

Keynote Address

Constitutional Matters:

Women, State, Law, and Constitutions in the Aftermath of the Arab Uprisings

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The Approach

Following the Arab Spring in 2011, constitutions and constitutional reforms were everywhere in the air in the Arab world. Constitutional matters were a must in critical conversations on women and gender rights in the Arab world at that historic moment. Egypt has reworked its constitution more than once since 2011. Constitutional debates mixed with debates about law and family codes were engaging diverse publics in Algeria, Iraq, Morocco, Tunisia – and always in Lebanon – as well as many other Arab countries. Regardless of whether in a particular Arab country constitutions are changing or even the possibility of constitutional change is being discussed, it remains the case that constitutions are useful projects to think with and to think through for understanding gender, rights, and other key social issues. Here I raise some of the questions and issues that can be productively engaged with through the lens of constitutions. I focus on some of the framing questions that might productively be considered in conjunction with, or perhaps juxtaposed with, the idea of constitutions.

Why Constitutions

No other social project sheds light on the framing issues of a society more than its constitution. In American studies, we tend to talk about the “framers” of the constitution, recognizing that those who write constitutions are engaged in large social construction projects about the very architecture of a society. Constitutions map out a vision of society, its structure, its people, and its fundamental principles. They speak not only of who belongs in the society, but of the very nature of the people’s being, their relationship to other members of society, and most pointedly, their relationship to the political project which they invent and which invents them as a people – the “state”. Constitutions address the organization and distribution of power in a society, including protecting the citizenry from the very state that constitutions instantiate (Gordon, 1999). Constitutions, in mapping the social domain, narrate the sites of power, authority, rights, and responsibilities. They offer a vision of decision-making on behalf of the body politic, a vision of decision-making defined as “for the social good”. I use constitutions as a point of departure to suggest a lens for re-figuring questions about women, gender, and the women’s location in the political maps of their societies. The intervention I hope to make here is less about the specificities of particular constitutions, and more about the work that the idea of constitutions does in framing social matters. The discussion below at times conflates constitutions and laws. Certain matters are addressed in constitutions in some countries, while in other countries they are addressed in laws.

That constitutions are a critical lens through which to map, track, and understand gender issues was recognized by the United Nations when it launched, in 2013, the first-ever database on constitutions which locates all provisions relevant to gender in all constitutions globally.¹ Independently, Duke Law School graduates Laura Lucas and Taryn Marks developed the Women and Constitutions Project to analyze constitutional provisions that mention women in all constitutions that have been written since World War II.² Analyzing women's strategies towards constitutions, Alexandra Dobrowolsky and Vivien Hart (2004) compare women's efforts to affect change through constitutional interventions in several countries, including the United Kingdom, South Africa, the United States, and Canada – one of many such studies emerging, particularly in the last decade or so.

Constitutions as Civic Myths: Originary Tales

At some level, constitutions operate at the level of “civil myths”. Brook Thomas (2007) argues that civic myths are the stories we tell about ourselves as a society: about a society's values, membership, and origin. Rogers M. Smith (1997) contends that citizenship laws are based on such civic myths. It is telling that Brook Thomas, unlike political scientists, turns to foundational literature to find these stories about the nature of civic myths in the United States. He turns to stories such as *The Scarlet Letter* (1850) by Nathaniel Hawthorne (the good citizen, transgression, and civil society); *The Man Without a Country* (1863) by Edward Everett Hale (the patriotic citizen, Lincoln, and civil liberties); *The Adventures of Huckleberry Finn* (1884) by Mark Twain (the independent citizen and civil rights) to identify foundational stories about what it means to be a good citizen, to transgress, to belong to civil society, to be patriotic, to be independent, and exercise your civil rights. It is noteworthy that these texts are required readings in most American high schools.

