POLITICAL AND CONSTITUTIONAL DEVELOPMENTS IN TUNISIA AND EGYPT IN THE AFTERMATH OF THE ARAB SPRING

Arap Baharı Sonrası Tunus ve Mısır’daki Siyasal ve Anayasal Gelişmeler

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Abstract
People of the Arab World, who had to lead their lives under authoritarian governments for remarkably long years until the Arab Spring, failed to obtain any concrete response to their democratic demands and quests. The civil commotions commencing in the year 2010 spread over the whole Arab territories and led to overthrowing of the leaders in Tunisia, Egypt and Libya, which hallmarked the signals of a new approaching era. The given democratisation movements have proved to be unsuccessful owing to the facts that the people of the Arab World lacked experience in the regime of democracy, and that the countries with particular goals on the said territory were irritated by the Islamic awakening, and that the new authorities taking over the governments might make use of the natural resources and strategic regions against the interests of the western states and that Israel’s security in the region might be jeopardised. As a result of protracted endeavours in Tunisia, such a constitution that bears nothing less than those of western liberal democracies has been drafted and adopted through public reconciliation, and afterwards, political and constitutional reforms have been carried out decisively. As for Egypt, the constitution drafted in 2012 was a significant stride towards democratisation and acquisition of rights and freedom, which nevertheless was suspended by the coup in 2013. Even though many improvements brought about by the Constitution of 2012 have been preserved in the Constitution of 2014 which embodies the martial democracy, the way of its adoption was not inclusive of whole public and the Parliament is deprived of effective opposition, because of which the constitutional developments remain solely on the paper.

Key Words: Arab Spring, Jasmin Revolution, Constitutional Developments in Tunisia and Egypt, Democracy and Human Rights in Tunisia and Egypt

Özet

Anahtar Kelimeler: Arap Baharı, Yasemin Devrimi, Tunus ve Mısır’da Anayasal Gelişmeler, Tunus ve Mısır’da Demokrasi ve İnsan Hakları

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INTRODUCTION

The recent popular uprisings in the Arab World have been labelled as the Arab Spring by the West and this term has been in prevalent use since then. Nevertheless, a literature scan presents that such terms as Arab Awakening, Arab Uprisings and Arab Revolution have also been used. Even though the most appropriate term to use for the occurrences in the said region would be the Arab Winter, this study prefers to use the concept of Arab Spring whose usage prevails in the literature.

It is presumed to be not wrong to trace back to the period of separation of this region from the Ottoman Empire so as to identify what evokes the Arab Spring. In fact, the main underlying reason behind the current revolts in this region is totalitarian mode of governance. This mode of governance stems from continuation of the mentality of rule that the Western states imposed or supported upon partitioning of the Ottoman Empire. Despite having abandoned and abolished government of mandates, i.e. tutelage for various reasons, the sovereign powers ruling the region after Ottoman Empire divided via the artificial borders the Arab people who indeed share the same language, religion and race, and thereafter shaped the future of this region, which is very precious in terms of geopolitics and economy, according to their own will. Particularly in Iraq, Syria and Lebanon, ethnical and sectarian minorities have been deemed more entitled to rule compared to legitimate majority powers while in other countries, the right to rule has been apparently bestowed upon several leaders of tribes or dynasties in an effort to create leaders who abide by the west. It might be deduced that these obedient leaders who do not represent the public are prone to be totalitarian and repressive so as to reinforce their own positions.

It seems that the countries in this region granted and made available to the West their prolific natural and economic resources in return for gaining the support of Western states at the forefront of the economic, technologic, political and military power. Under these circumstances, it might be considered that the western countries ignored all sorts of sporadic democratic demands of the region’s people aiming to change the current order, without any regards to

the fact that the legitimacy of governments relies on the monarchy, coups or power rather than democracy. Moreover, it is alleged that the revenue obtained from the rich natural resources are allocated to the public as hush money so as to hinder and impede any potential steps to be taken for democratisation. Demands for democratisation have been rendered ineffective and remained unsupported because this region does not bear much significance for the west as long as the western countries, particularly the United States of America (USA), have secure access to the sources of oil at reasonable prices, and ensure the security of their own strategic military bases as well as that of Israel, and the current totalitarian government leaders do not pose any risk to realisation of their desires. In fact, USA and western countries have preferred stability to the democracy and have remained silent against all anti-democratic practices and violations of human rights so long as their interests are not prejudiced.

On the other hand, nerve compressions and social explosions occurred in the countries like Egypt and Tunisia which lack the advantage of having natural resources, and which have lagged behind in industrial breakthrough, and which were severely affected by the impacts of global economic crisis of 2008-2009, and where free market does not function and foreign investors keep away. Having difficulty in access to the basic needs, unemployment and high inflation also aggravated the unrest, thus leading to a popular uprising.

In Tunisia, the civil commotions, which erupted as an economic-oriented rebellion and then evolved into questioning of the legitimacy of political elites, shortly spread across the whole Arab World excluding few countries, which consequently ousted the dictators in Tunisia, Egypt, Libya and Yemen, and changed the governments in Oman, Morocco and Jordan. In general, the Arab countries strived to quell the public demands by resorting to constitutional reforms.

Today Tunisia is regarded as the first and sole fruit of the Arab Spring. The popular uprising achieved a response at short notice and thus, a democratic and bloodless revolution took place. As for Egypt, even though a bloodless revolution took place, the Muslim Brotherhood movement who attained both legislative and executive powers through democratic means was unseated through a coup allegedly supported by the Freedom and Justice Party, western countries, Israel and Saudi Arabia, thereby returning the country to its past.

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years of dictatorship.\(^8\)

The well-known political scientist Huntington classified the waves of democratisation and stated that the disintegration of Soviet Union led to the 3\(^{rd}\) and last wave of democratisation. It springs to the mind whether the civil commotions starting in 2010 in the Arab World, which hosts no democratic state apart from few exceptions, will trigger the 4\(^{th}\) wave of the democratisation movements which have not resumed as from 1990s.\(^9\) Nevertheless, the sequence of events taking place so far has demonstrated that it is improbable for democracy to arrive at this region until distant future either by legal means or by revolutions. The main underlying reasons among many others might be cited as that Arab countries lack experience in politics and democracy, and that the desire for democratisation is overshadowed by the economy being the pressing issue for the public, and that Arab societies making their own decisions of their own free will conflict with political and economic interests of western countries. Furthermore, it should be expressed from scratch that transition to and transformation into a democratic system where the public actively participates in the government is also related to the long-standing culture of democracy.\(^10\) For instance, it might be claimed that democracy has been properly and entirely established in Turkey upon the first free elections run in 1950 terminating the period during which the public was kept off the government. However, in order to gain an insight as to what paves way for the free elections in 1950, one must trace back to the proclamation of the Republic in 1923, and, on the other hand, with a view to interpreting the latter, one must trace back to the Ottoman Empire, especially the period when the constitutional developments were performed. As is seen, Turkey owes its position in 1950s to its almost half century-long culture of democracy and politics. However, it seems unlikely to present such a timeline for the countries in the Arab World. That’s why the Arab people either cannot achieve democracy as in the case of Syria or democracy slips through their fingers as in the case of Egypt. As is observed, this region still houses the kingdoms equipped with reinforced powers or pro-coup heads of state whose legitimacy does not rely on democratic elections. Therefore, nations who have not experienced various hurdles in realisation of democracy in their past would not find it easy to

\(^8\) Azzurra Meringolo, “From Morsi to Al-Sisi: Foreign Policy at the Service of Domestic Policy”, *Insight Egypt*, 2015, p. 4.


establish democracy through coups or revolutions.

This study intends to analyse the political atmosphere in Tunisia and Egypt before the Arab Spring. Indeed, the constitutional and political developments occurred after the revolutions will be clarified better by analysing the main reasons and origin of the events which brought those nations to the edge of riot. Additionally, through making a comparison between the constitutions in effect prior to or following the revolutions in Egypt and Tunisia, changes of any kind would be examined in such topics as legitimacy of constitutions, legislation, execution, judiciary system, separation of powers, the system of check and balance, the composition of legislative and judicial bodies, human rights, political parties, election systems and viewpoints of constitutions at Sharia.

1. Political and Constitutional Developments in Tunisia after the Arab Spring

Political and constitutional developments in Tunisia are so deeply intertwined that it would be challenging to examine these developments separately and independently. Nonetheless, in an effort to have the subject better understood, political and constitutional developments will be evaluated under separate headings.

1.1. Transition from Authoritarian System to Liberal Constitutional System and Important Political Developments

Even though Tunisia declared its independence from France in 1956 under the leadership of Habib Bourguiba, the existence of France’s military in the country did not terminate until 1963. Bourguiba was announced as the President for a lifetime by the Parliament, which revealed the first signals of the fact that the regime of Bourguiba would not come to an end easily through democratic means. Government leaders of Tunisia had to always cope with the organised opposition which maintained its existence by virtue of the unionisation structure inherited from France. As a result, Bourguiba often had to grapple with the extensive protests launched by the labour unions. For instance, quelling of a protest with strict measures in 1978 led to arrestment of almost all the leaders of unions. Even if it is suggested that Bourguiba came to realise that his reign could not continue with use of force and therefore introduced the multi-party elections for the first time in 1981, Bourguiba’s party held all the seats in the Parliament as a result of this sham election.11

Zine al-Abidine Ben Ali who formerly served as the Minister of Interior and Prime Minister in Bourguiba’s government, took over the power upon an

occasion called silent/bloodless revolution in 1987. Having sensed the urgent need for change in the acutely uneasy society, Bin Ali had 7 doctors issue medical reports declaring 80-year old Bourguiba as mentally unfit to rule the state, thereby inaugurating a new authoritarian era through bloodless coup. At the beginning of his term of office, Bin Ali signalled his tendency to return to pluralist mode of governance and multi-party elections, and released the political prisoners from the jails in an attempt to reduce the high tension in the society. Nevertheless, when Bin Ali won both presidency and parliamentary elections in 1989, he adopted a majoritarian and controlled mode of governance like his predecessor. Along with stepping in of first opposing party in the presidential elections apart from Bin Ali’s party, Bin Ali confronted his first rival in 1999. However, the way the elections were held absolutely complies with the concept of ‘plebiscite’ used to express that the democracy is “in words” not in deeds, which weakened the public’s not only trust in the political power but also faith in democratisation. With a glance at the election outcomes, it seems reasonable to deduce that Bin Ali’s rival was nominated as presidential candidate just to ensure legitimacy of elections.

