

Arab Constitutionalism

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For me, it is really a dream come true to come back to Juniata College. Indeed, sometimes dreams come true. I was thinking of this song about somewhere over the rainbow, where there is a land where dreams come true. I was thinking about a rainbow and realized that the rainbow is a compelling metaphor for social scientists because it conveys the idea that you can never really reach the rainbow, only approach it. Like rainbows, social and political ideals can be approached but never reached. You can get close to them but not really enter them. For instance, a polity can be more democratic or less democratic, but full democracy is impossible because, ultimately, it implies full political autonomy with people having full control over their lives, which is impossible.

I am saying this because the title of this lecture is “Arab Constitutionalism.” Maybe there should have been a question mark there: “Arab Constitutionalism?” Is there an Arab constitutionalism? Can we talk about an Arab constitutionalism? Because constitutionalism is an ideal. It is an ideal that we can approach, but we cannot really reach. Why do I say that? Because you might have a constitution, but that doesn’t necessarily mean that you will have a constitutionalist system. A constitution can be considered from a descriptive and from a normative perspective. Take, for instance, North Korea. North Korea has a constitutional charter, but the Constitution of North Korea is descriptive; it is not really normative. Now the ruler might claim that it is binding, but it is binding only upon his own whim. If he decides not to be bound, he will not be bound by the Constitution.

Then, what happens with the United States or France or Spain? What happens if Donald Trump decides to step outside the American Constitution? You can ask yourself then whether the American Constitution is really binding or not and whether there are mechanisms for making it binding. Well, you have separation of powers, and that is the first mechanism for making it binding. But what happens if the branches of government get together and decide not to abide by the Constitution? That is, what happens if there is an agreement between the Congress, the Supreme Court, and the Executive not to abide by the Constitution? Well, that can happen. That has actually happened. For instance, it happened in the Republic of Weimar, and that is how Adolf Hitler came to power eventually with the Enabling Act of 1933.

Hence, separation of powers alone does not really ensure that you will have constitutionalism. You also need democracy to make sure that the people can be situated as another bulwark of protection of the constitution. You need separation of powers and democracy to have constitutionalism, that is, to have a political system that has a constitution and where the constitution is binding. In this context, human rights come to play a crucial role. Actually, constitutionalism refers to the idea of a constitutional Constitution, synthesized in article sixteen of the Declaration of Rights of the Man and the Citizen that was signed in 1789 in France. Article sixteen of the Declaration says that any society where separation of powers is not ensured and human rights recognized lacks a constitution (that is, a normative constitution). You need human rights because without human rights there is no democracy. I am not referring only to the right to vote. You can have the right to vote recognized, but what is its usefulness if you do not have the right to form political parties? Or imagine that you have recognition of the right to vote and the right to form parties, but you do not have freedom of thought. How can people then form their political preferences? Or imagine you do not have freedom of religion, but maybe we need freedom of religion to inspire our political preferences. Or imagine you do not have the right to privacy; maybe then you do not feel safe to read, talk in private, and form your own political preferences. As a result, you do not have political autonomy. You have little control over your own life and even less over the political system.

In other words, you have to have civil rights, public freedoms, political rights, and even economic, social and cultural rights to really have a constitutionalist system. The reason I say that pure constitutionalism does not exist is that you will never be able to fully implement that entire range of rights. So that is it: the enigmatic question of how close we can get to the constitutionalist ideal. But again, can we talk about Arab countries getting close to constitutionalism? Can we talk about those political systems as becoming constitutionalist? All Arab countries have a constitution, from Morocco to Iraq, but are those constitutions really binding? When we approach the issue of the Arab constitutionalism, there is something that defines these countries' political and legal identities, and it is that they have Islam as their religion and declare Islam as the religion of the state. Religion might become an element of distortion in the constitutionalism in these countries. Islam has important implications in the way that we understand constitutionalist values.

Islam can imply many things. In principle, it is just a religion that was originated in the seventh century and that is based in the revelation given by God to the prophet Muhammad. The prophet wrote that revelation in the Quran, which is the Word of God, and then the prophet lived his life. After his death, people made accounts of his life, and those accounts became the Hadith. So we have two main basic texts, the Quran and the Hadith. In the Quran, which is a religious-spiritual text, there are over one hundred directly legal provisions, but then in the Hadith we have thousands.