Stories such as these embody myths about who we are. In such civic myths we talk to ourselves and to each other about who we are as a people. We tell ourselves that we are a secular democracy; or we tell ourselves that we are a state founded on Islamic principles; or we tell ourselves that we are a state organized around a specific ethnic community. We tell ourselves that everyone within the state is equal with equal rights and capacities; or we tell ourselves that some members of the state need protection because they lack certain competencies. We tell ourselves that color does not matter; or we tell ourselves that color conditions social positionality. We tell ourselves that membership in the state is by blood; or we tell ourselves it is by land; or we tell ourselves it is both. We tell ourselves that anyone meeting fairly accessible criteria can become a member of the political body; or we tell ourselves that membership in our political body is exclusive or nearly exclusive. Constitutions embody these stories that we tell ourselves about ourselves. They are foundational narratives of origins – the narrative embodiment of the imagined community (Anderson, 1983). In some sense they are part of the originary tales which transform the “abstract society of strangers” into an “embodied community” of people who feel they belong together (James, 1996, p. 34).

Constitutional Recognition

On the global stage, constitutions are certificates of recognition: They are the union cards for membership in the international community. They are one of the lenses through which states view, see, recognize, and evaluate each other. A Google search

for “constitutions of the world” brought up 13,300,000 links.³ Wikipedia lists the constitutions of nearly 170 countries, in addition to partially recognized countries and territories.⁴ The Constitution Finder at the University of Richmond offers links to multiple constitutions of a host of countries, with the United States having the largest number.⁵ HeinOnline, an online source for legal information, boasts the most complete list of historical and contemporary constitutions. Additionally, a host of publications have emerged about Arab constitutions in the wake of the Arab Spring.⁶

Constitutions as Compulsory: Mapping Membership in Nations/States

Constitutions frame social structure and social relations in the contemporary world – on a global stage. They paint the landscape of the modern concept of the “nation/state” vis-à-vis other nations/states. Constitutions are critical, because, as Sami Zubaida pointed out sometime ago, the nation/state has been a “compulsory” model for former colonies (1988, p. 121). One must belong to a nation/state to have a political identity and to have rights to resources, services, travel, and protection vis-à-vis other states. Citizenship is compulsory. If citizenship in a nation/state has become the venue for defining membership in the world community, then the manner in which nations/states define citizenship and structure membership in their body politic becomes crucial for understanding women’s positions globally and women’s positions vis-à-vis the globe. Constitutions are the starting point for defining the political community; they are the stories which define positionality on the global stage. Constitutions establish the rules for “intersubjective recognition” domestically and internationally (Habermas, 1993).

Who Gets to Write the Narrative

Constitutions are stories told most often by a small segment of society. They represent the narrative construction of those who are authorized to speak – or authorize themselves to speak through – on behalf of the society. They demarcate whose voices are authoritative, who is authorial, who gets to speak on behalf of the whole. Constitutions represent the order of speech in a society. Constitutions are often framed through the lens of gender and class – and they can be framed through the lens of religion, race, ethnicity and other forces which shape privilege and power.

One question then becomes, who gets to speak on behalf of society? Who gets to tell us who we are, what kind of beings we are, where we belong, and how we are to relate to each other? We know that these myth makers, globally, are most often males and males from privileged classes. In the case of Arab states, constitutions have been almost exclusively written by men – men with privileged access to power. The inclusion of women in the writing of several of the new post-2011 constitutions has been a door-opening experiment, the outcome of which is still unfolding.

Arab constitution writing has received intense scrutiny since 2011. A Google search of “Arab constitutions post Arab Spring” brought 10,200,000 responses, whereas a similar search of “Arab constitutions and women” brought up 21,500,000 responses.⁷ Particularly interesting has been the role of the five Egyptian women who were appointed to the Egyptian Constitution writing in 2014. Among the most interesting analysis of women and the writing of the 2014 Egyptian Constitution is the work of Hoda Elsadda, herself one of the five women.⁸ Perhaps indicative of the interest in women’s role in the writing of the 2014 Egyptian constitution is the endless demand

for public talks and seminars Elsadda has been subjected to.⁹ Though only five, the active role played by these Egyptian women leaders was a watershed in constitution writing in the Arab world.

