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# CONSTITUTIONAL REFORM IN TIMES OF TRANSITION

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## EDITORS

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ÁLVARO VASCONCELOS  
GERALD STANG





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## FOREWORD

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BASSMA KODMANI

EXECUTIVE DIRECTOR OF THE ARAB REFORM INITIATIVE

This collection of essays offers narratives of constitutional moments in eight different countries. They present a wide spectrum of experiences from nations with diverse social, political and cultural histories: from Latin America to Southern Europe, Asia and the Middle East. *Constitutional Reform in Times of Transition* is part of the larger Arab Reform Initiative project, *Living Constitutions*. The project focuses on knowledge building and policy dialogues with diverse voices to foster awareness that a constitution is a living document owned by the citizenry, from the drafting phase to the implementation, and needs periodic amendment to adapt to changing realities in a democratic system.

The drafting of a constitution mobilizes political, social, economic forces, as well as the groups with coercive power on the ground (military and security institutions). All groups are aware that the resulting document will lay the foundations for governing relations between social, ethnic, religious, cultural and regional communities, between men and women, and between social classes and interest groups. But a constitution is only step one in a democratic transition. In the aftermath of the drafting process, societies discover that the constitution is only one body of laws which, though essential for framing key issues and defining a path, is a mere first step. Many laws that follow are also important in their capacity to affect the political and social system and relations between state and society.

As Álvaro Vasconcelos indicates in his introduction, and as the country studies illustrate, the constitution-drafting process is a transformative exercise. Some groups, especially those that triggered the political transition, enter the process thinking they have a blank slate before them. As the process unfolds, they realize that they need to reconcile opposing interests and accommodate different traditions, beliefs, principles and values. They learn that compromising to build consensus is the most precious part of themselves that they need to nurture. The outcome is invariably very different from what was sought at the start. The best indicator of a successful constitutional process is when it transforms the actors themselves. In effect, many admit that it is a rich learning process for them.

*Living Constitutions* draws on several projects conducted by the Arab Reform Initiative over the last eight years. A first project was conducted in Egypt in the immediate aftermath of the 2011 revolution when the process of constitution-drafting was still in its first phase. The studies and dialogues organized then were among the first efforts to involve multiple stakeholders in the discussion of the drafting process.

Prior to the Arab revolutions, the *Critical Dialogue* project led to a sustained dialogue over two years between political forces with different ideological backgrounds on state and religion, freedom of expression, the rights of women, minority rights and social agendas of political parties. Representatives of political forces sought to develop common ground and explore ways of building coalitions to oppose authoritarian regimes. These were the very same actors who participated two years later in the constitution drafting processes in Tunisia, Egypt and Yemen.

Another ARI project is the multi-country project entitled *Governance of Diversity* launched in 2010. It addresses the critical issue of ethnic, religious and cultural diversity within Arab societies and sets the issue at the centre of state responsibilities. It designates diversity as a criterion for good governance and identifies benchmarks for ensuring sound management of diversity through constitutional provisions, laws, institutions and public policies.

Last but not least, the project entitled *Securitocracies and Security Sector Reform in the Arab World* tackled the very nature of the authoritarian systems and shed light on the importance of enshrining basic democratic principles to govern the security sector in the constitution.

These different lines of work over the years seemed to converge when the constitutional debates began to engage multiple actors in the aftermath of the revolutions in Tunisia, Egypt and Yemen. Other perspectives were also brought in, including those engaged in a gradual process of constitutional reform, such as Morocco, and Syrian opposition groups concerned with the future constitution for a democratic Syria.

The Arab Reform Initiative, as a process driven organization, remains committed to Living Constitutions for Arab citizens building their democratic environment.

I would like to thank the Ford Foundation in Cairo, the International Development Research Centre in Ottawa, the Open Society Foundations in Amman and the Rockefeller Brothers Fund for making this project possible.

## INTRODUCTION: PRIORITISING THE LEGITIMACY OF THE PROCESS

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BY ÁLVARO VASCONCELOS

*“Our constitution is called a democracy because power is in the hands not of a minority but of the whole people”*

*Thucydides, History of the Peloponnesian War*

The Arab Reform Initiative (ARI) conducted a project entitled *Living Constitutions* which addressed constitutional reform in times of democratic transition with the goal of contributing to the debates on democratic consolidation in the Arab world. The project used comparative analysis to address both substantive constitutional issues and the processes of constitution building. The work was enriched by a research conference in Ankara, Turkey organised in cooperation with the Economic Policy Research Foundation of Turkey (TEPAV). This text is intended as an introduction to the project, collecting a number of basic ideas from the individual country papers, the 2012 kick-off conference in Ankara and discussions about the main findings at follow-up meetings in Tunis and Cairo. The project was directed by Álvaro Vasconcelos with the assistance of Gerald Stang.

One of the most important and polarising topics for the on-going democratic transitions in the Arab world has been the process of creating new constitutions. Constitutional processes can be especially important for democratic transitions because they are critical in the construction of national consensus and democratic political legitimacy, particularly after a revolution. Comparative analysis of different constitutional processes can enrich the debate in countries going through these processes. At the time of publishing, Tunisia had just achieved its goal of finalising a democratic constitution. It was approved with wide political consensus and is considered quite advanced on commitment to international norms guaranteeing human rights, women’s rights, the protection of religious freedom, freedom of conscience and social rights.

Each democratic transition is unique and lessons may be learned from studying multiple cases. The project studied democratic transitions in southern Europe in the 1970s, Latin America in the 1980s, central Europe in the 1990s and the ongoing Arab transitions. India has also been included because the topic of unity in diversity was considered critical for the Arab region. The analysis of past constitutional reform processes has been a topic of keen interest in Tunisia, Morocco, Libya and Egypt, and is

a subject of intense interest for Syrians who are concerned with planning for after the war. Each case provided its own lessons. Much can be learnt from the Spanish Moncloa pacts of 1977, for example, which brought together the government, political parties and trade unions to manage a consensual transition. The Portuguese case, in turn, offers unique insights regarding regime type choices, particularly regarding the semi-presidential system. The cases of Spain, Portugal and Brazil all dealt with the question of dismantling security structures from the old regime and empowering new democratic ones, while almost all cases studied looked at how to guarantee the legitimacy of the transition process itself. Ensuring inclusiveness in the political process for all sectors of society was another critical factor, notably in India and in southern Europe. It proved to be the decisive issue in Tunisia. The project concluded that the declared goals and the shape of a constitution will be influenced by its time of writing, such as after a war or peaceful transition, as well as by the roles of the military and international actors. A few key observations are worth highlighting:

### **THE PROCESS IS AS IMPORTANT AS THE SUBSTANCE**

Both the form and the public legitimacy of a constitution will be affected by the process of constitution-making, particularly the decision of whether it is a limited elite-led processes or an open popular process. The constitutions analysed in this project were more likely to be successfully accepted and implemented if they were created with the support of a large majority of the populace and not simply with 50%+1. The objective of most constitutional processes analyzed was to create a constitution that would have the support of the largest number of people. It is for this reason that the 2/3 rule of approval (legislative and/or in public referendum) has been introduced in some countries and why some constitutional formation processes have been particularly long (2 years in Brazil, 2.5 years in India and almost 3 years in Tunisia). The mobilisation of actors other than political party representatives was seen as essential for achieving a high level of consensus. In Arab countries, building public support requires overcoming the divides between Islamist and non-Islamist factions. For this to be possible all parties involved in the process need to make concessions. Narcis Serra points out in his paper on Spain that in drafting the constitution, "...all the parties had to renounce ideas that they had been defending fiercely until that time. To give just two examples of this, the Communist Party and the socialists were forced to relinquish their calls for a State with a republican structure, while the right wing renounced the idea of maintaining a centralised State". In Egypt, the lack of consensus meant that the 2012 constitution was seen as lacking legitimacy by an important and active sector of the population. In Tunisia, in contrast, the building of consensus in the National Constituent Assembly (NCA) and through the National Dialogue is an important case study of how to overcome mistrust between Islamists and non-Islamists.

The mobilization of public support was seen as a success in Brazil where, from the beginning of the process, proposals were accepted from civil society and technical experts in public hearings. These public hearings turned into major events with significant media coverage, allowing for public input before the constitution was put to referendum. This differs from the case of Bosnia where the constitution was imposed by the Dayton Peace Agreement in a top-down approach that lacked mechanisms for civic participation. The Bosnian constitution has been a source of political paralysis and national division. In Egypt, the process leading to the creation of the 2012 constitution failed to create

the sense that the constitution was for all Egyptians. This was due to lack of political consensus in the process itself, and of the weakness of efforts at interactive civic dialogue such as the Constituent Assembly's Committee for Social Dialogue. There was more concern among leading political and military actors with power sharing than with empowerment of civil society. The 2013 constitutional draft, created after the military overthrow of the elected president and adopted in early 2014, is clearly an instrument of power. It cannot be considered a constitution for all citizens as important political and civil society voices were excluded from the process of its creation. According to the paper by Yasmine Farouk, "Until this moment, the constitution in Egypt is still a zero sum game, a "battle" for political domination."

The Turkish case has involved a series of consultations to gather public input, though the outcome of the process is still unclear. Tunisia's participatory approach consisted in organizing sessions at both national and local levels to register public concerns. Civil society organised itself in a National Dialogue involving trade unions, business organisations, human rights organisations, lawyers associations and political parties. The points of view expressed by civil society organisations were echoed in the National Constituent Assembly (NCA). There is no doubt that civil society, through the National Dialogue, played a major role in searching for negotiated solutions on divisive issues, helping overcome the dangerous polarisation that derailed the Egyptian constitutional process and the transition itself. According to the paper by Azzam Mahjoub and Salwa Hamrouni, the most important legacy of the Tunisian constitution is that a mechanism was created to manage disputes and achieve consensus with two levels: in the NCA, through the conciliation committee; and through the National Dialogue, which was able to bring the results of its work back to the NCA when the assembly was paralysed by lack of political consensus on the transition process. Mahjoub and Hamrouni highlight, in particular, the role of the Union générale tunisienne du travail (UGTT), the Tunisian trade union that pushed for "...better guarantees for economic and social rights, including the right to strike and, in a process singular to Tunisia, by playing a major role as mediator between the opposing parties."

### **A SUCCESSFUL CONSTITUTION MAY BE OPEN OR CLOSED**

Finding consensus to build a constitution or amend one is important, as is flexibility regarding what is included in the constitution and what can be decided at a later date through normal legislation. There is no uniform answer for dictating the comprehensiveness, level of detail, amendability and programmatic specification of a constitution. Sacralisation of the constitution, with the conviction that it can solve all the problems of a country, does not appear as a good model. The conviction that an open, easy-to-revise constitution was seen in Brazil as the most suitable for keeping the constitution clean from the specific needs of the transition period. The Brazilian constitution has been amended 72 times since its adoption in 1988. In his paper, Pedro Dallari warns against the idea of an ideal constitution as the solution for all issues of building a democracy, "A constitution is a political agreement creating a basis for discussion to address the many other issues that need to be answered. The Brazilian constitution allowed the consolidation of democracy and the realization of important economic and social achievements, permitting the emergence of Brazil as an important global player."

The Portuguese constitution was revised seven times, including amendments to liberalise the economic system and overcome the ideological nature of the 1976 constitution, originally drafted in a revolutionary period. Spain, on the other hand, also had an inclusive drafting process but decided on a relatively closed constitution which has been amended only twice since its adoption in 1978. In Tunisia, the conviction that the constitution can be amended in the future facilitated the process of approval and easing tensions. India, like Brazil or Portugal, has a large, complex and amendable constitution - a 'living document' – that, as Radha Kumar writes, "...provides an executive framework for what we want to be, but have to work hard to realize." As seen in Alexandra Barahona de Brito's comparative paper on Latin America, "...even the most well-designed constitutional texts are only the starting point for the development of a healthy polity that involves political plurality, civil society engagement and embedded rule-of-law relations."

### **MANY DIFFERENT POLITICAL MODELS CAN WORK**

There is no single dominant democratic political model. From Brazil's presidential system to Spain's parliamentary monarchy and Portugal's semi-presidential model, there is an enormous diversity that corresponds to the conditions of the transition. Tunisia and Egypt have opted, in the first phase of their constitutional processes for semi-presidential systems. In Tunisia, their softer semi-presidential version is similar to the Portuguese one which, as Eduardo Cabrita describes, "...was designed to avoid an excessive concentration of powers". Amr el-Shobaki, in comparison, considers that a developing country with the problems of Egypt, "...needs a presidential system that is capable of finding radical solution to these problems, rather than reproducing the same performance of the former regime, covering up problems and looking for half solutions for severe problems in order to please everybody." Egypt's arrangement since the ousting of President Morsi moved further in the direction of a strong presidential system with the president having substantial executive powers.

In most of the cases studied, particularly in Portugal and Tunisia, there were attempts to avoid the danger of an excessive concentration of power in the hands of one leader. The analysis also found that in addition to diversity in the form of government and the balance of power among executive, legislative and judicial actors, the countries discussed had great diversity in the way their constitutions approached questions of individual rights, economic, social and cultural rights, minority rights, regionalism, religion and national identity.

### **A RELIGIOUS REFERENCE IS NOT INCOMPATIBLE WITH A DEMOCRATIC CONSTITUTION**

The religious question has been one of the most contentious issues in the process of writing new constitutions in the Arab world. The constitutions analysed show that there are multiple models of secularism that can be adopted in democratic constitutions, including with references to God or specific religions, as long as the rights of all citizens, believers and non-believers, are protected. The Brazilian constitution of 1988 makes a clear reference to God and alludes to the Catholic history of the country.

The Spanish constitution declares that “no religion shall have a state character” and makes a specific reference to the need for authorities to take into account “the religious beliefs of Spanish society” and to cooperate with the Catholic Church and other confessions. In contrast there is no reference to God in the Portuguese constitution. The Indian constitution allows the application of family laws for minorities. All of them have in common the need to guarantee freedom of conscience and religion, as well as equality of rights and duties, for members of all faiths.

In Egypt, the reference to sharia as a source of legislation was not challenged but in Tunisia, the proposal of including sharia in the constitution was not accepted. There was a consensus accepting that “La Tunisie est un État libre, indépendant et souverain, l’Islam est sa religion,” (“Tunisia is a free sovereign and independent state, Islam is its religion” – Article 1) while at the same time the constitution does “garantit la liberté de conscience et de croyance et le libre exercice du culte,” (“guarantee freedom of conscience, belief and religious practice” – Article 6). The handling of the religious question in the Tunisian constitution is seen as a good compromise between the need to protect religious freedom, including that of not having a religion, and to highlight the identification with Islam of the large majority of its people which had existed in different Tunisian constitutions since 1957. This compromise was reached with the support of the Ennahda Movement, a democratic Islamic party, the majority of the NCA, and the support of the secular opposition. The fact that an Islamic party abandoned all reference to sharia in the constitution and accepted freedom of conscience may have an important influence in the process of democratization for Islamic parties across the region.

### **IT IS IMPORTANT TO GUARANTEE THE PRINCIPLE OF UNITY WITHIN DIVERSITY**

One of major objectives of the constitutions under study was to guarantee the principle of unity within diversity, with perhaps the exception of Bosnia and Herzegovina. In Bosnia, the constitution was designed not to guarantee democracy but to enforce peace. The imposition, via the constitution adapted as part of the Dayton Peace Agreement, of the cantonisation of Bosnia, reflects an acceptance and consolidation of ethnic divisions rather than seeking to overcome them. As Denisa Sarajlic-Maglic wrote, this was the result of the fact that as “...the sides negotiating peace also negotiated the power-sharing design, they were each compelled to focus on protection of their respective ethnic group, while less attention was paid to the way in which the new institutions would be made more democratic or functional.” The Bosnian case provides important lessons for multicultural countries coming out of military confrontation.

In Syria, the debate on the objectives of a future post-Assad democratic constitution shows that the principles of citizenship and equality of rights will be crucial for the integration of religious minorities and respect for human rights. This would call for a careful handling of the reference to Islam in the constitution since, as Noel George remarks, “This diversity and multi-faith situation make it more complicated for the establishment of Islamic constitutional and political dominance. Consequently, the Syrian constitution should be free from any provisions regarding the dominance of Islam or any other religious beliefs. At minimum, the provisions regarding the principles of Sharia or Islamic Fiqh

should be “a source” or “one source” of legislation, but not “the source” or “the major source” of legislation.” Syria’s immense diversity is not just religious, but cultural and linguistic. Even during armed struggle, debate over the constitution for a post-Assad Syria can help overcome the concerns of different groups about their rights in a future democratic state.

In India, the guaranteed protection of diversity led to the granting of rights to the minorities and the construction of India as a federal state. According to Radha Kumar, the Indian constitution introduced unique “asymmetric rights” for both the states of the Union and for minorities to help preserve unity. Minorities would be governed by their religious laws for issues concerning marriage and personal law, though asymmetric rights on personal law, important as they have been to maintain unity, “...have negatively impacted women’s rights.” In Spain, a central issue of the constitutional process was the creation of a system of regional autonomous communities with important legislative and executive powers and the right to develop distinct cultural identities in the framework of a unitary state.

In Portugal, even if there is the conviction among political forces that the country is linguistically and religiously almost uniform, regional governance in the islands of Madeira and Azores was an important issue with the constitutionalisation of regional autonomy. The granting of important powers to elected local authorities has been progressively reinforced with the introduction of the principle of subsidiarity, though the concept of progressive autonomy is controversial. As Eduardo Cabrita notes, decentralisation allows for greater political participation of citizens since, “The regional and local elected bodies gave a chance to political participation of thousands of persons with near half million candidates for seats in the two regional assemblies, the 308 municipal assemblies and executive bodies and more than 4000 parishes assemblies.” In Turkey, the rights of minorities, particularly the ‘Kurdish question’ has been one of the most polarising issues, making it extremely difficult to move forward with the constitutional process due to the prevailing nationalistic ideology of a centralised unitary state.

## **THE MILITARY MUST BE PLACED UNDER CIVILIAN POLITICAL CONTROL**

In all constitutional processes under study, the question of civilian control over the military was a key issue. In Brazil, emerging from decades of military dictatorship, the normalisation of civilian control was an objective of the constitutional process which sought to define the principle of political subordination of the armed forces. In Portugal, where democracy was brought about by a military coup, the armed forces, in name of their revolutionary legitimacy, imposed a pact on civilian political forces at the time of transition. This pact was eventually resolved with a defense law and constitutional revision in 1982, nearly a decade after the transition. These changes defined the role of the military as solely for external defense. In Spain, the main concern was to have a constitution that would allow for gradual normalisation of political military relations as part of major reforms of the democratic process. Spain decided that the constitution need not solve all critical questions of Spanish democracy, but should definitely not become an obstacle to solving these issues in the future. In Turkey, the military question seems to have been solved by the political process itself, without requiring constitutional reform. In Tunisia, the question has not been a central issue of the constitutional process. This was not the case in Egypt where the

military was able to protect critical autonomous rights from civilian interference in the 2012 constitution, and guaranteed their autonomy from civilian control in the post-coup, 2014 constitution.

## DEMANDS FOR SOCIAL JUSTICE MUST BE ADDRESSED

The objectives of the Arab revolutions are not only freedom and democracy, but also dignity and justice. The Tunisian constitution clearly references social rights, with constitutional rights on education (Article 38), health (Article 37) and the right to labour (Article 39). This is the result of the role played by the labour movement in the Tunisian democratic transition. In this sense, the Tunisian constitution is similar to the Portuguese constitution and to the trend in Latin American constitutions which have instituted a broad gamut of social rights and rights for minorities and indigenous people. In Latin America during recent decades, those rights were particularly important because the new democracies were emerging from years of dictatorship marked by political exclusion, a social welfare deficit and unequal economic systems. The constitutional process was perceived as an opportunity to overcome that heritage. Portugal has a unique catalogue of social rights in the 1976 constitution as a consequence of the role played by socialist and communist parties in the Portuguese revolution. However, both in Brazil and in Portugal there is the prevailing conviction that the two constitutions are too programmatic, complicating the balance between the protection of basic social rights and the freedom of each elected government to govern according to its political agenda, including with respect to economic policies.

The Tunisian constitution, like a number of Latin American constitutions, introduces a new wave of rights, including rights for minorities in the political process. According to Alexandra Barahona de Brito, recent constitutional processes in Latin America, "...have introduced the most innovative and radical instruments for participation and direct democracy, and instituted a broad gamut of rights, notably social, environmental, collective and indigenous rights." In the Tunisian constitution, the right to sustainable development is also introduced. Mahjoub and Hamrouni note, "The constitution devotes Article 44 explicitly to the right to sustainable development, in addition to references in the Preamble and Article 12. Article 44 guarantees the right to a healthy, secure and balanced environment and requires the state commitment to the elimination of pollution."

## CHAPTER SUMMARIES

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Radha Kumar's paper, '**The Making of the Indian Constitution**,' described the creation of the Indian constitution as part of a transition from colonial rule. It did not rise out of war and division, but as part of a democratic transition. The constitution reflects the aspirations of diverse communities living together. It was a top-down process to create the constitution, but because it rose out of the independence struggle, it had bottom-up elements in the shape of the people who were involved in the process – popular independence leaders. India had 100 years of building democratic institutions before independence. This smoothed the negotiations and compromises of democratic nation building. India has the largest constitution in the world with many unique articles enshrining asymmetric federalism to grant different powers to different states. The constitution also includes asymmetric rights for minorities. The Constituent Assembly took close to two and a half years to debate, draft and adopt a constitution. Though the delay was criticized, the constitutional debates touched on every aspect of Indian identities and aspirations, and its key elements were discussed across the country. The constitutional debates touched upon the political, social and economic issues that would transform India according to its people's aspirations. Minorities are bound by religious laws for personal law (marriage, etc.), allowing sharia law for Muslims, church law for Christians and civil law for Hindus. In the 1980s, a debate about whether minorities should be governed only by their religion was raised. Muslim women's groups pushed for an opt-out law to allow people to choose civil law. This did not pass due to opposition from religious authorities.

In '**Local and Regional Governance in the Portuguese Constitution: A Case Study in Democratic Transition**,' Eduardo Cabrita wrote how Portugal is seen as a success story for transition from autocratic rule. Portugal had 48 years of dictatorship, including 13 years of colonial wars, then a coup, a debate over joining the West or the East, and finally a democratic system. The transition period required patience, deft handling of military influence in the process and, above all, consensus and popular mobilisation on the part of democratic forces. There is a broad consensus of the need for regional autonomy but a permanent fight continues on the limits of the progressive autonomy.

Narcis Serra's paper, '**Constitutional Reform and Civil-Military Relations in Spain**,' described how Spain went through a peaceful process in moving away from autocratic rule, first through a democratic transition followed by democratic consolidation. At the time of transition, a completely new constitution was needed. The hardest issue to be resolved in the constitution was the demands of self-government by certain regions and, hence, the creation of a system of regional autonomous governments. There were multiple disagreements with the armed forces that were handled with patience and progress through the process of consolidating democracy. Spain found that the constitu-

tion couldn't become the final answer to all the issues on debate. The constitution instead should allow problems to be solved at the right time. Military reform has to be understood as a part of the overall process of transition to democracy, together with other reforms such as the police and judicial sectors. Even the most important problems for Spain (armed forces and regions) were not fully addressed in the constitution. Instead, there was an effort to ensure that the constitution should not become an obstacle to solving these issues in the future.

Pedro Dallari wrote in **'Brazil: The Constitution-Making Process and the Political System,'** how Brazil, like India, has a large, detailed constitution that is seen in the country as a success. It was created following the end of military rule through a publicly accessible process, which Brazilians consider more important even than the final substance of the constitution, with wide public and civil society participation providing legitimizing support. Transitions to democracy are always difficult processes even when peaceful. Brazilian transitions have generally been peaceful, but the price was in the survival of unequal social structures from regime to regime. Brazil's constitution facilitates relatively easy amendment if reflects the idea that a constitution cannot solve all of the problems of a country or remove them from political discussion. A constitution is a political agreement creating a basis for discussion to address the many other issues of importance. Brazil, like most Latin American countries, has a presidential system.

Alexandra Barahona de Brito looked at 30 years of Latin American constitutional change in her paper, **'Constitutional Reform Processes in Latin America: Key Issues of Comparative Interest,'** studying processes in Colombia, Brazil, Venezuela and several others. Sixteen new constitutions were promulgated after 1978 in the context of processes of transition to democracy or democratic reform. Given disappointments with the democratic and economic performance of the 1990s, and a history of systematic exclusion and marginalisation of some social groups from political decision-making and social welfare which democratisation failed in large measure to overcome, constitutional reforms have reflected a rejection of liberal democratic and market oriented arrangements, enshrining a more participatory, multicultural and collectivist vision of democracy and rights. The constitutions of Colombia (1991), Venezuela (1999), Ecuador (2008) and Bolivia (2009) exemplify this trend. The history of Latin America is not the history of the absence of state and law, but rather of the selective ignoring of well-established rules and laws, and the co-existence of rule-based relations and other forms emerging from patronage, clientilism and other non-rational forms of power mediation. If the problem is not the absence of institutions then the solution may not be the creation of new ones but the adaptation of existing ones. Ultimately, even the best sort of constitutional texts and judicial reforms are only the starting point for the development of a healthy polity and of the predictability, legitimacy and security that comes from embedded rule of law relations.

In her paper, **'Constitutional Reform in Bosnia and Herzegovina,'** Denisa Sarajlic-Maglic wrote how the Bosnian constitution was created as an Annex to the Dayton Peace Agreement that ended the civil war in 1995. The constitution was designed to build a state and enforce peace. It was not designed to build a democracy. It has never been ratified by parliament or any other domestic structure. Dayton had two purposes: bring peace and to create a new political system. The constitutional process accepted and consolidated ethnic divisions and was complicated by international focus on transi-

tional justice and economic issues. The parties negotiating the peace were the ones invested in the new structures. These parties, largely, represented different ethnic communities and the constitution thus reflects this ethnic division. The constitution was created in a top-down process seeking the lowest common denominator among the conflicting parties. All efforts to change it have been led by the international community, largely by the US and more recently with the EU. The constitution is complex and dysfunctional, and almost impossible to amend. Anyone from outside the three main communities is limited in terms of their capacity to run for office. This was recently declared to be a violation of the European Convention of Human Rights and its Additional Protocols by the European Court of Human Rights.

Azzam Mahjoub and Salwa Hamrouni's paper, '**Economic, Social and Cultural Rights in the New Tunisian Constitution**,' studied the versions of the constitution that were produced in December 2012 and June 2013 and finalized in January 2014. The founders of the young independent state did not include economic, social and cultural rights (ESCR) in the constitution of 1959. Only the preamble stated that the republican regime was "the most effective one to protect the family and the citizens' rights to work, health and education." Eventually Tunisian courts recognized the constitutional guarantee of human rights, including ESCR, as expressed in the preamble, giving them the same legal value as the rest of the constitutional text. Social concerns were a driving engine of the 2011 Tunisian revolution. ESCR are on the agenda of the NCA, which has committed to draft a new constitution in line with the main claims of the revolution: Dignity, Freedom and Social Justice. The constitutional drafting committees decided early in the process to draft the constitution from scratch. They made some efforts to develop a consultative process together with civil society organizations. The 2012 rough draft was a significant improvement compared to the constitution of 1959 with the affirmation of ESCR. However, there was not a clear and full commitment of the state to keep its obligations, and the two main principles on gender equality and on non-discrimination were not sufficiently addressed. The 2013 draft reflected the greater involvement of civil society, which demanded and received improvements on gender equality and the removal of plans to integrate sharia as a source of law. The 2013 draft also included a reference to social justice in Article 12 and greater clarity on youth, health and labour issues, partly reflecting the greater input from labour. The ultimate goal was to reach a genuine national consensus for a very progressive constitution in line with the most advanced international standards and reflecting the profound spirit of the globally supported Tunisian revolution.

Amr el-Shobaki's paper, '**The Egyptian Constitution: Procedural Problems and a Crisis of Content**,' looks at the content of the constitution (executive, legislative and judicial roles) as well as the process of drafting Egypt's first constitution following Mubarak's removal in 2011. The 2012 parliament elected a Constituent Assembly to write the constitution but this Assembly, dominated by allies of then-President Morsi's Freedom and Justice Party, was dissolved by court order in April 2012. A second, more diverse, Constituent Assembly was then appointed and drafted another constitution, approved in a referendum in December 2012. The divisions in Egyptian society over the 2012 constitution, however, contributed to a deepening of political polarization. Egypt struggled with several major questions for the constitution, including the use of sharia as a fundamental source for legislation, the role of al-Azhar as a religious authority, how to develop judicial independence, and how to define the role of military. There was a lack of political consensus on the constitutional and legal basis upon which the political

process will be based. The situation has now become a new model that should be studied by all democratizing countries so that they can learn with it. An influential segment of the Egyptian population felt that the 2012 constitution did not express their views. When a community fails to find consensus on its constitution, this represents the beginning of the failure of its democratic experience.

A second paper on Egypt, **'Writing the Constitution of the Egyptian Revolution: Between Social Contract and Political Contracting'** by Yasmine Farouk, explained how the 2012 constitution reflected the conflicts of interests and short-term political alliances that existed at the time of its writing, instead of being the common reference for the political, economic and social systems in post-Mubarak Egypt. The paper explained how yielding the constitution making – not just constitution writing – process to the dictates of the political balance of power affected the mechanisms of constitution making and how the composition of the Constituent Assembly led to the adoption of a constitution that “locks in” the existing political balance of power. This locking in, in turn, led to a near reproduction of the old political regime. The Constituent Assembly's attempts to control civil society participation in the constitution making process led to the exclusion of key stakeholders. These actors then contested the legitimacy of the constitutional process, thus paving the way for the suspension of the 2012 constitution only six months after its adoption. The 2012-13 Egyptian constitutional experiences confirm that the best way to resolve a constitutional process locked in a short-term power struggle is the participation of all political and social forces. Despite the undeniable progress on the issues of rights and freedoms, large sectors of society reject the 2012 and 2013 constitutions because of the process.

**'Constitutional Reform: The Case of Syria,'** by Nael Georges, analyses prospects for the role of religion in any future Syrian constitution, as well as suitable constitutional provisions for women, minorities and freedom of religion. The non-representation of Islam as a state religion in Syria is almost unique in the Arab world. Successive Syrian constitutions have neither been fully inspired by religion nor have they adopted strict separation between state and religion. The current 2011 constitution contains some religious arrangements such as reserving the presidency for a person belonging to the Islamic community and including provisions linked to Sharia as a source of legislation. The 1973 constitution remained applicable until the Syrian uprising in March 2011. A new constitution was then adopted by the Assad regime to reduce political tension in the country and stifle the nascent revolution, but no form of secularization was adopted and the role of political ideology is still apparent, most particularly with the constitution's commitment to Arabism. Non-Arab minorities, especially Kurds, emphasize that their cultural rights are affected through this constitution. The Syrian constitutional system has contributed to forming the great principles of human rights and, in particular, to introduce the notion of citizenship, which is crucial for the integration of religious minorities and respect for women's rights. However the Syrian constitutional system is far from ideal. Equality among citizens, Muslims and non-Muslims, men and women, at every level, should expressly be included in the Syrian constitution. Equality is a key aspect of the citizenship principle which is crucial for the unity of the Syrian people as well as the integration of minorities. The Syrian constitution should recognize the primacy of international law over national law and provisions of international human rights law should be incorporated in the Syrian legal system, including its constitution.

Though no paper was completed on Turkey, it was analysed in depth at the Ankara conference. **Turkey** went through a series of public consultations to gather public input for the constitution-writing process led by the Turkish parliament. Turkey needs a new constitution because the current one is a legacy of a military coup. There is a wide appetite to develop a system of government that can move past political deadlock. Turkey has made strides in recent years in putting the threat of military coup behind it. All options are under consideration in shaping the constitution, including major issues such as the choice of electoral system, the number of elected houses, the power balance between the centre and the regions, the limits of parliamentary privileges, and the possibility of parliamentary or presidential systems. The biggest questions, however, remain the role of the judiciary and the rights of minorities, particularly the ‘Kurdish question’. As Turkey wrestles with how to recognize fundamental rights and shape its justice system, it is searching for how the state can treat religious and linguistic minorities equally. Turkey is seeking to ensure that the final result reflects three pillars of constitutional legitimacy: a good constitution-making process, a constitution that guarantees fundamental values and a constitution that is effective.

## THE MAKING OF THE INDIAN CONSTITUTION

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BY RADHA KUMAR

*“Long years ago we made a tryst with destiny, and now the time has come when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance. It is fitting that at this solemn moment we take the pledge of dedication to the service of India and her people and to the still larger cause of humanity.”*

*Jawaharlal Nehru, ‘Tryst With Destiny’, Independence Day broadcast, August 14, 1947*

### I. INTRODUCTION

India gained freedom from British rule in 1947. Its founding fathers – and in this case, mothers – achieved independence through a combination of political mobilization and direct negotiations, mostly non-violent, for over fifty years. This was in sharp contrast to the majority of imperial territories, which were granted freedom through international decisions following the defeat of empires in World War I and II, or achieved it through war. Despite its unusual history, India had to pay the price of partition for independence; and the day of independence itself was marked by violence and a great displacement of peoples in the north and east of India.

As was so elegantly lamented by the poet Faiz Ahmed Faiz, independence was not supposed to have happened this way. In fact, the British government and Indian independence leaders had agreed to a Constituent Assembly that would pave the way for constitutional freedom for a united India. The Assembly, whose members were elected by the provincial legislative assemblies, comprised 217 representatives, including 15 women. It began its work in December 1946, while India continued under British rule, but made little progress given the Indian Muslim League’s growing demand for a separate Muslim homeland. In June 1947, the delegations from the Muslim-majority provinces or regions of Sindh, East Bengal, Baluchistan, West Punjab, and the North West Frontier Province withdrew in order to form the Constituent Assembly of Pakistan, which held its first meeting in Karachi. On Au-

1. Batybyal, Rakesh (2007). *The Penguin Book of Modern Indian Speeches*, Delhi: Penguin India, pp.327-8.

August 15, 1947 the Dominion of India and the Dominion of Pakistan became independent nations. After independence, 28 members of the Muslim League, who had opted to stay in India, joined the Indian Constituent Assembly. Later, 93 members were nominated from the princely states.

Thus, the real work of constitution making started only after the 1947 division of India. Under an interim government formed from the Constituent Assembly, the next two and a half years were spent drawing up a constitution. The constitution of India was eventually adopted on November 26, 1949 and came into effect on January 26, 1950. With the Congress having led the country to independence, its leaders put their stamp on the constitution. Since then it has been amended close to a hundred times, yet its spirit continues to infuse Indian democracy as it deepens and widens.

## II. AIMS OF THE CONSTITUTION

What were the aims of the Indian constitution and the goals of its makers? There were two overarching priorities: first, forging a colonized and diverse people into a nation, and second, consolidating a democratic dispensation within a Union of States. Ensuring lasting sovereignty from British rule was a third and relatively easy to achieve priority (though it was expanded to ensure freedom from any dependency relations, which was not so easy to achieve in a poor and war-torn country).

Introducing an 'Objectives Resolution' in the first sitting of the Constituent Assembly on December 13, 1946, India's first Prime Minister Jawaharlal Nehru, laid down eight goals for the new country, to be reflected in its constitution:

- (i) India would be a sovereign democratic republic;
- (ii) It would be a "willing" Union of territories and states;
- (iii) The Union would be of "autonomous units";
- (iv) Its powers would derive from the people;
- (v) It would secure justice, equality and freedom of thought and expression for all Indians;
- (vi) It would safeguard the rights of minorities, tribal and "backward classes";
- (vii) It would maintain the sovereignty and territorial integrity of the republic; and
- (viii) It would contribute to world peace and welfare.

