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Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia

Summary

- Countries emerging from authoritarianism frequently face constitutional challenges, among them sequencing constitutional reform with a transition to democracy, designing a constitutional review process that is seen as legitimate, and addressing substantive constitutional concerns.
- Sequencing constitutional reform and elections begs the questions who should lead the constitutional reform and when should it be conducted. Constitutional reform prior to elections can leave stewardship over the constitution-making process to unelected and perhaps not wholly trusted transitional governments. Elections prior to constitutional reform may be tantamount to simply handing the machinery of authoritarianism to a new set of actors. Egypt and Tunisia offer different paths to transition and each face criticism. In the end, a less "democratic" solution might be the best one.
- Whatever the chosen process for constitutional reform, legitimacy must remain the *sine qua* of a successful constitution-making moment. Adherence to guiding principles of inclusivity, participation, transparency, consensus and national ownership can legitimize the constitution-making process and the final document itself.
- Just as the history, society, culture, and preferences of every country is unique, so too is every constitution. Certain common issues, however, are likely to be front and center for countries transitioning from authoritarian rule to democracy. This Peace Brief offers a brief examination of many of these commonly recurring issues.

“ The Egyptian and Tunisian approaches, though different, suffer from the same core challenge: reformist parties oppose the transitional governments revising the constitution, but early elections favor established parties at the expense of the reformers who led the revolutions. Neither option—a prolonged transitional period or early elections—provides adequate assurance that the new political order will reflect the reformists’ democratic agenda. ”

Introduction

The overthrow of the Mubarak and Ben Ali regimes were merely the beginning of the revolutions in Egypt and Tunisia respectively. The course the revolutions will take has yet to be charted, and the demands and aspirations of the tens of thousands of demonstrators have yet to be realized. In general, countries emerging from authoritarianism frequently identify constitutional reform as a priority—and Egypt and Tunisia have been no exception. How, when and by whom these and other countries transitioning from autocratic regimes revise their constitutions will substantially impact the democratic nature of the post-transition states. Procedural and substantive constitutional decisions made during the earliest hours of the revolution will inform, for better or worse, the path the revolution ultimately takes.

In unpacking the constitutional challenges presented in post-authoritarian regimes, three issues frequently emerge: (1) sequencing constitutional reform with a transition to democracy; (2) designing a constitutional review process that is seen as legitimate; and (3) addressing substantive constitutional concerns.

Constitutional Reform and Elections: The Sequencing Challenge

Demands for constitutional reform are often at the forefront once transitions from authoritarianism begin. But who is to lead the reform? And when should it be conducted? If states seek to empower legitimate lawmakers under the existing constitutional framework, elections are likely to suffer from the same constitutional dysfunctions that kept the former regime in power. More ominous still, elections prior to constitutional reform may be tantamount to simply turning over the machinery of authoritarianism to a new set of actors. Timing matters, too. Early elections favor parties that flourished under the previous regime at the expense of the nascent or formally underground opposition. Such challenges argue in favor of a longer transitional period during which comprehensive and popularly-led constitutional reform can occur. On the other hand, longer transitional periods can entrench transitional actors, while insisting on constitutional reform prior to elections can leave stewardship over the constitution-making process to unelected and perhaps not wholly trusted transitional governments.

Egypt

The Catch-22 of sequencing elections and constitutional reform has come to the fore in Egypt's debate over democratic transition. In February, the transitional government, led by the Supreme Council of the Armed Forces, suspended the constitution and conducted an expedited, secretive and limited constitutional review. The work was conducted in just 10 days, with only three weeks of public discussion before a March 12 referendum. The referendum passed with significant dissent from the opposition, which felt the reforms—amendments to nine articles that shortened the presidential term and created a two-term limit; expanded the field of eligible presidential candidates, restored judicial oversight of elections; limited the president's emergency powers; and provided a roadmap for additional constitutional revision after the elections – did not go far enough to guarantee the goals of the revolution. Opposition groups claim the changes have "frustrated Egyptians' hope that they would usher in a democratic transition or address the problematic electoral system before parliamentary and presidential elections,"¹ and that they actually allow the next government to repeat the sins of the former regime.² In Cairo, nearly 40 percent of referendum voters rejected the amendments, with similar results in other major urban areas.³

Exacerbating these concerns, elections for the legislature are now scheduled for September, with presidential elections expected to follow in November. Members of opposition parties fear they will not be sufficiently organized to fairly compete. With the newly elected legislature expected to design and oversee the constitution-making process, exclusion from the legislature could mean a constitution "likely [to] entrench the same power relations and values which the January 25 revolution rose up against."⁴

