

Introduction

The wave of popular uprisings engulfing the Middle East and North Africa in 2010 and 2011 – commonly known as the Arab Spring – created a unique momentum for democratization in a region known for “robustness of authoritarianism” (Bellin 2004) and “non-constitutionalism” (Brown 2002). Despite four regime breakdowns, these uprisings failed to bring democratic change to the region. A plethora of studies have attempted to explain the failure of the Arab Spring in democratizing the region; however, focusing on elite negotiations or structural explanations of authoritarian regime durability, this literature has overlooked the importance of constitutional processes (see, e.g., Kamrava 2014; Lynch 2014; Brownlee, Masoud, and Reynolds 2015; Elbadawi and Makdisi 2017; Ketchley 2017; Volpi 2017). Ten years into the Arab Spring, no major study has theorized about the link between constitution-making and democratization. This book shifts the focus away from autocratic regime breakdown and structural mechanisms of democratic transition to a constitution-building approach to the study of democratization and popular uprisings in the Arab world.

The popular uprisings in the Arab world, which started in Tunisia and quickly spread to several countries in the Middle East and North Africa, instigated a wave of constitution-making in the region. Since the uprisings, seventeen constitutional events took place in eleven Arab nations including five new constitutions adopted in Morocco (2011), Syria (2012), Egypt (2012 and 2014), and Tunisia (2014) and two other constitutional reform processes, which failed to produce or adopt a permanent constitution (Libya (2017) and Yemen (2015)). Furthermore, six nations amended their constitutions including Jordan (2011, 2014, and 2016), Oman (2011), Bahrain (2012 and 2017), Saudi Arabia (2013), Algeria (2016 and 2020), and Egypt (2019).

The Arab Spring was a wake-up call not only for the leaders but also for more than 300 million people living under those constitutions, which for

decades were merely instruments for authoritarian control rather than institutions for the enforcement of rule of law and the protection of people's rights. Searching for new social contracts, protesters in Egypt, Tunisia, Algeria, and other countries concentrated on finding constitutional remedies for the ills of Arab polities. This "constitutional sophistication of demonstrators" came as a surprise to Arab executives who often view their people as lacking political sophistication (Brown 2013, 44). Those leaders who were not overthrown by the protesters hastened to make constitutional reforms in an effort to pacify the situation. Morocco was the first to adopt a new constitution only six months after the start of the demonstrations. Less than two years into the Arab Spring, however, it became clear that these constitutional reforms would not make meaningful changes to the status quo. With the exception of Tunisia, the search for new social contracts failed; authoritarianism remained robust; and the hope for constitutionalism faded away.¹ Why was Tunisia the sole Arab country that succeeded in adopting a democratic constitution? More broadly, what role do constitutional negotiations play in establishing democracy?

Recently, scholars of participatory and deliberative democracy suggest that inclusive constitution-making processes are most likely to generate "smart" and "epistemically superior" outcomes (see Landemore 2017). This call for "direct democracy" in constitution-making processes, or what Chambers (2004, 153) labels "the democratization of popular sovereignty," not only emphasizes the legitimacy of the process but also predicts that more participatory and inclusive constitution-making processes yield more democratic outcomes (Pateman 1970).

Building on these normative assumptions, several empirical studies have focused on examining the relationship between constitution-making and a vector of outcomes, such as constitutional durability (Elkins, Ginsburg, and Melton 2009) and legitimacy (Moehler 2008), conflict resolution (Widner 2005), and democratization (Eisenstadt, LeVan, and Maboudi 2015). While some of these studies find robust empirical evidence linking participatory or inclusive constitutional processes and democratic outcomes (Eisenstadt, LeVan, and Maboudi 2015; Eisenstadt and Maboudi 2019), several

¹ While this book was being prepared for print, Tunisia was witnessing a political crisis. On July 26, 2021, President Kais Saïed dismissed the prime minister and suspended the parliament, jeopardizing the future of democracy in the sole "successful case" of the Arab Spring. Less than two months later, Saïed suspended parts of the constitution to grant himself the power to unilaterally reform the constitution. As discussed in Chapter 3 of this book, while the constitution stipulated the creation of a Constitutional Court as the ultimate arbiter of constitutional disputes, the Parliament – caught up in years of partisan disputes – failed to appoint its share of judges. And when Saïed suspended the parliament, there was no Constitutional Court to stop his unconstitutional power grab.

others remain skeptical about a causal link (Horowitz 2013; Saati 2015). The empirical evidence is, thus, inconclusive at best. Moreover, this growing field has not succeeded in establishing a convincing direct causal mechanism through which constitution-making processes affect specific democratic outcomes. Building on theories of democratization, political institutions, comparative constitutionalism, and participatory and deliberative democracy, this book seeks to explain the role of constitutions and constitution-making processes in democracy-building.