These were ambitious goals. Under the British Empire, India was divided into two sets of territories: (a) provinces that were directly ruled by the British, and (b) semi-autonomous princely states that were under British protection but had their own distinct laws and norms. The vast majority of princely states

opted to join the new Indian federation and were members of the constitution-drafting process. A handful of states were integrated through force and/or diplomacy. For example, Pondicherry (Puducherry) and Chandernagore (Chandannagar) were transferred to India in November 1954 by the French authorities, and Goa, Daman and Diu were wrested from Portuguese control in December 1961.

Forging administrative and federating units out of these states was one of the first challenges faced by the Constituent Assembly. Close to 600 princely states joined India following independence: clearly they would have to be integrated into larger units for a manageable federation. It took over a year to persuade the princes to agree to allow their kingdoms to be absorbed into states. Led by Sardar Patel, one of the most powerful Indian National Congress leaders, a committee of the Constituent Assembly finally negotiated an agreement to merge with the proviso that the princes would retain their titles and personal wealth in return for ceding their territories. Additionally, merged princely states would be governed by a princely head but would have an elected legislature. By the time the draft constitution was introduced, India was to comprise a little over 20 states.

A more difficult issue, which was debated heatedly in the Constituent Assembly, was the demand by several princes to retain feudal laws in the merged states but the Congress, which commanded a majority in the Assembly, would not compromise on democracy and universal franchise.

### III. FEDERALISM VERSUS CENTRALISM

Article 1 of the Indian constitution begins with the statement, "India, that is Bharat, shall be a Union of States". Nevertheless, when introducing the constitution, the Chairman of the Drafting Committee, Dr. B.R. Ambedkar, clarified that India was not, like the U.S., a federation of states that had come together to form a Union, but rather an already existing collection of states that decided to adopt a federal structure upon achieving independence. Thus, he argued, the right to secession could not be sought or implied. Moreover, he said, the federal authority needed to have strong powers rather than limited functions.

Most Indian constitutional theorists believe that the choice of balancing a strong centre with federal powers to the states was made against the backdrop of partition and its attendant communal and ethnic war. Having already suffered a major division, India needed to close the partition chapter rather than allow it to remain even slightly open. That there has been a heated debate over the past decade or more on whether India is a federal or "unitary" state may testify to the fact that we have put the shadow of partition firmly behind us. Much of the debate is in response to the emergence of strong regional parties that seek greater powers for their states; in fact, India has been in a process of willy-nilly and unplanned federalization for ten years now, which has in fact weakened the centre and strengthened the states.

The Indian federalism debate has centred on apparent contradictions between, on the one hand, the federal and Union divisions of powers in the articles of the constitution and, on the other hand, the detailed separation of legislative and administrative powers enumerated in the Union, States

and Concurrent Lists that form Part XI of the constitution. Some analysts see the Union list as granting greater powers to the centre than to the states; indeed, residual powers vest in the centre, as in the Canadian constitution, and the centre is empowered to dismiss a state government if national security is threatened.

But Dr. Ambedkar's explanation of the intent underlying Part XI was very different. Critics, he said, had asked what was the need for administration to be laid out in such detail and had pointed out that much of it was taken from the colonial Government of India Act of 1935. It was indeed a pity that the constitution had to include so many administrative details, Dr. Ambedkar observed; but given the diversity of the country and the relative underdevelopment of the majority of its people, "Constitutional morality is not a national sentiment. It has to be cultivated." A profound point indeed, and one remains valid today, unfortunately as much for the centre as for the states, albeit in a different manner.

In the most important sense, therefore, India's constitution was forged in the context of transition to democratic rule, not in the context of ethnic conflict and division.

#### IV. ASYMMETRIES

The federalism issue is further complicated by the fact that India's constitution created an asymmetric federation in which some states have powers that other states do not. The most vivid example is Jammu and Kashmir, whose relation to the Indian Union is governed by Article 370 of the Indian constitution, adopted in 1953. Under Article 370, the Union Government has authority over the portfolios of defense, foreign affairs and currency; all other functions rest with the State of Jammu and Kashmir, including its own constitution, election commission, laws and judiciary. Though ten other states have constitutional autonomies, these deal with relatively minor matters, such as taxes.

Jammu and Kashmir is seen as having a special status within the Indian Union constitutionally, and thus does not really impinge on the federalism debate. However, several states have piggy-backed off the Jammu and Kashmir provisions of disallowing non-natives from acquiring property; the mountain states of Himachal and Uttarakhand, for example, have passed laws restricting non-native land acquisition to 2500 yard plots.

Asymmetries of rule of law are more significant for centre-state relations. Law and order is on the States' List, which does not demand uniformity. Disparities in the quality of policing are sharp, with some states assuring a basic level of security (these are mostly the demographically smaller states, as is to be expected), and others not. Yet attempts at reform by the centre have largely been met with cries that Indian federalism is endangered. With increasing numbers of citizens asking for better governance, however, such warnings are beginning to sound increasingly hollow.

This does not mean that India will not hang together. Disparities between states are likely to increase but as long as India is one country, the wealthier states will offer migration opportunities that people

from the poorer states will seek. The wealthier states are unlikely to seek secession because they can gain powers and access, for example to exploit resources in poorer states, through the centre. And the centre, once a controlling power under Prime Minister Indira Gandhi, now works mostly through consultation with the states.

## V. MINORITIES

Significantly, the first set of principles to be presented to the Constituent Assembly was on minority rights. Given the Muslim League's call for a separate homeland, and the impending threat of partition, Assembly members were anxious to provide reassurance to the Muslims of India that their rights and interests would be protected. On May 1, 1947, two months before independence and partition, Sardar Vallabhbhai Patel moved Clause 18 in the Constituent Assembly, proposing that:

- (i) Minorities would be protected in "respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially" against them.
- (ii) Any discrimination against minorities in educational admissions would be unlawful; religious education would not be compulsory for them; and
- (iii) All minorities would be free to "establish and administer educational institutions of their choice"; State aid for such educational institutions would be non-discriminatory.

The protection of fundamental freedoms for all citizens, including minorities, guaranteed the freedom of religion, both practice and propagation, and, more controversially, guaranteed that minorities would be governed by their religious personal laws concerning issues such as marriage, divorce and adoption rights. At the same time it allowed individuals to opt for civil laws if they chose. To ensure representation, seats were reserved for minorities and representatives of the dispossessed.

In practice, the record has been patchy. Personal laws have been especially controversial because they have negatively impacted women's rights (including with respect to maintenance and property). While few minorities have felt the need to leave independent India en masse, there have been periodic outbursts of communal violence in which more members of minority communities – such as Muslims and Sikhs – have died than have Hindus. Hindu-Muslim tensions have been more explosive than any others, partly because Muslims form by far the largest minority (numbering around 170 million) and partly because of the legacies of partition.

One way around the minority issue was to create multi-ethnic states whose people were united by linguistic and cultural identity. Following the adoption of the constitution, the Indian government did exactly that in a massive reorganization of states in 1956, creating 14 states and 6 Union territories (ruled directly by a Chief Administrator rather than a Chief Minister). Over time, the number of states has grown to 28 and the Union territories also have elected legislatures. In addition to the cultural-linguistic principle, a topographic principle was added in the 1990s, allowing the creation of separate

mountain states; moreover, the indigenous people criterion that underlay the creation of the seven North Eastern states was expanded soon after, to allow for the creation of tribal states in east and central India.

In fact, both lowest-caste and tribal representatives had argued in the Constitutional debates that they did not want to be identified as minorities, and thus two separate categories were added, of scheduled castes and scheduled tribes, who were entitled to affirmative action in development and employment. Though the government's implementation policies did create a small group of underclass elites, unedifyingly described as a "creamy layer", it did not help in the development of lowest-caste and tribal middle classes. Self-rule, the Indian government and Parliament felt, might allow for speedier development than affirmative action had. But they forgot Dr. Ambedkar's observation that constitutional morality had to be cultivated, and tribal areas suffered the same degree of misrule as they had when they did not have their own states. Many see the on-going Maoist insurgencies in India's tribal areas as an outcome of neglect, flawed policies and poor implementation, which is an accurate assessment. But they do not include in their list of problems the one big flaw that stems from disregard of the need to nurture professionals and administrators: the vacuum in governance capacities.

## VI. LESSONS

India was rare in comparison to other ethnically or communally partitioned countries such as Ireland, Cyprus or Bosnia-Herzegovina (de facto but not de jure) in that it was able to develop a secular and pluralist constitution. How did this happen?

Firstly, India accepted partition as the price of independence, and put the focus on the latter. Ireland did not accept partition at the time of independence, and only fully accepted it in 1997 with the Belfast peace agreement and in a European Union context that made borders invisible. Cyprus and Bosnia-Herzegovina avoided de jure partition but accepted it de facto, and included ethnic power sharing in their constitutional and/or political structures, the former without a formal agreement and the latter with one. Initially, the Indian thrust was on protection of minority rights and affirmative action for dispossessed communities, but from the 1990s onward India entered a phase of Democracy 2.0, with the development of minority political parties and achievement of legislative representation through the ballot box in addition to reserved seats.

Secondly, India was large and diverse enough for partition to become relatively less important than freedom. The country was able to concentrate on governance, reconstruction and reconciliation.

Thirdly, the Indian leadership insisted that partition could not be tied to future constitutional dispensation, even if to avoid the former. Indeed, some would argue that the Indian leadership preferred partition to a predetermined constitutional or political structure. The constitutional structure of free India, the founders said, would be decided by the Constituent Assembly, established in December 1946, which would stand dissolved once the constitution was passed. Thus, Indians could focus on what they wanted their country to be.

## LOCAL AND REGIONAL GOVERNANCE IN THE PORTUGUESE CONSTITUTION: A CASE STUDY IN DEMOCRATIC TRANSITION

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BY EDUARDO CABRITA

Fourthly, the process whereby the constitution was drafted, adopted and came into effect helped make it a living document. The Constituent Assembly took close to two and a half years to debate, draft and adopt a constitution. Though the length of time it took was much criticized, the constitutional debates touched on every aspect of Indian identities and aspirations, and its key elements were discussed across the length and breadth of the country. Finally, the issues covered during the constitutional debates touched upon the key political, social and economic issues that would transform India according to its people's aspirations. Among them were: the nature and structure of the Indian Union (federal and asymmetric), the rights and laws of all communities (religious, linguistic and cultural, labour, women and the dispossessed), the nature of the executive and administration, and civil-military and security issues.

As a result, the constitution has withstood the tests of time and, though it has been much amended and many of its principles have been violated, its core principles have been untouched, and amendments have added to its resilience. As previously mentioned, it is a living document that provides an executive framework for what we want to be, but have to work hard to realize.

### I. PORTUGAL: FROM AUTHORITARIAN RULE TO A EUROPEAN DEMOCRACY

From 1926 to 1974 Portugal was ruled by the longest-lasting authoritarian regime in Western Europe. Sub-national policies were focused on colonial issues in Africa, and at the local level mayors were appointed by the national government. On 25 April 1974, the military, tired of 13 years of colonial wars in Portugal's African colonies (Angola, Mozambique and Guinea-Bissau), took power with a declared program of democratization, decolonization and economic development with an adequate distribution of wealth.

The new authorities, led by a group of young army officers known as the Armed Forces Movement (AFM), promised to return power to a civilian democratic government and to hold elections in one year. Apart from a period of political instability caused by disputes between a pro-European orientation and a leftist revolutionary orientation, the elections for a Constitutional Assembly were held on the first anniversary of the April Revolution with more than 90% of potential voters participating.

Before the 1975 election, radical wings in the army, with support from some popular movements in

the streets, pushed for a system based on “direct democracy” combined with a permanent Council of the Revolution as the voice of revolutionary legitimacy. After the defeat of a conservative-led attempted military coup in March 1975, this leftist trend was strengthened. Facing strong pressure to postpone the elections, the leading political parties agreed to sign a Constitutional Pact with the AFM as a pre-condition for holding the scheduled democratic elections for the Constituent Assembly that would be tasked with writing a new constitution for Portugal. This AFM-Parties Constitutional Pact was designed to set up a democratic system under military supervision with strong powers given to the Council of the Revolution (composed of AFM representatives) and an indirect election of the President of the Republic by an Assembly composed of both democratically elected parliamentarians and revolutionary representatives appointed by the army. Concerned with the risk of postponing the elections, all major parties signed the Constitutional Pact.

Surprisingly, the 1975 election led to a Constituent Assembly with a majority of members in favour of representative democracy and a path towards EEC membership. The Constituent Assembly had 116 deputies from the Socialist Party (strongly supported by European social-democratic and labour parties), 81 from the Democratic People’s Party (conservative), 30 from the Communist Party (pro-Soviet), 16 from the Democratic and Social Centre (Christian-democrat) and 7 from smaller parties.

During its first months, the constitution drafting process of the Constituent Assembly was surrounded by huge controversy and beset by popular demands, backed by radical wings in the Council of the Revolution, for a mix of parliamentary democracy with direct popular power. Another difficult issue was to define the role of the army in the transition to a full democratic system.

However, following another attempted military coup in November 1975, this time led by communists, the moderate wing of the army took control and consolidated a move toward representative democracy following Western European models. A consequence of this shift was a second version of AFM-Parties Constitutional Pact, signed by all the political parties with elected members in the Constituent Assembly, that selected a semi-presidential system with a directly elected president and a reduced role for the Council of the Revolution, limiting its remit to issues related to the armed forces.

The constitution drafting process lasted from June 1975 to April 1976. Legislative elections were held under the new constitution on 25 April 1976, and a presidential election followed on 27 June 1976. As a proof of Portuguese *realpolitik*, the first elected president was the Army Supreme Chief and a leader of the moderate side in the 1975 political process.

## II. CONSTITUTIONAL DRAFTING IN REVOLUTIONARY TIMES

The constitutional drafting process of the Constituent Assembly began with the presentation of draft constitutions by political parties and a discussion on methodology and structure of the constitution. In the end, the 1976 Portuguese constitution was developed as a long text, with 312 articles in its original version. It contains a large section on traditional political rights called “Rights, freedoms and guarantees” which includes workers’ rights, like the right to strike and form trade unions

and workers committees, as well as more than 30 articles on economic, social and cultural rights and several provisions about economic organization.

The chapters on political structure were influenced by the dynamics of the revolutionary process and changed according to the two versions of the Constitutional Pact with the armed forces. Although, formally, the discussions in the elected Constituent Assembly were based on the draft constitutions submitted by political parties, debate was strongly marked by the global revolutionary environment.

The nature of the regime, the economic model, the extent of fundamental rights, the definition of economic, social and cultural rights and the system of government were all under strong scrutiny by the public and the press, and were the focus of multiple large public demonstrations. The majority of the arguing was about a choice between a “bourgeois democracy” model and a direct democracy model supported by revolutionary legitimacy. The drafting proceedings in the Assembly took place with a remarkably mature level of political and legal debate even as the political temperature outside the Assembly ran very high. A siege of the Parliament building by trade unions even led to discussions of an emergency plan to transfer the Assembly away from Lisbon to Oporto in the north.

Due to the political environment, academic institutions did not play a major role in the drafting process, though some young scholars such as Jorge Miranda from Lisbon University and Vital Moreira from Coimbra University were elected as members of the Constituent Assembly and played key roles in the discussions. Due to their academic authority and knowledge of history they were able to produce reference works on the constitution and are commonly consulted when constitutional controversies arise.

The basic structure of the constitution is still in force today but it was amended seven times from 1982 to 2005 (see Annex). The most relevant amendments included the consolidation of civil democratic power in 1982 with the elimination of the Council of the Revolution, a liberalization of economic organization in 1989, opening way to privatization in the public sector, and several amendments to accomplish closer integration with European Union (EU) legal requirements (1992, 2001, 2004 and 2007) or with the jurisdiction of the International Criminal Court (2001). The difficulty of achieving the two-thirds majority required in Parliament for constitutional changes has led to a stabilization of the system of government after the revolutionary period. Revisions generally reflect a bipartisan consensus between the two largest parties, the Social Democratic Party (PSD) and the Socialist Party (PS) in all elections since 1976.

Besides its wide scope as a charter of not only traditional political rights but also economic, social and cultural rights, the Portuguese constitution can be seen as a product of a transition process from an authoritarian regime to a democratic political system. A major success, mostly unchanged since 1976, was the creation of a parliamentary system with a directly elected President who has significant power, particularly in moments of political crisis or when there is no clear parliamentary majority. The president appoints the prime minister according to the electoral outcome, may dis-

solve the parliament in the case of irregular work of the democratic institutions and has veto power on legislation. All four elected presidents since 1976 have dissolved parliament after breakdowns in ruling coalitions or when the governments had no capacity to get major legislation adopted by the chamber. The first president, Ramalho Eanes, for example, appointed three prime ministers on his own political initiative without clear partisan support (1978, 1978 and 1979) and Jorge Sampaio dismissed the government and called new elections in 2004 due to political instability even though there was no breakdown in the ruling coalition.

The Portuguese system was designed to avoid excessive concentration of powers and for this reason has been referred to as a potential model during the current constitutional debates in Arabic countries, particularly in Tunisia.

During the drafting proceedings, specialized committees were created to prepare draft versions of different sections of the constitution that would then be reviewed and voted in the plenary session. The number and scope of the committees followed a discussion about the structure of the constitution and the number and content of the chapters. Among the committees, one was dedicated to 'autonomous regions' and another to 'local power'.

The drafting committee discussions were based on proposals from political parties, but as there was no majority, the texts submitted for analysis by the plenary reflected a range of contributions. Major roles were played by the PS and PSD in the autonomous regions chapter and by the Communist party in the local power chapter.

Both the autonomous regions chapter and the local power chapter are included in the part of the constitution about the organization of political power. In the current version, these are Title VII – Autonomous Regions (Articles 225-234) and Title VIII – Local Power (Articles 235-265). There are also several references to sub-national entities in other constitutional articles, including in the section declaring Portugal a unitary state, in the provisions on the legislative powers of the Assembly of the Republic, in the section on presidential powers and in the section on guarantees and revision of the constitution.

### **III. REGIONAL AND LOCAL POWERS IN AN OLD COUNTRY**

Portugal has had stable borders since the 13<sup>th</sup> century and has no significant linguistic, ethnic or religious minorities. As opposed to Spain's nationalities problem or the British devolution process, political debate over the sub-national organization in Portuguese politics is mostly over administrative organization, models of territorial governance, the proximity of decision-making and respect for local traditions and aspirations.

A more comparable political and administrative tradition may be found in France where discussion of the status of the Overseas Dominions and Territories (DOM-TOM) or Corsica may be compared to Portugal's autonomous regions issue, and questions on regionalization and decentralization may be contrast-

ed with Portugal's discussions of local government. Another affinity with the administrative debate in France has roots in the Napoleonic and Jacobin legal and philosophical traditions which link modernization and equity with a strong enlightened central government. That centralized tradition was dominant in the Portuguese Constitutional Monarchy (1820-1910) and the first Republic (1910-1926). Authoritarian rule (1926-1974) consolidated central control and weakened local entities, seeing the devolution of powers as connected with inefficiency, parochialism and the influence of local pundits.

The 1976 constitution opened a new era of regional autonomy for the Atlantic archipelagos of Azores and Madeira and of democratic local government for municipalities and parishes (infra-municipal entities) in continental Portuguese territory. The regional and local elected bodies provided a chance for political participation to thousands of people, with nearly half a million candidates for seats in the two regional assemblies, the 308 municipal assemblies and executive bodies and more than 4000 parish assemblies.

Autonomous regions and local governments were assigned more competences with the ideas of progressive autonomy, decentralization and principles of subsidiarity enshrined in the constitution in 1997. They had also gain significant roles in development and infrastructure programs after Portugal joined the European Community in 1986 and gained access to strong support from structural funds.

Today, in the context of the European financial crisis (Portugal is constrained by a memorandum of financial assistance with the EU, the European Central Bank and the International Money Fund – 'the troika'), the autonomy of regional and local governments is under strict scrutiny as the country tries to harmonize the desire for political autonomy with respect for fiscal discipline. The troika agreement involves a review of the Regional Finance and Local Finance laws. The Madeira region, for example, submitted to a fiscal adjustment program which raised taxes in the region and made severe cuts in public expenses.

## IV. DECENTRALIZATION IN A UNITARY STATE

Portugal is defined by Article 6 of the constitution as a unitary state: "the state shall be unitary and shall be organized and function in such way as to respect the autonomous islands system of self-government and the principles of subsidiarity, the autonomy of local authorities and the democratic decentralization of the Public Administration." According to Article 6, Section 2, "the Azores and Madeira archipelagos shall be autonomous regions with their own political-administrative status and self-government institutions". The reference to subsidiarity comes from the 4<sup>th</sup> constitutional revision (1997) and the concept of self-government institutions in the autonomous regions from the 1<sup>st</sup> revision (1982).

The autonomous status of the Azores (nine islands in the north Atlantic almost halfway to the United States) and Madeira (two islands closer to Casablanca than to Lisbon) has historical and geographical roots. Even with almost non-existent independence movements since the revolutionary period, the islands have trended towards progressive increases in autonomy, submitting propos-

als to amend the constitution or the regional statutes beyond the limits admitted at the national level. The deepening of European integration and the designated status as ultra-peripheral regions given by the EU treaties has given a new multilevel dimension to the fulfilment of the concept of subsidiarity enshrined in both the Lisbon Treaty of the EU and in the Portuguese constitution. The fundamental concepts are:

- Portugal is a unitary state, not a federal or a regionalized country, with autonomous regions in the Atlantic justified for geographical, economic, social and cultural reasons and by the “historical autonomic aspirations from islands populations” (Article 225/1);
- Autonomous regions have self-government with legislative and executive powers according to the constitution and the Political-Administrative Statutes adopted by the Assembly of the Republic after a draft submitted by regional legislative assemblies;
- Local government is democratically elected at municipal and parish levels, according to the law adopted by the Assembly of the Republic, and exercise powers and competences consecrated in the law adopted by the Assembly of the Republic respecting the principle of administrative decentralization.

## V. AN ATLANTIC REGIONAL SELF-GOVERNMENT

Azores and Madeira have historically suffered from isolation and have developed aspirations for autonomy from the central government. After the 1974 revolution, in the context of political turmoil, decolonization of Portugal’s African colonies and suspicion about the leftist trend in Lisbon, pro-independence movements arose in the islands and the constitutional debate was held in this complex environment.

Political and administrative autonomy is based on an elected regional assembly, a regional government and a financial status which gives to the regions all tax revenues collected there and the right to transfers from the national government. The level of autonomy and the legislative powers of the autonomous regions had always been at the root of tensions between the central power, the Constitutional Court and regional authorities.

The legislative powers of the regional assemblies were originally subordinated to matters of regional specific interest not regulated in the general laws of the republic, and for the adaptation or execution of these laws. After the 2004 constitutional revision, regional legislative powers were expanded to include all matters in the Political-Administrative Statutes not under exclusive responsibility of national sovereign bodies. The Statutes are adopted in the national parliament through a two-thirds qualified majority but the regional assembly has exclusive initiative for revision. The four central issues of the constitutional status of the autonomous regions are:

## THE BASIS AND THE NATURE OF REGIONAL AUTONOMY

Since the original drafting of the constitution, the distinction between the political and legislative autonomy of the Atlantic regions and the administrative autonomy of local entities has been clear at the sub-national level. The historical and territorial narratives, the existence of regional governments and legislative bodies, the role of regional branches of the national parties and local public opinion all stressed a move towards progressive autonomy limited only by statehood powers. Clear redline areas have been the existence of a regional judicial system, the existence of a regional tax system or powers related to security forces, but issues like participation in EU affairs or the extent of legislative powers have seen significant developments. The autonomous regions have their own government bodies, legislative and executive, rooted in a parliamentary system of government with only limited supervision by the constitutional representative of the Republic. However, due to the existence of parliamentary majorities (except once in Azores) the system has developed with the core of power centred in the Presidencies of the Regional Governments.

## THE LEGISLATIVE POWERS OF REGIONAL GOVERNMENT BODIES

The legislative powers of the autonomous regions were defined in stages. There was an experimental phase between 1976 and the first revision of the constitution. This time was also the era of the first Political-Administrative Statutes adopted by the Assembly of the Republic through the initiative of the regional legislative assemblies. The Azores Statute was adopted in 1980 and amended three times, most recently in 2009. The Madeira Statute was, after a long controversy, adopted in 1991 and amended twice since then. Before the adoptions of the Statutes, regional autonomy was framed by the provisional Statutes enacted in 1976 immediately after the drafting of the constitution. The difficulties in adopting and amending the Statutes came from the dual system of regional initiative and central adoption submitted to the limits of the original draft. At first, the legislative powers of the regions were limited to matters of specific regional relevance and to the adaptation of national laws. The 1982 constitutional revision created the concept of “general laws of the republic” from which the regions were able to legislate in all areas not reserved to the national government and to adapt them when allowed. The 2004 revision of the constitution substantially enlarged the regional legislative powers, with the disappearance of the concept of “general laws of the republic” as the requirement for defining a “specific regional interest”. Since 2004, the regions have legislative powers in all domains enshrined in the Statutes not reserved to the national bodies. Even national legislation may be adapted by the regional authorities when the regulation powers are not reserved to the national bodies.

## FISCAL AUTONOMY

The autonomous regions have taxation rights which go beyond those of some federal states. The regions have the right to adapt the tax system to regional specificities according to guidelines adopted by the Assembly of Republic. This has resulted in varied income tax and VAT rates. However, the most important constitutional provision is the attribution to the regions of all tax revenues generated there, plus the right to financial transfers from national tax revenues according to a principle of national solidarity.

The constitutional revision of 1997 added a national power to adopt a Regional Finance Law, making it an absolute reserve of competence for the Assembly of the Republic and becoming the greatest limitation to regional autonomy in the economic and financial fields. The obligations adopted by Portugal in the EU in the context of the Stability and Growth Pact, and more recently in the Treaty of Fiscal and Economic Integration, oblige the government to review the Regional Finance Law with potentially deeper limitations to regional autonomy. Another controversy emerged in the context of the fiscal adjustment policies as the government created extraordinary income tax changes and kept the revenues coming from the autonomous regions. The issue will be reviewed by the Constitutional Court. Another sensitive matter is how to combine the monopoly of regional tax revenues by the region governments with the constitutional right of municipalities in the autonomous regions to share the revenues from direct taxation.

## THE REGIONAL REPRESENTATION OF NATIONAL SOVEREIGNTY

Initially, a Minister of the Republic was assigned to each region but the position's powers of supervision were diminished in 2004. The post is now called Representative of the Republic and has no seat in the Council of Ministers. The Representative appoints the regional government according to the outcome of the election and may submit regional legislation to the Constitutional Court. The Representative is appointed by the President of the Republic after consultation with the national government and in some way exercises presidential powers at the regional level. The revision of the Regional Finance Law and limits imposed from the EU level will be significant tests for the Portuguese model of regional autonomy.

## VI. LOCAL POWER AND A CENTRALIST TRADITION

Local power is developed through territorial entities with elected executive and deliberative bodies and "shall seek to pursue the interest of the local people". On the Portuguese mainland, the constitution establishes three levels of local authorities: administrative regions, municipalities and parishes. All of them have only administrative autonomy according to the law and their financial status is defined in the Local Finance Law adopted by the Assembly of Republic.

The administrative regions were never created as intermediate bodies between the central government and the municipalities. Following the 1997 constitutional revision, the formal institutionalisation of the administrative regions could proceed only with an affirmative vote in a national referendum. A national consultation was held in 1998 with a majority voting against any changes. The creation of administrative regions is now very uncertain.

Municipalities are the stronger and more traditional local bodies in Portugal, existing in various models since medieval times. The municipalities have an assembly and an executive body both directly elected through a proportional system. The first member of the list with the most votes becomes mayor. The 1997 constitutional revision admitted an evolution to a single election system with an executive body emerging from the assembly, but the political parties have never reached the two-thirds majority agreement required in the Assembly of the Republic to change the electoral system.

Municipalities have their own taxes, created by the Assembly of the Republic, and the right to share national taxes according to the Local Finances Law.

Parishes are local entities inside the municipalities' territories with competences defined in the law and executive powers decentralized by the municipalities. The number of parishes is justified by historical, cultural and geographical reasons, ranging from fewer than five in some municipalities up to 89 in one municipality in the rural north of Portugal. The government is now trying to apply a controversial law reducing the number of parishes by at least a third. Parishes receive financial transfers from the national budget as ruled in the law and also from municipalities as decided in their own budgets.

Administrative decentralization is a major principle of state organization that must be defined by the Assembly of the Republic. The issue is now under severe economic constraints and, with a technocratic view suspicious of decentralization predominant, low on the list of political priorities. In 1999, the Assembly of the Republic adopted a general law on decentralization of competences to the municipalities but since then the only important developments were in the area of basic education.

## **VII. CONSTITUTIONAL REVISIONS AND REGIONAL AND LOCAL AUTONOMIES**

Since 1976, the Portuguese constitution has had seven amendments and some unsuccessful revision proceedings. The sections on autonomous regions and local power underwent several changes but are among the more consensual areas in the text. The political autonomy of the Atlantic islands and democratic local governments are consensual issues in the Portuguese constitutional system.

There is a broad consensus among the national parties on the status of regional autonomy, though criticism often comes from deputies elected in the Atlantic islands demanding wider constitutional autonomy. The controversy over regional powers and the balance with the central government has been usually focused on revisions of the regional Political-Administrative Statutes and of the Regional Finances Law. The idea of "progressive autonomy", which led the autonomous regions to claim increasing autonomy in some matters, such as legislative powers and right to tax receipts, remains under close scrutiny.

Local power is something generally referred to positively in political rhetoric, even if central entities are generally reluctant to decentralize powers to the municipalities and there is a public debate on economic efficiency. The most controversial constitutional issues were the blockade to the institutionalization of administrative regions (with the requirement for approval by national consultation) and the plans for changes in the electoral system for the executive body which have been in standstill for 15 years. Budgetary constraints also raise new challenges for decentralization policies. The political deadlock will likely continue, giving an artificial impression of constitutional stability in this field of political organization. Considering the political difficulties in amending the Political-Administrative Statutes or the constitution, the Regional Finance Law has become a key piece in the relations between national and regional governments.

## VIII. A CONSTITUTION FOR DEMOCRATIC TRANSITION

The Portuguese constitution is an example of success for a revolutionary transition from a dictatorial regime to a representative democracy. The pragmatic way of managing the submission of the army to political power, the avoidance of difficult historical controversies with the Catholic Church, the amendment of the constitution according to global economic changes, and the demands of the European integration process were all handled through consensual constitutional work that required two-thirds agreement in the Assembly of the Republic.

The system of government with its mechanism of checks and balances between a president and a legislative majority, under the review of the Constitutional Court, cannot be easily exported but is a lesson of collective democratic behaviour that could be examined by those working on democratic transitions in the Arab world.

## ANNEX – REVISIONS TO THE PORTUGUESE CONSTITUTION

The Portuguese constitution was adopted by the Constitutional Assembly on 2 April 1976.

### 1<sup>ST</sup> REVISION – 30 AUGUST 1982

This major revision concluded the transition from a revolutionary period to a civilian democracy. This revision abolished the Council of the Revolution and gave full legislative powers to the Assembly of the Republic. There were also significant changes in the revolutionary wording used in the original text. The presidential powers were clarified, eliminating the double responsibility of the government to the parliament and to the president. However, the presidency maintains its power of veto to legislation on a constitutional or political basis and the power to dissolve parliament if there is a non-regular working of the democratic institutions. This revision was not focused on the chapters relating to “autonomous regions” or “local power”. The most relevant matter was the creation of the category of “general laws of the Republic” as a limitation to the legislative powers of the regional assemblies.

### 2<sup>ND</sup> REVISION – 8 JULY 1989

This revision made major changes to the economic sections of the constitution, reducing the role of the state in the economy and giving permission for privatization of public companies. There were no important changes to the provisions on autonomous regions or local power.

### 3<sup>RD</sup> REVISION – 20 SEPTEMBER 1992

This extraordinary revision permitted the ratification by Portugal of the Maastricht Treaty.

### 4<sup>TH</sup> REVISION – 20 SEPTEMBER 1997

This revision reduced the number of members of the Assembly of the Republic and opened the way for

changes in the electoral system allowing single-constituencies (never implemented). Military service became voluntary and an increased range of subjects were opened to be submitted to national referendum.

This revision gave general legislative power to the regional legislative assemblies in areas of specific regional relevance. Those powers were only limited by specific provisions of the general laws of the Republic or powers entitled to national bodies. However, this revision also declared a new legislative power of the Assembly of the Republic: the adoption of Regional Finances Laws. Since then, budgetary issues have been the strongest limitation on regional autonomy and a matter of political controversy between national and regional governments. At the local level this revision gave room to independent candidates in local elections and opened the way to a deep change in electoral and government systems in the municipalities. As local electoral laws require a two-thirds majority for adoption, there have been no changes since this 1997 revision. A major change permitted by this revision was the limitation of re-election to the executive bodies. In 2005, a law was adopted to limit officials to three terms (12 years) as mayors or parish chairpersons.

### 5<sup>TH</sup> REVISION – 12 DECEMBER 2001

This extraordinary revision justified the ratification of the Rome Treaty creating the International Criminal Court. The text also reinforced a deeper European integration in the areas of freedom, justice and security and the equality of rights for citizens from Portuguese-speaking countries. This revision did not refer regional and local powers.

### 6<sup>TH</sup> REVISION – 24 JULY 2004

This revision was done with a view towards the adoption of a European constitution (which was later abandoned). This was also an important revision regarding autonomous regions. The legislative powers of the regional legislative assemblies were clearly reinforced with the elimination of the criteria of respect to the general laws of the Republic. The regional legislature may adopt regional legislation in all areas not reserved to national bodies. Another change with political relevance was the downgrading of the political status of the Ministers of the Republic to mere Representatives of the Republic appointed by the President but without seats in the Council of Ministries.

### 7<sup>TH</sup> REVISION – 12 AUGUST 2005

This extraordinary revision permits a referendum on a potential European constitution.

# CONSTITUTIONAL REFORM AND CIVIL-MILITARY RELATIONS IN SPAIN

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BY NARCÍS SERRA

## I. CONTEXT – THE TRANSITION TO DEMOCRACY

Before examining the process by which the 1978 Spanish constitution was drafted, it is important too describe, albeit briefly, the context of the process of transition in which it was drafted. The Spanish transition to democracy began a few months after the death of General Franco in November 1975, after King Juan Carlos I appointed Adolfo Suárez as President of the government in July of the following year.

Within a short space of time, Suárez proposed a political reform of a democratic nature that was received favourably in the Francoist Parliament, and was later widely approved by referendum in late 1976. The plan involved holding free elections to create a democratic constituent Parliament (July 1977) and a new constitution, which was endorsed in December 1978.

Several factors helped to facilitate this transition process, but just three will be highlighted here. Firstly, the existence of a substantial middle class sector that had been created by the economic development generated since the country's economy had opened up to the outside world following the Economic Stabilisation Plan of 1959, backed by the IMF and the World Bank. Secondly, the memory of the disasters of the Civil War of 1936-39, which encouraged all the political actors to seek solutions that would prevent any possibility, no matter how remote, of a return to an internal conflict. And thirdly, the existence of the figure of the king who, even though he had been designated by Franco, was accepted by the Spanish citizens and was crucial in ensuring that the dictator's supporters and the armed forces would accept the transition process<sup>2</sup>.

