The 'state' of pivot states in south-eastern Mediterranean

Turkey, Egypt, Israel, and Tunisia after the Arab Spring

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Francesco Duranti

Introduction

With the adoption of the new Constitution on January 26, 2014, Tunisia completed the long and difficult constitutional process which began over three years earlier, in the aftermath of the Jasmine Revolution, and which was marked by a complex transition from authoritarianism to democracy (Ben Achour and Ben Achour 2012). The Constitution – approved almost unanimously, with 200 votes, 12 against and 4 abstentions – by the *Assemblée Nationale Constituante* (ANC) – elected by proportional electoral system in October 2011 and composed of representatives of a wide variety of political parties – placed Tunisia "in a unique position, because is the only country in which the Arab Spring gave rise to a new constitutional settlement that replace an authoritarian regime whit a democratic one in a process in which the electorate was properly represented" (Grote and Röder 2016, 26).

The Tunisian constitution-making process included the participation of the population, a number of other actors, but also, albeit not widely recognized, the *European Commission for Democracy through Law*, better known as the *Venice Commission*.

The Venice Commission

The Venice Commission is an independent consultative body established by the Council of Europe (CoE) in 1990, under the initiative of the Italian European Affairs Minister Antonio La Pergola, who developed the idea – after the fall of the Berlin Wall – to bring together in Venice the representatives of the CoE member countries in order to create a body originally charged with the task of assisting, by constitutional advice, especially the countries of Central and Eastern Europe in the delicate transition from communism to democracy (Craig 2016). According to its Statute – extensively amended in 2002 – membership in the Commission is reserved to the member States of the CoE and to non-European States willing to become full member.[1] At present "the Commission has transformed from a European club into a global, transnational, constitutional forum" (Tuori 2016, 2).

As for the composition of the Commission, the Statute provides that only «*independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and po-*

litical science» (art. 2) can be part of it. The members of the Venice Commission serve in their individual capacity and cannot receive or accept any instructions. They are appointed by their respective countries, and hold office for four years, renewable. The individual members are professors of constitutional and international law, constitutional judges, lawyers, members of national parliaments or high independent authorities. Independence and impartiality are, moreover, essential features of the Commission that has, from the outset, always operated with the necessary equidistance from the various political parties involved in the constitutional or legislative reform processes, and refrained, for example, from intervening in the heat of an electoral campaign or referendum (Buquicchio and Granata-Menghini 2013).

The tasks entrusted to the Commission are regulated by the Statute (art. 1): strengthening the understanding of the legal system of the participating states, notably with a view to bringing these systems closer; promoting the rule of law and democracy; examining the problems raised by the working of democratic institutions and their reinforcement and development, giving priority to the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions, as well as the principle of the rule of law, fundamental rights and freedoms of the citizens and, more in general, the enhancement of democracy.

In view of these statutory aims, "constitutional reform is central to the Venice Commission's work, including the drafting of constitutions and constitutional amendments, and legislation of a constitutional nature" (Craig, 2016, 6). The Commission has, indeed, been actively involved in the main constitution-making processes that have taken place in Europe since 1990, moving "from an experimental laboratory of institutional changes to an essential point of reference for professional and independent expert advice in constitution-making, in Europe and beyond" (Buquicchio and Granata-Menghini 2013, 242).

According to the Statute (art. 3), the Commission may supply opinions upon request submitted by the main organs of the CoE;[2] or by a State or International organisation or body participating in the work of the Commission. Finally, any State which is not a member of the Venice Commission may benefit from the activities of the Commission by making a request to the Committee of Ministers.

The *Rules of Procedures* – published in the Commission's website – carefully provide the working methodology that the Commission applies when a request of opinion arrives, along the following lines, as summarised by the Commission itself:

a) reference to the Commission of a (draft) constitutional or legislative text by a national or international body or the Council of Europe;

b) setting up of a working group of rapporteur members and experts assisted by the Secretariat;

c) draft opinion on compliance of the text with international standards and proposed improvements;

d) visit to the country for talks with the authorities, civil society and other interested stakeholders;

e) final draft opinion;

f) submission of the final draft opinion to all members of the Commission before the plenary session;

g) discussion of the draft opinion in a sub-commission and with the national authorities;

h) discussion and adoption of the opinion at plenary session;

i) submission of the opinion to the body which requested it;

j) publishing of the final text of the opinion on the Commission's website.

As can easily be observed, the Commission adopts a dialogue-based working method with the national or international institution that requires its intervention, in order to facilitate the implementation and adoption of its opinions.