Hence, Islam is a religion that has important legal consequences. It is not like the Christian religion, which offers in the New Testament elements that are more moral than political, in the sense that they give a normative content that does not call for the intervention of the political authorities. In the case of the Islamic religion, there is a strong political and legal load in the sacred scriptures. Implications might encompass even the area of criminal law since there are certain conducts categorized as crimes that carry certain penalties. Actually, it can be seen as a little bit obnoxious, from certain perspectives, for instance, with the penalties of stoning for women who were caught being unfaithful and the execution of Muslim citizens who are apostates. There is also the cutting of limbs for thieves. We can ask ourselves whether that really respects human rights or not. On top of that, there is also another problem because, according to certain interpretations, Islamic law spills over into constitutional law since the prophet was also a ruler, and the way the institutions were configured under his rule can be considered to offer legal provisions. Then we also have a lot of civil law: inheritance, marriage, divorce. There are also implications in procedural law (on how to find out the truth in a process confronting opposing positions) and in the field of corporate law because usury is prohibited. So we have important implications for all the legal system.

But where does the legitimacy of the political power in the Arab countries to regulate the social life in such an “Islamic way” come from? Indeed, these decisions, which are upheld by the state, are not really democratic decisions because they are predetermined solutions to social problems, escaping the free determination of the people at a given moment. It is not the people of Saudi Arabia that have willingly desired to stone unfaithful women. This is done because it is written in Islamic law, and Article One of the Saudi Constitution says that the law of Saudi Arabia is the Islamic law. The constituent power takes out all these legal provisions, incorporating them without democratic discussion into the political and legal systems, and the interpretation of these Islamic legal provisions will be done by Islamic scholars. Hence, we could say that the country that fully applies Islamic law cannot be a constitutionalist country. For one reason, most of their political decisions are already predetermined by sacred scriptures and interpreted by religious people without a strong democratic legitimacy, so there is no democracy.

Furthermore, many of the provisions contained in the Islamic body of law are by themselves not democratic. I remember in Beirut, a student came and told me there is rule of law as a conceptual construct in the Islamic political theory. I said, “What are you talking about? Rule of law is a concept that has a constitutional implication. Rule of law. It is rule, not by men, but by legally configured norms.” I checked about it and, indeed, there is some literature about “rule of law” in Islam, which uses the term “rule of law” as a misnomer when in reality it is referring to a descriptive theorization of the political arrangements in early Islamic societies. This is an idea that takes the example of the prophet and the Constitution of Medina of 622. What is called the Constitution of Medina was a text that was supposed to

rule the political life in the city of Medina. The normative content of the Constitution of Medina and the power arrangements in the early years of Islam referred to the absolutist power of the khalif, the ruler. The khalif was the center of power, carrying with it an autocratic element. Hence, if the Islamic “rule of law” is supposed to be encapsulated in the power arrangements in the early years of the Islamic empire, then it is a concept incompatible with democracy. Islamic public law configures undemocratic polities.

As a result of the above, we can say that a full application of the body of normative statements that are in the Quran and in the Hadith will lead to a non-constitutionalist situation. But the question is this: Is this body of rules really implemented as a whole? The answer is no. The truth is that in most Arab states, Sharia law refers only to civil law, not to criminal law. In Saudi Arabia and other Gulf countries, they extend it to Islamic criminal law and even to corporate law, with the prohibition of usury and its implications in terms of setting interest rates and insurance contracts. But outside the Gulf, application of Islamic law is restricted to civil law. So, is Islam an obstacle to an Arab constitutionalism? As it is applied in practice, not so much. In most Arab countries the application of this body of law is restricted to private law, that is, to the relations between citizens—not the relation between citizens and the State.

On the other hand, to have a constitutionalist system there has to be a sense of being bound by the constitution. The constitution becomes binding with separation of powers and democracy, and ultimately, it is the will of the people that makes it binding. In this vein, the fact that there have been revolutions recently in the Arab world already means something. It means that there is a certain sense of being bound by the popular will to set out new constitutional principles. It means that the constituent power (the power to create a constitution) is in the hands of the people who can exercise it again at any time. There is, as a result, an increased awareness of what Thomas Jefferson called the right of the people to alter or to abolish any form of government destructive of the ends set out in the constitution, a principle that was enshrined in the American Declaration of Independence. Ultimately, it is the right to revolt that upholds the constitution, and that is quite present now in the Arab world, with the recent uprisings still hot. That is an important point to consider when analyzing contemporary Arab constitutionalism. The recent events in Algeria and Sudan in 2019, with two presidents resigning as a result of popular pressure, prove it.

