Chapter 6

Constitutional Developments in the MENA Region during Malta's EU Presidency

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Introduction

Since the beginning of the Arab uprisings, the European Union has supported the constitutional reform processes taking place in the MENA region, thus following the strategy provided for by Article 3(5) of the Treaty of the European Union, which stipulates that the EU "shall uphold and promote its values and interests" in "its relations with the wider world".[141] This support to the democratic transitions in North Africa and the Middle East continued during the semester of the Maltese presidency of the Council of the European Union, i.e. from January 1st to June 30th 2017. Indeed, the priorities of the Maltese presidency for the EU's Southern Neighbourhood included "ensuring that the democratic transition in Tunisia remains on track", "the stabilisation of Libya through a peaceful transition", and "contributing to the EU and international efforts to address the Syrian conflict".[142] As will be discussed in this short paper, the semester of the Maltese presidency (and the days which immediately followed that period) saw significant constitutional developments in all these three countries. In Tunisia some important organic laws implementing the 2014 Constitution were adopted, in Libya the Constitutional Drafting Assembly approved a new draft Constitution, and in Syria the Russian Government presented its draft proposal for a new Syrian Constitution.

Tunisia: The Implementation of the 2014 Constitution

Seven years after the beginning of the "Arab Spring", most countries in the MENA region have remained either authoritarian or "hybrid" regimes.[143] It seems that the only State that has thus far managed to mark a clean break with its illiberal past is Tunisia, especially thanks to the adoption – on 26th January 2014 – of a Constitution which is often rightly considered as one of

[141] Tohidipur, T. (2016) p. 879.
[142] Government of Malta (2016); Lowell, M. and Talbot, F. (2017).
[143] "Hybrid" regimes are those regimes that combine democratic and authoritarian elements (Diamond, L. (2002) p. 21). They fall into a "political gray zone […] between full-fledged democracy and outright dictatorship" (Carothers, T. (2002) p. 9 and 18).

the most democratic Constitutions (or the most democratic Constitution) in the Arab world.[144]

In order to measure the sincerity of the innovations introduced by this Constitution, the process of implementation is extremely important. The European Union, which has supported the democratic transition in Tunisia since 2011, reiterated its commitment to continue to support the process of reforms – and in particular the process of implementation of the Constitution – even during the Maltese presidency of the Council of the European Union. For example, in the thirteenth session of the Association Council of the European Union and Tunisia, which took place in Brussels on 11th May 2017, the Minister of Foreign Affairs of Malta, George Vella, and the Minister of Foreign Affairs of Tunisia, Khemaies Jhinaoui, issued a joint statement in which the EU "welcomed the unprecedented nature of the Tunisian democratic experience, renewed its resolute commitment to continue to support the process of reforms undertaken by the Tunisian authorities *with a view to ensuring the effective implementation of the Constitution* […]" (emphasis added).[145]

During the semester of the Maltese presidency there were some relevant developments with respect to the enforcement of the 2014 Constitution. In the first place it is important to mention the adoption of the Organic Law no. 2017-17 of 14th February 2017, which amended and completed the Organic Law no. 2014-16 of 26th May 2014, regarding elections and referendums. Among the most significant innovations of this new Organic Law, which regulates municipal and regional elections, one has to mention the fact that the right to vote in these elections has been extended to the military and the members of internal security forces (Art. 117 *septies*). This issue was extremely sensitive and caused months of political deadlock. The main fear was that the involvement of the military and the police in the elections would have undermined a tradition of political neutrality.[146] The parliamentary majority, however, decided to grant them the right to vote in municipal and regional elections.

