CONSTITUTIONS AS PEACE TREATIES: A CAUTIONARY TALE FOR THE ARAB SPRING

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The December 2010 self-immolation of 26-year-old Tunisian Mohamed Bouazizi, a desperate response to the debilitating lack of economic opportunities for Tunisia's youth and the pervasive sense of humiliation engendered by the state's corrupt and degrading treatment of its citizens, tapped into deep popular frustration in Tunisia and throughout the Middle East. It sparked a series of uprisings that led to the ouster of authoritarian governments in Tunisia and Egypt, a civil war that ultimately brought down the Qaddafi regime in Libya, widespread public protests in Bahrain and Syria, and a virtual civil war in Yemen. The Arab Spring, as the moment has been dubbed, provides an important opportunity for Tunisians, Egyptians, Libyans, and others in the region to create new governing institutions and, more fundamentally, to redefine the nature of the relationship between the citizen and the state in the Arab Middle East.

One important step in the establishment of new political orders in Tunisia, Egypt, Libya, and perhaps elsewhere will be the adoption of new constitutions. The constitution-making process in at least some of these countries is likely to prove contentious, particularly as groups and factions that have never played a meaningful role in national political life all strive to advance their preferred visions of society. In some cases, the end of authoritarian regimes has unearthed deep divisions over such issues as confessional/sectarian identity, tribal iden-

tity, regional identity, or the liberal versus religious character of the state. The protagonists on different sides of these divisions can be expected to attempt to codify—indeed, to *constitutionalize*—the vision of society or special role for their group they favor. Participants, however, should approach the constitution-making processes cautiously. In societies in transition, efforts to resolve deep divisions or fundamental disagreements about the nature of society through constitutional drafting may sharpen political differences and heighten the political salience of controversial issues or social cleavages. Above all, seeking a constitutional resolution of the most contested issues may discourage the development of an approach to political relations in which all parties commit to a vision of the future in which there is an acceptable, or at least bearable role, for all other parties. It may accordingly be better to defer resolution of the most contentious issues than to attempt to settle them as constitutional matters.

A. *Principles From Conflict Resolution*

In the legal academy, constitution-making is a field well-studied by comparative constitutional scholars. In the case of societies in transition—particularly those in which there are deep conflicts among different groups or fundamental disagreements about the vision of the future state—there are also important lessons about the constitution-making process to be drawn from the field of conflict resolution.

The Stanford Center on International Conflict and Negotiation, which I co-direct, brings an interdisciplinary approach to studying the barriers to conflict resolution and identifying strategies for overcoming them. In examining whether there may be a range of possible solutions to a violent political conflict, we ask the parties to consider whether each of them is willing and able to envision a future that would also be acceptable to the other side. We ask, in other words, whether each of the parties can articulate a vision of a *mutually bearable shared future*.[1] No agreement is possible unless both parties feel that they would enjoy a reasonably tolerable existence if the other side's basic aspirations were realized. The parties do not need to share a single view of the future. Indeed, the future that one side seeks may be—and probably will be—far from what the opposing side wants or would deem fair. But ultimately both sides must be reasonably confident that under their own vision of the future, not only their own lives but also the lives of the opposing side would continue to be bearable in the aftermath of an agreement.

This notion of a bearable shared future is quite limited; in particular, it is important to note that a vision of a *shared future* does not require the parties to

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1. The material in this and the following paragraph is drawn from the work of my colleagues Byron Bland and Lee Ross, Relational Barriers: Reflections on Peacemaking 4-6 (Aug. 27, 2008), *available at* http://www.law.stanford.edu/program/centers/scicn/papers/relational_barriers.pdf.

embrace a *shared vision* of the future. That would imply that a consensus has been reached about institutions and policies as well as the very nature of some new political arrangement or entity. Rather, the minimalist conception I am describing merely requires that each party be committed to a *political process* that guarantees each side a bearable future. Essentially, what is envisioned is a range of potentially acceptable outcomes in which the parties commit to forming an ongoing relationship and in which they agree to refrain from using violence to change the course of future events. They commit instead to relying on normal political processes to achieve desired adjustments within the range of potentially acceptable outcomes.

