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Constitutions and Accountable Governments In the Arab World

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It is an American convention in giving public lectures to ease the audience into weighty topics with a joke. In this case, however, I will begin confessing that my entire lecture might be perceived as a joke. Let me explain by posing a question: What do the chief justice of the Supreme Court of the United States, the president of the American Civil Liberties Union, the governor of Connecticut, and I all have in common? This question sounds like the beginning of a bad joke in which I figure unflatteringly in the punch line. I hope that my talk today does not provide that punch line.

Unfortunately, however, a factual rather than facetious answer to the question of what all these individuals share does not allow me to escape holding myself up for ridicule: I, like the distinguished individuals I just mentioned, was invited to give the “Constitution Day” address at Dickinson College. And here let me shift from the company I keep to where I stand: Dickinson College is quite an imposing place to speak of constitutions. Its namesake not only participated in the composition of the American constitution but also drafted—in his own hand—the document that our current constitution replaced, the Articles of Confederation. But that is not all—the founder of Dickinson College, Benjamin Rush, was one of the signers of the Declaration of Independence, which stands with the constitution as an elegant and inspiring presentation of the American political experiment. To top it off, this lecture is sponsored by the Clarke Center, named for Henry D. Clarke, Jr., whose combination of private business activity with public spiritedness is an admirable expression of the ideals of the American republic.

It is probably the case that those who invited me did not expect me to have the historical knowledge to realize how intimidated I should feel by my task. Little hoping that I would recognize the names of John Dickinson and Benjamin Rush, they sought to underscore my responsibility in a less subtle manner: they have scheduled my lecture in a location called the “Great Room” in a building referred to as the “Stern Center.” Past and present have conspired to assign me a very daunting task indeed. But of course I was hardly invited for who I am; instead I was invited because of what I will talk about. Previous “Constitution Day” addresses have focused on the American constitution, and for a good reason. Not only is the American constitution ours, it is also the world’s first written constitution for a sovereign state. But the practice of writing constitutions quickly spread beyond America’s borders; within a few years, France and Poland had followed with their own documents. In the nineteenth century, constitution writing spread across the European continent and beyond it; much of the area that I will focus on today—the Arab world—began its experimentation with constitutional documents in the second half of the nineteenth century. And today, at the beginning of the twenty-first century, only a handful of states have resisted the trend toward writing down the fundamental principles of their political systems.

So it makes sense to broaden our horizons. But why look to the Arab world or to the Middle East more broadly? If I have been invited for my topic rather than my person, that makes my task no easier. For just as one might question whether I do belong in the company of the previous distinguished “Constitution Day” speakers, so too does the Middle Eastern experience with constitutions seem to pale next to that of other areas. Is the regional experience with constitutionalism really of any interest to anyone but naïve outsiders and textual aficionados? The Middle East is rich in constitutions, it is true, but it

is very much poorer in constitutionalism: documents have proliferated but their effectiveness in constraining and regularizing political authority seems scant at best.

In fact, for centuries Middle Eastern political systems have been held up by Western constitutionalists to be negative models, helping us understand who we are by showing us what we are not. Cautionary tales of Oriental despotism—based on their didactic value rather than their historical accuracy—have been a staple of our political understanding several centuries before Saddam Hussein. Montesquieu, for instance, claimed that the failure to develop constitutional mechanisms in succession led to quite grisly practices:

In countries where there are no fundamental laws, the succession to the emperor cannot be fixed. The crown is then elective by the prince either in his own or in some other family. In vain would it be to establish here the succession of the eldest son; the prince might always choose another. The successor is declared by the prince himself, or by a civil war....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.

I wish to suggest this evening that it is long past time we update our understanding Middle Eastern governance. There are, to be sure, deep problems with constitutional structures in the Arab world. The lack of accountability; the unrestrained nature of executive authority; and the unenforceable nature of universally valued rights and freedoms are no secret outside the region. Neither are they a secret inside it: Arab critics tend to be far less forgiving of their political practices than outsiders.

But there are still two reasons we should develop a more sophisticated understanding of the Arab experience with constitutions.

First, it tells us something about constitutions and constitutionalism more generally. As I have already mentioned, much of the Middle East was an early entrant to the world of constitutional experimentation. And the primary unifying cultural factor in the region—Islam—with its strong legalistic nature and insistence that rulers are bound by higher laws would seem to be a natural force for constitutionalism. Indeed, there is a long and lively history of Arab constitutions. But they have not succeeded in holding executive authority accountable to any higher authority, whether God, law, or people. In fact, they have generally not been intended to serve such ends. We can learn something about how constitutions actually operate, what their attractions are, and even what mistakes to avoid.

