

Constitutions, Civil Society, and Democratization in the Arab World

Constitutional reforms almost always occur in the context of crises or some sort of “exceptional circumstances,” including regime changes (Russell 1993, 106; Elster 1995, 370). Since the Third Wave of democracy, constitutional reforms have become an essential part of democratic transition. As a result, constitutional negotiations – and renegotiations – are intertwined with transitional arrangements. Over one-fifth of all new constitutions since the Third Wave have been drafted during moments of transition. Similarly, every single Arab country with significant protests during the Arab Spring went through some kind of constitutional change in response to the uprisings. Yet, only in Tunisia, the birthplace of the Arab Spring, the constitutional reform process led to democratization. What was exceptional about Tunisia and its constitutional reform?

The Tunisian political scene was nowhere near an ideal environment for democratic transition. In effect, transitional negotiations broke down several times, most notably in June 2013 as a result of a controversial draft constitution (known as “the June Constitution”) and the assassinations of secular political leaders. In the wake of the breakdown of these negotiations, the General Union of Tunisian Workers (l’Union Générale Tunisienne du Travail, or UGTT) joined forces with three other civil society organizations (CSOs), including the Tunisian Union of Industry, Trade and Handicrafts (UTICA), the Tunisian Bar Association, and the Human Rights League, and hosted the national dialogue with leaders of different political groups (Chayes 2014). These four associations, which later came to be known as the National Dialogue Quartet, convinced the political parties participating in the dialogue to sign a Road Map document, which outlined the formation of a new nonpartisan government, an independent electoral commission, and modification of the June Constitution. The result of this national dialogue was a consensual constitution approved by 93 percent of the votes in the

Tunisian National Constituent Assembly (NCA) and a successful democratic transition. The 2015 Nobel Peace Prize awarded to the Tunisian National Dialogue Quartet for their role in the constitution-making and peacebuilding in Tunisia marked the progressive nation as a role model for democratic transition in a region that is often characterized as hostile to democratic norms.

The National Dialogue Quartet, and more broadly the Tunisian CSOs, played three key roles in constitutional renegotiations. First, they acted as a watchdog over the Constituent Assembly, ensuring the transparency and integrity of the constitutional process. Second, CSOs were actively engaged in steering the constitutional debate by creating a public sphere for constitutional discussions through constitutional fora, conferences, round tables, and organized protests. Lastly, they acted as an independent, third-party arbiter of constitutional and political disputes. In these capacities, CSOs paved the way for democratic transition by ensuring that the constitution reflects the aspirations of the Tunisian society for democracy and equality. The influential role of civil groups was made possible through an inclusive and participatory process, which allowed all major social groups to actively engage in the constitution-making and, more broadly, in the transitional process.

By contrast, in Egypt, where the stakes were arguably much higher, efforts to weld the opposition parties into a more coherent democratic force for change failed, partly due to a weakly institutionalized and unorganized civil society undermined by decades of authoritarian domination. A participatory process, similar to that in Tunisia, took place in Egypt as well, and, in terms of sheer numbers, even more people participated and were engaged in the constitutional debate. Nevertheless, in contrast to Tunisia's experience, the popular participation in Egypt was less effective in changing the constitution. Massive protests, boycotts, and withdrawals from the Constituent Assembly just a few days before the constitutional referendum showed that the 2012 Egyptian Constitution was not what many groups in the country wished for. Eventually, on July 3, 2013, General El-Sisi, the Egyptian army chief, capitalized on this broad dissatisfaction with the constitution and the Muslim Brotherhood government and led a coup d'état to remove the country's first democratically elected president and suspended the constitution. With a revolution, a military coup, a counterrevolution, and two constitutions adopted in just two years, the Egyptian transitional process held the most dramatic series of events of the Arab Spring (Mednicoff 2014).

Why did the Tunisian constitution-making process facilitate democratic transition while the Egyptian process failed to bring about democratic change? Previous studies suggest several factors were important for the failure of

democratic transition in Egypt, such as a politically powerful military (Barany 2011), a relative imbalance of power between political forces including Islamists and non-Islamists (Brownlee et al. 2015), lack of a clear design for transition (Brown 2013), weak CSOs as well as lack of a progressive Islamist leadership (Stepan and Linz 2013), and the country's global and geopolitical importance (Mednicoff 2014). While these factors may explain the failure of constitution-making and the broader transition in Egypt, they fall short of offering a general explanation for the success or failure of constitutions in establishing democracy across other cases. As the cases of Egypt and Tunisia show, constitutional negotiations have increasingly become intertwined with transitional negotiations; yet, the relationship between the two processes has largely remained understudied in the context of the Middle East. The question remains, what role do constitutional negotiations play in democracy-building?

