

Constitutions of Arab Countries in Transition: Constitutional Review and Separation of Powers

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As of 2014, new or newly restructured constitutional courts have appeared throughout the Arab Mediterranean. In the wake of the Arab Spring of 2011, Arab liberals and Western donors promoting democracy encouraged authoritarian Arab rulers to strengthen judicial review in their countries. They had hoped that this would help to entrench the democratic reforms that had recently begun in the region. Today, however, real democratisation seems to have stalled in most of the Arab Mediterranean, and the region's newly established and newly empowered constitutional courts are doing little to effectively promote further democratisation.

The failure of constitutional courts to guarantee an entrenchment of democracy is naturally disappointing to liberals. But it should, perhaps, not surprise them. The understanding of constitutional review as synergistic with democracy is a relatively new development in the second half of the 20th century. Some contemporary legal scholars and social scientists have recently voiced significant scepticism about the relationship between constitutional courts and democracy and, in particular, about whether politically insulated constitutional courts are likely to serve as effective agents of transition from authoritarian government to democracy. Looking at the behaviour of constitutional courts in the Arab Mediterranean after the Arab Spring, it is too early to say with confidence whether they support the sceptics' claim that constitutional review is often ineffective or counter-productive in encouraging a long-term transition away from authoritarian rule to full democracy. They

do suggest that due to a lack of popular legitimacy or, in some cases, due to concerns about the rise of a tyrannical majority in rapidly democratising states, independent courts will often fail to support rapid democratisation. The hope for liberals can only be that they will play a productive role in promoting democratisation in the longer term.

Constitutional Review, Its Early Liberal Critics, and Its Global Spread

Liberals have long debated whether democracy is enhanced by constitutional review. Despite 19th century pessimism, consensus appeared to congeal in the late 20th century that the two work together well. Increasingly, however, a new generation of sceptics has argued that constitutional review can be undemocratic. Furthermore, they argue that, when constitutional review is imposed during a transition away from authoritarianism, it impedes the establishment of a truly democratic society.

The Birth of Constitutional Review and Early Liberal Scepticism

The United States was the first country in the world to draft a written constitution. Thereafter, it vested its courts with the power of constitutional review. Outside the US any governments, both autocratic and liberal, decided thereafter to draft national constitutions of their own. Neither autocrats nor liberals, however, tended to welcome the institution of constitutional review by genuinely independent institutions. Autocrats did not wish to constrain their power in any way.

19th century liberals tended to believe that constitutional judiciaries prevented the orderly operation of

democracy and the natural evolution of a society. Rejecting the US model of “legal constitutionalism” in which judges interpreted and enforced the constitution, many European liberals in the 19th century preferred a regime of “political constitutionalism” in which political institutions were trusted to consider thoughtfully whether a law or policy that they were considering violated constitutional values. If they acted in accordance with an implausible or offensive answer, they would answer politically.

Outside of the US, a few 19th and early 20th century states did leave some room for constitutional review by judges. Often, however, the powers of constitutional review were limited or, as sceptics had predicted, the institutions entrusted with the power of review failed to exercise their powers in a meaningful fashion. Through the Second World War, liberal democracies outside the US tended to put their faith in political more than legal constitutionalism.

The Global Spread of Constitutional Review in the Second Half of the 20th Century and Contemporary Sceptics

After the Second World War, constitutional review came to be associated popularly with the rise of democratisation. The American model of legal constitutionalism gained sway, as the United States came to be seen as a model for the rest of the world, and as the United States used its power to shape the political reconstruction of numerous countries after WWII.