The middle-class of the society was demolished by Bin Ali’s policy of making available the economic resources solely to the particular social spheres. Since the number of losers of economy surpassed the number of winners, the society was drifted into social explosion due to economic course of events. The civil society naturally rebelled against then-current status quo on the following grounds that Tunisia is deprived of rich natural resources, and was severely devastated by the impacts of 2008’s global economic crisis, and had an unemployment rate rising up to 18 percent and youth unemployment climbing up to 42 percent, and, what’s more, their non-elected leaders laid the groundwork for wretched conditions in the society.

It is of course not true to claim that the Arab Spring only stemmed from

economic grounds. Tunisia was identified as one of the most suppressive regimes of the world by international observers on account of illegal detentions and persecutions, state’s tight grip on media and internet, pressure on and threats towards dissenting voices and human rights activists along with no right to live offered to the cited spheres during Bin Ali’s reign. All such social imbalances felt deeply in all aspects of life evoked social explosion thus waging a new era for Tunisia. Consequently, the desire to fulfil economic and political demands of the public and to eradicate the economic and political corruptions and to ensure access to the basic rights and freedom laid the foundations to spark off the civil commotion.

The society itself initiated a new movement with a view to improving the social and political conditions, putting an end to corruptions and assuring general freedoms. Tunisian people who were oppressed and wrestled with economic and political troubles under the half-century long dictatorial regime, poured out into the streets by organising themselves on the social media after a university graduate street vendor killed himself by setting himself on fire.

The continuous demonstrations defying against the threats of persecutions and detentions spread across the whole country by virtue of organised social structure of Tunisia, use of mass media means and gaining both national and international support. Upon extending of demonstrations all over the country, Bin Ali abandoned the country and thereafter the National Unity Government was formed, which was greeted with excitement in the Arab region. Although ‘an Islamic awakening’ did not exist among the dynamics of the Arab Spring, the movement indirectly arouse expectations with respect to realisation of such an awakening through which the regimes based on monarchy, dictation and strict laicism would be toppled and instead anti-USA, anti-Europe and anti-Israel regimes would be formed.

As soon as Bin Ali left the country, Mohamed Ghannouchi formed a

20 Ulutaş, Torlak, 2011, p. 6.
transitional government and Fouad Mebazaa, the former president of the Chamber of Deputies was appointed as interim President. So as not to startle Bin Ali’s loyal soldiers and government leaders, Ghannouchi assigned 12 Ministers from the former government to the newly set up cabinet, which triggered widespread public demonstrations and eventually the cabinet was reshuffled on January 27th, 2011.\(^{24}\)

Upon formation of the government, the issue of which legal norm would create a basis for this transition period emerged. Shall the Constitution 1959 be deemed still valid and in force or shall this Constitution be repealed thereby causing a legal gap and then the new route of the President Mebazaa be followed up?\(^{25}\) Owing to difficulty of drawing a new road map inclusive of all social spheres, Mebazaa is claimed to prefer the former to the latter option. However, according to the provisions of the Constitution 1959, ‘powers of interim President are too few to count that he is obliged to hold an election in the country within 45-60 days.’\(^{26}\) Mebazaa’s hands were tied due to the facts that it seemed impossible in such a short notice like 60 days to re-establish the forbidden parties under Bin Ali’s reign and prepare them for the approaching election, and to ensure a democratic electoral system after setting up an election supervisory mechanism. What’s more, the Constitution 1959 was not able to provide flexibility for smooth democratic transition. Nevertheless, the Constitution was circumvented and the transition period was sustained thanks to empowering of Mebazaa by the both Assemblies to issue a decree-law and also by virtue of the provisions of the newly issued Decree-Law No. 14.\(^{27}\)

This Decree-Law entrusted the President with extensive and strong powers and thus helped him manage the process easily. This Decree-Law prescribed and ensured that both Prime Minister and Ministers of interim period cannot compete in the elections of the Chamber of Deputies, and that the interim President cannot run in the election of the Chamber of Deputies and in any other election held after adoption of New Constitution.\(^{28}\) These provisions set down as a rule that these cited must not acquire a new position or title in the future, thereby ensuring that these persons served impartially and unselfishly during their interim terms of office.

\(^{24}\) Birdane, 2017, p. 90.  
\(^{25}\) Açıl, 2017, p. 185.  
\(^{27}\) Açıl, 2017, p. 185.  
All the preparations required for establishment of a democratic system were completed by the Decree-Laws of the Transitional Government. The Constituent Parliament of Tunisia was founded via the election held. Although none of the parties running in the election won the majority of votes, the parties adopting Islamic thoughts formed a strong alliance. The winner of the election, Ghannouchi, waived his chance to be elected as Presidency to Marzouki who was another party leader in the alliance, and waived his chance to be elected as Prime Minister to Cibali, the secretary general of his party El-Nahda and left presidency of the Parliament to Jafar, the younger member of alliance. As is seen, Rashed Ghannouchi who won the elections by 41 percent with a landslide victory assured that his friends of common cause were not appointed to influential positions in order to prevent the fragile politics of the country from deteriorating under the intensive pressure from the secular and western social spheres.

The intensive pressure of the public masses in the country, who used all kinds of issues they faced an excuse to hold demonstrations, wore out the current government and caused the Prime Minister to resign after assassination of an opponent leader, which eventually paved the way for formation of a new cabinet consisting of more technocratic and independent persons. Upon escalation of demonstrations, Ghannouchi called an election in attempt to prevent social tensions. This move thwarted any coup attempt leading to return to the former dictatorial regime like in Egypt. Being surrounded by such hardships, Ghannouchi could not prevent his party from turning out to be opposition in the election of 2014.

1.2. Constitutional Developments in the aftermath of Revolution

Tunisia is regarded as the only country who managed to create a democratic constitution during the Arab Spring. Under this heading, we will scrutinise and identify what sorts of changes took place when the old and new Constitutions are compared with respect to such subjects as legislation, execution,
jurisdiction, rights, freedoms and Sharia. First of all, we will analyse whether
the constitution was established through social inclusion or not, i.e. ‘legitimacy
of constitution’, which is one of the most crucial indicators of ‘extent of
democracy’ of a constitution.

1.2.1. Legitimacy of Constitution-Making Process

As per Özbudun’s classification, three different ways are available for
transition to democracy, which are designated as “reform”, “breakaway” and
“agreement”. In Tunisia, breakaway refers to a process in which the government
in power suddenly collapsed due to revolution or popular uprising and none
of the political leaders of the past took part in formation of new government.
Özbudun puts forward two options either of which is to be preferred in making
of constitution after transition to democracy through breakaway. The options
are either ‘making of constitution by democratic and representative constituent
Parliament’ or “making of constitution under the influence of transitional
government”.31

In Tunisia, it seems that the first democratic option which puts an emphasis on
representation of vast majority of public has been used in drafting and adopting
the Constitution. In this method, the public embrace their constitution as a
result of a process during which all freedoms of the constitution, particularly
freedoms of press and speech are assured by the representatives who are
elected by a fair, free and transparent election and do not turn a deaf ear to
public demands. Therefore, drafting of constitutions through this method lasts
longer than those designed by a certain group of elites behind closed doors.32

Although Tunisia was ruled under a repressive government, its history
and social, economic and cultural background contributed to globalisation
of Tunisian people and creation of a strong civil society, which promoted
active participation of all social and political segments of society in the first
democratic constitution-making process of the country.33

The legitimacy of constitution-making process was also strengthened
through setting up a supreme electoral commission by a decree-law in order
to conduct electoral processes and ensure election security. During Bin Ali’s
term of office, electoral processes used to be conducted by the Ministry of
Interior. The dictatorial regime used to take advantage of non-availability of

32 Gluck, Jason, “Constitutional Reform in Transitional States: Challenges and Opportunities
Facing Egypt and Tunisia”, USIP, 92, 2011, p. 4, (Online) https://www.usip.org/sites/
University in Cairo, 2014, p. 28.
an effective supervisory mechanism to resolve the election disputes. On the other hand, in the new era, entrusting the conduct of election processes to an independent supreme electoral commission and assigning the judicial review of election disputes to the Council of State remarkably increased the legitimacy of the authorities entitled to draft the Constitution.\textsuperscript{34}

It would not be incorrect to argue that the above-cited Supreme Commission had a quite pluralist structure. This Commission who was comprised of 16 members included four lawyers, three judges, two university professors, two non-governmental organisation leaders, one notary, one journalist, one foreign resident, one accountant and one IT specialist.\textsuperscript{35}

Another component required to establish the legitimacy of the Constitution is that the electoral system to be used in formation of the parliament, which will be in charge of drafting the Constitution, must uphold a pluralistic approach. This component was not disregarded in Tunisia and therefore proportional electoral system was adopted. According to this electoral system, each party is represented in the Parliament in proportion to the number of votes they gain in the constituencies. In the election of Parliament of Tunisia, even very minor parties managed to hold seats in the Parliament by virtue of implementation of proportional representation system and thanks to the lack of any electoral threshold, which democratised both the election system and constitution-making process. The election outcomes brought about a fragmented parliament in which 19 parties and 8 independent candidates acquired representation in the Parliament. In addition to envisaging such an election system to ensure representation of all social spheres in the Parliament, gender-related regulations were made to ensure active participation of women in the processes. It was stipulated that half of the candidates the parties nominate in the constituencies had to be women, and it was further prescribed that the lists of candidates had to be prepared by placing names of men and women one after another to prevent women from being placed at the end of the list.\textsuperscript{36}

14,083 observers of the Supreme Electoral Commission of Tunisia were assigned to supervise proper and safe running of elections. Moreover, 661 international observers in total, 52 of whom were from Arab countries and 10 of whom were from Turkey, followed up the election processes.\textsuperscript{37} With respect to how legitimate and democratic the running elections were, complimentary

\textsuperscript{34} Açıl, 2017, p. 191.
\textsuperscript{36} Açıl, 2017, p. 190.
\textsuperscript{37} Ulutaş, Torlak, 2011, p. 7-8.
POLITICAL AND CONSTITUTIONAL DEVELOPMENTS IN TUNISIA AND EGYPT IN THE AFTERMATH OF THE ARAB SPRING
Dr. Abdurrahman TEKİN, Res. Asst. Ömer TEMEL

remarks and responses were received from international observers, the ministries of exterior of many countries and international organisations like Arab League.38

In Tunisia, the elected Parliament which was deemed to promote democratic transformation assumed two important functions. First function was to conduct usual legislative processes as in the assemblies of other countries while the second was to draft a democratic constitution. Although some countries elect a second Parliament called ‘constituent Parliament”, which will be exclusively in charge of making a constitution, in order not to raise the workload of the Parliament, whereas Tunisia did not follow this practice and instead entrusted one single Parliament with both tasks. In this sense, it might be argued that, driven by the fact that the Parliament is expected both to draft a constitution and conduct legislative processes, French-type constituent Parliament model was preferred as a manner of democratic constitution-making.