Constitutional Change

Constitutions are fought over and changed not only because they no longer represent society. Representing society is itself a problematical assertion. Rather, or in addition, constitutions are contested and changed because social narratives become contested. New narratives emerge; new stories, new frames, new landscapes and maps are charted. As new forms of privilege or new access to power allow new storytellers to write the narratives, they too must position themselves as writing on behalf of society. New constitutions can tell us we are now different kinds of people, different kinds of beings, and we can create different kinds of relationships. The complexity of methods for changing constitutions and the social transformations they either represent or induce has spawned blogs and websites such as Constitutional Change.¹⁰

Constitutional Disconnect

As with any myth, constitutions may be disconnected from reality. They may tell us we are something we are not; they may tell us we have rights which we never experience; they may tell us our leaders are something they are not; they may tell us the state is something it is not; they may tell us about values which often do not guide the practice of lived lives.

Constitutional disconnect is ever greater in societies with high rates of illiteracy, especially legal illiteracy. In most Arab societies, vast numbers of citizens are uninformed about their own constitutions and what rights they have or do not have. For a number of Arab societies which lived under emergency laws for decades (such as Egypt and Syria), the constitutional disconnect was structural and purposeful. Perhaps a majority of the citizens of the United States and Europe are also not fully aware of their own constitutions and what rights they have or do not have. Constitutional illiteracy is global – a money making machine for lawyers. While constitutions can often act as façade for authoritarian governments, even the façade tells a story of self-conception (Sartori, 1994).

Materiality of Constitutional Stories

Though constitutions may be civic myths and though they may be stories told by the hegemon of an era, constitutions are not bedtime stories. They carry the weight of the state, with its monopoly on power and force and coercion. Constitutional stories are materialized through laws, codes, courts, and through enforcement agencies like schools, the media, the police, the militaries, prisons – and even families. As Ranabira Samaddara argues (2007), the materiality of constitutions translates into life and death realities for citizens and non-citizens alike.

It is this materiality of constitutions that concerns us. It is the materiality of constitutions that makes them a site of contestation. It is the materiality of constitutions that makes them so critical for women's rights and women's lives. The key areas in which constitutions materialize themselves in the lives of women – and men – in the Arab region are discussed briefly below.

Unit of Society

Any society must define the units that compose it: What are those units? What do they look like? How do they relate to each other? How does the state relate to them? Most Arab constitutions define the basic unit of society to be the “family” and not the “individual” citizen. It is a logical premise for a political treatise about Arab societies: Arab constitutions define Arab societies as composed of families.¹¹ They see their citizens through families. They recognize humanity through families. They know their people exist when they know who their families are. This narrative assertion, that society is made up of families, operates not just as an ethnographic description of society. It also does work as a political command – that to be recognized by the state, one must be or become a member of a family. And while most constitutions do not lay out the precise parameters of what a “family” is, the cumulative impact tells a straight story for gays, lesbians, and even single men and women who are unattached to extended families. It tells them that they do not belong; they cannot be recognized.

It is not accidental that most human rights narratives are written around the concept of the individual (Brems, 2001). Problematical as the project of individualism is, it has discursively allowed for possibilities of a variety of ways of being in the world which may not be encompassed by the categorical mandate that we must all belong to families – especially given the many different kinds of families implied in many legal codes. While the concept of individualism is problematical and must be historicized, it merits mentioning that a major struggle for recognition has formed itself in Arab countries among those who do not see themselves mirrored in the notion of “family” that is implied in constitutional discourse.

Nationality Law

One of the most crucial powers of constitutional definition – though sometimes the specifics are written in laws outside the constitution – are the narratives of who manages to become a member of the body politic and how. Sometimes these are written as nationality laws outside the constitution and sometimes the definitions of membership in the body politic are within the constitutions themselves.

