition of political parties could work within the boundaries established by the constitution. Furthermore, Tunisia has a history of constitutional stability – the first Tunisian constitution survived for more than half a century.

The Moroccan constitution will survive as long as the power of the King is not directly challenged. It represents a reasonable compromise between democratic principles and royal prerogative and also would allow a more lively democratic process if the parties took full advantage of the opportunities. And there is no indication that the King will encounter a direct challenge to his authority in the foreseeable future. There is no indication that a major opposition force is likely to emerge and the palace has shown great ability to defuse lesser challenges.

The constitution that will certainly not prove viable for long is the Egyptian one. It was designed to serve the needs of a particular moment and of specific players, above all the military and the judiciary. The constitution could not survive a loss of power by the military, because any civilian government would be anxious to rein in a dangerous rival and would amend the constitution. But even while the military remains in power – and this might be for a long time – the constitution will not be a viable document, truly regulating the country's political life. The contradictions between political reality and the constitutional principle started eroding the constitution as soon as it was enacted.