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## **NEW CONSTITUTIONS FOR NEW DEMOCRACIES: POLISH AND WORLDWIDE EXPERIENCES**

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Since 1974 – when General Ernesto Geisel, the President of Brazil from 1974 - 1979, started gradually introducing political reforms and freedom, marking the beginning of the end of Brazil's governing military junta - about 90 countries have been travelling the path from dictatorship to democracy. These travels have been as fraught with dangers as those of Sindbad the Sailor because unfortunately, only 27 percent of these countries successfully consolidated their democracies. However, in Central and Eastern Europe almost 60 per cent (11 among 19) accomplished this journey well. What is most interesting is that Central and Eastern European countries accomplished the transition two times faster than South American and South European countries.

### **DEMOCRATIC TRANSITIONS**

Global experience has confirmed that the most effective transitions have taken place where there were pro-democratic elites, but only if these elites were **consensually polarized** and divided. It is impossible if there is one dominant political camp to create a well-balanced democracy, even if it is an expressly pro-democratic camp, like for example the Polish "Solidarność" movement. In Poland, the first good semi-presidential constitution was established in 1992, just as opposition was beginning to appear inside the "Solidarność" movement and sharp competition was occurring the between supporters of President Lech Walesa and former Prime Minister Tadeusz Mazowiecki. In addition, this period witnessed rivalry among state institutions, such as between the office of the president and the two chambers of parliament.

After the fall of Communism in 1989, as a result of the complete political marginalization of the former communists, Poland was threatened to fall under the domination of the "Solidarność" movement, and of course at the time, only a few people understood that the essence of democracy is based on competitiveness and the peaceful transfer of power, even to the opposition. Although at that time we felt disappointed with the political divisions

and the prospect of losing control of the government, from today's point of view it is clear that had the country relied on Poland's *ancien regime* constitution (similar to that of former Egyptian President Hosni Mubarak's, with a very strong president and the parliamentary majority electoral law(what does that mean)) it would have resulted in Lech Walesa and "Solidarność" achieving political hegemony for many years. Yet the level of consolidation of democracy tends to increase and become more stable after the first, and especially the second successful rotation of power. I personally feel optimistic for Egypt where the debate on a new constitution includes people elected by universal suffrage and also representing separate institutions like the People's Assembly, the Shura Council, and in the near future - the soon to be elected President. From this point of view, I am a bit afraid about the process of democratization in Tunisia, where a new constitution and the most important constitutional acts are able to be dictated by the Al Nahda party and its coalition partners.

"Rotten door" transitions (as opposed to "hard door" ones), are where the former ruling elites achieved such a level of "rot" during the fallen regime, that upon the removal of the dictatorship, they are no longer able to provide valuable opposition, but decide instead to spread into other groups or they stay away from politics. In the meantime, the new post-revolutionary camps, if they are united, almost always try to write a constitution and other fundamental rights "for themselves," to allow for their easy re-election or to allow them to maintain control of the government for longer. To these ends, they usually also issue laws explicitly authorizing themselves with wide discretionary powers, and they keep these laws purposefully vague to make it difficult for people to understand the limits of these laws. They often forget that one of the key tenets of democracy is that governments have to peacefully and cooperatively hand over power to oppositions; that trying to write / legislate constitutions and laws that "permanentize" the post-revolutionaries' government often ends in failed democratic transitions. In 1990s years of the last century, this oversight resulted in so-called "no cooperative" transitions in Argentina, the Republic of South Africa, and other sub-Saharan African countries; and also in Europe in Romania, Serbia and Croatia. Of course, building a democracy is also prevented if there is too large and too dominant an influence on the transitional process by elites from the pre-revolutionary dictatorship. This was the case in Brazil in the years X to Y when the country was first emerging from under military rule; and even more particularly it was the case in Chile where the former dictator, General Augusto Pinochet had secured in the constitution - through his influence on configuring the second

chamber of parliament - 'enclaves' which gave him an autocratic influence on the decisions of the state (including the budget of the army) and provided him with impunity for years.

In the process of designing a new constitution two things seem to be most important. First, the importance of having a so-called "constitutional moment", that reflects the public's support for the transition process and for the Constituent Assembly which will prepare the constitution. Second, obtaining approval for a draft constitution among a meaningful number of the political elites because these are the elites who in practice will determine its effectiveness or sabotage the process and the draft constitution document. And we must remember that we can only speak of successful democratic consolidation and transition when there is consensus between the basic social actors and the elites that the same game is being played – namely that of democracy – and that no one will try to pursue their interests in any other “non-democratic” way. The Polish experience in this regard may be instructive. In Poland we made so many mistakes, almost as many as were possible or even more. In 1990 we lost the "constitutional moment" (the same happened later in Belarus, Ukraine and Russia), with the result that between the years 1989 to 1997, we had three constitutions, and the impression that each team may be trying to adapt the constitution to suit their own political ambitions. This confirms the global experience of the transactional process of constitution-making, whereby everyone attempts to use the politicians (for example the former Communist Party first secretaries and chairmen of the socialist parliaments) to fight for the best position and the biggest influence in the future. At the time, unfortunately, too many people from the "Solidarność" movement thought that they alone were enough to ensure a democratic Poland. Nothing could be further from the truth. I kept hearing there's still time! As it turned out, we did not have time and the Polish constitutional process lasted for about one year and a half. On the other hand it must be said that during this time we were learning from our mistakes and reacting to the changing political situation in the country. And is there a need for a constitutional referendum? Of course, because a constitution must have strong democratic legitimacy for it to survive and to withstand the constant attempts that people will make to try and change it during the transition process; a referendum provides the necessary stability required for a democratic regime. In addition, the very announcement of the constitutional referendum will mobilize public debate.

