



Constitutions in a Nonconstitutional World

Arab Basic Laws and the Prospects
for Accountable Government

Nathan J. Brown

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CONSTITUTIONS IN A
NONCONSTITUTIONAL WORLD

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*Arab Basic Laws and the
Prospects for Accountable Government*

Nathan J. Brown

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To Aaron and Ruby Kohn

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FOREWORD

MANY POTENTIAL READERS of this book might regard its topic as either too narrow or too broad. Both criticisms have some merit, so it might be best to begin by explaining how I chose it.

It is my colleagues in political science who might find the book too narrow, or, more precisely, marginal and old-fashioned. As I discuss more fully in the introduction, disciplinary interest in constitutions and constitutionalism began to dry up about four decades ago, based on the conviction that many constitutional texts were not closely related to broader political dynamics. It is true that interest in constitutions has recently revived, but thus far it has been those countries aspiring to some form of liberal democracy (especially in central and eastern Europe) that have drawn attention. I have tried to keep abreast of this scholarship and in a small way contribute to it.

Still, it is not my colleagues who have led me to the topic of Arab constitutionalism. Instead, my interest stems from conversations and readings in the Arab world. In the course of conducting earlier research on Arab legal institutions, I was surprised to find a set of rich constitutional traditions. Arab constitutional documents are not always liberal, as will be clear, but they are often carefully crafted and based on sophisticated political visions. And in recent decades, as many Arab intellectuals have become increasingly troubled by the authoritarianism that their constitutions have often enabled, regional interest in liberal and Islamic variants of constitutionalism has grown. While my own attention was attracted by these regional concerns, I have tried to cast the arguments in this book to make them of wider interest: I believe that the Arab constitutional experience can shed light on broader issues regarding constitutions, constitutionalism, and politics.

In contrast to my colleagues in political science, scholars of the law (and historians as well) will likely regard this book as brash and excessively ambitious.

I have tried not simply to cover most of the Arab world (with only a few countries excluded); I have also insisted that one non-Arab case (Iran) be included in the analysis. I have cast my net so widely for three reasons.

First, there is an Arab constitutional tradition (and even a broader Middle Eastern one)—constitutional architects in most Arab countries, for instance, have relied extensively on Ottoman and often on Egyptian documents. Second, commonalities extend beyond texts to broader political contexts: much of the constitutional engineering in the region has occurred in a variety of authoritarian contexts. Third, even where dissimilarities exist, viewing Arab countries together is helpful in illuminating alternatives and unrealized possibilities. It is also for these reasons that the Ottoman constitution (the starting point for much twentieth-century constitution writing in the Arab world) is included. And two Iranian constitutional experiments are included as well: the first (in the early twentieth century) because of the strong parallels to contemporary Arab developments; the second (the Islamic Republic of the late twentieth century) because it helps illuminate the implications of some current arguments about Islam and constitutionalism in the Arab world.

This ambitious scope carries undeniable costs. I have done extensive primary research on several constitutional traditions in the Arab world (the Egyptian, Kuwaiti, and Palestinian) and less extensive primary research on some others (chiefly Jordan and Iraq). For North Africa and Iran, I am almost wholly dependent on the work of other scholars. To exclude these countries from the analysis would have been a mistake, because of the light they shed on the countries I am more familiar with. Modesty has led me to keep the sections on North Africa shorter; I have also consulted with those who have deeper knowledge than I do about the political systems in Iran and North Africa. In this regard, I wish to thank Said Arjomand for assistance on Iran and Emad Shahin for guidance on North Africa. My gratitude should not implicate them in my conclusions: both scholars have their own works which readers should consult for more expert coverage of these cases.

