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Human Rights and Democracy in North Africa: Challenges for Change

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I. Introduction and Scene-Setting

The view that human rights and democracy are not in synch with the Arab ‘forma mentis’ or that these concepts are inimical to, or in tension with, Arab religious values or cultural norms (a view often termed as Arab exceptionalism) was clearly and unequivocally refuted by the Arab protestors in the streets of Tunisia, Egypt and Libya. The same view is coming through from Syria where an authoritarian regime has resorted to naked, brutal force to hold on to power. Arab, European and American diplomats, politicians and religious leaders, who claimed that democracy and human rights are Western impositions, have been shown to be either wrong or deceitful.

The point being made above is a simple one: there is no *a priori* prejudice in the peoples of the Arab world against human rights and democracy. The calls of the masses in Deraa, Tunis, Benghazi or Cairo are for the possibility of meaningful political participation, socio-economic opportunities for the many, not the few, and a certain freedom of thought and expression.

The protests and call for change occurred within a specific context that was well-articulated in the Arab Human Development Report of 2004:

“...however we classify rights and freedoms, the level to which they are actually enjoyed in the Arab countries remains poor.”¹

¹ United Nations Development Programme (UNDP), 2004: *Arab Human Development Report 2004: Towards Freedom in the Arab World* (New York: UNDP): 81.

This is not a position taken or imposed by European countries, but the considered view of the Arab authors of the Arab Human Development Report. Therefore, it is clear that long before the revolts of Tunisia and Egypt, Arab thinkers and academics had described a situation where fundamental rights and democratic freedoms were largely lacking and that the lack of these freedoms was hampering development. At this stage, before considering what changes (structural and behavioural) are being anticipated in those countries where revolts have occurred, it is necessary to provide an overview of the human rights and democracy situation in North Africa pre-2011.

In this regard it has often been the case, that any criticism of the human rights situation in the region has been characterised as European neo-colonialism or American Imperialism. However, the most damning descriptions of the levels of freedoms, rights and democracy enjoyed by the people of North Africa have been produced by Arab commentators. The negative evaluation of the human rights situation in the Arab world by the Arab Human Development Report has already been alluded to.

The 2010 *Ibrahim Index Report on African Governance*² provides another autochthonous contribution in the same vein. This Report maps, *inter alia*, the human rights and democracy situation in North Africa within the broader context of the African continent. The Index is composed of four main indicators: (i) safety and rule of law; (ii) participation and human rights; (iii) sustainable economic opportunity; and (iv) human development. The North African region, which is exclusively composed of Arab states, is one of the sub-regions examined in the Report. Suffice it to say that North Africa as a whole, in the Participation and Human Rights Indicator (which is the most relevant one to measuring democratic participation and human rights), has a regional average score of 35, as against a continental African

² Mo Ibrahim Foundation, 2010: *The 2010 Ibrahim Index Report on African Governance*. Available at: <http://www.moibrahimfoundation.org/en/section/the-ibrahim-index>.

average score of 46. Only Central Africa scores worse in this Indicator. This fact alone is a telling measurement that encapsulates North Africa's deficiencies in the context of human rights and democracy.

If one examines the Indicator in more detail, further evidence of serious human rights and democracy lacunae prevalent in the region until 2010 may be seen. The Human Rights and Participation Indicator comprised 3 sub-categories: Participation, Rights and Gender. Within the ambit of Participation, none of the African states place within the top ten scores, while two states, namely Morocco and Libya place in the bottom ten scores. Once again, in the sub-category referring to Rights, no North African country places in the top ten while two, namely Tunisia and Libya place in the bottom ten. The news is better when it comes to the Gender sub-category, with Tunisia placing in the top ten and only Libya placing in the bottom ten.

What is the point of going through this catalogue of deficiencies? First, it establishes that North Africa was, until 2010 at least, one of the worst performing sub-regions in Africa. This record should, in itself, be enough reason to push the processes of change. Secondly, the record which refers to the period pre-2011, may serve as one of a range of benchmarks, through which progress may be measured in the post-revolutionary period. Having emphasised the Indicator in which North Africa fares poorly, it is also important to highlight that in some Indicators of Governance the region performs better than average. This is particularly the case in the Human Development Indicator, which in the Ibrahim Index measures health and educational standards.

