Constitutional transitions in the Middle East: Introduction

Sujit Choudhry*

The Middle East and North Africa (MENA) is witnessing the greatest degree of political transformation and regime change in a generation—the Arab Awakening. The causes of these revolutions are rooted in corruption, a lack of economic opportunity, and most fundamentally, authoritarianism. What is striking is that constitutional transitions of various forms have accompanied regime change in every case—in Tunisia, Egypt, Libya, and Yemen. New constitutional beginnings are demanded not only as a necessary means to break from a discredited past; they are viewed, perhaps unrealistically, as being necessary for achieving progress in economic and social reform. Indeed, equating constitutional reform with progress has become so commonplace that two non-transitioning states, Morocco and Jordan, have enacted a set of comprehensive constitutional amendments to preempt popular uprisings. Conversely, it is feared that erring in constitutional design will condemn the region to repeat the mistakes of the past, and may open the door to the establishment of Islamic states that may be authoritarian under a new guise, and which could have little respect for human rights, religious minorities or the rule of law. Debates over constitutional design are now at the very heart of political life.

These momentous events mark the occasion for this *ICON* Symposium, "Constitutional Transitions in the Middle East." The discipline of comparative constitutional law has neglected this region almost entirely, on the assumption that constitutionalism and the rule of law mattered little under authoritarian rule. Constitutions were Potemkin documents that did little to constrain power. Of course, prior to the Arab Awakening, the picture was much more complex. As Nathan Brown argued over a decade ago, constitutions in the "non-constitutional" Arab world served a number of functions: to organize and augment the exercise of public power, to assert the national sovereignty of newly independent states, and to signal basic ideological commitments

and programs.[1] Tamir Moustaffa's definitive study of Egyptian judicial politics explained how autocrats often created partially independent courts to create a system of "rule by law" (as opposed to rule of law).[2] And Ellen Lust and Brown have taught us how the monarchies in Morocco, Kuwait, and Jordan, which have long had elected parliaments that in theory could assert control over executive power, manipulated electoral systems and political party legislation to undermine the political opposition.[3]

The Middle East and North Africa, then, is a region with a constitutional past, and one dimension of the complex constitutional debates occurring in the region over a host of issues—the nature of executive power and executive-legislative relations, electoral system design and political party legislation, decentralization and federalism, security sector oversight (including civil-military relations), judicial review and bills of rights, and the constitutional status of Islam—is comparative in a historical sense. The immediate past stands as a negative constitutional model of a disaster not to be repeated, and in some cases (e.g., Libya), the more distant, pre-authoritarian past furnishes a positive constitutional model to be retrieved, updated and reinstated. This Symposium adds two additional dimensions to the comparative analysis of the constitutional politics of the Arab Awakening. First, it examines issues that have emerged as central questions in constitutional debates that are common to the region. Second, it explores the so-called "Turkish model," which has emerged as the central example of a state that has grappled with the relationship between political Islam, political competition, and constitutionalism in the Muslim world.

The origins, precise trajectories, and institutional mechanisms for constitutional change have varied enormously across the Middle East and North Africa. And every country in the region is distinct among multiple dimensions—political, economic, religious, ethnic—which makes it risky to abstract away from these national particularities to offer an account of a regional constitutional politics. Finally, the speed at which constitutional developments are arising poses the risk that any constitutional analysis will soon become quickly out of date. But despite these variations in origins and processes, diverse national experiences and the rapid pace of constitutional change, Mohammad Fadel and Clark Lombardi's contributions to this Symposium examine common and enduring issues.

Using Egypt as a case-study, Fadel ("Judicial institutions, the legitimacy of Islamic State Law and democratic transition in Egypt: Can a shift toward a common law model of adjudication improve the prospects of a successful democratic transition?") argues that in the Arab world, legal systems are hybrids of Pre-Modern Islamic Law, State Law consisting of transplanted European codes introduced in the nineteenth century, and Islamic State Law consisting of positive law enacted by the state "as an attempt to articulate an Islamic legal sensibility." Fadel argues that the ideological differences

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[1]   Nathan Brown, Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government (2001).

[2]   Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt (2009).

[3]   Brown, *supra* note 1; Ellen Lust, Structuring Conflict in the Arab World: Incumbents, Opponents, and Institutions (2007).

among these different areas of law were left unresolved prior to the Arab Awakening. Resolving them is integral to the successful democratic consolidation of post-authoritarian states. The solution lies in a common law method of adjudication that mediates among these ideological cleavages. He draws on the jurisprudence of the Egyptian Supreme Constitutional Court to illustrate how this might work in practice.

