

The Middle East Revolution, Take 2: The constitutional moment

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Working constitutions represent democracy's strategic depth and in the Middle East, and provide the institutionalised future for nonviolence as a profound marker of the unfolding revolution. The question is when and how to get there. The present article discusses the constitutional moment in the midst of the Middle East Revolution.

Caveat: On Secession

An important starting caveat is that a working constitution does not necessarily represent the only route forward in a state. While a constitution presupposes a state with generally defined and accepted boundaries, domestically and internationally, this is not always the case, especially in the Middle East. One could conceive the division into two or more states of a given territory, *de facto* and *de jure*. Somalia is the *de facto* enduring example of a failed state collapsed into several territories variously wrecked by violence and instability. Sudan and South Sudan splitting into two states in 2011 represents a recognised, *de jure* secession supported by powerful arguments, undergirded as they are by a discriminatory, repressive, war-mongering North over several decades. Advocacy of secession is not unique to the Sudan, and similar reasons continue to simmer in Iraq and elsewhere. Persecuted minorities have a legitimate communal grievance that takes the shape of the need for the state to protect them against the structural brutality of the majority. The problem, however, is whether secession is to be preferred to a change of regime at the center.

Even if one perfectly understands the wish of long-standing victims to sever all chords to a horrific central rule, secessions are troubling on multiple levels and are a particularly dangerous drift for three reasons clearly at work in the Balkans in 1992 and now threatening the Middle

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East Revolution: secession is a recipe for ethnic cleansing, it allows the central ruler to remain in power, and it begets the logic of further secessions. The formal Sudanese secession completed in 2011 has already fulfilled all three logics. People continue to be killed in both the North and South, the Northern dictator Omar Bashir still rules with a fist of lead, and Darfur and Nuba appear to be next on the road to secession.

This is not confined to Sudan, and the spectre of secession looms over Yemen with a similar set of scenarios. And this is not the preferred way forward, whether in Yemen or elsewhere, including in Palestine. A working constitution for Arabs and Jews in Israel is better, more just, and more realistic than the secession of historic Palestine into two or three states.

The Constitutional Moment

Constitutions – refurbished or totally rewritten - are social contracts capturing the expectations of the people in a text that imposes the spirit of the new regime on the ruins of the old. Ruins are never neat; constitutional revision and writing is a complex process and constitutional change is the first port of call for a successful revolution. It naturally unfolds in countries like Egypt and Tunisia where the head of the former regime no longer carries the high symbolism of the previous order vested in him as dictator. And even if the dictator has been unseated, the constitutional process does not occur in a vacuum. Depending on the situation of the opposition turned government, and of the surviving expressions of the former system, the whole society dancing around constitutions and constitutional reform is inevitable. With the profound reshuffling of the social contract, many constitutional prototypes and declarations end up worth less than the ink and paper on which they have been penned. Countless documents and proposals are produced in a popular revolution; crystallization of a new constitution that works is an otherwise and much more complex matter.

To add to the complexity of the setting, the constitutional discussion is not restricted to countries in which the *sine qua non*, the fall of Pharaoh, has been achieved. Dictators who are challenged always invoke the constitution and the need for its reform as a way to regain social peace. Prior to proposed reform in response to popular upheaval, the constitution sits on dusty shelves, its democratic traits smothered by well-honed devices: the manipulation of elections and plebiscites, decorum legislators, and misuse of the police and related repressive apparatus; bill of rights -

typically empty words; provisions of a constitution that fail to be implemented - as good as nonexistent. Whilst the exception in democratic countries, the provisions protecting the rights of the citizen are typically ignored in authoritarian countries.

More pointedly for those sections in the constitution that are supposed to provide legal protection to the citizen against the misuse of state power, provisions borrowed from the international lore of modern human rights are undermined by a set of emergency applications, military and state security trials, sub-constitutional criminal and procedural laws that block the citizens' redress, and even by simple ignorance of any right-protective constitutional stipulation. A legacy all too common, these practices became entrenched in the second part of the twentieth century in military, one-party and dynastic authoritarianism across the globe, with the Middle East trailing behind democratic and human rights progress in sub-Saharan Africa, Latin America and Eastern Europe. In the first decade of the 21st century, the repression of dissent has been intensified by restrictions on liberties worldwide in the name of combating terrorism, an inchoate concept that ultimately consecrates power in the executive branch and provides a convenient tool that Middle Eastern rulers embrace wholeheartedly to refine repression.

With respect to constitutional regulation of separation of powers, authoritarian drift invariably means a concentration of powers in the executive. Variations on the absolute power of a single individual are simply that – variations – and embrace inner circles, family, a one-party system, the king's court, and the courtiers of the president. Irrespective of the particular group upholding the system at the top and its hierarchical extensions all the way down to street control, the core of power is firmly in the hands of one ruler, so that a separation of powers, enshrined in all Middle Eastern constitutions is simply a false statement.