In order for the Constitution to be adopted in the constituent Parliament, two different quorums were laid down. In case the Constitution is adopted by the 2/3 of total number of Parliament members, the Constitution will directly come into force. On the other hand, in case the Constitution is adopted by any percentage between 1/2 and 2/3 of total number of Parliament members, draft Constitution is proposed to the approval of public opinion via referendum. During and after the constitution-making process, western academicians and Tunisian opposition strived to underestimate the legitimacy of Nahda with their intensive perception operation. Even though the Islamic parties constitute more than 60 percent of the Parliament in numbers, it was constantly expressed that these parties could not make the Constitution as they pleased, by putting an emphasis on the fact that these parties actually gained support of 49.7 percent of the voters in the election.39 Although the parties, which allied with Nahda, had the sufficient power to make the Constitution at their will based on the number of seats they held in the Parliament, the Nahda coalition demonstrated reconciliatory approach towards the opposition parties. Therefore, the process did not result as similarly as in the Egypt and the Constitution was eventually adopted by high number of approval votes.40 Despite many hardships faced, the constituent Parliament adopted the Constitution on January 26, 2014 with

200 approvals, 4 abstentions and 12 rejections.\textsuperscript{41}

As is seen, in spite of having restricted itself with drafting the Constitution within a year, the newly founded Parliament managed to complete the constituting-making process only in 2014 because of the non-reconciliatory attitudes of the “strict secular” minority in the Parliament remaining from the old regime and also due to the widespread protests and marches. Since Nahda frequently took steps to lessen the tension, withdrew from the government although it came first in the election, and retreated from the issues likely to arouse tensions, the task of Constitution-making handed over to the government officials by the people was accomplished in peace and with ease.

1.2.2. Legislative Developments

Under this heading, we will try to analyse the democratisation steps in Tunisia with a brief assessment of the roles tailored for the Parliament in the old and new constitutions. Prior to the revolution, the Parliament of Tunisia was equipped with quite weak powers. The Parliament which used to function under absolute hegemony of the executive power can naturally be described as a part of executive body.\textsuperscript{42} For long years, one single party ruled and dominated the Parliament. Although other parties were allowed to run in the elections, which were held shortly before the revolution, these parties might be considered as “satellite party”,\textsuperscript{43} inasmuch as it is prevalently observed in almost all dictatorial regimes that the satellite parties blindly attached to dictators are granted the right to run in the elections just in order to dismiss the increasing demands for democracy and right to speak.

Tunisia had adopted a bicameral system when the Constitution of 1959 was in effect. Pursuant to this system, the Chamber of Deputies used to be directly elected by the popular votes while the Chamber of Advisors used to be selected partly by the public and the Head of State. \textsuperscript{44} The practice of appointing of chamber members by the Head of State, which was usually observed in the old British colonies like India, Australia and Canada, was favoured in Tunisia too only to end up in a quite undemocratic scene. It is of course not expectable to accomplish representative democracy with this practice which causes the public to be governed by the persons they did not elect. The bicameral legislature was abolished and instead unicameral legislature was preferred.

Another most significant legislative change took place in the structure of parliamentary commissions. The issues to be brought up and discussed

\textsuperscript{41} Açıl, 2017, p. 198.
\textsuperscript{43} The Carter Center, 2014, p. 21.
\textsuperscript{44} Tunisia’s Constitution, 1959, art. 19/para. 1-7.
in the Parliament are first prepared by the parliamentary commissions and finalised by the deputies, which constitutes a very important phase because composition of commission members plays a vital and fundamental role in the countries’ politics. In the old Constitution and in its revised versions, no regulation was found as to how the opposition would be represented in the commissions because there was not any direct or indirect reference to opposition parties. In any country governed for a half-century by a single party, representation of more than one party in the country’s commissions would not be naturally possible too. On the other hand, in the Constitution drafted during the period of transition to multi-party elections, existence of opposition was not forgotten and it was explicitly stated that all parties would be represented in the parliamentary commission according to proportional representation.45 Additionally, it was stipulated that the Chairmen of Budget and Foreign Affairs Commissions would be designated by the opposition parties. What’s more, opposition parties were entitled to set up an investigation commission once a year to supervise the operations and actions of executive body.46

As is seen in the new era, existence of legislature, particularly opposition, has been admitted and, to this end, many requisite regulations have been issued to integrate them into the system and equip them with more powers. The new regulations have involved, inter alia, determination of members of independent, impartial and autonomous administrative authorities, which are established to conduct operations in specific fields or advise either legislative body or executive body on specific topics. In Tunisia, it has also been prescribed and assured that the Parliament shall host the election of members of independent administrative authorities like the Electoral Commission, Audio-Visual Communication Commission, Human Rights Commission, Sustainable Development Commission and Good Governance and Anti-Corruption Commission, and that their members shall be elected by qualified majority voting.47 Determination of members of such empowered institutions and organisations by the legislative body rather than executive body points out the importance attached to the Parliament. Moreover, requirement of qualified majority for this election promotes alliance between parties and thus helps foster a pluralistic structure.

Another distinguishable change in the Constitution of 2014 is on the authorisation to introduce a bill of law. In almost all democratic countries, every deputy (Member of Parliament) is authorised to introduce a bill by himself whereas the right to introduce a bill can only be employed by a group

47 Tunisia’s Constitution, 2014, art. 62.
of 10 deputies in Tunisia. If this right is granted to each and every deputy in Parliament, then it might be mentioned about a more democratic practice.

The old Constitution did not include any provision making the way for removal of the Head of State from office. Even if this procedure had been inserted in the old constitution, it would not be likely to implement the procedure due to the then-current regime, but, it could have been an indicator of democratisation and would enable change of current regime through legitimate ways. This deficiency has been remedied in the newly drafted Constitution and ‘responsibility’ of the Head of State has been integrated into the constitutional system.

Although constitutions of many countries allow for use of the powers to declare war and make peace by either simple majority or absolute majority, the new Constitution requires 3/5 of the total number of members of Parliament to decide on these issues. Determination of such a hard-to-reach percentage means to strengthen the Parliament and to ensure participation of especially opposition parties in the decision-making process.

Another issue to touch upon is organic laws/institutional acts (lois organiques). Constitution-maker has assigned different legal statues to the laws enacted by the Parliament on several topics named organic law, which are of high importance for the society and governance of the country, such as election, political parties or basic rights and freedoms. By virtue of importance of these laws, harder-to-reach majority is required to be fulfilled for these laws compared to simple majority required for other laws. The underlying reason behind adopting an organic law by a very hard-to-reach percentage in the Parliament might be argued to aim at urging the parties to make alliance and to ensure broader participation in carrying out such important procedures. It seems that the Constitution of 2014 regulates the organic law like the old Constitution of Tunisia and similarly requires the same quorum, i.e. absolute majority of all members of parliament. Nevertheless, contrary to the old Constitution, the Constitution of 2014 provided a much longer list with respect to which topics to be regulated by organic laws. Some of these topics can be exemplified as follows: budget law, citizenship law, local governments, voting of international treaties, election law, human rights and freedoms, syndicates etc. It can be deduced from this situation that this has been a good progress in terms of hindering a lesser majority group in the legislative body to easily take decisions on such important political matters of the country.

48 Tunisia’s Constitution, 2014, art. 88.
49 Tunisia’s Constitution, 2014, art. 77/para. 2-subpara. 4.
50 Tunisia’s Constitution, 2014, art. 65/para. 2.
51 M’Rad, 2016, p. 84.
Last but not least, another issue to mention is judicial review of laws. When the old Constitution was in effect, the power to subject the laws to judicial review was exclusively vested in the Head of State. However, the new Constitution granted this power to 30 deputies, i.e. approximately 1/7 of the Parliament, along with the Head of State. Exercise of this power by deputies enables that any legislative act introduced by the sufficient majority of Parliament against the Constitution can be nullified after being referred to the Constitutional Court by 30 deputies whom even minor parties can bring together.  

1.2.3. Executive Developments

Although Tunisia had a dual executive system prior to the revolution which consists of the head of state and ministers, it could not be possible for the council of ministers to make decisions and create policies independently of the Head of State. It might be claimed that design of a dual executive system does not actually aim at sharing of powers, but instead intends to conceal the dictatorial regime in the background. In spite of the dual executive system in place, the old Constitution specified that the executive power could be exercised at the disposal of the Head of State and the government was only expected to assist this management. In the old constitutional order, the Head of State was exempt from the liabilities of his own actions and works with impunity and political immunity, and could not be judged even if his term of office terminated, which is the indicator of such an immense reinforced power held by the Head of State.

The new constitutional system established after 2014 has been built upon the semi-presidential system where the dual execution has been equipped with broad authority as in the old system. However, dual execution has remained only in words in the latter system. In this context, prime minister has been designated as the head of government and has also been entitled to execute general politics of the state along with the Head of State. Because of being also in charge of smooth running and proper functioning of various administrative organisations, public authorities and Ministries, the Prime Minister has become much more powerful compared to the former system.

52 M’Rad, 2016, p. 84.
54 Tunisia’s Constitution, 1959, art. 37.
55 Tunisia’s Constitution, 1959, art. 41/para. 2; No matter what kind of regulations are issued with respect to constitution or no matter how hard it is tried to conceal and obscure the truth, it might be argued that these states are governed by a super-presidential system under such regimes. See Açıl, 2017, p. 175.
Being empowered in the new constitutional system after having been removed from a symbolic position, the Council of Ministers has been enabled through the new regulations to easily obtain a vote of confidence to take office/continue to serve. Constructive vote of no confidence, one of the tools of the ‘rationalised parliamentarism’ model implemented in Germany, has also been involved in the Constitution. According to this model, removal of the Prime minister from office would require votes of absolute majority of total number of all parliament members while the new Prime minister to take the office is required to receive the votes of absolute majority of all parliament members.57 It might be claimed that what is aimed at through this practice is to empower and stabilise governments in the countries which have fragmented parliaments.58

The old constitutional system did not impose any restriction or limitation on election of heads of state whereas new constitutional system has set down that presidency can be occupied twice at most.59 This will ensure that this office changes hands without being permanently occupied by one single person as in the old system. It was cited above that Bin Ali ran for the pre-revolutionary presidential elections mostly as the single candidate. The underlying reason for this was based on a provision in the Constitution. In order to be presidential candidate, it is required to collect signatures of a certain number of deputies or mayors. Existence of a single-party regime in the country caused Bin Ali to be unrivalled. The pressure that this situation put on Bin Ali triggered a constitutional amendment within the scope of democratisation steps. Accordingly, in case either the Parliament or the mayors cannot nominate any presidential candidate, any political party leader can automatically run as candidate in the elections of 2009.60 However, it has been regulated in the new system that even a small number of people from the public can nominate presidential candidates, thus creating competitive election circumstances.

