

Constitutionalism in 2014: Basic Rights in Egypt and Tunisia

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Right to Nonviolence

Save for Tunisia, the country where the 'Arab Spring' started, the year was morose for those who believed in the promises of the revolution that had brought down four despots three years earlier.

In Egypt, where the nonviolent revolution swept away a three-decade entrenched President, the 'eighteen days that shook the world' appear as a distant moment of fleeting exhilaration. Abdel Fattah al-Sisi has turned into another Hosni Mubarak. Registering a heavy record of dismal human rights violations even before he took on the presidential mantle, his score of 96 per cent of the votes in June 2014 is typical of dictators. The military hijacked the Egyptian revolution twice in just two years. In March 2011, Field Marshal Tantawi took over Egypt. In July 2013, it was the turn of Field Marshal Sisi.

In Yemen, the former President continues to play havoc with the country, protected by a 2011 UN-GCC agreement that gave him immunity for three decades of authoritarian rule. Meanwhile, the country has descended into cyclical bouts of violence, despite a National Dialogue which had kept the flame of unity and the future of peace alive for two years.

In Libya, the revolution was violent from its very first days, and Gaddafi fought it, literally, to the death, leaving a reservoir of hatred on both sides fuelled by the militias. Daily life in Libya is insecure and brutal. As for other countries, where similarly massive demonstrations failed to unseat the dictator, most promi-

nently in Syria and Bahrain, human rights have receded in the face of further authoritarianism and/or daily massacres. In Syria in particular, where the revolution was nonviolent for six straight months since a massive demonstration led by women in the heart of Damascus was brutally repressed on 16 March 2011, a ruthless display of brutality is being played out between the Assad dynasty and its Islamist challengers. Save for Tunisia, the gap between reality and bills of rights has widened.

Rights in the New Constitutions: Egypt and Tunisia

Despite the failure to deliver on the human rights promise of early 2011, the constitutional experimentation across the region is slowly proceeding. Two countries established new constitutions: Egypt and Tunisia. Libya started the process haltingly in 2014 with the election of a chamber of 60 constituents. Yemen also started a more formal process in 2014 with the appointment of a constituent committee in charge of translating the National Unity dialogue results into a new social contract. Throughout all these experiences, the bill of rights was an integral part of wide-ranging discussions over several issues, from the role of women to the judicial protection of basic rights.

In a plethora of constitutional texts and declarations since the dictators were deposed, I briefly look at four indicators for progress and retreat: religious symbolism, the place of Islamic law as a reference, enumerated rights, and their judicial protection. Progress and retreat depend obviously on the position

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of the reader of the constitution, and mine is set on the universal values of human rights.

I will examine the two legally binding constitutions we can draw on, those of Egypt and Tunisia. The others remain in the making.

Egypt

The Egyptian Constitution, confirmed by referendum on 14-15 January 2014, replaced the Constitution passed a year earlier by the Muslim Brotherhood. Since Sisi took over in July 2013 as the effective ruler until his 'election' as President in June 2014, the previous Morsi Constitution is referred to officially as '*al-dustur al-mu'atta,*' – the voided Constitution. *Mu'atta* is a derogatory term which underlines the political chasm between the constituents who signed off the Morsi Constitution, many of whom ended up in prison, and the constituents who rushed in a year later to pass the Sisi Constitution.

- a) *Religious symbolism.* Regarding the necessary equality of citizens in any bill of rights, Egypt missed its calling in the very first words of the 2014 Constitution. The Preamble starts with the opening of the Quran's first chapter, the *basmala* – '*bismillah al-rahman al-rahim,*' the formula which is usually translated as 'In the name of God, most gracious, most merciful.' Non-Muslim Egyptians, including a sizeable number of Copts, can hardly identify with the formula. An extensive debate in 2011-13 had resulted in a 'compromise' which non-Muslim Copts and (the very few Jews) could accept more readily, and which remained in the 'final draft' of the Muslim Brotherhood Constitution. It was passed by the constituent assembly on 29 November 2013, and says simply '*bismillah,* in the name of God,' which all religious communities of Egypt can identify with. On 30 November, the following day, the same text was released again, with one difference: Egypt was back to full Quranic formula. This did not change under Sisi. The current Constitution has retained the charged discriminatory reference, defeating an important symbol for equality reached by Egypt's Muslims and a sizeable number of non-Muslims.
- b) *Islamic law template.* A second indicator is found in the now classic Article 2 reference to