The Arab uprisings have led in many cases to a reconfiguration of the constitutional systems, taking the new Arab political systems much closer to the promising rainbow of constitutionalism. But where did the uprisings really succeed in overthrowing the previous authoritarian systems? Probably only in Tunisia. In Egypt and Morocco, there has been just a partial success. And it is only these three countries, Morocco, Tunisia and Egypt, that came to approve new constitutions in 2011, 2014 and 2014, respectively.

Then there are other Arab countries where the easy financial resources drawn from the natural resources available introduce an inherent tendency towards authoritarianism. (The political power just

keeps on subsidizing the society to keep the people content.) There is Algeria and all the countries of the Gulf in this situation. These countries have oil and gas, and because they have resources they do not rely much on taxing. Because they do not rely on taxes, the autocrat can give gifts, allowances, and entitlements to the population, and keep the protests under control. In the same way that the American people declared their grievance that there should be no taxation without representation, there is no representation without taxation. That explains why in the Gulf countries there were no substantial revolts. In Yemen, which lacks natural resources, there was a big rebellion that degenerated in a bloody civil war. A case apart is Libya, where there are substantial natural resources, but where the authoritarian regime of Muammar Gaddafi collapsed and a civil war ensued.

Then we have constitutional reconfigurations in Morocco in 2011, Tunisia in 2014, and Egypt in 2014. Actually, in Egypt there were two consecutive constitutions, one in 2012 and another in 2014. In Jordan, there was no new constitution, but there were changes in two important organic laws, setting up a constitutional court and creating a body to supervise the elections. In Syria, there was a new constitution in 2012, something that people tend to forget about since there's a tendency to oversimplify the problematic and disregard that there were some advances made in this authoritarian regime. In my research, I have been analyzing how these four new constitutions, Morocco, Syria, Tunisia, and Egypt, have changed, and whether they really show a movement towards constitutionalism or not. I found ten important commonalities across the three new constitutions, with the incorporation of new important elements.

1. The new Arab constitutions are long constitutions, longer than the previous constitutional texts. This greater length tends to be connected with a revolutionary intent because at the end of the day, the long constitution tries to make things clear, to really bring about change, and to enshrine a set of principles that will have to inspire the future democratic journey and to lay a solid foundation for the democratic transition and later consolidation.
2. The new Arab constitutions substantially enlarge the bills of rights. They add the most recent catalogues of constitutional rights. Interestingly, these bills of rights tend to adopt a special focus on economic, social, and cultural rights. For instance, in the constitution of Egypt you can see many social rights recognized, like the right to water or to practice sports, as well as the more classic rights of affirmative action recognized to special categories of the population: rights for women, for the elderly and for children, for war veterans. There are also cultural rights, such as the right to preserve the patrimony of the country.
3. There is an update of the position of Islam as an identity reference. This does not imply that the Islamic law is automatically recognized as a source of law. Morocco might seem like a very Islamic country, but the Moroccan constitution does not recognize Islamic law. Neither

does the constitution of Tunisia. The constitutional dimension of Islam has now been somehow updated, highlighting its symbolic dimension. We have mentioned the legal implication of declaring the Sharia as a source of law. What other implications can be carried by the recognition of a religion in a constitution? All the Arab constitutions recognized in the past, and recognize today, that the State is Islamic. But what does this mean? The consequences of that are not clear. As Nathan J. Brown has pointed out, states do not fast in Ramadan. States do not pray. So how can you say that a state is Muslim? What does it mean that a state is Islamic? At the end of the day, that means whatever the constitutional interpreter says that it means. So if we want to know what that means, we should go to the constitutional jurisprudence. In the case of Tunisia, there was an interesting jurisprudence on this issue, because in the 1970s, some Islamists went to court and they said that the court should enforce Sharia law. Initially the request of the Islamists was accepted, but ultimately it was overturned by higher jurisdictional instances. However, in the case of Malaysia, whose constitution recognizes Islam as the religion of the state in its Article 3, in 2004 the supreme court used that clause for denying a Muslim woman the possibility to apostate.¹ So, the fact that the state is declared to be Islamic can have legal implications (like it has had in Malaysia), but not necessarily (as it has been interpreted in Tunisia).