In the aftermath of WWII, the US helped reconstruct the political and legal systems in a number of formerly authoritarian countries, including Germany, Italy and Japan. Each adopted the institution of constitutional review. Democratisation in these countries appeared to be successful and they proved inspirations to other countries that hoped to democratise. The late 1960s and the 1970s witnessed a second wave of expansion for constitutional review, when the collapse of military regimes in Greece, Portugal and Spain led to democratisation. These countries also incorporated institutions of constitutional review. In the 1980s and 90s, the Soviet Union fell, as did the apartheid regime in South Africa and numerous military dictatorships in South America and East Asia. Thereafter in a third wave of expansion, consti-

tutional review re-emerged in Central and Eastern Europe, South Africa, the Americas and in many parts of East Asia.

Increasingly, some legal scholars and social scientists are challenging the new orthodoxy. Tom Ginsburg, for example, argues that authoritarians who face democratic pressure sometimes create politically independent constitutional courts as a form of “insurance” against the possibility that future democratic governments might seek to reverse their most cherished policies. Ran Hirschl has made a similar argument. Staffed with jurists known to share the constitutional vision of the threatened elites, the courts may, from the sidelines, limit the power of the authoritarian. But the authoritarian has the satisfaction of knowing that they are likely to interfere far more with the plans of a future democratic government that tries to overturn core policies to which he and his judges are committed. These contemporary critics often echo 19th century liberal concerns about constitutional review’s relationship with democratisation.

Constitutional Review in the Arab World

Until the 21st century, much of the Arab world had continued to resist the institution of constitutional review. At various times in the first three quarters of the century, monarchies in the Arab Mediterranean region, such as Iraq and Libya, experimented with constitutional review. As the monarchies collapsed, however, military governments in Iraq stripped these courts of their constitutional jurisdiction, and Libya stripped them of their independence from executive control. Courts in Jordan asserted, in theory, the right to interpret the constitution and to refuse to enforce laws that were inconsistent with the constitution as they understood it. However, they were unable to exercise this power vigorously. At the close of the 20th century, Morocco established a constitutional council to review proposed legislation. But it was staffed entirely by figures appointed by the King and was seen as a tool by which the King retained a veto over legislation. Among states in the Arab Mediterranean at the end of the 20th century, only Egypt had developed a truly robust tradition of independent constitutional review within the Arab Mediterranean world. Even there, the independence of the

constitutional court had gained power in an unusual fashion and was currently under attack.

Although Egyptian judges in the early 1950s tentatively asserted a limited power of constitutional review, the increasingly authoritarian government of Gamal Abd al-Nasser explicitly denied regular judiciary any right of constitutional review and placed the power of constitutional review in an institution deemed to be firmly under his thumb. After the death of Nasser, his authoritarian and politically weak successor, Anwar al-Sadat, made concessions to liberals who demanded that he re-establish the legitimacy of his new government on something other than mere charisma and military power. In his 1971 Constitution and supplementary legislation, Sadat decided to enact laws creating the possibility of limited democratisation, alongside safeguards that would enable him to check any potentially threatening institution. Consistent with this plan, Sadat's new 1971 Egyptian constitution created a Supreme Constitutional Court with robust powers of constitutional review and considerable independence from direct executive control. The President, however, had the ability to increase the number of judges and, indirectly, to control appointments to the Court. Thus, if the court defied him, he could stack it with sympathetic figures. After the assassination of Sadat, a new authoritarian President, Hosni Mubarak, continued to operate under the 1971 constitution and allowed the court to establish itself. He permitted the court's sitting members to decide upon appointments and, importantly, demonstrated a pattern of respecting the court's increasingly liberal judgments. At first, the court was very cautious about how aggressively to challenge the laws that the President used to stay in power. Over time, however, the Court began increasingly to issue opinions that were perceived as threatening to the regime. By the late 1990s, President Mubarak lost patience and he began to take steps to rein in the Court, exercising his power to pack it with friendly judges. Fairly quickly, the Court began to turn its back on its recent tradition of liberal activism and started to rubber stamp increasingly authoritarian and deeply unpopular policies. It was unclear whether these opinions genuinely reflected the justices' understanding of the Egyptian constitution, or whether it reflected merely a tactical willingness on the part of astute judges to avoid antagonising a resurgent executive.