Parliaments, when they exist, are empty decorum. Legislation is crafted at the beck and call of the leader's whim. The judiciary is weak and while heroic judges occasionally shake the system, it easily renders their efforts ineffective. The moment dormant constitutional devices are put into question by a large social upheaval, the first stratagem of the challenged absolute president or king is to express understanding of 'the legitimate grievances of the people', and readiness to convene panels and commissions tasked with constitutional reform.

In a repentance speech infamously adumbrated, Zaineddin Ben Ali presumed it would be

sufficient to defuse tension with a grandiloquent De Gaullesque ‘Je vous ai compris’. Similar expressions are found across the board of challenged authoritarian rule running an expected gamut throughout the Middle East. ‘I understand, we need to reform and I am keener than you to do so. Let’s dialogue for legal and constitutional change.’ This is the easily discernable pattern of a dictator on the defensive trying to buy time against the revolutionary tide in an effort to contain it into oblivion.

Neither the Tunisian ruler nor his Egyptian colleague had time to develop the scheme. In other countries where the heads of state are able to survive longer, the counter-revolution proves more resilient in sticking to the mantra of reform and dialogue. In the early months of 2011, it can be seen donning an institutional shape in several countries, including the achievement of constitutional amendments that are then put to rapid referendum. The new constitution, in these cases, is mostly a replica of the dormant texts of the old regime. Reform does not touch the core, the absolute power of the ruler.

In countries ruled by a dictator and progeny for years, talk about revisiting basic laws is not new. There is always a moment when ‘reform’ has been flaunted by the regime. When it gathers some pace with well-meaning opponents, the rug is drawn away from under their feet, and many end up in prison. Here also the pattern is common across the Middle East. Why does the expressed readiness to engage in constitutional reform not materialise for the runaway dictator? After all, he expresses his wish to respond to the people, and to open a dialogue to that effect. One obvious element is the lack of trust by seasoned opponents who have lived his false promises in the flesh

Another is the glaring contradiction between opening up and the resistance to accepting the democratic results promised . Examples range from Saddam Hussein on August 1, 1991 to the Israeli attempts to write down a constitution in the first decade of the new century. Both are expressive markers in the wide Middle Eastern spectrum of authoritarianism, and underline a profound political deadlock in society. In Israel, it represents a glaring failure for the Jewish majority to accommodate the non-Jewish minority within the 1948 borders, and the larger mass of Palestinians beyond. In the case of Saddam Hussein, the emergence of a draft constitution in the summer of 1991 cannot be understood outside the considerable pressure of the population after eight years of a devastating war initiated by the Iraqi dictator with Iran, and during which the emergency situation he imposed was easily legitimised by the open conflict. When the war

came to an end in 1988, the justification for the harsh treatment of the population slowly receded, and the Iraqi ruler responded with a draft constitution in which the absolute powers of the Provisional Constitution of 1970 appeared to be dented.

In the typical brutality that has marked his political life more than any other ruler in the region, Hussein could not conceive of any opening that would risk emboldening his aides in seeking more power, or indeed the population at large. Iraq's invasion of Kuwait on August 2, 1991, one day after the draft constitution was announced, is more than just a symbolic act. Rather than embark on any form of domestic reform, a foreign war appeared a safer bet for the prolongation of his absolute rule.

The Iraqi example may appear extreme because of the superlative violence of Saddam Hussein's rule, but the pattern is well entrenched. At the turn of the new century, similar 'reforms' cascaded in the region beginning with the so-called Spring of Damascus in 2001, which lasted a few months before its leaders were thrown again in prison. In 2002, the Emir of Bahrain traded up his title to King in exchange for a 'constitutional monarchy' accompanied by an open invitation to Amnesty International to advise him on human rights reform. Three years later, the situation had receded to a worse point than before the 'reform' was embarked upon, and the 'constitutional monarchy' the King flaunted was emptied from any democratic significance. In 2005, under street pressure resulting from the effect of the Cedar Revolution, the Egyptian dictator amended Article 76 of the Constitution to allow for competitive presidential elections. His most prominent opponent was jailed for four years when he dared present his candidacy. By the beginning of 2011, no meaningful domestic change had occurred elsewhere in the region.

The lack of trust in a challenged ruler is one element of the Greek tragedy that is answered in the call for a constitutional dialogue, yet it is hardly the only explanation. There is a more pervasive logic at play. The dictator who awakens to a street challenge to his rule embarks on constitutional reform precisely because of the popular revolt and by doing so gives moral authority to his challengers. Both challengers and supporters know that the ruler would not have budged otherwise and the deadly cycle begins: once the dictator appears to yield to street pressure in the paeon of 'the people have legitimate grievances, let's dialogue', the street is emboldened because of its success, and there are more street demonstrations to prevent procrastination and increase the pressure. The natural propensity of the ruler is to then unleash

the apparatus of fear against the demonstrators, and he sends his goons, the secret police, and eventually the army to repress the growing uprising.