Most Arab countries prioritize blood, especially male blood, as the leeway to political membership. While a number of Arab states in the past decade have given women the right to pass citizenship on to their children (often circumscribed by specific conditions) and some have given them the right to pass citizenship on to their non-national husbands – nevertheless male privilege remains central to the definition of membership within the state.

Many scholars have analyzed the implications for gender equality of male blood privilege and its multiple sources in patriarchy and religion. Here I draw attention to the implication of constitutional law around nationality – that there are different kinds of blood in the state community. Certain blood is a reliable source for the production of citizens; and other blood cannot be trusted to produce citizens. There is blood that cannot change – it always belongs to the state. There is blood that can change and can betray the state – and thus must be guarded and controlled. These bloodlines are organized around gender, race, ethnicity, and other critical metrics of inclusion/exclusion.

Family Law: Personal Status Codes

While states in the region define themselves mostly as made up of “family units”, family law is often derived from both the civic realm of the state and the realm of religion. Most Arab states deploy family codes informed by, based on, or directly derived from religious codes. Perhaps no other area of women’s rights has been more struggled over and written about than that of family law or personal status codes. Deference to religious law for family law implies that the foundational narratives of statehood revolve around the sense that states conceive of themselves as embodying religion; they conceive of their citizens through the lens of religion; they define being-hood through god-hood. They conceive of the “family” as god-made. The implications of family law for the kind of social being that is being written into constitutions and statehood is that the social being must have a religious character. It is that foundational narrative that we are all god-creatures and can only be recognized by the state through our god-credentials that has largely transformed gender battles into religious wars. The political privileging of religion in the foundational narratives of statehood and people-hood opened the palace to the clergy, the men of religion. Nowhere in the Arab world, does family law based on religious codes view women as equal to men. In most of the countries of the Arab world, men are defined as head of the family. In many countries men have authority over women’s right to work; in some, men control women’s right to travel; in others, men control women’s right to own businesses. Some countries still require “*ta’a*” – a woman’s obedience to the husband.¹² However, this is not solely an Arab issue, nor solely an Islamic issue. In much of the world, when family law is based on religious law, women are disadvantaged and placed in positions inferior to men.

Constitutionally Religious

Constitutions, by asserting a religion for the state, or promulgating religious law as family law and not offering civic alternatives, in effect are defining personhood as religious. In some Arab states, one cannot be an atheist. A Muslim cannot convert. A Muslim woman cannot marry a non-Muslim. Children of Muslim fathers must become Muslim. Children of Christian fathers must become Christian. This constitutional narrative of religious statehood prescribes a religious being-hood, which is a concomitant of the mandate that children follow the religions of their fathers (Billingsley, 2010). Under such narratives, citizens can be citizens only through a sect, through a religious sect. To be recognized by the state in one’s humanity, in such states, citizens can only be seen through their religious personhood. Being non-religious is to be a non-person, unrecognizable as a citizen. Such primordial constructions of being-hood, under the prescriptions of religion, constrain political subjectivity and person-hood.

God-States

State deference to religious codes is an assertion of self-definition by states. States that defer family law to religious codes imply a definition of themselves as incapable of addressing fundamental questions as to the nature of their citizenry. That does not mean that they are not in fact defining their citizenry; rather it is an articulation of a public message, a message to their public as to their apparent deference to godly authorities. That message is not lost on many publics. One could argue that such a public message offers, in part, a public legitimacy for self-defined religious movements to make claims on political power in the state or over the state: When the state defines

itself as incompetent in a critical area of community life (personal status laws), it leaves itself open to public claims of its incompetency on other grounds as well. If the state must defer to godly authorities on matters of family law (which are foundational to society), then why should the public not accept and even expect the claims to legitimacy of godly authorities in other social/political/economic realms as well? It is not an accident that political Islamic movements focused on family law for so many decades. It was how they could claim legitimacy from the state. That wedge into public legitimacy based on religion, can be seen as a basis for the wider claims for god-states. Claims to god-states are on the rise and have broad-based support in many countries of the region, even in the more democratic states and states which have emerged from more secular traditions (Cesari, 2014).