There were also a number of factors that complicated and hampered the transition process, including the need to resolve the demands for autonomy by the regions that had enjoyed such freedom under the Second Republic; namely, Catalonia, the Basque Country and Galicia. Also of relevance was the existence of terrorism in the form of the Basque group ETA and, finally, the economic crisis that resulted from the rise in oil prices in 1973. This reached Spain belatedly but with great force, with lasting effects that included high levels of unemployment.

It was under these constraints – which make the Spanish case a very specific one – that the transition was carried out in Spain. Many different opinions exist over how this period should be divided into phases of transition and consolidation, but it is generally accepted that the transition began with the

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2. For a general overview on the democratisation process and the transition phase in particular see: Charles Powell, *España en democracia, 1975-2000* (Barcelona: Plaza y Janés, 2001); José María Maravall, *La política de la transición, 1975-1980* (Madrid: Taurus, 1981).

appointing of Adolfo Suárez, and ended one year later following the proclamation of the constitution, when the respective Statutes of Autonomy were approved in Catalonia and the Basque Country in October 1979. The period of consolidation lasted much longer. If we accept the idea proposed by Philippe Schmitter of «partial regimes»<sup>3</sup> by which, with regard to the armed forces (which is the subject that concerns us here), we can say that the transition was not concluded until 1982, with the trials of the perpetrators of the military coup of 23 February 1981. The period of consolidation lasted from October 1982 (when political alternation took place in Spanish democracy for the first time, with the Socialist party's election victory) until the late 1980s when, after entering the European Union, Spain became a member of the Western security system, by gaining permanent membership of NATO, joined the WEU and signed a new security agreement with the United States<sup>4</sup>.

## **II. THE DRAFTING OF THE CONSTITUTION**

The new constitution represented a fundamental step forward in the transition process and has ensured – without any subsequent modification – the solid consolidation of democracy over the past 35 years. It had to be a new constitution, not just a rehashed version of the previous democratic constitution of the Second Republic of 1931, because too many years had passed and, particularly, because forming a republic was not a possible option; instead, the regime was to be a constitutional monarchy.

To draft the new constitution, the constituent Parliament selected a committee made up of seven MPs who represented all the different perspectives of the political spectrum. Just how diverse the committee's composition was can be seen from the fact that that one of them had been a minister in the governments of the dictatorship, another was a member of the Communist Party, while a third belonged to the Catalan nationalist party. The rest of the committee were made up of a socialist MP and three centrists from Adolfo Suárez's party.

The process of drafting the new constitution was relatively quick, though it allowed for widespread debate to take place at all levels. After five months at work, the committee had completed the preliminary draft of the constitution. Published in January 1978, a period of amendments ensued (more than 3,000 of them were submitted to the Chamber of Deputies), which were presented by the committee in April, thereby initiating the process of parliamentary debate, which consisted of 24 sessions by the Constitutional Affairs Committee and 12 by the Parliamentary plenary.

The preliminary draft was then submitted to the Senate. The debate was extended by 17 sessions

3. Schmitter proposes a vision of democratic transition and consolidation whereby it is not one democratic regime as a whole that constitutes democracy but different political and institutional sub-systems by which society seeks representation. On this view consolidation may be considered from the perspective of a series of social groups seeking representation and democracy as a composite of such regimes, which are ideally rendered coherent by an overarching set of rules that define a hierarchy of interactions and assign specific roles to each. Philippe C. Schmitter, 'Organized Interests and Democratic Consolidation in Southern Europe', in Richard Gunther, Nikoforos Diamandouros and Hans-Jürgen Puhle (eds.), *The Politics of Democratic Consolidation* (Baltimore, MD: John Hopkins University Press, 1995): 284-314.
4. For a more detailed analysis on the military reform, see: Felipe Agüero, *Soldiers, Civilians and Democracy: Post-Franco Spain in Comparative Perspective* (Baltimore, MD: Johns Hopkins University Press, 1995); Narcís Serra, *The Military Transition. Democratic Reform of the Armed Forces* (Cambridge: Cambridge University Press, 2010). For a critical view of the reform see: Miguel Platón, *Hablan los militares* (Barcelona: Planeta, 2001).

of the Constitutional Affairs Committee and 10 of the plenary, ending on 5 October. As the Senate had made alterations to the preliminary draft, a mixed committee of MPs and Senators had to be created, and their agreed version of the document was published on 28 October. This was the text that was put to the vote on 31 October in both chambers. In the Chamber of Deputies the preliminary draft obtained 325 votes in favour out of 345, with 6 voting against and 14 abstentions. In the Senate, out of a total of 239, 226 voted in favour, 5 against and 8 abstained. The popular referendum was held on 6 December, and the preliminary draft was approved by 87.78 percent of the citizens who voted.

In retrospect, it can be seen that the drafting of the constitution confronted huge problems. One of these was the fact that all the parties had to renounce ideas that they had been defending fiercely until that time. To give just two examples of this, the Communist Party and the socialists were forced to relinquish their calls for a State with a republican structure, while the right wing renounced the idea of maintaining a centralised State. Without doubt, the thorniest issue was that of the territorial model, of a return to the autonomous communities of the Second Republic, or in other words, agreeing to self-government for specific regions that considered themselves to be nations owing to their history and because they had their own languages. This difficulty was exacerbated by the intervention of the armed forces, who saw themselves as the guardians of the defence of the Franco regime's principles and structures, or rather, as the guarantors of the continuity of Francoism.

In the end, the second article of the constitution was approved thanks to the use of the word "nationality" instead of the term "nation" to refer to the historic autonomous communities (Catalonia, the Basque Country, Galicia); said article "guarantees the right to autonomy of the nationalities and regions" that make up the Spanish nation.

This point, like many others, shows that the 1978 constitution was not a simple reform of the previous situation, but a break with the characteristics of that situation. The early phase of the transition was dominated by a struggle between the continuists (represented basically by the armed forces), and the reformists, represented by Adolfo Suárez and the party he created, the *Unión del Centro Democrático*. Some examples of this conflict-ridden situation included the resignation of General de Santiago, Vice-President of the government, when trade unions were legalised, and that of Admiral Pita da Veiga as Minister of the Navy when the Communist Party was legalised in order for it to be able to stand in the first democratic elections in 1977. In contrast, the drafting of the constitution had already become a debate between the reformists and the parties deriving from the democratic opposition to Francoism, who wanted a complete break with the previous situation. The end result has been termed a «*ruptura pactada*» [negotiated rupture], through which the foundations were laid for a fully democratic regime, but one which was produced through consensus<sup>5</sup>.

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5. For a recent study of the Spanish transition viewed as a pact, see: Richard Gunther 'The Spanish Model Revisited' in Gregorio Alonso and Diego Muro (eds.), *The Politics and Memory of Democratic Transition* (New York: Routledge, 2011).

### III. THE CONSTITUTION AND THE INSERTION OF THE ARMED FORCES INTO THE STRUCTURE OF THE DEMOCRATIC STATE

When General de Santiago resigned as Vice-President of the government, Adolfo Suárez appointed General Gutiérrez Mellado in his place. This proved to be a providential appointment, as General Gutiérrez Mellado launched and masterminded the military reform of the transition period, with such vital measures as the abolition of three military ministries and the creation of a single Ministry of Defence.

General Gutiérrez Mellado's reforms during the transition had a two-fold effect on the armed forces, at the same time democratising and modernising them. Thus – and with the aim of unifying all the armed forces – one of his first measures was to create the posts of Chief of Staff for the Army and the Air Force (posts which had previously not existed), and to create the Joint Chiefs of Staff (*Junta de Jefes de Estado Mayor* - JUEM), a body that was formally modelled on its counterparts in most NATO countries, but with an important difference: Spain's JUEM was constituted as a senior-level body that commanded all three sectors of the armed forces. Gutiérrez Mellado adopted this measure in March 1977, a few months before the creation of the Ministry of Defence and some 20 months before the constitution was approved. But in addition to the creation of JUEM, measures were taken that represented a perceptible loss of privileges and power for the military. It is commonly known that in all these processes of democratisation of the armed forces, their reaction to their loss of power is always to try and strengthen the military's autonomy with respect to civil power.

That is what happened in Spain, where furthermore an attempt was made to impose a theory devised during the final years of Francoism, when it became apparent that the regime was drawing to a close, and which basically tried to differentiate between the two parallel lines of command over the armed forces. In the first of these, the line of command ended with JUEM as the senior-level body of the joint military command, while the second, known as the political-administrative line, included the President of the government and the Minister of Defence. This theory was embodied in the decree-law to create JUEM, of 8 February 1977, which established that JUEM would be «under the supreme command of His Majesty the King», and at the same time, «politically dependent» on the President of the government. This proposal, which was later also introduced in several South American countries, represented an attempt to weaken the government's control and to strengthen the organisational and functional autonomy of the armed forces.

In addition, JUEM became the organ of corporate defence for the military, and of their resistance to the ministry's decisions. Proof of this is the fact that JUEM wrote directly to the constitution drafting committee, voicing their proposals concerning the wording of the constitution, and without going through the Ministry of Defence. And so, regarding the process of military democratisation, three clear dangers existed at the time when the constitution was drafted.

The first of these dangers was the placing of the article on the armed forces among the opening articles of the constitution concerning State Institutions, and directly connected with the Crown. The second was to maintain the police and the civil guard (*Guardia Civil*) as part of the armed forces. The third was the differentiation between the lines of military command and that of the political-administrative. JUEM requested the constitutional committee that these three points, among others, should be included in the constitution. However, the committee rejected the second proposal, even though

the issue was later debated by the committee and in plenary because one of the parties – Alianza Popular, which contained renowned politicians from the previous regime – advocated the same proposals as JUEM.

With respect to the first area of danger, the article concerning the armed forces (no. 8) was included in the Preliminary Section, with the following wording:

- 8.1. The mission of the Armed Forces, comprising the Army, the Navy and the Air Force, is to guarantee the sovereignty and independence of Spain and to defend its territorial integrity and the constitutional order.
  
- 8.2. The basic structure of military organisation shall be regulated by an organic law in accordance with the principles of the present constitution.

As regards JUEM's demands, the final document contained two major differences. The first was the deletion of the expression «to guarantee the unity of Spain», replacing the term «unity» with «sovereignty». The second was the deletion of the paragraph that constitutionalised JUEM as the supreme collegiate organ of the military chain of command. The importance of this alteration cannot be underestimated. It resulted from a personal intervention by General Gutiérrez Mellado, who communicated in writing to the drafting committee that this point did not possess constitutional status, and that it should be duly developed by law. Thus it became possible to complete the military reform in the period of democratic consolidation, since otherwise, the Law 1/1984 (which modified the role of JUEM to that of a military advisory body to the President of the government and the Minister of Defence and unified the two parallel lines of command over the armed forces) would not have been possible without changing the constitution. And it would be almost impossible to alter the first articles of Spain's constitution, as this would require Parliament to be dissolved and a popular referendum held. Obviously, the inclusion of the military's demands into the constitution would have prevented the decisive and necessary step that the Law 1/1984 represented to complete the reform of the military.

The end result of the drafting of this part of the constitution regarding the democratisation of the armed forces proved to be ambiguous. While on one hand it was decided that the police should be demilitarised, and that the same process should be commenced with the civil guard (and this was very important), on the other, the armed forces were included in the Preliminary Section together with the monarchical form of the State and the recognition of the autonomy of Spain's nationalities and regions. This kept hopes alive among certain areas of the military who considered themselves to be an institution capable of negotiating with the other State institutions. In any case, it must be accepted that despite the lack of clarity in the constitution, the drafting of this document made it possible to bring about a process of military reform that is considered complete in terms of the insertion of the armed forces into the structure of a democratic state. In light of the pressure being exerted by the military, and the weight of that pressure in the years prior to the death of General Franco, we must conclude that, with respect to these issues, the wording of the constitution was as close to the best possible draft that could be hoped for at that time.

#### IV. CONFLICTIVE ISSUES WITH THE ARMED FORCES IN THE DRAFTING OF THE CONSTITUTION

The issue that was most at odds with the military's position, and most dangerous in terms of their possible reaction, was that of the territorial organisation of the State. In the end, the use of the word "nationality" to refer to Catalonia and the Basque Country instead of the term "nation" succeeded in preventing open conflict, even though there was enormous military pressure against the process of recognising the autonomous governments, a process the military viewed as the disintegration of Spanish unity.

Let us now take a brief look at the evolution of other issues that were problematic, or which were the object of conflict with the armed forces in the drafting of the rest of the constitution, though some of them have been mentioned previously.

##### THE DEATH PENALTY

The military authorities were against the view of the political parties who wanted to completely abolish the death penalty in the constitution. In the end, article 15 was approved, which stated: «The death penalty is hereby abolished, except as provided for by military criminal law in times of war». In the 1985 Military Penal Code, the death penalty could only be applied in times of war but it was not by any means the only sentence that could be applied for an offence, so that there was no possibility that a military tribunal would be forced to impose it. Later on, in 1995, the death penalty was completely abolished.

##### COURTS OF HONOUR

Owing to pressure from the military, article 26 of the constitution was worded as follows: «Courts of Honour are prohibited within the framework of the Civil Administration and of professional organisations». During the period of consolidation of the military reform, and specifically when the reform of military justice commenced in 1985, the military Courts of Honour were abolished.

##### CONSCIENTIOUS OBJECTION TO MILITARY SERVICE

This point was covered in article 30 of the constitution: «The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection as well as other grounds for exemption from compulsory military service; it may also, when appropriate, impose a community service in place of military service.» This article recognised the right to conscientious objection, but could not be developed within in the period of transition. The law that regulated this constitutional mandate was number 48 (1984), which established what was termed "substitutional social service", or social service compatible with the reasons for conscientious objection. This issue was definitively resolved with the abolition of military service on 31 December 2001.

##### THE INDEPENDENCE OF MILITARY JUSTICE

Under Franco's rule, the military established their own system of judicial power that had a Supreme

Council for Military Justice which was independent of civil judicial power, and which therefore violated the democratic principle of the unity of judicial power, as well as many others. Naturally, the military requested that these prerogatives should be maintained, and they subsequently succeeded in including wording into the constitution that permitted this, albeit to a limited extent:

Art. 117.5. The principle of jurisdictional unity is the basis of the organisation and operation of the courts. The law shall make provision for the exercise of the military jurisdiction strictly within a military framework and in cases of a state of siege (martial law), in accordance with the principles of the constitution.

In fact, the issue of military justice had already been dealt with, in October 1977, with the signing of the Moncloa Pacts, which represented an agreement between the political parties, the representatives of the business sector and the trade unions over the essential priorities for political reform and economic policy at that time. These pacts included an agreement on preventing military justice from being able to judge civilians.

As a result, in 1980, during the transition period, military justice was reformed by means of two very important steps: the first, by preventing it from judging crimes of public order and, in general, civilians; and the second, by enacting the right to appeal against military judgements before the nation's Supreme Court. However, no further progress could be made in a period in which, furthermore, military justice had to judge the perpetrators of the coup of 23 February 1981.

The rigorous constitutional interpretation was applied with the reform of military justice that was commenced in 1985. The independence of military judicial power was abolished, and a military chamber was created within the Supreme Court, thus integrating the two jurisdictions. This reform was completed approximately 10 years after the constitution had been approved.

## THE ARMED FORCES AS AN INSTITUTION

It is significant that this was one of the most hotly-debated issues in the parliamentary discussions on the military aspects of the constitution. Alianza Popular, the most conservative party in the parliamentary spectrum, claimed that the armed forces were much more than a mere department of the administration or a section of a ministry. As already mentioned, the great danger here laid in strengthening the military autonomy's with respect to the government, by considering the military as an institution with a collegiate supreme command (JUJEM) connected with the king, to whom art. 62 of the constitution grants supreme control of the armed forces. The constitution failed to check this danger, as in the end the article concerning the armed forces was not included in the section dedicated to Government and Administration, but in the Preliminary Section, as mentioned previously. This helped to lend further fuel to the argument in favour of the existence of two lines of dependence, one military (JUJEM and the king) and the other related with the government and its political and administrative spheres.

This ambiguity was tackled during the transition, but it was not resolved until the period of consolidation, with the Law 1/1984. In effect, this law clarified two essential issues. Firstly, it defined JUJEM

as a collegiate advisory body to the President of the government and the Minister of Defence, organically and functionally framing it within the Ministry of Defence. Secondly, it assigned effective control to the President of the government, by ordering that he was responsible for controlling defence policy and furthermore «exercises his authority to organise, coordinate and direct the actions of the armed forces». With this issue, it took approximately seven years for the previous ambiguities to be definitively resolved.

## V. THE DEBATE IN THE SPANISH PARLIAMENT ON MILITARY ISSUES IN THE CONSTITUTION

The parliamentary debates on the constitution were only limited to some of the aforementioned conflictive points. Alianza Popular, the most conservative party represented in the constitutional committee, supported the inclusion of the police and the civil guard within the armed forces, though in the final debates they merely called for the civil guard to continue as part of the armed forces. Alianza Popular also argued the armed forces had the mission to guarantee the unity of Spain. In both cases these views were countered by the other parties, and were finally rejected.

The debate over the nature of the armed forces did not succeed in clarifying their subordination to civil government. Several parliamentarians argued that the armed forces were above the different political parties, and that they could not be considered as a section of the ministry for home affairs or a municipal department. This resulted in the ambiguity of the armed forces being included in the opening articles, and not in the section on the Administration of the State, and which meant that the constitution was not explicit on the subject of the subordination of the armed forces to the government.

## VI. SOME LESSONS DERIVING FROM THE SPANISH PROCESS OF DRAFTING THE CONSTITUTION

The constitution cannot represent the definitive answer to issues that are debated within society. Nevertheless, it is of the greatest importance that the constitution should not prevent solutions which, with the evolution of debate, become accepted by society subsequent to the passing of the constitution.

The case of Spain, especially in relation to how the issue of the armed forces was dealt with, shows that many issues that were blocked at the time the constitution was drafted were successfully resolved in the years that followed. Rather than resolving all problems, the constitution must lay the foundations for (or simply permit) the future, and sometimes gradual, resolution of problems when the time is right. Processes of democratisation take a long time, especially in Turkey, and a new constitution should open windows to the future instead of fossilising and stagnating any possible solutions at a specific moment in time.

The constitution should contain the broad outlines of the institutions that shape coexistence within the nation, the definition of the freedoms it guarantees, the agreements between majorities and mi-

norities, etc., but it cannot develop and specify these issues or, for example, the insertion of the armed forces into the democratic structure of the State. These issues should be left for the legal system to resolve in a gradual manner.

In some cases, the constitution allows specific reforms, but does not require or encourage them, it simply makes them possible. In the case of Spain, military reform was carried out by formally invoking the constitution, but in fact the new constitution was not the driving force behind this reform. The reform was pushed through above all by the political will to achieve a situation comparable with Spain's neighbours. The military reform laws were based on comparative policies in European democracies, and on common sense, all moderated by a sense of prudence and by graduating the speed of the changes.

This does not mean that a constitution accepted by a very broad majority (as was the case with the Spanish constitution in 1978) does not represent a highly important backing for any subsequent process of reform. Given that it was an unequivocal sign of democratic transition and consolidation, the Spanish constitution represented an essential element in the acceptance of the new situation by the armed forces. And here it must be borne in mind that no form of stable, lasting control of the armed forces can exist if it is not accepted by the military as a whole. The military must believe that subordination to civil power is the best way – if not the only way – to be accepted and valued by society. In this respect, we cannot underestimate the influence of a constitution that has been drafted following lengthy debate and discussion, agreed to by the political classes, and accepted by the great majority of citizens.

## BRAZIL: THE CONSTITUTION-MAKING PROCESS AND THE POLITICAL SYSTEM

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BY PEDRO DALLARI

### I. INTRODUCTION

With the end of the military regime and the re-democratization of Brazil in 1985, a debate arose about the need to draft a new constitution that might replace the constitution enacted by the military government. In November 1985, the National Congress, which had retained limited power but remained in place during the military regime, set forth that it would be incumbent on members of the National Congress – including both Members of the House of Representatives (to be elected in 1986) and of the Federal Senate (elected in 1982) – to establish the Constitutional Convention which would make the new constitution.

This democratic transition took place peacefully due to the increasing social pressure in favour of democratization and the end of the dictatorship, in place since 1964. In 1984, large demonstrations in major Brazilian cities claimed the right to choose by popular vote the president whose term would begin the following year. Although this goal was not reached, the weakness of the dictatorship became evident and the system of indirect election, which had been used for choosing a succession of military presidents, was instead used to elevate to the presidency a civilian leader from the opposition. Repeating a common sequence in Brazilian history, the transition and the new government had significant political and public support which until then had supported the dictatorial regime.

As a consequence, the installation and operation of the Constitutional Convention was initiated under a consolidated civilian government committed to building a democratic system and promoting human rights. Removed from power, the military preserved autonomy for the management of the armed forces (defence matters effectively passed to civilian control only in 1999) and amnesty for actions committed during the dictatorship (an issue that still generates strong controversy today), but was not involved in the constitutional debate. The controversies of the constitutional process were largely unrelated to any potential endangerment of democracy, therefore, but dealt primarily with issues relating to the organization of the state, especially the regulation of economic activity and the modelling of the political system. As often seen in consolidated democracies, disputes in the Constitutional Convention often took place between the liberal and social democratic conceptions, with little influence wielded by those in politically extreme positions.

The constitution drafted by the Constitutional Convention was meant to replace the constitution of the military regime, imposed in 1967 and significantly amended in 1969, when the dictatorship be-

came stronger and more violent. No consideration was given to the idea of restoring the earlier 1946 constitution, which was democratic but was largely outdated. The newly drafted constitution instead integrated a series of constitutional texts dating back to the 1824 constitution that governed the monarchic period from independence (1822) until the proclamation of the Republic (1889).

In the monarchic period, the Emperor had strong powers of political intervention, but the political system was a parliamentary one. All subsequent constitutions consecrated Brazil as a presidential republic, adopting the pattern seen across Latin America, greatly influenced by American constitutionalism. The constitutions of 1891 and 1934 had democratic characters, but the 1937 constitution was written to legalize a civilian dictatorship. After the fall of that dictatorship, a new 1946 constitution, which lasted until the advent of the military regime in 1964, continued the presidential tradition except for a brief period – 1961 to 1963 – in which, by virtue of a constitutional amendment adopted in the context of a political crisis, Brazil lived under the aegis of parliamentarianism.

## II. COMPOSITION OF THE CONSTITUTIONAL CONVENTION

After the elections of November 1986, the Constitutional Convention was convened on February 1, 1987, presided by the Chief Justice of the Brazilian Supreme Court. The Constitutional Convention was composed of members from all Brazilian states and the Federal District (Brasília), including 487 Representatives, all elected in 1986, and 72 Senators, of whom 49 were elected in 1986 and 23 were elected in 1982 (starting their eight-year term of office in 1983). The 559 members of the Constitutional Convention were distributed over 12 political parties. Three of its members later became presidents of Brazil, governing the country in sequence for 19 years between 1992 and 2010: Mr. Itamar Franco, Mr. Fernando Henrique Cardoso and Mr. Luis Inácio Lula da Silva.

In the session following the opening of the Constitutional Convention, the Representative who had been elected President of the House of Representatives was also elected President of the Constitutional Convention. The 559 members of the Constitutional Convention Plenary Assembly also approved a set of provisional rules to be in force until the Constitutional Convention Rules of Procedure could be passed. Based on these provisional rules, which disciplined even the drafting of the permanent Rules, the President of the Constitutional Convention appointed the provisional board that would guide its work, and the Reporter of the permanent draft of the rules. On March 24, 1987, after almost two months of discussion and voting, the Constitutional Convention Rules of Procedure were passed. The following was established therein: 1) the sovereign power of the Constitutional Convention was affirmed; 2) the work developed by the Constitutional Convention would be consonant with the functioning of the Congress and its two houses, the House of Representatives and the Federal Senate; 3) the structure of the Committees and other bodies of the Constitutional Convention were defined; and, 4) the constitutional text drafting process was systematized.

The debate about how the Constitutional Convention would ascertain its sovereign power was quite intense. Several alternatives were discussed, ranging from preliminary planning measures to the drafting of a new constitution that could promote immediate changes in the legal system (such as,

for instance, the revocation of the National Security Law) to alternatives that granted the Constitutional Convention only the role of drafting the constitution, setting it aside from the internal political and legal order. In the end, the prevailing understanding was that the Constitutional Convention, without interfering *a priori* with the legal system in force in Brazil, might examine proposals aimed to suspend measures that might threaten its work. Called decision projects, some proposals were submitted, but none of them was voted by the Constitutional Convention Plenary Assembly.

As the Constitutional Convention was able to develop its work in an environment of freedom, initial concerns about possible external interference eventually lost strength. The still-valid National Security Law and legislation emanating from the dictatorial period did not prevent the regular process of drafting the new constitution. The fact that, in some respects, the new constitutional text preserved the interests of conservative political groups previously linked to the military government was not the result of undue constraint on the Constitutional Convention. Given the fact that the Brazilian transition happened in a negotiated manner, without disruption of the political and legal order, these conservative groups, although a minority, preserved some influence in the policy framework and used that power within the constitutional process.

Considering the equivalence between the activities of the Constitutional Convention and the regular work of the National Congress – an indispensable measure, since their members were the same – the Constitutional Convention Rules of Procedures determined that the Federal Senate and the House of Representatives should adapt their respective rules, so as to hold their sessions extraordinarily and only to examine urgent matters or those relevant to national interest, assuring full priority to the work of the Constitutional Convention. This measure was effectively implemented and resulted in a significant slowdown of federal legislative activities for almost two years, giving rise to some controversy at the time.

### III. STRUCTURE OF THE CONSTITUTIONAL CONVENTION

The structure for the Constitutional Convention was based according to the planned procedure for the drafting of the new constitutional text. Assigning the Constitutional Convention Plenary Assembly the highest importance, since it included all 559 members, the Constitutional Convention was composed of eight Committees, and each member would only be allowed to work as an incumbent member in one Committee and as a substitute member in one other Committee. The eight Constitutional Convention Committees were:

- (i) Sovereignty, Men's and Women's Rights and Guarantees;
- (ii) State Organization;
- (iii) Branches and Governmental System Organization;
- (iv) Voting, Political Parties and Institutional Guarantees;

- (v) Tax, Budget and Financial Systems;
- (vi) Economic Order;
- (vii) Social Order; and
- (viii) Family, Education, Culture & Sports, Science & Technology and Communications.

The eight Committees were each subdivided into three Subcommittees, comprising a total of 24 Subcommittees with an average of 21 members and an equal number of substitute members. The Branches and Governmental System Organization Committee, for instance, included the following three Subcommittees: 1) Legislative Branch Subcommittee; 2) Executive Branch Subcommittee; 3) Judiciary Branch and Public Prosecution Office Subcommittee.

Under the Rules of Procedure, the distribution of members to the Committees and Subcommittees obeyed, as much as possible, political bloc proportionality, a criterion that was similarly applied to choose, upon prior agreement among the political bloc leaderships, the Presidents, Vice Presidents and Reporters of the Committees and Subcommittees.

To systematize the reports produced by the Committees and Subcommittees, a Systematization Committee was created, composed of 49 members directly appointed by the political bloc leaderships, according to political bloc proportionality, plus the Presidents and Reporters of each of the 8 Committees and the Reporters of the 24 Subcommittees.

Finally, the Constitutional Convention Board was composed of six incumbent members and three substitute members, all elected by the Constitutional Convention Plenary Assembly. Among other powers set forth in the Rules, the Board was to direct the work of the Constitutional Convention during the sessions and keep the internal order of the Constitutional Convention.

#### IV. CONSTITUTIONAL DRAFTING PROCESS

Based on this framework, the new constitution of Brazil was drafted.<sup>6</sup> The procedure adopted by the Constitutional Convention was a novelty, considering former Brazilian Constitutional Conventions. This time, a constitution draft was not the starting point of the discussions and deliberations, as had happened in the five prior occasions, from the first Constitutional Convention in 1823 to the most recent one in 1967. Rather, the 1987 Constitutional Convention decided not to adopt any drafted proposal beforehand as a starting document and, from the very beginning, no instance of the Constitutional Convention was granted jurisdiction to draft any project that might be used as reference.

6. In a book devoted to the analysis of the Brazilian constitutional principles on foreign relations, the author of this essay described the structure and the drafting process of the new constitution adopted by the National Constitutional Convention (Pedro DALLARI, *Constituição e relações exteriores*, São Paulo: Editora Saraiva, 1994 e 2002).

A progressive development was the method of choice whereby – based on proposals arising out of society and of the Constitutional Convention, and throughout successive screening stages performed jointly by all the members of the Constitutional Convention – little by little a project to be examined by the Constitutional Convention Plenary Assembly was drafted. The result of this process was that it was only in November 1987 that a draft constitution was formally examined by the Constitutional Convention Plenary Assembly, which had been convened in February 1987.

The Constitutional Convention developed its work of redesigning the constitutional order in two major stages. The first stage unfolded in several steps with first the Subcommittees, then the Committees, and finally the Systematization Committee working on the draft constitution. In the second stage, also divided into several steps, the Constitutional Convention Plenary Assembly, working with the draft constitution developed by the Systematization Committee, discussed and voted on every subject to be included in the new constitution.

The starting point of the first stage was the proposals submitted by the members and the suggestions offered to the Constitutional Convention by society – institutions, entities and experts in different subjects who took part in the public hearings organized by the Subcommittees. These public hearings turned into major events with significant media coverage, and were observed by the public. Grounded in such contributions, in April and May 1987, the 24 Subcommittees initially prepared sectoral drafts containing proposals of provisions concerning subjects under their specific purview.

In May and June 1987, each of the eight Committees examined the drafts of their three Subcommittees and consolidated the provisions into a single draft that, jointly with the drafts of the other seven Committees, was submitted to the Systematization Committee.

The Systematization Committee, in the third and final step of the initial stage, examined all the submitted drafts and concluded, in November 1987, the draft constitution that would guide the work of the full Constitutional Convention Plenary Assembly. Considering the initial expectation that the work of the Systematization Committee would last just a few weeks, the six month process seemed remarkably long.

The second stage of development of the draft constitution consisted of discussion and voting in two rounds by the Constitutional Convention Plenary Assembly of the original draft – as delivered by the Systematization Committee – and the amendments presented to it by the members and by civil society groups, who could propose amendments if backed by the minimum support of 30,000 signatures. The first voting round was characterized by intense political discussions and extended for the first six months of 1988.

Upon the conclusion of the first round of examination of the draft constitution, the second and final round started. As the National Congress had defined in 1985 that any constitutional matter should be approved by the Constitutional Convention Plenary Assembly in just two rounds, only suppressive amendments, or amendments aimed to cure omissions, errors or contradictions, were admitted. The second round went quickly, partly due to the pressure of the electoral calendar, which had set forth local elections for November 1988, in which several members would take part.

The second round brought few amendments to what had already been approved by the Constitutional Convention Plenary Assembly in the initial round. The subjects voted were delivered to a Drafting Committee so that, without any amendment on the merits, the final text could be drafted. The final text proposed by the Drafting Committee, with 305 articles, was approved by the Constitutional Convention Plenary Assembly and enacted on October 5, 1988, becoming the new Constitution of the Federative Republic of Brazil.

## V. THE POLITICAL SYSTEM ESTABLISHED IN THE CONSTITUTION

As expected, the 1988 constitution defined the rules of the political system, having established for the country a presidential system of government in which the president is both head of state and head of government. There is not, in the Brazilian system, the figure of a prime minister.

During the Constitutional Convention, there was a strong controversy about this matter. In the initial phase of drafting the constitution the option for a parliamentary system was proposed, with the presidential option prevailing at the end. Due to this controversy, the transitional provisions of the constitution stated that the population would define by plebiscite the form of government – a republic or a monarchy – and, in case of the choice of the republic, the population would also define the system of government – presidential or parliamentarian. The alternative of the monarchy was offered due to the fact that between 1822, the year of independence, and 1889, this was Brazil's form of government.

Five years after the adoption of the Constitution, in September of 1993, the plebiscite was held and voters almost unanimously supported the preservation of the republican form and opted by a large majority for maintaining the presidential system, thus preserving the choices made by the Constitutional Convention.<sup>7</sup>

The controversy surrounding the system of government was not marked by an automatic alignment of the leading alternatives along the political spectrum. At the Constitutional Convention and the 1993 plebiscite, both the parliamentary system and the presidential system had advocates among members of both conservative and progressive political forces, which were internally divided on the matter. Thus, regardless of ideological reasoning, the choice of the presidential system reflected the desire of the population to be able to elect a president endowed with political power. The model historically enshrined in Latin American constitutionalism prevailed.

The mandate of the president was set by the Constitutional Convention at five years, with no right to re-election. Because of a constitutional amendment of 1994, it was reduced to four years without the possibility of re-election, and through further modification in 1997, the current rule was adopted, establishing a four-year term with the right to re-election for a consecutive period. The prohibition of a third

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7. Taking into account the characteristics of the Brazilian presidential system – specifically the participation of political parties in the government in order to guarantee for the President the support of a majority in the Parliament –, the system is frequently qualified in the Brazilian doctrine as “coalition presidentialism” (Fernando LIMONGI, “A democracia no Brasil: presidencialismo, coalizão partidária e processo decisório”, revista *Novos estudos*, 76, São Paulo: CEBRAP, 2006; an English version of the article – “Democracy in Brazil: presidentialism, party coalitions and the decision making process” – is available at <http://www.fflch.usp.br/dcp/html/fernandolimongi.html>).

consecutive term does not preclude a former president to occupy the post again after a term out of office. Former presidents Fernando Henrique Cardoso and Luis Inácio Lula da Silva, who preceded the current president, were elected for two consecutive terms, each having remained eight years in office.

The Constitutional Convention also decided that the president would be elected directly by the population. The majority system was adopted, with elections in two rounds, with the top two candidates going to the second round if no candidate receives more than 50% of the valid votes in the first round. This formula also applies to the choice of state governors and mayors of municipalities.

Regarding the legislature, the National Congress is bicameral, consisting of the House of Representatives and the Federal Senate. As is the general rule in democratic countries, the parliament has the prerogative to approve all legislation and perform oversight of government action. States and municipalities have unicameral parliaments, which are also endowed with legislative and control powers.

For the election of the 513 parliamentarians who now comprise the House of Representatives, a proportional system was adopted, with the representatives being elected for four year terms through open electoral lists in each state and in the Federal District. Each elector may nominate a candidate, and the percentage of seats allocated to each party corresponds to the total percentage of votes received by the party. With the number of seats corresponding to the party assigned proportional to their votes, the party's candidates occupy seats according to the number of votes received individually. This system is also used for the election of parliamentarians in the states, the Federal District and municipalities. For the Federal Senate, the majoritarian electoral system was adopted, letting the electorate in each state and in the Federal District elect three senators for an eight year term.

Finally, the vote is secret in Brazil and the right to vote is ensured to all Brazilian citizens over the age of 16. For citizens aged between 18 and 60 years, voting is compulsory.

## VI. CONCLUSIONS

Much more can be said about the Brazilian constitution-making process and on the guidelines of the political system. There remains considerable debate about the drafting of the constitution, concerning both the procedural aspects – it is often claimed that the process was too time consuming – and the final result of the work – constitutionalists tend to be critical of the fact that the text is long, with too many subjects, and extensively detailed.<sup>8</sup> But, in general, it is considered positive that it gave rise to extensive and intensive participation of society during the whole process, which allowed the text to include several proposed claims from outside the membership of the Constitutional Convention.