Building on theories of democracy and the recently developed conjectures in comparative constitutionalism, this book examines the circumstances under which constitutions facilitated or failed to facilitate democratic transition during the largest wave of popular movements in the twenty-first century in the Middle East and North Africa (MENA). The core argument of this book is that constitutional negotiations facilitate democratic transitions if they succeed in designing a constitution capable of resolving societal cleavages and the political ills prevalent in society. CSOs can help bring about such constitutions if they are engaged in constitutional negotiations through an inclusive and participatory process. Before expanding on this argument, I first briefly discuss the concept of democracy, followed by the conceptualization of constitutions, as well as constitutional functions and changes. I then present my thesis and conclude the chapter with a brief overview of the Arab Spring upheavals and constitutional changes in the Arab world.

DEMOCRATIC PROCESS, DEMOCRATICITY, AND DEMOCRATIZATION

The causal link that I seek to establish in this book is that a democratic process leads to a democratic constitution, which itself leads to democratization. We should, as such, differentiate between democratic processes, democratic constitutions, and democratic outcomes (i.e., democratization). To make this distinction, we should first ask what democracy is. That is, what characteristics a country should have to be counted as a democracy?

As Coppedge (2012, 11) suggests, one of the most difficult challenges in studying democratization lies in conceptualizing democracy. Indeed,

democracy is one of the most contested concepts in political science. A minimalistic definition of democracy entails a system of government in which rulers are selected through competitive elections (Schumpeter 1942). The more contemporary applications of this electoral conception overlap with Dahl's concept of polyarchy. Dahl (1998) identifies five criteria for democracy including effective participation, equality in voting, gaining enlightened understanding, exercising final control over the agenda, and inclusion of adults. Dahl (1998), however, develops these utopian criteria in the context of the government of very small and voluntary associations. And while he argues that these criteria can also be applied to the government of a state, he acknowledges that no association can realistically meet all these criteria (Dahl 1998, 42).

In some of his earlier works, Dahl (1971) establishes the minimum, attainable threshold for what he calls polyarchal democracy, that is, modern large-scale democratic government. Dahl's concept of polyarchy has two dimensions, including contestation and inclusiveness, which to some degree parallels the Schumpeterian concept of electoral democracy. Dahl's polyarchy, however, is more elaborate and has six institutional requirements including: "(1) elected officials; (2) free, fair, and frequent elections; (3) freedom of expression; (4) alternative sources of information; (5) associational autonomy; and (6) inclusive citizenship" (Dahl 1998, 85). Dahl's concept of democracy, while not accepted by all political scientists, is a well-known starting point for many scholars who offer alternative definitions of democracy (Coppedge 2012).

As Coppedge (2012, 12) argues, while there are numerous definitions of democracy, almost all can fit into one of the six overlapping models of democracy: socioeconomic, people's, participatory, representative, liberal, and deliberative democracy. Since people's democracy is limited to some communist regimes, deliberative democracy is still in an experimental phase, participatory democracy is still limited to some Western countries and only to a limited extent, and socioeconomic equality is not considered in many cultures as necessary or even relevant to democracy, these models of democracy lack the generalizability necessary to compare democratic regimes (Coppedge 2012). However, all democratic states today enshrine some form of representative democracy ranging from "popular sovereignty," which emphasizes the rule of the majority, to "liberal democracy," which emphasizes limits on the powers of the majority (Coppedge 2012).

Going back to the question of what constitutes a democratic state, I adopt a liberal representative definition of democracy to determine whether a country has transitioned to democracy. On the one hand, to distinguish

between democracies and hybrid regimes, we cannot use a minimalistic, Schumpeterian definition. On the other hand, we cannot operationalize democratic regimes or democratization using utopian characteristics such as Dahl's (1998) five criteria that are "unattainable." Neither can we use models with limited generalizability and applicability to transitioning states, such as participatory or deliberative definitions. While I build on participatory and deliberative models of democracy to conceptualize and operationalize democratic constitution-making processes, I believe we cannot use these models to determine whether a country has transitioned to democracy.¹ Indeed, as previous studies show, participatory and deliberative decision-making processes, including participatory budgeting or participatory and deliberative constitution-making, do improve a country's level of democracy down the road (Eisenstadt et al. 2017). However, we cannot argue that a country is really "a deliberative democracy," even though elements of participatory or deliberative decision-making processes might to some extent be at work. By contrast, we can call a state "a liberal representative democracy" if it meets the minimum institutional requirements. Besides guaranteeing basic human rights, liberal representative democracy should limit the tyranny of the majority by guaranteeing some fundamental rights to minority groups. It should also limit the government's arbitrary use of power by "creating constitutional checks on executive, legislative, and judicial powers" (Coppedge 2012, 13). Democratization can, thus, be achieved when there is a shift toward rule of law and constitutionalism (i.e., the limit on the arbitrary use of power) and when the government guarantees protection of rights, including minority, group, and associational rights.