## DEMOCRATIC CONSOLIDATION - WHAT KIND OF CONSTITUTION?

Pro-democratic elites are not enough to ensure a successful transition to democracy. This has been painfully revealed in Iraq, Afghanistan, and Bosnia as they build their democracies. Modernization is needed (in the economy, education, civil society), and at the beginning, this change is mainly needed in the state's institutions. The modernization of state institutions is critical at the beginning to combat the erosion of democracy, which a young democracy will struggle with from the start.

When it comes to change and modernization, in the context of the democratization process, one can be an optimist about Egypt. As shown by various indicators, at the end of the Mubarak government, Egypt reached a level of liberalization equivalent to the level of liberalization in Central Europe (excluding Belarus, Russia and Ukraine) in 1986, which was fully three years before the beginning of the democratic transformation in Central Europe. In addition, Central Europe countries needed an average of 11 years to achieve the current level of consolidation of their democracies, while Southern Europe (Greece, Spain, Portugal) required 14 years, and Latin America as much as 26 years.

In Poland particularly, the transition to democracy was expedited largely due to the fact that work on revisions to the Constitution were focused on preventing the most dangerous elements of the erosion of democracy, namely:

- 1) disregarding the principle of "separation of powers" (reflected in "legislative" proactivity or rights given to the executive power, i.e. the right to self-decrees or to allowing the executive to unilaterally call for and hold referendums on the constitution, as occurred in Latin America, Central Asia, Belarus, Russia, and Ukraine);

- 2) excessive dominance of the executive power (the Presidents in a presidential system and the government in a parliamentary system), often resulting, in practice, in attempts to paralyze the basic democratic mechanism of "checks and balances", resulting in the constitutional weakening of the position of parliament and the judiciary;

- 3) giving in to the "dominant party" syndrome (such as Mubarak's party), which destroys multi-party pluralism and social options.

The answer to these common threats to the young democracies of Central and Eastern Europe which managed to build good democracies was the establishment of semi-presidential systems, but founded on the logic of parliamentarism. Under this system, the president is elected by popular vote, however he does not have the authority or power to interfere with governance, and where the government (ministers and cabinet) would be accountable only to the parliament – who would have the right of no-confidence over the government- not simultaneously to the President . Eight of eleven former Eastern Bloc Communist countries chose this system of government; the remaining countries chose purely parliamentary regimes. Professional indexes (rankings) of consolidation and quality of democracy (Bertelsmann Transformation Index, Nation in Transit, Freedom House) give their highest ratings to semi-presidential models, including countries such as Slovenia, Poland and the Slovak Republic (after 1998) and also to the parliamentary republics of the Czech Republic and Estonia. In fact, in the world rankings of the top ten new democracies, half of the regimes are semi-presidential, and at the top of the list (other than Uruguay and Spain) are Slovenia, Portugal, and Poland.

Why is that? In my opinion, first, because this version of the semi-presidential system provides the most reasonable mechanism for expanded "balance of powers" (i.e. checks and balances), which protects, despite the appearance here and there of the return of some dictatorships, attempts to reinstate autocratic practices. Second, the application of the proportional electoral system in most of these hybrid semi-presidential systems, protects fair and honest elections (which is extremely important for the starters of democracy) and the distribution of political power among different social groups. Thirdly, with the exception of the Czech Republic, it was decided as soon as possible to decentralize power through general elections at the local authority (municipality) level, and to provide local authorities with independent budgets, and thus give them independence from the central government. Unfortunately, in Poland, we all too often forgot that there is also erosion of democracy at the local level in a similar or even identical manner as that which happens at the state level.

In summary, it appears that young democracies, including those in North Africa, and, it is hoped, those in the Middle East in particular, should avoid the presidential model of governance (other than the U.S. this system has not succeeded anywhere because of the lack of respect for "separation of powers"). Young democracies should also avoid the British

parliamentary system (there has been a complete failure of the application of this model in sub-Saharan Africa), and the irresponsible mix of both systems (for example a president who functions as prime minister). The exception to the rule is set by the variants to the semi-presidential system founded on parliamentary logic. We must constantly keep in mind, and again I emphasize that once the basic flaw of the Arab and Communist countries was that there was never a transfer of power or rotation of rule – and that is the very definition of democracy. Finally, to successfully fulfill the conditions for the consolidation of democracy, consent must be reached among the elites regarding the basic rules governing media freedom, the existence and activities of social organizations, and governing local authorities.

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He served as the Secretary of the Constitutional Committee of the Polish Parliament after democratic breakthrough. He is one of the authors of the draft of the Polish new constitution and political parties law as well as the author of the Polish parliamentary electoral law. He served as Deputy Mayor of the city of Wrocław for five years and was city councilor for sixteen.

He Co-founded the Institute for Islamic Studies in Poland and is an expert at the European Center of “Solidarność” and the Polish Institute of Public Affairs. His main interests are in worldwide democratic transitions and institutional (constitutional) design for young democracies, especially in Muslim-majority countries. His most recent book is: *How to Build and How to Destroy Democracies: The Study on Consolidation of Young Democracies in the 20<sup>th</sup> and 21<sup>st</sup> Centuries*.

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