I have enjoyed able research assistance from several individuals, all of whom deserve thanks: Hakim al-Samawi, Halla Abudaff, Shannon Laughlin, Kevin Kreutner, Carrie Gerkey, Maha Juweied, and Jessica Lieberman. I have also benefited from discussions with students in a variety of seminars at The George Washington University. Three former teachers—Roger Bass, Dean Brink, and Carl Brown—helped me in ways that they have likely long forgotten. Scholarly dialogue with a variety of colleagues has been quite helpful. Special mention must be made in this regard to those whose greater expertise in a subject related to this book has helped guide me: Awad El-Morr, Adel

Omar Sharif, Keith Lewinstein, Armando Salvatore, Karim Mezran, Ingrid Creppel, Bruce Rutherford, and Frank Vogel. The anonymous readers of the manuscript were unusually helpful and constructive in their suggestions. The Middle East Institute hosted me as scholar-in-residence while this project was in the very final stages. On several occasions, I have been able to present some of my ideas to scholars and practitioners; the United States Information Agency (now the Department of State's Bureau of Education and Cultural Affairs) made possible a tour of Egypt, the West Bank, Gaza, Jordan, and Tunisia where I could share some ideas with experts in the Arab world. On two occasions Egypt's Supreme Constitutional Court and the British Council have jointly sponsored conferences in Cairo, which enabled me to meet a wide variety of scholars with similar interests to exchange ideas. At SUNY Press, I owe thanks to Michael Rinella, Cathleen Collins, and Donna Plesser. The Kuwait Information Office supplied the cover photograph.

Several members of my family deserve special mention. I did not design the study in order to have my parents host me in Kuwait, but it had that happy effect. Judy, my wife, read the manuscript quite carefully, contributing editorial suggestions and her own insights based on her regional expertise. Our children, Ariel and Eran, have accepted my absences (though I should confess that I selected a topic that could be based partly on textual studies to avoid making these absences any longer).

This book is dedicated to my wife's parents, Aaron and Ruby Kohn. It is unusual to cite one's in-laws in a dedication, but those who know them will not be overly surprised. They are, of course, kind and generous parents, grandparents, and in-laws. Yet it is not such qualities that deserve mention in this context: instead it is their boundless intellectual curiosity, a virtue that I not only admire but also work to pass on to their grandchildren.

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INTRODUCTION

A RECENT RENAISSANCE of constitution writing, particularly in newly democratizing countries, has led to a revived interest in constitutions and constitutional design—a field that political science abandoned more than a generation ago. Scholars stopped studying constitutions because they increasingly seemed quixotic: if political authority was to be constrained, it would not be done with mere pieces of paper. Constitutional authors and scholars came to be seen as well intentioned but naive. Despite the recently renewed interest in constitution writing (far more pronounced among practitioners than scholars), such a view still prevails in the academy.

The purpose of this work is to show that an interest in constitutions (and constitutionalism) is not necessarily well intentioned nor is it always naive. More specifically:

1. *Constitutions have generally been written to augment political authority; liberal constitutionalism (aimed at restraining political authority) has generally been at most a secondary goal.* Thus, constitutions are not only of interest when they serve liberal ends. Many constitutional authors have been far from quixotic; they are often even more cynical than those scholars who have ignored or dismissed their efforts.

2. *Even though constitutionalism has been a secondary goal, its prospects are often brighter—and far less related to democracy—than initially appear.* The Arab world, the focus of this study, is often viewed as particularly hostile to constitutionalist values. Accountable and limited government seems alien to the area. While the record of Arab authoritarianism is real, so too are the prospects for movement toward constitutional government. It is not naive to see constitutionalist seeds in Arab political practice. To do so, however, we need to study constitutions as they operate over time, turning away from the standard emphasis only on the moment of composition. What is especially

remarkable about the Arab experience is that many of the possibilities for constitutionalist practice lie in divorcing constitutionalism from democracy. Arab constitutionalism is far more likely to emerge from institutional balancing and elite bargains than it is from any authentic form of popular sovereignty.

Over the past century and a half, the Arab world has grown rich in constitutions—documents that spell out the basic legal framework for governing—without growing richer in constitutionalism—limited and accountable government. Basic laws have proliferated but few Arab governments have been restricted in their authority by them.

The structure of this study is designed to answer two questions. First, why are constitutions written in the Arab world? Arab constitutional architects, like their counterparts in many nondemocratic societies, have been far less hypocritical, and their texts far less desecrated, than is often believed. What purposes are they designed to serve? Part One addresses these questions, presenting the view that constitutions have been designed primarily to render the political authority of the state more effective and secondarily to underscore state sovereignty and establish general ideological orientations.