Democratization in this sense is more likely to be achieved when representatives of major political and societal interests are involved in the constitutional bargain during the transition, highlighting the importance of democratic constitution-making processes. Building on participatory and deliberative models of the democratic theory, I argue that a democratic constitution-making process has two main features, including being inclusive and participatory. Theories of deliberative democracy contend that democratic authenticity requires substantive and real public participation and deliberation (Dryzek 2000), which empowers citizens, particularly the marginalized in society (see Chambers 2003). As will be discussed in the next chapter, democratic authenticity in constitution-making is most likely to be realized through inclusive and participatory processes where major

¹ See Chapter 2 for a detailed discussion on the conceptualization and operationalization of democratic constitution-making processes.

societal, political, and interest groups, including civil society and citizenry, are allowed to take part in the constitutional bargain.

A genuinely inclusive and participatory process is more likely to lead to consensual and democratic constitutions in transitioning states than noninclusive processes. That is, nondemocratic processes – including window-dressing and populist processes that only *appear* inclusive and participatory – cannot democratize constitutions or generate societal consensus over the constitutional terms. But what constitutes a democratic constitution? Carey (2009) argues that constitutional ideals have three characteristics including democracy, temperance, and durability. Democracy refers to the kind of ideals one expects to see in the constitution such as the inclusiveness property of constitutions and the degree to which they reflect the popular consensus. Thus, for Carey (2009), democracy is the most prominent constitutional ideal. Temperance refers to constitutional properties that limit the power of officeholders and encourage moderation and deliberation through establishing checks and balances. Lastly, durability refers to constitutional stability over time.

Refining and expanding Carey's constitutional ideals, Landemore (2016) considers nine criteria for a "good constitution," including formal qualities, Gordian Knot factor, rights-heaviness, democraticity, temperance, deliberative capacity, value fitness, adaptability, and minimal expected durability. Landemore (2016, 79) argues that a good constitution should "(1) be a clear, concise, logically coherent document; (2) offer reasonable procedural solutions to foreseeable political conflicts; (3) protect and entrench rights of various kinds, first and foremost human rights, as well as (4) entrench democratic principles – centrally political equality and majority rule." Such a document should also "delineate (5) a temperate political system, characterized by (6) deliberative capacity . . . [and] contain (7) values and principles that are representative of citizens' preferences while allowing for (8) the possibility of change over time and yet retaining (9) a decent (sufficient) life expectancy" (Landemore 2016, 79).

Indeed, not all democratic constitutions are "good" constitutions. Building on Landemore (2016), I argue that, at a bare minimum, a democratic constitution should entail democraticity, rights-heaviness, and temperance. Democraticity refers to the overall democratic quality of the constitution. Such a quality includes several important components, such as the degree to which a constitution reflects the popular consensus and the degree to which a constitution promotes government transparency. Landemore's democraticity is similar to Carey's democracy ideal of the constitution with one difference. Contrary to Carey (2009), who considers various constitutional rights

under the democracy ideal, Landemore (2016) proposes a separate category for consideration of rights: rights-heaviness. By rights-heaviness, Landemore (2016) refers to both the quantity and quality of constitutional rights. For Landemore, the minimum threshold for a good constitution is the entrenchment of basic human rights. Most undemocratic constitutions, however, also include basic human rights, which have become a common fixture of all constitutions (Elkins et al. 2014b). Democratic constitutions, as such, should guarantee a wider array of rights including basic human rights as well as association and group rights, such as minority group's rights. Lastly, democratic constitutions should limit the government's arbitrary use of power by institutionalizing checks and balances.²

I argue that these democratic characteristics of the constitution-making process and the content of constitutions can explain the successful and failed pathways of democratization during the Arab Spring. Without a democratic process, a democratic constitution is less likely to materialize. It matters who sits – and who does not sit – at the constitutional negotiation table. When large segments of society are not represented in the constitutional bargain, the constitution is less likely to protect their interests. Without popular consensus, protection of group rights, and constrained governments, new constitutions will fail to facilitate democratization.

There is then a clear link between what I define as a democratic regime and the characteristics of democratic constitutions. In other words, democratization cannot be achieved without constitutional democraticity, rights-heaviness, and temperance. These democratic characteristics of constitutions, in turn, depend to a large extent on the democratic features of constitution-making processes (i.e., participation and inclusion). Constitutions, as such, play an important role in establishing democracy. Not all constitutions, however, function as democratizing tools.