It is worthy of note that all the opinions expressed by the Venice Commission are non-binding, and represent, at most, a clear example of soft law, a growing tendency of all contemporary legal systems. As recently observed, "the work of the Venice Commission provides examples for the general observation that the increased internationalization of the law is accompanied by a growing fragmentation of norms: traditional hard law is increasingly complemented and/or replaced by soft law; the concept of soft law includes norms that are legally non-binding, or binding to only a very limited extent, and lack sovereign enforceability/sanctionability, but nevertheless provide other *stimuli* for compliance and thus for enabling effectiveness; soft instruments can implement soft law – as well as hard law – and/or add to its efficacy; soft instruments dispense with legal formality and, above all, with legal bindingness; they include critical evaluations, moral persuasion, recommendations etc." (Hoffmann-Riem 2014, 580).

It should also be emphasized that the impact of the constitutional advice offered by the Commission appears more significant when requested by a national authority, with an immediate and direct interest in the implementation of the suggestions and indications contained within the opinions adopted by the Commission, with the equally obvious consequence that "when opinions requests come from the interested States themselves, it is the rule that opinions are followed, in part or in full" (Buquicchio and Granata-Menghini 2013, 250). Therefore – especially in cases where a country is facing the adoption of a new constitution – the opinion of the Venice Commission is now almost invariably required, including countries far from the borders of Europe, in order to increase their level of 'democratic standing' in the international community (Craig 2016).

All this accounts for the growing prestige of the Venice Commission with national and international partners and the authoritativeness of its work, which is constantly enhanced by the many new cases – such as the Tunisian one – where its constitutional assistance helps to secure the difficult transition towards democracy.

The Opinion of the Venice Commission on the Constitution of Tunisia

The advice and assistance provided by the Venice Commission during the Tunisian constituent process has developed along a wide and continuous dialogue that began during the early stages of the process, first by means of an informal exchange of views (De Visser 2015) and, then, with the formal request for advice sent by the Speaker of the ANC after the approval of the final draft of the Constitution in June 2013, at a very delicate stage for the Assembly itself (Groppi 2015). In order to allow the ANC to take into account the advisory opinion of the Venice Commission as quickly as possible, the *plenum* of the Commission has asked for a report on the final draft of the Constitution to be prepared by eleven rapporteurs, more than generally used in such cases. This report was to be approved, subsequently, by the *plenum* itself.

In July 2013, after just a month the rapporteurs completed their task – that would have been shared unanimously by the plenary of the Commission during the session of October – by issuing a detailed opinion taking into analytical account the draft Constitution submitted for its consideration (*Opinion 733/2013 on the Final draft Constitution of the Republic of Tunisia*).

The *fil rouge* that guides the reasoning of the Venice Commission on the Tunisian draft Constitution is, of course, directly related to verifying the compatibility of the chosen solutions with respect to the values of the CoE, namely democracy, human rights and rule of law. These principles are accepted since the Preamble as is clarified from the draft Constitution, has full legal force and the violation of which can, therefore, provide reason to appeal to the Constitutional Court, in order to impose an harmonic interpretation of the entire Constitution, including the recalled constitutional values of the Preamble.

As in Chapter I, dedicated to the general principles of the Constitution, the Commission expounds, in particular, the question of the relationship between State and religion, noting a possible line of tension between Article 1, which (similarly to the text of the Constitution previously in force) proclaims Islam as the religion of Tunisia, and the subsequent Article 2, which states, however, the civil nature of the Tunisian State: a standard (as the same draft Constitution shall clarify) that constitutes an absolute limit to constitutional revision as non-amendable provisions. This tension is also exacerbated by Article 6, which gives the government the task of 'guarantor' of religion and, at the same time, proclaims the freedom of conscience and belief, the practice of worship and neutrality of mosques.

According to the Commission's line of thought – that has influenced, on this point, the subsequent work of the ANC (Groppi 2015) – the interpretation to be accepted, in order to avoid possible antinomies, sees the Islam as the religion of the majority of citizens, without compromising the civilian character of the State and allowing inadmissible discrimination against non-Muslim citizens. This is the only interpretative stance consistent with the norm envisaged by Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR, an international agreement

also signed by Tunisia), according to which the fact that a religion is recognised as a State religion or that it is established as official or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under that Covenant, nor in any discrimination against adherents to other religions or non-believers.