Second, there is a particular reason that American citizens should pay more attention to constitutional development in the Arab world: the leaders we elected have decided that the matter is connected to our own national security. We can—and should—debate whether or not that connection exists, but the fact remains that as a country we have committed ourselves to a very ambitious project indeed. In June 2002, President George W. Bush called for the Palestinians to write a new constitution; in the spring of 2003, we overthrew an internationally recognized government in Iraq and promised to lead a process of constitutional change in that country. Both steps provoked considerable debate, but the audaciousness of such policy initiatives should not obscure a deeper

consensus among our political leaders that democracy, constitutionalism, and human rights should figure much more prominently in our diplomacy in the region than they did even a few years ago. We are entering uncharted waters, and the past is much less of a guide than may initially appear. It is true that after the end of the Cold War—and in a few areas even before—the United States steadily integrated such concerns into its foreign policy, but it generally pursued them where the host country welcomed American assistance. By contrast, our intervention has received a less enthusiastic welcome in the Arab world. Some Americans have therefore sought instructive lessons not from our own history but from that of Britain and France in the Arab world. But that experience is not analogous to our present position for two reasons. First, after World War One, Britain and France received mandates for specific territories in the region from the League of Nations; there was a clear international legal basis and an overseer over British and French imperialism. We Americans have decided to shun any international oversight. Second, Arab constitutionalism in its earliest phases is better seen as an attempt to stave off imperialism. As we shall see, the first thing that the British and the French did was generally to shut down indigenous constitutional experiments. We Americans are attempting to combine projects that our predecessors saw as quite distinct.

It is best to study the lay of the land where we have been led. I hope I have convinced you that those who invited me have not erred by selecting the topic of Arab constitutionalism. But I have done nothing yet to convince you that I have anything of worth to say on that topic. Let me therefore provide an outline of the remainder of my remarks.

First, I will seek to show the purposes that Arab constitutional experiments have been designed to serve—and which ones they have avoided or addressed only at the margins. In the process I will show an unfortunate (though incomplete) separation between constitutions and constitutionalism in the Arab world.

Second, I will briefly explore whether constitutional practice might actually evolve in a more promising direction, delivering not simply legal texts but also a real measure of accountability.

Third, I will explore, with even greater brevity, whether attempts to build constitutional government can draw on—or must instead repudiate—the Islamic political heritage.

Let me turn to my first task: the evolution and purposes of Arab constitutional documents. And here we confront immediately the great failure of constitutionalism in the Arab world: if by constitutionalism we mean limited and accountable government, we can find very little in the region. But we find constitutional documents everywhere: documents that take familiar forms and seem to promise boundaries, rights, and fair procedures but have nowhere delivered on their promise. This is what I mean when I say that the region is rich in constitutions but poor in constitutionalism. Constitutions have augmented rather than limited political authority; accountability is proclaimed in principle but deprived of any mechanisms to operate in practice.

But let us not exaggerate Arab exceptionalism in this regard: in fact 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

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, their efforts were marked by a large degree of failure. Poland disappeared from the political map of Europe for over a century. The American constitution showed some short-term success and indeed was the only one to outlive its authors. But the constitution could not solve the issue that dared not speak its name: slavery. Violence, rather than political compromise, resolved slavery, though the American constitution did survive the struggle, albeit in modified form. The French state survived only by abandoning some of the republican principles its constitution proclaimed—though in the longer run, linear descendants of the 1791 constitution govern not only France but also many other countries.

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. They were even less successful, however. 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 an effective life less than two years. The Egyptian Basic Law had an even shorter life, suspended in the same year it was written 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 attempted often to put their post-imperial position beyond the reach of constitutional institutions. In Iraq, the British did so by rushing through an oil concession shortly before the parliament—which would have had the authority to review it—could convene.

But the seeds of constitutionalism were quite capable of dying on their own. More often, though, they survived imperialism. Instead of perishing, they proved capable of producing hybrid plants in which authoritarian forms 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. And indeed, they grew meeker with each passing year (although there are currently some grounds for hope, as will make clear shortly). 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 things they could provide. Internationally, issuing a constitution became a clear statement of sovereignty. Domestically, constitutions could signal fundamental programmatic and ideological directions, and that is why texts became longer, and more bombastic, over time.

