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Constitutional Reform in the Arab Spring:
A New Beginning or an Unhappy Ending?

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Some years ago, when I was considering various paths my scholarly agenda could take, I asked a colleague of mine who worked on international law regarding Antarctica how he had selected his specialization. He responded that the obscurity of the subject was its own reward: even if he produced bad scholarship, he would still be one of the top people in his field.

It was in this spirit that I decided to focus on constitutionalism in the Arab world. What little attention the topic had attracted was negative. For centuries, Middle Eastern political systems have been held up by Western students of constitutionalism to be negative models: helping us understand who we are by showing us what we are not. Cautionary tales of Oriental despotism were a staple of our political self-understanding several centuries before Saddam Hussein. Montesquieu, for instance, claimed that the failure to develop constitutional mechanisms for succession in this part of the world led to quite grisly practices:

In countries where there are no fundamental laws, the succession to the emperor cannot be fixt.... As every prince of the royal family has an equal capacity to be chosen, hence it follows that the

*prince who ascends the throne, strangles immediately his brothers, as in Turkey; or puts out their eyes, as in Persia; or bereaves them of their understanding, as in the Mogul's country, the vacancy of the throne is always attended with a horrid civil war.*¹

I was in for a rude shock. I quickly discovered that there were already armies of constitutional law specialists in the Arab world and that they had been developing their expertise for over a century. Moreover, that interest seemed to be increasing beyond narrow circles, as many within the region came to the conclusion that unaccountable executive authority was the central problem of Arab governance. In the 1980s and 1990s, this was common talk among intellectuals; in the 2000s, it inspired some broader protest movements. By January 2011, I actually heard a demonstrator in Tahrir Square explain his demands to an Al-Jazeera journalist as something like: “Our problem in this country is an over-concentration of authority in the hands of the executive. We need a new constitution with an effective parliament and an independent judiciary.” It was clear by this point that I would have to work hard even to be an average analyst of Arab constitutions.

In that spirit of striving to be average, what I hope to do today is offer a modest modification in our understanding of what constitutional politics is about. We often view

¹ Montesquieu, *The Spirit of the Laws*, edited by David Wallace Carrithers (Berkeley: University of California Press, 1977) 145–46.

constitutional politics as above normal politics; constitutional moments are pre-political moments of invention in which a society does not merely make rules but rather makes rules about rules and defines the basic values that unite people as a political community.² The experience of constitutional reform after the Arab Spring, however, illustrates the limitations of that view. I believe that the story of constitution formation and reformation across the Arab world suggests that constitutional moments are, in truth, neither pre-political nor moments of invention.

THE HISTORICAL TRADITION

I want to begin by briefly situating us in the historical tradition of Arab constitutions. These are texts that have typically been designed more to augment rather than limit political authority—especially the authority of the executive. Here, I should not exaggerate Arab exceptionalism; the line between augmenting authority and limiting it through constitutional tools is thin indeed. The world's first three constitutions—the American, the French, and the Polish—were

² There are many versions of such a vision of constitution writing; perhaps the most influential among social scientists has been Jon Elster's image of “self binding” developed in his *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1984). Significantly, Elster later backed away somewhat from the applicability of this image to constitutions, confessing to have been much influenced by a colleague's comment that “in politics, people never try to bind themselves, only to bind others.” See *Ulysses Unbound* (Cambridge: Cambridge University Press, 2000) ix.

issued in remarkably similar circumstances. Political leaders operating in a context of deep social divisions, desperate fiscal crisis, paralyzed central government, and severe international threat attempted to redesign their national political institutions in order to render them more effective. In all three cases, the efforts were marked by a large degree of failure. Poland all but disappeared from the political map of Europe for over a century. France survived revolution only by abandoning some of the republican principles its 1791 Constitution proclaimed—although, the linear descendants of that document have come to govern not only France but many other countries. The American Constitution—the only one to outlive its authors—showed some short-term success but ours could not solve the issue that dared not speak its name: slavery. Horrific fratricidal violence, rather than political compromise, resolved slavery, and the American Constitution survived that struggle only in a profoundly modified form.