Furthermore, the new Organic Law has strengthened the principle of equality between men and women. Indeed, since 2011 the electoral law has provided for the principle of "*vertical*" equality, according to which "lists shall be established in such a way to alternate between men and women".[147] Although

[144] On the 2014 Tunisian Constitution see Al-Ali, Z. and Ben Romdhane, D. (2014); Ben Achour, R. (2014) p. 783.; Groppi, T. (2015) p. 189.; Groppi, T. and Spigno, I. (2015); La Constitution de la Tunisie – Processus, principes et perspectives (2016).
[145] "Joint statement on the occasion of the EU-Tunisia Association Council of 11th May 2017" (2017).
[146] Ghanmi (2017).
[147] Article 16 of Decree-Law no. 35 of 10th May 2011. This provision was later confirmed in Article 24 of the Organic Law 2014-16.

the adoption of the principle of alternation was undoubtedly extremely important so as to ensure a significant representation for women in Parliament (at present, 31% of the seats are held by women), it was not immune to criticism. Indeed, the law does not specify which position women must have in the electoral lists, with the consequence that only a few parties placed women in the highest positions. Therefore, small parties that only won one seat did not have any female representative in Parliament. In order to reinforce equality between men and women in municipal and regional elections, the new Organic Law has adopted the principle of "*horizontal*" equality (Art. 49 *nonies* par. 3), according to which "political parties will be obliged to respect the equality of sexes, not only in the same list but also between the lists that they present in different constituencies in such a way that if in Constituency A the lead candidate of a list is a man, the lead candidate in Constituency B must be a woman."[148] Furthermore, Organic Law no. 2017-17 promotes the participation of young people and disabled people. Indeed, each electoral list has to include among its first three candidates a candidate who is not older than 35 years (Art. 49 *decies*, par. 1), and among its first ten candidates a candidate affected by disability (Art. 49 *undecies*, par. 1).

Another important organic law adopted during the semester of the Maltese presidency is Organic Law no. 2017-10 of 7th March 2017, concerning the procedures for the denunciation of corruption in the public and private sector and the protection of those who denounce it. The public institutions affected by this Organic Law are the following: the presidency of the Republic, the Assembly of the Representatives of the People, the presidency of the Government, the Supreme Judicial Council and all judicial authorities, the Constitutional Court, independent constitutional bodies, ministries and secretariats of state, the Central Bank of Tunisia, public institutions and enterprises, credit institutions, public financial institutions, local authorities, and independent public institutions. Complaints of corrupt practices have to be submitted before the Good Governance and Anti-Corruption Commission.[149] In addition to this Law, Parliament recently adopted Organic Law no. 2017-59 of 24th August 2017, on the Good Governance and Anti-Corruption Commission, which is an independent institution responsible for "contribut[ing] to policies of good governance, and preventing and fighting corruption" (Art. 130 Const.). The abovementioned Organic Laws are important measures in the fight against corruption, which has long been one of the scourges of Tunisian society.

Parliament also adopted the Organic Law no. 2017-58 of 11th August 2017, on the elimination of violence against women.[150] This Organic Law

[148] Mekki, N. (2017).
[149] Democracy Reporting International (DRI) (2017) p. 27
[150] The law will enter into force six months after its publication in the Official Gazette of 15th August 2017.

represents the latest link in the chain of measures aimed at promoting gender equality in the country. Indeed, as is well known, Tunisia has been for a long time at the forefront of the Arab world with respect to women's rights and the recent constitutional developments – including in particular the adoption of the 2014 Constitution – continue to move in this direction. Among the most relevant innovations, the Law imposes harsh sanctions for sexual harassment in public spaces and makes it easier to prosecute domestic violence (Arts. 15 and 16). Moreover, it calls for the Ministries of Education, Religious Affairs, Health, Social Affairs, Justice and Interior to organise trainings on how to prevent and handle cases of violence against women (Arts. 7 ff.), and stipulates that young generations should be educated about human rights and gender equality (Art. 7). Last, but certainly not least, Tunisia has joined a movement across the Arab world to get rid of the so called "marry your rapist laws", which allow rapists to escape prosecution if they marry their victims. Thus, Article 227bis(4) of the Tunisian Criminal Code, which contemplated this "escape route" for rapists, has been repealed (see Art. 15 of Organic Law no. 2017-58). Despite the fact that in a number of Arab countries similar provisions are still in force, in the past few years there has been a trend towards their abolishment. Indeed, Egypt and Morocco repealed their laws respectively in 1999 and 2014, and in 2017 (in addition to Tunisia) Jordan and Lebanon also joined this group of countries.[151]