But when it came to ensuring—rather than proclaiming—accountability (either to the people or to the law), Arab constitutions showed a capability to sprout 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; some have found more than traces of the problem in our own constitutional history. Two years ago, Nadine Strossen explained in her “Constitution Day” address: “When we review American history, we see too many examples where we have been panicked into too quickly assuming that we must choose between national security and individual liberty, and we too often have made choices that are in fact the worst of both worlds, sacrificing liberty with no countervailing gain in security.” In the Arab world, the problem has been less 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; 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. Judiciaries are sometimes treated more subtly. They are administered by judicial councils—an element promoting judicial autonomy in other settings—and given the right to review the constitutionality of legislative and executive acts. But the councils and constitutional courts are often brought under executive domination by budgetary control and critical appointments.

The result 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. Might the trend be reversed? Is there any possibility for change?

This brings me to my second point, the prospects for using constitutional documents to bring about limited and accountable government. In this regard, it is worth observing that we meet less than one week after the first anniversary of the momentous events of September 11. I am speaking of course, of the memorable action of the Palestinian Legislative Council to reject the president’s choices for ministers and force the resignation of the cabinet.

To be fair, this was by no means the first time the Arab world has witnessed such an event. It was the second. The first came eighty-two years earlier when an Arab parliament meeting in Damascus moved to withdraw confidence from the cabinet, charging it with ineffective international and diplomatic failures. Within months, the parliament was vindicated as the French conquered the area and shut down the parliament.

If what I said in the first part of my talk is accurate, the exceptional nature of these actions should be no surprise: Arab constitutions have carefully robbed mechanisms of accountability of the tools they need to operate effectively. In this respect, Arab constitutions have often worked as intended.

But must they continue to do so? There is more reason for hope than may first appear: those who design constitutions often make mistakes. If constitutions stand as tribute to human beings confidence in their ability to use reason to structure political communities, it is striking how bad much reasoning has been. The American constitution foundered as it became clear that the fundamental dispute over slavery involved not the international slave trade—which the constitution obliquely—but on the expansion on slavery, a matter on which the constitution’s authors had not thought to give any guidance.

In some ways, the American record, replete as it is with failure to anticipate how Congress, the presidency, and political parties would operate, is better than that of many other constitutional experiments. One of the most carefully crafted constitutions of the twentieth century—the Weimar constitution in Germany—began miscarrying within just a few years of conception. Efforts to tweak relations among branches of government (such as the move in the 1990s to strengthen the Israeli prime minister by electing him directly) misfire especially frequently. Indeed, constitutions sometimes work best when they operate in ways their authors never anticipated: two of the most successful and long-lasting constitutions have been explicitly interim documents—that of the French Third Republic, which governed France longer than any other document, and the German Basic Law, which has endured over half a century, longer than any of its predecessors.

Might we be pleasantly surprised in the Arab world? Could democratic constitutionalism emerge from structures and documents that were designed to serve other purposes? Might the events of September 11, 2002 repeat themselves? Here I see signs for some optimism.

In Kuwait, the parliament uses its constitutional tools—limited but real—to force issues into the public sphere and bend (if not determine) government policy. In the past year, Bahrain and Qatar have taken some steps in the direction of emulating Kuwait's example. In Yemen and Morocco, successive multi-party elections have not transformed the regimes, but they have led to some opening of political space and even some changes in the composition of the executive. Egypt's Supreme Constitutional Court took an activist role in the 1980s and 1990s, revamping the electoral system, preventing the parliament from abdicating some of its authority, and providing a greater—if admittedly still modest—level of protection to Egyptians attempting to found political parties or operate nongovernmental organizations.

In some ways, the past couple decades have seen a definite (if limited) upsurge of interest in constitutionalism in the Arab world. Recent constitutional innovations have stressed regularization of authority, bounded democracy, and a modest increase in the autonomy of some constitutional structures (especially courts and parliaments). Given the anticonstitutionalist spirit of much post-independence Arab politics, this is a remarkable development.

Is it likely to continue?

If the past is any guide, any movement is likely to be incremental. And the past also indicates something odd about the prospects for accountability in Arab governance: they are less wedded to democracy than we often understand to be the case. We now conflate constitutionalism and democracy in ways that would make the authors of our own constitution deeply confused. Democracy involves allowing the people to exercise political authority directly or indirectly. Constitutionalism involves ideologies and institutional arrangements that promote the limitation and definition of the means of exercising state authority. Democratic accountability is to the people; constitutionalist accountability is to the fundamental law.