CONSTITUTIONS AS CONTRACTS

Constitutions fulfill different functions in democratic and authoritarian settings. In authoritarian regimes, for example, Ginsburg and Simpser (2014) argue that constitutions serve four key purposes. They can function as an “operating manual” to offer a means of binding authoritarians so that members of the ruling coalition do not act outside of the prescribed norms. Similarly, constitutions can be “billboards” that advertise autocrats' policy statements, “signaling the intentions of leaders within the regime to those

² Chapter 2 builds on these three criteria to operationalize democratic constitutions.

outside of it.” Alternatively, when serving as “blueprints,” constitutions describe societal aspirations rather than political institutions as they exist. Lastly, under the “window-dressing” function, “the text is designed to obfuscate actual political practice” (Ginsburg and Simpser 2014, 6–8). Besides these four functions, constitutions in authoritarian settings can help formalize pacts among different competing groups (Ginsburg and Moustafa 2008) or legally change publicly undesirable policies (Moustafa 2007). They can also provide the legal basis for leaders’ political, social, and economic plans (Negretto 2013). Many rulers find it less costly and more legitimate to enforce their wishes through constitutional amendments, as was demonstrated by Singapore’s ruling party’s move to constitutionally suppress opposition parties (Silverstein 2008) or the Algerian government’s constitutional amendment in 2008 to remove presidential term limits (Goui 2015).

As Ginsburg and Simpser (2014) argue, authoritarian leaders may seek to implement constitutional change for several reasons. Through constitutional reforms, authoritarians seek to control their challengers within the ruling coalition, signal intentions of reform (whether genuine or not) to regime critics (domestic and international), and, perhaps, bargain over transitions of power and future regime prospects. Whatever the case, societal pressures for liberalization, as O’Donnell and Schmitter (1986) and Przeworski (1991) argue, constitute part of the reason for authoritarian constitutionalism. Authoritarians need stability, aim to distribute risk, and also seek information to control actors inside and outside their coalition through sanctions, and constitutions can deliver these ends for them.

In democracies, by contrast, constitutions serve two simultaneous functions: they enable the government to rule while at the same time constraining it. Achieving these constitutional objectives, needless to say, has proven to be a challenge, especially for new democracies. In James Madison’s (Federalist Paper #51) words, “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.” A central question in democratic theory concerns the mechanisms by which the rules and institutions (especially those identified in the constitution) that constrain a government are maintained and enforced (Ordeshook 1992, 138). In the last few decades, at least two models have emerged to address this concern, which, following their central arguments, can be labeled as “contractual” and “self-enforcing” models.

In the first model, constitutions are conceptualized as contracts between the state and society or even among citizens (Brenan and Buchanan 1985). This view was built on the modern social contract theory, which regards the

state as a social contract among men (and women) (Hobbes 1968; Locke 1988; Rousseau 1997). Several economists employed this conceptualization in the 1980s to answer important questions regarding the limits on the exploitative power of governments and the problem of maintaining the constitutional contract (see, e.g., Buchanan and Faith 1987; Aranson 1988; Grossman and Noh 1988; Epple and Romer 1989; Wagner 1987). Niskanen (1990, 57), for example, suggests that a constitution is a unique form of “contract among various parties to form a government in which the government – the object of the contract – has the dominant power to interpret the rules and resolve any disputes in its favor.” An effective constitution, as such, is a “set of rules that serve the interests of the current dominant coalition” (Niskanen 1990, 58). The constitution or its specific rules and provisions are maintained as long as the benefits of maintaining the set rules exceed the costs for the dominant coalition.

Scholars have raised several criticisms of these contractual or, as Grossman and Noh (1988) call them, “proprietary” government models. The major criticism focuses on how such a contract and its terms are defined and enforced (Ordeshook 1992). The conventional explanation is that the Supreme Court, as a third party, interprets or enforces the constitution. But, as critics point out, this explanation only pushes the problem back a step as now we must ask how social groups enforce the rules and regulations that define the Supreme Court’s (or any other third party’s) jurisdiction (Niskanen 1990; Ordeshook 1992). There are several other reasons why a third-party justification is not an adequate explanation. As Niskanen (1990) notes, there is no plausible theory to explain why the Supreme Court should have the authority or the incentive to play this role. The American Constitution itself does not empower the Supreme Court as the arbiter of constitutional disputes between different branches. Moreover, the Supreme Court is specific to the United States (although it has become more popular across the world in the last few decades), and in many countries, the highest court does not have any constitutional role (Niskanen 1990).

Partly as a response to these criticisms, a new literature, using a game-theoretic approach, has emerged that conceptualizes constitutions not as “contracts” but as “devices” by which organized social groups coordinate to achieve particular outcomes (see, e.g., North and Weingast 1989; Przeworski 1991; Ordeshook 1992; Weingast 1997). A constitution endures only if it is self-enforcing (Ordeshook 1992), and to be self-enforcing, it should overcome the coordination problem (Weingast 1997). The coordination problem is similar to a Prisoner’s Dilemma game; the only difference is that the game is played repeatedly indefinite number of times (Ordeshook 1992). There are multiple

equilibria in an iterated Prisoner's Dilemma game, which can resolve the dilemma to each player's satisfaction. This multiplicity of equilibria is the key here because it implies that the only way players (i.e., citizens, groups, or political entities) can achieve a mutually agreeable outcome is to coordinate their strategies. In other words, it is the repetition of the game, rather than the exogenous enforcer (third party) that allows the establishment of outcomes as equilibria. If each person (or player) believes that the other will abide by the rules, then both players have the incentive to act accordingly. As such, the agreement (constitution) will be self-enforcing (Ordeshook 1992, 147).