4. On the other hand, in the new Arab constitutionalism the state is not going to be subordinated to the religion. It is not that the ulema, the equivalent to the priests, are going to say whatever and the state is going to apply it. It is actually the other way around: the state is going to have an input in the religious system. In the Arab countries, there is a Ministry of Religious Affairs and through this ministry, Islamic religion is regulated. That is something important now, because in the new constitutions there is the explicit goal to make the exercise of religion as tolerant as possible. Indeed, there is an explicit objective to avoid radicalism, which we have to remember is a threat not only to western societies but also to Arab societies. In Morocco, for instance, there is the Council of the Ulema, presided directly by the King, in conformity with Article 41 of the constitution. Not only that, but the king of Morocco is called Amir al-Mu'minin, Commander of the Faithful. The king can also issue royal decrees on religious issues, royal decrees that are not democratic because they do not need a countersignature by any democratically accountable political appointee. What I am saying is that in Morocco, Islam is the religion of the state, and the state intervenes in religion. The same is true in Egypt, where Al-Azhar University—the main reference for Islamic doctrine—has constitutional status, and the method for appointing its leader is legally defined according to Article 7 of the constitution.

5. From the constitutionalist perspective, the recognition of Islam as the state religion poses a problem because there is no equality of religions, so the state can discriminate, in this case positively in favor of Islamic religions. In practice, Islamic institutions receive a lot of funding by the state. They even have public TV channels. Of course, that goes against the equality in the exercise of freedom of religion because then you are discriminating against the other religions. On the other hand, the new Arab constitutions recognize freedom of worship but not freedom of religion as such. Freedom of worship is just a part of freedom of religion. Freedom of religion consists of the right to have a religion, the right to not have a religion, the right to change your religion, the right to convince others to adopt your religion, the right to do things that your religion tells you to do, and the right not to be obliged to do things that your religion tells you that you cannot do, and the right to express yourself in your religion (only this latter is the right to worship). Now if you see here, they are only recognizing the right to freedom of worship and that means that if you are a Christian, you can pray, and if you are a priest, you can celebrate mass in Morocco, in Tunisia, and in Egypt, with no problem. Now, the problem is if you proselytize, then you are in trouble. You will actually be prosecuted by the authorities. And the problem also, which is perhaps more troubling, is the situation of the apostates. That is, if you are a Muslim and you say, "I do not like my religion anymore. I want to become a Christian" or "I want to become an atheist," you cannot. If you do, you will be prosecuted. In the case of Egypt, maybe the situation is a little bit more worrying because freedom of worship extends here only to the "revealed" religions, which Muslims consider to be Islam, Judaism, and Christianity. However, in the case in Egypt, there is something interesting because the 2014 constitution was passed as a backlash against the previous 2012 constitution that had a strong Islamic inspiration; it was the constitution of the Muslim Brotherhood regime. In a sort of pendulum movement, the new 2014 constitution tried to take explicit moves to protect the Christian minority in Egypt, which makes up 10% of the population. First of all, the state commits itself to rebuild the churches because they had big problems getting licenses for rebuilding the churches, which were almost in ruins. There is also an article that aims to give a proper representation to Christians in the democratic institutions. Hence, there is a special treatment of Christians in Egypt, but it does not extend to all religions. If you are Jehovah's Witness or any other religion or sect, you will be discriminated against; you won't even have freedom of worship.
6. Women rights are another of the main elements of these new constitutions. There was an awareness that women face a systematic situation of discrimination, and showing this awareness could enhance the domestic and international legitimacy of the new constitutional

charters. As a result, the new constitutions increased the mentions made to women's affirmative action rights. Women are listed as one of the groups that need to be favored by the state action. There have to be a set of policies in place in favor of women. There are also elements in the new bills of rights that recognize important political rights to women; there are political quotas for women. In Morocco, these quotas are mentioned for regional parliaments and for the Supreme Council of the Judiciary. In the case of Tunisia, there have been important advances. They have gone as far as passing electoral laws providing for candidate lists. That means that at least half of the candidates have to be women and there has to be a man, a woman, a man, a woman, and so on (which are called zipper lists), because elections are done through a proportional vote on the basis of lists. With this measure in place, in Tunisia women comprise 31% of the parliament, which is a similar proportion to countries like the United Kingdom.