As in Chapter II, dedicated to the rights and fundamental freedoms of the citizens, what is most remarkable, from a comparative perspective, is the indication of the Venice Commission – then transposed into the final text of the Constitution (De Visser 2015) – about the necessity to incorporate in the Charter (art. 49) a general limitation clause on fundamental rights (also protected, as an absolute limit, from subsequent revisions of the Constitution), which is expressly referred to as the principle of proportionality of the restrictions to the objective pursued. Furthermore, it is underlined that any limitation on rights should be undertaken only with the law and that they can be taken only in cases of real need being compatible with a civil and democratic State. This is essentially analogous to what happens in the constitutional experiences of established democracies, among which, in particular, the Anglo-Saxon jurisdictions of Canada and New Zealand (Duranti 2012).

On the separation of powers and the form of government, the Venice Commission made extensive use of comparative law, constitutionally recalling many experiences of European systems, with particular reference mainly to the French model of the Fifth Republic, which appears to be that which most inspired Tunisians constituents.

With regard to forms of government, it is useful to recall – in the words of one of its influential members – the consolidated interpretation followed by the Venice Commission in the matter:

"the establishment of the new democracies required fundamental choices about the system of government to be adopted at the approval of the Constitution (…) but the Commission has correctly abstained from expressing a preference in favour of a parliamentary, or presidential or semi-presidential government: general principles about this problem are missing, the choice which has to be made is a choice of opportunity in view of the peculiarities of the concerned societies, and the freedom of the States to select one solution instead of another solution has to be recognized (…) therefore, the Commission has frequently underlined the exigency that a system of checks and balances between powers and the inter-institutional cooperation shall be insured and its approach certainly implies the reference to the models of the forms of government which the legal doctrine and the political science have elaborated" (Bartole 2016, 8-9).

Based on this shared methodological premise, the Commission has analysed the III and IV chapters, dedicated to the Legislature and the Executive, in order to check their compatibility with the models of government in the comparative dimension of established democracies.

From the examination of the pertinent rules contained in the draft Constitution,

the Commission notes, first of all, that the form of government can be included under the semi-presidential model, with a President of the Republic elected by universal suffrage,[3] which grant to the President significant policy-making powers, alongside a government politically responsible before the Parliament, appointed by the President of the Republic taking explicitly into account the results of the general election. Unlike the French model, the Tunisian Constitution does not assign to the President the power to freely dissolve Parliament, but only in the event of specific institutional conditions, specifically articulated by the constitutional rules, thereby significantly reducing one of the major powers available to the President in the classic semi-presidential model. Comparing again with the Fifth French Republic, the Venice Commission underlines that a clearer delimitation of the relationship between the President and Prime Minister has been introduced in the draft Constitution. The former is expressly reserved competencies in the areas of foreign policy, defence and national security, and any conflicts of competence between the two must be settled through legal channels – unlike the French system – through their allocation to the jurisdiction of the Constitutional Court, called upon to resolve these conflicts within a period of one week since receiving the appeal. Still in analogy with the French constitutional system, the President of the Republic may, in exceptional cases of constitutional crisis, make use of emergency powers – delimited by a series of guarantees provided by the Constitution – and remit a law to the Parliament for further deliberation, and may submit it to the judgment of the Constitutional Court for *a priori* constitutional review. The President also has the power to activate the procedure of legislative and constitutional *referendum*.On the President of the Republic, the Commission critically notes, however, the choice of reserving eligibility for election only to citizens of the Islamic religion, as well as the power granted to the President himself to appoint the *Grand Mufti*. These standards appear incompatible with the explicitly non-confessional institutional condition of the Tunisian State.

The powers of the Parliament are also largely based on the French model. In particular, it is fully accepted the distinction between ordinary and organic laws and, above all, the division of the sphere of competences between the legislative power of Parliament – which can only legislate in subjects set out exhaustively by the Constitution – and the regulatory power of the Government, which is assigned the entire (large) residual regulatory powers. Finally, the Venice Commission expounds the issue – frequently at the core of its interventions (Bartole 2016) – of the separation of powers in relation to the effective independence of the Judiciary and on the overall configuration of the constitutional justice system established by the Tunisian constituent.

As for the independence (external and internal) of the Judiciary, the Commission addresses particularly the question of the composition of the Supreme Judicial Council to point out that the procedure for appointing members (half elected by the judges and half appointed from outside the judiciary) is not in line with the need for

effective institutional guarantee of the independence of the Judiciary. This organ is largely modelled on the basis of the Judicial Councils in the constitutional experience of Italy, France and Spain. Hence the suggestion – accepted in the final text of the Constitution – to provide for a different composition of the Council, with a majority of 2/3 of the members elected by judges and the remaining third chosen, such as lay members, from outside the judiciary.