The other powers strengthening the position of Head of State in the old Constitution were to declare state of emergency and, with this end in view, take necessary measures. The State of Head was required to consult the Prime Minister and Presidents of both Chambers in order to eliminate the emergency circumstances.61 Even though the Head of the State was required to take advice of the given persons prior to taking measures, this consultation was not binding on him. Taking into consideration the fact that the Prime Minister and Presidents of Chambers belonged to the party of the Head of State in Tunisia governed by

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57 Tunisia’s Constitution, 2014, art. 97/para. 2.
59 Tunisia’s Constitution, 1959, art. 39/para. 3; Tunisia’s Constitution, 2014, para. 75/para. 5.
60 Tunisia’s Constitution, 1959, art. 40/para. 3; Tunisia’s Constitution, 2014, para. 74/para. 4.
61 Tunisia’s Constitution, 1959, art. 46/1.
POLITICAL AND CONSTITUTIONAL DEVELOPMENTS IN TUNISIA AND EGYPT IN THE AFTERMATH OF THE ARAB SPRING
Dr. Abdurrahman TEKİN, Res. Asst. Ömer TEMEL

a single-party, this act of consultation would not be expected to put the brakes on execution. This provision was likewise preserved in the Constitution of 2014, albeit inclusive of the President of the Constitutional Court as the person to be consulted along with others. More importantly, contrary to the old one, this Constitution has not ignored the Parliament and has vested the President of Parliament and 30 deputies with the right to apply to the Constitutional Court for cancellation of the measures when deemed unlawful.62

One of the most important tools empowering the Head of State is the power to veto. The old Constitution stipulated that any act of legislation rejected and returned to the Parliament by the Head of State for reconsideration had to be re-passed by 2/3 votes of the total number of Parliament members to resubmit the bills for approval by the Head of State. However, the new Constitution reduced this quorum and instead, found sufficient the absolute majority of all Parliament members.63 Thus, ‘the veto weapon” employed by the Head of State to put an immense pressure on the Parliament has been preserved in the new system too, albeit with alleviated influence.

1.2.4. Judicial Developments

It is asserted that the pre-revolutionary judicial system of Tunisia did not function independently of the legislation and execution, instead acted as the sub-organ of the executive body.64 To prove whether such a contentious statement is based on truth at least theoretically, the constitutions have to be examined. First of all, it would be useful to compare the legal guarantees provided to judges in order to ascertain the level of development of the judicial system. The Constitution of 1959 set down that judges and prosecutors were independent and not obliged to abide by anything other than the laws and could not be arrested unless they were caught red-handed in the act of committing a serious crime. The new Constitution has not found these guarantees adequate enough and additionally offered another guarantee that judges and prosecutors cannot be dismissed from their places of duty involuntarily.65 It can be deduced that judges who have achieved a very significant guarantee through inclusion of such a provision in the Constitution will be able conduct their duties without fear of being exiled or expelled any longer.

In the new constitutional system, remarkable efforts have been exerted to maintain independent functioning of the supreme board which has been in charge of promotion, appointment, dismissal from profession, assignment,

62 Tunisia’s Constitution, 2014, art. 80/para. 3.
63 Tunisia’s Constitution, 1959, art. 52/para. 2; Tunisia’s Constitution, 2014, art. 81/para. 3.
64 The Carter Center, 2014, p. 90.
Disciplinary procedures of judges and prosecutors. In the old Constitution, selection of members of the Supreme Board which was in charge of promotion procedures of judges and prosecutors was entirely subject to the law. Therefore, it might be asserted that this Board was under the influence of Bin Ali who dominated the Parliament. In the old system, in order for judges and prosecutors to be appointed to their places of duty, the decision of the Head of State was required upon advice of ‘Supreme Judicial Court’ whose independence was in doubt, whereas, the new system has prescribed that final decisions of the Board on promotions are required to be signed by the Head of State just as a mere formality.\(^6^6\) Despite the fact that involvement of the executive body in the selection of judicial members does not seem to be quite democratic, both more independent functioning of the Board and rendering the approval of the Head of State as a mere procedural requirement distinguish the new Constitution from the old one.

The scope of jurisdiction of the Constitutional Court has been extended and the legislative body has had more influence in its member composition. Furthermore, all organic laws have been counted in among the norms to be referred to the Constitution Law for revocation. The old Constitution included a less variety of organic laws, whereas they have increased in number and type in the new Constitution. Although only specific organic laws were subject to judicial review in the old Constitution, the new Constitutional system enabled review of all organic laws. Moreover, the new constitution paved the way for concrete control of norms, which means that in any pending case, the norm applied to the case can be claimed to be unconstitutional, and an appeal can be lodged to the Constitutional Court to review it with this ‘Contention of Unconstitutionality’. What’s more, 30 deputies are allowed to appeal to the Constitutional Court for contention of unconstitutionality of a norm adopted by the Parliament and to request judicial review of the relevant norms, thereby enabling some acts of legislature to be balanced indirectly by the judicial system via its instruments of abstract and concrete controls of norms.\(^6^7\) Upon the appeal of the Parliament to put the Head of State on trial and to remove him from office, the Constitutional Court was designated as the authorised body to hear this trial, which has empowered the Court and reinforced its position in the state’s system of government.\(^6^8\) Additionally, the Constitutional Court has been authorised to settle and resolve, within a week, any disputes emerging between the government bodies. For instance, in case of any dispute of powers between the Head of State and the Prime Minister, the Court has been entitled to deliver a judgment thereon. Even if it can be asserted that such

\(^{66}\) Tunisia’s Constitution, 1959, art. 66; Tunisia’s Constitution, 2014, art. 112.

\(^{67}\) Tunisia’s Constitution, 1959, art. 72; Tunisia’s Constitution, 2014, art. 120/para. 1.

\(^{68}\) Fedtke, 2014, p. 11.
an intermediary role might also bear the risk of politicisation of the Court\textsuperscript{69}, it will not be inaccurate to state that the most appropriate and impartial body to be authorised in resolution of any disputes between government agencies is the judicial body. This authorisation will thus promote legalisation of politics. By virtue of all the above-cited powers, the Court can also exercise its power on the executive body to more easily ensure balance among powers.

As for member composition of the Court, in the old constitutional order, the Constitutional Court was comprised of 9 members, 4 of whom used to be appointed by the Head of State and 2 of whom by the President of Parliament and 3 of whom by the Supreme Judicial Bodies. On the other hand, according to the new Constitution, the Head of State, the Parliament and the Supreme Judicial Council appoint 4 members each.\textsuperscript{70} It is easily understood from this brief outline that the Parliament has attained a more critical position. Since the quorum sought after in determination of the members to be elected to the Constitutional Court by the Parliament is qualified majority, member composition of the Court will be rendered more pluralistic. Equal division of the power of appointment into 3 branches of government indicates that none of the branches are deemed superior to another and that balance of powers are strengthened.\textsuperscript{71}

1.2.5. Other Constitutional Developments

Under this heading, we will try to put an emphasis on whatever changes have taken place in the new Constitution with respect to such issues as position of religion, general situation of human rights, women’s rights and political rights.

Although Tunisia is a country where a great majority of its population are Muslim, the political system somehow used to distance itself from religion because both leaders of the State prior to the revolution had adopted and carried out a secularist politics. Nevertheless, the Constitution of 1959 began with a Basmala and highlighted among the characteristics of the country that the religion of the State was Islam.\textsuperscript{72} In the constitution-making processes, the Nour Party and the Freedom and Justice Party, which had a numerical superiority in the Parliament, desired to govern the State with Sharia, but they had to give up and renounce their desires owing to pressing voice of local and international society. Islamic Parties demonstrated a reconciliatory approach and upheld the attitude of the Constitution of 1959 towards religion and thus, the provision that the religion of the State is Islam was included

\textsuperscript{69} The Carter Center, 2014, p. 89.
\textsuperscript{70} Tunisia’s Constitution, 1959, art. 75; Tunisia’s Constitution, 2014, art. 118/para. 1-2.
\textsuperscript{71} The Carter Center, 2014, p. 92.
\textsuperscript{72} Tunisia’s Constitution, 1959, art. 1.
in the Constitution without any direct reference to Sharia. Furthermore, the Constitution has specified that the State is liable to protect ‘sacred religious values’. It seems that this article has been designed to protect not only Islam but also all religious beliefs. Even though the Islamic Law, Sharia, protects non-Muslim’s freedoms of religion and worship, inclusion of this issue also in the Constitution can be regarded as a signal to the West.

It was mentioned above that in the old constitutional order, single-party regime dominated the political life for quite a long period of time and later on, ‘satellite parties’ were set up to have the legitimacy of the dictatorial regime recognised through the reforms. As the public could not find any other political alternatives in the elections, they naturally lost their interest in the elections, thereby causing the political freedoms to remain solely on the paper. Implementation of the ‘majority rule system’, which is one of the election systems that do not generate fair outcomes, aggravated the situation.

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In the post-revolutionary constitutional system, there have been provisions with respect to holding of elections in a fair and transparent manner and setting up of an independent electoral commission, which was a significant

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74 Tunisia’s Constitution, 2014, art. 6.
75 Akar Yüksel, Bingöl, 2013, p. 319.
step towards democratic running of the elections.77 Thanks to preference of a proportional representation system without any election threshold as well as assurance of the right to organise, more than a hundred political parties have been set up, which describe and characterise themselves as ‘centre-right, centre-left, centre, socialist, right-wing, environmentalist, left-wing, Islamist, independence party, Marxist, Marxist Leninist, new left-wing, pro-Arab League, workers’, progressive, reformist, social democrat, social libertarian, communist, scientific socialist78, and thus achieving a great breakthrough in establishment of a pluralist order.