Of course, giving the people a role in determining the fundamental law helps combine constitutionalism and democracy, though such an effort involves far more difficulties than our easy elision between the two implies. But here I seek to emphasize

only that moving toward constitutionalism in the Arab world need not move solely through democratic channels: the executive so dominates not only the state but also the public sphere that adopting democratic forms often vitiates their spirit: allowing the people to speak in the Arab world often has a ventriloquist effect that results us only hearing the voice of the rulers. In this sense, furthering what has been called “horizontal accountability—the accountability of various state institutions to each other—may be a more realistic strategy in the short term than developing “vertical accountability”—the accountability of rulers to the people.

Let us turn to existing institutions to see how constitutionalism may evolve from the more effective operation of constitutional institutions than from democracy. In most Arab states, two state institutions stand ready to oversee and regulate the actions of the executive, holding it accountable. The first is the parliament. The most effective parliaments in the Arab world—in terms of their determination to exercise genuine oversight over the executive—are the Kuwaiti and the Palestinian. It is notable that political parties have not been legalized in Kuwait and that in the sole Palestinian parliamentary elections, held in 1996, political parties did not play a major role. But in a real sense, the failure of both societies to develop viable electoral party systems has made their parliaments harder for either government or opposition to dominate. The result in both cases has been a parliament full of individual independents, lacking the ability to act coherently on most occasions but in the process robbing the rulers of a rubber stamp for their legislative proposals.

A similar story can be told with judiciaries. The most remarkable judicial actor in past decades has been Egypt’s Supreme Constitutional Court. In the 1980s and 1990s it embarked on a project of rendering the vague, unwieldy, loquacious, and confusing 1971 constitution into a charter for a more liberal Egypt. What is remarkable about the Court is not only its audaciousness, but also its autonomy from other political structures—or even from the people. Existing members on the court nominate new members, making the body close to self-perpetuating.

Taken together, these examples suggest an anomalous pattern: Arab constitutionalism is less wedded to democracy than initially appears. The ability of Egypt’s Supreme Constitutional Court and a few Arab parliaments to strike an independent pose is based on their institutional autonomy more than it is based on any democratic mechanisms.

The news that I am giving so far may seem like slim basis for hope. Yes, we can find glimmers of hope, but many of these fade quickly. Is the Arab world simply infertile ground for constitutionalism?

This brings me to my third point. Any discussion concerning the suitability of either democracy or constitutionalism for the Arab world very quickly edges into a discussion of the influence of Islam. A generation or two ago, liberal and democratic enthusiasts were vexed about Roman Catholicism rather than Islam. Was the authority structure of the Catholic Church and its doctrine simply inhospitable ground on which to build? Such questions were rapidly forgotten when Southern Europe (and, to a lesser extent, Latin America) built stable and liberal democracies. Will we soon be able to forget similar questions about Islam? Since our focus is specifically on constitutionalism rather

than liberalism or democracy, we need to ask whether attempts to build constitutional government can draw on—or must instead repudiate—the Islamic political heritage.

On a theoretical level, this question can be answered with ease: Islamic political thought would seem to be quite friendly to constitutionalist ideas and practices. The idea that the supreme source of law lies in religious texts would seem to encourage the view that earthly political authorities can be held to standards far higher than the ones they might set for themselves. Earlier scholars writing on constitutionalism had no trouble tracing it to the idea of a higher authority in Jewish and Christian political traditions; with its strong legal tradition, the Islamic heritage could serve the same function. And indeed, analogies between Islamic law and constitutionalism have become a staple of Islamic political writings over the past century and a half.

The problem for developing an Islamic basis for constitutionalism rests on a far more practical level than a theoretical one. To understand the practical obstacles, we need to delve into the historical background of the relationship between law and politics in the predominantly Muslim Middle East.

This historical exploration reveals that the problem is not that an Islamic constitutionalism cannot develop, but only that it has not developed as strongly as might have been expected. The latent constitutionalism failed to develop not so much because Islamic law was ignored but because it was pursued as a set of institutions and practices partly autonomous from the process of governing. In other words, Islamic law did not form the basis of the political order but was allowed to function in its own realm of legal scholarship, education, and courts. Rulers and religious institutions encroached on each other's affairs only on rare occasions. This arrangement did entail practical limitations on the rulers' authority but not in any constitutionalist guise: it was based not on explicit and well-articulated fundamental principles but on unspoken mutual deference between governments and religious institutions.