In Tunis in 1861, in Istanbul in 1876, and in Cairo in 1882, existing governments faced crises similar to those confronted in Philadelphia in 1787 and in Paris and Warsaw in 1791. Reformers sought to shore up weak central governments beset by foreign threats, domestic limitations, and fiscal crisis. While the American, French, and Polish constitutions were by no means unmitigated successes (the latter two were in full force for less than two years), the documents that emerged

in the Middle East were even less successful. The Tunisian Constitution stayed in force for three years and certainly did nothing to prevent the ultimate incorporation of the country into the French Empire. The Ottoman Constitution was suspended after less than two years. The Egyptian Basic Law had an even shorter life, suspended in the same year it was promulgated by the invading British army.

I do not wish to imply that imperialism was solely, or even primarily, responsible for the failure of constitutionalism to take root in the Arab world. It is true that imperial authorities shut down constitutional mechanisms wherever they found them; it is also true that when they left, they often attempted to put their post-imperial position beyond the reach of constitutional institutions. In Iraq, for instance, the British accomplished this by rushing through an oil concession shortly before the Iraqi Parliament—which would have had the authority to review it—could convene. They then forced the new parliament to ratify an Anglo-Iraqi treaty that placed core British interests outside of constitutional structures. But such ruses aside, the seeds of constitutionalism were quite capable of dying on their own. More often, however, Arab constitutions did not die but instead survived imperialism and independence in weakened form. Rather than perishing, they proved capable of producing hybrid plants in which authoritarian structures grew from constitutionalist roots.

The early experiments with constitutional structures often set off struggles between monarchs and presidents on the one hand and parliaments on the other. No Arab parliament has won such a struggle yet. Indeed, in the second half of the twentieth century, they grew meeker with each passing year. The problem was that, having brought parliaments and other constitutional structures into being, Arab rulers proved quite capable of finding ways to outmaneuver them. They learned to like constitutional structures for some of the benefits they provided. Internationally, issuing a constitution became a clear statement of sovereignty. Domestically, constitutions could signal fundamental programmatic and ideological directions. This is why, over time, the texts became longer and more bombastic.

But when it came to ensuring, rather than proclaiming, accountability—either to the people or to the law—Arab constitutions proved quite capable of sprouting loopholes, escape hatches, and fulsome but unenforceable mechanisms. Such developments were generally justified in the name of national security. This is, of course, not an Arab disease. Many of my fellow citizens might worry that the same panic—a quite understandable panic perhaps but panic nonetheless—has led the United States constitutional order to some very worrying symptoms of the same ailment.

In the Arab world, this problem has been less a sudden panic and more the slow but seemingly unstoppable accretion of special courts, emergency laws, and revolutionary

measures. Parliaments have been created but stacked with members of a single political party. Elections have been held but election monitoring has been treated as a crime. Executives have been given the authority to rule by decree in loosely-defined emergency situations. Legislation and budgets are prepared by the executive and then submitted to a parliament that is given neither the tools nor the time to examine them.

Let me point out something odd about constitutional mechanisms in the Arab world here: many of the most problematic, from the perspective of holding political authority accountable (to the people or to the law), are hardly Arab in origin. Instead, they were borrowed from Europe, sometimes word-for-word. In some cases, these provisions were expressly written to undermine constitutional safeguards: the current Egyptian emergency law is a linear descendant of a law issued by the British occupation at the beginning of the First World War. More often, however, the language was less direct. Take the typical clause in many Arab constitutional texts that basic freedoms—such as those regarding expression—are to be defined *by law*. The Kuwaiti constitution, for instance, requires the parliament to guarantee (and thus define) freedom of the press by legislation: “Freedom of the press, printing, and publishing is guaranteed in accordance with the conditions and manner specified by law.”³ In such situations, the need for implementing legislation comes close to reversing the relationship between constitutional

³ *Constitution of Kuwait* (1962), Article 37.

and statutory law. Rather than have the constitution limit and define the scope of statutes, statutes define the limits of the constitutional text.