Some regulations stand out in the new constitutional system with respect to women’s rights in addition to their political rights and freedoms. At the very beginning of the constitution-making process, women were defined as complementary to men. Such a definition or characterisation was harshly criticised by the local and international media and non-governmental organisations. The Nahda representatives emphasized that women were fundamentally equal to men, but they differed from each other in terms of biological roles and responsibilities and therefore, men and women complemented each other in a family.79 Due to intensifying pressure on them, this statement was removed from the constitution and instead it has been highlighted that men and women are the individuals with equal rights and duties. In this sense, it has been ensured in the constitution that the state will play an active role to increase women’s achievements and provide equal opportunities along with protecting the women’s rights, thus imposing a positive obligation on the State.80

Along with the assured rights and freedoms, some independent administrative authorities such as the Electoral Commission, Audio-Visual Communication Commission have also been guaranteed in the Constitution. Securing these authorities in the Constitution of Tunisia as is seen in almost all liberal constitutional systems are of high significance in terms of ensuring duly implementation of the provisions of the Constitution. Additionally, it can also be asserted that effective operation of these organisations can help many rights and freedoms take on a higher importance.81

Despite the fact that many constitutional developments have taken place with regards to effective exercise of fundamental rights and freedoms, ‘grounds for general limitations’ on the guaranteed rights and freedoms have also been specified in the constitution, which is perceived to be somehow undemocratic. Accordingly, it will be possible to place limitations on fundamental rights and freedoms.

77 The Carter Center, 2014, p. 87.
78 Ulutaş, Torlak, 2011, p. 8.
79 Marks, 2014, p. 23.
80 Tunisia’s Constitution, 2014, art. 21, 46.
81 M’Rad, 2016, p. 84.
freedoms by law on several general grounds of protecting rights of other people, public order, national security, public health, public decency or necessities of a democratic state. Criticisms have been directed since this might lead up to restricting or exploitation of the essential rights and freedoms by the executive body which might derive the legal basis of its practices from these open-ended ambiguous concepts.

2. Political and Constitutional Developments in Egypt in the aftermath of the Arab Spring

2.1. From Dictatorship to Revolution and from Revolution to So-called Democracy

The political structure of Egypt is more military-oriented compared to that of Tunisia. Principal reasons behind this military orientation are constant coups and changing hands of presidency among military persons. Upon the coup staged in 1952 by the military organisation called as ‘Free Officers’, Gamal Abdel Nasser ended up being in search of an identity and followed a balance policy between Arab nationalist and state-centric socialism under the influence of the Soviets. Successor Anwar Sadat who rose to the power upon death of Nasser made efforts to build a more liberal system after abandoning socialist policies and put an emphasis on private enterprises. During the terms of office of both these leaders, three large-scale wars were waged against Israel and the position of military in the eyes of the public was reinforced as the Egyptian military played an effective role in these wars. However, due to being defeated in these wars, the economy collapsed and reconciliation with the West was sought after. Under the Camp David Accords, Egypt received military and economic aid and assistance from the USA in return for recognition of Israel, which caused Egypt to find itself within the West Block against the Soviets. Upon the assassination of Sadat, the country had been governed by Hosni Mubarak with his repressive and despotic methods for 30 years until the Arab spring. Ongoing Liberal economic policies could not suggest any remedy to deteriorating economy of the country. Consequently, the economy of Egypt was heavily burdened with debt from many countries and entities particularly IMF, the USA and European countries.

In order to gain an insight into the current situation of Egypt, we should examine the three important factors which act as a driving force of social,
economic, religious, political and constitutional developments. First one refers to structure of the military which played a leading role in the wars against Israel despite even being defeated and which brought many military persons to power and owned probably one quarter of the whole Egypt economy. The second one refers to the non-governmental organisations which were suppressed with anti-freedom policies by the dictatorial governments in order to reinforce their own power and hinder emergence of any alternatives the public might prefer to them. The third factor is that Egypt hosts strong religious organisations and movements because it bears the necessary qualities to be identified as the cultural and religious capital for over hundreds of years. These three dynamics must be taken into account and assessed in understanding of any kind of development in Egypt.

In order for entirely distant secular, Islamic and socialist spheres of non-homogenous society to be ruled in peace and tranquillity under the dictatorial regime, reforms were occasionally introduced during the reign of Mubarak. The reforms, which allowed for running of more than one party in the elections with the intention of increasing the legitimacy of the then-current regime, were effectively used by the organised opposition shortly afterwards. However, this led to termination of reforms. The latest example of this took place in 2005 and the Muslim Brotherhood, which was mostly excluded and ostracised from the politics, gained 88 seats in the Parliament with such a power, no opposing party had ever attained. One of the principal factors facilitating this situation can be considered to be the reforms allowing for presence of non-governmental organisations not only during voting but also during counting of votes as well as camera-recording of the counting of votes.

The opposition, which had great expectations for the elections to be held in 2010, realised that the then-current anti-democratic system could not be easily eliminated through democratic means due to some restrictions imposed by the regime. The opposition had to withdraw from and boycott the approaching election race on the grounds that the judicial review of electoral disputes was removed, and that the opposition parties could not carry out their electioneering activities effectively under pressure of the regime, and that the regime put a heavy pressure on use of printed and visual media means. The Muslim Brotherhood, the largest opposition movement, which had succeeded

86 Bekaroğlu, Kurt, 2015, p. 12.
87 Saleh, 2014, p. 41-42.
in entering the parliament with 88 deputies in 2005, managed to gain only one seat this time owing to various pressures and frauds. The public felt convinced that it was high time for change of the regime when nearly 500 of 514 members of the Parliament belonged to either Mubarak’s party or the parties or independents standing by his party. Moreover, Mubarak’s preparations for handing over the power to his son Gamal also caused strong reaction in the public and arouse their desire to give an end to this situation. Taking advantage of the popular uprising beginning in Tunisia, millions of people poured out to streets against Mubarak. Having realised that the country took an irreversible, the army changed sides, which paved the way for a new era.

The armed forces announced that they temporarily seized the control of the government after Mubarak and proclaimed that a Constitutional Declaration consisting of 63 articles was brought into force to provide for a democratic transformation. An election calendar was promulgated for both Chambers of Parliament. According to the election results, the party of Mohammed Morsi, a follower of the Muslim Brotherhood movement and other Islamic parties won a landslide victory. As Morsi won the presidential election held in 2012 and the Constitution of 2012 was drafted and took effect, democratic transformation period gained speed.

The wind of democracy in Egypt lasted for a short time and the army seized the government which was ruled under the leadership of Morsi, the first democratically elected Head of State and a new period of time resumed as the substitute of its past. It might be expressed that a lot of factors had an impact on this period the Country underwent. The following grounds might be considered to set the stage for the coup. Although Morsi and the parties he allied with had the parliamentary majority, all their actions and decisions of any kind drew a strong reaction at both local and international levels as in Tunisia. The protest marches continued incessantly. The economic recession resulting from the stockpiling methods of anti-Morsi wealthy people could not be surmounted. Other countries in the region felt disturbed by strengthening of the Muslim Brotherhood movement through the developments in Egypt. Morsi built closer ties with Palestine and Turkey by following anti-Israel policies. The fact that Morsi was not enabled to govern the country despite remaining in power because of strikes by the civil officers of the past government who had penetrated deep into the armed forces, police departments, judicial bodies and bureaucracy, can be enumerated among the most critical reasons behind

89 Bekaroğlu, Kurt, 2015, p. 20.
90 Barnes, Ashley, “Creating democrats? Testing the Arab Spring”, Middle East Policy, V: 20/2, 2013, p. 66.
Morsi’s failure in overcoming the crises and behind this military coup can be enumerated.92

The democratic transformation initiated by the public in Egypt was shortly converted into a dictatorial regime upon firm refusal of this transformation by the public under the silent watch of the entire West. Local and international community, academicians, media and political spheres vigorously criticising the majoritarian approaches of Morsi remained silent to murdering of thousands of unarmed demonstrators in a morning prayer by Sisi who was brought to power by coup, to detentions of Muslim Brotherhood leaders, acquittals of the representatives of the old dictatorial regime particularly Mubarak, trials of Morsi and many other politicians with death penalty, which left a deep scar in the history of democracy.93 Although Morsi and his allied parties had gained over 70 percent majority of the Parliament, all sorts of reforms and moves of these parties were deemed unreasonable and inadequate to such an extent that even the western academicians designated this period as a “black period” 94. In the period of time between revolution and coup, such concepts as ‘west and pro-Israel and anti-Israel’ mainly used in distinguishing between social layers of Egyptian people lost their meanings. Having gathered together by exclusively being driven by such concepts as economic situation and social justice95, the society turned a blind eye to ousting of the democratically elected Morsi government and preferred the coup and the coup-backed government to the democracy they had formerly introduced.

Despite the West’s continual pressing for democracy in the past quarter-century, the following grounds prove that the Western world does not find objectionable the cooperation with the authoritarian governments when deemed compatible with their own interests96. John Kerry, the Secretary of the State of the USA, summarised as ‘restoration of democracy’ the seizure of people’s will by means of bloody methods on air in 21st century. Egypt and the

95 Bingöl, 2013, p. 35.
West expanded their military and economic relations without any slowdown and remained silent to violations of human rights.

2.2. Constitutional Developments in the aftermath of Revolution and Coup

2.2.1. Constitution-making Process and Issue of Legitimacy of New Constitution

The army, which realized the approaching end of Mubarak’s government, seized the power in order not to be excluded from the period of transformation and ensured the democratic transformation took place under their own control. The Military Council proclaimed how to and when to hold parliamentary elections pursuant to a 63-article Constitutional Declaration they issued. The closed parties found a chance to be reorganised and eventually the given election was held in which voting and counting of votes lasted almost one-month to the astonishment of all the countries ruled according to a liberal constitutional system. 97

Unlike Tunisia, the newly established Parliament of Egypt was only in charge of enactment while it was stipulated to set up a separate Constituent Assembly for constitution-making processes. The intention behind founding the Constituent Assembly by following the USA-type procedures was to accelerate the democratic transformation while assuring that both assemblies became engaged in their own respective works. As per the Constitutional Declaration, the Constituent Assembly shall be comprised of 100 members whose 50 members were required to be selected from the Parliament and the remaining 50 to be designated outside the Parliament. Taking into account that 70 percent of all seats of the Parliament were held by the Islamic parties, it would be inevitable for at least 70 percent of all members of the Constituent Assembly to belong to the same Islamic parties. However, 66 members of the Assembly turned out to come from Islamic front. During the constitution-making process, the pro-western secular members of the opposition forgot deserving only 30 percent of the public and struggled to acquire a larger slice of the cake. When they failed to accomplish, they decided to boycott the Constitution Assembly. Afterwards, the Constituent Assembly was set up for a second time and it was composed of 85 members, 64 of whom were selected from the Islamic front. Inadequate representation of religious minorities and women in the secondly established Assembly laid the groundwork of the objections raised at the legitimacy of the Constitution. 98 Ensuring pluralist composition of the Constituent Assembly would create a tight-knit community

and increase the legitimacy of the drafted Constitution. Nevertheless, it must also be pointed out that the persons and entities making accusations against the legitimacy of the Constitution of 2012 kept silent against the allegations about illegitimacy of the Constitution of 2014 to be touched upon soon below, which is quite noteworthy.