The importance attached to the pursuit of legitimacy and of compromise must be emphasized. Regarding the first aspect, the constitutional process was structured so that society could be heard: there were a large number of public hearings, and the possibility of proposals for constitutional provi-

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8. A recent collection of articles related with this debate – “Constituição e processo constituinte” – was published in *Lua Nova: revista de cultura e política*, n. 88 (São Paulo: Cedec, 2013).

sion by popular initiative was granted. The search for compromise involved the successful intention to have all segments of society find themselves minimally addressed in the new constitution in order to adopt it as an instrument of reference to ensure peaceful coexistence.

After 24 years, the constitution is still in effect. Almost 80 constitutional amendments have been adopted in the last two decades, thus keeping the constitution permanently up to date. As set forth in the constitution, constitutional amendments are passed with the approval of the National Congress with the support of three-fifths of the House of Representatives and the Federal Senate.

Does Brazil have a good constitution? This is the subject for a lot of discussion. The fact is that a constitution cannot solve all of problems and remove them from political debate. A constitution is a political agreement creating a basis for discussion to address the many other issues that need to be answered. The Brazilian constitution allowed the consolidation of democracy and the realization of important economic and social achievements, permitting the emergence of Brazil as an important global player. And certainly this is what really matters in a political perspective.

## CONSTITUTIONAL REFORM PROCESSES IN LATIN AMERICA: KEY ISSUES OF COMPARATIVE INTEREST

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BY ALEXANDRA BARAHONA DE BRITO

### I. INTRODUCTION

The politics of constitutional reform has been particularly intense over the last quarter century: more than half of the two hundred constitutions in the world in existence today were written or re-written during the last twenty-five years of the twentieth century.<sup>9</sup> Latin America, with its active two hundred years of constitutional history, is no exception to this rule. From 1810 through 2007, it produced a total of 231 constitutional systems,<sup>10</sup> an unusually high level of constitutional experimentation.<sup>11</sup> Sixteen new constitutions were promulgated after 1978 in the context of processes of transition to democracy or democratic reform, although the rate of constitutional replacement declined with the stabilisation of democratic government during the 1980s and 1990s.<sup>12</sup>

Latin America's constitutional experiments have often been viewed as peripheral or imitative, and thus of less comparative interest than, say, the Anglo-Saxon or Napoleonic models. But the region's constitutional reform processes "may be more relevant to the new constitutional systems emerging in Africa, Asia, the Middle East and the post-socialist countries than the atypical Anglo-Saxon models." In the twentieth century, "central concerns, such as the role of political parties and the status of social as opposed to narrowly political rights, were explored by Latin American constitutionalists with quite as much vigour and creativity as in the English speaking world." And in the twenty-first, "questions such as the scope of direct democracy, the role for mechanisms of citizen participation, or the revocation of mandates, which are of universal significance are still being explored with unusual originality and insight in this supposedly 'marginal' sub-continent."<sup>13</sup>

Why have constitutions been replaced and amended so often in Latin America when the costs of replacing them are high and the outcome of such exercises uncertain? Constitutional change usually

9. Vivien Hart, *Democratic Constitution Making*, Special Report 107. Washington DC: United States Institute of Peace, 2003, p. 2.
10. 111 of these were written before 1880. See: José António Cheibub, Zachary Elkins and Tom Ginsberg, "Still the Land of Presidentialism? Executives and the Latin American Constitution," in Detlef Nolte and Almut Schilling-Vacaflor (eds.), *New Constitutionalism in Latin America*. Aldershot: Ashgate, 2012, p. 79.
11. Indeed, "the mean lifespan of constitutions has been 16.5 years for all the constitutions enacted since independence, and 23.3 years for those in force from 1900 to 2008." Gabriel Negretto, "Toward a Theory of Formal Constitutional Change: Mechanisms of Constitutional Adaptation in Latin America," in *op. cit.*, p. 54.
12. In addition, 350 constitutional amendments were passed between 1978 and 2010. In the 2000s, the rate of constitutional amendment increased again, as although the record varies from country to country. G. Negretto, *op. cit.*, p. 7.
13. All quotations in this paragraph from Laurence Whitehead, "Latin American Constitutionalism: Historical Development and Distinctive Traits," in *op. cit.*, p. 130.

comes about when states are founded, regime transitions occur, or when there is a political crisis and powerful political actors find their interests are no longer met by the existing dispensation. In Latin America, “almost half of all constitutional replacements and amendments enacted by elected constituent assemblies from 1900 to 1977 were adopted as part of a process of transition to democracy.” With democratic stabilisation since 1978, “most constitutional replacements and amendments have been undertaken in response to balance-of-power shifts among party actors, or to the failure of a political regime to provide public goods demanded by voters.”<sup>14</sup>

More broadly, the dynamism of constitutional politics mirrors the emergence of different political projects each with its set of competing elites, and more recently, different modes of conceiving and practising democracy. Constitutional change can be seen as a reflection of the competition between “multiple modernities,”<sup>15</sup> with each project of modernity taking shape as a new or modified set of constitutional “game rules” for the political, social and economic organisation of the polity.

In the 1990s, reform was largely about improving the institutional conditions for democracy and good government, focusing on economic deregulation and privatisation; decentralisation; accountability and judicial reform; and introducing new mechanisms for political participation.<sup>16</sup> More recently, given disappointments with the democratic and economic performance of the 1990s, and a history of systematic exclusion and marginalisation of some social groups from political decision-making and social welfare which democratisation failed in large measure to overcome, constitutional reforms have reflected a rejection of liberal democratic and market oriented arrangements, enshrining a more participatory, multicultural and collectivist vision of democracy and rights.

The constitutions of Colombia (1991), Venezuela (1999), Ecuador (2008) and Bolivia (2009) exemplify this trend. They have introduced the most innovative and radical instruments for participation and direct democracy, and instituted a broad gamut of rights, notably social, environmental, collective and indigenous rights. The “increasing recognition of group rights and cultural diversity has been one of the main characteristics of modern constitutionalism worldwide since the second half of the twentieth century [...] intertwined with the adoption of longer and more complex bills of rights, most recently judicable social rights [...] In Latin America ‘multi-ethnic constitutionalism’ has spread since 1978 with the third wave of democratization [...] The rights of indigenous peoples and, more recently, of inhabitants of African descent in particular have been enshrined in the constitutions of the region.”<sup>17</sup> These innovations have led some scholars to refer to a new post-liberal Latin American constitutionalism, a new “constitutional paradigm” that aims to initiate a “transformative process.”<sup>18</sup>

14. G. Negretto, *op. cit.*, p. 57 and p. 55, respectively. With reference to Colombia and Bolivia in the 1990s, Negretto cites Van Cott, who argues that three crises explain constitutional replacement: a crisis of representation, participation and legitimation. Donna Lee Van Cott, *The Liquidation of the Past: The Politics of Diversity in Latin America*. Pittsburgh, PA: University of Pittsburgh Press 2000, p. 1. Another influential factor is how high the bar is for amendment, although flexibility and rigidity are shaped by context and not necessarily rule-inherent. G. Negretto, *op. cit.*
15. L. Whitehead, *Latin America: A New Interpretation*. London & New York: Palgrave, 2009.
16. D. Nolte and A. Schilling-Vacaflor, “The Times they are a Changin’”: Constitutional Transformations in Latin America since the 1990s,” in D. Nolte and A. Schilling-Vacaflor, *op. cit.*, p. 15.
17. A. Schilling-Vacaflor and René Kuppe, “Plurinational Constitutionalism: A New Era of Indigenous-State Relations?” in D. Nolte and A. Schilling-Vacaflor, p. 347.
18. Albert Noguera Fernández, “What do we mean when we talk about ‘Critical Constitutionalism’? Some Reflections on the New Latin American Constitutions,” in, D. Nolte and A. Schilling-Vacaflor, p. 101.

This chapter begins by focusing on constitutional judicial reform packages, offering the Colombian case study as a particularly positive example of the results of such reforms. The second section examines the broader results of judicial reform across the region. This is followed by an overview of some key challenges that are thrown up by constitutional reform, notably the introduction of indigenous and collective rights, of mechanisms for participatory democracy, and economic nationalism or sovereignty-affirming nationalisation of primary resources. The fourth section looks at issues related with constitution-making procedures and the political use of constitutions, and reflects on how constitutions can shape ordinary politics with reference to the Brazilian case. The conclusion focuses on the broader problem of implementing rights related reforms in the Latin American context.

## II. THE RULE OF LAW AND THE JUDICIARY

One of the curses of Latin American political history is the malfunctioning of the “weakest branch.” Various judicial reform packages were introduced to remedy that ill in the 1990s, in the context of region-wide processes of democratization. As a result, over the last thirty years “Latin American countries have transformed, sometimes radically, their justice systems [...] the wave of change has touched virtually every aspect of these systems.”<sup>19</sup>

The goals of this reform cluster were to increase the independence and impartiality of the judiciary, improve the efficiency of the courts, increase access to justice; and strengthen judicial accountability. To that end, reforms packages moved from legislative or executive appointment to self-selection selection systems; altered the composition of the highest courts; introduced “European-style” constitutional courts for judicial review;<sup>20</sup> created Ombudsmen to monitor rights compliance and accountability, and National Judicial Councils to administer the selection, monitoring and removal of judges;<sup>21</sup> and introduced mechanisms to improve administration and to professionalize careers. New rights were also introduced, reflecting a new acceptance of international human rights law, and mechanisms were instituted to protect those rights and promote accountability.<sup>22</sup>

19. Julio Ríos Figueroa, “Institutional Design and Judicial Behaviour: Constitutional Interpretation of Criminal Due Process Rights in Latin America,” in, D. Nolte and A. Schilling-Vacaflor, p. 267.

20. There are seven countries with constitutional courts (Bolivia, Brazil, Chile Colombia, Ecuador, Guatemala, and Peru. In the remaining countries, the Supreme Court or a chamber of that court is the constitutional organ. In the diffuse (US based) model, court decisions apply only to the case under examination (*inter partes* effect); in the centralized model, the court decision applies “abstractly” to all such cases (*erga omnes* effect). The model is called European because it first emerged in Austria in 1920 under the influence of Hans Kelsen. See: Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989; J. Ríos Figueroa, “Institutions for Constitutional Justice in Latin America,” in: Gretchen Helmke and J. Ríos Figueroa (eds.), *Courts in Latin America*. New York: Cambridge University Press, 2006.

21. Ombudsmen now exist in most countries of the region. See: Thomas Pegram and Ryan Goodman (eds.), *Human Rights, State Compliance and Social Change: Assessing Human Rights Institutions*. Cambridge: Cambridge University Press, 2012. By the end of the 1990s, most Latin American countries had adopted some kind of Council. See: Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America*. Washington, DC: Carnegie Endowment for Peace, Rule of Law Series, Democracy and Rule of Law Project, number 28, June 2002.

22. The right to file writs to annul laws or acts which are deemed unconstitutional exists in Colombia (1991), Venezuela (1999), Ecuador (1998), Bolivia (partial 1967, and universal 2009). Some constitutions (Ecuador and Bolivia) also provide the “writ of omission,” which does not exist in most European countries, whereby citizens can demand that the state adopt the necessary measures to make a constitutionally enshrined right effective. A. Noguera Fernández, *op. cit.* For a broad examination of the new legal strategies in the pursuit of rights, see: Pilar Domingo, “Novel Appropriations of the Law in the Pursuit of Political and Social Change in Latin America,” in Javier Couso, Alexandre Huneus and Rachel Sieder (eds.), *Cultures of Legality: Judicialisation and Political Activism in Latin America*. Cambridge: Cambridge University Press, 2011.

The reforms also overhauled the slow and ineffective criminal justice systems in the region. New penal process codes were passed to improve due process and defendant's rights, replace slow and biased written procedures with oral trials, and transfer investigative authorities from the police to prosecutors. The main change has been the shift from the traditional inquisitorial system to a prosecutorial one more akin to the US model, with the introduction of public defenders and prosecutors,<sup>23</sup> and the adoption of oral trial proceedings.

These changes have received widespread support, but they have also been criticized as a means to "deliver symbolic goods" without making any real changes.<sup>24</sup> Nevertheless, in some instances reform has made a noticeable difference. The case of Colombia serves to illustrate the positive effects that such reforms can have.

## THE COLOMBIAN CONSTITUTIONAL COURT

In response to the growing instability and violence produced by the "war on drugs" and the growing discredit of political institutions, a constitutional reform process was initiated in the 1970s that culminated in the establishment of a Constituent Assembly in 1991 and the replacement of the 1886 constitution.

As Jaramillo outlines, the 1991 constitution has improved the independence and increased power of constitutional judges, and changed their interpretation of rights. It expanded the range of rights to include social, economic and cultural rights; and it instituted various mechanisms to ensure the enforcement of those rights, namely *tutela* or *amparo* actions, popular actions (for collective rights), compliance actions (to enforce laws and administrative acts), and group actions. It also established a Constitutional Court and an Ombudsman to monitor rights observance. As a result, the constitution has "revolutionized the country's legal system," by ensuring that legal recognition of rights is actually implemented and by making Colombians aware that they are effectively entitled to their rights.<sup>25</sup>

Court rulings have substantially improved the protection of indigenous rights, ensuring that indigenous jurisdiction does not violate any basic rights, and that indigenous communities are consulted about and consent to the exploitation of natural resources in their territories.<sup>26</sup> Consequently, "the contentious 'indigenous question' is no longer considered a simple public order problem; it has become an important challenge for the development of Colombia's new political community. This, in turn, has permitted the institutional channelling of multiple factors of conflict revolving around the relationship between indigenous minorities on the one hand, and the majority citizenry and state institutions, on the other."<sup>27</sup> A similar, albeit less intense, process has occurred with the Afro-Colombian communities, increasing hu-

23. CEJA, Challenges of the Public Prosecutor's Office in Latin America. Santiago, at: [http://www.cejamerica.org/portal/index.php/en/virtual-library/virtual-library/doc\\_details/5145-challenges-of-the-public-prosecutors-office-in-latin-america-](http://www.cejamerica.org/portal/index.php/en/virtual-library/virtual-library/doc_details/5145-challenges-of-the-public-prosecutors-office-in-latin-america-), accessed 13 September 2012.

24. D. Nolte, "Constitutional Change in Latin America: Power Politics or Symbolic Politics?" paper presented at the ECPR Joint Session of Workshops Rennes, 11-16 April 2008, at: [http://www.giga-hamburg.de/dl/download.php?d=/content/staff/nolte/publications/constituational\\_change.pdf](http://www.giga-hamburg.de/dl/download.php?d=/content/staff/nolte/publications/constituational_change.pdf), accessed 14 September 2012.

25. Jaramillo reports that 3,000,000 *tutela* cases were filed with the Court between 1991 and April 2011. Juan Fernando Jaramillo Pérez, "Colombia's 1991 Constitution: A Rights Revolution," in D. Nolte and A. Schilling-Vacaflor, *op. cit.* p. 315.

26. The Court declared unconstitutional laws that regulate the use of forests, the agricultural sector, and that reformed the mining code because indigenous communities were not consulted. *Ibid.*, p. 317.

27. *Ibid.*, p. 317.

man rights protections and promoting the formation of civil society groups that have taken advantage of the new legal environment to put their issues on the government agenda.

The Court has also played a key role in the protection of internally displaced peoples (IDP). The Court has ruled that the state's lack of response to the plight of IDP constitutes a state of unconstitutionality, which has led to progress with IDP health and education rights, and a vastly increased budget to deal with the problem. The Court has also come to the defence of gay rights, namely regarding equal property, health and pension rights; it has ruled that overcrowding in prisons amounts to a state of unconstitutionality, leading to the construction of new prisons; and it has improved the application of social rights and the mechanisms whereby individuals and groups can claim those rights.<sup>28</sup>

The 1991 reforms have also changed the capacity of government to declare states of exception. Between 1949 and 1991, Colombia spent 35 years (83 per cent of the time) under a state of exception and the Supreme Court rarely contested government declarations of such states. By contrast, from 1992 to 2002 Colombia was in a state of exception for less than 20 per cent of the time over that period, as the Court found three out of twelve declarations of state of exception unconstitutional, and four partially unconstitutional.<sup>29</sup> In sum, "without a doubt, the rules and instruments created by the 1991 constitution have promoted a rights revolution in Colombia."<sup>30</sup>

The Colombian story as reported above is extremely positive. However, it is important to remember that final outcome of rights litigation is not the only factor that should be taken into account when assessing the quality of such processes. It is important to look at the "anatomy" of such litigation.<sup>31</sup> Other aspects that must be kept in mind include the degree of responsiveness of courts to rights claims and their financial and technical capacity to respond to them, and the capacity of litigants to make their voices heard. More importantly, the political, social economic and cultural conditions that prevail in each national context will determine the degree of which positive and transformative decisions translate into effective enforcement and change. This is very apparent when one looks at the broader results of judicial reform packages in the region.

### III. THE IMPACT OF JUDICIAL REFORM PACKAGES

Colombia's constitutional judicial reform appears to be a success. Legal changes in Chile have also been judged very positively. Elsewhere there are perhaps less resounding but nevertheless encouraging success stories. Judicial budgets have increased, training and professionalization programmes have advanced, technological improvements have helped to reduce case-loads, the establishment of justices of the peace and claims courts has improved access to justice outside urban centres, and

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28. Decisions include declaring that primary education must be free, that taxes on basic living goods are unconstitutional (in current conditions), rules on increases in minimum wages for public employees, a fundamental right to a minimum level of subsistence, the rights of children are fundamental rights and subject to the tutela action, and various decisions on the right to health. *Ibid.*

29. J. Ríos Figueroa, "Constitutional Interpretation of Criminal Due Process Rights," *op. cit.*, p. 280.

30. J. F. Jaramillo, *op. cit.*, p. 326.

31. Roberto Gargarella, Pilar Domingo and Theunis Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Aldershot: Ashgate, 2006, pp. 255-315.

criminal proceedings have improved. But overall, the expectations generated by reform have not been met, the systems continue to function slowly, they lack transparency and autonomy, and for users the experience in the new system is very similar to the old.<sup>32</sup>

The tendency for executives to manipulate courts and judges remains a constant problem.<sup>33</sup> Strong executives can be an advantage when expediting the passage of new laws, but continued executive dominance stands in the way of institutionalization. This has been observed with regard to economic reforms. First-generation market reforms benefited from swift executive decisions, but second-generation reforms, which involve the institutionalization of strong credible institutions that act without the interference of executive powers, have not benefitted from over-weening executive power.<sup>34</sup> It has yet to be fully recognized that not all elements of judicial reform are mutually reinforcing, and “negative synergies” can occur between different priorities.<sup>35</sup> It has also been hard to attain a balance between independence and accountability (holding judges to account).<sup>36</sup> There remain the problems of recalcitrant justice operators and institutional inertia, lack of transparency, and corruption, compounded in some countries by economic crisis and rising criminality. In this context, it has been difficult to “reach a broad consensus on sustaining credible, long-term public policies on reform,” and without a sustained commitment which allows technical innovations to “penetrate” the system and transform it, reform is stillborn or only very partially effective.

Ultimately, although it has often been treated as a technical issue, judicial reform is a political process, affecting powerful interests, power balances and the whole social, political and economic fabric. Effective judiciaries require a “law abiding state” and effective “rule of law,” which is not just about the performance of judicial actors. That is why change can be so difficult: the same actors and institutions that pursue reform stand in its way. “Once in place, reforms must confront the same conditions that gave rise to them: a repressive or unresponsive executive power, and an inefficient or inaccessible judiciary.”<sup>37</sup>

#### IV. INDIGENOUS AND COLLECTIVE RIGHTS AND POPULAR PARTICIPATION

As the above suggests, however well designed and technically competent a judicial reform or a constitutional text may be, its application will depend not only on its inherent qualities: its performance and its evolution over time are entirely context-dependent. Thus, two constitutions that are exactly the

32. Luis Pásara, “Criminal Process Reform and Citizen Security,” in Marcelo Bergman and Laurence Whitehead (eds.), *Criminality, Public Security, and the Challenge to Democracy in Latin America*. Notre Dame University Press, 2009.

33. Ombudsmen and Judicial Councils have suffered from this problem despite initially high expectations. See L. Hammergren, *op. cit.*

34. The example of the veto points applied by former President Menem and the concomitant politicisation of economic policy making is given by William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Westport, CT: Praeger, 2000.

35. Prillaman argues that simultaneous reform on all fronts (as in Chile) is most effective, and “staggered gradualism” the worst at producing such negative synergies. “Despite the claims of reform experts, narrowly targeted incrementalism in judicial reform does not produce gradual improvement; it produces a negative synergy that contributes to a failed reform and democratic decay.” *Ibid.*, p. 112. He also criticizes reforms for being too technical approach, often transplanting systems from other countries without due attention to local conditions.

36. Hammergren contends that a “common feature throughout the region is the failure to admit that the underlying problem is inadequate judicial institutionalisation, not too little Independence.” L. Hammergren, *op. cit.*, p. 35.

37. Mark Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*. Boulder, CO: Lynne Rienner, 2002, p. 4.

same will produce different effects in one society and another, depending on the historical and political, social and economic configuration of each. Attempts to promote indigenous rights and popular participation serve to illustrate this point.

## INDIGENOUS AND COLLECTIVE RIGHTS

As observed above, and as Schilling and Kuppe explain, one of the most notable shifts observable in the most recent constitutional reform processes is a new emphasis on collective rights, including self-government and control over natural resources for indigenous communities.

“The incorporation of indigenous peoples’ rights was also influenced strongly by developments in international human rights law. The efforts of (self-identified) indigenous peoples and their advocates also explain the attainment of significant legal achievements in the rights of indigenous peoples at both the domestic and international levels. The transition to democracy, the broadening of human and citizen rights, and the creation of new spaces for political participation and public debate have opened a window of opportunity for the recognition of the legal-political demands of indigenous groups [...]. Moreover, the decline of Marxist-inspired parties in many Latin American countries after the fall of the socialist regimes of Eastern Europe left a vacuum in the political left that was filled partly by new social movements and ethno-populist parties.”<sup>38</sup>

In that context, the new constitutions of Bolivia and Ecuador laid the foundations for a multicultural and multi-ethnic state, and incorporated strong collective rights for indigenous peoples, among them the right to self-government, including control over land and natural resources. The Ecuadorian constitution recognises “communities, peoples, nationalities and collectives” as rights-holders and holds that rights can be exercised, promoted and enforced individually and collectively. The Bolivian constitution also makes “collectivities” rights holders. And the Venezuelan constitution refers to indigenous peoples and organized civil society as rights holders with the right to participate in decision-making.<sup>39</sup>

This constitutes a dramatic change in terms of the acknowledgement of the historical marginalisation and of “the right to have rights” of indigenous peoples. This recognition has gone beyond the extension of equal individual rights to members of indigenous communities; there is recognition that to guarantee certain collective rights it is essential to protect these communities as collective entities. For the first time in the history of the region, states are truly acknowledging cultural diversity, the validity of indigenous law, outlined its jurisdiction, established parallel legal orders to permit the self-administration of indigenous peoples, in accordance with the norms laid out in the ILO Convention on Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples. In the case of Bolivia and Ecuador, this has even led to a shift in the concept of the state, from an assimilation-based or homogenous to a pluri-national model that breaks with the traditional liberal system.<sup>40</sup>

38. A. Schilling-Vacaflor and R. Kuppe, *op. cit.*, p. 347.

39. A. Noguera Fernández, *op. cit.*, p. 109.

40. See A. Schilling-Vacaflor and R. Kuppe, *op. cit.* As Barrera contends, “new institutional frameworks have done much to take Bolivia and Ecuador beyond the ‘thin’ legal foundations of legal pluralism of the past.” Anna Barrera, “Turning Legal Pluralism into State-Sanctioned Law: Assessing the Implications of the New Constitutions and Laws in Bolivia and Ecuador,” in D. Nolte and A. Schilling-Vacaflor, *op. cit.*, p. 371.

Some of the changes were not uncontroversial, and resistances and conflicts are likely to emerge as the effects of reforms penetrate the social fabric. One of the contentious issues during the constituent processes in Bolivia and Ecuador was the creation of indigenous autonomies. Indeed, as in Venezuela, where changing the name of the national to Bolivarian Republic of Venezuela generated enormous controversy, in the former two countries the constitutional statement that these were now pluri-national states was highly contested, not only by opposition groups but also by sectors of the governing coalitions. "It was repeatedly argued that the construction of pluri-national states would be a threat to national unity and state governability, and that it would fragment popular movements along ethnic lines. This tension between ethnic and class-based demands and, more generally, between specificity and equality, is frequently observable in alliances between indigenous and popular left-wing sectors in Latin America as well as among diverse indigenous organizations." The concern regarding autonomies was to prevent state fragmentation and isolation, with the creation of a colonial-like apartheid or system of reductions. In Bolivia the debate about whether to establish autonomies or strengthen state unity was waged between indigenous organisations and peasant groups and the MAS within the Unity Pact, and the latter only ceded "during the Constituent Assembly largely as a strategy to counter the creation of strong departmental autonomies," which had been the goal of the conservative opposition.<sup>41</sup> The implementation of the autonomies has faced various difficulties. Perhaps one of the central paradoxes is that the government parties which promoted the constitutionalisation of this process resist its implementation since it implies a loss of central state power and therefore a loss of their own capacity to concentrate power.<sup>42</sup>

The tension between goals is also exacerbated by the fact that the new constitutions have increased executive powers. "The unresolved tension between power concentration by government and the aim of indigenous populations to gain effective decision-making powers have been particularly evident when it comes to prior consultations regarding legislative and administrative measures affecting indigenous peoples. Both governments have been reluctant to declare consultations as binding and to state that their aim is to achieve indigenous consent."<sup>43</sup> Further, while one of the main attractions of autonomies was the scope it would give indigenous communities finally to gain some control over the natural and land resources on their territories, since there is a heavy reliance of the state on now-nationalised extractive industries that operate in those areas, it can be predicted that central state authorities may have a hard time handing over such important decisions to local communities.

The constitutional recognition of pluralism is only a first step towards real equality. At present, there is no equality between different groups, there are tensions between decentralisation and centralised executive power, there are questions regarding the material resources to make the new systems work. New judicial systems and other key institutions must be equipped with the necessary staff and technical resources, including translators, indigenous law experts, and must have adequate budgets to render them effective. Coordination between parallel jurisdictions is necessary to avoid duplication and jurisdictional disputes. Further, not all indigenous practises and customs comply with international human rights standards. "Collective interests and wellbeing usually

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41. A. Schilling-Vacaflor and R. Kuppe, *op. cit.*, p. 354.

42. *Ibid.*

43. *Ibid.*, p. 362.

come first, generating legal practices that may contrast starkly with the individual rights guaranteed by national and international law.”<sup>44</sup> Legal autonomy should be made compatible with human rights standards.<sup>45</sup>

Beyond the changes inherent to the judicial system itself, there is the broader issue of societal and political change. These are societies with long histories of discrimination and marginalisation, and the effectively implementation of constitutionally enshrined rights will take require a change in attitudes, an active civil society.

## POPULAR PARTICIPATION

It has been argued the “judicialisation” of political conflict been a key way for economic and political elites to insulate policy-making from popular pressures and democratic demands.<sup>46</sup> But the Latin American countries that have established new mechanisms for direct democracy and collective participation – the constitutional right to resist (Ecuador), provisions for grass roots political participation and economic self-management, fourth “powers” (the Council for Public Participation and Social Control in Ecuador, and provisions for social participation and control in Bolivia), and mandatory participation for collectives in state bodies (the ‘empty seat’ in certain institutions for citizen representatives in Ecuador), and new provisions for citizens and groups to file suit against state bodies – all these measures seem to suggest the opposite.

Whatever the criticisms, “it would be mistaken to describe the constitutional changes of Venezuela, Bolivia and Ecuador simply as top-down processes; this would not do justice to their multi-faceted nature.” Indeed, “the adoption of the new constitutions was part of bottom-up process, including legal mobilization, and was among the central demands of social movements and citizens that were discontent with the previous social and political order.” And these processes are seen as “instruments to reconfigure the relationships between the state and citizens, by broadening participation rights and enshrining new social and collective rights.”<sup>47</sup>

But as the case of Venezuela shows, mechanisms of popular participation can be used to strengthen executive power and even authoritarian tendencies. When he came to power, Chavez claimed to represent a new kind of democratic politics and proposed a sweeping constitutional reform in 1999, the focus of which was decentralisation, a new division of powers (the addition of a fourth citizen’s power and the Supreme Electoral Authority), and the reinforcement of executive power.

As Lalander describes, supporters believe it to have been “the most democratic process of popular consultation and constitutional approval ever undertaken in the history of constitutional rewriting in

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44. Ibid, p. 377.

45. The importance of paying attention to individual rights within a collective rights framework has been magisterially explored by Will Kymlicka in *Liberalism, Community and Culture*, Oxford: Clarendon Press 1989; *Multicultural Citizenship*, Oxford: Clarendon Press, 1995; *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*. Oxford: Oxford University Press, 2001.

46. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Ca.mbridge, MA: Harvard University Press, 2004, as reported in D. Nolte and A. Schilling-Vacaflor, op. cit.

47. D. Nolte and A. Schilling-Vacaflor, op. cit, p. 19.

Latin America to that date.<sup>48</sup> They also claim that the reforms have made the political system more participatory and decentralised, encouraging grass roots participation in decision-making at the neighbourhood and community levels (through the Bolivarian Circles between 2000 and 2004, then the State Social Mission Programmes, and, after 2006, the Community Councils). They highlight that opposition forces participate in these structures, women have become involved in politics in greater numbers at the community level, and that the opposition is using the new constitution to argue for greater autonomy and decentralisation.

Critics make several points that belie the more optimistic assessments: they note that the absence of a strong civil society has meant that grass roots organisations (the Bolivarian Circles and their successors) are overly dependent on the state, the dominant party and its allies, and Chavez himself; and that decentralisation is not working because the constitutional reforms reinforcing executive powers have trumped its effects (in 2009, a new referendum was held, which also included a provision to end limits on presidential re-election, which passed, and this has reinforced the cult status of the president).

In effect, it appears that contradictory forces are at play: “the participatory democracy promoted by the Chavez government has created opportunities for political inclusion and for previously marginalized citizens to voice their demands” but “grassroots organizations often have had relatively little autonomy from central government; and at times selective paternalism has characterized the relationship between national and grassroots government.”<sup>49</sup> Thus, the state promotes grass roots democracy and limits it. “In principle, participatory democracy requires the decentralization and diffusion of power, not the reverse. To make changes that strengthen the presidency *and* widen the scope for greater participation at the same time is a contradictory endeavour, and the risk is that one of the goals will be obscured or annulled.”<sup>50</sup>

The Venezuelan case also illustrates the problem of constitutional “transplants.”<sup>51</sup> Gargarella discusses the grafting of elements from three very different kinds of constitutional projects that have existed historically in Latin America: a conservative politically elitist and morally perfectionist one; a liberal, anti-statist one, in favour of checks and balances and moral neutrality; and a radical, majoritarian and morally populist one. He notes that “grafts” generated serious tensions between rights-granting radical constitutionalism, on the one hand, and a society that was habitually liberal-conservative project on the other. These societies left these rights in the hands of the courts, which simply failed to enforce them. The same can be said about participatory clauses added in the most recent wave of constitutional reform: if, as Gargarella notes, “mechanisms to promote civic participation such as plebiscites and referenda can challenge the authority of parliaments, and if parliaments remain constitutionally responsible for designing or promoting these participatory mechanisms, there is little hope for these innovations. The point here is not that judges or legislators are never capable of identifying with the most disadvantaged members of society, or of working to promote greater participation; rather, it is that the effective implementation of the mechanisms and rights associated with the radical constitutional model

48. Rickard Lalander, “Neo-Constitutionalism in Twenty-first Century Venezuela: Participatory Democracy, Deconcentrated Decentralisation or Centralized Populism?” in D. Nolte and A. Schilling-Vacaflor, *op. cit.*, p. 165.

49. *Ibid.*, p. 181.

50. R. Gargarella, “Latin American Constitutionalism Then and Now,” *op. cit.*, p. 152.

51. *Ibid.*, pp. 147-150.

requires a particular social and institutional framework, which is not usually recreated or preferred but is presumed to be indispensable to render the constitutional model truly functional.”<sup>52</sup>

## V. CONSTITUTION-MAKING ISSUES

This section offers some broad observations about drafting processes and institutional frameworks, the main contentious issues that arise during drafting process and the challenges of adoption and coming into effect.

As regards process and institutional frameworks, most of the countries in the region require legislative approval of new constitutions or constitutional amendments (in most cases, two-thirds majority approval is required, with the exception of Uruguay, Bolivia and Ecuador, where a referendum suffices; in El Salvador and Panama, two consecutive legislatures must give their approval; in Mexico the state legislatures must also approve change). Some call for the establishment of constituent assemblies (Bolivia, Costa Rica, Nicaragua, Paraguay and Venezuela require this for new constitutions, and Argentina for new and amended ones); others require referenda or plebiscites (Bolivia, Ecuador, Guatemala, Paraguay, Uruguay and Venezuela).

Over the last years, the idea that a highly participatory assembly is necessary to ensure legitimacy has gained much traction. Extensive popular consultations were undertaken in the Dominican Republic, Venezuela, Bolivia and Ecuador in the drafting phase, in some cases including sectors who had never participated historically in such high-level politics (indigenous, Afro, peasant and women’s groups). However, it has also been pointed out that participatory processes it may actually increase the likelihood of conflict and failure.<sup>53</sup> Constitution-making moments differ from ordinary politics not in terms of “the motives of the actors” but because of “the absence of stable rules and institutions. Constitution-making is often undertaken in situations in which existing political institutions have broken down, and the constitution-making process itself is often a challenge to the legitimacy of remaining institutions. The absence of the channelling functions played by political institutions during normal periods can make constitution-making moments particularly dangerous: strong-men or individual parties can manipulate temporary majorities in order to reshape the political system in a manner that is not conducive to competitive democracy.”<sup>54</sup>

It has also been claimed that constitutional politics are a higher form of lawmaking with dynamics that differ from those shaping ordinary politics, and that a deliberative process in which the role of groups and institutional interests are set aside is the best way to go.<sup>55</sup> However, it has been pointed out that “achieving deliberation and transformation through constitution-making is unrealistic in certain situations” and in some contexts, the best one can do is “not to achieve a higher form of lawmaking but rather to constrain unilateral exercises of power.” Venezuela and Bolivia show that “if political forces in assemblies are left unconstrained or poorly constrained, they can reshape politics to create

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52. *Ibid.*, p. 150.

53. David Landau, “Constitution-making Gone Wrong,” at: <http://law.mc.edu/files/6413/3397/7799/Landau.pdf>, accessed 14 September 2012.

54. *Ibid.*, p. iii.

55. *Ibid.*, p. 3.

a quasi-authoritarian regime (as occurred in Venezuela), or their attempt to impose a constitution on a reticent minority may create a constitutional breakdown (as nearly occurred in Bolivia).<sup>56</sup>

This is a view of constitution-making “as an essentially preservative rather than transformative process: it seeks to avoid worst-case outcomes that come from abuses of the process.”<sup>57</sup> This is not altogether unwise for a region that is characterized by a tendency towards grand projects but with a long history of abuse of power.