The Strengthening of Constitutional Review in the Arab Mediterranean in the 21st Century

Across the Arab Mediterranean, then, constitutional courts had democratic cachet and, in theory, could support democratisation, but in practice were carefully designed and staffed in a way that prevented them from forcing democratisation. These courts could be designed in a manner so unthreatening that as the 21st century dawned, authoritarian rulers seemed increasingly willing to create Potemkin institutions of judicial review. In Tunisia, the authoritarian President Ben Ali granted the power of constitutional review to a constitutional council with almost no independence. Shortly before his fall, under pressure from European governments, Muammar Gaddafi began to reform his judiciary. On paper, Libya's Supreme Court had long had the power of constitutional review. However, the courts were organised in a way that precluded them from exercising this power with any independence. The reforms, in theory, granted them some new degree of independence. In practice, however, the courts did not really exercise their power until Gaddafi's fall in 2011.

In the 21st century, however, even before the Arab Spring, Arab liberals and Western donor countries were encouraging authoritarian Arab regimes to establish more meaningful constitutional review as a step towards genuine democratisation. Most notably, in the wake of the US invasion of 2003, Iraq established a new Supreme Court with the power of constitutional review. Furthermore, starting in 2011, the political uprisings of the so-called Arab Spring seemed to promise a revolutionary change in the patterns of Arab governance. Events suggested that Arab governments would create new space for both participatory politics and constitutional review. The early phases of the post-Arab Spring transitions did provide evidence of such developments. Many countries in the Arabian Peninsula and the Arab Mediterranean alike came under mass pressures to democratise. A number of constitutions were replaced or reformed in ways that appeared to create new room for liberal democratic politics. In many countries, the political sphere was opened. Furthermore, constitutional review arose where it had not previously existed, or it was strengthened, at least on paper, in other countries.

The Strengthening of Constitutional Review during the Arab Spring

Tunisia

The Arab Spring transitions began when popular protests led to the ouster of Tunisia's authoritarian President Ben Ali. Thereafter, a new Tunisian constitution was enacted that grants the power of constitutional review to a special court. In an attempt to guarantee that the judiciary reflected the opinions of multiple constituencies, different branches of government would each be allowed to appoint a number of justices.

Libya

In neighbouring Libya the collapse of Muammar Gaddafi led to a political vacuum. With competing factions unable to agree on a new constitution, the Supreme Court retains constitutional jurisdiction and, given the weakness of the political branches of government, it has assumed some important responsibilities. For example, it has weighed in on some thorny questions of parliamentary procedure that have had real impact on political outcomes.

The Kingdoms of Morocco and Jordan

In 2011, after popular protests in favour of democratisation, Morocco adopted a new constitution that purported to usher in more political openness. It also strengthened, albeit marginally, the institution of constitutional review. It eliminated the Constitutional Council, which was viewed as lacking in independence. In its place, the constitution created a Constitutional Court and gave the King the power to appoint only half the members, with the Parliament holding the power to appoint the other half. Parliament itself, however, continues to be elected in a manner that many people believe is less than free and fair. The new Constitutional Court thus still seems to lack, for now, meaningful independence.

Similarly, Jordan's government responded to the Arab Spring by establishing, in 2011, a new Constitutional Court that lacks independence. Indeed, all members of the court are appointed by the King.