Shortly after drafting of the Constitution, Morsi’s government was overthrown by the military coup and Adly Mansour, formerly the Chief Judge of Constitutional Court, became the interim Head of State. Following the coup, a Constitutional Declaration consisting of 33 articles was proclaimed as to how to revise the Constitution of 2012. The Advisory Council of Experts comprised of 6 legal experts and 4 university professors was assigned to determine how to amend the Constitution. A Constituent Assembly consisting of 50 members was set up to draft the new Constitution. Although all segments of the society were invited to take a seat in the Assembly, exclusive of the followers of the Muslim Brotherhood movement, which won the 5 consecutive elections in the wake of the revolution. The Assembly involved a great variety of people from parties, intellectuals, workers, peasants, merchants, universities, churches, police and military departments. Excluding the Muslim Brotherhood from the constituting-making processes indicated not only the fact that the democratic means did not lay the groundwork for the coup but also that the post-coup military government would not be democratically ruled.

2.2.2. Legislative Developments

Having established a unicameral legislature upon adoption of the Constitution of 1971, Egypt set up a second chamber called the Shura Council i.e. Consultative Council as per the Constitutional amendment of 1980. The relationship between the Chambers was asymmetrically built, according to which the People’s Assembly was entrusted with such stronger and wider authorities that the People’s Assembly was entitled to have the final word in case of any dispute between two chambers.

The Head of State was authorised to appoint a specific number of deputies, albeit considered not democratic to some extent, in the elections of both chambers’ deputies, which naturally enabled the Head of State to possess a directive power over legislature. The practice of appointment of deputies for both chambers, which is usually carried out in monarchical states, was in place for both Chambers of Egypt. It was prescribed that 10 members of People’s

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100 Meyer-Resende, 2014, p. 6-7.
Assembly and 1/3 of members of the Shura Council shall be selected by the Head of State. It was also explicitly laid down in the Constitution that half of the deputies would be made up of workers and farmers.\(^{101}\)

The Constitution of 1971 vested the Head of State with the powers of dissolving the Parliament, calling the Parliament to an extraordinary meeting, bringing forward a bill, which enabled the executive body to be relatively more powerful than the legislative body.\(^{102}\) On the other hand, the legislative body was vested with several additional powers in an attempt to remedy and strengthen its position against the executive body. For instance, the right of deputies to raise written and oral questions to members of executive body was guaranteed under the constitution. Furthermore, the Assembly was also entitled to instigate a parliamentary inquiry, introduce a motion of no-confidence i.e. censure motion against a minister with 1/10 of its members and to launch a general debate with 20 deputies. As observed, the Constitution of 1971 specified and made available almost all kinds of legislative checks on the executive power, as practised in the liberal constitutional systems.\(^{103}\)

What matters at this very stage is whether any opposition exists to exercise these vital powers for democracy. Apart from the elections of 2014 in which the Muslim Brotherhood ran as independents and then gained 88 deputies, the main opposition parties had managed to hold 7 seats at most against the Mubarak’s party in the 5 elections preceding the revolution.\(^{104}\) It would not be wrong to assume that vesting the assembly of Egypt with the same powers as those granted to assemblies of the most democratic countries of the world would be of no avail as long as such parliamentary election results persist. Bearing in mind the following argument is theoretically articulated, it stands out that the Constitution of 1971 does not differ much from the Constitutions of 2012 and 2014. While both the Constitution of 1971 and the Constitution of 2014 were respectively in force, there was no effective opposition in the parliament in spite of many tools to be used by the opposition parties.

On the other hand, when the Constitution of 2012 was in effect, there were a freely elected government in power and strong opposition parties. Therefore, for the first time in Egypt, convenient and favourable circumstances emerged to be able to implement the provisions laid down in the constitution with respect to the legislative body. Although the Constitution of 2012 designed a bicameral system as in the former Constitution, the Constitution of 2014

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\(^{102}\) Egyptian Constitution, 1971, art. 102, 109, 136.

\(^{103}\) Egyptian Constitution, 1971, art. 124, 126, 129, 131, 135.

removed this system and instead reduced the number of Chambers to one as in the period before 1980. The Constitution of 2012 prescribed that the Head of State shall appoint 10 members of People’s Assembly and 10 percent at most of the members of Shura Council. On the other hand, the Constitution of 2014 introduced a unicameral legislature and, in this sense, lay down that the Head of State shall appoint 5 percent of members of this single assembly. Nevertheless, a bicameral legislature was desired to be brought back through a bill of law submitted to and approved by Parliament in 2019 with a pending referendum thereon. It was provided in the bill that 1/3 of all members of second Chamber shall be appointed by the Head of State.

Another issue to mention is that the Head of State was authorised to declare a state of emergency and take extraordinary measures. Pursuant to the Constitution of 1971, such kind of decisions of the Head of State were subject to approval by 2/3 members of the Assembly whereas the Constitutions of 2012 and 2014 required the same decisions to be approved by of ½ of the Assembly members. It can be asserted that necessitating such a relatively hard-to-reach ratio which was specified as 2/3 in the Constitution of 1971 and ½ in the Constitution of 2014 surely strengthened the place and position of the Parliament. This very assumption that such an approval would increase the importance and power of the Parliament would be realised in case the period of Constitution of 2012 continued. Because the only period of time when all segments of the society could freely get organized and run in the elections in a democratic environment was the period of the Constitution of 2012. Nevertheless, it is noticeable in other periods that the Parliament was dependent on and used to function under the direction of the Head of State who forcibly seized people’s right to govern and sustained his power through the anti-democratic elections described as plebiscite. It cannot be naturally expected from such a dependent parliament to object to these decisions, which results in the fact that necessity of approval by the Parliament remains only on paper-based procedure.

Even though the Constitution of 1971 vested the Head of State with the power to easily dissolve the Parliament, the use of this power was rather more difficult under the Constitutions of 2012 and 2014 which prescribed as follows:

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the head of State would be allowed to dissolve the Parliament on the condition that the Parliamentary activities were first suspended with a decree-law for 20 days and afterwards a referendum was held on dissolution of the Parliament. Furthermore, it was also provided that, according to referendum results, if the public voted for the Parliament members to remain in office, the Head of State would immediately resign, or if the public voted for the Parliament members to be discharged from office, an early general election would be called and then held within 30 days. Such a mechanism of dissolution was thus envisaged that it built a mutual balance between legislative and executive bodies and even might result in removal of the Head of State from the office.

Unlike the Constitution of 1971, other two Constitutions required approval by the Parliament for the execution’s activities like borrowing and finding sources of finance. Since the executive body was entirely in need of the parliamentary approval for these activities, it was constitutionally guaranteed that the executive body could not be only decision-maker when the country’s economy was concerned, which can be considered a positive step towards reinforcement of the Parliament.

### 2.2.3. Executive Developments

It is seen that the executive body of Egypt had a remarkably vital role in the politics of the country prior to the revolution. It is observed that the Head of State was always at the core of the political regime of the country and possessed all the powers and authorities. The Head of State was brought up to an untouchable position in the system because of the broad range of powers and privileges from dissolution of the Parliament to his unaccountability, from selection of deputies to declaration of state of emergency. As Lord Acton stated, “Power tends to corrupt, and absolute power corrupts absolutely”. As witnessed many times in the history, vesting one person with absolute power causes him to degenerate even if he does not will or desire it. This is exactly what happened in Egypt in the true sense of the word.

What stands out in the Constitution of 1971 as an anti-democratising factor of the system is that the given Constitution only mentioned what would happen in case of resignation, death and incapability of the Head of State and did not involve any provision as to how to regulate political or criminal liabilities of the

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Head of State.\textsuperscript{113} Because it is unthinkable that that any authorised person bears no responsibilities. No matter whether they will be destined to remain only on paper or not even in case of existence of provisions related to liabilities, the absence of such provisions reveals an insight into democratic structure of the period of 1971.

Mubarak removed the limit on the number of terms the Head of State can serve, who was allowed to be elected twice at most during the reign of Sadat, thereby opening a new era which would last for 30 years. Having been constantly exercised by Sadat, the power to declare a state of emergency specified under the Constitution was at the disposal of Mubarak along with the power to hold a referendum, which reinforced his power day by day. Moreover, after having included in the Constitution ‘an article on terrorism’, Mubarak attained such a power that he could take all kinds of measures with a view of ensuring and maintaining public order and security in case of ‘threat of terrorism’.\textsuperscript{114} It should be taken into account that for these measures to be taken, it will be found sufficient to simply face a threat of terrorism rather not experience a terrorist attack, which points out how this power can be easily exercised. Additionally, holders of important political positions and mayors would not be selected through elections, instead would be exclusively designated by the Head of State. On top of that, the law enacted in 1994 ruled that the mukhtars, i.e. representatives of neighbourhoods, would even be designated by the central authority.\textsuperscript{115}

When the provisions of the Constitutions of 2012 and 2014 are examined, it is noticed that both constitutions bear striking similarities in many aspects. As stated above under the title of legislation, the Constitution of 2014 led to formation of a remarkably powerful execution because of absence of an opposition in the Parliament which would be able to balance the execution. For instance, both Constitutions required 2/3 majority votes of the Parliament to re-submit a formerly refused bill for approval by the Head of State. Since almost all the deputies were supporters of Sisi the putschist Head of the State in the parliamentary composition after 2014, it can be argued that it would be very unlikely to resubmit the bills for approval by the Head of State.\textsuperscript{116}

The political system established in Egypt after 2014 can be identified with the semi-presidential system of government. However, when this system designed with an inspiration from France was scrutinised in depth, 2 significant differences are noticed. One of the differences was the reinforced veto cited