Second, what are the prospects for Arab constitutionalism? In other words, can a document written to serve the purposes of a generally authoritarian regime metamorphize into the legal basis for limiting and regularizing state authority? Part Two addresses these questions, presenting real but limited possibilities for the development of accountability in Arab governance. Oddly, such possibilities seem only loosely linked—and sometimes in tension with—any movements toward democracy.

The Arab experience is far from unique. Most states in the world now have written constitutions; the number of states without such documents has decreased to a mere handful. Yet if constitutions have become the norm, constitutionalist practices have not. Most political scientists lost interest in constitutions a generation ago because constitutions did not seem to reflect political reality. Political philosophy continued to take constitutionalism quite seriously, but other parts of the discipline of political science focused on other issues and approaches.

A renewed interest in constitutions and constitutionalism has begun to emerge among scholars. As in the past, political scientists have reacted to the world around them. The collapse of authoritarian regimes in the former Soviet bloc and Latin America was accompanied by a new bout of constitution writing. Scholars have explored questions of constitutional design and the process of constitution writing. And the resurgence of liberalism and democracy has

led some to see new constitutions and providing (or benefiting from) new opportunities to build constitutionalist practices.

This book represents an attempt to contribute to the renewed effort to understand constitutions and constitutionalism in two major ways. First, it explores the consequences of separating constitutions from constitutionalism: why are constitutions adopted in the absence of any desire for constitutionalism? Understanding the various (and not merely constitutionalist) purposes of constitutional documents is vital to understanding their appeal. In addition, it will prevent us from dismissing nonconstitutionalist constitutions as liberal facades irrelevant to the actual practice of politics. Second, the book explores how constitutional structures built for nonconstitutionalist ends might still serve as a basis for the emergence of constitutionalist practices.

In undertaking these tasks, we must recognize that some of the conceptual framework we have used to understand constitutions and constitutionalism is inadequate—or, more accurately, some of the most appropriate concepts have been lost or confused, partly as a result of our prolonged disinterest in the subject. This work will therefore appear old-fashioned to some, focusing on subject matter and concepts that have been relegated to political philosophy. It should not appear old-fashioned to political practitioners—especially those in the Arab world—however, because the issues it explores are very much the material of daily political struggles in the region.

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PART ONE

THE PURPOSES OF
ARAB CONSTITUTIONS

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INTRODUCTION

Constitutions in a Nonconstitutional World

WHY ARE CONSTITUTIONS issued in parts of the world where constitutionalism has never been established? This section presents various nonconstitutionalist motives for writing constitutions.

Arab politics joined the global trend toward writing constitutions very early. During the late nineteenth century that part of the Arab world under direct Ottoman rule became subject, albeit briefly, to the Ottoman constitution of 1876. Constitutional documents were also written in Tunisia and Egypt, though their effects were only slightly less fleeting. In the twentieth century, constitutional documents have multiplied, some countries rewriting theirs approximately every generation. Even some longtime recalcitrant states—such as Saudi Arabia and Oman—have recently adopted “basic laws.” Palestinians began drafting such a document even before any other attributes of statehood were assured. Yet these documents do not seem to have successfully established constitutionalism, especially in practice. The idea that state authority should be regulated and limited by law has found adherents but has yet to establish itself firmly in institutional form.

Constitutions in a Nonconstitutional World

Why do constitutions continue to proliferate in the Arab world, an area largely bereft of constitutionalist practices? A deep cynicism pervades the region: many political activists and ordinary citizens remain convinced that constitutional texts remain worthless papers written to hide the reality of despotic, even

tyrannical rule. Constitutions are generally viewed as elegant but insincere expressions of aspirations that rulers issue in an effort to obscure the unrestrained nature of their authority. Constitutions are written not to limit authority, according to this view, but to mask it; it would be naive to take them seriously.