More specifically, I seek to explain in the following pages of this book that there is reasonable evidence to believe that democratic constitution-making processes enhance the democratic content of constitutions and that democraticity of constitutions facilitates democratization. Eisenstadt et al. (2017a), in a manuscript that appeared in this series, *Constituents Before Assembly: Participation, Deliberation, and Representation in the Crafting of New Constitutions*, show that broad participation by individuals or groups is critical if new constitutions are to enhance the level of democracy in any country. Extending that idea, I argue that the mechanism through which constitution-making processes lead to democratization is the participation of institutionalized, organized, and independent civil society organizations (CSOs) in the new constitutional negotiations.

In advancing these claims, the book proceeds in seven chapters. Chapter 1 lays out the theoretical groundwork of the book. In the chapter, I offer a conceptualization of democratic processes, democratic constitutions, and democratization. I also conceptualize constitutions and constitutional functions and changes. I will then present my argument that builds on three propositions. First, constitutional negotiations have a higher prospect of success in establishing democracy in transitioning states if they resolve social, ideological, and political dilemmas. Second, constitutions can resolve these problems best through a participatory and inclusive process. Third, the link that connects constitution-making processes to the resolution of these dilemmas is civil society. Without the engagement of civil society during constitutional moments, new constitutions can face hurdles in establishing democracy. In other words, the missing link that connects constitution-making processes to successful democratization is a strong and independent civil society that can shape and steer constitutional debates. Through constitutional fora, conferences, roundtables, and focus groups, CSOs play a vital role in steering constitutional debates and generating public interest and awareness beyond the polarizing issues within the society.

The empirical evidence for this thesis derives from cross-national statistical analyses and comparative case studies. In Chapter 2, I use an original

worldwide data set of 195 constitutions adopted in 118 countries from 1974 to 2015 as well as an original data set of all constitutions in the Middle East and North Africa from 1861 to 2020 to study the impact of the process of drafting constitutions on their democratic content. A recent study finds a positive relationship between public participation in constitution-making and the protection of minority rights (Fruhstorfer and Hudson 2021). Another study, however, shows that the identity of groups present at the constitutional bargaining table matters more for democracy than mere public participation (Eisenstadt and Maboudi 2019). Building on the extant literature and using cross-national, time-series analyses, the chapter suggests that both individual-level participation and group inclusion improve the democratic content of constitutions by guaranteeing more rights. Particularly, I build on participatory and deliberative theories of democracy, not only to conceptualize and operationalize democratic processes and democratic constitutions but also to emphasize the importance of constitution-making processes for democracy. Differentiating between individual-level participation and group-level inclusion as two democratic, albeit distinct, forms of democratic processes, the chapter offers robust statistical evidence that greater inclusion and participation are associated with an increased number of democratic provisions in constitutions, specifically *de jure* constitutional rights, indicating that broad participatory and inclusive processes can improve the democraticity of constitutions.

Next, Chapters 3–6 employ case studies from all recent constitutional reforms in the Arab world to establish a causal mechanism for the cross-national statistical pattern discovered in Chapter 2. Specifically, Chapter 3 focuses on pathways of success by showing that the successful democratic transition in Tunisia was facilitated by a constitution that addressed both social and ideological cleavages as well as human rights and unresolved political dilemmas. In the chapter, I first provide an overview of the process of constitution-making and democratic transition in Tunisia. The chapter then shows that in order for new constitutions to facilitate democratic transitions, both participation and inclusion in the process are necessary. I use empirical evidence from a statistical content analysis of the public input and constitutional drafts, as well as interviews from Tunisia, to establish a causal mechanism for the cross-national patterns found in Chapter 2. The statistical analysis of a data set of more than 2,500 citizen proposals and the content of three constitutional drafts show that 43 percent of public proposals were included in the final draft of the Tunisian constitution. The results also demonstrate that public input related to rights and freedoms is more likely to generate change in the constitution than other public proposals. Furthermore,

empirical evidence from field research and interviews with drafters of the Tunisian constitution, leaders of different political parties, CSOs, and constitutional law experts show that public participation and the inclusion of a wide range of interest groups in the constitutional bargaining process both legitimized the constitution and improved its democratic quality. Next, the chapter explains the role of civil society in shaping the public sphere of constitution-making and steering constitutional discussions. CSOs in Tunisia fulfilled three core functions. They acted as a third-party arbiter of constitutional and political disputes among different groups. Different CSOs also acted as watchdogs, ensuring the integrity and transparency of the process. Third, they created a public sphere for constitutional debates by offering an inclusive venue for citizens to engage in the constitution-making process. Finally, the chapter shows that as inclusive and participatory processes inevitably broaden the constitutional debate, properly steering the discussion becomes crucial for a successful democratic transition. More specifically, democratization is more likely to be on the horizon when constitutional debates and negotiations encompass both democratic political institutions and social and ideological issues.