Building on both "contractual" and "self-enforcing" models, Elkins et al. (2009) follow the rationalist approach in institutional studies to introduce their "theory of renegotiation." Following the "contractual" model, they define constitutions as a specific type of contract and call "bargains," which are meant to endure. Unlike the "contractual" model, however, constitutional bargains are not enforced by a third party (although constitutional courts can resolve ambiguities down the road); rather, they are self-enforcing (Elkins et al. 2009, 76–77). "A constitution will be maintained only if it makes sense to those who live under its dictates," they write, "so a crucial quality of any successful constitution is that it will be self-enforcing" (Elkins et al. 2009, 7). The model of Elkins et al. also assumes that a constitutional bargain, once adopted, will endure as long as there are no endogenous or exogenous shocks that would alter the cost–benefit analysis for groups considering remaining in or exiting from the bargain.

Constitutions, as such, change when those under its rule find it less costly (and more beneficial) to alternate the rules. Given the costs associated with constitutional renovations, constitutional change becomes more likely when the constitution no longer serves its purpose. In such circumstances, the cost of maintenance and enforcing the constitution becomes much higher than its benefits. Constitutional renegotiation can be initiated by any party in the bargain, which anticipates higher future costs than benefits. It can be initiated by the incumbent, winners, or authoritarian leaders (which we can collectively refer to as "top-down" processes) or alternatively by the opposition, losers, or grassroots movements ("bottom-up" processes).

Prior to the Arab Spring, the majority of constitutions in the Middle East were drafted through a top-down process. Constitutional bargains were, thus, limited in their scope and purpose. If we understand constitutions as "the basic legal framework for governing" and constitutionalism as "ideologies and institutional arrangements that promote the limitation and definition of means of exercising state authority," then the general purpose of constitutions in the Arab world was defining state authority and organizing power without

necessarily limiting it (Brown 2002, 8–12). For Nathan Brown (2002), such “nonconstitutionalist” constitutions have three functions. First, they are “symbolic,” that is, constitutions have become so common that it is difficult to imagine state sovereignty without a constitution (written or non-written). Second, they can be “ideological,” as many constitutions go into length to proclaim the basic ideology of the state. And finally, nonconstitutionalist constitutions can be “enabling,” making lines of authority and succession clear but not restricting the actions of leaders. Thus, constitutions in the region were historically drafted not for the sake of constitutionalism but for extra-constitutional purposes. And as Brown notes, democracy cannot exist without constitutionalism. The Arab Spring uprisings, however, changed the cost–benefit calculation of several Arab leaders and forced them to enter new constitutional bargains.

CONSTITUTIONAL RENEGOTIATIONS IN A NONCONSTITUTIONAL WORLD

Eleven Arab countries in the MENA changed their constitutions after the 2011 popular uprisings. The failure of Arab constitutions in establishing the rule of law and constitutionalism over a long period, along with increased constitutional knowledge in the public sphere, precipitated a call across the region to renegotiate constitutional bargains.

Since the twentieth century, Arab constitutions have faced many challenges, from colonial rule to independence wars and modernization, all of which threatened their stability. Rather than perishing, these constitutions endured by changing forms. They selectively borrowed constitutionalist language from European constitutions, establishing democratic institutions such as political parties, parliaments, and courts, but modified them to serve authoritarianism (Brown 2013). The outcomes of these selective borrowings were Frankenstein-style constitutions that were neither democratic nor authoritarian. They allowed multicandidate presidential elections, for example, but made it extremely difficult for anyone but the incumbent to qualify or win. Constitutions were rich in “escape hatches” that allowed the executive to breach provisions of the bargain repeatedly. Over time, constitutional modifications resulted in more authoritarian than democratic constitutions and created strong, unchecked executive authority across the region (Brown 2002).

Constitutions were, as such, not “making sense” anymore for people who lived under their mandate. They did not limit the executive power or enforce the rule of law. But CSOs and other democratic forces were too weak to

challenge the state for a new constitutional bargain. It was not until the late 1970s and early 1980s when a public sphere for constitutional talks was formed. Economic and political liberalizations in the 1970s and 1980s led to more freedom of speech across the region. Opposition press emerged in countries like Egypt. Media with higher professional standards and greater ability to cover news, such as Aljazeera, entered the market which, through the expansion of satellite receivers, created new competitors against authoritarian state-owned media that once had the monopoly of controlling the news feed. Furthermore, nongovernmental organizations (NGOs), think tanks, and universities started to hold discussions and conferences on trending political issues (Brown 2013). Expansion of postsecondary education, along with increased internet penetration and social media, made the general public more aware of a host of political matters.