\textsuperscript{113} Egyptian Constitution, 1971, art. 82-85.
\textsuperscript{114} Egyptian Constitution, 1971, art. 148, 152, 179; Feuille, 2011, p. 234-248.
\textsuperscript{115} Bekaroğlu, Kurt, 2015, p. 18-19.
\textsuperscript{116} Egyptian Constitution, 2012, art. 104/f. 3; Egyptian Constitution, 2014, art. 123/para. 3.
above. This power borrowed from the USA corrupts the checks and balances between executive and legislative bodies in favour of the execution. Unlike France, the Head of State in Egypt was authorised to perform all kinds of actions without the requirement of a countersignature. The power of the Head of State to call a referendum on any subject without being subject to any limitations enables him to quell and resistance of the Parliament from scratch.\footnote{In fact, the system in Egypt can be called as plebiscitary presidency. See. European Parliament, “Egypt: In-Depth Analysis of the Main Elements of the New Constitution”, 2014, p. 9, (Online) www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET_NT(2014)433846_EN.pdf, Accessed: 15 May 2018; Egyptian Constitution, 2014, art. 157.} Giving the Army a supra-constitutional position under the new Constitution as well as lacking of the factors essential for existence of an opposition differ this Constitution from that of Tunisia.\footnote{Fedtke, 2014, p. 9.}

After having made a proposal in 2019 for a constitutional amendment with respect to extending his two terms of office finishing in 2022 to additional two six-year terms of office, Sisi the putschist Head of State had this amendment adopted in the Parliament with up to 85 per cent of all votes. With this amendment entering into force through a referendum, Sisi paved the way for serving as the Head of State until 2034, which lifts the lid on the test of democracy of Egypt.\footnote{Egypt Today, 2019, p. 1.}

2.2.4. Judicial Developments

An examination of the Constitution of 1971 indicates that the judiciary, whose scope and framework were narrowly defined therein, was not provided with a constitutional guarantee. It was not specified in the constitution at all how many members the authorised body in charge of appointment of judges and prosecutors, the Constitutional Court and other supreme courts of appeals would be comprised of and how these members would be appointed. All these issues were to be regulated by the laws, in other words, were put at the disposal of the majority of the Parliament. Taking into account that Mubarak’s party always held the majority of seats in the Parliament, it can be asserted that there was not any separation and balance of powers in Egypt before the year 2012. On the other hand, the Constitution of 2012 explicitly provided who shall select the members of the supreme courts, albeit, not much positively. Because this allows the holder of parliamentary majority to easily revise the member composition of the judicial body. In this context, the sole favourable development was that it was prescribed in the Constitution that the Court was made up of one chairman and ten members. However, as in the past, the Constitution of 2014 did not include any provision with regards to number of court members and as to who
would select them.\textsuperscript{120} The constitutional amendment, which was adopted by the Parliament in 2019 with a pending referendum thereon, enabled the Head of State to appoint the very high judiciary members and chief prosecutors and to preside over the supreme judicial council.\textsuperscript{121}

The Constitution of 2012 involved a provision prescribing that the judicial body had its own budget and had to be definitely consulted when an amendment of law concerned the judicial body. It can thus be inferred that the judicial body began to be considered somehow important a little bit. Preserving of the same provision in the Constitution of 2014 can be construed as a favourable progress.\textsuperscript{122}

One of the most important problems in the Egyptian judicial system is the existence of military justice due to a history brimmed with military coups and because of the military’s close interest in politics of the country. In this sense, what raises an issue at this point is that civilians are being tried in the military courts although soldiers are supposed to be tried for their crimes arising out performance of their duties as long as it falls under the scope of military jurisdiction. While the Constitution of 1971 was in force, the duties of the military courts were not defined in the Constitution and it was absolutely put at the disposal of the Parliament to define it as they will. Showing a sharp contrast to the former one in this respect, the Constitution of 2012 introduced a regulation which significantly restricted the broad range of powers of the military courts over the civilians. Accordingly, the military courts will be deemed a competent authority to put the civilians on trial provided that they cause any harm or damage to the military personnel. The Constitution of 2012 showed signs of retrogression on this matter and enumerated in detail the circumstances under which the civilians would be tried at the military courts.\textsuperscript{123}

As per the judicial review of laws, although the Constitution of 1971 regulated this matter, interestingly it did not explicitly specify by whom and how this right would be exercised. Likewise, the Constitutions of 2012 and 2014 did not mention who would use this right. On the contrary, the Constitution of 2012 laid down that the control of norms shall be conducted as “preventive control”.\textsuperscript{124} Thus, the judicial body will have the chance to review an act of legislation passed in the Parliament before it enters into force and will attain

\textsuperscript{120} Egyptian Constitution, 2012, art. 176; Egyptian Constitution, 2014, art. 193.
\textsuperscript{122} Egyptian Constitution, 2012, art. 169; Egyptian Constitution, 2014, art. 185.
\textsuperscript{123} Fedtke, 2014, p. 9; Egyptian Constitution, 1971, art. 183; Egyptian Constitution, 2012, art. 198; Egyptian Constitution, 2014, art. 204/para. 2.
\textsuperscript{124} Egyptian Constitution, 2012, art. 177; Egyptian Constitution, 2014, art. 192.
an important power against the legislation.

Under the Constitution of 2012, Al-Azhar University was entitled to review the laws in terms of conformity with Islamic rules and principles and to make decisions, albeit not binding. However, the Constitution of 2014 completely revoked this power of Al-Azhar University and instead emphasized principal duties of Al-Azhar University to contribute to proper teaching and spread of Islam in Egypt and in the world.\textsuperscript{125} It might be deduced from the above-cited provisions that the Constitution of 2012 was drafted in light of more Islamic concerns and with a desire to rule the state according to Sharia principles, whereas the Constitution of 2014 embodied the desire of pro-coup government to be more pleasantly perceived by the West.

Now that theoretical dimensions of the judicial developments in Egypt have been briefly explained, it will be worthwhile to touch upon the practical aspects of Egyptian judiciary. In the countries with a background of dictatorial rule like Egypt, the judiciary fulfils the functions of acquitting the dictatorship of the consequences of their actions and legitimatising their practices rather than performing what the law requires. In other words, it can be stated the judges protect the dictatorial regime, from which they derive their power, rather than the law itself and that they exercise their judiciary power as a means of fulfilling the demands of the possessors of power, by whom they are nourished, rather than implementing the law.\textsuperscript{126}

The post-coup events support these arguments. For instance, after Morsi and his allied parties had won a victory in the first democratic election, the Constitutional Court took a decision to cancel and nullify parliamentary elections; however, Morsi convened the Parliament and continued his works in defiance of this decision. By introducing reforms, he also endeavoured to clear the judiciary from the members who remained from Mubarak’s period and adopted his ‘mindset’.\textsuperscript{127} In fact, even though the judiciary members in all democratic countries have to abide by the laws enacted by the legislative body and punish violators of the laws, the judicial body in the countries like Egypt objects to all the legal regulations which are not in favour of them and thus get engaged in judicial activism. It can be asserted that these arguments are supported and verified by the following facts\textsuperscript{128}. After the judiciary

\textsuperscript{125} Egyptian Constitution, 2012, art. 4; Egyptian Constitution, 2014, art. 7.
\textsuperscript{126} David Risley, “Egypt’s Judiciary: Obstructing or Assisting Reform?”, Middle East Institute, 2016, p. 6-9.
system returned to its former order during Sisi’s term, Morsi and leaders of the Muslim Brotherhood Movement were brought to trial with a sentence of capital punishment, the ousted leader Mubarak charged with pre-revolutionary unlawful processes was acquitted, and no investigation was launched at all about killing of thousands of unarmed people demonstrating against the coup.

2.2.5. Other Constitutional Developments

Egypt, where over one hundred million people live and 90 percent of the population are Muslim, has always been of high significance for the World of Islam from past to present. As the Cairo served as one of the foremost capitals of the World of Islam in the fields of culture, literature and Islamic law particularly during the Umayyad, Abbasid and Ottoman periods, respect to Islam and sensitivity to Islamic institutions have been displayed at the highest-level no matter which mode of governance comes to power. Therefore, it would not be inaccurate to assert that none of political actors can achieve success without support of the prominent figures with featured Islamic identities. This judgment can be supported by the fact that Sisi’s government, which occupied the first elected President Morsi’s position through a coup, took a primary step, inter alia, to gain the support of Al-Azhar University just after the coup. Although the Constitution of 1971 was drafted under the governance of those without Islamic concerns, it was provided therein that the religion of the state shall be Islam by virtue of Egypt’s significant place in the Islamic Civilisation.

It was mentioned that Sharia shall be one of the principal resources of the laws.\footnote{Egyptian Constitution, 1971, art. 2.} By means of an amendment made thereto in 1980, it was provided that Sharia shall be the main source of laws, thereby paving the way for control of norms within a broader scope. Thus, efforts were made to raise Sharia up to a superior position. On the other hand, since it was not explicit enough what the concept of ‘Islamic Principles’, which corresponds to the word Sharia, refers to, all segments of society interpret it in a different way. In an attempt to overcome this ambiguity, different interpretations had been produced until adoption of the Constitution of 2012.\footnote{Dupret Baudoin, “The Relationship between Constitutions, Politics, and Islam”, Ed. by. Rainer Grote and Tilmann J. Röder, \textit{Constitutionalism, Human Rights, and Islam after the Arab Spring}, New York, Oxford University Press, 2016, p. 239.}

Likewise, the Constitution of 2012 specified that Islam shall be the religion of the State and that Sharia shall be the fundamental source of laws. Unlike the Constitution of 1971, this Constitutions answered the question as to
which Islamic principles would constitute the basis thereof. Accordingly, the concept of ‘Islamic Principles’ referred to the whole of following components: Quran (the holy book of Islam), Sunnah (traditions and practices of Islamic prophet), Usul al-Fiqh (methodology of Islamic Jurisprudence) and Madhhabs of Islam (legal schools of thought). The Constitution of 2014 underwent a retrogression and did not clarify the vagueness as to which Islamic Principles would be resorted to.

In contrast to the Constitution of 1971, the Constitutions of 2012 and 2014 did not disregard the Christians and Jews and prescribed that they would be subject to the jurisprudence of their own religions on the matters concerning their personality and religions. It was additionally stated that they would be free to select their own religious leaders. It can be inferred that the underlying reason for adoption of this article was not to scare the non-Muslim community with this provision declaring Islam as the principal source of laws, and assure that their rights would also be protected.