The revolutions in Tunisia, Egypt and Libya have clearly established that the deficiencies highlighted above, have been acutely experienced by the peoples of these countries and are not merely academic or statistical exercises. The roots of the revolts may not be completely attributable to a thirst for human rights and democracy; however, the demands for dignity, liberty and justice

vehemently expressed by the protestors have an unmistakable resonance with the concepts of human rights and democracy.

The next stages of the post-revolutionary period in Tunisia, Egypt and Libya have been the subject of considerable and understandable debate in the countries themselves, and also in the broader Euro-Mediterranean region. It is self-evident, that as the revolutions were achieved by the peoples of Tunisia, Egypt and Libya, it is up to the same people to decide on what forms of governance they wish to adopt and to deliberate and decide upon the best ways to promote, safeguard and strengthen human rights in their countries. Without prejudice to this right of the Tunisian, Egyptian and Libyan people to determine their own future, one may outline some options which have proven to be useful in building democratic structures, and in protecting human rights within other contexts and scenarios. Thus, in the next section of this paper some options for establishing democratic governance and guaranteeing human rights standards shall be assessed.

II. Democratic Governance

The immediate reaction to the removal of autocratic regimes is a call for democratic reform, which is often taken to mean the holding of free elections. However, beyond the mantra of elections, there are a number of institutions that need to be designed and constructed, as well as processes that need to be put in place for democratic reforms to have a reasonable prospect of success.

The notion of impartial and independent institutions has been recognized as an important component of democratic reform.³ Two of the most important institutions in this context are the Electoral Commissions (which is self-evident) and also the

³ See, for example, Diamond, Larry; Plattner, Marc F.; Chu, Yun-han; Thien, Hung-mao (Eds), 1997: *Consolidating the Third Wave Democracies: Themes and Perspectives* (Johns Hopkins University Press).

Judiciary, which is crucial, both in terms of democratic governance and the protection of human rights. Electoral Commissions are of immediate and practical importance in any democratic reform process.

The importance of the role of such a Commission may be illustrated by referring to the case of Tunisia. Following the revolution, the Tunisian provisional government had to outline the path to democracy, which would be acceptable to the Tunisian people. The path chosen by Tunisia is that of an election for a constituent assembly which will adopt a new constitution, after which Tunisia will proceed to hold elections, be they legislative or presidential (or both), depending on the constitutional set-up adopted by the constituent assembly. Thus, the transition period leading up to the elections for the constituent assembly are of critical importance in navigating a safe passage to the new democratic constitution, upon which much depends in terms of guaranteeing continuous democratic growth and safeguarding human rights. During this transition period the Electoral Commission has the delicate task of ensuring free, fair and transparent elections that should set the tone for future electoral contests, and gain public confidence for the constituent assembly, as a body entrusted with designing the constitutional architecture of the new Tunisia.

One may argue that there are two key aspects for an Electoral Commission that is impartial, independent and efficient. The first aspect refers to its composition and the second one to its mandate. In terms of composition the obvious answer would be to ensure participation by political parties on an equal basis, including civil society and also possibly opening the process up to regional and/or international organisations, to ensure that fairness is verified not only by local actors but by international ones too. Independent and impartial international/regional bodies may also prove useful in mediating any disputes between different parties, where levels of trust are characteristically low. However, even such obvious answers contain certain difficulties and challenges. For instance, should all political parties contesting elections be included? At the

time of writing, Tunisia has close to 70 political parties. Including all of these parties would make the Commission unwieldy, inefficient and possibly stall progress towards elections. Excluding parties, on the other hand, can be discriminatory and undemocratic, and may undermine trust and confidence in the institution, especially at a time where there is no reliable measure (such as the number of seats in the outgoing parliament), to determine the public support enjoyed by individual parties. Including civil society organisations in the Electoral Commission, presents similar challenges of how to be inclusive, without being inefficient. One way around this conundrum is to construct a commission that is made up of persons outside the political establishment, who are of proven integrity and independence which is acknowledged by most, if not all, the parties. Transparency, in the appointment of such a commission, and clear basis for inclusion is therefore paramount.

