

Crafting a Constitution

SPECIAL FEATURE TO MARK THE FIRST ANNIVERSARY OF THE TUNISIAN CONSTITUENT ASSEMBLY ELECTIONS

Constitutions are increasingly seen as a way to promote democracy, reduce conflicts and enhance social cohesion

Tunisia recently celebrated the first anniversary of its Constituent Assembly elections. Over the year, multiple parties have worked tirelessly together to draft a document that would define the identity of a new, post-Revolution Tunisia and reconcile the interests of its diverse population. There are some fundamental considerations to this important process and key lessons that Tunisia should extract from the experiences of other post-revolution or post-independence nations.

Constitutions incorporate the basic principles that guide a nation and regulate the manner in which sovereign power is to be exercised. Ideally they empower the state in pursuit of the common good while ensuring such power is not abused. Cuneiform law developed and used throughout the ancient Middle East dates back to 2350 BC and includes the famous Code of Hammurabi. Two millennia later scribes were more ambitiously drafting rules for the management of the flourishing Greek City States. Aristotle – 384–322 BC – was in prime position to observe this close up. In his *Politics* he analysed over 150 of these constitutions and concluded they provided the frame upon which the government and laws of a society are built.

Constitutions appear immortal. The reformer

Thomas Paine said: “A constitution is a thing antecedent to the government and always distinct therefrom.” implying that a constitution, wisely crafted beyond the immediate political fray, can only be open to improvement. Constitutions that are inflexible may be as risky as those which encourage easy revision. The truth, thus far at any rate, is that constitutions cannot be cast in stone. The longevity of the celebrated US constitution is in no small part due to its capacity for tweaking. It’s been amended nearly thirty times, allowing Americans to adapt their structure of government to changing beliefs and practices. The Bill of Rights came two years after the Constitution, the Thirteenth Amendment made slavery illegal in 1865, and the Nineteenth Amendment gave women the right to vote in 1920. Woodrow Wilson, regarded as America’s first progressive President, invented the theory of the “living Constitution” – a constitution able to evolve and change quickly to confront novel problems and be responsive to the needs of a modern society.

The constitutions of post-colonial Africa emerged with Ghanaian independence in 1957, 170 years after the American constitution was adopted. More recently there has been a swathe of constitution-making following the collapse of the Soviet Union,

the break-up of states like Yugoslavia and the emergence of new nations like South Sudan. Since 1990, 34 new countries have been created all requiring constitutions. Nearly 190 national constitutions are in force today and more than half of them have been written or rewritten in the past three decades. That’s a hive of constitutional activity.

This century political developments have given Afghanistan, the Congo Republic and



The Tunisian Constituent Assembly aims to draft its constitution by April 2013

Bahrain new constitutions, and others like Iceland are hoping for a revamp. Finland's fresh constitution came into force in March 2000. Until then it had adapted its original Constitution Act of 1919 to changing realities by using 'exceptive laws'. Acts, which did not become a part of the constitution, were passed instead of amending or changing the constitution. The drafting of a new Finnish constitution suggests there are limits to such a strategy.

But nations are themselves at the mercy of their history. Constitutions that have been imposed on a nation, as in South Africa under apartheid, are indefensible and are destined to be re-written. The South African experience has also been encouraging. Although the fairy tale of the Rainbow Nation has lost some of its charm – largely because of economic woes – it continues to illustrate the possibilities of a constitutional transition to democracy in the most deeply divided of societies. If nothing else the South Africans made their constitution precious.

Constitutions are increasingly seen as a way to promote democracy, reduce conflicts and enhance social cohesion. Even before the Arab Spring heightened democratic expectations, constitutions were the tool of choice in extending liberal freedoms. Unsurprisingly, there's been a resurgence of writing about constitutions. There are also complaints that much of this is 'technical', focused on the process of public participation and institutions, isolated from driving aspirations and real content.

Constitutional change in the wake of the Arab Spring extends beyond the clash of religiosity and secularism. Balances must also be struck between military and civilian authority, the private and public sectors, sectarian and national identity and competing indigenous and foreign values. Moreover, the religious question is not Arab-specific. It is also relevant in Israel, Turkey and Iran. Larger coalitions of secular, national and progressive parties are emerging as part of the transformation. The decision in Tunisia to elect the president through a national vote rather than by a parliament dominated by one party is worth noting. The religious-secular face-off is likely

to dominate debate of the draft constitutions in Tunisia and Egypt – and indeed further afield. Many would regard such open discussion as a remarkable achievement in itself.

Middle East analyst, Rami G Khouri says the shock and definitive result of the street demonstrations have ushered a new phenomenon of populist legitimacy. It is now difficult for any one group – the armed forces, Islamists, judges or the old guard – to seize control. They must comply with, "the single most important new development in the region, which is the applicability, and perhaps even the supremacy, of the principle of the consent of the governed in some Arab countries.

The Tunisians and others are unlikely to abort the project of writing a new constitution for fear of plunging their countries into chaos. They will also be aware that the US and France, not to mention Britain, were still developing their liberal democratic consensus long after the historical moments that launched their constitutions. Most significantly, the adoption of a Tunisian constitution that successfully combines religious and secular elements will legitimise and inspire nation-building across the region.

It is a little known fact that the first national constitution in the Muslim world was actually enacted in Tunisia. In 1861, under the rule of Turkish chieftains (or bey), a council of sixty members would approve laws according to the constitution, and the bey himself pledged to govern within its limits. While not entirely analogous to the present situation, Tunisians today should be proud of this heritage and allow it to inspire them when producing their latest installment. E



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The adoption of the American Constitution of 1787 is considered one of the biggest milestones in the constitutional history