B. *Constitution-Making and a Vision of a Mutually Bearable Political Future*

These ideas are relevant not only in the context of conflict resolution, but also in thinking about constitution-making in societies in transition—particularly those societies experiencing significant national, ethnic, or religious cleavages, or where there is deep disagreement about the fundamental vision of the state to be formed. A key question in evaluating constitution-making processes, and the constitutions that result in such settings, is whether the parties involved see the constitution they are drafting and the institutions that constitution will create as establishing a regime in which they will pursue *political* relationships with one another; in other words, all parties must at a minimum be certain that they will experience a bearable future, even as they accept the risk that other parties may be more successful in realizing their goals through the political process into which they are entering. A constitution can, in a sense, be seen as an articulation of an arrangement that assures for all parties a mutually bearable future, and which all constituents can accordingly support. The comparative constitutional law scholar Nathan Brown uses a somewhat similar concept by defining a "legitimate" constitution "as one which most political actors will accept or embrace over a long period."[2]

An alternative approach to constitution-making—one that portends a much less successful future for societies in transition—is one in which each faction seeks to entrench its particular set of interests and aspirations as constitutional rights that are not subject to the kind of discussions, negotiations, and compromises that build political relationships that would allow for a viable model of diversity. In such cases, factions are essentially seeking to use the constitution-making process to defeat, in an irrevocable fashion, those whose interests and visions for the future differ from theirs, instead of seeking to create a structure in which citizens build political relationships based on their commitment to a vision of a mutually bearable future.

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2. Nathan J. Brown, *Bargaining and Imposing Constitutions*, *in* CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 63, 73 (Said Amir Arjomand ed. 2008).

C. *Constitution-Making on Divisive Issues and the Politics of Envisioning a Shared Future*

These concerns will prove particularly salient as we enter into constitutional drafting processes in Egypt, Tunisia, and Libya, and perhaps elsewhere. Constitutions, as we know, potentially serve a range of different functions, from establishing a basic blueprint for the institutions of government, to expressing the principle of popular sovereignty (i.e., the idea that governmental authority is limited and derived from the people), to declaring individual rights. These latter two functions of constitution-making will be particularly significant in the wake of the Arab Spring as new constitutions in these nations, establish, perhaps for the first time, that people are citizens and not subjects of the state.

But another function constitutions can serve—and the key one for our purposes—is to attempt to address deep conflicts within a society, either between different groups or to resolve fundamental divisions about the essential character of the state. For example, to the extent the constitution adopted in Iraq in 2006 attempted to address the autonomy of Kurds, to preserve the right for other governorates to form "regions" that could claim autonomous status, and to allocate powers between the central and regional governments, it sought to resolve deep ethnic and confessional divisions.

Where a constitution attempts to resolve deep tensions between different communities, it can serve as a kind of intercommunal peace treaty.[3] In other contexts, the constitution-making process is used as an attempt to settle deeply contentious disputes about the essential character of the state, such as the role of Islam and Sharia law in the functioning of the state. This was a major issue in Afghanistan and Iraq,[4] and may be as well in Egypt and other states that will adopt new constitutions in the wake of the events of the Arab Spring.

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3. I owe this term to Jonathan Morrow. *See* JONATHAN MORROW, IRAQ'S CONSTITUTION PROCESS II: AN OPPORTUNITY LOST 5 (2005) (United States Institute of Peace Special Report).