Egypt

In Egypt, the Arab Spring led to the military ouster of authoritarian President Hosni Mubarak and an extremely messy transition. Under a transitional constitutional document, a parliament was elected that was dominated by the long-banned Muslim opposition party, the Muslim Brotherhood. A Muslim Brother, Muhammad Morsi, was elected President in free and open presidential elections. The Constitutional Court continued to operate. Relying on a precedent from the Mubarak years, the Constitutional Court annulled the parliamentary elections and dissolved the Parliament, leaving some question about who was to create laws and draft a new constitution. After complex negotiations with the army, the President acquired power not only over policy but also over drafting a new constitution. In the ensuing months, many Egyptians became uncomfortable with the new constitution that was drafted and also with the policies of President Morsi. Ignoring dangerous signs of discontent among powerful factions within the judiciary, military and security services, President Morsi continued to demonstrate some latent authoritarian tendencies infused with a commitment to a vision of Islam that made many Egyptians uncomfortable. After mass protests, the military removed President Morsi and violently repressed his supporters. In a gesture that seemed to signal approval of the coup, the Chief Justice of the Constitutional Court accepted the position of President in the transitional government and formally accepted a draft of a new constitution which was subsequently approved by referendum. This was followed by an election boycotted by the Muslim Brotherhood, in which the recent Army Chief, General al-Sisi, ran effectively unopposed.

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Throughout these complex events, the strong Egyptian Constitutional Court morphed into an institution even more independent and powerful than it had previously been. Although the court seems, at the very least, to have accepted the return of guided democracy in Egypt, the country's judges demanded that they take a far more powerful position among the guides. The Supreme Constitutional Court had come to exercise an important role under President Mubarak in policing abuses of executive power. It ensured some freedom of speech and at least minimal freedom of political association. Its ability to police the executive had been limited, however, by its vulnerability to court packing. The President controlled the number of justices and, indirectly, appointments to the Court. Since the fall of Mubarak, the justices on Egypt's SCC have negotiated significant independence from control by the political branches of the emerging State. Most importantly, the judges on the Constitutional Court gained, for the first time, near total control over appointments to the Court as well as control over discipline of its members. By the time the regime of General al-Sisi took power, the Supreme Constitutional Court had negotiated for itself a position as a self-perpetuating, largely autonomous, unelected branch of government. It selects and disciplines its own members and has no responsibility to answer to any elected political body or indeed to any other body at all. Indeed, it is on paper today one of the most independent constitutional courts in the world.

Have Newly Empowered Constitutional Courts in the Arab Mediterranean Promoted Democratisation?

In the immediate aftermath of the Arab Spring, optimistic liberals anticipated a virtuous cycle. Democratic forces would call for a strengthening of constitutional review. Constitutional courts would exercise their new power to enforce Constitutional rules protecting citizens' political rights and requiring orderly democratic transitions of power. For these optimists, the past three years have been a disappointment. In many countries, democratisation has stalled, and constitutional courts appear to have done little to restart the process. It is possible, however, that they will do so in the future.

Doubts about the Ability or Desire of New Constitutional Courts to Promote Deep Democratisation in Morocco and Jordan

In the resilient monarchies of Morocco and Jordan, the monarchs have made concessions to the democratic opposition by promising to open the political sphere and by creating or strengthening constitutional tribunals. Nonetheless, these institutions appear too weak or lacking in independence to promote democratisation deeper than the King approves. If anything, they might be expected to subvert democratisation by striking down laws that are contrary to the interests of the King.

Open Questions about the Power and Philosophy of Courts in Tunisia and Libya

Tunisia has followed the most significant path towards democratisation. Its new Constitutional Court has been carefully designed to help continue the process. An inclusive mode of judicial appointment would appear likely to promote its legitimacy in the eyes of multiple political factions. It should, in theory, be well suited to address constitutional questions in a way that promotes democracy and is accepted as legitimate. However, it is, until now, untested. It is hard to say how much popular legitimacy the new Constitutional Court has or whether, if a true constitutional crisis erupts it will have the power and inclination to guide politics systematically in a democratic direction.

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Similarly, it is hard to evaluate with confidence the performance or prospects of the constitutional

chamber of the Supreme Court in Libya. This chamber, reorganised under the ousted Gaddafi regime, has continued to operate during the transitional period. Indeed, it has opined on at least one potentially explosive question of political process. At the time of writing, however, the country has not approved a new constitution, and appears to be descending ever deeper into warlordism. If that continues, it seems hard to imagine the court continuing to play any significant role in shaping the behaviour of political actors, and it might, in any case, be replaced or significantly redesigned when a new constitution emerges.

