

A Tale of Two Constitutions: The Divergent Paths of Egypt and Tunisia

Written by Noha Aboueldahab

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NOHA ABOUELDAHAB, FEB 17 2014

In the continuing saga of the Arab Spring, January 2014 saw the adoption of two new constitutions in Egypt and Tunisia. The drafting process and the content of these two constitutions, however, reveal just how differently the transitions in Egypt and Tunisia have taken shape. Tunisia has been lauded for the transparent and participatory way in which its National Constituent Assembly drafted the document over the course of two years. Egypt, on the other hand, ploughed through several amendments to its constitution during six months of political turmoil and violence. While the Islamists and the secularists in Tunisia managed to compromise and agree on the final provisions of the constitution, the Muslim Brotherhood was entirely excluded from the drafting process in Egypt and was designated a 'terrorist organisation' in December 2013. Islamist-secularist tensions, however, are but one of the contentious issues that plagued the constitution drafting process in Egypt and Tunisia. This article provides an overview of other contentious factors that shaped the constitution building process in Egypt and Tunisia.

Three factors help explain the drastic difference between the Egyptian and Tunisian constitution building process and outcome. First, a particular set of socio-political conditions played a significant role in shaping the constitution-building process in Egypt. These conditions include the role of the military, the police force, and the judiciary – all of which play an entirely different and less imposing role in Tunisia. Second, while the drafting process in both countries was marred by political violence and in some instances even ground the process to a halt, the participatory spirit with which the Tunisian constitution was drafted stands in stark contrast to the exclusionary process pursued in Egypt. Third, while the Egyptian constitution lacks an implementation mechanism to ensure that the rights enshrined in the constitutions will be enforced and protected, this key component occupies a clear space under Chapter 6 of the Tunisian constitution. I will address each of these three factors in turn.

Securing Institutional Interests vs. Promoting Civic Consensus

The particular set of socio-political conditions under which the Egyptian constitution was drafted is an important factor that explains much of the content of the document. Unlike Tunisia, the police force in Egypt did not collapse and the military is heavily invested in the socio-economic and political stakes of the country. Consequently, the military-backed government, headed by interim president Adly Mansour, oversaw the drafting of a constitution that secures the interests of the military, police and judiciary in multiple articles dotted throughout the document.

For example, article 234 grants the military – and not the president as was previously the case – the power to select the defense minister for the next two presidential terms, or the equivalent of 8 years. Moreover, the presidential-parliamentary balance of power in the previous 2012 constitution under former president Mohammed Morsi is significantly diminished. In the 2014 constitution, the president may issue and object to laws and the appointment of key ministers is within his – and not the prime minister's – mandate. Such centralization of presidential power has a long history in Egyptian governance and is worrisome as it weakens the prospects for an effective separation of powers – one of the key demands of the Egyptian revolution in 2011.

Additional constitutional setbacks that similarly threaten the checks and balances system include the absence of civilian or any other oversight of the military's budget and the continued presence of the provision that allows for the

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military trial of civilians in article 204. While the latter article includes a slightly more detailed description of the circumstances under which civilians would be subjected to military trials, it is still ambiguous and allows perilous room for the continued abuse of military trials for civilians. The article reads:

Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties. The law defines such crimes and determines the other competencies of the Military Judiciary.

It is unclear what would constitute a 'direct assault' against the military because of the 'performance of its duties.' Given the alarming number of military trials of civilians since the overthrow of Mubarak in 2011, this article is particularly troubling as it secures – even if in a slightly limited manner than before – the continuation of this arbitrary practice.

While much well-deserved attention has been given to the Tunisian constitution's strong support for equality in women's political representation (Article 45), [1] it should also be lauded for its provisions concerning judicial reform. Egypt and Tunisia differ quite widely on this question: The Tunisian constitution guarantees the independence of the judiciary and increased the number of judges that sit on the High Judicial Council from one half to two-thirds. The High Judicial Council is tasked, among other things, with proposing reforms, reviewing draft laws related to the judiciary, and managing the conduct of and disciplinary measures for judges.

On the other hand, the Egyptian constitution lacks details on the make-up of the Supreme Judicial Council, "leaving its composition and most of its duties to be codified by legislation." In a country where a highly politicized judiciary is in dire need of reform, the Egyptian constitution leaves this problem largely unaddressed. Instead, it strengthens the autonomy of the judiciary without the necessary reforms to make it effective and independent.

The Drafting Process: A Political Weapon vs. An Exercise in Peace Building

Constitution-building should be a process that enhances national reconciliation for a society undergoing a difficult political transition. The compromises made throughout the Tunisian constitution-drafting period have been lauded as an example of negotiation, particularly between the Islamist party Ennahda and secular parties. However, Ennahda's position was 'softened' by the violent clashes between the Muslim Brotherhood and the military two doors down in Egypt. The threat of an aggressive – and, in the case of Egypt, bloody – crackdown on Islamists was therefore more of a motivating factor in the negotiation process than an intrinsic will to compromise. Moreover, the drafting process in Tunisia was far from smooth. Throughout the course of the two years of constitution-building, there were two political assassinations and several political deadlocks that put the drafting process on hold and at times threatened its collapse. The fact that Tunisia was able to overcome these challenges and produce a consensus document strengthens its 'role model' image in the overall constitution-building process and outcome.