4. It is interesting to note that although this was a major issue in both Afghanistan and Iraq, the constitutions ultimately adopted in both countries were compromise documents that actually avoided reaching a "collective decision" on the status of Islam. Brown, *supra* note 2, at 72. Avoiding a definitive constitutional solution certainly prevented "constitutionalizing" the defeat of either the Islamists or the proponents of a civil state. It is nevertheless fair to say that there is in these cases no vision of a mutually bearable future; the agreement on the constitution in these cases masks persistent disagreement on the key issue of the role of Islam in the state. Although I suggest below, in Section D, that there may be advantages in postponing beyond the constitution-making moment efforts to resolve the most divisive issues facing a society in transition, there is unfortunately no guarantee that the contesting groups will be able to reach an accommodation in the future. The hope is that after the parties have, with the passage of time and through the conduct of regular political relations, developed some trust in one another, addressing the most difficult issues will be less likely to threaten the very stability of the state.

My central concern in this Essay is to question the wisdom of attempting to resolve this last category of problems—i.e., resolving deep divisions between various groups in society or resolving highly contentious social issues—via constitutions and constitution-making processes. The essence of constitution-making is to create structures, institutions, and rules that, once adopted, are no longer subject to further political discourse or adjustment. If the constitution says the term of the president will be four years, then it is four years. There is no point in our discussing the wisdom of allowing a particularly good president to serve for a fifth year, or to have a particularly bad president end his term after three years, unless we are prepared to amend our constitution. If the constitution grants all citizens above the age of 18 the right to vote, there is no basis for discussing whether 21-year-olds should be required to have a college degree, or own property, in order to vote. In other words, resolving a contentious relationship or issue at the constitutional level means, in essence, removing it from the realm of ordinary politics.

The danger with attempting to address deeply divisive issues as a constitutional matter, of course, is the possibility that one side's view—and only that view—will become "entrenched" as the normative perspective of the state.[5] Although this might produce a short-term victory, it can be deeply destabilizing for the long term. It is, in effect, the opposite of a vision of a mutually bearable future in which the parties commit to building their relationship through normal political processes. To the extent that the constitutional solution removes the issue from the realm of political relations, the message to the side that loses is that there is not under this new constitution a bearable future for that party, group, or faction. It signals that there is no commitment under the new constitution to address the aspirations or goals of that side through the ordinary political process. It runs the risk of turning the losing faction into a permanent opposition group and ultimately a source of political instability.

Because of the "all or nothing" consequences of constitutionalizing the substantive interests or preferences of groups or factions within a society, this approach to constitution-making may also have the perverse effect of deepening the extent to which political identities are organized around, and even based on, those interests, preferences, or group affiliations. In Iraq, for instance, some informed observers have argued that the effort to reach early constitutional consensus on the rights of different "regions" to exercise autonomy from the central government had the effect of exacerbating and hardening sectarian identity as the most important organizing principle for participation in politics. The effort to resolve the status of different sectarian groups in Iraq as a constitutional matter had the effect of weakening the sense of Iraqi national identity and augmenting the importance of political affiliation along sectarian lines; in the more emphatic words of Feisal al-Istrabadi, who participated in the post-

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5. *See* HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 10 (2011).

Saddam transition in Iraq, the push for "early constitution drafting in . . . Iraq was devastating." He notes that a more deliberative approach would have allowed the political elites "to engage in confidence building measures, develop trust in one another, and develop a compromised, but shared, vision of the future for the state."[6] It is striking how closely al-Istrabadi's comment resonates with the concept of a mutually bearable future described above. Under a more incrementalist approach, al-Istrabadi continues, "[c]rosscutting issues transcending ethnic or confessional affiliations might have emerged."[7]

If the first political negotiations among the various segments of society are over the most contentious issues—and will produce a definitive outcome that will not be subject to future "tweaking" through the political process—the parties will feel pressure to negotiate maximalist, ironclad guarantees. Since all parties will have the same incentives, the constitution-making process runs the risk of becoming highly divisive. In the case of Iraq, al-Istrabadi argues, "before [the political] process could be nurtured, the parties were forced into a negotiation 'for all the marbles' in a zero-sum environment."[8] Or as one of the negotiators, Kurdish leader Jalal Talibani, told his counterparts during one of the negotiating sessions over the Iraqi constitution:

> If I knew that the result of all our efforts was going to a genuinely democratic Iraq, I would place my life in your hands. But I do not know what the end product is going to be, and so I need assurances that I will not be strangled as I was by the previous regime.[9]

Similarly, in a country likely to face deep divisions about essential social questions, such as the role Islam will play in public life, efforts to reach a definitive resolution of the question as a constitutional matter may sharpen political cleavages between "liberals" and "religious" citizens. If the constitution-making process is one that will provide a definitive resolution to a disputed social issue—a resolution that by virtue of its "constitutionalization" will preclude further political dialogue and negotiation on the matter—the salience of that issue will grow tremendously for those who care deeply about it, to the point where it may become *the* issue that defines their sense of political identity. This can deepen the extent to which citizens' political identities are organized around the most divisive issues, which in turn fosters deeper social conflict.

If my view of the importance of a conception of a mutually bearable future is correct, it requires parties in divided societies to make a leap of faith and to trust one another—to trust that each side will remain committed to the range of potentially acceptable political outcomes that the parties envision. In a society in transition, what is at stake in the constitution-making process is enormous,

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6. Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1629 (2009).

7. *Id.* at 1652.

8. *Id.* at 1629.

9. Quoted in al-Istrabadi, *supra* note 6, at 1645.

and the parties may not have established the kinds of relationships with one another that would provide a basis for trust. This is why asking constitutions to serve as "peace treaties" that resolve deep group or social divisions strikes me as perilous.

D. *A Soft Prescription*

The implication of the views I have set out above is that there may be significant advantages to *incremental* constitution-making processes, in which attempts to resolve the most divisive issues about the fundamental character of the state or the resolution of conflicts between different communities are deferred. Consider the example of India, which is generally perceived today as a country that has been successful at coping with its tremendous diversity. It is notable that the Indian constitution adopted in 1950, during India's constitution-making moment, essentially avoided settling two of the most contentious issues facing the new country. One related to disagreement over the religious versus civil character of the state, namely, whether a single civil law would apply to personal/family law matters, or whether those issues would instead be governed by communal law. The other was related to the issue of national identity, namely, the question of the national language.[10]

Incrementalist approaches like the one adopted by India may be appropriate in other contexts, as well. Parties may find that attempting to build their society gradually on the basis of political relationships that demonstrate a shared commitment to a mutually bearable future—rather than through a struggle for victory in a contest over non-negotiable constitutional rights—is the better strategy for managing deeply divided views about the nature of the state. In the words of one particularly thoughtful commentator:

> The incrementalist approach to constitution-making rests on the recognition that the struggle over the character of the state is a political struggle which cannot be resolved through revolutionary means . . . at the time of the constitutional drafting. In this struggle, when the right solution is difficult to find, it is the politicians—and not the lawyers or the philosophers—who should lead the search for practical solutions. This is not meant to be a pessimistic conclusion, but rather to insert optimism regarding the importance of politics as the main domain for deliberating national identity and for determining the fundamental principles and shared values that underpin the state.[11]

In the West in general, and in the United States in particular, we have developed tremendous faith in the role of constitutions as instruments for creating not only an institutional framework for governance, but also a political consensus around a vision of the shape a given society will take. We may underestimate, however, the extent to which successful constitutions are the products of

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10. *See* LERNER, *supra* note 5, ch. 4.

11. *Id.* at 234.

a set of political relations in which the parties are committed to a vision of a mutually bearable shared future, rather than generative of such relations. The leaders of Egypt, Tunisia, Libya, and other countries seeking to remake their societies in light of the events of the Arab Spring would be well-served to commit to doing the hard work of gradually building political relations based on a vision of a mutually bearable shared future, rather than seeking to resolve their most contentious ethnic, sectarian, regional, tribal, and political divisions immediately through constitutional fiat.