Ambiguities about the Egyptian SCC's Behaviour to Date

Unlike other courts, the Egyptian Supreme Constitutional Court has demonstrated both power and a willingness to use it. Its dramatic actions have, however, been highly controversial. It is very difficult to evaluate at this point whether the Court was actually trying to promote democracy or, if so, whether its actions have been productive.

The SCC's Role in the Early Transition from Authoritarianism

After the fall of President Mubarak, Egypt moved into a transitional period governed by a mixture of existing laws and new transitional documents. After the election of a new legislature and President, a new constitution would be drafted. The constitutional order was to be overseen by Egypt's Supreme Constitutional Court (SCC), which continued to be staffed by figures appointed by the ousted authoritarian President Mubarak. The SCC exercised oversight in a manner that betrayed discomfort with the implications of electoral democracy as it was emerging in Egypt.

The SCC's Actions after the Electoral Victories of the Muslim Brotherhood

During the post-Mubarak elections, the venerable Islamist organisation the Muslim Brotherhood formed a political party and vastly outperformed most rival parties. The group had already developed a large and sophisticated organisation that could manage

proselytisation programmes and charitable services. It leveraged this to win both a majority in parliament as well as the presidency. Shortsightedly, in retrospect, the resurgent Brotherhood proved insensitive to the concerns of communities who had not been able to organise themselves politically and who felt disenfranchised. Ominously, this included a number of important communities, including urban secular-leaning elites whose vision for Egypt probably coincided with those of many military officers and justices on the SCC. Critics in these communities argued, self-servingly, that the electoral returns did not represent national opinion, and they warned that the Brotherhood would use its temporary majority to entrench itself politically. Perhaps taking those concerns seriously, the SCC, early in the transition, issued decisions that interfered with the Muslim Brotherhood's ability to quickly translate its electoral victories into effective control over policymaking. Most notably, citing a precedent from the Mubarak era, the Court declared the law under which the Parliament had been elected to be unconstitutional, and thereafter dissolved the Brotherhood-dominated Parliament.

Already sceptical about the wisdom of Brotherhood policies and concerned about the inability of its opponents to organise themselves politically, a majority of justices on the SCC seem to have feared the possibility that, under the Brotherhood's new constitution and under laws enacted by a Brotherhood-dominated government, judges might lose their power to check government abuses

The dissolution of Parliament did not disempower the Brotherhood, which still controlled the presidency. The President and Army negotiated a tense *modus vivendi*. The President was allowed to exercise executive and some legislative power, and a constituent assembly controlled by the President was appointed to draft a constitution. The President and

his allies continued to alienate numerous communities, and the new constitution did little to alleviate concerns about the direction that Egypt was headed. While concerns mounted among Egyptians who were not supporters of the Brotherhood, judges worried about Brotherhood actions that seemed to encroach upon judicial and prosecutorial independence. Already sceptical about the wisdom of Brotherhood policies and concerned about the inability of its opponents to organise themselves politically, a majority of justices on the SCC seem to have feared the possibility that, under the Brotherhood's new constitution and under laws enacted by a Brotherhood-dominated government, judges might lose their power to check government abuses. After large public protests against the Brotherhood's policies, the military ousted the elected president Muhammad Morsi.

The SCC's Behaviour since the Military Coup of 2013

Strikingly, the Court refused to consider the constitutionality of the action. Indeed, the Chief Justice appeared to legitimise the military's actions by serving a powerful symbolic role as President of the military-dominated transitional government. After nominally supervising the drafting of a new constitution, he handed power to the Army Chief of Staff who was elected, effectively unopposed, as the first President under the new regime. His regime, in turn, granted remarkable power to the SCC, which was granted near-total control over appointments to the court and over its own internal affairs. The military, in short, took power but relinquished the one tool that it had previously needed to restrain the judiciary. Egypt appears to have returned to a period of guided democracy – but one in which the judiciary will have a remarkably powerful role, at least on paper, as one of the guides.