Islamic law as 'the principal source of legislation.' Here there is nothing new, and the amendment introduced in 1980 by former President Anwar al-Sadat still stands. There was generally no debate in Egypt about modifying the text, which the Supreme Constitutional Court had developed in a progressive, enlightened reading of the Islamic legal tradition. In late 2012, however, in the Muslim Brotherhood Constitution, an additional Article 219 was suddenly added in the rush to complete the text forced on the constituent assembly by President Morsi. Article 219 stipulated that 'the principles of Islamic law comprise its general rules and jurisprudential method as understood in the Sunni schools.' This was a clearly sectarian article set to exclude Shiism. It was not reproduced in the Sisi Constitution.

- c) *Rights overview.* Then there is the list itself, which is the equivalent of the bill of rights after the fashion of English and American constitutionalism. Here I could not really detect much change. The relevant Egyptian text reads generally as a litany of Western-style human rights with some corporatist localisms, a feature which appears in almost all Arab constitutions. In the new Egyptian Constitution the list is extensive and sometimes repetitive, with about a hundred articles dedicated to rights, almost half the constitution (Art. 3 to 99). The more specific section on 'public rights, freedoms and obligations' (Art. 51-93), includes little which is novel or contentious.

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- d) *The role of the judiciary* in the protection of human rights defines how rights are implemented. The new Constitution changed little to a several-tiered system of courts, which is dysfunctional, and includes a separate system of administrative and military courts. Only the Supreme Constitu-

tional Court (SCC) can look into the constitutionality of laws and regulations (Art. 192), but the Constitution leaves it to the law to determine the mechanisms by which the SCC is seized of a constitutional matter. Traditionally, the SCC ruled mostly in cases brought to it by lower courts on the occasion of a dispute over the constitutionality of a statute, but the travails of the SCC in the years since the fall of Mubarak have dissipated much of its aura amongst the Egyptian public and in the comparative constitutional world.

Since implementation is key, the test had come even before the Constitution was passed. The army's brutal killings of Muslim Brotherhood demonstrators in Rabaa square followed the massive popular removal of Morsi from power in the revolutionary days of 18 June – 3 July 2013. The killings in Cairo's public squares were compounded by the humiliation of the Egyptian judiciary forced into mass trials of dozens of people and death sentences running into the hundreds. On that score, in just a few months Sisi has already overtaken Mubarak's record over three decades.

In short, Egypt in 2014 is a replica of Mubarak's, with a revolution in between. Rights in the 2014 Constitution do not offer any significant improvement to those one could find in the Constitution of 1971, and military dictatorship is back with the usual veneer of constitutionalism.

Tunisia

The constitutional process in Tunis was much more serious than the one undertaken in Cairo. The process went through several drafts, each word was parsed and discussed, and it took three years of a relatively smooth process to produce a constitution. It was completed by the Parliament acting as a constituent assembly, and the new Tunisian Constitution was passed by a massive majority of parliamentarians on 26 January 2014.

No country in the world is the exact replica of another country, but for didactic purposes, I propose to use the four indicators above for the assessment of rights in the Tunisian Constitution.

a) *Religious symbolism.* Because Tunisia is almost entirely composed of Sunni Muslims, the *bas-*

mala formula figuring at the beginning of the Preamble did not create a significant stir in society. On the more constructive side, the Tunisian constituents adopted into their Constitution a common mantra of the Middle East revolution by reference to the system as civil, *madani*, in opposition both to the military (*'askari*) and the religious (*dini*). (Art. 2, considered as 'unamendable').

b) *Islamic law template.* Notwithstanding a sustained battle between entrenched secularists (represented mostly by the President) and Islamists (dominated by the ruling Ennahda party) on the political front, the Article 2 template of the Egyptian Constitution was never strongly advocated by Ennahda. There is no reference to Islamic law in the Tunisian Constitution. Instead, the traditional formulation prevailed, consecrating Islam as 'the state religion.' (Art. 1, also enshrined as 'unamendable').