Chapters 4 through 6 turn attention to pathways of constitutional failure in facilitating democratic transitions and examine when political choices (in the process or constitutional design) and intractable differences (such as lack of strong and independent civil society or the prevalence of ethnoreligious divisions) yield such constitutional failures. Chapter 4 focuses on the process of constitution-making and cases in which a non-inclusive process leads to either constitutional failure or democratic backsliding. The first type of process leading to the failure was the “populist” process where the general public was massively mobilized to participate in the constitution-making process, but the process did not ensure the inclusion of citizens’ input, partly because the process was non-inclusive and partly because an institutionalized and independent civil society did not exist to channel their voices (Egypt 2012). The second type was the “window-dressing” process where severely contested regimes unwilling to democratize initiated constitutional reforms, which only appeared inclusive or participatory by allowing a small group of moderate opposition groups to participate (e.g., Jordan 2011, Morocco 2011, Egypt 2014, and Algeria 2016). The third failed pathway was through “closed” constitution-making processes where input from the general public was not sought, nor were major interest groups and CSOs offered a seat at the table. This included cases where an ethnic minority ruled against the majority’s will (Bahrain 2012 and Syria 2012), where a stable authoritarian regime was under no public pressure for democratization (Oman 2011 and Saudi Arabia 2013), and where

constitutional reform was a crucial step to strengthen the incumbent's grip over power (Egypt 2019). The last failed pathway of constitution-making processes included "conflict" constitutions, which involved a non-inclusive process in ethnically or regionally divided nations. As the cases of Yemen (2015) and Libya (2017) show, in such circumstances, the process of crafting the constitution only exacerbates the existing conflict.

Next, Chapter 5 focuses on civil society and its role in fortifying democratic constitutions as well as on elements that present a threat to constitutional success. It highlights how civil society was undermined and why CSOs failed to play a more consequential role in constitution-making and democratization. It first examines why the characteristics of the constitution-making process matter if civil society is to succeed in its democratizing role. As the cases of Jordan, Morocco, and Algeria show, when the process is not inclusive, CSOs cannot fulfill their democratizing role. The chapter also looks at both endogenous and exogenous factors impacting civil society's failure, which persist across the region. The first endogenous factor hindering the work of most CSOs in the region is the lack of organizational capacity. In Egypt (2012), for instance, lack of political experience and negotiation skills as well as a unified agenda hindered the CSOs' public outreach efforts. The second endogenous factor leading to civil society's failure is the CSOs' lack of public legitimacy. The chapter also examines two exogenous factors that contribute to civil society's failure in playing a more prominent role in democratization. First, using the cases of Yemen and Libya, I discuss the negative impact of societal cleavages and conflict on the work of civil society. Second, I explore the negative impact of undemocratic forces, such as the military or international intervention in Egypt and Bahrain.

The last empirical chapter explores how the content of new constitutions hinders democratization by focusing on five particular types of nondemocratic and nonconsensual constitutional designs, which emerged during the Arab Spring. In Chapter 6, I first examine cases where constitutions failed to limit the arbitrary powers of the monarchs (Morocco and Jordan) by utilizing a constitutional design that lacks textual clarity, adopting contradictory provisions, and creating parallel institutions, which would leave the door open for future manipulations through illiberal constitutional interpretations. Similarly, in countries such as Algeria and Egypt, the constitutions remained undemocratic, despite adopting executive term limits, because they failed to address the lack of checks and balances and constraints on the executive's powers. The other three failed pathways of constitutional design were specific to countries that were deeply divided across different lines. When these divisions resurfaced during the moments of constitutional negotiations, the

“non-consensual” constitutions that emerged failed to properly address them. First, in countries where an ethnoreligious minority is ruling against the majority’s will (Bahrain and Syria), new constitutions failed to institutionalize power-sharing. Second, where regional cleavages, rivalries, and grievances were prominent issues as in Yemen and Libya, federalist and region-based power-sharing constitutional arrangements failed to prevent conflict. Lastly, where a country was deeply divided across ideological and identity lines (as was Egypt in 2012), the winner-takes-all approach to constitutional drafting alienated at least half of the population, leading to the failure of the constitution and, subsequently, the democratic transitional process.

In Chapter 7, I compare and contrast Tunisia’s successful pathway to constitution-making and democratization to the failed pathways in other Arab nations. I conclude the book with a discussion of lessons learned from the failure of the Arab Spring to democratize the region. The chapter contends that despite being a failed democratization project, the Arab Spring created a new repertoire for change in an exceptionally authoritarian region. The mistakes and bad choices and decisions made then will continue to live as lessons learned by people who for the first time were empowered to bring about democratic change from below. As the recent public protests and renewed interests in constitutional reforms in Iraq and Lebanon (2019–2020) and the overthrow of authoritarian leaders and constitutional changes in Algeria and Sudan (2019) show, grassroots movements for constitutionalism and democratization are still alive and quite powerful, and the lessons learned from the Arab Spring will no doubt have an everlasting impact on contentious politics in the Arab world.