Yet such constitutional language was not developed in Kuwait or Cairo or Tunis. Instead, it emerged in Europe where parliaments anxious to assert their supremacy insisted that basic political matters could only be governed by laws that they had passed. The effort there was to enhance political accountability to the people's representatives, not undermine it. These provisions, when implanted into the political contexts that developed in the Arab world, became means for removing rather than protecting accountability mechanisms. There are other examples: judicial councils have been adopted in Europe and Latin America to give institutional expression to the idea judicial independence; in the Arab world, these councils have frequently been placed under the authority of the head of state.

The result of all this selective borrowing and tinkering has been an unchecked executive authority. This is not by accident. Over the course of the twentieth century, Arab constitutional texts became more authoritarian rather than less. The question is whether this trend might be reversed or if there is any possibility for change. Simply put, does the Arab Spring provide an opportunity to write a constitution that can actually function as a limit on state authority?

THE UPHEAVALS OF 2011

The political upheavals of the past three years in the Arab world have been premised, in large part, on the proposition that the ills of Arab politics need a constitutional solution. Putting pretense aside, let me confess that when I talk about the Arab world, I often mean Egypt. The Egyptian experience is central both because of its intrinsic importance and because of its influence in the Arab world.

In the years before the Egyptian revolution of 2011, public deliberation on the country's deep political problems was not merely possible, it was the stuff of daily political discussion in the press, satellite television, and conference halls. What that talk lacked in efficacy, it compensated for in specificity and frankness. In a totalitarian system—or even a fully authoritarian one—the space for political speech and expression, along with the rules of political speech, are often sharply limited. But Egypt during the Mubarak years was not totalitarian; it was not even fully authoritarian. The president was inevitable, as was the regime, but there was plenty of room for complaining.

The formation of this public sphere began in the 1970s and 1980s when political speech became far more free and sophisticated. In the 1970s an opposition press emerged and in the 1980s that press discovered its shrill voice. By the 1990s, pan-Arab newspapers, with their more restrained rhetoric,

higher professional standards, and greater ability to cover news, had also entered the Egyptian market. In addition to the press, NGOs, universities, and think tanks stepped into the fray, holding discussions and conferences on a host of political matters. With the advent of satellite television, these discussions were beamed directly into coffeehouses and homes throughout the Arab world. Indeed, over the past decade, it seems that public discussion about politics may even have begun to edge out sports.

In the resulting public sphere of Mubarak's Egypt, red lines existed to be sure but they were constantly probed and tested. Criticism could be bitter and exacting as long as it was abstract. It also helped to be both elitist and slightly indirect. Organizing against the president was dangerous but suggesting constitutional amendments to curb his power was fair game. Organizing an opposition political party was risky but documenting and decrying electoral abuses became routine. This rise of an independent press in the first decade of the twenty-first century, even with all its limitations, may have been the single most overlooked transformational force in Arab politics. During this period, the Arab world saw the articulation of new political visions through a network of *nadwaat* (symposia) and newspapers. What emerged was a public discourse that owed just as much to Habermas as to Orwell and relied just as much on Johannes Gutenberg as on Mark Zuckerberg. Most remarkably, this discourse

expressed itself primarily in political terms, adopting concepts of human rights, democracy, and constitutionalism.

What is surprising is how widely this new discourse of rights and constitutions resonated. There were different strains, to be sure, but when the General Guide of the Muslim Brotherhood summed up his organization's goal as "freedom," when Nasserists called for an independent judiciary (something their namesake did much to undermine), or when human rights organizations found their themes embraced by a wide variety of political forces, it was clear that constitutional reform was becoming the lingua franca of political debates. Across the spectrum, groups who had long advocated for reform began developing a set of overlapping diagnoses for Egypt's political predicament, and their core conclusion was that the problem lay in the basic framework according to which the country was governed.