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c) *The bill of rights,* covering a full chapter (Art. 21-49), is similar to that in traditional democracies, with additional rhetorical references to the role of the State in providing for health and education, also common to third world countries. The list offers little variation on the expected enumeration, but there is one conspicuous innovation. Article 46.3 adds to formal gender equality, the request for the State to 'strive for realising parity between men and women in elected councils.' 'Striving' and 'elected councils' weakens the Article, yet of all rights mentioned in the Constitution, parity (the Arabic *tanasuf*, a neologism, is a probable translation from the French *parité*) reads as the most progressive contribution to comparative constitutionalism.

d) *The protection of rights* by the judiciary is confusing, but it adds an important feature which had represented the hallmark of success for the

Supreme Constitutional Court of Egypt before 2011. The confusion comes from Tunisia continuing the traditional French judicial system, with a high judicial council organising the work of lower courts, and the Court of Cassation (*mahkamat al-ta'qib*) at the apex (Art. 106-17); while, in parallel and without much coherence, the Constitution adopted for its, so far, innocuous Constitutional Council the possibility for the citizen, indirectly, to test the constitutionality of a law in the way it affects him or her (Art. 121.4). This is the most significant innovation for the protection of the constitutional rights of the citizen, but it is buried in a brief line, and leaves it to the law to develop the appropriate mechanisms. All in all, the judicial structure is not conceived well in the new Tunisian Constitution to protect the rights of the citizen.

Conclusion

In the treatment of basic rights in the two constitutions brought about by the Arab Spring, the model is close enough in both countries. It is also clear that the new constitutions took over established templates from each country's own pre-revolutionary past, with few changes made.

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The two texts say little about the gap between rights expressed in grand terms within a constitution, and the daily reality of trampled human rights. The difference between Egypt and Tunisia is far less in the list of rights they chose to enumerate, or the reference to human rights treaties and/or Islamic law. It is the difference between an Egyptian society which was unable to shake off a fifty-year old military system of domination, and a Tunisian society which has so far

succeeded in remaining generally faithful to the principles of its revolution.

In Egypt, society was unable to protect the making of the Constitution from the authoritarian ambitions of the Muslim Brotherhood or the army. The showdown which started with Morsi and continued until Sisi has turned the constitutional process into a one-faction show, and led to the replacement of a 1971 text by two successive texts in 2013 and 2014 that did not read as well as the original. More dramatically, a hundred or so articles enumerating a wide-ranging list of rights in the current Constitution have been massively violated well before the ink had dried on the paper they were written on.

In Tunisia, the process was more inclusive, and the energies liberated by the revolution kept to a minimal understanding that allowed for a reasonably comprehensive support for the Constitution when it was finally passed in Parliament. Unfortunately, the constitutional imagination remained prisoner to a template where not enough thinking was devoted to the Islamic legal tradition, or to better ways to conceive of a judiciary that protects the citizen against the violation of his or her basic rights.

And yet the writing of a bill of rights could be a far more alluring exercise than hitherto adopted. Between the riches of the Islamic/Middle Eastern legal tradition, which were all but ignored in constitution-making, and the comparative constitutional advances in the structuring of a judiciary better capable to act as the citizen's constitutional protector, there is better leeway for bills of rights than the rendering, in Arabic, of rights translated from Western constitutionalists.

This survey suggests that forthcoming constitutions and constitutional amendments in Yemen or Libya will bring little new to the traditional template one has found in human rights since the Enlightenment. If Libyan and Yemeni societies can be as successful as Tunisia, this would be a significant achievement considering the turn to violence in both societies. One should not expect much more. In other countries of the Middle East, the constitutional debate will have to wait for the end of authoritarian rulers.