Al-Azhar University, which has a voice in Islamic matters, is a highly significant institution in Egypt. This fact was not ignored in drafting of the Constitution 2012 which stipulated that Al-Azhar was an independent institution free from external pressures, and that the Council of Senior Schools in Al-Azhar is an authority to be consulted about the matters related to Sharia, and that members of this Council could not be dismissed or discharged from their posts. In fact, during the Constitution-making deliberations, such matters as whether an enacted law will come into force before being reviewed by Al-Azhar or whether it is required to appeal to Al-Azhar for repealing of a law in force became the subjects of discussions. Nevertheless, since putting the above-cited reforms in practice will turn Egypt into a country ruled by Sharia in real terms not just on paper, such proposals were withdrawn owing to a barrage of harsh criticisms, and instead the Constitutional Court was invested with the power to review the laws in terms of their compliance with Sharia. On the other hand, the Constitutional Court would be able to consult Al-Azhar about some issues, if need be, under the above-cited provision. However, the Constitution of 2014 removed the advisory role of Al-Azhar and left no room for either the Parliament or the courts to resort to Al-Azhar. Thus, the influence of an institution with a solid Islamic background, which would indirectly supervise whether the laws derived their sources from Islamic principles or would at least express their opinion on a relevant issue, was weakened.

132 Egyptian Constitution, 2012, art. 3; Egyptian Constitution, 2014, art. 3.
133 Egyptian Constitution, 2012, art. 4.
removed. It can therefore be asserted that the country succeeded in letting the Sharia principles to degenerate. Another constitutional reform was related to the election of Head of State. Only in one of the ten presidential elections held until the Revolution, it became possible for three candidates to run for and contest in the election together owing to the absence of opposition in the Parliament or due to the fact that the opposition was represented by the satellite parties during some periods of time.

Although the Constitutions of 2012 and 2014 simplified the conditions of candidacy, here it will be actually mentioned how an electoral body in charge of management of elections would be set up. One of the most critical factors for running fair, free and transparent elections is that the institution to be assigned to manage and supervise elections must be independent and autonomous. Under the Constitution of 1971, the Electoral Commission was comprised of 10 members with 5 members to be selected from senior judges and with other 5 members from the public. The fact that almost all the members of the Parliament stand by the government in power sheds light on the matter regarding which political movement these 5 members might belong to. Ineffectiveness of the opposition parties in the Parliament and governance of the country by the dictatorial regime caused no candidate to be nominated or, even if any candidate was nominated, caused the elections not to go beyond being plebiscite. The Constitution of 2012 tried to come up with a solution to this issue. To this end, it prescribed that all the members of the Commission would be selected from the senior judges and that no political organisation including the Parliament would interfere in this election.

The Constitution of 2014 displayed signs of retrogression on this issue. Accordingly, all the ten members of the Commission would be selected from judiciary members also by judiciary members. Nevertheless, appointment of these persons would be subject to decision of approval by the Head of State.

Additionally, retrogression occurred also in the field of human rights and freedoms. As a matter of fact, half of the articles of the Constitutions of 2012 and 2014 involved human rights. Articles 8-81 of the Constitution of 2012 and Articles 8-93 of the Constitution of 2014 were dedicated to human rights and freedoms. In order for establish an effective legal system which protects human rights and freedoms, it must not be deemed adequate to expound these rights at length in the constitution, these rights must not lose their meanings due to

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137 Egyptian Constitution, 1971, art. 76/5.
139 Egyptian Constitution, 2014, art. 209/1.
exceptions and not be rendered non-functional because of play on words. These judgments can be verified with the following examples. The Constitution of 2014 involved the freedom of faith rather than freedom of religion. Furthermore, although the rights of assembly and association and freedoms of thought and expressions were specified therein, miscellaneous exceptions and practices caused these rights and freedoms lose their meanings. Likewise, closure of political parties was so broadly interpreted and explicated that it can claimed that this right was prejudiced to the core.

The dissolution of the ‘Freedom and Justice Party’ identified with the Muslim Brotherhood was decided based on the allegation of its being a party established based on religious grounds, which exemplifies how the principle of narrow interpretation of exceptions to the freedoms was ignored. Even though it is not inaccurate to describe this party as a political wing of the Muslim Brotherhood, this fact must not be deemed sufficient enough to indicate that this party was established based on “a religious ground.”

Another point to touch upon is the freedom from persecution. In this sense, the Constitution of 2014 stated that persecutions of any kind would be forbidden without any exceptions. However, it seems quite noteworthy that ‘other acts of maltreatment’ were not counted in and forbidden along with persecutions. Likewise, it has been very controversial for the said Constitution not to replace the concept of ‘harm’ in its statement of ‘…physical and mental harm cannot be inflicted…’ with the concept of ‘suffering’ used in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, i.e. the “Torture Convention”. This situation demonstrates that the constituent power interspersed throughout the constitution only the elements it would need to reinforce its power after the coup, and did not include in the constitution any matter that might run the risk of being accused of charged with.

When the Constitution of 2014 is examined in terms of the regulations as to under which circumstances a state of emergency could be declared, it is observed that the conditions of a State of Emergency were designed in conformity with the constitutional systems. On other hand, it was criticised for not drawing a framework of limitations that could be imposed on rights and freedoms during a state of emergency. It was likewise exposed to criticism for not introducing any limitation with respect to infringement of the inviolable rights and freedoms like the freedom from persecution as prescribed in many international treaties.

141 Egyptian Constitution, 2014, art. 64, 65, 75.
142 Egyptian Constitution, 2014, art. 74.
Although the condition that the laws regulating the rights and freedoms shall be adopted by 2/3 votes of the total number of members of the parliament would not cause any inconvenience during the periods of government when the executive body enjoys absolute power over the legislative body and the state is ruled by a majoritarian system, it might constitute a problem during the periods when the parliament becomes fragmented and democracy is applied. Had such a hard-to-reach quorum been required for placing a limitation on the rights and freedoms, a reasonable and effective protection would have been assured; however, the rule of adopting the laws expanding the scope of a right by 2/3 of the total number of parliament members takes criticism.144

CONCLUSION

The Arab Spring was supposed to offer the people of this region an opportunity to elect their government leaders with a free will. This process turning out to be successful at the very beginning without any external support in Tunisia and Egypt overthrew the oppressive leaders from their offices. As the changes of powers in these countries which are of high significance in terms of geopolitics and natural resources took place in favour of those with an Islamic identity, the powers with particular goals on Arab region suffered from the fear of any Islamic awakening in this region. Efforts were made in Tunisia and Egypt, which achieved success the beginning of the process, by both internal and external dynamics to adjust the democracy with ‘a west-type alignment and balancing’. When the West came to realise that both the potential impacts of the Nahda and Muslim Brotherhood movements on other countries and the path followed by these countries would be out of their control, public demonstrations were triggered to arouse instabilities and political crises, thereby causing the screams of happiness to result in people’s murmuring by means of economic operations.

The Nahda movement which managed the period of transition to democracy in Tunisia after the revolution was deliberately worn out and was reduced to being opposition from that time. On the other hand, in Egypt, Mohammed Mursi, the first democratically elected president was overthrown by a military coup. Even though the democratic institutions and democracy function fairly well compared to their counterparts, the country continues to be deeply afflicted by the economic and political crises. The course of events was sharply reversed in Egypt in the wake of the revolution and a constitutional order completely distinct from that of Mubarak’s period was tried to be designed and established. The silence and unresponsiveness of the western countries and academic spheres to the occurrences in Egypt have been the indicators of the fact that the West attaches more importance to the identity, belonging and

allegiance of a leader rather than the form of government of a state.145

As frequently witnessed in the history, one of the first actions to take in the immediate aftermath of the processes like coups and revolutions is to suspend the current constitution and instead, make a new constitution, which has repeated in this region too. In fact, the idea of amending or replacing the constitutions usually stems from outburst of the anger at the previous constitutional system. In this sense, such a new understanding permeated down to the society that the design of the state must be arranged in a manner to prevent the post-revolutionary governments of Tunisia and Egypt, formerly ruled by the repressive leaders, from being more authoritarian. At this very stage, the need to make a new constitution arose. Indeed, the idea of limiting the government in power with a higher norm unlikely to be changed lies behind the logic of existence of the constitutions. In this context, constitution-making processes were launched in both Tunisia and Egypt by the constituent assemblies (despite all the pressures of the transitional military council) whose democratic structure was built in front of the whole world. In these countries which have heterogeneous social structure and suffer from wide divergence of opinions, the new constitutions were adopted in the assemblies by the qualified majorities and entered into force following the referendums. Although the allied parties, who won the general elections in both countries, possessed the power to draft the constitutions on their own, they preferred to take steps backward on many matters with the aim of reaching a compromise, thereby assuring the inclusiveness and legitimacy of the constitution. Constitutions of the both countries with a high population of muslims were actually drafted under the sway of political actors to be regarded Islamists.

As the Sharia and religion-state relations were addressed in many parts of the constitution, it is possible to infer that influence of Islamic constitutionalism prevailed. The enacted laws are considered to be in conformity with the liberal system. In this context, it is observed in Tunisia and Egypt that the constitutions were designed to involve the typical features of liberal constitutionalism along with those of the Islamic constitutionalism, and that necessary instruments were interspersed throughout the constitution to assure a limited power, thereby making the necessary arrangements for smooth running of powers within a system of checks and balances. However, Egypt did not have the same destiny with Tunisia. The ruling party was dissolved by the coup and ‘so-

145 In case one leader, even if he is a dictator, demonstrates obedience to Western countries, antidemocratic governance of his country is excused or tolerated, which is very noteworthy in terms of seeing the meaning the West attaches to democracy. Because these arguments are also justified when the Western countries mostly focus the democratisation demands and criticisms on such leaders as Putin, Maduro and even Erdogan rather than a leader who comes to power by coup.
called democracy’ stepped in under the leadership of coup-plotters. First of all, the Egyptian Constitution of 2012 was targeted, inter alia, by the coup-plotters and instead, a new constitution-making process was instigated. Although the Constitution of 2014 did not undergo theoretical retrogression at a large scale compared to the Constitution of 2012, it seems that a pluralist system of democracy was not formed. Because dissolution of parties, suspension of many freedoms and rendering of the legislative power as a satellite of the executive power led to forming of such an order in which the powers were virtually united.

After all the above-cited courses of events, what needs to done by the oppositions of both Egypt and Tunisia is to raise their democratic demands through democratic means within the framework of democracy, and to struggle further to win power at the polls by being in continuous search for democratic means without being marginalised or ostracised from the system. As for the governments in power, they are required to implement policies that will enable pluralism by bearing in mind that one day they might also be reduced to an opposition.
BIBLIOGRAPHY


Birdane, Merve, “Arap Baharı Sürecinde Tunus’un Demokrasiye Geçişinde


RISLEY, David, “Egypt’s Judiciary: Obstructing or Assisting Reform?”, *Middle East Institute*, 2016.