7. In the new Arab constitutions, there is a tendency towards semi-presidential forms of government. That is, to take away power from the president and give it to the parliament and to the head of government. Forms of government in the Arab world were similar to the Latin American neo-presidential system—that is, a caricature of the American presidential system where the power ends up concentrated around the president, de facto becoming a kind of authoritarian regime. In the case of Egypt, the constitutional changes in this vein could have become very important as a last bulwark against authoritarianism. Indeed, in Egypt the president cannot run more than two presidential terms; it is like in the United States. That being said, Abdel Fattah el-Sisi was supposed not to run for president beyond 2022. Unfortunately, a constitutional reform in Egypt in 2019 did away with much of the changes brought about by the 2014 constitution in this sense.
8. Another change in the new Arab constitutions is that there has been a reinforcement of control circuits. First, there are provisions that reinforce the independence of the judiciary. Second, there are provisions that reinforce the constitutional courts. Third, there are provisions that create new mechanisms of constitutional appeals. Fourth, there is the creation of agencies that monitor public policies, such as bodies that monitor the respect of human rights, that monitor the respect towards women's rights, that monitor the independence of mass media, and provisions for creating mediators or ombudsmen.
9. There is a greater monitoring and control of the state of emergency. For those who are familiar with the Arab or Middle East politics, you might know that in the case of Egypt under Hosni Mubarak there was a perpetual state of emergency. That means that in practice

many human rights were not respected because a state of emergency exists precisely to restrict human rights.

10. Finally, the new constitutions are all rigid. That is, the reform of these constitutions is very hard to do. The amendment procedure has become harder to do, and there are certain provisions that are supposedly unamendable; take for instance the case of Egypt, with the already-mentioned provision that says that the president cannot run for candidate more than two times (Article 140 of the Egyptian Constitution).

As a result of all of the elements laid out above, we can say that, formally, the new Arab constitutions are getting closer to the ideal of constitutionalism. But what about the material constitutions? Note here that a formal constitution is not the same as a material constitution. The formal constitution is the black letter constitution, the constitution that is written down in a charter. The material constitution is the constitution that is really implemented and applied in practice. We have to ask ourselves, are the new constitutions being implemented or are they being disrespected? The truth is that we are seeing already situations that put in peril the constitutionalist values. The new constitutional provisions are not really being implemented as they should be. In the case of Morocco, the process of deconstruction of the previous legal system is slow. Indeed, you change the constitution, but then the previous legal system remains in place; the constitution does not affect or change right away, overnight, the previous legal system. For instance, in Morocco you still have a criminal code that minimizes freedom of speech, and a criminal procedural code designed in such a way that if you are tortured in detention, it will be very hard to prove that you are being tortured. In the case of Egypt, you still have to go through a long administrative process to build new churches. There are also important restrictions to rights such as right to strike, freedom of demonstration, and freedom of speech. In the case of Tunisia there is no constitutional court after five years. In all three cases, the legislative activity has been slow, and the advances in terms of social rights have been almost non-existent. The bottom line in all this is that perhaps there is no clear commitment to implement the new constitutional charters. From a more socio-political perspective, it has to be considered that in the cases of Morocco and Egypt, there clearly has not been an influx of new blood in the juridical apparatus. For instance, the judges of the highest jurisdictional instances remain the same as under the previous regimes.

But I do not want to end with a pessimistic view because I am personally optimistic by nature. I want to look at the bright side of life, which is, first of all, that even if progress in the constitutional implementation is slow, there is progress. New laws are being approved little by little, effectively deconstructing the previous legal orders. Second, there is a new rights language that is embodied in the new constitutions, which is penetrating the political discourse. Third, there are inherent mechanisms in

the new constitutions, such as the new monitoring bodies, which create a dynamic of commitment with the new formal constitutions.

Constitutional history shows us that constitutional implementation takes time. That can be clearly seen in the history of Europe during the nineteenth century. Constitutional waves like in 1848 were entirely defeated, but sowed seeds for democracy that eventually germinated. I do believe that the new Arab constitutions are sowing the seeds of democracy. It will take some time for those seeds to germinate, but eventually they will. I have scientific reasons to be sanguine about it. Now citizens feel themselves as citizens. The success of the uprisings has made citizens know that they can rebel against the political power, and the political power knows that people can rebel if they feel deceived. I think that it is just a matter of time before these Arab countries will get closer to the rainbow of constitutionalism and eventually, perhaps, live a better life, like you do in the United States.

NOTES

1. Li-Ann Thio. "Constitutionalism in Illiberal Polities." *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012).