This cynicism is shared not only by residents of the area but by scholars of the Arab world (and of the nondemocratic world more broadly). Indeed, it was precisely the expansion in scope of American political science to encompass newly independent states in the postwar decades that led scholars to abandon any serious focus on constitutional structures. Political scientists in the 1960s and 1970s favored a variety of other approaches to politics, including modernization, political culture, and dependency. More than a generation has passed since constitutional analysis has occupied a central part of the effort to understand politics in other countries. Even a renewed interest in political institutions that began in the 1980s has largely bypassed constitutions, except in a few very specific areas. Fleeting attention has been given to electoral rules and the attributes of presidential and parliamentary systems, but greater attention to constitutional texts has been avoided by those trained to dismiss "formal legalism" or "the old institutionalism."¹

Scholarly cynicism about constitutions is thus hardly restricted to the Arab world. In fact, the cynical attitude toward constitutional texts emerged long before specialists in comparative politics abandoned constitutional analysis. Its roots can be traced back to the formal legalists themselves in their efforts to understand Soviet and Nazi politics. Constitutional structures and written documents hardly seemed to be the appropriate focus of study of such systems. The carefully designed Weimar constitution was insufficient to prevent the Nazis from coming to power through constitutional methods. The Soviet Union was similarly unrestrained by its constitutional documents. The Soviet constitution was viewed just as Arab constitutional documents are today: an insincere promise of rights, freedoms, and democratic processes meant to fool both citizens and foreign observers by obscuring the untrammelled authority of the rulers. Stalinism was hardly restricted by vague statements of rights incorporated in Soviet constitutional documents; the promises contained in the Soviet constitution were never meant to be honored.

Formal legalists were far less naive than later generations of scholars have treated them: they summarily dismissed such constitutions. Constitutions either served constitutionalist goals or were described as "paper" or "facade" constitutions. Herbert Spiro wrote that constitutions might not be "wanted as a device for helping the system deal with its substantive problems, but as a

facade behind which anticonstitutionalist rulers can hide.”² Karl Loewenstein, like Spiro one of the last political scientists to specialize in comparative constitutional analysis, wrote: “Mussolini, Goebbels, Peron, Ngo Dinh Diem, Naser and *tutti quant* are modern men and no fools. They cannot believe in what their constitutions proclaim and their elections produce.”³ Scholars justified their continued interest in such constitutions by seemingly grasping at straws: perhaps some day constitutional provisions would come to life; in the meantime nonconstitutionalist rulers could be denounced as hypocrites.

This cynicism that constitutions are often hypocritical documents whose provisions are ignored in practice is deeply unsatisfying, however, precisely because it is so widespread. If everybody knows that constitutions do not limit authority, then why bother to promulgate them? Why bother to speak what everybody knows to be a lie? Why have constitutions become ubiquitous in a world where constitutionalist values have been so difficult to establish?

In fact, constitutions are often far more frank than cynics claim. Karl Loewenstein was incorrect when he wrote that such documents hid reality so that “The proverbial man from Mars, when confronted with these documents, would not imagine that behind the structural and often verbal identity of these provisions is hidden a vast differentiation of the actual power dynamism.”⁴ This view is misleading for two reasons. First, nonconstitutionalist and constitutionalist orders both leave key features of the political system outside of the constitutional text. In some areas nonconstitutionalist documents are actually more accurate and complete. The most frequent and obvious example is the party and electoral system. Generally such matters are referred to only briefly in a constitutional document, yet they can work profound effects on the nature of the political system. Strong party discipline and a two-party system, for instance, can gut the practical importance of a parliament in a so-called parliamentary system, converting it into a mere electoral college for the prime minister and a debating forum for the opposition. Similarly, many of the democratic constitutions of sub-Saharan Africa were turned to authoritarian purposes not by violating the constitutional text but by creating a one-party system that robbed constitutional mechanisms of their viability.⁵ Nonconstitutionalist constitutions are far more likely to include detailed language on the party system, often by establishing a single political party. All constitutional texts—and not just authoritarian or so-called “facade” ones—can work in a wide variety of ways and admit a panoply of structures.