The development of these public and political spheres contributed to the emergence of a common framework for assessing major political problems in the Arab world in the wake of the 2011 uprisings. As Brown argues, “[The Arab Spring upheavals] have been premised, in large part, on the proposition that the ills of Arab politics need a constitutional solution” (2013, 41). It is no accident that the majority of protesters concentrated on rule of law, dignity, and government harassment. From Western Sahara to the Levant to the Arabian Peninsula, protesters were more organized than before, and rather than having a wide range of demands, they surprisingly focused on their constitutions. With their nations in search of new social contracts or new pacts that could protect them from the state itself, Arab leaders had no choice but to negotiate new constitutional bargains. But these new constitutional bargains mostly failed to change the status quo, as they did not lead to more accountability, rule of law, or constitutionalism. Less than a decade into these new bargains, it seems that most Arab constitutions have failed to deliver what they promised. Why did these constitutional bargains fail in resolving the problems that prompted them in the first place?

CONSTITUTIONS AND DEMOCRATIZATION: THE MISSING LINK

This book suggests that the inclusion of different organized groups in constitutional processes leads to democracy. Groups participating in constitutional (re)negotiations need to coordinate their strategies to achieve a mutually beneficial equilibrium, which is a Magna Carta that successfully resolves social, ideological, and political dilemmas and is deemed “fair” by all groups. The key assumption here is the iteration of the game. To overcome the coordination problem inherent in a repeated game, groups participating in

constitutional (re)negotiations must learn to participate and to choose “voice” over “exit” (Hirschman 1970). This in turn would instigate trust among these groups, leading to compromise, and subsequently democracy (Axelrod 1984). In other words, the success or failure of constitutional (re)negotiations in establishing democracy depends to a large extent on whether they can resolve the ideological and political dilemmas prevalent in societies with social or religious divisions and a legacy of authoritarianism. The resolution of these dilemmas requires public and inclusive constitutional debates. Constitutions should not be silent on ideological issues that divide society or leave the door open for the executives’ abuse of power. Constitutional renegotiations provide a unique opportunity for transitional states to engage in public debates on these issues and build trust among the relevant parties. The question is why such comprehensive debates did not take place in most Arab polities.

The answer lies in the inclusion or lack thereof of CSOs at the bargaining table. Through constitutional fora, conferences, roundtables, and focus groups, CSOs play a vital role in steering constitutional debates. And through organizing protests, gatherings, and national dialogues, they are the dominant democratic force in shaping the public and political spheres. Most CSOs are dedicated advocates of human rights, social and individual equality and justice, and strong democratic institutions, including an independent judiciary (which could protect them from future retaliations). And when they are institutionalized, organized, and financially and bureaucratically independent, they can steer constitutional debates in the direction that not only can resolve social and ideological cleavages but also can concentrate on other urgent issues such as human rights and democratic institutions. We should, however, note that even with the presence of an institutionalized civil society, some constitutional negotiations still do not succeed in resolving ideological and political cleavages. The reason is a vector of unfavorable exogenous factors including the dominance of nondemocratic forces such as the military and the prevalence of ethnoreligious or regional divisions that can polarize civil society and render it ineffective in steering constitutional debates.³

CSOs, however, can play the abovementioned roles as much as they are allowed to be or succeed in forcing themselves into being part of the constitutional negotiations. An inclusive and participatory constitution-drafting process can guarantee access to civil groups. The main function

³ We should differentiate between ideological cleavages and religious divisions in the region. While the former concerns cleavages and polarization across ideological lines, for example, between Islamists and non-Islamists, the latter is about the divisions mostly between Shias and Sunnis in the Arab world.

of inclusive processes is to signal a credible commitment by the incumbent (or the majority group). Allowing the main segments of society to take part in constitutional negotiations in a transparent manner increases the cost of breaching particular provisions of the bargain for any party. Through inclusive processes, participating groups learn democratic negotiations and compromise. More likely than not, the result of these democratic negotiations is a binding agreement that is viewed as “fair” by most groups and, hence, has a higher prospect of success in institutionalizing the rule of law.

In sum, the argument in this book 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 CSOs 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. In the next sections, I elaborate on each of these three propositions.