The development of this public—and very political—sphere does not explain the series of upheavals but the emergence of this common framework for assessing the country's problems does help us understand why people were so quick to recognize each others' revulsion and disgust with the status quo. It also helps us understand why the opposition—when it discovered a political voice—expressed itself so easily and specifically in constitutional terms. A decade of constitutional discourse lent a ready vocabulary, and even a set of detailed critiques and proposed remedies, for opposition leaders.

This may also help explain why the upheaval of 2011 followed such a different, and far more coherent, path than previous outbursts of more inchoate urban unrest in 1977 and 1986. In 1977, economic grievances figured heavily; in 1986, institutions of state, ruling party offices, and tourist locations seem to have drawn special ire from rioters. But in 2011, more disciplined demonstrators focused surprising energy on shredding a piece of paper: the country's 1971 Constitution. As the regime fragmented, a group of autodidact constitutional experts were poised to step into the breach.

When the Egyptian people spoke with a single voice in January 2011, their simple demand could be summed up as the fall of the regime and the departure of the president. But it was not always summed up so simply. Almost as frequent were calls for judicial monitoring of elections, transferring authority from the presidency to the parliament, greater transparency, and increased oversight of public finances.

The constitutional sophistication of the demonstrators was a surprise to everyone—except those who had been reading Egyptian newspapers for the past decade. What had emerged in the press was a detailed set of constitutional arguments—how to restrain the power of the presidency, how to recover long forgotten parts of Egypt's political history (such as the abortive 1954 draft constitution), how to take the 1971 Constitution's bombastic and loquacious list of rights

and transform them into real and effective guarantees of the rights of Egyptian citizens. Thus, by 2011, when the Egyptian Third Estate spoke, it often did so in the language of a rather bookish constitutional law professor.

THE UNFOLDING OF CONSTITUTIONAL REFORM

By 2011, the Arab world had every reason to be cynical about constitutions. The terrible experience with authoritarian constitutions, however, had the opposite effect: rather than lead societies to abandon the idea of constitutions, the experience led to a broad consensus that no progress was possible until the constitution was done right. As it should have, idealistic hopes eventually gave way to practical bargaining and bare-knuckled politics in 2011 and 2012. But by 2013, things took a turn for the worse across the region. Here, let me expand my focus beyond Egypt and divide up the failures into three categories, all centered on the nature of the bargaining.

In Kuwait, Morocco, and Jordan, existing regimes were nervous but they were not fundamentally threatened. Constitutional reform, therefore, took the form of entrenched regimes seeking to placate oppositions through limited change—a greater role for elected deputies in the parliament, a more liberal environment for public expression, perhaps concessions toward institutional autonomy of oversight bodies like judiciaries. While such incremental reform

should not be dismissed, these liberal reforms came nowhere near what could be called true democratization. Seen from a distance, the history of democracy in most Western European states is a dramatic story but, over the short term, it was a more mundane struggle over defining the exact nature of parliamentary prerogatives or qualifications for the franchise. Monarchs negotiated these matters with popular forces, sometimes under duress, and, following each concession, with renewed resistance to the next step of democratic reform. But similar struggles in the Arab world seem to hold less promise. The contest in Europe between democrats and non-democrats was frank and honest. In the Arab world, democracy is conceded in principle but hollowed out in practice through a series of manipulative techniques, which only deepens mistrust. In some Arab countries (possibly including those that I just mentioned), the effect might be to hollow out not just democratic practices but also the promise and the attractiveness of democracy as an ideal.

In a second set of countries—most notably, Bahrain and Syria—the regimes did not even attempt such bargaining. Instead, they met the demand for radical reform with radical repression. Both countries quickly transformed what began as a fight over principles into one between sectarian groups. They did this by cultivating some constituencies while repressing others. The strategy of divide and rule has worked in Bahrain thus far; the first part (divide) has worked

in Syria but it is not yet clear how much the regime there will be able to rule. In both places, the field of battle quickly moved from a tussle over constitutional structures to one over identity and security.