Insofar as the mandate of such an Electoral Commission is concerned, one can discern some obvious tasks such as the mapping of electoral boundaries and the monitoring of the fairness of election to avoid fraud or malpractices. These tasks, however, are fraught with difficulties. The mapping of electoral boundaries can make a substantial difference to the outcome of elections,⁴ and thus the drawing of electoral districts needs to be done carefully and transparently. This will depend largely on the impartiality and independence of the Electoral Commission. With respect to the monitoring of elections, to ensure a free and fair ballot, this in itself is a very complex issue that ranges from establishing anti-fraud processes to protecting people from intimidation, to ensuring equitable access to public service media to all parties. These are challenging tasks in any scenario, but in contexts where there is little or no experience of them, the challenge is naturally greater. It is within this framework that technical assistance may be useful for countries transitioning towards democratic governance. At the

⁴ Hence the term ‘gerrymandering’ which refers to the drawing of electoral districts or constituencies with a view to favouring a particular party or group of parties and to disadvantage other parties.

same time, one needs to underline the fact that such technical assistance should be provided as, and when, requested by the state concerned.

Another issue worth pondering on is that of appeals from the decisions taken or the processes adopted by the Electoral Commission. In order to sustain confidence in its work, it is useful to allow a degree of oversight on the work of the Commission. Aggrieved parties who allege that, for example, the Commission gerrymandered an electoral district or failed to protect the access to public service media, should have some means whereby their allegation is considered and, if proven true, redressed. Thus the critical role of an independent and impartial judiciary (which will be one of the recurring themes throughout this paper) is apparent.

The judicial institutions in any country are crucial for engendering a sense of trust and safety. In this regard, the constitutional set up is highly pertinent. The impartiality and independence of the judiciary needs to be established as part of the constitutional arrangements, and adequate mechanisms for guaranteeing such independence adopted and entrenched. The exact mechanisms for guaranteeing an independent judiciary will vary from one country to another, and states such as Tunisia and Egypt will have their own ways of enshrining the principle by paying due attention to local needs and traditions.

Thus, it seems quite clear that elections are but one element of the democratic reform processes. For a start, institution-building, be it the judiciary, electoral commissions, ombuds systems etc., is required to ensure the freedom and fairness of the elections. The constitutional arrangements also play a pivotal role in a number of respects. The guarantee of independent judicial structures has already been alluded to, but one can broaden this issue in terms of constitution building to refer to some semblance of separation of powers, thus ensuring that power of the state is, to some degree, spread over the different branches of government: legislative, executive and judicial. This is of particular salience in states which

have had a history of absolute centralisation of power with authoritarian Presidential systems of government.⁵

The already-cited Arab Human Development Report 2004 makes an important observation, which links all of the above issues with the quintessential aspect of democratic governance: citizen participation. The Report states that in the Arab world:

*“citizen participation in government remains weak. Feeble electoral mechanisms and marginal legislative assemblies, which tend to be tools of the executive power, as epitomized in the person of the Head of State, account for this low participation”.*⁶

The institutions outlined above may go some way in reassuring citizens that civic participation may be meaningful, effective and safe. Nevertheless, for participation to become woven into the fabric of the state, a culture of participation needs to be built. This is a far more long-term process than institution-building or constitution-making are. Among the factors that contribute to such a culture are education for active citizenship, public decision-making that is transparent and consultative, as well as political parties which are unambiguously committed to retain power only insofar as the public desires them to, as evidenced by free and fair elections. The extent to which political parties are fully prepared to assume and relinquish political power in a calm and orderly fashion, will be a good indicator as to how far democratic reforms have been successful.