The Egyptian drafting process for the 2014 and the 2012 constitutions was based on a series of amendments to its 1971 constitution, which is a document already fraught with flaws. Whereas Tunisia started from scratch and completely abandoned its 1959 constitution, the Egyptian drafting committee massaged existing articles, removed others and added new ones. As Zaid Al-Ali notes, "The effect is that while the new constitution claims to be a product of the people's will, it is heavily influenced by the preceding decades of autocratic rule." [2] The result is a mix of the preservation of legal loopholes from previous constitutions, the creation of new loopholes, and the elimination of only a few.

The drafting committee ploughed through these amendments in a rushed six months during which secular political activists as well as Muslim Brotherhood supporters were systematically arrested amidst an atmosphere of intimidation by the military, police and the judiciary. The controversial arrests of individuals who posted 'vote no' campaign signs in the run up to the constitutional referendum in Egypt is one example of the intimidation that marked constitution-building under the guise of the military-backed government. Such crackdowns go against the spirit of

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constitution-building – an opportunity to engage the public peacefully and to foster an environment of civic education about citizens' rights and how the constitution will enshrine and protect them. While the Tunisian case is an illustration of how conflicting parties were able to come together to agree on a future vision of their country, the Egyptian case demonstrates how the constitution was used as a political weapon to secure the interests of state institutions at the expense of national reconciliation. A de facto military government has dictated the 'vision' of the state and as a result, the protection of rights is arbitrarily and inconsistently applied.

Theoretical Human Rights vs. Human Rights in Practice: The Need for Implementation Mechanisms

The Tunisian constitution provides clear stipulations for the protection and enforcement of human rights, whereas the rights enshrined in the Egyptian constitution remain theoretical without any guarantees for their implementation. For example, while the inclusion of a more comprehensive list of socio-economic rights in Egypt's constitution is a positive step, it will mean little without sufficient implementation mechanisms to ensure those rights are fulfilled. Article 125 of the Tunisian constitution, on the other hand, reads:

The Human Rights Commission shall oversee the extent to which human rights and freedoms are respected, and promote human rights and freedoms. The Commission shall propose reforms to develop the human rights framework and must be consulted on draft laws that are related to its mandate. The Commission shall conduct investigations into violations of human rights with a view to settlement or referral to the competent authorities. The Commission shall be composed of independent and impartial members who possess competence and integrity. They undertake their functions for one six-year term.

Despite calls by human rights advocates, no such guarantees exist in the Egyptian constitution, which points to the problematic way in which the constitution was drafted and reflects the political balance of power in favour of the military-police-judiciary trio. As Al-Ali warns, "...without democratic, effective, transparent and accountable institutions to enforce rights, they will remain just as theoretical as they did under the 1971 constitution, which is something that Egypt can ill afford today...constitutional reform is clearly far from over in this country."

The Egyptian and Tunisian experiences in constitution-building illustrate how new constitutions can be used to serve completely opposing objectives during fragile transitional periods. Tunisia is an example of constitution-making as a national reconciliation effort that is consultative and is pursued within the spirit of consensus-building. It reflects the practice of constitution-building in a democratic transition, despite the tense political circumstances under which it was developed. While there have been positive steps taken in the new Egyptian constitution, they are heavily overshadowed by the unjustifiable provisions on the role of the military, police and judiciary and by the largely nonexistent language on the implementation of the rights of citizens. Egypt represents a complicated case of constitution-building in a deeply polarized and volatile transition led by a de facto military government that has been far from democratic throughout its reign.

This is not to say that the time is not 'right' for constitution-building in Egypt; on the contrary, the country badly needs a strong and representative constitution. Its problematic drafting process, however, has resulted in a flawed document that constitutes another painfully missed opportunity for national reconciliation and a building block towards establishing a democracy. While the transition in Tunisia has been steered by socio-political factors that are vastly different to Egypt's, the success of its constitution-building stands as a beacon of hope for Egypt and other countries in the region.

[1]Article 11 of the Egyptian constitution also introduces new legislation protecting women from violence and calling for equality between men and women in civil, political, social, economic and cultural rights.

[2] Although Zaid Al-Ali made these remarks with regards to the 2012 constitution, they hold true for the 2014 constitution as the 1971 and the 2012 constitutions were also used as the base documents to which amendments were made.

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Noha Aboueldahab is a doctoral candidate at Durham Law School. She has been researching the prosecution of political leaders in the Arab region since 2011, through a comparative case study of Egypt, Libya, Tunisia, and Yemen. Since 2004, she has consulted for various United Nations agencies in New York, Lebanon, and Qatar. Her most recent op-ed is “No generals in the dock: Impunity soldiering on in Egypt.”