The impact of ordinary politics on constitutions become even more apparent when we speak of amendments rather than replacements: “the role of ordinary politics in constitution making processes has been underestimated by the focus on the enactment of new constitutions and the neglect of amendment processes. This inattention to amendment processes is probably a consequence of the central role that the American constitutional tradition plays in constitutional studies, and to the extreme rigidity of the American constitution that makes amendment processes rare events. In any case, as soon as amendment processes are included into the picture the extraordinary character of constitutional politics is called into question, and the study of the role of ordinary political actors and their ordinary motivations play in constitutional design gains importance.”<sup>58</sup>

## CONSTITUTIONAL REFORM AS A MEANS TO POWER

One example of how constitutional reform can be subjected to political pressures and manipulated by office-holders to their own advantage is the tendency for democratically elected leaders to hang onto power beyond their initial legally established mandates, by changing constitutional prohibitions on re-election. Since 1992, eleven countries have reformed constitutional rules to end the prohibition on presidential re-election, or to permit immediate re-election, or even to eliminate limits on the amount of times the same president can be elected. Unsurprisingly, many of these reforms benefited the sitting president, permitting their re-election.<sup>59</sup>

This tendency, accompanied by growing executive law-making powers, poses some potential problems for democracy in the region. Given that most Latin American constitutions have been and are presidential, the powers of the presidency have been broad (including dissolution of the legislature, appoint and cabinets, and emergency powers), but in the twentieth century law making powers became almost universal after 1979). Some argue that this concentration of power and the erosion of the separation of powers it entails are simply a result of the complex demands posed by modern government, and highlight that this trend has also been accompanied by strengthened legislatures.<sup>60</sup> But others see it as a more recent manifestation of the historical tendency toward tyranny and for the accumulation and prolongation of power.

56. *Ibid.*, p. i.

57. *Ibid.*, p. 2.

58. Andrea Pozas Loyo and J. Ríos Figueroa, “Ordinary Politics in Constitution-Making: Supreme Court Influence in the Design of Judicial Councils,” paper prepared for the Symposium on “Constitutionalism in Latin America,” University of Texas Law School, 4-6 March 2011, at: [http://www.texasrev.com/sites/default/files/images/Symposium2011\\_RiosFigueroa.PozasLoyo.pdf](http://www.texasrev.com/sites/default/files/images/Symposium2011_RiosFigueroa.PozasLoyo.pdf), accessed 14 September 2012.

59. Presidents Menem (1989–1999), Fujimori (1990–2000), Chavez, Cardoso (1995–2002) and Uribe (2002–2010) and Morales were re-elected after constitutional reform.

60. J.A. Cheibub, Z. Elkins and T. Ginsberg, *op. cit.*

## BRAZIL: CONSTITUTIONALISING PUBLIC POLICY

If a society shapes a constitution, the reverse is also true: a constitution can shape “ordinary politics.” The Brazilian case illustrates the difficulties that emerge when constitutions include provisions that go beyond basic principles and cover public policy issues. As Couto and Arantes explain in their work on the subject, such constitutions will “trigger a permanent process of constitutional amendment” as “public policies address problems that arise in everyday political processes, so when they become constitutional norms they shift the interests of political actors to the constitutional arena, and oblige them to engage in *constitutional politics* if they want to advance governmental agendas.” Further, a text that constitutionalizes public policies deprives political actors – particularly opposition forces – of “the opportunity to alter ordinary policies through a regular political process and requires them to work to change the constitution.”<sup>61</sup>

The 1988 Brazilian constitution is a policy-oriented text, with a relatively flexible amendment rule (three-fifths approval by deputies and senators in two voting sessions in each chamber) and an active constitutional control system.<sup>62</sup> In this context, instead of “freezing the framework of preferences and interests in force at the time,” the nature of the constitution has led to an ongoing process of amendment. Between March 1992 and July 2010, 72 constitutional amendments were approved: a total of 72 amendments in 19 years.<sup>63</sup> Although the Lula government did not propose constitutional reforms in his electoral platform and his party opposed the constitutional reformism of Cardoso, the rate of constitutional amendments of his and Cardoso’s administrations was practically the same. This shows that the rate of amendment is inherent in the nature of the constitution rather than ideological or the result of another cause external to the constitution.

Some scholars believe that this has not made governability more of a challenge, but others argue that the constitutionalisation of public policies may make it more difficult to implement new policies swiftly and relatively inexpensively.

## THE COSTS OF AFFIRMING ECONOMIC SOVEREIGNTY

One innovation in the most recent constitutional reforms – one which has led many observers to say that Latin America has returned to a left-wing nationalism akin to that which preceded the onset of right-wing authoritarian rule in the 1960s and 1970s – has been the attempt of political actors to gain control over and nationalise key natural resources.

This move reflects a rejection of the perceived high costs (to health, the environment, food security, physical integrity, among various others) and insufficient benefits of participation in a liberalised international market which favour “foreign” interests and transnational or multinational companies, the desire to have more control over the environmental impact of extractive industries in the hands of

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61. Rogério B. Arantes and Claudio Couto, “Constitutionalising Policy: The Brazilian Constitution of 1988 and its Impact on Governance,” in D. Nolte and A. Schilling-Vacaflor, *op. cit.*, p. 208.

62. There are 1,627 provisions in the main text of the 1988 constitution (excluding the Temporary Constitutional Provisions Act), of which 30.5 per cent relate to public policies; and 69.5 per cent to constitutional norms proper. On this and what follows, see: R. Arantes and C. Couto, *ibid.* pp. 203-220.

63. This includes six revising constitutional amendments (*emendas constitucionais de revisão*). *Ibid.*, p. 213.

outsiders who do not seem to care about the preservation of the health and suitable living conditions for local populations, as well as the need of central states to garner more resources to undertake their transformative political projects. For indigenous populations, the key attraction of a nationalising position is the prospect of gaining control over their territories and resources therein, from which they have been historically alienated.

Predictably, as Mueller-Hoff explains, nationalisation and the concomitant change in “game rules” has generated much conflict and resistance on the part of the national and international actors who were benefiting from the prior neo-liberal dispensation, so favourable to private enterprise and so compliant with international investment rule and stability clauses (which state that the legal environment cannot change to the detriment of investors).<sup>64</sup> The fact that new constitutional laws make certain natural resources the inalienable property of “the people” and state that foreign businesses must submit to national jurisdiction conflicts with international agreements that the nationalising countries entered into previously. Withdrawal from such international agreements may resolve the problem for future investments, but not for already existing ones. Transnational actors have responded to this shift by filing suit against nationalising states, with astronomical costs for countries that are already quite poor.

One example of the potential risks and costs is the conflict between Texaco and the Ecuadorian state. Texaco exploited oil fields in the eastern Ecuadorian rainforest between 1964 and 1992, and in 1993 indigenous communities filed suit against Texaco for health and environmental damages, specifically contaminating water with oil waste and causing increased cancer rates in the area. In 2001, Texaco was taken over by Chevron, which has engaged in every sort of legal stalling tactics to deny Ecuadorian jurisdiction, including making compensation claims against the Ecuadorian state with international arbitration organisations. In 2011, an Ecuadorian court finally ruled that Chevron had to pay USD 9.5 billion and issue a public apology. However, this is a pyrrhic victory, since Chevron’s international arbitration claims have led to a decision that Ecuador should pay USD 700 million in damages: “This is equivalent to about 7.2 per cent of the annual total income of the Ecuadorian state [...] but to only roughly 3.7 per cent of the annual net income of Chevron in 2010, the annual net income of which is about double that of Ecuador.”<sup>65</sup>

Cases such as these exist not just in countries, like Ecuador, which have opted to nationalise, but in various Latin American countries. The leverage that multinationals, backed up by investment and trade agreements that these countries have signed, and the rules of international organisations and arbitration institutions that they have become parties to, “pose massive financial risks,” and highlight how costly independence and indeed “sovereignty” can be.<sup>66</sup> Thus far, “the region’s new constitutional systems have not yet shown a structural capacity to control such tendencies and to effectively de-

64. Claudia Mueller-Hoff, “How does the New Constitutionalism Respond to the Human Rights Challenges posed by Transnational Corporations?” in D. Nolte and A. Schilling-Vacaflor, *op. cit.*

65. *Ibid.*, p. 341. Mueller-Hoff says there were 27 proceedings filed with the ICSID between 1966 and 1993 and that since 1998, there has been an average of one case per month. She also states that Ecuador had had 14 cases filed against it until 2008, and ranked fourth in the world, but the figures will be much higher if one takes into account not only the ICSID but the various international dispute resolution, such as the International Chamber of Commerce (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce, the London Court of Arbitration, the UNCITRAL; the Hague Permanent Court of Arbitration (HPCA), and several further regional entities and mechanisms. *Ibid.*, p. 342.

66. *Ibid.*, p. 342.

defend the public interest against them.”<sup>67</sup> It may be that international human rights law could help to counteract these tendencies. Certainly, “if we look at the power and influence that international public and private, individual and multilateral actors exercise over other states and their peoples, the conclusion should be that it is incumbent upon the international community to take on board the extraterritorial realization of international human rights. This applies particularly to the activities involving international financial institutions, and international trade relations [otherwise]the international community will be complicit in obstructing the ability of national constitutions to defend and provide human rights guarantees in favour of international private and public business interests.”<sup>68</sup> But this is not likely to come about in a hurry. International human rights law is still in a nascent state and largely “toothless.”

## VI. CONCLUSIONS

A key feature of the new constitutions of some Latin American countries and of recent judicial reforms is the inclusion of a very broad range of rights.<sup>69</sup> This has led critics to claim that the political and material conditions to make those rights effective are scant or non-existent, so these texts are nothing but papers full of promises. Others note that citizens may lose faith in their democracies if they observe that all the rights they are granted on paper do not become a reality.

In response to such criticisms, it has been argued that “dormant rights” are worthwhile, since they act as a platform for civil society to mobilize and litigate to ensure they become a reality: “constitutional ‘dormancy’ does not mean constitutional rights are null or meaningless... ordinary people can ‘awaken’ those dormant rights, noting that they apply and can be exercised... a dormant clause may surprisingly or even surreptitiously come to life; it may be awakened from its torpor.”<sup>70</sup> Indeed, “without the inclusion of new rights today, there can be no judicial recognition of new rights tomorrow.”<sup>71</sup> Further, as noted above, many of the new constitutions provide mechanisms for citizens to demand that their rights be realized in court.

This has certainly happened in Latin America over the last decades. Indigenous rights, women’s rights and gay rights have gathered force as non-governmental organisations, political parties, and other national and international organizations have mobilized to “put their money where their mouth is.”<sup>72</sup> Constitutional rights and an active civil society are not the only conditions for rights to become a reality. There must also be sufficient levels of judicial independence, the instruments for citizen appeals must be effective and easily accessible, judges must be minimally sympathetic to rights causes, and civil society organizations and individuals must have access to the necessary know how to take action.<sup>73</sup>

67. Ibid, p. 343.

68. Ibid, p. 344.

69. Gargarella invites us to compare the seven articles and twenty or so amendments to the US constitution with the more than 400 articles of the Brazilian, Ecuadorian or Bolivian constitutions. R. Gargarella, “Latin American Constitutionalism Then and Now,” op. cit, p. 153.

70. Ibid, p. 154.

71. D. Nolte and A. Schilling-Vacaflor, op. cit, p. 26.

72. The more positive effects of what has been called the “justice cascade” have been studied by Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: W. W. Norton & Co., 2001.

73. As shown in the study of Colombia and Mexico by Rios-Figueroa, op. cit, p. 267-287.

All this against a particular historical backdrop: there has always been a tension in Latin America between *hecho* and *derecho*. The history of Latin America is not the history of the absence of state and law, but rather of the selective ignoring of well established rules and laws, and the co-existence of rule-based relations and other forms emerging from patronage, clientilism and other non-“rational” forms of power mediation. Put differently, “legal formalism, combined with substantive discretionality, has been the hallmark of public administration throughout Latin America across several centuries.” Thus, “the question at issue is not how to introduce public accountability where it had never previously existed, but rather how to redesign, focus, and render effective practices that have long been subject to manipulation and abuse, and that have therefore traditionally been viewed with cynicism.”<sup>74</sup>

If the problem is not the absence of institutions then the solution may not be the creation of new ones but the adaptation of existing ones. “The problem is that the existing, often very venerable, institutions often lack ‘teeth’, and their coverage is uneven and uncertain. Instead of operating uniformly and according to plan, they may become inflexible and oppressive in some areas and virtually inoperative in others. In both they may be dominated by informal practices and special interest capture.”<sup>75</sup>

Ultimately, even the best sort of constitutional texts and judicial reforms are only the starting point for the development of a healthy polity and of the predictability, legitimacy and security that comes from embedded rule of law relations. The keys to success must be realism, long-term commitment to broadly consensual goals, and perseverance and patience in the face of the many setbacks thrown up by democratization, particularly where there is a long history of state abuse, social and political exclusion and marginalisation of key population sectors, and a social welfare deficit.

74. L. Whitehead, *op. cit.*, p. 135 and p. 136, respectively.

75. *Ibid.*, p. 138.

# CONSTITUTIONAL REFORM IN BOSNIA AND HERZEGOVINA

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BY DENISA SARAJLIC-MAGLIC

## I. CONTEXT - CONSTITUTION THROUGH A PEACE AGREEMENT

The constitution of Bosnia and Herzegovina (BiH) is contained in Annex IV to the Dayton Peace Agreement. It was designed and proposed by international peace-makers, and accepted as a part of the peace treaty. The constitution of BiH has never been ratified by the Parliament. The original version exists only in English and French languages and there has never been an official translation into the local languages. The Peace Agreement was signed in 1995 following almost four years of very violent conflict, in the wake of an international military intervention after genocide was committed in Srebrenica in July 1995. The primary purpose of getting the warring parties to come to an agreement under international supervision and facilitation was to end the war and stop the bloodshed. However, the Dayton Peace Agreement (Dayton) had another purpose - to define a new constitution. This meant that the Agreement had to bring peace between the parties at war, while at the same time negotiating a power-sharing mechanism. It can also be said that defining the power-sharing system was the ultimate condition for making peace.

As a result, Dayton put in place a very complex institutional structure which was a reflection of compromises made in search of peace and of a political settlement. Unfortunately, the compromises that were embodied into the power-sharing mechanism were not themselves sufficient guarantees that the new system would function. Moreover, the nature of those compromises, and the fact that large concessions were made in order to meet the opposing demands of the negotiating parties, meant that the decision-making system had to be based on finding a lowest common denominator within the power-sharing system. What forced the search for the lowest common denominator were mechanisms for the protection of individual national interests that have been built into the power-sharing system. The mechanisms for the protection of national interests demanded an overreliance on a high degree of political will, which then became the fabric underlying the functioning of the power-sharing mechanism. In practice this means that absence of political will by any party can bring the system to a halt. Due to this perpetual and often time-consuming search for compromises and policies of the lowest common denominator, the power-sharing structure built into the BiH constitution is inefficient, complex and, in some aspects, discriminatory.

However, an even more important aspect of the dysfunctionality of this arrangement is the problem of democratic legitimacy and the effects that such a system of governance has on the quality of de-

mocracy, even seventeen years after the signing of the agreement. This can be attributed to a lack of vision how to build a democracy during peace negotiations and while designing the constitution. Due to a focus on finding peace through a power-sharing arrangement, democracy-building was undermined during state-building. Having recognised this, there have been several attempts to improve the constitution over the past ten years. It is important to note that so far all of the formal efforts to reform the constitution were either led or supported by the international community, while domestic initiatives for constitutional reform stayed at the level of public debates within civil society.

## II. CONTENT – DEMOCRACY-BUILDING VS. STATE-BUILDING

The ethnic composition of the territorial units within BiH became highly homogenous due to the conflict, which involved massive population movements and ‘ethnic cleansing’. The population of Republika Srpska thus became predominantly Serb while seven out of ten cantons in the Federation of BiH<sup>76</sup> have predominantly Bosniac or predominantly Croat population, leaving only three with mixed populations. These demographic changes within individual territorial units were caused by the conflict and were then enshrined in the constitution. The very process of designing the new constitution was initially compromised by the dominance of ethnicity because of the way in which peace negotiations were approached. This was evident from the fact that the sides which were invited by the international community to negotiate the Peace Agreement represented their respective ethnic groups, and their negotiating positions primarily concerned the protection of the ethnicities they each represented.<sup>77</sup> Due to the approach in which the sides negotiating peace also negotiated the power-sharing design, they were each compelled to focus on protection of their respective ethnic group, while less attention was paid to the way in which the new institutions would be made more democratic or functional. The new domestic institutions were thus designed against international human rights norms from the very start, as the constitution ensured more rights for the collectivities, i.e. ethnic groups, than for individuals. This has *de facto* created ethnically homogenous electoral constituencies, which create mirror image ethnic/territorial divisions at the level of political representation in the state, in the Presidency, the Parliament and in all executive institutions. It can thus be said that content-wise, two particular aspects of the constitution impede democracy-building and functionality of the state.

First, the constitution contains discriminatory provisions which favour three ethnic groups and thus disadvantage all other ethnic groups as well as individuals without any ethnic affiliation. As already discussed, those provisions were products of the very process through which the constitution was designed.

- (i) The state level – with Presidency, bi-cameral Parliament, and Council of Ministers;
- (ii) Two entities – Republika Srpska and Federation of BiH – each with their own presidents, bi-cameral parliaments and governments;

76. Created as a part of the Washington Peace Agreement between Croats and Bosniac

77. Even though the delegation representing the internationally recognised Republic of Bosnia and Herzegovina was formally not representing any ethnic groups, and was itself in fact of multi-ethnic composition, negotiations were carried in a way that treated them as a side representing primarily Bosniacs.

- (iii) Within the Federation of BiH, ten cantons – each with a parliament and government;
- (iv) One district – Brcko;
- (v) 142 municipalities.

Even though the flaws in the new constitution were evident to its designers<sup>78</sup> at the very beginning, they considered it a temporary arrangement that had the primary purpose of achieving and sustaining peace until such time as its undemocratic aspects could be addressed.

### III. PROCESS – CONSTITUTIONAL REFORM UNDER AN INTERNATIONAL UMBRELLA

The flaws in the functioning of the Dayton-created institutions were apparent from early on, but were formally addressed for the first time by the Council of Europe after Bosnia and Herzegovina gained membership in April 2002. Based on Opinion No. 234 (2002) of the Parliamentary Assembly of the Council of Europe,<sup>79</sup> BiH assumed a series of post-accession commitments. Commitment III.c obliged BiH authorities “to examine continuously the compatibility of legislation with the European Convention on Human Rights”.<sup>80</sup> The Council of Europe initially addressed this issue by organising a conference on compatibility of legislation of BiH with European Convention on Human Rights and its Protocols and Case-law in Sarajevo on 12-13 December 2002. Meanwhile, the Venice Commission of the Council of Europe issued a number of opinions which discussed in detail specific provisions of the BiH constitution and election law and gave concrete proposals for changes. When Protocol 12 of the European Convention became effective on 1 April 2005, it strengthened guarantees for the protection of the right to equal treatment without discrimination.

However, the issue of constitutional change was not brought into the public domain prominently until 2005. In late 2005 and spring 2006, a US-led effort to reform the constitution led to the formulation of the ‘April package’ of constitutional reforms. It was first initiated by a former US diplomat, Ambassador Donald Hays.<sup>81</sup> Ambassador Hays returned to BiH after the end of his mission in the Office of the High Representative, this time as an expert of the US Institute for Peace. He helped set up a local NGO under the name ‘Dayton Project’, and involved some of the original American legal drafters of the Dayton Agreement. The project embarked upon a mission to engage as many local political leaders as possible in a reform effort to change the constitution. Through a consultative process involving many political actors, and also by organising public debates throughout the country, they came up with a comprehensive package that had the support of most political parties and got full backing of the international community. One of the most important changes this pack-

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78. European Court for Human Rights, *Sejdić and Finci v. Bosnia and Herzegovina* (27996/06 and 34836/06) judgement, para. 45.

79. Opinion No. 234 (2002) of the Parliamentary Assembly of the Council of Europe <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EOP1234.htm>

80. *Ibid.*

81. Ambassador Hays had previously served as the Principal Deputy of the High Representative of the International Community, an office with the executive mandate given by the UN Security Council to maintain peace in BiH and interpret its Constitution.

age proposed was to abolish discrimination and introduce mechanisms for election to the Presidency and the House of Peoples. The 'April package'<sup>82</sup> solutions relied heavily on previously issued opinions of the Venice Commission of the Council of Europe, and the Venice Commission also issued an opinion on the amendments proposed through the 'April package'.<sup>83</sup> The US administration provided political support from the highest level and following the occasion of the 10th anniversary of signing of the Dayton Agreement, BiH political leaders gathered in Washington in November 2005 and signed an agreement to change the constitution in the presence of then US Secretary of State, Condoleezza Rice.<sup>84</sup>

The 'April package' had the support of all major political parties in Republika Srpska and Federation of BiH, except Stranka za BiH (Party for BiH) and HDZ 1990.<sup>85</sup> As such, it had the broader political support than any other attempt to discuss constitutional reform. However, the package ended up short of two votes in the House of Representatives in April 2006. This was the first and only formal effort to date to reform the constitution.

In the four years following the failure of the April package, the political situation deteriorated dramatically with party leaders taking a very confrontational stance and intensifying nationalist rhetoric to levels unseen since Dayton was signed. In the atmosphere of amplifying ethnic divisions, parties from Republika Srpska gradually withdrew their support for the changes that had been proposed in the 'April package' and announced that they had no intention to return to that level of Dayton revisionism. The debate on constitutional reform thus came to a halt and, although elimination of discrimination remains a high priority on the agenda of international agencies, the credibility of the international agencies had been significantly shaken after the failure of the 'April package', giving them little leverage to bring up the discussion. The international community lacked mechanisms to bring it to the attention of leaders or the public.

In October 2009, the issue was unsuccessfully tabled for discussion between party leaders at another attempt to negotiate a solution outside formal institutions. These negotiations came to be known as the 'Butmir process'<sup>86</sup> and were held under the leadership of the Swedish EU Presidency, and Swedish Foreign Minister Carl Bildt personally, as well as the US Assistant Secretary of State James Steinberg.

82. This was the most comprehensive constitutional reform package to date. It sought to eliminate many flaws of the Dayton Agreement, including elimination of discrimination and changing the system of election to the Presidency and House of Peoples, reducing the powers of the Presidency and strengthening the role of the Parliament, a reform of the decision-making in the Council of Ministers, expanding the size of the House of Representatives and limiting the competence of the House of Peoples, transfer of competencies and setting up new state-level ministries in line with EU integrations, etc.

83. European Commission for Democracy through Law (Venice Commission), Opinion 375/2006, Issued on 67<sup>th</sup> Plenary Session held on June 10, 2006, upon the request from Mr. Sulejman Tihic, Bosniac member of BiH Presidency.

84. [http://www.pbs.org/newshour/bb/bosnia/july-dec05/holbrooke\\_11-22.html](http://www.pbs.org/newshour/bb/bosnia/july-dec05/holbrooke_11-22.html)

85. HDZ 1990 was formed after they split from HDZ during the process of constitutional negotiations because of dissenting opinions from a group of party members.

86. After the Butmir EUFOR base in Sarajevo where negotiations were held.

#### IV. APPLICATION – THE ROLE OF THE EUROPEAN COURT FOR HUMAN RIGHTS

Two provisions in the constitution, those regarding election to the Presidency and to the House of Peoples, have been designated as discriminatory by the European Court for Human Rights (ECHR). The case before the ECHR was filed by members of Bosnian Jewish and Roma communities, Dervo Sejdić and Jakob Finci. On February 10, 2006 and January 3, 2007, they received written confirmation from the Central Election Commission that they were ineligible to stand for election to the Presidency or the House of Peoples of the Parliamentary Assembly because they do not fulfil the criteria of ethnic origin. That privilege, according to the BiH constitution, is reserved only for Serbs, Bosniacs and Croats.

They thus appealed before the ECHR against prohibition from participating in public life.<sup>87</sup> The Grand Chamber of the European Court of Human Rights found that the applicants' continued ineligibility to stand for election to the House of Peoples of BiH lacked an objective and reasonable justification and was therefore discriminatory. The Court also held that there had been a violation of Article 1 of Protocol 12 as regards the applicants' ineligibility to stand for election to the Presidency of BiH. This case is the first ruling by the Court under Protocol 12, and it struck at the heart of the power-sharing arrangements established under Dayton.

The court ruling debates in multiple places an argument proposed in the submission by the BiH government that the disputed constitutional provisions were a result of a search for peace and as such require the power-sharing mechanisms peculiar to BiH to remain in place for the preservation of peace, and that the time may still not be ripe for a political system to be changed. However, even though the ruling recognises the need to find a peace settlement at the time, it nonetheless crucially points out the fact that BiH has since signed and ratified a number of European human rights instruments. The state has thus formally accepted European norms and has taken responsibility to implement them.

Since then, implementation of the ECHR judgement has been made a condition for the submission of a BiH application for EU membership, and the coming into force of the EU Stabilisation and Association Agreement has been delayed until there is a 'credible effort'<sup>88</sup> to implement the judgement. The judgement of the ECHR thus served the purpose of an anchor to which the EU was able to attach its further conditionality, and also to raise the public profile of the issue.

Meanwhile, because of a political deadlock that followed the October 2010 elections, EU member states tacitly agreed to delay the coming into force of the Stabilisation and Association Agreement until this basic condition was fulfilled, even though all member states had ratified the Agreement by the end of 2010. EU officials publicly declared that BiH application for membership would not be considered 'credible' before they saw a 'credible effort' in finding a solution to implement the ECHR ruling. Since then, diplomatic efforts by the Council of Europe, the European Commission, different EU Presidencies, and member states have sought to sustain pressure in order to change this constitutional provision.

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87. Proved to be in violation of Article 14 ECHR (non-discrimination) taken together with Article 3 of Protocol No.1 ECHR (right to free elections), as well as Article 1 of Protocol No. 12 ECHR (general prohibition of discrimination).

88. Wording used by EU officials.

Following the ECHR judgment, the BiH Council of Ministers set up a working group to prepare an action plan for implementation of the judgment by 29 March 2010, with a view of amending the Election Law by 15 April 2010. The goal was to have the new rules in place for the general elections scheduled for October 2010. Following a series of unsuccessful meetings of the working group, party leaders decided that the 'political atmosphere' was not favourable to constitutional changes, and this question should be addressed after the October 2010 elections.<sup>89</sup>

Following the election, the debate on changing the constitution continued on two tracks: through a formal debate in a commission set up by the BiH parliament, and among leaders of the six parties which then formed a coalition. The parliamentary commission was not able to table a formal proposal as three of the six party leaders agreed on a solution, but were not able to secure the support of the remaining three party leaders. Meanwhile, the EU gave Bosnian authorities another deadline to make a credible effort to change the constitution, 31<sup>st</sup> August 2012, which also went unmet.

## V. LESSONS LEARNED

First, regarding actors, all efforts to reform the constitution have been done under the umbrella of the international Community, or due to their pressure and conditioning. Even though the wider public, media, experts and civil society have been engaged at different stages of the process, they were not able to make a significant impact on the decision-making process.

Second, regarding timing, even though it had been recognised ever since BiH joined the Council of Europe that the constitution was in breach of human rights conventions, the EU did not make it an issue of concern for EU integration until the ECHR judgement.

Third, regarding substance, it was the US that raised the issue and led the process toward finding a solution. The important thing to note is that all along, even after the ECHR judgement, the EU never tabled any specific proposals for change, only emphasised a mere need for change.<sup>90</sup> The US, on the other hand, engaged legal teams which provided expert support and drafted proposals that were discussed in Washington and in Butmir, while the US administration and diplomacy stood behind those proposals.<sup>91</sup> The Council of Europe also provided legal assistance and was directly involved in negotiating the content of reforms.

Finally, regarding local buy-in, none of the efforts listed above have been sufficient to secure genuine domestic support for change. This can be attributed to the alternative motives of those who favour and benefit from the status quo, so that no change has been seen as rewarding enough to risk the loss of their current position.

89. <http://www.source.ba/clanak/581242614100/Nije%20realizovana%20odluka%20u%20slu%C4%8Daju%20Sejdi%C4%87-%20Finci>

90. This excludes the Venice Commission opinions, which did offer many solutions for changes and commented on the existing proposals. However, EU officials and institutions always emphasised that they had no preference for any solution.

91. Interviews with various international and domestic participants in negotiations.

## ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE NEW TUNISIAN CONSTITUTION

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BY AZZAM MAHJOUB AND SALWA HAMROUNI

The objective of this short paper is to highlight issues related to the on-going constitution drafting process in Tunisia with a particular focus on economic, social and cultural rights (ESCR). After a brief introduction on ESCR and their importance in the new constitution, specifically in regard to the popular claims and socio economic aspirations expressed during the 14 January 2011 Tunisian revolution, the paper describes the constitution drafting process, analyses the contents of the draft constitution and discusses controversial issues related to ESCR as reported in the draft constitution.

### I. INTRODUCTION

The universal system of human rights protection is based on a holistic view of rights: they are universal, interdependent and complementary. Indeed, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted on the same day as the International Covenant on Civil and Political Rights. The ICESCR guarantees rights to a decent life including the right to work (Articles 6 and 7), the right to association (Article 8), the right to social security (Article 9), the right to an adequate standard of living, including adequate food and housing (Article 11), the right to health (Article 12) and the right to education (Article 13) and the right to participate in cultural life and to take advantage of scientific progress (Article 15).

In Tunisia, the founders of the young independent state did not include ESCR in the constitution of 1959. Only the preamble stated that the republican regime was “the most effective one to protect the family and the citizens’ rights to work, health and education.” It took a few years for the Tunisian courts to recognize the constitutional guarantee of human rights, including ESCR, as expressed in the preamble, giving the later the same legal value as the rest of the constitutional text.

Social concerns were the driving engine of the 2011 Tunisian revolution. The first sparks of revolution were seen in a popular uprising in Tunisia’s southwest mining cities in 2008 but were harshly repressed by the former regime. The first protester slogans of December 2010 concerned the right to work and to equal opportunities for development and dignity. The main trade union organization, the Union Générale Tunisienne du Travail (UGTT), relayed the socio-economic claims of the protesters and engaged activists to defend the socio-economic interests of vulnerable and middle classes. The

UGTT played a key role in the collapse of the former regime, in particular by launching regional strikes and a general strike on 14 January, forcing then-President Ben Ali to flee. Socio-economic issues are central to the on-going transition process: the new National Constituent Assembly (NCA) and the government elected in October 2011 are challenged by the development of sharp poverty and vulnerability traps, regional disparities, high unemployment, continuing job vulnerability and deterioration in the quality of education and health care.

## II. ESCR AND THE CONSTITUTION DRAFTING PROCESS

ESCR are on the agenda of the NCA, which has committed to draft a new constitution in line with the main claims of the revolution: Dignity, Freedom and Social Justice. Once elected, the NCA adopted rules of procedure which allowed it to establish its mode of operation for the constitution drafting process. Six constitutional committees were created:

- (i) Committee in charge of the preamble, general principles and revision of the constitution;
- (ii) Committee on rights and freedoms;
- (iii) Committee on legislative and executive power and relations between them;
- (iv) Committee on constitutional bodies;
- (v) Committee on justice (ordinary, administrative, financial courts);
- (vi) Committee on local and regional public authorities.

Article 42 of the NCA's Rules of Procedures indicated that the composition of the committees should reflect that of the NCA (proportional representation), which gave a plurality of seats to the Islamist Ennahda party with 9 seats out of 22 on each committee. Obviously, this political configuration of the committees greatly influenced the outcome, despite the fact that all the members are committed to reach consensual agreements on controversial issues.

In order to avoid any potential blame for lack of neutrality, the NCA committees decided early in the process to start the constitution drafting from scratch. In other words, they decided not to take as a base reference any particular draft constitution proposed by political parties (e.g. Afek Tounes party, Ennahda Party, Labour Party) or civil society organizations (e.g. Doustourouna, UGTT, Committee of Experts). This decision complicated the process, raised contradictions, nourished heterogeneity and repetitions and created difficulties in synthesis. This clearly appeared clearly in the first draft of the constitution submitted in August 2012, as well as in the second draft of December 2012.

Regarding ESCR, two commissions were involved in the drafting process: one related to the preamble and general principles and the second dealing with rights and freedoms. Unfortunately, no

permanent expert group has been designed to assist the different committees on a permanent basis. However, on many occasions experts have been consulted for particular issues but this procedure of occasional expert hearings resulted in mistakes in many formulations in the two first drafts. A relative distrust of international law among the committee members also contributed to inefficiency in the writing of the drafts. Public commissions have made efforts to develop a consultative process together with civil society organizations (CSOs). The participatory approach consisted of organizing sessions with associations at both national and local levels to register their concerns. It is difficult, for the moment, to evaluate to what extent those concerns have been, or shall be, effectively taken into account because the process is still on-going. But it is clear that CSOs have been very active and play a valuable role in influencing the output of the constitution drafting process.

A first draft was published in August 2012: it was a synthesis by an ad hoc group of the many outcomes of the six committees. This controversial draft provoked heated public debate. The second draft took into account the criticisms made by civil social society activists and many corrections and readjustments were added to the second draft.

### **III. ESCR IN THE PREAMBLE AND GENERAL PRINCIPLES**

There are few references to socio-economic issues in the Preamble and General Principles of the draft constitution. The three main claims of the Revolution are cited: Freedom, Dignity and Social Justice, with 'Dignity' being added to the previous official motto of 'Freedom, Order and Justice'. The Preamble also describes a new rupture with injustice and corruption, equality between all citizens, categories and regions, and a call for brotherhood and social solidarity. Few words were added regarding the necessity to preserve the environment for the future generations. Article 7 guaranteed individual and collective rights for all citizens and committed the state to provide all the conditions for a life with dignity.

In regard to the deeply socio-economic nature of the Tunisian revolution, many analysts and civil society activists objected that the spirit of the revolution, rooted in popular social demands, is missing and that references to ESCR issues are too few, very brief, evasive, incomplete and don't meet the expectations. Moreover, in comparison with many other constitutions, the Preamble and the General Principals are less consistent and less significant.

The right to development (associated with genuine social justice and a protected environment) deserves more emphasis and to be more clearly referenced and formulated. Unfortunately, the Preamble does not explicitly mention attachment to the universal human rights model (including the ICESCR and the Vienna Declaration on the Right to Development already ratified by Tunisia). This omission, whether voluntary or involuntary, may have been the result of political and ideological bias. Proposals have been discussed which would include an explicit paragraph in the Preamble and one or two articles in the general principles to deal specifically with ESCR items.

The socio-economic nature of the state has yet to be discussed in the constitution along with its civil and democratic nature. It is important that the Preamble be faithful to the spirit of the revolution and its main objectives and reflecting popular aspirations. The Preamble should:

- Ensure genuine, fair, inclusive development for all,
- Provide for gender equality and non-discrimination of any kind (due to social, physical, regional or religious differences),
- Ensure support for human dignity by realizing basic human welfare for all, particularly for those who suffer from deprivation, exclusion and humiliation. Social justice, economic development and environment sustainability have to be recognized as prerequisites.

Moreover, a separate article must be devoted to the ESCR in the General Principles chapter: the State must recognize the right to development based on equality and sustainability, including ESCR as formulated in approved international covenants, and should be committed to keep its related obligations by taking appropriate steps to safeguard ESCR and to achieve, progressively and effectively, their full realization.

#### **IV. ESCR IN CHAPTER 2 RELATED TO RIGHTS AND FREEDOMS**

There is no separation between ESCR and political and civil rights. ESCR are first introduced in Article 27 with 'the right to work' («Work is a right for every citizen. The State will provide all the necessary efforts to ensure decent and fair conditions») and in Article 28 with 'the right for trade union organization' («The right to trade union organization is guaranteed, including the right to strike, provided that it does not threaten people's health and security.»)

The right to education has been affirmed by Article 29: «the State guarantees the right to public education at all levels and for all.» Education is compulsory until the age of 16. Freedom of academic and scientific research is affirmed in Article 30 with the indication that the state will provide the necessary means to promote them.