Tunisia

Tunisia has taken a different approach to Egypt, placing comprehensive constitutional reform ahead of elections for political office. The Tunisian Constitution also greatly privileges the former ruling party at the expense of the opposition, making free and fair elections simply impossible

under the existing framework. At the same time, the constitution cannot legally be revised by the transitional government; it can only be amended after elections for a new president. The Tunisian solution has been the dissolution of the constitution and the formation of a national constituent assembly, to be elected on July 24, 2011, that will develop an entirely new constitution. According to the BBC, “[o]nce elected, the constitutional council could either appoint a new government or ask the current executive to carry on until presidential or parliamentary elections are held.”⁵ Like in Egypt, many Tunisians fear that the July elections, even for the limited purpose of constituting a constituent assembly, will occur too soon and will give an advantage to established parties.

The Egyptian and Tunisian approaches, though different, suffer from the same core challenge: reformist parties oppose the transitional governments revising the constitution, but early elections favor established parties at the expense of the reformers who led the revolutions. Neither option—a prolonged transitional period or early elections – provides adequate assurance that the new political order will reflect the reformists’ democratic agenda. At its heart, this presents a legitimacy problem for the new constitutions, and by extension, the new political order in Egypt and Tunisia. Ironically, the best solution may be a less democratic one.

While the impulse to create elected constitution-making bodies is natural, it is not mandatory. In fact, if legitimacy is the paramount objective, an appointed constitution-making body (for example, the “round table” employed by many former Central and Eastern European countries during the 1990s), or a partly-elected and partly-appointed constituent assembly (such as in Kenya or Eritrea) may result in a more legitimate outcome. Egyptians and Tunisians might benefit from a survey of their respective political, social, and economic communities and ask themselves what interests need to be included in the constitution-making body for it to be deemed legitimate. The states might then augment election results with appointed representatives of these communities and interests to achieve the legitimacy that is vital to any constitution-making process. Such an approach has already been proposed in Egypt, where a prominent local human rights nongovernmental organization has called for an “interim” president that would form a constituent assembly that includes “all the necessary professional expertise for the task and also genuinely reflects Egypt’s political, intellectual, religious, ethnic and racial diversity,” according to a news report in *The Public Record*.⁶

First Principles of a Constitution-Making Process

The tension between constitutional reform and elections currently experienced in countries such as Egypt and Tunisia can be addressed in part by agreement on and application of fundamental principles designed to legitimize the constitution-making process and final document, including inclusivity, participation, transparency, consensus and national ownership. Together, these principles not only contribute to institutions and systems of governance that reflect the will of the people, but can spark a national dialogue and provide an opportunity to reach broader political and social goals, including:

- Transitioning to democracy from authoritarian rule;
- Providing a framework for negotiation and reconciliation among political forces and other communities of interest;
- Developing, strengthening and promoting national identity;
- Reaching consensus on the core values of the state;
- Educating citizens on the principles and practice of democracy through civic education and participation in the constitution-making process;

- Demonstrating a commitment by political leadership or government to democratic principles and processes;
- Addressing regional or ethnic issues through new institutional arrangements, rights or guarantees; and
- Identifying national priorities for development and a mechanism through which those can be achieved.

Inclusivity: Where the constitution-making body reflects the diversity of the nation so all voices are heard in the process. Such a body should include, among others, political parties, civil society organizations, women, youth, ethnic, linguistic and religious minorities, and the geographic areas of country. Each should be able to say it had a hand in the negotiation and drafting of the document and that each felt secure that it was a valued component of the new nation.

Participation: A participatory constitution-making process is one in which the people are educated about the process and the choices being decided, and are given a free, fair and genuine opportunity to directly express their will in a secure forum that is facilitated by those tasked with analyzing and incorporating the people's views into the final constitution. Importantly, such a process requires substantially more time than a closed, elite-drive, constitutional review—two years is not uncommon.

Transparency: A transparent constitution-making process is one where the public is aware of what is happening at each stage of the process. Such a process increases the accountability of the constitution-making body to the public and the public's confidence that their voices have been heard.

Consensus: Consensus driven decisions are reached by drafting and ratifying bodies based on discussion, negotiation, and persuasion, not by inflexible application of majority rules. Such a process requires time to develop, but can result in a constitution that is owned and respected by all parties, instead of one with "winners and losers."