The adoption of the new Organic Law on the elimination of the violence against women is extremely important in a country where women very often experience domestic and public violence. In 2016, the Tunisian Ministry of Women, Family and Childhood reported that 60% of Tunisian women were victims of domestic violence, and 50% of women declared that they experienced aggression in a public area at least once in their lives.[152] Furthermore, in 2016 the Centre for Research, Study, Documentation and Information on Women, a Tunisian research centre that works closely with the United Nations, reported that from 70% to 90% of women had been victims of sexual harassment between 2011 and 2015.[153]

The adoption of the abovementioned organic laws represents an important step in the process of constitutional implementation and a positive contribution to the democratic transition that Tunisia is currently experiencing. All in all, the path followed by the country thus far seems to be the right one.[154] Having said that, one should not forget that several innovations provided for by the 2014 Constitution have still remained "on paper" (the most evident example is probably given by the fact that the Constitutional Court has not been established yet), and that the country is

[151] Dehnert, E. (2017).
[152] Blaise, L. (2017) p. 4.
[153] Blaise, L. (2017) p. 4.
[154] Feldman, N. (2013) p. 10; Mezzetti, L. (2016) p. 246–247.

facing a number of complicated challenges from a political, social, and economic standpoint. Moreover, terrorism continues to represent a major threat, which explains why the state of emergency has been in place since November 2015. Therefore, the positive outcome of the process of transition should not by any means be taken for granted.[155]

Libya: The Adoption of a New Draft Constitution

Seven years after the death of Muammar Gaddafi Libya is still in the middle of an extremely complicated process of stabilisation. Current Libya comprises several different local realities trying to exist and prosper within a highly anarchical context. The country has a UN supported Government of National Accord – led by Prime Minister Fayez al-Sarraj – which is based in Tripoli, while the eastern part of the country is *de facto* ruled by General Khalifa Haftar and his army. Moreover, part of the south and the far south of the country are lost to any central authority and are controlled by different local tribes. The extremists of ISIS, which have lost much of their territory (including the city of Derna in July 2015, and their stronghold in the city of Sirte in late 2016), are now regrouping in rural areas. In addition to that, the state of human rights and the rule of law in the country is bleak, and the scourge of human trafficking has not been eradicated yet.[156]

In this highly problematic context, Libya is also facing a very important challenge, namely drafting a new Constitution.[157] A Constitutional Drafting Assembly was elected on 20th February 2014, and on 21st April of the same year it started its activities in the city of Al-Baydha, in the eastern part of the country. It should be noted that the European Union has often called on the Assembly to complete its mandate as soon as possible, and this support for the constitution-making process continued also during the semester of the Maltese presidency. On 23rd May 2017, for example, the EU, the African Union, the League of Arab States, and the United Nations (i.e. the so-called "*Quartet*") issued a joint communiqué commending "the efforts by the Constitutional Drafting Assembly to finalize a draft constitution" and expressing their "appreciation for the work made so far". They also "called for the constitution-drafting process to be concluded as soon as possible to pave the way to general and presidential elections."[158]

The latest draft of the Libyan Constitution was approved by the Constitutional Drafting Assembly on 29th July 2017, without broad

[155] Sigillò, E. (2016) p. 9.; Namane, W. (2017).
[156] Indeed, it is well known that the country has become a "springboard" for migrant exodus to Europe: every day smugglers pack desperate migrants into unsafe boats bound for Malta and Italy. According to the International Organisation for Migration, 2,357 people died in the Mediterranean in the period from 1st January to 12th July 2017 (https://www.iom.int/news/mediterranean-migrant-arrivals-reach-103175-2017-2357-deaths).
[157] Schnelzer, N. (2016).
[158] "Meeting of the Libya Quartet: Joint Communiqué" (2017).