This may work, and the jury is out on the repression in several countries, most strikingly in mid-2011 in Bahrain and Syria. But fear has abated, in part because of the recognition by the ruler that ‘the people have legitimate grievances’, and because demonstrations grow with victims whose blood calls for more protests. For each death, one can surmise that at least twenty family members and friends will take to the streets, initially in the funerals, and then with a well-founded exacerbated grievance against the dictator. The spiral of demonstrations, deaths, and demonstrations grows, while the demand for real change hardens, with real change meaning ultimately that the people have the right to choose their own leaders. This is democracy 101 and is unassailable, and the ruler responds to it by closing down the dialogue window that anyway has yielded little, and by issuing a revolution’s counter narrative: foreign conspiracy becomes the axis of reactive discourse, to which is added the accusation that extreme Islamists are in charge, an attempt to deflect foreign criticism. In general the foreign conspiracy narrative is directed towards the West, and in particular to the US government, with a wink towards the alleged control of US foreign policy by Israel.

Repression grows and the mantra shifts slightly, regardless of the obvious contradictions. The regimes are concerned that the West antagonises them and in their mind, the usually sympathetic coverage by the news and the positions of human rights organisations are conflated with that of Western governments. The language of the regime becomes confused; a Western-Israeli conspiracy is flaunted as well as an Islamist one, however contradictory to each other.

The main problem by then is the spiralling logic of repression. Several ploys are used by the dictator: he expresses his wish to see new laws on freedom of information, on political parties, on competitive parliamentary elections, and may indicate his readiness not to extend or renew his mandate. Between the lack of trust, the emboldening of the opposition, and the increasing bloodshed in the street against nonviolent demonstrations, nothing appears to work.

Republics and Monarchies

There is a logic to the constitutional moment that ensues. Constitutional reform is on the table

everywhere, and talk about it can be found across the countries of the Middle East, but there is a qualitative constitutional difference in Bahrain, Morocco, Jordan, Oman, even in Kuwait and the other monarchies and emirates in the Gulf, in contrast with the republics, Tunisia, Algeria, Mauritania, Egypt, Yemen and Syria. The Islamic Republic of Iran, based on the Shi'i-based theory of the rule of the jurist, *velayat-e faqih*, has its own idiosyncrasies, but it followed suit the Arab republics. By 2009, the appropriately designated 'Supreme Leader' had been embedded with absolute power for twenty years, turning the once complex system of checks and balances into a religious dictatorship for life. With the widespread fraud in the presidential elections, the Green Revolution brought Iran very much into the Middle East revolutionary mood that began in Lebanon in 2005 and flourished across the region in 2011.

The national set-up of each budding revolution is naturally different, but the distinction between monarchies and republics forms a discernible pattern. The difference between monarchs, emirs, and sultans on the one hand and presidents for life with a dynastic bent (first applied by the Asad family in June 2000) on the other, carries real consequences.

Revolutions in the Arab monarchies countenance a vision of the future in which the head of state is not removed altogether. However entrenched the dictatorial president is in a republic, the underlying republican premise is the non-dynastic transfer of power. This is obviously different in a monarchy. An absolute monarch, who operates in fact like a dictatorial president, can never project a will to leave. He can abdicate, of course and if the abdication is absolute, a republic naturally follows. He could also abdicate in favour of a son or a brother. All these figures have occurred in the 20th century in moments of crisis, but there seems to be a new, distinct element in the 2011 revolution, that is, a window of 'constitutional monarchy' forcing an important nuance. Oman, Saudi Arabia, Jordan, Morocco, Kuwait, even the United Arab Emirates have witnessed troubles unprecedented in history as part of the Middle East Revolution. By and large, the street demonstrations in monarchies and the writings of dissidents have tended to fall short in their demands of the departure of the monarch.

Overall, the various responses of sundry Middle East absolute rulers are part of a panoply that appears as a futile attempt to respond to the central message of the revolution: that the dictatorship must end, and that the ruler's executive power is over. Discussion over constitutional reform, when it takes places in this context of a dictator not willing to leave power

immediately, is profoundly distorted because it is premised on a dividing line of legitimacy that operates on a binary basis: the ruler is intent on retaining power, the revolution is intent on ending his rule.

As a consequence, the constitutional set-up of the Middle East 2011 Revolution is burdened by a complex setting where proper constitutional change is ultimately premised on the end of the dictator's rule, whether monarch or a president. Tunisia and Egypt are thus the most important areas for live constitutional experimentation. In the other countries, constitutional reforms may touch upon areas of relative importance, but they fall short by definition of change at the top.

In conclusion, a successful constitutional moment is the antidote to both authoritarianism and secession. A working constitution is the embodiment, over time, of nonviolence. Across the Middle East, the political turmoil opens up unprecedented windows onto a constitutional moment, especially in the countries where the head of the regime has fallen. In a tide that must be appreciated over a decade at least, it is far too early to speculate on the success of the transition, but the constitutional discussion over the future of the Middle East has arrived.