The right to health has been addressed in Article 31 of the draft. It states that «health is a right for every human person,» and that «the State guarantees the prevention and health care for all citizens without discrimination.» The state also guarantees «free health care for low-income people.»

Article 32 deals with social protection: «the State guarantees the right to every individual to social security including social insurance as laid out by law.» Articles 33 and 34 emphasize the rights for a healthy, well preserved environment, stressing the right to water and the national obligation to protect and manage all natural resources, including water.

Obviously, there is a significant improvement compared to the constitution of 1959 with the affirmation of ESCR. However, as mentioned above, there is not a clear and full commitment of the state to keep its obligations, and the two main principles on gender equality and on non-discrimination are not sufficiently addressed.

It is true that the ICESCR recognizes that states must realize all these rights progressively, but the same covenant requires that states will take all appropriate measures to guarantee the rights. For the right to work, other constitutions refer to decent work as currently defined by the International Labour Organisation (access to productive work with fair and secure conditions) and indicate that in order to ensure this right the state is charged to implement full employment policies with no discrimination of any kind, and to promote equal opportunities in the choice of profession (see for example Articles 58 and 59 of the Portuguese constitution detailing the right to work and the precise obligations of the state). Article 31 of the Moroccan constitution of 2011 provides, for example, that «The State, public institutions and local authorities are charged to mobilize all means available to facilitate equal access of citizens to the conditions allowing them to enjoy the ESC rights”.

The most controversial issue for the right of work concerns the right to strike. The UGTT trade union opposed restrictions on the right to strike related to health and security threats in the current constitutional draft. According to the ICESCR, the exercise of this right complies with national law provided that it would not prejudice or attempt to disrupt core rights. Moreover, the UGTT claims the necessity to insert the right to social dialogue between social partners in the constitution.

Other rights were also affirmed, but not thoroughly. This is the case for the right to education which does not match the requirements of the ICESCR, which includes the quality of education. On the other hand, the right to education must include a preschool system, technical and vocational training for workers and the eradication of illiteracy.

When dealing with the right for health, there is no reference to required standards in public as well as private healthcare. Motherhood, infant and childhood specificities must be mentioned as long as rural areas are still suffering from high mother and infant mortality.

Regarding the right to a healthy environment, there is a significant progress, as rights to water and to sustainable development are clearly stated, but some confusion must be avoided and a better, more complete formulation is needed. The right for everyone to enjoy a healthy and well preserved environment must include rights to access to appropriate related information and to participate in the decision making process in the projects and programs that have an impact on the environment; everyone should be engaged in helping protecting the environment. Moreover, the state guarantees the right of every citizen to sustainable development, thereby also ensuring social justice, economic growth and environmental protection. This precision is necessary to erase ambiguity about the notion of sustainability.

Finally, a very important right has been omitted: the right to an adequate standard of living, including adequate nutrition standards (quantity and quality), adequate housing (access to safe water and

sanitation) and the improvement of living conditions. There is only one reference to this issue (in the chapter on General Principles) which considers the state's commitment to provide the conditions for a decent life ('a life with dignity') but it is necessary to introduce a specific article to enshrine this essential right, particularly since this right reflects the core of the claims of the Tunisian revolution. It requires the state to implement appropriate fair policies to eliminate poverty, infant malnutrition, and unacceptable housing conditions.

In conclusion, the hope of many CSOs is that their critiques and recommendations to fix, complete and improve the current constitutional draft shall be taken into consideration by the NCA representatives. The ultimate goal is to reach a genuine national consensus for a very progressive constitution in line with the most advanced international standards and reflecting the profound spirit of the globally supported Tunisian revolution.

# THE EGYPTIAN CONSTITUTION: PROCEDURAL PROBLEMS AND A CRISIS OF CONTENT

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BY AMR EL-SHOBAKI

## EDITOR'S NOTE:

*Following Egypt's parliamentary elections in late 2011 and early 2012, a new process was designed to draft a constitution. The new parliament elected a Constituent Assembly to write the constitution but this Assembly, dominated by allies of then-President Morsi's Freedom and Justice Party, was dissolved by court order in April 2012. A second, more diverse, Constituent Assembly was then appointed and proceeded to draft the new constitution. It was completed in November 2012 and approved in a national referendum in December 2012. Despite this approval, the contents and the process of writing the constitution remained divisive. Following President Morsi's removal from power by the Egyptian military in July 2013, the future of the 2012 constitution is in doubt. The constitutional debates of the past two years remain important for today's discussions about an appropriate democratic constitution for Egypt and hold lessons for other countries managing democratic transition. This paper addresses several of the most important issues from these debates, including the role of religion in the constitution, the powers of the presidency and the role of the courts.*

## I. INTRODUCTION

The process of writing the 2012 Egyptian constitution encountered many challenges. There is still debate about the constitution and even before the fall of President Morsi, a broad movement demanding amendments, despite the constitution's passage by a comfortable majority in the December 2012 referendum. Writing a constitution is certainly not a simple process. It is a long and difficult road over which many societies have passed. Egypt chose the most difficult and perhaps worst path of all because of the bad management of the transitional period after the fall of former President Hosni Mubarak, particularly from the Supreme Council of the Armed Forces, which ruled provisionally after Mubarak's downfall.

Any experience of political transformation is faced with two paths for handling the constitution: either there should be a political vision with leaders who are capable of establishing a new constitution that reflects the transformations taking place after the fall of the old regime, which did not occur in Egypt; or there should be temporary amendments to the old constitution, as happened in Poland and other countries, until presidential and parliamentary elections can be held and agreement can be reached on a new constitution. What happened in Egypt was the abandonment of its old constitution

under pressure from civil society and revolutionary coalitions, who took advantage of the military council's weakness and confused performance, to end the use of the 1971 constitution. For the first time in Egyptian history, they opened the door to organizing a constitution-drafting process around the strength of political movements in the street. Dominance of this process went to the Islamists, led by Mohamed Morsi's Freedom and Justice Party (FJP), who felt that it was their right to draft the constitution in accordance with their vision, so long as they attained a majority in the parliament or the Constituent Assembly.

The problems with Egypt's Constituent Assembly began with the assignment of seats according to political quotas, an idea which comes from a culture that should have no relation to the writing of constitutions. Turkey's on-going constitution-drafting process, in contrast, involved the formation of a drafting committee of only twelve members. The committee members equally represented the four parties in parliament, despite the fact that the ruling Justice and Development Party (AKP) had received nearly 50% of the votes while the other three parties had received approximately 10% of the vote apiece. Each of these four parties had 3 members in the committee. Turkey's Islamist governing party did not try to control the Constituent Assembly in the way that the Islamist majority did in Egypt. Communication between Egypt's FJP and Turkey's AKP is extensive, but Egypt's FJP did not benefit from the political messages sent by the constitution-drafting committee in Turkey. Turkey's constitutional committee held dozens of meetings with representatives from unions, civil society associations and different organizations with connections to the people as a preface to establishing a new constitution for the country, which had lived under a "military" constitution for more than 30 years, though revised more than once.

The wrong start in the formation of the Constituent Assembly led Egypt to the wrong results. Ending the current crisis will not be possible without awareness by all political powers that there was a fatal defect governing the creation of the Constituent Assembly. That defect produced a constitution that did not attain a consensus amongst the country's political forces, despite the fact that the constitution received support from 63% of the voters, with approximately one-third of eligible voters exercising their right to vote.

This paper attempts to discuss the most prominent and controversial issues in the 2012 Egyptian constitution, along with their relationship to the current political crisis.

## II. SHARIA LAW AND FREEDOM OF BELIEF

Political factions were divided over the place of *sharia* in the constitution. While both secularists and Islamists agreed to leave the second constitutional article as it had been in the previous constitution, stipulating that the principles of *sharia* are the principle source of legislation, some Salafis insisted on putting the provisions of *sharia* in more than one place in the constitution. Thus, Article 219 states that "The principles of Islamic *sharia* include its general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community." This article has created more division than consensus, particularly after reservations were voiced by secular

and reformist Islamist factions. There is no sense in repeating the second article, which reflects an area of consensus, in more detailed, though still brief, interpretations of Islamic *sharia* based on the “Sunni Community” just to satisfy the Salafis.

Furthermore, due to pressures by Islamists, the constitution refrains from mentioning anything about keeping Egypt’s commitments to conventions and treaties in the field of human rights, due to concerns that a specific kind of treaties may contradict the principles of *sharia*, the values of the society and the identity of its civilization. This argument is a pretext without any truth to it, considering that the existence of Article 2 in the constitution about *sharia* as the principle source of legislation had resolved this problem by making it impossible for Egypt to sign any international agreement that contradicts the constitutional text of this article.

Egypt, which suffers from the danger of an economic and political collapse, problems with illiteracy, poverty, and corruption, and the collapse of health, education, and other services, will not solve these problems by repeating the slogan of *sharia*, regarding whose principles most Egyptians do not significantly differed, anyways. What Egypt needs are successful policies inspired by the principles of *sharia*, over whose interpretation jurists disagree, and over which the Islamist movement is divided, to the point where the movement has broken into several parties and factions that sometimes act as rivals. The fear that there will be an oppressive system that governs in the name of *sharia* is far larger than the fear that there will be a secular regime that ignores *sharia*.

With regards to freedom of belief, defined in Article 43, the 2012 constitution states that, “Freedom of belief is an inviolable right. The State shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions, as regulated by law.” This article represents a significant regression from the former constitution. The article is limited only to protecting belief, but the right to worship is much broader and extends far beyond the right to belief. Furthermore, the article is limited to the ‘divine’ religions only, which creates several issues about who decides whether or not a specific belief belongs to one of these religions.

Egyptian jurist Mohammed Qandil suggested that the preamble of the constitution, or perhaps the section on rights and freedoms, should have included the following statement: “The state is committed to international standards of human rights, contained in the Universal Declaration of Human Rights, and in the international agreements that Egypt has signed.” In composing this statement, the drafter’s goal was to direct state authorities to respect international standards of human rights, while also placing international law above domestic law, so as to encourage judges to enforce international agreements and to clarify the position of international law in the Egyptian legislative framework. In submitting this proposal, the drafter is supported by developments in international jurisprudence and constitutional law. Egypt would enter the ranks of countries that have defined international standards of human rights as an important part of their constitutions, such as some European and African countries, and even the following Arab countries: Mauritania, Algeria, Sudan, Tunisia, Morocco, Somalia, Yemen, and Iraq.

### III. THE PRESIDENCY

The debate surrounding the position of the presidency in the Egyptian constitution comes from the aftermath of the January 25 Revolution and the desire of some Egyptians to move away from a presidential system and toward a parliamentary system. This opinion is based on the belief that a presidential regime leads to authoritarianism, so that the problem in Egypt was due to the presidential system rather than the “Mubarak” system.

It is clear, however, that there are many cases throughout the world in which a democratic presidential system was established, in South America, France, the United States or many other regimes, whether presidential or mixed, and in which the president enjoys well-defined powers, which doesn't compromise the balance of powers.

### PRESIDENTIAL POWERS IN OTHER COUNTRIES

#### (i) France<sup>92</sup>

France has a semi-presidential system. The 1958 French constitution grants the president broad powers, especially in the fields of foreign and defence policy. The president appoints the prime minister, by way of consultation with parliament, as well as the most important officials of the administration, is able to dissolve parliament, and has the power to call it into an extraordinary session. The president guarantees the independence of the judiciary and appoints three members of the nine-member Constitutional Council. The president carries out negotiations and ratifications of international treaties, and possesses extraordinary powers in periods of crisis. The constitution requires that the president shares some powers with the prime minister. However, activating the president's shared powers depends on a number of conditions, including the nature of the relationship between the president and the prime minister, the political climate, and the relationship between the president and the parliament. A reduction of the president's term from seven to five years was concluded in 2002 to reduce problems resulting from periods of “cohabitation” (divided powers between the president and a parliament that may not share his political beliefs and programs).

#### (ii) Brazil<sup>93</sup>

Brazil's presidential system was established in 1889 with the end of the empire and the proclamation of a republic. Since then, the country has been governed by six constitutions and has passed through five periods of governance, two of which were authoritarian and three of which were democratic. The president of Brazil is the head of state and the head of government. The president leads the executive power and the federal government, and is the supreme commander of the armed forces. The Brazilian president holds executive power and appoints the Council of Ministers with the agreement of the Senate. He/she can enact emergency laws under exceptional circumstances. The president does not intervene in electoral, taxation, or criminal laws. The Brazilian president represents the country abroad and also enjoys important powers regarding the establishment of laws.

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92. France 24: <http://www.france24.com/ar/20120506-france-president-head-state-powers-duties-wields-significant-influence-choose-prime-minister>

93. <http://www.masress.com/almesryoon/125280>

### (iii) South Africa

The president holds real executive and legislative powers in a system that is a blend between parliamentary and presidential systems. The president of the republic is elected by the parliament, known as the National Assembly, and he practices executive powers that are shared with the ministers. The president chooses a deputy president who must be a member of parliament, while the remaining ministers and vice-ministers are from parliament, with the exception of no more than two who can be appointed by the president from outside of the parliament. The responsibilities of the ministers are attained through both the president and the parliament, since the president appoints those who are members of parliament.

As a result, the presidency in the South African constitution, despite its effectiveness, is limited to representing the legislature, so that the government's composition is truly representative in accordance with the constitution. At the same time, the president possesses serious powers and is not just an honorary president. The parliament has the right to withdraw its trust in the ministers, and if the cabinet loses a majority in the parliament, the president must create a new cabinet. The parliament also has the right to withdraw its trust in the president, and if a majority of the parliament supports the vote, the president and deputy president must submit their resignations.<sup>94</sup>

## THE PRESIDENT IN EGYPT'S 2012 CONSTITUTION

The 2012 Egyptian constitution defines the powers of the president in Part III: Public Authorities, Chapter Two: Executive Authority, Section 1: The president.<sup>95</sup> Some of the key articles defining the position are:

- Art. 132: The president is Head of State and chief of the executive authority.
- Art 133: The president is elected for four years and may be reelected once.
- Art. 134: presidential candidates must be Egyptian citizens born to Egyptian parents, must have carried no other citizenship, must have civil and political rights, cannot be married to a non-Egyptian, and cannot be younger than 40.
- Art 135: Candidates must be recommended by at least 20 elected members of the House of Representatives and the Shura Council, or endorsed by at least 20,000 citizens who have the right to vote, in at least 10 governorates, with a minimum of 1,000 endorsements from each governorate.
- Art 136: The president is elected by direct secret ballot with an absolute majority. The procedures for electing the president shall be regulated by law.
- Art: 139 The president appoints the prime minister, who shall form the cabinet and present it to

94. <http://www.arrasid.com/index.php/main/index/33/40/contents>

95. <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>: All direct translations of the Egyptian constitution were based on the translation completed by the Egyptian Independent.

the House of Representatives. If the cabinet is not granted parliamentary confidence, the president shall appoint another prime minister from the party that holds the majority of seats. If the cabinet of that appointed prime minister does not obtain parliamentary confidence, the House of Representatives then appoints a prime minister who shall be assigned by the president the task of forming a cabinet. Otherwise, the president of the Republic shall dissolve the House of Representatives and call the elections of a new House of Representatives..

- Art. 140: The president of the Republic, in conjunction with the cabinet, shall lay out the public policy of the State and oversee its implementation.
- Art. 141: The president shall exercise presidential authority via the prime minister and the prime minister's deputies and ministers, except those authorities related to defense, national security, foreign policy, and authorities outlined in Articles 139, 145, 146, 147, 148 and 149.
- Art. 142: The president may delegate some of the presidential purviews to the prime minister, the prime minister's deputies, ministers or governors.
- Art. 145: The president shall represent the State in foreign relations and shall conclude treaties and ratify them after the approval of both the House of Representatives and the Shura Council. Approval must be acquired from both Legislative Houses with a two-thirds majority for any treaty of peace, alliance, trade and navigation, and treaties related to the rights of sovereignty or that make the State liable for any expenditures not included in its budget.
- Art. 146: The president shall be the Supreme Commander of the Armed Forces. The president is not to declare war, or send the Armed Forces outside State territory, except after consultation with the National Defense Council and the approval of the House of Representatives.
- Art. 147: The president shall appoint civil and military personnel, diplomatic representatives and shall confirm representatives of foreign countries.
- Art. 148: The president may declare, after consultation with the cabinet, a state of emergency. Such proclamation must be submitted to House of Representatives within the following seven days. In case the House of Representatives is dissolved, the matter shall be submitted to the Shura Council. The declaration must be approved by a majority of members of each body. The declaration shall not exceed six months and can only be extended by another similar period upon approval in a public referendum. The House of Representatives cannot be dissolved while a state of emergency is in place.
- Art. 150: The president of the Republic may call for a referendum that shall be binding to all state authorities and the general public in all cases.
- Art. 152: An impeachment againsty the president can be issued only by a two-thirds majority of the House of Representatives. The president shall be tried before a special court headed by the

president of the Supreme Constitutional Court, the longest-serving deputy of the president of the Court of Cassation and the State Council, and the two longest-serving presidents of the Court of Appeals; the prosecution to be carried out by the Prosecutor General.

- Art. 153: If the president is unable to carry out the presidential functions, the prime minister shall act in his place. If the presidential office is vacant, the Speaker of the House of Representatives shall temporarily assume presidential authorities. A new president must be elected during a period not exceeding 90 days. The person acting in place of the president is not allowed to run for office, request amendments to the constitution, dissolve parliament or dismiss the cabinet.

## UNDERSTANDING THE PRESIDENTIAL ROLE

Linking the idea of successful democracy only to parliamentary forms of government is a significant mistake. Assuming that parliamentary government is the only way to confront authoritarianism is an even more significant mistake. This neglects the fact that most democratic systems in the world are presidential systems. A majority of developing countries that established democracies in recent decades have done so with presidential systems, particularly in Latin America where every country created a presidential system. Presidential systems give expansive powers to the president. However, it is not absolute power, as the president is considered to be the head of the executive branch, subject to the oversight of the parliament and the people. Furthermore, the president is generally limited to two terms in power and laws can only be passed with the agreement of the parliament. There are also some presidential systems that give powers to the prime minister, such as France. These semi-presidential systems most closely resemble the situation in Egypt.

In Egypt, it has become difficult to separate the powers of the president not only from the years of the Hosni Mubarak presidency, but also from the Morsi presidency. Many who wish to constrain the powers of the president believe that Morsi had to be constrained because he is a member of the Muslim Brotherhood, and they will only wait for a liberal or leftist president before calling to grant the presidency additional powers.

Discussion of the presidential system also reflects fears of another Mubarak, which stems from serious confusion about the constitution. Some powers have been given to the Egyptian president that dominate the powers of the other branches, particularly in regards to the right of the president to appoint the head of the Supreme Constitutional Court and other judicial leaders. It is also among the president's powers, rather than the prime minister's powers, to appoint some civilian leaders in addition to military leaders. At the same time, other powers granted to presidents in other presidential systems are taken away from the Egyptian president, such as the condition that the president can unilaterally declare a state of emergency without the agreement of parliament. The constitution also grants parliament the right to request a vote of no-confidence against the president in situations where he has committed high treason, carried out a crime, exploited his influence, or violated the constitution. This provision does not exist in any presidential system, semi-presidential system, or any other mix of institutions.

More than it risks suffering from an oppressive and authoritarian government, Egypt risks presenting a model for a failed state, a state that suffers from chaos, absence of rule of law and freedoms, and the violation of its values. A developing country such as Egypt suffers from problems of poverty and unemployment. In the past thirty years, the country has witnessed corruption and a complete collapse of health, education, and public services. The country needs a presidential system that is capable of finding radical solution to these problems, rather than reproducing the same performance of the former regime, covering up problems and looking for half solutions for severe problems in order to please everybody. Those who will be displeased with a democratically elected president will be always be haunting him, accusing him of abusing his powers or even of high treason.

Egypt experienced a 2012 presidential campaign in which the majority of its candidates, particularly the strongest ones, ran without parties. The exception was Mohammed Morsi, who benefitted from his association with the Muslim Brotherhood. However, no president will not be able to do anything if there continues to be an insistence on stopping any initiative or policy with a thousand legal and political roadblocks, based on obsessions rather than true concerns.

It is true that presidents' powers are limited in all democratic states, but these restrictions exist to keep an individual from acquiring authoritarian power or remaining in power for life, not to forbid him from adopting serious policies for the sake of reform.

## IV. THE LEGISLATIVE BRANCH

### THE LEGISLATIVE BRANCH IN EGYPT'S 2012 CONSTITUTION

The Egyptian legislative branch consists of the House of Representatives and the Shura Council (Art. 82). The president, the cabinet, and every member of the House of Representatives has the right to propose laws and every draft law shall be referred to a specialist committee of the House of Representatives, which shall study it and submit a report. Draft laws presented by members of the House of Representatives shall not be referred to that committee before being first endorsed by the Proposals Committee and approved for consideration by the House of Representatives. Reasons for rejection must be presented if the Proposals Committee does not endorse a proposal for consideration. A draft law proposed by a member but rejected by the House of Representatives may not be presented again during the same legislative term (Art. 101).

Neither of the chambers may pass a bill without seeking consultation with the other (Art. 102). In case of legislative dispute between the two House of Representatives and the Shura Council, a joint committee of 20 members, 10 from each Council, shall propose re-wording of the disputed clauses for approval by each chamber. If an agreement is not reached, the case is referred back to the House of Representatives to reach a decision based on a two-thirds majority (Art. 103).

Upon legislative approval, legislation is passed to the president to sign it into law. In case the president objects to the draft law, it must be referred back to the House of Representatives. If the draft law is ap-

proved again by a two-thirds majority, it becomes law (Art. 104). In the case of the dissolution of House of Representatives, the Shura Council shall carry out joint legislative responsibilities. Any bills passed by the Shura Council during the period of House of Representatives' dissolution shall be presented to the new House of Representatives for consideration as soon as it is convened (Art. 131).

The House of Representatives may decide to withdraw its confidence from the prime minister, a deputy of the prime minister, or any one of the ministers with a majority vote. If the House of Representatives decides to withdraw confidence from the prime minister or a minister, and the cabinet announced its solidarity with him before the vote, then that cabinet is obliged to offer its resignation. If the no confidence resolution concerns a certain member of the government, that member is obliged to resign their office (Art. 126).

As outlined in Section III above, the president can dissolve parliament in a situation where the president and parliament fail to agree on the prime minister (Art. 139). The president can also dissolve the parliament "by a causative decision and following a public referendum." The House of Representatives may not be dissolved during its first annual session nor for the same cause for which the last House of Representatives was dissolved. To dissolve parliament, the president must issue a decision dissolving the House of Representatives and establishing procedures for a popular referendum on the dissolution to be held no more than 20 days after the decision is issued. If a majority of voters supports the dissolution, the president is to announce early elections to be held no more than 30 days after the dissolution. If the decision to dissolve the parliament is not carried out with all of the above procedures, or if the determined time periods for the referendum or elections elapse, the House of Representatives returns to its session with the full force of law (Art. 27).

## UNDERSTANDING THE LEGISLATIVE ROLE

The House of Representatives enjoys more expansive powers than the Shura Council, but laws can only be passed with the approval of both houses, as stipulated in Art. 102. This situation differs from the 1971 constitution, which did not require the People's Assembly (the predecessor to the House of Representatives) to receive approval from the Shura Council on most laws. There is no doubt that it is better for both chambers to have true powers in a bicameral legislature, as has been established in the 2012 constitution, than for one chamber to have ceremonial powers, as with the Shura Council in the 1971 constitution.

The power of the president has some limitations with respect to the legislative chambers. Despite the fact that the constitution gives the president the right to object to laws that have received approval of parliament (Art. 104), the last word resides with the parliament, which can pass laws over the president's veto with a two thirds majority. In addition, during a period in which the House of Representatives is dissolved, legislative power moves to the Shura Council (Article 131). This stipulation is an improvement over the 1971 constitution, which gave powers to the president under certain circumstances, as previously motioned in the paper. Limiting legislative powers to the two legislative chambers demonstrates a commitment to the principle of separation of powers.

The text concerning the appointment of the prime minister and the role of the House of Representatives in this appointment, along with the text about the vote of no-confidence in the government raises questions about the nature of the political system that has been established by the 2012 constitution. Defining the nature of the political system depends on the prerogatives of the president, Legislature, and prime minister, just as it depends on determining who appoints the prime minister, if he must belong to the parliamentary majority, and on who controls his dismissal.

Article 139, which outlines how the president and parliament must come to agreement over the prime minister and cabinet, does not require the president to appoint a prime minister from the party that acquires a majority in parliament. The House of Representatives holds the ability to reject the appointment, however, which should motivate the president to appoint a member of the winning party so as to avoid such a rejection. However, the fact that the constitution gives the president the right to dissolve parliament in a situation in which no agreement is reached means that choosing to reject the president's appointment is a risky decision for the House of Representatives that could result in its dissolution. Therefore, the article gives the president the last word in choosing the prime minister, which on this point makes the system closer to a presidential system than a parliamentary system.

The right of the president to dissolve the House of Representatives using Article 139 is granted without any restrictions that keep the president from arbitrarily exercising it. There should be restrictions on this right that regulate its practice, however, just as there are restrictions on the right of the president to dissolve parliament by using Article 127, which requires that the president receive approval in a national referendum. In all cases, the constitution would be better if the president would be able to dissolve the House of Representatives only after a public referendum.

However, despite the fact that the political system approaches the process of appointing the prime minister by way of a presidential system, as discussed above, the fact that the parliament has the right to a vote of no-confidence in the prime minister, and to force the cabinet to resign after such a vote, demonstrates that the political system also includes characteristics of a semi-presidential system (of which France is the prime example). As a result, we can see that the nature of the political system in regards to the appointment of the prime minister has not been defined with enough clarity, and it requires more discussion and development.

Regarding the power of the president to dissolve the House of Representatives as defined by Article 127, it would be preferable that such extraordinary powers for the president not exist. However, it should be noted that many of the advanced constitutions, such as France, include similar powers (Article 12 of the French constitution).<sup>96</sup> In exchange for the right of the legislature to withdraw its trust in the executive branch, as represented by the cabinet, the president has the right to dissolve the parliament. This weapon is equivalent to the weapon possessed by the parliament.<sup>97</sup> However, in granting such powers to the president, their usage must be regulated. Article 127 places several conditions on the president's use of this power:

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96. <http://www.assemblee-nationale.fr/english/8ab.asp#II>

97. *Political Systems and Constitutional Law*, Dr. Ibrahim Abdelaziz Shiha, Professor of Public Law at Alexandria University, 2005, p. 577.

- Only in case of necessity
- It requires the issuance of a causative decision by the president
- It requires the establishment of a request for the dissolution by the cabinet
- It can proceed only after receiving the opinions of the heads of each chamber
- It cannot be used during the first year in session of the House
- It requires a public referendum on the dissolution

Limiting the power of the president with a public referendum is clearly the most important safeguard for preventing the president from abusing this power. Article 127 stipulates the procedures and timeline for the dissolution, but it does not stipulate whether the president must dissolve the parliament immediately after the referendum. The importance of this omission can be seen in the fact that early elections are supposed to be held no more than thirty days after the decision is issued, and as such it would be preferable if the text of this article specified the date at which the president must issue the decision.

## **V. THE JUDICIAL BRANCH**

The 2012 constitution places the section on judicial authority in Part III: Public Authorities, Chapter Three: Judicial Authority, and it divides the chapter into six sections: general provisions, the judiciary and public prosecution, the state council, the supreme constitutional court, judicial bodies and judicial officers.

The detailed provisions of the judiciary in this chapter make it clear that the 2012 Constituent Assembly decided to unify the judicial system in Egypt and, by doing so, put an end to this highly controversial issue outside the Constituent Assembly. It was a controversy which resonated because of an earlier draft law on the unification of the judiciary that had been presented by the Minister of Justice. The draft law was rejected by the judges of the General Assembly of the Council of State and the judges of the Constitutional Court because they saw that the unification of the judiciary in one body would diminish the role of the Constitutional Court, whose rulings are binding on all state authorities, including other judicial bodies. How then, can the centres of the Constitutional Court be equal to the other legal authorities, which are supposed to follow its constitutional rulings?

The new constitution represents a regression from the 1971 constitution, which states in Article 166 that “Judges are independent. Only the law has authority over them. No other branch of government is permitted to intervene in the affairs of the judiciary.” However, Article 168 of the 2012 constitution states, “The Judicial Authority shall be independent, vested in the courts of justice, which

shall issue their judgments in accordance with the law. Its powers are defined by law. Interference in the affairs of the judiciary is a crime that is not forfeited by the passing of time.” It is clear that the wording in the new constitution is neither unequivocal nor specific on the issues of intervening in the affairs of the judiciary and influencing their rulings. It does not indicate the institutions that might interfere in the judiciary which, especially after the January 25 Revolution, has been a problem with the executive branch interfering in the judicial affairs. In addition, the constitution didn’t stipulate the consideration of not delegating judges from their posts. That is despite the fact that a consensus existed amongst all of those concerned with justice and the law in Egypt, including the judicial bodies in this regard.

In regards to the dismissal if the judges, Article 170 states that judges are independent, cannot be dismissed, are subject to no other authority but the law and are equal in rights and duties. The conditions and procedures for their appointment and disciplinary actions against them are defined and regulated by the law. When delegated, their delegation shall be absolute, to the destinations and in the positions defined by the law, all in a manner that preserves the independence of the judiciary and the accomplishment of its duties.

## PROSECUTIONS AND PRISONS

According to the second section, which concerns the public prosecution, it is clear that the Constituent Assembly limited the role of this office to prosecution rather than investigation; this might be a positive thing to separate the prosecution role from the investigatory role. This change was resisted by the judiciary and the Public Prosecutor’s office, but their complaints were not sufficient to result in its removal from the 2012 constitution. As a result of human rights violations and theft of public funds committed by the Public Prosecution prior to the revolution, this division of powers was favoured by most Egyptians, and particularly by those who worked in the law field. However, these violations stemmed primarily from the executive branch’s dominance of the judiciary and the negative role played by the justice minister in influencing public prosecution.

Perhaps the rejuvenation of the Public Prosecution’s role, whether as prosecutor or investigator, will not depend on the division of these roles, but on a set of limited standards by which the Public Prosecutor can be appointed. In particular, the office might benefit from a ban on appointing a member of the police to the position, so as to avoid a situation in which the police penetrate the judiciary. Furthermore, there should be rules that guarantee the neutrality, fairness, competence, and professionalism of the Public Prosecution.

Additionally, Article 180 explains in details the role of the Administrative Prosecutor in public prosecution. The Constituent Assembly apparently didn’t take into consideration the mutual separation between the members of different judicial bodies, the members of the Administrative Prosecutor and the State Litigation Authority, including them as judicial bodies. This may be problematic because of the lack of training and capacity of the members of the Administrative Prosecutor to investigate the criminal lawsuits. However, this issue should not overshadow the positive development of having a specific institution to prepare lawsuits on behalf of the courts and the public prosecution.

The constitution states in Article 37 that, “Prison is a place of discipline and reform, subject to judicial supervision, where anything that is contrary to human dignity or a person’s health is prohibited. The State is responsible for the rehabilitation of convicts and facilitating a decent life for them after their release.” Currently, we are not in a place to judge the rhetoric and significance of the text, but rather the role of the public prosecution in overseeing Egypt’s prisons and detention centres. It was necessary for the Constituent Assembly to grant the Public Prosecution oversight of the country’s prisons and detention centres so as to guarantee that the violations of prisoners’ rights would stop.

## THE SUPREME CONSTITUTIONAL COURT

The Constituent Assembly has undermined the historic role of the Supreme Constitutional Court. Article 175 states, “The Supreme Constitutional Court is an independent judicial body, seated in Cairo, which exclusively undertakes the judicial control of the constitutionality of the laws and regulations. The law defines other competencies and regulates the procedures to be followed before the court.” Instead of defining the court as an independent judicial body standing apart from the rest of the judiciary, as in the 1971 constitution (which placed the Supreme Constitutional Court in its own chapter), the Constituent Assembly placed the Supreme Constitutional Court in the chapter on the judiciary. As a result, the constitution defines the Supreme Constitutional Court not as its own independent authority reviewing the constitutionality of laws, but as part of the judicial branch. Its decisions must be followed by all other governmental institutions, including other parts of the judiciary. This development demonstrates the Constituent Assembly has implemented the views about unifying the judiciary, as discussed previously. Article 175 also ignores the inherent jurisdiction of the Supreme Constitutional Court to consider the claims and request of its members. This oversight will result in members of the Supreme Constitutional Court relying on other judicial bodies, representing interference in the special issues of the court and its justices. Additionally, Article 175 ignores the jurisdiction of the court to adjudicate disputes which are based on the implementation of final conflicting judgments.

## JUDICIAL REVIEW

Article 177 stipulates that the president of the Republic or parliament must present draft laws governing presidential, legislative or local elections before the Supreme Constitutional Court to determine their compliance with the constitution prior to dissemination. The idea of constitutionality of the laws is well established in Egypt, legally and judicially, and has been done after the law has passed, in accordance with both the law and the judiciary. Prior to the January 25 Revolution, the issue of judicial review gained prominence when the executive branch attempted to limit the court’s role in reviewing the constitutionality of laws. However, despite the pressure exerted, the Court continued to exercise its oversight abilities during this period. The text identifies rules for judicial review for three categories of laws organizing elections: presidential, legislative, and local. It is understood, without compromising the Court’s role of reviewing constitutionality of the laws after they are promulgated, that these laws greatly influence public life and that they have shaken the stability of the country. However, it is understood that the text of the constitution doesn’t say anything about the court’s ruling have ultimate authority over the laws and that their decisions must be followed by all branches of government.

## VI. CONCLUSION

The divisions in Egyptian society over the 2012 constitution contributed to a deepening of the state of political polarization in the country. It transformed the constitution from a text of consensus to one of sharp disagreement. This polarization was compounded by the constitutional decree issued by then-President Morsi that gave his decisions and the Shura Council (elected by only 7% of Egyptians) immunity from judicial review. This decree sparked massive protests involving hundreds of thousands of Egyptians marching in front of the presidential palace and engaging in bloody confrontations with the youth of the Muslim Brotherhood. As a result, the country faces a number of challenges carried over from the Morsi era to the post-Morsi era.

First, there is a lack of political consensus on the constitutional and legal basis upon which the political process will be based. The dilemma is one of political and economic failure, mismanagement, and confusion. The situation has now become a new model that should be studied by all democratizing countries so that they can learn with it. A significant segment of the Egyptian population feels that the 2012 constitution does not express their views, particularly after representatives from the liberal movement, Christian churches, and human rights association withdrew from the Constituent Assembly and President Morsi and the Muslim Brotherhood insisted on holding the constitutional referendum anyway.

Second, a new public prosecutor was appointed by the same way in which the public prosecutor was appointed under Mubarak: by presidential decree. When Morsi issued the decree, he ignored the text of the new constitution which stipulated that the public prosecutor should be first nominated by the Supreme Judges Council. Morsi himself selected the public prosecutor without any respect for the constitution, which both he and the Muslim Brotherhood supported.

Third, the success of the Muslim Brotherhood in building a powerful organization and electoral machine was not enough for them to effectively control the state and its institutions. The way in which the Brotherhood dealt with society, the unions, and the parliament, as if they were the opposition, is not a way to administer the state, and it demonstrates that the skills of fleeing from security services and staying patient during the decades of arrest are not equivalent to the skills required for governing the country and presenting an effective and reformist vision for dealing with its institutions.