Violence Against Women

When constitutions abstain from asserting women's equality with men, they inadvertently or intentionally assert or imply women's secondary status; women's dependency on men; women's incapacity to be self-directing and self-caring; women's incapacity for adult rationality – and indeed, women's incapacity for full citizenship before the state. Those intentional or unintentional narratives, viewed in the context of the constitutional primacy of the family, and in the context of the deference of family law to religious codes, have laid the groundwork for the hands-off policies of states towards domestic violence. If families are god-made, then who is the state to interfere with the goings-on within the family? If god has made women to serve their husbands sexually, then there can be no such thing as marital rape. If family honor is narrativized as central to masculine identity, then honor crimes become lesser forms of criminality. If women are not fully rational competent adults, then they must be guided, controlled, at times forcefully so. Such narrative logics underpin the widespread domestic violence in the region and the reluctance of states to intervene in domestic violence.

Political Violence: Domestic

The conditions for women's rights within and outside of constitutions are shaped by another kind of violence: political violence. Political violence works at numerous levels. Foremost, domestically, it is the violence of authoritarian, dictatorial, and military states. The suppression of the Arab uprisings in many states, the suppression of the media and the press, the suppression of non-governmental organizations, the aggressive suppression of political protest of any sort, is an issue for both women and men. When governments are fundamentally non-democratic, neither constitutions nor formal legal rights have much meaning.

In most states of the Arab region, judiciaries are not fully independent; judges are overwhelmingly male and overwhelmingly sexist; courts are highly politicized and/or are not seen as citizen-friendly recourses by most citizens; police and security forces serve at the whims of leaders and not laws, and are themselves overwhelmingly male and macho. Such political violence, as a daily chronicle of life in many countries, projects a narrative of the social body as unruly, unreliable, untrustworthy, dangerous, needing to be controlled, patrolled, and put under constant surveillance. The story casts society as a threat to the state, indeed, casts society as a threat to the citizen from which the state must "protect" the citizen.

The narrative of the ouster of the democratically elected Egyptian government of Mohamed Morsi by the military and the eventual election of General Abdel Fattah El Sisi as President was partially cast as a society at risk from its own members. It was narrativized as Egypt having to be rescued from itself (or from some of its members) by the national military who could only rescue society by suppressing all of society. The narrative of emergency law is a narrative that society is too dangerous for its own good; that the state must protect society from itself. Constitutions often provide for the possibility for emergency law or marshal law. How states justify emergency law for two to three decades, as the on-going state of life in the political body, is based on a story that society is unable to rule itself, unable to control itself, unable to be a rational adult – society is a woman needing to be guided, controlled, patrolled, and protected against itself.

Political Violence: International

External or international political violence is rampant in the Arab world and has been for decades: The more than 65 years of violence against the Palestinians; the many Arab-Israeli wars; the many Israeli wars on Lebanon; the wars on Iraq; the Iran/Iraq war; the war on Kuwait; the Arab uprisings; the war on Libya; the war in/on Syria and so forth. Wars that are regional and international, have a specifically gendered effect on women. Women lose their sons and husbands; they become single parents; they are disproportionately represented among refugees; domestic violence often increases during and after “hot wars”; at times states rewrite laws to favor men during and in the aftermath of wars, as Saddam Hussein did in the 1980s during and in the aftermath of the Iran/Iraq war.

Constitutional Culture and Political Participation

Constitutions do other kinds of violence, selectively. Constitutions define who are full participating members of the body politics: who can vote; who can run for office; how old a citizen has to be to vote or run for office; which offices can be held by which citizens – all examples of violence of exclusion. Increasingly over the past half-century women in Arab countries have won the right to vote, yet there are very few women in public office. Where countries have written quotas for women into laws or into constitutions, the percentages are improving – and at times are greater than those of women holding office in Western countries. Women, in most Arab countries, do in fact participate in politics in many forms. Yet few Arab countries have women in higher public offices, and none have women elected as heads of state. Constitutions do not always specify that the head of state must be a man or even that heads of high government offices must be men.