Lombardi ("Designing Islamic constitutions: Past trends and options for a democratic future") examines a closely related issue—the interpretation of what he terms "constitutional Islamization provisions" in the constitutions of many Muslim-majority countries. While considerable attention has been devoted to the different ways in which such provisions have been formulated, Lombardi examines a hitherto neglected issue—the institutional arrangements surrounding the enforcement of these provisions. Lombardi looks carefully at which judicial bodies are vested with interpretive authority, and whether their judgments are supreme or subject to legislative override. He makes parallels to debates in liberal democracies on the question of who should enforce bills of rights, and draws on this literature to provide a vocabulary, framework for analysis, and options for constitutional design in the Arab world.

Turkey has come to play an important role in the Arab Awakening, as a political and economic model to be followed by democratizing countries in the region. For political actors in the Arab world, Turkey stands as an example of a Muslim-majority country that combines political competition and open markets within a constitutional framework of laws and institutionalized decision-making to which all parties adhere. Beyond that general description, there are important differences in emphasis in what constitutes the most salient features of the Turkish model.[4] For some, the most important lesson for Turkey is the possibility of a government led by a party closely identified with political Islam—the Justice and Development Party (AKP)—within a democratic constitutional framework involving regular elections and the alternation of power adhered to by all parties and an impartial state bureaucracy that serves, but is independent from, the party in power. For others, Turkey stands as an exemplar of civil–military relations which demonstrates how a military with a history of engaging in coups against democratically elected governments in defense of secularism can come to accept civilian control of the military. Yet another perspective emphasizes the central role of the Turkish Constitutional Court in serving as a check on the AKP. What the Turkish model precisely is, and what lessons can be drawn from it for the countries of the Middle East and North Africa, is of considerable scholarly and practical importance both in the region and internationally. Asli Bâli's, Turku Isiksel's, and Ozan Varol's contributions to this Symposium take up this important question in the context of the Arab Awakening.

Bâli ("Courts and constitutional transition: Lessons from the Turkish case") examines the jurisprudence of the Turkish Constitutional Court in the context of the rise to power of the AKP, and asks what role the court has played in the context of

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[4]   For a useful discussion, *see* Sinan Ülgen, *From Inspiration to Aspiration: Turkey in the New Middle East*, Carnegie Endowment for International Peace (December 2011), http://carnegieendowment.org/files/turkey_mid_east.pdf.

Turkey's own transition from authoritarian to democratic rule. Bâli notes that in a series of important cases, the Court was at odds with the AKP, and served to check its power—in challenges to the procedures for the parliamentary election of Turkey's President, a constitutional amendment aimed at rendering illegal a ban on the wearing of headscarves in universities and public buildings, and the constitutionality of the AKP's policies (on the grounds that they contradicted the constitutional commitment to secularism). Bâli argues that in cases such as Turkey, where constitutional courts were established and captured by autocratic regimes prior to democratization, judicial independence has important costs and benefits; it may need to give way to democratic accountability; and, indeed, should be reframed around the idea of "independence from elite capture." She suggests that this is the true lesson of Turkey for the democratizing states of the Middle East and North Africa, and supports recent constitutional amendments in Turkey that democratize the nature of the judicial appointments process.

Isiksel ("Between text and context: Turkey's tradition of authoritarian constitutionalism") examines a related but distinct issue. One of the enduring problems of constitutionalism is the risk that a written constitution will be a mere "parchment barrier" that does not constrain the exercise of political power—a particular concern in post-authoritarian states in the Middle East and North Africa. Turkey presents an interesting example, since on its face Turkish political actors appear to operate within the rules of the Turkish constitutional order established in 1980, most notably by participating in political competition and peaceful transfers of power. Isiksel argues that appearances are misleading because, in authoritarian states, constitutions are coopted by power, rather than constraining it. In this light, the AKP's constitutional agenda to attempt to dominate the bureaucracy, the judiciary, the military, and public education should be understood as another chapter in Turkey's history of authoritarian constitutionalism. The resilience of the latent authoritarian tendencies within Turkish political culture provides a cautionary tale on the limits of constitutional design for democratizing states in the Middle East and North Africa.

Finally, Varol ("The Turkish 'model' of civil–military relations") examines Turkey's experience with civil–military relations, a topic of great interest in Egypt and other Arab countries. The Turkish military has been criticized for being anti-democratic and repressive, and until recently, resistant to civilian command. Varol argues that this picture is more complex. Under the Turkish Model of civil–military relations, the military has played a crucial role in democratization by overthrowing democratically elected but authoritarian governments, especially in 1960. The military established a series of counter-majoritarian institutions under the 1961 constitution, which fragmented power and produced policy vacuums that prompted the military to intervene repeatedly in politics. The retreat of the military from political life has been prompted by the rise of stable civilian governments.

We trust that you will profit from this Symposium.