In a third set of countries, things got off to a much better start. Real constitutional bargaining began in Egypt and Tunisia but both countries show the limits of bargaining in deeply divided societies. In Egypt, the problem was not that the transition was badly designed but rather that it was not designed at all. Its original failing lay in a series of shortsighted decisions made by generally well-meaning but myopic actors who found themselves thrust into positions of limited authority in February and March 2011. In retrospect, we can see that the extensive debates about the mechanics of writing and ratifying a constitution and the process for electing a president only obscured the real mistakes that were being made.

The most basic problem was the huge amount of political control that fell into the hands of the military high command for no other reason than that the high command claimed it before anyone else could devise an alternative. This left the military free to take whatever misstep it liked—and it liked a lot of them. The first was to charge a tiny ad hoc committee with designing the outlines of a transition by amending parts of the 1971 Constitution. The second was to fold those amended articles not into the old constitution but into a new

so-called “constitutional declaration”—a document whose authors have yet to be revealed. Among the shortcomings of the 2011 “constitutional declaration” was the absence of a process for amending the constitution. While the declaration was only meant to be an interim document, various actors quickly came to believe that changes were immediately necessary. Without a clear amendment process, however, it seemed as if the only way to make those changes was for the military or the president (once elected) to assert the constitutional power to do so.

Had a process of broad and careful consultation been used to adjust the basic law, the results might have been made palatable. But the generals were predictably bad at consultation. Later, Egypt’s first freely elected president, President Muhammad Morsi—the only president who hailed from a civil society organization rather than the military—turned out to be even worse. Egypt’s rulers took their turns with unilateral changes, ultimately leading to disastrous results.

During this interim period, there was also a failure to specify the powers of the parliament. Thus, when Islamists found themselves in the parliamentary majority in January 2012, they also came to realize that this status gave them little leverage to effect changes in policy or even legislation. Those who later charged the Islamists with heavy-handed and unconstrained majoritarianism often ignored the fact that the existing system did not allow the parliamentary

majority to do anything at all. It was this dynamic that led the Islamists to seek greater control rather than build broader coalitions.

From its earliest days, and throughout the entire transitional process, Islamists suspected that their revolutionary partners’ real agenda was to delay elections for fear of how well Islamists would do. Non-Islamists felt (with similar legitimacy) that Islamists were shoving hard for a vote so they could elbow their way into the most seats at the table. Such political rivalries are not inherently bad. The deeper problem was that the only way to settle them was not through negotiation, compromise, and consensus but by pressuring, nagging, aligning, and bargaining with the generals. Suspicions of separate deals and secret agreements deepened fears, and Egypt’s contending political forces quickly learned that allegations need not be coupled with evidence in order to be taken seriously.

Differences on questions of how government should be structured were not that vast in early 2011, and a more consensual process could certainly have been devised. Much of the basic framework for making a post-revolutionary political order—a weaker presidency, stronger safeguards for freedoms, more democratic procedures, and judicial independence—united almost the entire political spectrum. For a brief period in early 2011, it looked as if good will could make up for a bad process. But as the revolutionary coalition

broke apart, few saw compromise as a paying proposition. Periodic efforts to achieve it—in 2012 when it was time to pick members of the constituent assembly or in early 2013 when domestic and international mediators tried to bring Morsi and the opposition together—foundered in an atmosphere of mistrust. In the end, all the suits were played, and military clubs turned up trump.

Egypt's experience during the Arab Spring seems to suggest that a bad process can prevent good bargaining. The conclusion is obvious: get your process down right. I think that conclusion is sound but it is also facile. It is true that a good process may help, but there is still a question about what makes for good process. Is it enough? The Egyptian process was not produced by accident. Rather, it was the product of a constellation of political forces that existed in the country and the short-term choices by those factions. A better process may have produced only a less bad outcome.

We can see in Tunisia—a country where the military is unable to play the same role and there is greater balance among political forces—that writing a democratic constitution in a democratic manner on a foundation built under years of authoritarian practices is difficult indeed. Among the most pernicious effects are a legacy of division and mistrust among political actors, an inability of post-uprising political forces to execute their programs in a manner that allows for coalition building, and the weakness of institutions at

fostering consensus. In other words, as the Tunisians have discovered this year, good constitutional bargaining is difficult even with a good process.