More fundamentally, the cynical view of constitutions in nonconstitutional orders is misleading because such constitutions often are far less hypocritical than claimed. So-called “facade” constitutional documents often present the

political system with as much candor and comprehensiveness as their supposedly authentic counterparts. Perhaps the most cited example of a country with a "facade" constitution was the Soviet Union. But Soviet constitutions were far too honest and clear to be simply disingenuous facades. The first such constitution—that of the 1918 Russian Socialist Federal Soviet Republic—proclaimed that its fundamental aim was "to establish (in the form of a powerful All-Russian Soviet Government) the dictatorship of the urban and rural workers, combined with the poorer peasantry, in order to secure the complete crushing of the bourgeoisie, the abolition of the exploitation of man by man, and the establishment of Socialism, under which neither class divisions nor state coercion arising therefrom will any longer exist." Lest the implications of this be lost to Loewenstein's "proverbial man from Mars," the document explicitly stated: "In the interest of the working class as a whole, the Russian Socialist Federal Soviet Republic shall deprive individuals and sections of the community of any rights used by them to the detriment of the interests of the Socialist revolution."⁶ Subsequent Soviet constitutions were less brutally frank, but they were equally clear; the final, 1977 version included a clause that one observer described as abolishing "not only the rest of its text, but the rest of legislation also":

The leading and guiding force of Soviet society and the nucleus of its political system, of all state organization and public organizations, is the Communist Party of the Soviet Union. The CPSU exists for the people and serves the people. The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of home and foreign policy of the USSR, directs the great constructive work of the Soviet people, and imparts a planned, systemic and theoretically substantiated character to their struggle for the victory of communism. All party organizations shall function within the framework of the Constitution of the USSR.⁷

Thus a one-party dictatorship was not hidden behind a constitutional facade but directly and unambiguously required by the constitutional text. Any other system would have been a violation of the constitution. Other constitutions establish the basis for nonconstitutionalist government in a variety of ways: unchecked executive authority; extensive and poorly supervised provisions for emergency rule; and rights provisions that fail to establish real protections.⁸

If we define facade constitutions as those that provide only an incomplete description of the political order, then all extant constitutions are facades.

If we define them more realistically as texts that are routinely and incontrovertibly violated, then there are a surprisingly small number of such documents. As will become clear in later chapters, it can be argued that there are no facade constitutions in the Arab world. The Saudi basic law, to give one example, is largely followed; no reader would take it to aim at establishing a constitutional democracy. A close reading of Arab constitutions reveals that they are rarely blatantly violated; problems stem from the content of their clauses and more portentously from their silences. On most occasions, regimes have interpreted existing constitutional texts in plausible (though often authoritarian) terms.⁹ When constitutions become inconvenient, it is rare for governments to run roughshod over their provisions; instead they completely abolish them, issuing a new constitutional text.

The discovery that constitutional texts are not routinely violated makes our task of explaining their emergence more difficult. If Arab constitutions are not ignored, then why are they written? If they do not restrict state authority, what is their true purpose? (The answers to these questions, the focus of Part One, will lead us to a further question, to occupy our attention in Part Two: once written, can Arab constitutions serve as the basis for building constitutional government, even if they are designed to serve other purposes?)

Recovering a Language for Understanding Constitutions and Constitutionalism

Our ability to enunciate basic concepts has atrophied through prolonged scholarly disinterest in constitutions and constitutionalism. Distinctions that long ago seemed vital in educated political discourse have been lost to all but a narrow group of specialists. Until a couple generations ago, the distinction between tyranny and despotism was widely understood; now we speak more vaguely about authoritarianism. Only specialists in political theory attach much importance to the distinction between republican and democratic government. Constitutionalism and democracy were viewed until fairly recently as operating in tension; now we have trouble envisioning nonconstitutionalist democracies or nondemocratic constitutionalist systems. The global spread of an interest in "human rights" has detached the substance of rights from their source; sharp debates even within the liberal tradition about the origin and nature of rights have been forgotten except among scholars, as has the traditional liberal view that democracy represents one of the greatest threats to such rights. Thus, during Newt Gingrich's tenure as Speaker of the House in

the 1990s, nobody found it anomalous when he routinely recommended reading of the *Federalist Papers*, a set of writings centrally concerned with justifying precisely what Gingrich purported to oppose: an increase in federal power and limitation of the influence of popularly elected legislatures.¹⁰