On the Constitutional Court and, more generally, on the review of constitutionality – largely inspired by the European model of constitutional justice – the Commission makes some critical remarks regarding the composition and the conditions of access to the Court.

As for the composition, the Venice Commission suggests to adopt the *prorogatio* system (borrowed by the Spanish experience) in order to prevent possible cases of voids in the composition of the Court that might, hypothetically, be determined by the high majority required for the election of its members.

As for the mechanisms of access to the Court, the Commission points out critically that appeal to the Court is reserved, in advance, only to the President of the Republic, suggesting to extend the recourse to the Constitutional Court – similar to the French model – even to a qualified parliamentary minority, thus increasing significantly the powers available to the opposition: this indication is also finally introduced in the text of the Tunisian Constitution.

The overall opinion of the Venice Commission on the draft Constitution is ultimately largely positive as to the compatibility with the fundamental values of European constitutionalism, albeit under of the mentioned critical remarks, many of which have been accepted in the final text of the Constitution of Tunisia (De Visser 2015).

Comparative Constitutional Law and International Constitutionalism

The advice rendered by the Venice Commission under the Tunisian constituent process can be used as an opportunity to make considerations on the current dynamics of contemporary constitutionalism. First among them is the widespread trend of the migration of ideas and constitutional institutions of the different legal systems of the world, struggling with the writing of a new constitution or with the adoption of important constitutional revisions. This trend – variously defined as "global constitutionalism" (Tushnet 2009, 895); "transnational constitutionalism" (P. Zumbansen, 2012, 75); "internationalization of constitutional law" (Chang and Yeh 2011, 1165); "globalisation of constitutional discourse" (Tuori 2016, 2); "migration of constitutional ideas" (Choudhry 2006, 2); "constitutional transplant and borrowing" (Perju 2012, 1304) – is one of the most interesting dynamics in progress in the constitutional systems of several countries.

From this point of view, a powerful incentive for constitutional cross-fertilization is the rapid proliferation of sources (Bills of Rights) and locations (Courts) for the international protection of human rights. These carry out the daily work of

protecting fundamental rights and profoundly affect the interpretative activities of the national Constitutional Courts called upon to similar functions, thus promoting broad interpretative circulation among the various Courts of the rules and institutions which tend increasingly to converge in order to ensure effective mechanisms for safeguarding the rights of the citizens (Groppi and Ponthoreau 2013).

In this context, the *European Court of Human Rights* holds an absolute leading role through its dynamic interpretation of the ECHR, which is impressive. At present, it is the cornerstone of Europe's constitutional heritage on the protection of fundamental rights. Other international courts have a similar functions, for example the significant activities of the *Corte Interamericana de Derechos Humanos*. In this respect, the work of the Venice Commission is equally relevant. Indeed, it is more and more frequently called upon as an advisory body assisting the constitution-making processes of countries including those not belonging to the CoE. In order to provide this advice, the Venice Commission – in addition to employing hard law sources, such as the jurisprudence of the Strasbourg Court – mainly uses what may be called the European constitutional heritage, that descends from settled constitutional cultures developed in Europe since the dawn of constitutionalism.

The reconstruction, identification and understanding of what can actually be appreciated as European constitutional heritage – i.e. how much the Commission employs in order to make its work of constitutional assistance – is one of the more prominent functions of comparing constitutional jurisdictions, so that "comparative constitutional law constituted a vital resource for the Commission" (Tuori 2016, 3), because "the Venice Commission's business is comparative constitutional engineering, which is a very complex and delicate exercise" (Buquicchio and Granata-Menghini 2013, 246).

Through this complex work of the analysis – and subsequent application – of the founding principles of contemporary constitutionalism, the Venice Commission is actively involved in the spread and circulation of constitutional ideas even in distant jurisdictions (not only geographically) from the European ones, making concrete that cultural trend according to which the process leading to the adoption of new constitutions "enriched the international constitutional debate and the relative constitutional processes affected not only the internal developments of the States, but also the relations between the States and international institutions" (Bartole 2014, 4). Thus, ultimately confirming "that comparative constitutionalism is more than an emerging field of legal inquiry: it is a tool for understanding the political and social condition itself" (Hirschl 2016, 212).

ENDNOTES

[1] Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA.

[2] Committee of Ministers, the Parliamentary Assembly, and the Secretary General.

[3] Through an electoral majoritarian system with possible second round of ballot.

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