Evaluating the SCC's Actions

There is room for argument about whether the Court's actions represent a defeat or a victory for democracy in Egypt. The case for defeat can be made simply. After the fall of a dictator, unelected judges appointed by that dictator stood silently by as the military reinstated the dictator and assisted in the reinstatement of what appears to be a new form of

authoritarian "guided democracy." Although the SCC has acquired new independence from the executive, and is now an autonomous, self-governing institution, it is unlikely to use that power to promote democratisation and may, indeed, act to forestall it. Supporters of the Court argue that the story is more nuanced. By their account, the justices on the SCC were not pre-disposed against elections generally or against the Brotherhood in particular. The Brotherhood, however, consistently acted in a fashion that suggested that it was planning to leverage a temporary electoral majority into entrenched power unchecked by independent judges. In those circumstances, it was compelled to turn to the only force that could prevent this – the military. But it extracted guarantees of independence that will allow it to push the military-backed government to democratise in the future without fear of suppression. The Court's actions are thus democracy-promoting.

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To determine which account is correct would require insight into the motivations of the justices, knowledge about how the Brotherhood-led government would have behaved if it had remained in power and, finally, an ability to predict with confidence whether the SCC will, indeed, reach out to constrain the new regime. It seems too early to engage in that task. Even accepting the second version, however, it seems that the Court betrayed a notable aversion to the democratic risks of rapid democratisation and significant tolerance of risks that might accompany the re-empowerment of the military.

Conclusion

Ever since the US developed the institutions of written constitutions and constitutional review in the

18th century, there have been debates about whether, in a democratising society, the institution of constitutional review tends to promote or enrich democracy. After the Second World War, the consensus began to congeal around the position that constitutional review was, indeed, synergistic with democracy and that the adoption of judicial review early in the process of democratisation tended to promote democratisation moving forward. There have always been dissenters from this view, and recently they have grown louder. Although it has not completely resolved the question, the experience of Arab Mediterranean states since the Arab Spring provides some support for the sceptics.

Today, almost four years after the start of the Arab Spring, there is, at a formal level, more constitutional review than ever before in the region, and the institutions empowered to perform it have, at least on paper, new independence and power. Nevertheless, setting aside Tunisia, where the Court has been largely untested, constitutional courts seem to lack the power or desire to encourage further democratisation. Some of this failure is by design. In some of the region's monarchies, where the executive was never truly threatened, the institutions of judicial review, though strengthened, still lack the independence that would be necessary to challenge the ruling elite or its policies. In others, it is a product of extreme circumstances. In Libya, the country has descended into violence and warlordism that no court could reasonably be expected to halt. A more perplexing case is found in Egypt. There, a powerful court actively weighed in on important questions in a messy but generally peaceful democratic transition. Then, as Egyptian factions grew increasingly divided, it seems to have given its blessing to a return to authoritarian rule – albeit one in which it was to operate with enormous independence. Its champions suggest that counter-intuitively, its embrace of guided democracy will actually enrich democracy in the long run. By their reading, the alternative was even less democratic, and the court, having retained the power to force a more gradual and productive democratisation, will wield it wisely. Recent events in the Arab Mediterranean cannot tell us whether 19th century and contemporary critics

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are correct to question the role that constitutional review is said to play in promoting democracy – and particularly in promoting democracy in the early phases of a transition from authoritarianism. At this point, it certainly seems safe to say that the strengthening of constitutional review in the Arab Mediterranean has not done much to promote rapid democratisation in the area. For liberals, the hope must be that newly empowered courts in the region will fulfil their promise during a longer-term process of democratisation in the future.

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