consultation or public debate.[159] As far as the form of government is concerned, the draft provides for a bicameral legislature (the House of Representatives and the Senate, which are both directly elected) and an executive branch which consists of the President of the Republic and his appointed Prime Minister and Ministers. On the one hand, the President of the Republic enjoys wide (and in some cases excessive) powers (Arts. 104 ff.), thus making the draft Constitution very similar to the majority of the new (or recently amended) Arab Constitutions,[160] but on the other hand the independence of the judiciary has been reinforced (Arts. 118 ff.) and the Constitutional Court has been granted a number of significant prerogatives (Art. 139).[161]

An entire chapter of the draft Constitution (Chapter 6) is devoted to decentralisation and local government, which has been for a long time a very sensitive issue in the country. Article 143, in particular, makes reference to the "principle of expanded decentralisation […] within the unity of the State". The draft states that the country will be divided into governorates, municipalities and other administrative levels directly elected by the people. Despite the fact that the draft seems to grant them a certain degree of autonomy (also from a financial standpoint), the real degree of independence that these local government units might achieve is hard to predict, also in the light of the fact that the regulation of some important issues (including the competences of the local government units) is left to ordinary legislation.

The draft Constitution (like many other Arab Constitutions, particularly those from oil and gas-rich countries)[162] also includes some provisions regarding natural resources. Although certain aspects are far from clear (in particular the management structure and the distribution of revenues), the draft contains some provisions that are in line with comparative best practices. Article 172, for example, stipulates that a law has to allocate a proportion of the revenues deriving from the exploitation of natural resources for the benefit of future generations.

There is one aspect in the draft Constitution that stands out, namely the special recognition granted to Islam and *sharia* and the lack of specific provisions guaranteeing the free exercise of religious practices.[163] This Islamic-oriented approach can be found, first of all, in Article 6, which stipulates that "Islam shall be the religion of the State, and Islamic *sharia* shall be a source of legislation". Furthermore, the President of the Republic,

[159] The text of the draft Constitution is available at the following address: http://www.constitutionnet.org/ vl/item/draft-constitution-libya-29-july-2017
[160] Biagi, F. (2018).
[161] Al-Ali, Z. (2017) p. 7.
[162] *Oil and Natural Gas: Constitutional Frameworks for the Arab States Region* (2014).
[163] It has been observed that "Since the start of the Libyan revolution, talk of the role of *Sharia* has dominated political and revolutionary discourse" (Saad, R. (2017)).

the Prime Minister, the Ministers, and the members of the House of the Representatives and the Senate must be Muslim (see Arts. 99, 113, 69 and 76). The President of the Republic must also be born to Muslim parents (Art. 99). Islamic principles and values also inform the establishment of the family and the right to education. Indeed, Article 27 states that "The family that is *established on sharia based marriage* between a man and a woman shall be the foundation of society. It shall be founded on *religion*, ethics, complementary roles between its members, as well as on affection and mercy […]" (emphasis added). Article 52 stipulates that "educational curricula" are based, among other things, on "the teachings and values of the Islamic religion". Nor is the National Council for Human Rights immune from this approach, as its task is to reinforce and promote the culture of human rights and public liberties "provided for in Islamic *sharia* and international conventions" (Art. 159). The draft Constitution also provides for a *Sharia* Research Council, responsible for expressing opinions on matters referred to it by State authorities, addressing religious issues and issuing *fatwas* (Art. 161).

It goes without saying that some of the provisions mentioned above are not in line with international standards and comparative best practices. It must also be stressed (as mentioned above) that in the draft Constitution specific provisions guaranteeing the free exercise of religious practices are lacking. Furthermore, it is emblematic that Article 7 does not include religion among the grounds on which discrimination is prohibited. All this raises serious concerns for religious minorities and stands in sharp contrast not only with a number of Islamic Constitutions, but also with the current Libyan Constitution, namely the 2011 Constitutional Declaration. The latter, indeed, stipulates that "The State shall guarantee for non-Muslims the freedom to practice their religious rituals" (Art. 1) and that "Libyans shall be equal […] without distinction on the grounds of *religion*, *belief*, language, wealth, gender, kinship, political opinions, social status, or tribal, regional or familial adherence" (Art. 6) (emphasis added).