The shifts in thinking and vocabulary are not products of mere ignorance. General understandings of politics have also been informed by the political experience of the twentieth century, in which limited, constitutionalist democratic government has come to be seen as the major alternative to a wide variety of unlimited, unconstitutional, and undemocratic systems. Yet the new muddiness has costs. A recent series of dramatic political changes that seemingly transcends regional boundaries has exposed the conceptual imprecision that has guided attempts to understand various systems of governing. Regime changes (and sometimes revolutions) in Latin America, East Asia, and the former Soviet bloc were initially referred to as “transitions,” a term that focused attention on the process of change while leaving the beginning and especially the end points murky. Others talked of “democratization” although political change has hardly been restricted to the construction of democratic institutions and process.

In seeking to analyze these changes, scholars have finally been forced to revive seemingly archaic vocabulary. The distinction between republicanism and democracy emerges in Robert Putnam’s influential *Making Democracy Work*; the distinction between constitutionalism and democracy is at the center of a recent collection of essays by leading scholars; understanding the complex relationship between democratization and economic liberalization is the task of some recent widely read scholarly works.¹¹

While interest in older distinctions and vocabulary has begun to widen in scholarly circles, more general political discourse still reflects amnesia about these distinctions. It is not simply in the United States that respect for human rights, constitutionalism, democracy, the rule of law, and the market economy are seen as so mutually reinforcing as to be virtually a single phenomenon; such an assumption has spread to many areas of the world with very different histories.

Thus it is especially important that terms be clearly defined at the beginning of this inquiry into Arab constitutions and constitutionalism. Definitions used here will reflect older usage for the most part (though even within the older vocabulary precise meanings changed over time). The term *constitution* here will indicate the basic legal framework for governing. The term *constitutionalism* will refer to ideologies and institutional arrangements that promote the limitation and definition of means of exercising state authority.¹²

It is as important to note what these definitions exclude as what they include. There is no necessary definitional relationship, for instance, between either constitutions or constitutionalism on the one hand and democracy on the other. This usage might seem slightly anachronistic, because democracy is currently defined in ways that virtually require it to be constitutionalist. Older views of democracy focused on the rule of the people (or the majority); constitutionalism was understood as an ideology that sought to place limits on the government, especially government by popular will.¹³ Recent scholars have introduced a subtle change by advancing a procedural view of democracy that inevitably involves some fundamental (and constitutional) legal limits and guarantees. Adam Przeworski, for instance, distinguishes democratic from authoritarian rule not in terms of popular sovereignty but in terms of institutionalized uncertainty in political outcomes: "Hence the crucial moment in any passage from authoritarianism to democratic rule is not necessarily the withdrawal of the army into the barracks or the opening of the elected parliament but the crossing of the threshold beyond which no one can intervene to reverse outcomes of the formal democratic process."¹⁴ Przeworski's alternative to democracy—authoritarianism—is explicitly defined as well in procedural terms: authoritarianism exists if there exists "some power apparatus capable of overturning the outcomes of the institutionalized political process."¹⁵ More abstractly, Stephen Holmes pursues a constitutionalist view of democracy when he defines it as "government by public discussion, not simply the enforcement of the will of the majority."¹⁶ Such discussion requires precisely the sorts of limitations, protections, and guarantees that constitutionalism seeks to provide.

It may be true, as these authors imply, that democracy needs constitutionalism. But the reverse is not true. We must admit the possibility—and historical reality—of some nondemocratic constitutionalist governments. Many constitutionalist systems of the nineteenth century—such as Britain, Germany, and pre-Jacksonian America—operated in accordance with constitutionalist principles while excluding the majority (even of the male citizenry) from a meaningful role in the political process. We need not accept the older view that democracy and constitutionalism operate antagonistically, but we must concede that the two can be, and have been, separated.

Just as there is no necessary requirement that constitutions or constitutionalism be democratic, there is no requirement that they provide for basic individual rights. Such relationships might (and often do) exist in practice, but these are links to be explored empirically rather than decreed by definition. The American constitution was drafted to contain all sorts of procedural