Social and Political Ills and the Constitutional Design

Scholars of the MENA often use the term “Arab exceptionalism” in reference to the resistance of the Arab world to democratic values and progressive ideas (see, e.g., Stepan and Robertson 2004; Angrist 2012). The Arab world is a “nonconstitutional world” because constitutions have historically suppressed democratic values and ideas (Brown 2002). The result has been a series of social and political challenges or ills, which, as discussed above, led to widespread calls for constitutional remedies in the aftermath of the Arab Spring. Only when constitutions addressed all of these issues, a pathway for democratization was opened. These challenges can be divided into two groups: political and societal ills. Political institutions that contribute to strong, unchecked executives constitute the most important political challenges in the Arab world (Brown 2013). Also, ethnoreligious, regional, and ideological cleavages were among the most divisive social issues, which created heated debates and social tensions in several Arab Spring cases (Brown 2017). As this book seeks to show, none of the Arab constitutions, with the exception of Tunisia’s, could attenuate these political and societal

issues. The failure of most Arab constitutions in addressing these issues can be traced to the lack of an institutionalized, organized, and independent civil society, which is an important force in establishing democracy and democratic consolidation down the road.

Political Ills of Authoritarianism: Unchecked Executives

Constitutions in the Arab world are arguably “nonconstitutionalist” because they have failed to limit the executives’ arbitrary use of power, protect citizens and groups’ rights, and build societal consensus over divisive issues. That is, most Arab constitutions rank exceptionally low on Landemore’s (2016) democraticity, rights-heaviness, and temperance. Over the past several decades, this nonconstitutionalism resulted in a series of political and societal challenges or ills, which ultimately led to widespread calls for constitutional reforms in the aftermath of the Arab Spring. The most important political issue for constitutions drafted in the wake of the Arab Spring was how to avoid political institutions, which empower strong men without constitutional constraints. Constitutional texts in the Arab world have historically created exceptionally strong executives with virtually no constraints. Egypt’s Mubarak, for example, ruled without any constitutional constraints from 1981 to 2011 under an emergency law he issued after the assassination of his predecessor, Anwar Al-Sadat. In the wake of the Arab Spring and the fall of dictators, one after another, political debates emerged about the way constitutions could prevent another strong man from coming to power. Several questions took the central stage. What is the best political system for increased executive accountability? How to institutionalize an independent judiciary. How to institutionalize executive constraints and term limits.

A major political debate, which emerged in a few countries, including Tunisia, was regarding the structure of a new political system. Indeed, one of the most important institutional designs concerns the executive and legislative powers and whether they should be combined or separated (Samuels 2007). Three forms of separation of power can be distinguished including parliamentarism, presidentialism, and semi-presidentialism. There is a vast scholarship on whether these forms are associated with specific outcomes. For example, Linz (1990) contends that presidentialism is associated with *regime* instability, while Cheibub (2007) argues that parliamentarism is associated with *government* instability. Presidential systems are also believed to enjoy more national accountability but less legislative accountability (Shugart and Carey 1992).

Surprisingly, given the history of strong, nondemocratic presidents and the consequences of political systems, most constitutional bargains did not address

the issue and, instead, retained the old political system. The issue of presidentialism was only fiercely debated in a few countries, including Tunisia. In fact, this was the single most important issue on which political parties resisted compromise (Marks 2014). Ennahda – a moderate Islamist party with a plurality of seats in the NCA – and its members who experienced years of imprisonment and exile under a strong presidency, insisted on adopting a parliamentary system. Opposition groups, on the contrary, believed that a presidential system could give them a higher chance of defeating the more organized Ennahda party in the executive elections. In the end, both groups agreed on a mixed, semi-presidential system.

Another major political problem that most post-Arab Spring constitutions did not resolve was the independence of the judiciary. Courts in the Arab world were historically subordinated to the executive office (Brown 2002). Even in Egypt, where the courts enjoy semi-independence, they have been unable to effectively challenge executive authority. While some political debates took place during the recent constitutional negotiations, the status quo did not change drastically. The only exception was Tunisia, where heated debates in the NCA led to new provisions that guarantee a strong and independent judiciary.

Without institutionalizing a balance of power or independent judiciary, most Arab constitutions failed to limit the executives' arbitrary use of power. In some monarchies, including Morocco and Jordan, the kings adopted constitutions that did not limit their powers by utilizing a constitutional language that lacked textual clarity, adopting contradictory provisions, and creating parallel institutions, which left the door open for future manipulations through illiberal constitutional interpretations. In some Arab republics, including Algeria and Egypt, where protesters focused on executive term limits, despite adopting executive term limits, the constitutions remained "nonbinding," allowing strongmen to manipulate the constitutional order without even lifting term limits and stay in power for years to come.

In sum, with the exception of Tunisia, Arab constitutions remained exceptionally undemocratic, filled with "escape hatches," strong executives, and subordinate courts. Most constitutional bargains in the aftermath of the recent upheavals failed to establish democracy and constitutionalism because the constitution-making processes were noninclusive and nonparticipatory, shutting out voices from different political and societal groups including CSOs.

Social Ills of Authoritarianism: Ethnoreligious and Ideological Cleavages

Writing democratic constitutions is even a greater challenge for societies with an authoritarian legacy that are also deeply divided. These divisions can be

across ethnolinguistic, religious, regional, or even ideological lines such as secular versus religious identities. For several decades, these cleavages have been muted under authoritarian state repression across the region. However, when authoritarian regimes fell or initiated constitutional reforms to extend their rule, these cleavages gradually moved to the top of national debates.