THE LESSONS

I suggested at the outset that I would offer some modifications to our image of constitutions as properly being pre-political moments of invention. By now, you might realize that these modifications are not so minor. I want to suggest to you that constitutions are neither pre-political nor the products of moments of invention.

First, as to the politics, it should be clear by now that when drafters enter the room, they do not leave politics behind. Even if they did, politics would seep in from the outside world. The story I have told may help explain why it is so difficult to write a constitution that will guide politics in ways that are seen as legitimate. It is difficult to bring a hall full of passionate leaders, operating under the watchful eyes of their aggrieved followers, to bargain to a successful conclusion. Even if they reach a deal, it is easy for the resulting document to paper over, rather than resolve, fundamental differences. Drafting takes place under pressure of various political forces. These forces strive for short-term victory, reach for jerry-rigged compromises when they cannot prevail, and sometimes lapse into silence if no compromise is available. While these compromises and silences may be

critical for reaching an agreement today, they may pack in surprises tomorrow. Even in those areas in which an earnest agreement is reached, enforcement and interpretation may quickly become issues. Politics is an unavoidable ingredient; no actor is prepared to put his or her interests aside at such a defining moment. At its core, my claim is that constitutions have been based far more on the human capacity to bargain than on the ability to reason. They fail because the politics have failed, not because a bargain could not be struck.

Second, constitutions are rarely written in moments of invention. For most countries, constitution writing is an iterative process, though not always intentionally so. Most countries have had a series of constitutional texts, and constitution writing is therefore often an act of recovery, repair, reorientation, or recalibration more than wondrous new beginning. Tunisians beginning the process in 2011 looked back at their older documents and processes as a starting point. Egypt's temporary military rulers suspended the entire 1971 Constitution in February 2011 and then issued a constitutional declaration in March that borrowed extensively from the suspended Constitution's clauses. When a constituent assembly finally began work on a new document in the summer of 2012, it very quickly went back to the 1971 constitution as a starting point. When that new document was suspended, rather than start from scratch, a committee set to work to offer comprehensive amendments, including

some restorative ones. Today, Egypt's drafters are rewriting every single article of the 2012 Constitution, but that document is still a starting point.

It is not merely the documents that remain a constant but also the institutions. The militaries, security services, political parties, and sometimes parliaments and judiciaries are active participants in the constitution-writing process. In Egypt in particular, though hardly uniquely, the odd result is one in which the state was not so much being constituted by society as it was reconstituting itself.

Stephen Holmes has famously compared constitutional rules to grammatical ones in that they are designed not merely to constrain but also to make other things (action or communication) possible.⁴ But if such a metaphor is accepted, it must also be recognized that the language in question is no ordinary one. For many liberals, constitutional language is Esperanto. Writing a constitution, in this view, consists of consciously and carefully creating rules; it is based upon a faith in the ability of human reason to structure society in purposeful and peaceful ways. Constitutions, if they resemble grammar, form the basis of an artificial and highly rationalized language.

Such a view is more inspirational than helpful. Elsewhere, I have tried to present a different view of constitutions: rather

⁴ Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

than Esperanto, the reality is that constitutions speak a language more like English, with its mongrel breeding, inconsistent and almost inexpressible rules and exceptions, multiple origins, improbable and idiosyncratic spelling, and rich vocabulary.⁵

In conclusion, let me note that even though constitutions in the Arab world sometimes rely on international forms, they are very much responding to deep needs that are frequently articulated within the region for accountable governments, limits on executive power, and political reform. The constituency for these ideas is very broad but also extremely diffuse. I cannot claim that the region will find a constitutionalist path out of its despair. While the revolutionaries of 2011 were correct in their diagnosis, the constitutional architects of 2012 and 2013 have been less ready with the cure. The result is fascinating to watch but depressing to live through. In that sense, the people of the Arab world are paying the price for the fact that the study of Arab constitutions is no longer as barren a subject as Antarctica.

⁵ For a fuller development of this idea, see Nathan Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: SUNY Press, 2001).