The participation of citizens in public and political life and the confidence attached to the democratic process are also influenced by the electoral system that will be adopted by the states,

⁵ This is also relevant vis-a-vis the democratic control of the armed forces and other security forces which is a matter dealt with in this volume by Derek Lutterbeck.

⁶ United Nations Development Programme (UNDP), 2004, art. cit.: 82.

transitioning from authoritarian regimes to democratic ones. One of the ways in which political participation can be triggered and sustained, is by making sure that every vote counts in an equal manner. It has been suggested that in societies emerging from conflict or transiting to democracy, Proportional Representation may provide some guarantee that votes count equally and that no-one will be willfully excluded from the political arena. In the context of South Africa, where the transition to democracy followed in the wake of serious civil strife, it has been noted that the adoption of proportional representation aided in the move towards moderate politics:

“Electoral reform was an especially important measure. Proportional representation, in particular, downgraded the significance of controlling territory and supplied incentives for parties to compete for support beyond the boundaries of their base support...”⁷

Nevertheless, proportional representation offers its own challenges and difficulties, including the risk of political fragmentation and unstable governments, especially where there is a proliferation of political parties.

The foregoing were just a few of the challenges that democratic reforms entail, but hopefully the magnitude of the challenge that faces Tunisia, Egypt and Libya is manifest. Constitution-making, institution-building, and creating a democratic culture, are complex and delicate matters in any scenario. When one considers the serious socio-economic difficulties that these countries are currently facing, the scale of the challenge is brought into sharper relief.

III. Strengthening Human Rights

⁷ Lodge, Tom, 2009: “Revolution Deferred”, in: Dayton, Bruce W.; Kriesberg, Louis (Eds.): *Conflict Transformation and Peacebuilding* (London: Routledge): 168.

One of the key deficiencies in the protection of human rights in a number of North African states is the ease with which constitutionally protected human rights are overridden by other laws. The constitutions of the southern Mediterranean states all guaranteed to a greater or lesser degree, fundamental human rights and freedoms. For example, the Constitution of Tunisia of 1959 asserts in its Preamble that the republican regime established therein, is “the best guarantee for the respect of human rights.” In Chapter One, which outlines the general provisions which should govern the Tunisian state, articles 5 to 14 establish a number of human rights and freedoms, including the right to freedom of expression and the freedom of association (article 8). However these rights and freedoms are subject to limitations contained in other laws, and thus what the Constitution provided for, other laws (including emergency laws) removed. This approach is prevalent in most of the states of the Maghreb and Mashrek, where what the constitution guarantees, the ordinary law takes away.

Emergency laws have had a particularly robust effect in negating human rights and fundamental freedoms. The Egyptian emergency law is illustrative of this point. Adopted in 1958, the emergency law has been in operation from 1967 almost uninterruptedly, and amongst its provisions are rules restricting public meetings, the control of media including newspapers and any other publications, as well as arbitrary arrest and detention.⁸

Thus, the experience of these countries shows, that human rights guarantees in the new constitutions in Tunisia and Egypt will only be effective if they are designed in such a manner as to protect them from the effect of the ordinary laws, enacted by the legislative or of executive orders issued by the executive branch. The effectiveness of constitutional human rights guarantees may be achieved through a number of mechanisms, such as constitutional entrenchment etc. The supremacy of the constitutional provisions over other laws would be an important

⁸ Egyptian Law 162 of 1958, Article 3.

tool in this context, with an expectation that any laws incompatible with the constitutional provisions will be invalidated.

The manner in which the human rights provisions in the constitution are drafted is also of critical importance. It is widely accepted that a number of basic human rights, such as the right to freedom of expression or freedom of association are subject to certain limitations. International human rights treaties recognise this, as do most domestic laws. The way in which limitations to certain human rights are drafted is, however, an extremely important matter in order to ensure a genuine protection of these rights.

In order to elucidate this point, it is useful to consider two legal provisions that both purport to guarantee the same right: freedom of expression. The first provision is Article 9 of the African Charter of Human and People's Rights which states that:

"1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law."