National Ownership: The constitution-making process should be defined, developed and led by national actors, and not international interests, donors or experts. A nationally owned process that also respects the principles of inclusivity, participation, transparency and consensus will best reflect the nation's unique history, culture, and society, and in so doing reflect the needs and aspirations of the people. It can also galvanize ownership horizontally, across political forces, and vertically, from the political leadership to the communities and villages.

Greater adherence to these principles in the recently completed Egyptian process may have instilled greater confidence in the public and minimized opposition at referendum. The extent to which they are applied to future constitution-making processes could greatly determine the path Egypt, Tunisia and other countries in transition take.

Substantive Constitutional Issues

Just as the history, society, culture and preferences of every country is unique, so too is every constitution. Certain common issues, however, are likely to be front and center for countries transitioning from authoritarian rule to democracy. A summary checklist of central issues includes:

Separation and Balance of Powers: A discussion of separation and balance of powers will likely include debate over a presidential versus parliamentary system, with states emerging from highly centralized authoritarian rule often favoring a parliamentary system, where the chief executive traditionally comes from and is more accountable to the legislative body. Even parliamentary systems, however, can experience executive dominance of the legislative body, as has been the

case in many new African governments. Therefore, more important than the system of government are necessary and appropriate checks on the executive power, including strong legislature oversight powers, presidential term limits, and an independent judiciary.

Emergency Powers: Akin to the balance of powers, one might also expect reform of the state of emergency laws (as has already happened in Egypt) with limitations on the circumstances under which the executive can declare a state of emergency and the powers and limitations that confer from it. Legislative oversight and delineation of nonderogable rights is essential.

Power and Wealth Sharing: Power-sharing schemes can be horizontal, for example, a chamber of the legislature that reserves seats for geographic or communal interests, and/or vertical, between national and sub-national government. Decentralization aims to more broadly distribute power in order to promote more effective and responsive government, improve access to basic services and economic resources, manage conflicts, particularly in diverse societies, and encourage greater public participation in government. It also creates multiple centers of power, thereby lessening the impact of a "winner take all" outcome at the national level. Wealth sharing guarantees revenue for lower levels of government and is vital to sub-national government effectively realizing the benefits of devolution. It can take the form of states retaining wealth generated in their localities and/or transfers of nationally collected revenue to the states.

Human Rights: Unlike the constitution of the United States, more recently adopted constitutions frequently enumerate dozens of fundamental human rights, including socioeconomic rights (i.e., the right to healthcare, housing, education and a clean environment). One might expect new constitutions in Egypt and Tunisia to follow this model. Often, however, the problem is not enumeration of rights but their implementation and enforcement. Institutions that enforce and guarantee these rights are critical to their realization. In addition, rights that are limited "in accordance with the law" can lead to an abuse of power. Such limitations should be narrowly tailored and permitted only if necessary to protect a compelling state interest. Finally, incorporation and enforceability of rights contained in international treaties and covenants to which countries are signatories can be an invaluable way of ensuring critical rights are captured and realized.

Security Reform: Especially where the security apparatus has been co-opted and used to subjugate the people, constitutional provisions to secure the integrity and neutrality of the security forces are essential. Consideration might be given to enumerating certain security organs in the constitution, making others subordinate to legislation, and mandating that officers in the security services remain non-partisan. The military should be led by a civilian within the national government, with jurisdiction and responsibilities of the armed forces and police clearly delineated and with separate chains of command. Police units attached to local government may be empowered with local law and order responsibilities, thus vertically dispersing command over the security services. National intelligence units should be subject to national law and all security services should be overseen by a national or local legislature, as appropriate.

Founding Principles: Founding principles contain the essence of the character and identity of the state, and are often contested on both symbolic and practical grounds. Issues such as the democratic, republican and/or federal nature of the state as well as other core values will be delineated. The status of religion, national languages, national symbols and the definition of citizenship might also be covered. These provisions take on added importance in diverse or ethnically, religiously and linguistically divided societies and merit special scrutiny in the course of designing a constitution that will reflect the values, interests and identities of the entire nation.

ABOUT THIS BRIEF

This Peace Brief, written in April 2011, examines some of the challenges to constitutional reform in transitional states and offers mechanisms for increasing the legitimacy and democratizing effect of constitutional reform. The views expressed in it do not necessarily reflect the views of the United States Institute of Peace, which does not advocate specific policy positions. Excerpts of this brief are also published in "Traveling toward the Rule of Law in the Middle East and North Africa: Avenues and Obstacles."

Endnotes

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