That deference showed some signs of decay in the nineteenth century when various states in the Middle East began to infringe on institutions of Islamic learning, legal scholarship, and courts. In the twentieth century, however, governments in the Middle East have generally forgotten past deference completely and either abolished or (more often) moved to control formerly autonomous religious courts and institutions of Muslim learning. And the increasing reach of the state in all spheres of life has left many residents of the area frustrated with the lack of political accountability characteristic of Arab governance.

It is no coincidence that as older relationships broke down, new attempts arose to recast the role of the Islamic law in political life. These attempts have taken on an increasingly constitutionalist flavor: rulers are to operate within the bounds of Islamic law. It is a separate—and far more complicated—issue whether such an approach can be liberal or democratic, but it certainly can be constitutionalist.

But here we come to the two practical problems. First, Islamic legal thought provides little guidance on procedure and structure. Basing a political system on religion invites a focus on substantive law: what is permitted and what is prohibited by God? But what about the practical questions that most constitutional systems have been designed to address: who has authority to decide what and how? Until quite recently, most Islamic

political thought stayed away from such questions, simply assuming the existence of a ruler and telling him what he could and could not do. Islamic political thought avoided detailed answers to questions involving the selection of rulers and how they must operate procedurally. How can one apply divinely-inspired law without giving authority to human beings? And how can human beings be held accountable to divine standards? The answers to these questions must be given institutional expression.

There is a second practical difficulty: while constitutionalism may find fertile intellectual ground in Muslim societies, the social and political foundation might still be difficult to secure. Many Islamist movements are dedicated to social and political transformation, and many rulers as well as many liberals—who share little else in common—seek to resist them. Badly divided societies, lacking a consensus on the fundamental principles or even the bounds of the political community, have tremendous difficulties developing the sorts of rules that are required. The sort of problem confronted in this regard in the Arab world is not novel, and indeed, constitutionalism can sometimes be part of the solution to its own problem. In the nineteenth and twentieth centuries, many left wing movements were slowly coaxed from revolutionary to electoral socialism by enticing them to operate through constitutional and parliamentary mechanisms. Many ruling parties in Europe today can trace their origins to predecessors that looked upon constitutional mechanisms with some mistrust. Over time, as parliaments found ways to increase their authority and socialists found that they needed to recast their programs in order to generate electoral support, these same parties ultimately achieved power through constitutional mechanisms—and were fundamentally transformed in the process. Transitions were not always smooth or peaceful, but the agreement, often reluctant, by rulers to give constitutional mechanisms real meaning led in the long run to a solution. Thus far, no Arab ruler has shown a willingness to take more than a tentative step in the direction of such an experiment. But it might be the only way forward.

Let me conclude by exploring what may be the lessons for the United States as it delves into the project of constitutional reform in the Middle East. Let me point to three. The first and most important lesson is that current efforts are not writing on a blank slate. There is a history of constitutional experimentation in the region that is now a century and a half old—only slightly younger than the American and the European experience. That regional history is quite mixed to be sure, and has as many negative models as positive ones. But that means that our task—should we choose to continue it—consists not in imposing a new set of practices but in helping to shape older ones.

Second, not simply is the field of constitutional experimentation old, it is also quite lively at present. Those who weigh in on questions of constitutional reform are entering a continuing debate, not introducing one. There are very active and imaginative regional efforts that should not be ignored.

Third, if there is any particular area of the American constitutional experience that might prove useful in the region, it is the emphasis not on checks and balances among branches of government. We often use “separation of powers” and “checks and balances” as synonymous. They are not. Separation of powers is a widely accepted principle; it is certainly widely cited in constitutional jurisprudence in the Middle East. But “checks and balances” focuses our attention not on drawing boundaries among branches of government

but on crossing those boundaries but doing so in such a way that each branch holds the other accountable. Separating branches in theory has not worked anywhere in the Middle East; somehow the boundaries are never drawn in such a way as to prevent the overwhelming domination by the executive. A shift to a checks and balances might give the weaker branches some tools that they currently lack and insure what some have begun to call “horizontal accountability”—accountability among branches of government—rather than “vertical accountability”—accountability directly to the people.

Those who work for constitutional reform in the Middle East rarely welcome American involvement. I do not know whether a more sophisticated approach to the topic will succeed. But I am fairly confident that plunging ahead in ignorance of regional histories and realities will fail.