The second is Article 10 of the European Convention on Human Rights:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject

to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The drafting in the African Charter, while affirming freedom of expression, subjects this right to ‘the law’, without clarifying what type of law the limitation is referring to. Thus, any law, whatever its nature, may suffice to limit, even in a draconian manner, the exercise of this right. On the other hand, the very careful drafting in the European Convention requires that any restriction or limitation to freedom of expression needs to be prescribed by (i) a law (ii) for a particular reason and, most importantly, (iii) that such limitation is necessary in a democratic society. Thus, the tests for any law, that seeks to limit the basic right to expression, are stricter and more difficult to fulfil.

Once again, in this context, the judiciary is required to play a critical role in interpreting any such constitutionally protected human rights. Without an independent and impartial judiciary, the letter of the law risks becoming a dead letter. For example, the phrase “necessary in a democratic society” is open to various interpretations. Thus, the judges, who interpret its meaning, will have a huge impact on whether or not human rights are strengthened or weakened in any given context. The courts are by any measure one of the first lines of defence for individuals whose human rights have been abused. If individuals may not rely on the courts for the redress of grievances they have against the state, the most sophisticated and advanced human rights rules will prove ineffective.

The importance of the role of the judiciary, and the lack of sufficient independence of judges in North Africa, has been highlighted by numerous civil society organisations in the region. The Euro Med Human Rights Network has published a number of reports on the independence and impartiality of the judiciary in the region. In its report on Tunisia, the Euro Med Human Rights Network quoted from an open letter sent by a Tunisian judge Mokhtar Yahyaoui to the then President Ben-Ali. The report states that in the letter Judge Yahyaoui “denounced the lack of independence of Tunisian magistrates in the exercise of their duties and the fact that the judiciary is subservient to the political authorities.”⁹ The gravity of the situation, that had developed in the Tunisian judicial system, is well articulated in this excerpt from the letter:

“Tunisian judges at all levels are frustrated and exasperated by their forced duty to deliver verdicts which are dictated to them by the political authorities and which are not open to impartial thought or criticism.”¹⁰

If the situation within the judiciary in Tunisia and Egypt are as grave as this testimony indicates, the task ahead is a mammoth one. Not only structures will have to be put in place and processes changed, but old habits will need to be eradicated, and a new culture of independence and impartiality created.

The issue of creating a new culture is an important consideration for human rights generally and for human rights in transition countries, in particular. A human rights culture is dependent on many factors and variables, however the role of human rights education has been recognized as a crucial one, by

⁹ Hammami, Ayachi 2008: *The Independence and Impartiality of the Judiciary-Tunisia, Emhrn Report 2008* (Copenhagen: Euro-Mediterranean Human Rights Network): 22.

¹⁰ Ibid.: 23.

the international community as a whole. The UN General Assembly, in Resolution 59/113A explicitly stated the belief

“that human rights education is essential to the realisation of human rights and fundamental freedoms and contributes significantly to promoting equality and preventing conflict and human rights violations and enhancing participation and democratic processes (my italics), with a view to developing societies in which all human beings are valued and respected...”

In countries emerging from prolonged periods of authoritarian rule, the value of human rights education, at all levels and within all segments of society, is paramount. The importance of the human rights education agenda, within the Mediterranean region at large, has been highlighted by civil society organisations in the past decade, prior to the revolutions which took place in Tunisia, Egypt and Libya.¹¹ Thus, within the window of opportunity that has emerged in these countries at this juncture, the development of an inclusive, open and effective human rights education strategy and action-plan should be prioritised.

In the context of human rights, education reference was made to the importance of working at all levels and with all segments of society. In particular, one must highlight the necessity that political participation and active citizenship must not become the privilege of the elites and middle-classes of society, but also the right of those who form part of the more marginalised sectors of society, especially the poor. In terms of democratic participation and access to human rights (civil, political, social and economic), any reforms have to ensure that there are opportunities for the many, not the few, and that democracy works for the unfortunate,

¹¹ See for example Euro-Mediterranean Human Rights Network Human Rights Education Working Group, 2003: *Human Rights Education: A Background Paper* (Copenhagen: Euro-Mediterranean Human Rights Network).

as well as the fortunate. Europe and the USA, for example, have not managed to ensure that all sectors of society gain equally from democracy and human rights, with the gap between the rich and the poor increasing rather than decreasing.¹² This is certainly not an area in which North African states can take European countries or the USA as a model of best practice, which is how these countries sometimes perceive themselves.