Despite their failing, the process of Islamists coming to power in some Arab Spring countries represents a historical opportunity that did not occur with former nationalist and Islamist revolutions. These Islamists have come to power through the ballot box, not by a coup or a revolution that destroyed the regime and the state at the same time. They did not require a complete reconstruction of the state on a “revolutionary” foundation, granting immunity for authoritarianism in the name of the “revolution,” as happened with some of the totalitarian communist revolutions. This opportunity stems from the fact that these modern revolutions happened because of demands for justice and democracy.

The problem, in Egypt, however, is that when in power, the Muslim Brotherhood have gone in the opposite direction of what would have been necessary to ensure their smooth entrance into the political

process and their safe arrival to power. Previously, the Muslim Brotherhood had stayed outside of the governing circle even during periods when it enjoyed legal legitimacy. The governing parties, the security services, and the military remained suspicious of them for more than half a century, considering them a danger to the state, and the Brotherhood also pulled away from other political forces, such as those associated with Christians. When the Muslim Brotherhood possesses an 85 year heritage of remaining outside of governing circles and outside of political party work is it reasonable that, soon after arriving in power, the Brotherhood focused all of their efforts on confronting others, particularly the judiciary whose fairness they have long suspected. This is despite the fact that the judiciary's neutral oversight of the presidential election enabled Morsi to become president.

Fourth, the safe integration into legal political life for the Brotherhood would have been better handled if they had only gradual access to power, rather than being able to place themselves in a position above society and the state, and in which their arrival to power involves overturning all existing political equations with a stroke of the pen. The rules of democracy require gradual transformations. Successful democratic transitions demonstrate that if a radical group from outside of the prevailing political organization comes to power, it must reassure and implement reforms that do not appear as if the organization is trying to control or monopolize all aspects of the political life, to write the constitution and basic laws by itself, and to settle scores with the state rather than reforming it. The Muslim Brotherhood refused to register itself as a legal organization, even after taking power, under the pretence that the organization is not satisfied with the law regarding civil society organizations. If a political movement wants to play the democratic game, they must respect all of its rules and laws, making changes gradually after that, rather than choosing to follow only the rules that suit its interests.

When a community fails to find consensus on its constitution, this represents the beginning of the failure of its democratic experience. And when this failure occurs, you will find some people claiming that this failure happened because the people are not yet ready for democracy. However, in reality this claim is only trying to cover up a lack of desire to figure out who is responsible for the political and constitutional failure. Democracy comes with a set of rules that help the people stay committed to it, but Egyptians have not followed those rules, they actually did the opposite. As a result, some of us have said that the responsibility ultimately lies with the Egyptian people.

## WRITING THE CONSTITUTION OF THE EGYPTIAN REVOLUTION: BETWEEN SOCIAL CONTRACT AND POLITICAL CONTRACTING (MARCH 2011-JULY 2013)

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BY YASMINE FAROUK

“The battle for the constitution”. This was the most accurate and most frequently used expression to describe the approach of key stakeholders to the constitution making process in post-Mubarak Egypt. The “battle” began when the leading political parties failed to define the rules that govern the constitution making process. Such rules should reflect stakeholders’ conception of the process as well as of the general contours of the substance of the constitution. The perception of the constitution as a social contract, and as the reference for governing state and society, stems not only from consensus over its content but also over the participation-representation principle that governs the whole process. This is why there was little hope that the content of Egypt’s 2012 constitution would overcome the deficiencies of the process that produced it. The constitution making mechanisms lacked clear criteria and did not ensure equal participation through equal representation of all stakeholders. This made it difficult for those who did not take part in writing the constitution to join the process at a later stage, a situation that could not but affect their assessment of the constitution’s content. This in turn made it impossible for the constitution to act as a reference point for all political stakeholders and for the political institutions. From that moment onwards, the existing political process became in itself the reference for the drafting and assessment of the Egyptian constitution.

The Egyptian situation reflects the conflict between two schools of thought over the process of writing constitutions. The first is the classical school that sees the constitution making process as a distinct field that rises above the ever-changing day-to-day politics. This means that all those involved should help protect the constitution’s lofty status and preserve its value as a reference for both the government and the governed. At the revolutionary idealist moment that existed after Mubarak’s overthrow, this school’s opinion was closer to that of the unorganized Egyptian masses who thought it possible to separate the constitution making process from the unfolding struggle for political power. The second school is closer to political realism in believing that the constitution making process cannot be separated from the political balance of power in which constitution making takes place. This school stresses that this is usually the case during democratic transition. Stakeholders have thus to come up with strategies that would empower them to trigger a regime change within this particular context.<sup>98</sup> In Egypt, the parties in control of the constitution making process went too far in adopting the second school’s view, while those who were excluded from the process went too far in adhering to the idealist perception of constitution making. The gap between the two groups continued to deepen

98. David Evan Landau, “Constitution Making Gone Wrong,” Florida State University, Public Law Research Paper: no. 587, 01/04/2012, pp. 1-54.

until the Supreme Council of Armed Forces (SCAF) and well-organised political groups – namely Islamist parties and remnants of the Mubarak regime – imposed a view that sees the constitutional process as a short-term political deal rather than a long-lasting social contract. This is how the stakes that govern the day-to-day political process became the reference for governing the constitution making process. Thus, since the rules of “majority” and “mass-mobilization” became the criteria that govern the political process, the same rules were applied to constitution making.

To the time of writing (November 2013), the constitutional process in Egypt has witnessed three different waves since the ouster of Mubarak in February 2011. The first was from the Constitutional Declaration of February 2011 to the first referendum of March 2011; the second lasted from June until December 2012, during which the Declarations of 17 June, 12 August, 21 November and 9 December were issued; and the third and current constitutional wave began with the Constitutional Declaration of 8 July 2013. During each of these waves, political stakeholders perceived the constitution as a means for immediate political empowerment via political victory over their opponents. The participation-representation norm continued to be disregarded while the military establishment became the main arbiter defining the mechanisms and participants of constitution writing. Oddly enough, although the SCAF’s partners in 2011 and 2013 were different, they all accepted that the “military” decides, with whomever it chooses, the manner in which the “revolution’s constitution” should be written.

This paper explains how the constitution was created as a document that reflects the conflict of interests and short-term political alliances at the time of its writing, instead of being the common reference for the political, economic and social systems in post-Mubarak Egypt. The first part of the paper explains how yielding the constitution making – not just constitution writing – process to the dictates of the political balance of power affected the mechanisms of constitution making. The second part explains how the Constituent Assembly’s composition led to the adoption of a constitution that “locks in” the existing political balance of power and to the reproduction of the old political regime. The third part addresses the Constituent Assembly’s attempts to control civil society participation in the constitution making process, and how the excluded stakeholders resisted and managed to challenge and contest the legitimacy of the constitutional process, thus paving the way for the suspension of the 2012 constitution only six months after its adoption. The conclusion revisits the most important lessons learnt from the 2012 constitutional process in a manner that sheds the light on a number of shortcomings in the 2013 process.

## I. CONSTITUTION MAKING AS REALPOLITIK

### THE POLITICAL VARIABLES

One main reason for the battle over the constitution was stakeholders’ perception of the constitution as the first step towards securing their respective territory in the public sphere. Two types of political coalitions dominated the process: on the one hand, there was a *rapprochement* among different Islamist forces against non-Islamist forces and, on the other hand, an arrangement was

concluded between the Muslim Brotherhood and the military establishment. It became clear that these influential stakeholders perceived the constitutional process as a short-term political bargain that involved only the most powerful players. Several factors played important roles in shaping such a view of the constitutional process:

The SCAF assumed power immediately after Mubarak's downfall and remained there until the election of Mohammad Morsi to the presidency in June 2012. The military hence selected the members of the legal committee tasked with defining the mechanism according to which the Constituent Assembly would be formed. This first selection of members took place within a context of limited non-transparent consultations with "trustworthy" legal experts. This mechanism was the subject of Article 60 of the Constitutional Declaration approved by 14 million Egyptians (or 72% of the voters) on 13 March 2011.<sup>99</sup> The SCAF also intervened in the composition of the first and second Constituent Assemblies through regular meetings with leaders of different political parties represented in the People's Assembly (lower chamber) and Shura Council (upper chamber). These meetings resulted in a general agreement on a number of generic principles to guide the formation of the Constituent Assembly. The latter was made public at the end of April 2012. At that time, the SCAF's popularity had waned and the number of demonstrations against it had increased, causing it to focus more on speeding up the constitution writing process than on applying pressure to achieve consensus. The main aim of speeding up the process was to allay the military establishment's fears regarding provisions in the constitution that enshrine its privileged status – or *supra-status* – within the Egyptian political system. The SCAF was in fact preparing to return to its original role of arbiter among different political players. The masters of the military establishment were even ready to take over the entire constitutional process in order to achieve a safe exit from the political process. This became amply evident on 17 June 2012 when SCAF issued a new Constitutional Declaration that threatened, in Article 60b, to shift the process of forming the Constituent Assembly to the SCAF "if the [present] constituent assembly encounters an obstacle that prevents it from completing its work." The same declaration threatens, in Article 60b1, the potential interruption of the constitution writing process upon any suspicion that "the new constitution contains an article or more which conflict with the revolution's goals and its main principles or which conflict with any principle agreed upon in all of Egypt's former constitutions."<sup>100</sup>

1. On 14 June 2012, a court order was issued to dissolve the People's Assembly, one day after announcing the formation of the second Constituent Assembly charged with writing the constitution. The lower chamber's dissolution turned the Constituent Assembly into an alternative space for parliamentary politics. The Constituent Assembly thus became an arena for *realpolitik* among different political currents, reflecting the balance of power captured by previous parliamentary elections. This was especially the case for Islamist parties which won the majority of seats in the dissolved parliament. Those parties officially submitted to the dissolution decision yet deep down they did not recognise it and found it biased and politicized.<sup>101</sup> The dissolution of the Lower Chamber made Mohamed Morsi's Freedom and Justice Party (FJP) reconsider its stated preference for a parliamentary system and opt instead, in the chapter on public authorities, for a

99. "Egypt referendum results: 77.2 per cent say "Yes" to the amendments," Ahram Online: <http://english.ahram.org.eg/News/8125.aspx>, visited on: 18 March 2013.

100. The Constitutional Declaration was published in the Official Gazette on 17 June 2012.

101. Interview with a member of the Constituent Assembly, belonging to the FJP; November 2012

mixed system that gives wider prerogatives to the President of the Republic. The dissolution also strengthened the powers of the Shura Council, which was not disbanded, in the chapter on transitional provisions. The planned parliamentary elections therefore became the main focus of all political actors, not only those from outside the Constituent Assembly but also those from within. Consequently, the performance of political parties in the constitutional process was seen as part of their parliamentary election campaigns. The ability of political parties and independent political actors to make concessions became limited out of fear of losing votes in the upcoming elections. Such political behaviour in the Constituent Assembly distracted the attention of the public opinion away from core constitutional issues and towards marginal issues such as the minimum age of marriage for girls.

2. Presidential elections took place amid discord around the composition of the Constituent Assembly. The winner was the FJP's own chairman, Mohamed Morsi. FJP became henceforth the ruling party through its majority in the Shura Council and the presidency of the Republic. Mohamed Morsi then appointed a new Prime Minister on the 24<sup>th</sup> of July 2012. Morsi's victory provided the Brotherhood with a self-confidence boost that other Islamist parties shared. The result was a shift in the manner in which these Islamist parties – especially the FJP – dealt with other political and social forces in the country, displaying an arrogance to which even some members of the Islamist political camp willingly admitted. This shift was manifested in the way the Islamist majority in the Constituent Assembly reacted to successive resignations from the Assembly. Resignations began at the onset of the negotiations to form the second Constituent Assembly. Fifty-three members had withdrawn from the Assembly by the time the vote on the final draft of the constitution took place.<sup>102</sup> On that Thursday 29 November 2012, the Constituent Assembly voted on the draft constitution in the presence of 85 members, including 11 members who were upgraded from the backup members to replace those who resigned.<sup>103</sup> The importance of these replacements stems not only from their number and political orientation, but also from the institutions and bodies they represented. The list of resignations included representatives of the famous 6 April Movement, different leftist and liberal parties, and the main religious institutions – Al-Azhar and the Orthodox, Catholic and Evangelical Churches. Moreover, the Bedouins and Nubians were not represented at all. Among the resignations were also members recently upgraded from the backup list. The vote on the final draft constitution consequently took place in the absence of all non-Islamist political currents except for Ghad al-Thawra, the only remaining liberal party.<sup>104</sup>
3. Since Morsi took office in June 2012, the President's role in the constitution writing process went through four different stages. The first was the "non-interference" stage in response to repeated calls from non-Islamist parties for him, in his capacity as president of all Egyptians, to ensure that consensus is achieved. The President thus issued several statements affirming that constitution writing was the responsibility solely of the Constituent Assembly members over whom the Presi-

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102. "The Ahram portal publishes the names of 53 withdrawals and resignations from the Constituent Assembly," <http://gate.ahram.org.eg/News/278155.aspx>, last date to visit the site 4 April 2013.

103. "Al Ahram publishes the results of the vote on the new constitution, in the presence of 85 members," Al Ahram, 29 November 2012; <http://www.ahram.org.eg/archive/Al-Mshhad-Al-Siyassy/News/185758.aspx>, site visited on 10 May 2013.

104. Al-Hayat newspaper, 30 November 2012: <http://alhayat.com/Details/457588>, visited on 10 May 2013.

dent of the Republic has no authority. The second stage, the “intervention” stage, began with the publication of the Constitutional Declaration of 12 August 2012. This declaration stated in Article 3 that “if the Constituent Assembly [tasked with drafting a new constitution] is prevented from doing its duties, the president can draw up a new assembly representing the full spectrum of Egyptian society mandated with drafting a new national charter within three months of the assembly’s formation.”<sup>105</sup> As usual, the text gave the President the power to create a new Assembly without defining its founding criteria or how other political organizations would contribute to it. The third stage was the “partiality” stage, during which the President issued Constitutional Declarations on 8 and 21 November 2012. The first declaration stated that “no judicial authority shall have the power to dissolve the Constituent Assembly or Shura Council.”<sup>106</sup> (Ever since this declaration was issued, the presidency never reconsidered its clear position in support of the Constituent Assembly, despite issuing a second presidential declaration on 8 December 2012 – i.e., one week before the referendum on the draft constitution.) The 21 November declaration stressed that citizens shall not elect a new Constituent Assembly unless “the people vote against the draft constitution in the referendum scheduled on Saturday, 15 December 2012...”<sup>107</sup> The fourth stage in the President’s role in constitution making began after the new constitution was approved. Morsi then invited the country’s political organizations to a national dialogue on various controversial provisions in the constitution adopted only one month earlier. The political opposition, in addition to prominent non-Islamist civil society actors, boycotted this sterile dialogue until the very moment President Morsi was deposed and the constitution suspended on the 3<sup>rd</sup> of July 2013.

4. The process of writing the constitution was not entirely free of foreign influence, with this interference sometimes amounting to foreign intervention in domestic affairs. Despite the rejection by the majority in the Constituent Assembly of any non-Islamist reference or intervention in the constitution, several foreign parties joined the political battle raging around it. These interventions, however, sometimes happened upon the invitation of domestic stakeholders. For instance, a number of Egyptian political and human rights organisations openly called on the international community (states, governmental and non-governmental structures) to step up pressure on national authorities regarding human rights provisions in the draft constitution. Such calls concerned mainly civil and political rights, as well as women and minority rights.<sup>108</sup> A good example of the impact of foreign pressure relates to women’s status in successive drafts. The famous Article 68, which was removed from the final draft, was subject to the most intense internal and external condemnation by civil society organisations as it recognized women’s rights “provided they do not contravene Islamic Sharia.” The establishment of successful coalitions among

105. Text of the Constitutional Declaration issued on 12 August 2012, as it appeared the portal of the General Information Department: <http://www.sis.gov.eg/Ar/Story.aspx?sid=64697> visited on 13 April 2013.

106. Text of the Constitutional Declaration published in the Official Gazette “Al-Ahram”, 22 November 2012; the Declaration stated that “Previous constitutional declarations, laws, and decrees made by the president since he took office on 30 June 2012, until the constitution is approved and a new People’s Assembly [lower house of parliament] is elected, are final and binding and cannot be appealed by any way or to any entity. Nor shall they be suspended or cancelled and all lawsuits related to them and brought before any judicial body against these decisions are annulled.” *ibid.*

107. Text of the Constitutional Declaration of December 8, 2012 published on the website of the General Information Department: [http://www.sis.gov.eg/ar/LastPage.aspx?Category\\_ID=2268](http://www.sis.gov.eg/ar/LastPage.aspx?Category_ID=2268), visited on 12 April 2013.

108. Intervention by one of the women leaders during a discussion over the constitution, held by the Social Contract Centre in September 2012; article by Amr Hamzawi, “Al-Dustour Laysa Faqat Qadiya Dakhiliya”, (The Constitution is not Only an Internal Matter), Al-Watan, 27 September 2012.

various feminist organisations contributed to the success of the campaign launched by women's rights advocates against the above article. Yet, the pressure exercised by foreign stakeholders on the President of the Republic, members of parliament and on the SCAF through closed-door meetings and media statements was a key factor in the decision to remove the article. In general, lobbying and pressure from foreign governmental and non-governmental stakeholders focussed mainly on the need for consensus building, especially on matters related to civil and political rights and freedoms. Moreover, international organisations – like the United Nations Development Programme, the European Union, expert groups and foreign research centres – held conferences and workshops inside and outside Egypt to lend Egyptian officials technical and legal support in constitution making.

## YIELDING THE CONSTITUENT ASSEMBLY TO THE PREVAILING POLITICAL BALANCE

The governing mechanisms of the Constituent Assembly shed light on the deficiencies of the process. Such deficiencies eventually hampered consensus building on the content of the constitution. Such divisive and controversial mechanisms included the initial selection process of Assembly members, the release of numerous drafts (sometimes on a daily basis), the management of hearing sessions and the voting process on the final draft. Major deficiencies in the process itself are basically the consequence of Article 60 of the constitutional amendment that the majority of Egyptian voters accepted in the referendum of 19 March 2011. This article assigns the composition of the Constituent Assembly to “The members of the first People's Assembly and Shura Councils (except the appointed members)” who “shall meet in a joint session following an invitation from the Supreme Council of Armed Forces within 6 months of their election to elect a provisional Assembly composed of 100 members who will draft a new constitution for the country within 6 months of the formation of this Assembly.”<sup>109</sup> As a result of the Constitutional Declaration and majority rule, the Islamist political current that controlled around 70% of the seats in the People's Assembly and 85% of the seats in the Shura Council was to dominate the first Constituent Assembly's formation process and membership. Such a result occurred although the official mechanism provides for the People's Assembly and Shura Council to elect only 50% of Constituent Assembly members from among themselves, and for the other 50% to be non-parliamentarians.<sup>110</sup> Thus, sixty-six out of one hundred Assembly members belonged to the Islamist political current according to the official list published on 24 March 2012.<sup>111</sup> In a quick reaction, 24 members announced their resignation from the Assembly, some of whom withdrew even before the Assembly began its proceedings, in objection to the deficiencies in the formation process and hence the final composition. Among the latter were representatives of Al-Azhar, the Christian

109. Test of the Constitutional Declaration on the Egyptian Government's website: <http://www.egypt.gov.eg/english/laws/constitution>

110. The FJP won over 38% of the seats in the People's Assembly, the Salafist current came in second place with around 29 seats, followed by Al-Wasat Islamic Party who won around 30% of the People's Assembly seats. Elections to the Shura Council only increased the Islamist Current's control on the legislative authority after the FJP won the equivalent of 58.5% of its seats, followed by the Salafist al-Noor Party with 25.5% of the seats. “Islamists win 70% of Egypt People's Assembly's Party List Seats,” Ahram online, <http://english.ahram.org.eg/NewContent/33/100/32287/Elections-/News/Islamists-win-of-Egypt-grip-on-Egypt-Shura-Council.aspx-party-lis.aspx>, last checked: 5 May 2013; “Islamists Tighten Grips on Egypt's Shoura Council,” Ahram online, 25 December 2012: <http://english.ahram.org.eg/NewsContent/1/64/61266/Egypt/Politics-/Islamsits-tighten-grip-on-Egypt-Shura-Council.aspx>, checked on 5 April 2013.

111. William Parlett, “Constitution Making by We the Majority,” Brookings Institution, 30 December 2012: <http://www.brookings.edu/blogs/up-front/posts/2012/11/30-constitution-egypt-parlett>, checked on 5 April 2013.

churches, the Supreme Constitutional Court and several non-Islamist political parties. However, another deficiency soon appeared. This time it was about the mechanism of mediation between members who resigned and the Constituent Assembly. The shortcoming laid in the fact that the main mediator – the FJP – was itself a rival. Moreover, not only did this mediator-rival refuse to reconsider the Assembly’s composition, but the SCAF also intervened after its meeting on 29 March with the leaders of the “big” political parties in Egypt by issuing a statement calling for consensus on the Assembly’s composition.<sup>112</sup>

Nevertheless, on 10 April 2012, the Supreme Administrative Court declared the Assembly null and void on the premise that the presence of parliamentarians amongst its members violated Article 60 of the Constitutional Declaration that limited their role to electing Assembly members without taking part in writing the constitution.<sup>113</sup> On the political level, the non-Islamist opposition, known as the “secularists,” believed that the Court had decided in their favour by implicitly admitting that the Constituent Assembly had not fulfilled the condition of representativeness of all sectors of the Egyptian society.

On 11 June 2012, a joint meeting of the two chambers of Parliament enacted Law no. 79 for 2012 relevant to the formation of the second Constituent Assembly. The law received the support of several non-Islamist parties.<sup>114</sup> Article 3 of the law simply states that “the Assembly’s composition shall represent – as much as possible – all sectors of the Egyptian society.”<sup>115</sup> However, the composition of the second Assembly was plagued by the same shortcomings that led the court to dissolve the first one. Parliamentarians were once again elected members of the Constituent Assembly! The Assembly also included members who held positions in the government such as Adel Abdul-Hamid, the Justice Minister at the time, Imad Hussein Hassan, the Deputy Interior Minister and Mohammad Mahsoub, who later became Minister of State for Legal and Parliamentary Affairs. Unfortunately, the criteria defined for the composition of the second Assembly did not resolve the problem of ensuring that all sectors of Egyptian society were equally and fairly represented without discrimination. The allocation of a percentage in the Assembly to “public and legal figures” further enhanced Islamist domination over the Assembly thanks to the murky criteria according to which these figures were selected. Additionally, the disagreement over the voting system inside the Constituent Assembly drove a number of non-Islamist parties to resign while negotiations on its composition were still on-going. The FJP and Al-Noor Parties insisted that a simple majority (50% +1) system must be followed when voting on the draft constitution, while other parties, mainly the Egyptian Social Democratic Party (left) and Free Egyptians Party (liberal), insisted on a two-thirds majority.<sup>116</sup>

112. Wahid Abdul-Majid, “The Complete Story of the Battle over the Constituent Assembly,” (Arabic), Al-Shurouq, 20, 21 June 2012.

113. “Egypt: Administrative Judicial Court Suspends the Constitutional Panel,” Global Legal Monitor, Law Library of the Congress, 16 April 2012: [http://www.loc.gov/lawweb/servlet/Iloc\\_news?disp3\\_1205403099\\_text](http://www.loc.gov/lawweb/servlet/Iloc_news?disp3_1205403099_text), last checked 5 April 2013.

114. Wahid Abdul-Majid, *ibid*

115. Text of the Law on the formation of the Constituent Assembly, Al-Ahram, 12 July 2012

116. Wahid Abdul-Majid, *ibid*

## II. THE POLITICAL ALLOCATION OF CONSTITUTIONAL PROVISIONS

### ACHIEVEMENTS OF THE NEW REGIME

Based on the distribution of membership in the Constituent Assembly discussed above, forces in control of the constitutional process began negotiating on their specific “shares” in the constitution. The goal was for each to secure a territory in the ensuing political process. On the one hand, the lobbying of the more conservative Islamist political parties, like the Salafists and Jama’a Islamiya, focussed on the provisions related to the foundations of state and society which they saw as defining Egypt’s identity. These parties also mobilized around provisions relevant to civil rights and freedoms that, according to their perception, shape the society. On the other hand, the Muslim Brotherhood intensified their lobbying around provisions related to the nature of the political system, in addition to those defining political rights and freedoms. Given these priorities, provisions organizing economic and social rights were absent from major political deals. This cluster of rights was not the object of appropriation. In fact, they provided a pool for all actors to outbid one another in media outlets. In addition, the growing political struggle among different actors both in and outside the Constituent Assembly prevented any consensus around basic social and economic rights, even in instances where a simple change in wording would have sufficed, such as substituting “sustainable development” to “comprehensive development,” in Article 14.

In the same vein, certain terminologies were associated with one current or another and thus some were deleted and others used just to reflect the balance of power inside the Assembly. One example is keeping the term “shura” in Article 6 to highlight the Islamist identity of the political system without explaining what the word “shura” would actually add to the term “democracy” preceding it. Likewise, the constitution no longer contained a clear recognition of the idea of “pluralism”, be it in the provisions related to the organization of state and society or those relevant to rights and freedoms. The only mention of pluralism in the constitution was related to political pluralism in the framework of political parties. There was also no mention of “diversity” as a value whereas its recognition was a vital issue for minorities like Nubians and Bedouins. However, since these communities did not use ethnic and cultural identity as a reference for political mobilisation, they were unable to impact the *realpolitik* of constitution making. On the other hand, reservations of AL-Azhar and the Coptic Church on constitutional provisions were given due attention both in and outside the Constituent Assembly. Such cases proved that what was at stake was not the substance of constitutional provisions *per se* but the political significance/weight of those voicing it.

Numerous civil society organizations also demanded the inclusion of law-like technical details in the constitution, especially as the crisis of confidence deepened between the Constituent Assembly and sectors not represented in the Assembly. One example is the demand to openly state in the constitution that the term “citizen” refers to both men and women. Similarly, there was a demand to change Article 47 on the right of access to information to specify a time span that would be imposed on the state to reveal official documents. Several feminist organizations demanded an open statement in Article 32 that an Egyptian mother can transmit her citizenship to her children. It is within this framework that the chapter on freedoms and rights became a fertile niche for political deal-making in the

context of the balance of power between Islamist political parties, on one side, and the non-Islamist opposition, civil society organizations and international stakeholders on the other. Meanwhile, negotiations over state institutions and public authorities only involved stakeholders who were already in control of state institutions at the moment of constitution writing: remnants of the Mubarak regime, the military establishment and the Muslim Brotherhood.

## RESISTANCE BY THE AGENCIES OF THE OLD REGIME

Early indicators of the eventual collapse of the entire political process could be found in the political bargaining over state institutions. It became clear after the publication of the chapter on “Public authorities”, and the reactions to it, that the organization of state institutions was not based on the principles of separation of powers and the balance between them. Instead, the organization of public authorities in the constitution reflected, once more, the political balance of power at the time of constitution writing.

The two major political partners, the Muslim Brotherhood and the military establishment, agreed to preserve the military establishment’s pre-2011 prerogatives in the Egyptian political system through articles 195, 197 and 198 of the 2012 constitution. The process of constitution making thus signalled a period of political reconciliation between the military establishment and the political elite in power following their clash over the “Basic Principles of the Constitution of the Egyptian State”, better known in the media as the “Silmi bill”, first published in August and then in November 2011. At that time, the Muslim Brotherhood had described this bill as an attempt by the SCAF to impose its political will, to interfere in the constitution making process and to place itself above it<sup>117</sup>. One of the main indicators of this reconciliation was the fact that the provisions of Articles 9 and 10 of the Silmi bill, that the Brotherhood previously condemned, were almost identical to the military-related provisions in the 2012 constitution, especially those that exempt military tribunals and the military budget from civilian oversight. It was also clear that some of the liberal parties’ objections to the military-related provisions, both in and outside the Constituent Assembly, were limited in scope. This was a reflection of the military’s enduring image as the ultimate arbiter among political rivals despite the deteriorating civilian-military relations.

At another level, some sectors of the judiciary entered into an open confrontation with the Constituent Assembly over relevant constitutional provisions. Their objections were specifically related to the provisions that allowed the current prosecutor general to remain in his position despite the deficiency of the process through which president Mohamed Morsi appointed him. Another highly controversial issue was the reconfiguration of the Supreme Constitutional Court and the suppression of the secondment of judges. In this context, the case of the Supreme Constitutional Court is the clearest example of how state institutions were submitted to the fortunes of the political balance of power, especially when the mechanism of the Court’s formation became the object of political bargaining. Many judges and law professors saw in Articles 175, 176, 177 and 233 an attempt to cut the Supreme Constitutional Court down to size for ordering the dissolution of the first post-Mubarak parliament and because one of its female judges led a legal opposition against Mohamed Morsi’s successive

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117. Al-Masry al-Yaom, 14 August 2011, Al-Ahram’s evening edition, 40/11/2011.

presidential decrees. The Supreme Constitutional Court was thus relieved from reviewing laws and verdicts that touched upon Islamic Sharia. Article 177 of the 2012 constitution then gave the Constitutional Court the right to review draft laws organizing political rights (the most important being the Legislative Elections Law) prior to, and not after, the draft law is approved by parliament. Once the draft law is adopted, no citizen or court can challenge a law's constitutionality before the Constitutional Court even if the members of parliament did not take the Constitutional Court's *ex ante* reservations into account.

On the other hand, Article 176 of the constitution cuts down the number of Supreme Constitutional Court members from 16 to 11 judges. The same article sets a different appointment system than the one that the Constitutional Court's General Assembly had recommended in a series of memorandums addressed to the Constituent Assembly.<sup>118</sup> These provisions coincided with the Islamist parties' off-and-on siege of the Supreme Constitutional Court's headquarters, which lasted from 2 December 2012 until mid-January 2013 in a protest against the potential dissolution of the Shura Council and the second Constituent Assembly itself.

The Judges Clubs of Egypt<sup>119</sup>, administrative prosecutors, the State Litigation Authority (*hay'at qadaya al-Dawla*) and the Supreme Judicial Council had been in contact with the Constituent Assembly through a number of memorandums in which they expressed their views on the provisions organizing the judiciary in the constitution. In addition, the then minister of justice, Judge Ahmad Mekki, sent a memorandum to the Constituent Assembly voicing some concerns of the judiciary over relevant constitutional provisions.<sup>120</sup> However, all memorandum contents were not similar; politics had infiltrated the judiciary, whose members had become divided among themselves along the lines of the unfolding political struggle. The crises between different judicial agencies and the Constituent Assembly, as well as the presidency, reached its peak when members of different judicial bodies disagreed among themselves on supervising the referendum on the constitution, to the extent that some judges offered to replace those who had decided not to take part.

### III. BOUNDARIES TO SOCIAL PARTICIPATION IN CONSTITUTION MAKING

#### INSTITUTIONAL CHANNELS

To allow for society's participation in constitution making, the Constituent Assembly chose an approach that essentially depends on listening as an alternative to dialogue. The first mechanism it adopted was the establishment of a "Social Dialogue and Communication Committee" to undertake three basic tasks: 1) organise public sessions and take part in special seminars to raise awareness about the constitution, 2) receive the public's amendments and 3) hold hearing sessions with a num-

118. "The Supreme Constitutional Court rejects the Constituent Assembly's proposals," al-Ahram's evening edition, 6 October 2012.

119. The first judges' club was established in 1939 as an elected body to represent Judges' rights and interests especially against the Executive authority, i.e.: the ministry of justice

120. Al-Ahram's digital portal: <http://digital.ahram.org.eg?articles.aspx?Serial=1093675&eid=1962>, date visited: 30 April 2013; Al-Watan newspaper, 30 September 2012.

ber of civil society organisations, public figures and experts and other non-members of the Constituent Assembly. The committee's work methodology could be summarised as follows:

1. The sessions that the Committee for Social Dialogue held at the Constituent Assembly were indeed "hearing" sessions; interactive dialogue on various articles was almost absent. Many hearing sessions did not actually bring visitors face to face with Assembly members directly in charge of writing the draft constitution. The Committee for Social Dialogue was the main interlocutor for visitors and was solely in charge of carrying proposed amendments to the specialised sub-committees. Such a mechanism allowed the Committee for Social Dialogue to transform its role from that of coordinator/mediator between the public and members of the Constituent Assembly into that of a party to the dialogue and sometimes an advocate of the draft constitution. Furthermore, it was sometimes unclear why some members of the Constituent Assembly who were neither members of the Social Dialogue nor of the relevant specialised sub-committee took part in some of the hearing sessions.<sup>121</sup>
2. The Committee for Social Dialogue organised public talks and hearing sessions outside the Constituent Assembly's headquarters across the country. However, the work methodology was not transparent enough. It was not easy for the public to know the timing of these events, not even by consulting the Assembly's website, which suffered some technical problems. Moreover, these activities were very poorly publicised; one of the communication mechanisms used in the governorates was to contact the Governor and ask him to choose those who will participate in the upcoming public session. Various opposition members, independent unions and political and human rights activists accused different governors of only inviting Islamist militants or supporters of Islamist parties. For its part, the Committee for Social Dialogue videotaped these public sessions and uploaded them on the Constituent Assembly's website.
3. The FJP totally dominated the Committee for Social Dialogue and, for that matter, all official contacts between the Constituent Assembly and the public. Those who headed the Committee for Social Dialogue were Mohammad Al-Beltagi, a Muslim Brotherhood leader and Secretary General of the FJP, and Omaira Kamel, also a leader in both the Brotherhood and the FJP and a member of the President's advisory council. The Committee's Secretary General was also an FJP member, and the minutes of the hearing sessions held at the Constituent Assembly's were registered and typed by FJP youth on computers that bear the party's logo.
4. The Committee for Social Dialogue was therefore responsible for receiving the public's amendments and requests, sorting them out and then dispatching them to the various specialised sub-committees of the Constituent Assembly. This mechanism made it difficult for those who actually submitted suggestions to the Constituent Assembly to know whether their submission found its way to the relevant sub-committee. There was also no clear mechanism to deliver submissions addressed to individual Assembly members. All public submissions landed at a certain office at the Assembly's headquarters and it was the individual members' responsibility to check

<sup>121</sup>. Meeting with members of an NGO which stayed in constant contact with the Constituent Assembly, and met twice with members of the Committee for Social Dialogue, in November 2012

regularly for their mail at that office. This is why personal relations with members of the Constituent Assembly, along with the media, played a major role in ensuring that submissions reached the relevant member and for participation in some of the public sessions organized by the Committee for Social Dialogue.

The second institutional channel to participate in constitution writing was personally initiated by Hossam El-Ghariani, the President of the Constituent Assembly. It was established for the purpose of receiving amendments on various provisions of the constitution from outside the Constituent Assembly. In September 2012, El-Ghariani formed an advisory committee to review successive drafts in order for its members to voice their opinion on the content and eventually hold hearing sessions with Assembly members. The ultimate goal behind the committee's formation was to "work together in order to produce a single amended draft that would ensure a wider social consensus."<sup>122</sup> The advisory committee was made up of 10 members who were experts on constitutional law and university professors, some of whom the opposition wanted as original members of the Constituent Assembly. As usual, however, ambiguity never ceased to surround the criteria according to which their selection for the advisory committee was made. Soon however, on 17 November 2012, less than two months after they were appointed, the committee members resigned. Members of the Constituent Assembly saw this committee's opinion as purely advisory and should therefore be given only when requested, especially since the Assembly had appointed its own advisors to different specialised committees. At no time during its lifetime was the advisory committee<sup>123</sup> thus consulted by any Constituent Assembly member.