Rather there is what one might call constitutional culture: the unwritten, but understood notion that politics is the work of men. Sometimes it is sufficient that the male pronoun is used to refer to occupiers of higher office for the public message to be made. Gender inequality is so ingrained in these societies that not much public messaging is needed to reinforce what is already written into cultural codes. Viewing political participation through constitutions and constitutional culture, the narrative offers a reading that societies are composed of different kinds of personas: personas which have the capacity for dealing with public power; and personas which do not have the capacity to deal with public power, and those personas are embodied and gendered, as well as raced and classed.

Constitutional Work: Economic Rights/Work Rights

Constitutions often set the age for legal maturity which then affects the age of work. They may assert whether all persons are to be treated equally in places of work. They may articulate the conditions under which employers may discriminate or may not discriminate in places of work or conditions of employment. Regardless of whether these stipulations are part of constitutions or part of the law, it is clear that in the majority of Arab countries there is systematic discrimination against women in places of work. Discrimination can take the form of designating certain kinds of work as male only – dangerous, heavy work, and military, and police work. It can take the form of women receiving lower pay for the same work. It can take the form of women being admitted only into lower-paying jobs (what is sometimes called “sticky feet” – women are allowed in, but they are not allowed up). It can take the form of sexual harassment in the workplace. It can take the form of informal slavery, which is not uncommon in domestic service. It can take the form of gendered unemployment or underemployment. Women in the Arab world have the lowest rate of economic activity in the world. The constitutional narrative implied in these labor practices is that there are different kinds of laboring bodies in the body politic, that laboring bodies are gendered, and that the female body is systematically defined as cheaper, less reliable, less respected, less capable, less productive, less necessary, and less contributive to the social community.

Conclusion

There are more exclusions, inequalities, violences against women that need to be addressed, than can be addressed in this intervention. What I offer here is a set of suggestions for reading constitutions critically: Constitutions as founding myths, as civic myths, as stories a society tells about itself; stories that one segment of society tells about all of society. The narratives are real and have material effects. Seeing some of the issues around women’s rights through the constitutional stories may open up questions on how conflicting segments of society, in their competition with each other over control of the state, are battling over the nature of who we are, what we are, and what we are to each other.

Constitutions are constitutive. Their material force can induce citizens into becoming what they construct citizens to be. That is their material power. Constitutions can open up possibilities of new ways of being for the social good and can shut down ways of being in the name of the social good. We cannot ignore this constitutive capacity of constitutions. Constitutional battles are battles we cannot afford to not understand. They are battles we cannot afford to not fight. They are battles we cannot afford to lose.

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ENDNOTES

1. See UN Women Constitutional Database. Retrieved from <http://constitutions.unwomen.org/en>
2. See the Women and Constitutions Project. Retrieved from <http://law.duke.edu/capstone/index.html>
3. Information searched on April 1, 2015.
4. For more information see the following website: http://en.wikipedia.org/wiki/List_of_national_constitutions
5. For more information see the following website: <http://confinder.richmond.edu/>
6. For more information see the following website: <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espu=2&ie=UTF-8#q=arab%20constitutions>
7. Information searched on April 5, 2015.
8. For more information see Article 11: Feminists negotiating power in Egypt. Open Democracy available at: <https://www.opendemocracy.net/5050/hoda-elsadda/article-11-feminists-negotiating-power-in-egypt>. For a list of Elsadda's other writings in Open Democracy, see: <https://www.opendemocracy.net/author/hoda-elsadda>
9. A google search of 'Hoda Elsadda constitution' brought up 3,240 responses (April 5, 2015).
10. For more information see: Group on Constitution Making & Constitution Change, available at: <http://constitutional-change.com/>
11. For comparative cases, see Joseph, 2000.
12. See Welchman (2007) for an extensive coverage of women and Muslim family Law.

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