According to the draft Constitution, Parliament has 90 days after the entry into force of the Constitution to approve the laws governing the elections of the President of the Republic, the House of Representatives and the Senate. These elections would then be held within 240 days from the approval of those laws (Art. 183). Thus, over one year, this roadmap would give Libya a new Constitution, an elected President, and two houses of Parliament, which might contribute to strengthen the legitimacy of State institutions.[164] Things, however, are much more complicated, also in the light of the fact that the destiny itself of this draft Constitution is very uncertain. Indeed, the new Constitution will only enter into force following its ratification in a popular referendum. However, on 17th August 2017, the appeal court in the city of

[164] Toaldo, M. (2017).

Al-Baydha invalidated the vote of the Constitutional Drafting Assembly approving the draft Constitution. As a consequence, the notifications to the House of Representatives to draft a law authorising a referendum and to the Elections Commission to prepare such a referendum were considered null and void. This case will be probably examined by the Supreme Court, but this might take months.[165]

Libya is currently facing a number of very serious and complicated challenges. The priority should be to address the concrete needs of the population, such as guaranteeing public services to the people, addressing the economic and liquidity crisis, rebuilding destroyed cities, working to withdraw heavy weapons from urban centres, guaranteeing greater security to the people, and reinforcing the protection of human rights: "Without this broader strategy, a constitution born with such a flawed process risks [doing] little to stabilize Libya."[166]

Syria: The Russian Draft Proposal for a New Syrian Constitution

In November 2011, Syrian President Bashar al-Assad appointed a committee to draft a new Constitution to replace the one introduced in 1973. The new Constitution – that continues to grant the President extremely broad powers – was approved by popular referendum in February 2012. In the past two years, the reform of this Constitution has started to be considered crucial by the international community in resolving the still on-going conflict in the country. In particular, on 18th December 2015, the United Nations Security Council passed Resolution 2254 that – *inter alia* – outlines the UN's support for a Syrian-led political process that "establishes credible, inclusive and non-sectarian governance and sets a schedule and process for drafting a new constitution" within six months. The resolution also recommends "free and fair elections, pursuant to the new constitution, to be held within 18 months" under UN supervision. However, the numerous peace talks held in Geneva under the auspices of the United Nations (and strongly supported by the European Union) between the Syrian government and the opposition have not thus far achieved the above-mentioned aims.

Since the start of 2017 the role played by the UN and the EU in the conflict has been partially overshadowed by the initiatives of the Russian Government, which has increasingly begun to play a prominent role in the Syrian crisis. In particular, Moscow set up its own Syria peace talks in Astana, Kazakhstan, with Iran and Turkey, and on 23rd–24th January 2017, it officially presented its draft proposal of a new Syrian Constitution,[167] which Konstantin Kosachev, the head of the Russian Senate's Foreign Relations

[165] "CDA Vote on Draft Constitution Ruled Invalid by Beida Court" (2017).
[166] Toaldo, M. (2017).
[167] The text of the draft Constitution is available at the following address: https://sputniknews.com/middleeast/201701311050216226-syrian-constitution-full-text/

Committee, referred to as Moscow's "contribution to catalyse the peace process".[168]

The content of this draft Constitution has caused some perplexity. Indeed, it has been rightly stressed that "this document stands as an important example of a non-liberal constitutional model put forward as a solution to one of the world's most intractable conflicts."[169] In the first place, the draft Constitution – by relying heavily on the constitutional model of the Eurasian countries[170] – continues to provide for a strong concentration of powers in the hands of the President of the Republic, who is the leader of the executive branch. According to the draft Constitution, the President, *inter alia*, appoints the Prime Minister and the Ministers (Art. 64), issues decrees, edicts and instructions (Art. 57), concludes international treaties (Art. 58), may call for a referendum on important issues which affect the strategic interests of the country (Art. 59), and is the Commander in Chief of the Armed Forces (Art. 60). Moreover, whilst the draft Constitution states that the same person cannot hold the office of the President for more than two consecutive terms, still it provides for a very long term in office, i.e. seven years (Art. 49). In the light of the fact that Assad's current term ends in 2021, the draft Constitution would then allow him to remain in office until 2035.