## CIVIL SOCIETY AND GRASS-ROOTS INITIATIVES

The Constituent Assembly's approach to consulting experts and civil society organisations revealed that its perception of them was not as partners in writing the constitution but rather as groups that might or might not be consulted. This fostered a sense among civil society organisations that the constituent assembly didn't perceive their contribution to constitution making as complementary to the Constituent Assembly's work but rather challenging or substituting it. This helped launch a series of civil society initiatives whose instigators actually managed to use participatory mechanisms, thus providing an alternative to a partnership with the Constituent Assembly. The Social Contract Centre, a government think tank, pinpointed over 26 different initiatives to participate in constitution making, most of which succeeded in publishing documents that won the endorsement of specific groups in its respective area of expertise. Other initiatives successfully produced a complete draft constitution that enjoyed consensus among specific sectors of civil society. Most often, those behind these initiatives played the role of coordinator and mediator, collecting the public's demands and then drafting them with the help of specialists. This exercise was rather successful in many cases, as shown by the draft constitutions that the Egyptian Centre for Economic and Social Rights, the Egyptian Coalition for the Rights of the Child, the Egyptian Initiative for Personal and Social Rights, the Social Contract Centre and the National Council for Women and the United Group have published. Added to these

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122. Testimony of Hiba Raouf Izzat on her resignation from the consultative committee of the Constituent Assembly, published in *Akhbar al-Yaom* on 17 November 2012.

123. Al-Ghiryani announces the withdrawal of the Technical Advisory Committee from the Constituent Assembly, *Akhbar al-Yaom* website, 17 November 2012.

was a number of previously prepared then revisited drafts, such as the draft constitution that the Egyptian Organisation for Human Rights reproduced. In other initiatives, like that of the professors of Cairo University, the proposed draft represented a technical approach to different constitutional provisions, reflecting the scientific opinion of experts in economics, political systems, law and sociology, among other. A number of semi-governmental organisations, like the Union of Egyptian Industries, also proposed constitutional provisions specific to the economic sector.<sup>124</sup>

This period also witnessed a plethora of constitution writing initiatives by youth groups who did not belong to existing organised civil society. Such initiatives included the “Write Your Constitution” campaign, “Let’s Write Our Constitution” and “Egyptian, It Is Your Constitution.” These went hand-in-hand with a series of awareness-raising campaigns around different provisions of the constitution through short videos uploaded on the internet or social networking websites. Among these were the campaigns of the “Mosireen” Cooperative, entitled “Know their Constitution”, “The Citizen’s Guide in Understanding the Constitution,” by the Social Contract Centre in cooperation with the “Qabila” group, and the campaign entitled “A Constitution for All Egyptians”. Few, however, were campaigns that involved field trips and public seminars, particularly outside Cairo. The reason of this shortcoming was mainly that these initiatives relied on volunteers and the personal financial contributions of the participants. Social mobilization in fact went as far staging sit-ins and demonstrations in front of the Constituent Assembly at the Shura Council’s headquarters where the participants were mainly workers, peasants, women and children. Even after the date of the constitutional referendum was announced, the initiatives launched on social networking websites, such as Facebook and Twitter, continued through door-to-door awareness-raising campaigns that sometimes clearly indicated whether to vote yes or no.

In addition to those campaigns launched by non-governmental structures, political parties not represented in the Constituent Assembly launched their own constitution writing and awareness-raising campaigns. Among the latter were those launched by the “Strong Egypt Party”, “Free Egyptians Party”, “Egyptian Social Democratic Party” and “Popular Current Party”. Young activists belonging to these parties later formed a joint committee to come up with a draft constitution that reflects a national consensus on major issues and use it to confront that of the majority. That was even before the National Salvation Front was formed as an act of unity against the parliamentary majority that took over the Constituent Assembly<sup>125</sup>.

In general, members in some of these initiatives did try to establish direct contact with members of the Constituent Assembly in an attempt to share and discuss with them the outcome of civil society campaigns. Yet members of other initiatives simply made the outcome public and left to the Assembly the choice of whether to use them or not.

Although these independent initiatives were based on participation, representation and consensus, they provide a number of lessons-learned:

124. “The Citizen’s Guide in Understanding the Constitution,” website of the Social Contract Centre, [http://www.socialcontract.gov.eg/front/ar/scnew/details.aspx?sc\\_id=1672](http://www.socialcontract.gov.eg/front/ar/scnew/details.aspx?sc_id=1672), visited on 19 May 2013.

125. Interview with three youths from parties involved in the initiative, between January and March 2013

1. Human rights organisations focussed on awareness-raising and on producing constitutional texts limited to the area of expertise of each organization. A more useful exercise would have been to provide a rights-based conception of the chapter on rights and freedoms as a whole or even of the constitution as a comprehensive document.<sup>126</sup> Instead, the only comprehensive position that various human rights organizations took was to issue joint statements rejecting the constitution as a whole. It is also worth noting that similar groups or organisations also formed coalitions within each area of expertise. For example, feminist organisations focussed on proposed constitutional articles and issued statements on women’s rights. Similarly, organizations defending child rights focussed only on the rights of children and organisations that defend civil and political rights focussed only on these rights. In the final analysis, none of these groups mobilized for the rights and freedoms falling outside of its scope of interest or in the other parts of the constitution.
2. Civil society organisations did not adopt a unified strategy vis-à-vis the Constituent Assembly. They neither collectively agreed to boycott the Assembly’s activities nor to respond to its “invitation” to hearing sessions or to initiate requests for hearing sessions around specific articles in the constitution. Moreover, each organisation went alone in the hearing sessions rather than in the framework of a coalition that expressed the single or collective position of a particular group. The only exceptions were feminist and child rights organizations that sometimes dealt with the Assembly within a coalition, and sometimes on an individual basis. Overall, however, the ultimate collective position of human rights organisations and labour unions was first to oppose the Constituent Assembly and then to boycott it.
3. Human rights organisations helped stoke disputes over particular constitutional provisions at the expense of reaching consensus with the Constituent Assembly over other articles on which consensus depended on a mere change in the wording. In doing so, these organisations played a major role in sidelining economic and social rights in the constitution and in disregarding flaws in other chapters.
4. Civil society organisations focussed mostly on criticizing and deconstructing different drafts of the constitution without offering alternatives to the disputed article that would express a compromise.
5. Media outlets didn’t help shed the light on some initiatives that succeeded in reaching certain provinces in the Delta, Upper and Lower Egypt as well as the informal settlements in Cairo suburbs<sup>127</sup>.

## IV. THE CURRENT CONSTITUTIONAL PROCESS

Following the removal of Morsi, Interim President Adly Mansour issued a Constitutional Declaration that provides framework for a new constitutional process on 8 July 2013. Article 28 states that “A legal committee of experts shall be formed by a presidential decree in a period not exceeding fifteen days from the date of the issuance of this declaration, composed of two members of the Supreme Consti-

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126. Interview with a member of the Social Contract Center’s team, February 2013

127. For more information see: [http://www.socialcontract.gov.eg/front/ar/scnew/details.aspx?sc\\_id=1672](http://www.socialcontract.gov.eg/front/ar/scnew/details.aspx?sc_id=1672), visited on 30 April 2013.

tutional Court and its commissioners' office, two judges, two judges from State Council and four constitutional law professors from Cairo University. The Supreme Council of Judicial Bodies chooses its representatives and the Supreme Council of Universities chooses constitutional law professors. The committee shall propose amendments to the suspended 2012 constitution within a period of thirty days from the date of its formation". Article 29 then specifies that "The committee stipulated for in the previous article shall submit proposals of constitutional amendments to a 50- member committee representing all sectors of society and reflecting its diversity, especially political parties, intellectuals, workers, peasants, members of trade unions and professional federations, national councils, Al Azhar, churches, the Armed Forces, the Police and public figures including at least ten members from the youth and women. Each entity nominates its representatives and the cabinet nominates public figures. The committee shall finalize the final draft of the constitutional amendments within sixty days at most from the date it receives the proposal during which it is committed to submitting it to societal dialogue. The President of the Republic shall issue decrees required for the formation and venue of the committee. The committee shall define rules and procedures guaranteeing societal dialogue on the amendments"<sup>128</sup>.

This declaration vaguely defines the actors to involve and mechanisms through which the constitution is to be amended. In addition, the military establishment authoritatively issued the declaration after limited consultations with "people of trust", as was the case in March 2011. The new political and civilian allies of the military establishment in 2013 accepted these mechanisms in the framework of their *realpolitik* tactics to defeat the Muslim Brotherhood. The interim president then issued a decision on the composition of the 50 member committee/Constituent Assembly on 1 September 2013. As expected, the composition of the Constituent Assembly reflects the balance of power between the Muslim Brotherhood and their Islamist allies versus the military establishment and its allies from the non-Islamist political camp, the Mubarak regime and the Salafists. Hence, those who represent the "Islamist current" in the committee are only two: Bassam Al Zarqa from the Al-Nour Salafi party and Kamal Al-Helbawy, a former Brotherhood member who falls under the category of "Islamist current". Both of them, of course, supported the 3<sup>rd</sup> of July coup d'état. The FJP refused to participate in the Constituent Assembly. It is indeed hard to conceive of its participation in the aftermath of a coup d'état that removed it from power and within a context of severe repression where Brotherhood leaders and militants are arrested across the country. In addition to Al-Zarqa and Helbawy, three other members of Al-Azhar could be considered as "representing Islam" inside the Assembly. All in all, only the first two out of the fifty members represent political Islam, whereas the other three actually represent the religious establishment.

The first committee of ten legal experts amended the 2012 constitution, as clearly stated in the 8<sup>th</sup> of July constitutional declaration. However, the 50-member Constituent Assembly allowed itself to re-write the whole text while adding new provisions and removing others. The committee announced that it all be done re-writing the constitution on 3<sup>rd</sup> December 2013.

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128. Source: The official translation of the constitutional declaration is available on: <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2666>; last checked: 20/10/2013

## V. CONCLUSION

The downfall of the 2012 constitution did not begin with its suspension on 3 July 2013. It began when the new polity perceived the constitutional process as a power sharing mechanism that would allow it an immediate place within the same old regime. In the Egyptian case, writing a constitution according to the realist perception, i.e. constitution making within the limits of the current balance of power, cannot build a framework that would gradually transform the state of revolution into a state of transition to democracy.

It is alarming that the 2013 Constituent Assembly accepted to amend the 2012 constitution within the framework of the 8 July 2013 Constitutional Declaration. So far, the current wave of the constitutional process that started in July 2013 is not about writing the constitution of the Egyptian revolution, but rather about subduing the Muslim Brotherhood through the elimination of “their” constitution. While doing so, the 2013 polity is adopting the same 2012 perception of the constitution as a power sharing mechanism and not as an overarching reference for the entire political system that regulates state-society relations. In fact, while the 2013 Constituent Assembly is drafting the constitution, the Mubarak-era ministries of justice and interior are drafting laws regardless of how the constitution will organize their subject matters. The published draft laws on protests and on terrorism imply that the constitution is far from being regarded as the foundation of the rule of law where justice is politically and socially neutral. These draft laws target the political opposition: any political opposition at any time.

The 2012 and 2013 constitutional experiences confirm that the only safe exit for a constitutional process locked in a logic of short-term balance of power is the participation and equal representation of all political and social forces. Only representation and participation on equal footing and regardless of who won, through elections or violence, can guarantee the “social contract” function of the constitution. This is especially the case given the mounting political polarization, political violence and resistance of the old regime. What is at stake here is indeed whether regime change is the goal of the 2013 polity.

In such times of acute political and social conflict, the messenger becomes more important than the message. Despite their undeniable progress on the issues of rights and freedoms, large sectors of society reject the 2012 and 2013 constitutions because of the process and not because of the substance. Whether in 2012 or 2013, those who vote for or against the constitution don’t vote on the text but on the process: who was involved in writing it, who was excluded and how<sup>129</sup>. Until this moment, the constitution in Egypt is still a zero sum game, a “battle” for political domination.

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129. For further readings on this point of view: Laurel E. Miller (ed.), *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington, United States Institute of Peace, 2010.

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# CONSTITUTIONAL REFORM: THE CASE OF SYRIA

BY NAEL GEORGES

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## I. INTRODUCTION

The constitution of a country lays out the legal rules which create a system of government and define the use of political power. It defines the rights and freedoms of the citizens as well as the supreme principles of the state. Every subsequent law and decree should be compatible with constitutional rules. Therefore, constitutional provisions are important for the establishment of the rule of law and the protection of human rights, including the rights of women and religious minorities.

The first Syrian constitution (1928) was adopted under the French mandate (1920-1946). In the decades following independence in 1946, the constitution was suspended and redrafted multiple times because of political instability, including military coups, and the establishment of the short-lived United Arab Republic that united Syria with Egypt in 1958. The 1950 constitution is still the most important text from this period because of its legal adoption by the Constituent Assembly on 26 November 1949 and its provisions which put emphasis on citizen rights and the power of the people.<sup>130</sup> In spite of its significance, the 1950 constitution is not usable today for many reasons. First, its commitment to Arabism and Islamism would affect the rights of non-Arab and non-Muslim minorities, as discussed below.<sup>131</sup> Second, the 1950 constitution was drafted and adopted before Syrian ratification of international human rights instruments. Consequently, a new constitution should be drafted to enshrine Syrian obligations with respect to these instruments. Third, because some systematic human rights violations, such as enforced disappearance (made especially problematic by the immunity of security agencies), had developed under the Syrian dictatorship, certain rights should be guaranteed at the constitutional level to prevent their violation.

Further changes to the constitution took place until the arrival in power of Hafez Assad in a 1971 military coup. On 14 March 1973, Assad's regime promulgated a new, largely politicized constitution. It represents a synthesis between, on the one hand, protection of rights and freedoms and, on the other hand, the protection of the socialist and Baathist regime.<sup>132</sup> However, the Syrian regime has sacrificed human rights to save its political system. This is reinforced by Article 8, which considers the Baath Party as the leading party in society and state. Furthermore, Articles 48 and 49 require that all organizations have the duty to defend the regime.

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130. For example, Article 10, Paragraph 9 stipulates that "No-one shall be judged before the military courts other than members of the army (...)".

131. The 1950 constitution stipulates that Islam is the official state religion and "Islamic jurisprudence shall be the principal source of legislation".

132. Article 1 of this constitution states: "The Syrian Arab Republic is a democratic, popular, socialist, and sovereign state (...)".

The 1973 constitution remained applicable until the Syrian uprising in March 2011. A new Syrian constitution was then drafted and adopted by the Assad regime to reduce political tension in the country and stifle the nascent revolution. This new version removed the above-mentioned Article 8 from the new constitution, but no form of secularization has been adopted and the role of political ideology is still apparent, most particularly with the constitution's commitment to Arabism. Non-Arab minorities, such as Kurds and Assyrians, emphasize that their cultural rights are affected through this constitution. Therefore, the fragility of the Syrian constitutional system is still visible. This paper will analyse in more detail the above-mentioned issues before shedding light on future prospects concerning the role of religion in the constitution as well as suitable constitutional provisions for women, minorities and freedom of religion.

## II. CURRENT CONSTITUTIONAL GUARANTEES FOR MINORITIES, WOMEN AND FREEDOM OF RELIGION

As with the majority of constitutions in the Arab world, neither the current Syrian constitution nor the previous versions contained explicit references to the term "minority" nor direct provisions to guarantee their position within the state and the society. Nevertheless, the protection of religious minorities is provided by two main categories of fundamental rights. These provisions relate first to the freedom of religion and, secondly, to the principle of equality. This last category also grants rights to women.

The Syrian constitution guarantees the principle of equality in its preamble as well as through Articles 18, 19, 26 and 33. The preamble insists on "the protection of national unity, cultural diversity, public freedoms, human rights, social justice, equality, equal opportunities, citizenship and the rule of law". Under Article 26.2, citizens shall be equal in handling public service functions. Article 33.3 calls for equality of all citizens "in terms of rights and duties without any discrimination among them on grounds of gender, origin, language, religion or creed". Paragraph 4 of the same article stipulates that "the state shall guarantee the principle of equal opportunities among citizens". This principle means that the prohibition of discrimination among citizens should embrace all laws as well as access to public services. This is not always the case, as has been seen.

The current Syrian constitution, as well as the 1973 constitution, provides that: "The State shall respect all religions, and ensure the freedom to perform all the rituals that do not prejudice public order".<sup>133</sup> Article 42.1 of the current constitution adds that the "Freedom of belief shall be protected in accordance with the law". Unlike the Lebanese and Jordanian constitutions, the Syrian one does not guarantee the right to the freedom of a religious education.<sup>134</sup>

## THE CURRENT ROLE OF RELIGION IN THE SYRIAN CONSTITUTION

The successive Syrian constitutions have neither been fully inspired by religion nor have they adopted strict separation between state and religion. Neither the current Syrian constitution nor the 1973

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<sup>133</sup>. See Article 3 of the current constitution and Article 35 of the 1973 constitution.

<sup>134</sup>. See Article 10 of the *Lebanese* constitution and Article 19 of the *Jordanian* constitution.

constitution declares Islam as the state religion. Furthermore, the Syrian traditional constitutional system is deeply influenced by positive law; however it contains some religious arrangements such as reserving the presidency for a person belonging to the Islamic community and including provisions linked to Sharia as a source of legislation. Indeed, Article 3 of both the current Syrian constitution and the 1973 constitution proclaim that “the religion of the President of the Republic is Islam”.

The current Syrian constitution also stipulates that “Islamic jurisprudence shall be a major source of legislation”.<sup>135</sup> The main question is how this provision affects state laws and, more particularly, human rights issues. The impact of this provision on the Syrian legal system appears in matters related to family laws, also called personal statutes.<sup>136</sup> These are the main fields in which Sharia is applied and, consequently, provokes violations of the principle of equality between Muslims and Non-Muslims, women and men, as well as of rights to freedom of religion, thought and conscience.

## MUSLIMS AND NON-MUSLIMS

Because of the importance Islamic law on matters related to family laws, a religious pluralist system is applied to these laws. Consequently, Muslims have their own family law and jurisdiction, as do the Christians and Druze. Contrary to the 1973 constitution, the current Syrian constitution has strengthened this plural system by adding a provision regarding the independence of the personal status of the religious communities.<sup>137</sup> However, far from being a way to protect religious minorities, the separation between Muslims and non-Muslims regarding personal statutes has caused the violation of many human rights.

The above mentioned system includes a tendency toward Islamization when the conversion to Islam is a way to get access to all citizenship rights, to escape the abusive provisions of some non-Muslim legislation and to enjoy some benefits from Islamic law. This conversion is most often performed to obtain a divorce, to get custody of a child or to marry a second woman.<sup>138</sup> Unlike in Lebanon, the children from a marriage between a Muslim man and a non-Muslim woman are mandatorily registered as Muslims in Syria. According to the Syrian doctrine, children should follow the best of religions, Islam. Non-Muslim mothers are discriminated against because of the position courts take regarding the custody of the child in case of a legal conflict.<sup>139</sup> The testimony of a non-Muslim is not accepted before Islamic courts. Furthermore, an inheritance from a Muslim to a non-Muslim is forbidden under Article 264 of the Syrian Law of Personal Status (SLPS). Therefore the question of succession can

135. Other constitutional provisions are inspired indirectly from Islam such as Article 20 which states that “The family shall be the nucleus of society (...)”.

136. This includes matters related to marriage, divorce, inheritance, etc. The Syrian legal system was deeply influenced by French law. Islamic law is only used to fill gaps in positive law as stated in Article 1 of the Syrian Civil Code (adopted by Legislative Decree No. 84 of 18 May 1949). However, in addition to personal status matters, Sharia plays a role in other social and political issues such as the justification of the governor’s legitimacy.

137. Egyptian constitutional reform is also considered in Article 3 that: “the canon principles of Egyptian Christians and Jews as the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders”. Such provisions were already included in Lebanese and Jordanian constitutional systems (see Article 9 of Lebanese constitution and Article 99 of the Jordanian constitution).

138. In some Christian communities, divorce is not allowed, referring to where the Gospel says: “What therefore God has joined together let no man separate”. Thus the conversion to Islam is inevitable to get a divorce judgment in order to enter into a new marriage later.

139. Syrian tribunals follow the famous jurisprudence of the Syrian Cassation Court. On 6 April 1981, this Court ordered the verification of allegations concerning the influence of a child’s religion by his Christian mother (Case No. 301). As a result, the conversion of the Christian husband to Islam allowed him to seek immediate custody of the child.

only be solved when converting Christians to Islam. These restrictions are also applied in the neighbouring states of Egypt and Jordan; however modern interpretation of Sharia by Islamic judges could eliminate such discrimination, such as by granting custody of a child to a non-Muslim mother, which was accepted in the court of law in Jordan.<sup>140</sup>

## FREEDOM OF RELIGION

The above mentioned discrimination based on religion is considered a violation of the freedom of religion. This freedom is also affected because of the constitutional provision based on Sharia. The legal and legislative apparatus imposes strong restrictions to an apostate in Islam. Unlike Lebanon, which allows one freedom to change their religion, non-Muslim converts in Syria, just like Muslims by birth, cannot leave Islam.<sup>141</sup> It is true that Syrian laws do not deal expressly with the abandonment of Islam; however Article 305 of the SLPS demands the return to the rules of the Hanafi rite to fill in the absence of positive legislation. Therefore, the judges will be forced to return to the Hanafi School laws; i.e. the provisions in the Code of Qadri Basha.<sup>142</sup> This Code forbids apostates to change their religious identity on official documents. They are separated from their spouses and they cannot draw up contracts, including marriage. They are also deprived of their rights to child custody and inheritance. In some cases, such restrictions would not apply, but the Syrian government continues to deal with an apostate as a Muslim.

The ban on leaving Islam has led to the violation not only of the freedom of religion, but also some other fundamental rights of all Syrian citizens, including equality and freedom of speech.<sup>143</sup> To prohibit the renouncement of Islam in Syria imposes strong restrictions against non-Muslims regarding their legitimate right to proselytize.<sup>144</sup> This must be guaranteed under the right to freedom of speech and the right to follow any religion or belief.<sup>145</sup>

The violation of religious freedom also appears when imposing a recognized religion to all citizens. All citizens have to belong to a religion and no form of atheism is allowed in the country. This is a common issue in Arabic countries. Furthermore, some religious minorities are not recognized in Syria, due to their incompatibility either with the political mainstream, such as the Jehovah Witnesses, or with Islam, such as the Baha'i minority. The people belonging to these minorities cannot represent themselves correctly on their national identity cards. They also face persecution from the Syrian authorities when attempting to participate in religious meetings; this constitutes a violation of Article 21 and Article 22/1 of the International Covenant on Civil and Political Rights (ICCPR).

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140. See the example of ruling No 65/493 of the Court of Cassation (Supreme Court), published by Bar Association's Journal (Al-Muhamoun) in 1966. Nevertheless, the law's provisions become clearer in this regard following the adoption of the new Jordanian Law of Personal Status in 2010. Article 172b of this code states that a non-Muslim woman loses custody of her child when he or she reaches the age of seven.

141. See Mohamed Zuhir Abdou Al-Hakk, (chariee guide to the judge and the lawyer), Al-Majed, Damascus, 1994, p. 40.

142. Articles: 31-32, 120-130 and 303-309 concerning the status of apostates. For more details, see Sami Aldeeb, *Le délit d'apostasie aujourd'hui et ses conséquences en droit arabe et musulman*, 1994, p. 12, available on [www.sami-aldeeb.com](http://www.sami-aldeeb.com).

143. Unlike conversion to Christianity, the conversion to Islam is easily done and procedures are simplified, even if the convert wants to evade the law.

144. See the Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir for the sixtieth session of GA, A/60/399, 2005, para. 67.

145. Freedom to invite others by peaceful means to convert to their religion belongs to the category of freedom of expression. For more details, see Gianfranco Rossi, « Le droit à la liberté de diffuser sa religion », in *Conscience et Liberté*, 59, 2000, p. 123.

## WOMEN'S RIGHTS

Non-Muslim women are victims of discrimination at many levels, particularly in cases related to their personal status. Such discrimination is particularly applied to their marriage, during their marriage or its dissolution. Article 48 of the SLPS imposes restrictions on the women's rights to choose a partner.<sup>146</sup> This article stipulates that a marriage between a Muslim woman and a non-Muslim man is void, with the consequence that any child from such a relationship is illegitimate. This violation is related not only to the rights of women but also to non-Muslims and children. The other violations are related to equality in case of succession, inheritance, age for the marriage and polygamy. According to Syrian legislation, women also cannot pass their nationality to their husband or children.<sup>147</sup>

The influence of the Sharia constitutional provision was also confirmed through the Syrian ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>148</sup> In fact, this convention had been approved at the national level according to decree No. 330. However, the ratification was accompanied by many reservations which are motivated by Sharia. Such motivation is expressly stipulated by Article 1 of the above mentioned decree.<sup>149</sup>

### III. FUTURE PROSPECTS FOR THE ROLE OF RELIGION IN THE SYRIAN CONSTITUTION

It is true that the non-representation of Islam as a state religion in Syria is an almost unique case in the Arab world.<sup>150</sup> However, the above mentioned religious constitutional clauses affect the principle of state neutrality. They constitute a violation of the social and political rights of non-Islamic communities and affect the equality between women and men, of Muslims and non-Muslims and of the freedom of religion. The provision regarding the role of Sharia as a source of legislation is also incompatible with some other constitutional provisions such as the equality among citizens. This creates a complex situation affecting judicial stability in the country.

Secularization, which implies separation between religion and state as well as a respect for all religions without any distinction, is essential in the Syrian context. Islam should not be given a dominant role through any Syrian constitutional reform. Indeed, this country is the most diverse one in the Middle East. It is composed of several Christian and Muslim minorities as well as non-Arab ethnic minorities. This diversity and multi-faith situation make it more complicated for the establishment of Islamic constitutional and political dominance. Consequently, the Syrian constitution should be free from any provisions regarding the dominance of Islam or any other religious beliefs. At minimum, the provisions regarding the principles of Sharia or Islamic Fiqh should be "a source" or "one source" of legislation, but not "the source" or "the major source" of legislation.<sup>151</sup> This would be a means to

146. Law No. 59 of 1953, modified by law No. 34 of 1975.

147. See the 1969 Syrian nationality law.

148. Adopted in 1979 by the UN General Assembly.

149. Other international instruments such as the ICCPR have been approved without reservations.

150. This article is also absent from the Lebanese and Djibouti constitutions.

151. Regarding the distinction between Fikh and Sharia, see Razi A. Diab Esq, *Religion and the law in Syria*, The Arab Center for International Humanitarian law and Human Rights Education, available on: [http://www.acihl.org/article.htm?article\\_id=26](http://www.acihl.org/article.htm?article_id=26).

facilitate the management of Syrian religious diversity.<sup>152</sup> Such provision should be accompanied by a clause related to human rights principles such as the following: “common principles of Sharia and human rights shall be a source of legislation”. In this case, religious provisions which are incompatible with human rights principles should be eliminated. This also should pinpoint some barriers that need to be respected concerning human rights in the modern interpretation of Sharia, which is one of the main pillars needed to strengthen religious freedom and the rights of women and non-Muslim minorities.<sup>153</sup> The religious influence could also be reduced by adding provisions based on the citizenship principle, which is essential to build a civil and democratic state. The citizenship notion should be empowered in the Syrian legal system. This principle, which has emerged since the creation of nation states in the Arab world in the early twentieth-century, helped people in this region develop a sense of belonging to their homeland and not to their confession or religion.

## SUITABLE CONSTITUTIONAL PROVISIONS FOR WOMEN, MINORITIES AND FREEDOM OF RELIGION

Any new constitutional reform should take into consideration Syrian obligations to respect international human rights law. In fact, Syria participated in the preparatory work on the development of major international instruments guaranteeing the respect of human rights such as religious freedom and the principle of equality. In 1948, Syria was among the states that participated in the elaboration of the Universal Declaration of Human Rights. Syria has also ratified most international treaties, including the Convention on the Rights of the Child (CRC – 15 July 1993) and the two Covenants on Human Rights (21 April 1969) and the CEDAW (25 September 2002). Consequently, even in the case of a change in its regime, Syria is committed to respect international human rights law. This obligation should be confirmed by two essential principles.

First, the Syrian constitution should recognize the primacy of international law over national law.<sup>154</sup> Second, provisions of international human rights law should be incorporated in the Syrian legal system, including its constitution.<sup>155</sup> The constitutions of other Arabic countries take a more progressive position on these issues. The preamble of the Moroccan constitution, for example, stipulates that treaties ratified by the state “take precedence over domestic law”. Furthermore, the preamble of the Lebanese constitution stipulates that “Lebanon is a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception”.<sup>156</sup>

Some rights that are recognized in these international treaties do not find their equivalent in the current Syrian constitution. This applies to the protection of minorities (Article 27 of ICCPR), the freedom

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152. *Ibid.*

153. Various Muslim schools of law show a greater or lesser severity of Sharia interpretation.

154. In this context, Article 27 of the Vienna Convention on the Law of Treaties stipulates: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

155. The Permanent Court of International Justice recognized the principle of the insertion of international provision instruments into the national legislation. See P.C.I.J, *Case of Exchange of Greek and Turkish Populations*, Advisory Opinion, Ser. B, No. 10, p. 20.

156. The Jordanian Constitution doesn't state such provision, though, unlike Syria, many court decisions in Jordan recognised the principle of primacy as a Supreme Court ruling No. 38/1991.

to have or adopt freely a religious belief (Article 18 of ICCPR), the protection of children without any discrimination (Article 24 of ICCPR and Article 2 of the CRC), the right to equality before the courts (Article 14 of ICCPR) as well as the equality between spouses in term of rights and responsibilities in the marriage, during the marriage and its dissolution (Article 23 of ICCPR), which are not included in the Syrian constitution.<sup>157</sup> Similarly, many provisions of the CEDAW, such as the equality between women and men before the law aren't included in the constitution.<sup>158</sup>

Equality among citizens, Muslims and non-Muslims, men and women, Arabs and non-Arabs, at every level, should expressly be included in the Syrian constitution. Equality is a key aspect of the citizenship principle which is crucial for the unity of the Syrian people as well as the integration of minorities. Equality before laws and courts, when it has to do with rights and duties, is crucial in order to avoid discrimination in matters related to personal issues. In fact, improving the status of religious minorities and women could be achieved by reviewing the personal status codes in the light of international human rights instruments.

It is also important to adopt a unified civil code which applies to all citizens without discrimination based on gender or religion. The Turkish model could succeed in Syria. In 1926 Turkey adopted a civil code which replaced the religious code. This code included many provisions based on positive law and was successful in reducing discrimination in society. In the current political climate in Syria, a total secularization of family laws cannot be easily accepted. This requires a constructive debate in the public sphere as well as spreading the culture of human rights and freedom in the society. Unlike Syria, many political leaders in Lebanon such as Presidents Elias El-Hrawi and Michel Suleiman have supported the legalization of civil marriage. In this country civil society is seeking the establishment of secular law in parallel with the existing religious law. In such a system, the spouses would be free to enter a religious or civil marriage depending on their convictions. Syrian society should join the Lebanese efforts to adopt civil marriage.<sup>159</sup> In this context, attempts to implement reforms in the field of personal status have more chance of success if certified in advance by suitable constitutional provisions, including the right to marriage without discrimination, the right to freedom of religion and the right to equality before the court of law.

Given the Syrian context, violence against women should be prohibited in the constitution and a positive obligation from the state should be included in order to prevent all forms of violence towards women. Any future constitution should also introduce a quota for women to step up their participation in political life. Freedom of religion and conscience should be absolute in the constitution.<sup>160</sup> This right, which is essential for the protection of religious diversity, should necessarily include the freedom of worship to every religion, the freedom to change one's religion, to belong or not to a religious community and to be a believer or not.<sup>161</sup> The right of non-discrimination is related to religious free-

157. The future Syrian constitution must include the term "minority" as well as their specific rights. This would allow people belonging to minorities to be more protected according to international human rights law.

158. See Article 15 of the CEDAW.

159. Currently, Lebanese citizens can avoid restrictions regarding interfaith marriage by getting a civil marriage abroad and Lebanese authorities recognize this kind of marriage. Nevertheless, mixed marriage completed abroad is not recognized in Syria when it is incompatible with Syrian legislation such as Article 48 of the SLPS .

160. This clause is included in the Lebanese constitution (Article 9).

161. Individuals who do not belong to one of the official religions (Islam, Christianity) cannot represent themselves correctly on their national

dom; therefore the constitution should also provide a provision in order to punish by law any religious discrimination as well as discrimination based on gender and origin.<sup>162</sup> Finally the right for the parents to choose their child's religious education, which is often subjected to restrictions in Syria as in other Arabic states, should be included in the Syrian constitution.<sup>163</sup>

#### IV. CONCLUSION

The way to democracy is not easy given the political conflicts which have created an environment not conducive to such change. Improving the status of women and religious minorities in Syria could be achieved by taking serious initiatives. The strengthening of interreligious dialogue is essential to reduce tensions in Syria. The current education system is the source of interreligious tension in Syria, as in the other countries of the Arab world. It is important to restructure education to put it in the service of tolerance, democracy and human rights. We should eliminate discrimination in legislation and revise them in order to respect the rights to freedom of religion and women's rights. Full access of Syria to international human rights and their mechanisms is essential. Strengthening the role of civil society contributes to the establishment of democracy.

It is true that the Syrian constitutional system has contributed to forming the great principles of human rights and, in particular, to introduce the notion of citizenship, which is crucial for the integration of religious minorities and respect for women's rights. However the Syrian constitutional system is far from ideal. Furthermore, the Arab world, including Syria, continues to experience important political and legal reforms. These changes can lead to the introduction of a new political and legal framework that affects the issues of religious freedom, the integration of minorities and women's rights.

identity cards. Those people have to be under religious laws in matters related to personal statutes. Religious freedom is also bound by a number of other human rights, such as freedom of expression and opinion as well as with the freedom of association.

**162.** Acts of discrimination can be applied by state employees or any other citizen against a person or a group of people.

**163.** This right is protected according to Article 18 of ICCPR and Article 14 of CRC.

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This book, part of the Arab Reform Initiative's "Living Constitutions" project, addresses the challenges of managing constitutional reform in times of democratic transition. It uses a comparative approach to address both substantive constitutional issues and the processes of constitution building. The work was enriched by a research conference in Ankara, Turkey, organised in cooperation with the Economic Policy Research Foundation of Turkey (TEPAV), and by seminars in Cairo with the Arab Forum for Alternatives and in Tunis with l'Association de Recherches sur la Démocratie et le Développement (AR2D). Each democratic transition is unique, but studying multiple cases sheds light on challenges that confront every society seeking to build a new constitutional order. The book features narratives of democratic transitions from India in the 1940s, southern Europe in the 1970s, Latin America since the 1980s, central Europe in the 1990s and of today's Arab transitions – including the successful completion of the Tunisian constitutional process.

**The Arab Reform Initiative (ARI)** is a consortium of Arab policy institutes that mobilizes Arab research capacity to foster public discussion and deepen debate over home-grown Arab programs for democratic reform. ARI seeks to generate, facilitate, and disseminate knowledge by and for Arab societies, focusing on the ongoing revolutionary processes in the Arab world. ARI projects study the changing patterns of interaction between political forces, governments and societies within Arab countries that are experiencing profound political, socio-economic and cultural transformations. ARI opens a space for diverse voices, engaging with intellectuals, activists, women, civil society representatives, human rights groups, social movements, political parties, the private sector, and the media. As an Arab organization with partner institutes across the region, ARI also acts as an interlocutor and partner for governments and think tanks from other regions of the world. ARI produces research and policy analysis, supports research networks and young scholars, convenes policy dialogues, organizes regional platforms on critical issues related to the transition processes and is the home for the Arab Barometer public opinion surveys.