While accepting and highlighting that there should be no interference by external actors in the decisions taken by the people of Tunisia and Egypt, in determining what kind of future they wish to have, it is useful to consider the international dimension of governance. In particular, ratification of or adhesion to international human rights treaties without reservations should be encouraged. Prior to the revolutions, Tunisia and Egypt had ratified a number of international human rights treaties, although in some cases they had appended reservations to certain treaty provisions. It is worth noting that Tunisia has already embarked on a process of ratifying a number of human rights treaties and has acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Statute of the International Criminal Court on the 29th June 2011. All of these treaties may serve to strengthen human rights protection, and also serve as a deterrent to any political or other leaders, who may be tempted to commit grave human rights abuses. By the same date, Egypt had not yet acceded to these human rights treaties, and it is still to be seen if this process of human rights treaty ratification will be taken up in Egypt and Libya too.

¹² See for example Bennett, Rosemary (2010, January 27). Gap between rich and poor at its widest since the war. *The Times*. Available at <http://www.timesonline.co.uk>.; "Gap Between Rich and Poor Growing", *CBS News* (17 April 2009), available at: http://www.cbsnews.com/stories/2008/10/21/business/main4535488.shtml?source=RSSattr=World_4535488.

International human rights treaties, especially those which include an element of enforcement through international monitoring or even tribunals, are useful tools through which the citizens of a state may seek to protect their fundamental rights and freedoms. To this end, Egypt and Tunisia may also consider the possibility of making the requisite declaration in terms of the African Charter on Human and People's Rights, which they have both ratified, to grant the African Court on Human and People's Rights jurisdiction over complaints lodged to the Court, by individuals alleging that they have suffered a human rights abuse at the hands of the state. The more tools the people of any country have at their disposal to protect their human rights, the more likely is a culture of human rights to become part of the fabric of society and the state at large. These mechanisms are not about foreign interference in the internal affairs of the state, but about empowering citizens, as against those who exercise the power of the state. Internal controls through the constitutional protection of human rights, an independent judiciary and a vibrant civil society are complemented by international controls in the form of human rights treaty obligations and also international or regional courts or tribunals.

IV. Conclusion

When one considers the journey embarked upon by Tunisia, Egypt and Libya, through the ousting of their authoritarian leaders, it becomes immediately apparent that the voyage towards their destination will be a difficult one. The scale of the individual challenges is considerable: building institutions that represent the many not the few; drafting constitutions that equip them with the necessary tools to have participatory and democratic politics, a politics that is efficient, attuned to the modern world and yet truly autochthonous; strengthen and promote human rights for all citizens, including those whose voice is, for whatever reason, weak; re-invigorate their economies at a time of growing global economic uncertainty; and carry out all the above while acknowledging the short-term needs of their citizens.

Throughout this paper, the essential requirement of respecting the right of the Tunisian, Egyptian and Libyan people, to decide autonomously their constitutional and political future was highlighted continuously. However, it is worth pointing out that this right belongs to the Tunisian, Egyptian and Libyan people as a whole. Indeed this right belongs to all segments of society and not just to individual political leaders or sections of the elite (be it economic, gender, political or religious). After all, during the regimes of Presidents Ben Ali and Mubarak and of Colonel Gaddafi, they or their officials often stated that criticisms of their human rights and democracy record was either unfounded, or simply an attempt at Western imposition. The revolutions in their countries showed that the people disagreed with them. Thus, the caution is not to confuse or conflate the wishes and aspirations of the people as a whole, with those of particular persons or groups, who for their own reasons pretend to speak for the country as a whole.