Furthermore, there are certain constitutional provisions that go "beyond executive power and wield power to supervise and unify all branches of power in the state."[171] In fact, the President is the "guarantor of independence, unity, and territorial integrity of the country", ensures the "continuous operation of public authorities", and acts as an "intermediary for the state authorities, and between the state and the society […]" (Art. 55).

On a positive note, the draft Constitution contains some provisions specifically dealing with the Kurdish question. This is *per se* a step forward, especially if one considers that in the current 2012 Constitution "the existence of Kurds in Syria is completely ignored,"[172] despite the fact that they form the largest ethnic minority in the country, constituting an estimated 10% of the population. Article 4 of the draft Constitution stipulates that Syrian citizens have the right to "educate their children in their native language" and that "government agencies and institutions of Kurdish Cultural Autonomy shall use both Kurdish and Arabic equally." Moreover, Article 15 states that Syria consists of "constituent parts", and that the organization of the local authorities is based on the principle of decentralization. On the other hand, however, the draft contains some questionable points. In particular, it stipulates that the relationship between

[168] Suchkov, M. (2017).
[169] Partlett, V. (2017).
[170] Partlett, V. (2017).
[171] Partlett, V. (2017).
[172] Bammarny, B. (2016) p. 491.

the central government and the regional authorities, their mandate, financial revenues, control over their work, the appointment or election of their representatives, as well as the status of the Kurdish Cultural Autonomy are regulated by *law* (art. 15), thus leaving the possibility for the central government to significantly limit the scope of autonomy of the Kurds.

Only time will tell if and to what extent the draft Constitution released by the Russian Government will influence the content of a new Syrian Constitution. In any case, at the moment the adoption of a new Constitution can hardly be considered a solution to the conflict, also in the light of the fact that in the recent negotiations held "both in Astana (where the [draft constitution was] presented) and in Geneva (where this issue has been recently evoked), the [Syrian] government and the opposition showed very little interest in serious discussion about a new constitution."[173]

Conclusion

By supporting the constitutional processes in North Africa and the Middle East during the semester of its presidency of the Council of the European Union, Malta followed the path of its "predecessors". In the case of Tunisia, the hope is that the EU will continue to support the process of implementation of the 2014 Constitution, as the latter is of the utmost importance for a successful outcome of the transition. This process of implementation, however, must be accompanied by structural reforms that are necessary to put the economy on track. Indeed, the riots that took place in many Tunisian cities and villages at the beginning of 2018 are due to the dire economic situation of many parts of the country.[174]

In the cases of Syria and Libya, the European Union is supporting the constitution-making processes that are taking place in both countries. The EU should push more for the adoption of constitutions which are in line with international standards and comparative best practices and make clear that any deviation from these democratic standards will have negative consequences for future relations.[175] This is particularly important in the cases of Syria and Libya, where the constitution-making processes are taking place in times of conflict. Indeed, the risks of drafting a constitution in these contexts are numerous and different in nature, including where they touch on the consolidation of the position of those who are in power, the exclusion of women and minority groups, and the lack of consensus within the society on its shared values and vision of a common future: "Premature constitution writing risks condemning the constitution to oblivion, as it will neither reflect any such vision nor be able to keep pace with changes on the ground."[176] In

[173] Trombetta, L. (2017).
[174] Mezran, K. and Neale, E. (2018).
[175] Burke, E. (2013).
[176] Bisarya, S. and Zulueta-Fülscher, K. (2016).

other words, the risks are so serious that one may even question the utility of the adoption of a constitution in times of conflict. In any case, an unconditional support for the constitutional reform processes (which sometimes seems to be the approach adopted by the European Union) does not help the democratic development of Arab countries and is not in the interests of the EU itself.

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