When there are competing visions for the identity of the state and when there are clashing societal norms and values, innovative constitutional solutions become inevitable if the conflict is to be avoided. Without consensual constitutional solutions, these disagreements will be inflated. Subsequently, constitutional negotiations, instead of becoming instruments of compromise, become a major source of conflict and escalating societal tensions (Lerner 2011). What constitutes an appropriate constitutional resolution to address these societal ills depends to a large degree on whether that society is segmented along ethnoreligious or geographical lines or whether competing identities are the major source of divisions.

Ethnoreligious or regional cleavages were indeed the most important challenge for several Arab countries including Bahrain, Syria, Libya, and Yemen. When ethnoreligious and regional divisions are the major source of discord, power-sharing can function as the institutional mechanism for preventing conflict and enhancing democracy. A rich body of literature has suggested a variety of such power-sharing institutional arrangements including federalism, consociationalism, different electoral systems (such as proportional representation), as well as constitutional guarantees for special group rights. Each of these institutional arrangements, depending on the source of societal divisions, can provide a power-sharing solution for those deeply divided societies. None of the four countries mentioned previously could constitutionalize consensual power-sharing arrangements, mostly because the constitutional negotiation processes were noninclusive.

Power-sharing arrangements are, however, less relevant in societies that are deeply divided across ideological or identity lines. The constitutional solution for ideologically polarized societies is to avoid a winner-takes-all approach. Rather, the constitution should be satisfying enough for all groups to accept. In other words, the constitutional design should be the second-best choice for most groups. To achieve this, the constitution should adopt an “incrementalist” approach, that is, using broad, vague, and often contradictory language in order to avoid a clear interpretation that might please one societal group but alienate the others (Lerner 2011).

Arab polities are divided across several ideological lines, the most important of which is perhaps the polarization between Islamists and non-Islamists (Brown 2017). During the post-2011 constitutional renegotiations, the role of

religion in society became a source of societal and political polarization in several countries. For example, in Egypt, the major public debate over the new constitution was the issue of Sharia (Maboudi and Nadi 2016). Some of the major controversial issues that emerged in these constitutional renegotiations were whether Islam should be the religion of the state, whether Islamic Sharia is *a* or *the* source of legislation, whether constitutions should criminalize blasphemy, whether *takfir* (and other forms of religious calls for violence) should be banned, and the extent to which constitutions should guarantee and protect freedom of religion for minorities.

The major challenge that parties in the constitutional bargain faced was how to acknowledge the importance of religion in society while restricting its influence over the state. While most Islamists wanted the constitution to make strong statements about the role of Islam in state and society, most seculars attempted to limit this role. To address this challenge, the Tunisian constitution-makers used an “incrementalist approach” and intentionally formulated contradictory and vague provisions on several controversial issues pertaining to the role of religion and Islamic Sharia. By contrast, the Egyptian constitution drafters under the Muslim Brotherhood government took a very different approach. Rather than using an intentionally vague and contradictory language on controversial issues dividing the Egyptian society in order to avoid a winner-takes-all outcome, the constitution in its entirety had a more Islamist tone and alienated the non-Islamists’ vision about the identity of state and society. When constitutional negotiations have clear losers and winners, there is no incentive for the losers to remain in the bargain, and as such, rebellion or new constitutional bargains will become an inevitable solution down the road.

In the section that follows, I suggest that the main reason these political and societal challenges were not resolved was because of a lack of strong and independent civil society. When strong and independent CSOs form an influential coalition in constitutional negotiations, constitutions are more likely to constrain the executive’s unchecked powers and adopt more progressive rights and power-sharing institutions. By contrast, when weakly institutionalized and unorganized civil groups are shut out of constitutional bargaining, what emerges is a constitution that cannot address prevailing political or social issues.

The Role of Civil Society

The civil society thesis is a relatively newly developed conjecture in democratic theory, which, since the early 1990s, has attempted to explain

the post–Cold War democratic transitions, specifically in Eastern Europe and Latin America (Yom 2005). The theoretical foundations of the role of civil society, however, go back to Tocqueville (1969), who suggested that civic associations are essential to stable and effective democratic institutions. Another influential work is Almond and Verba’s study of the civic culture (1963), which examines differences in democratic governance across five nations using surveys of political attitudes under the rubric of civic culture. Building on these two classic studies, Putnam (1993) develops one of the first theoretical arguments for the role of civil society in a democratic society. Putnam’s (1993) core argument is that differences in the present-day institutional performance of the various regions of Italy can be traced back to differences in patterns of civic engagement that extend back to the early Middle Ages. Giving Tocqueville his assent, Putnam (1993, 182) writes, “Tocqueville was right: Democratic government is strengthened, not weakened, when it faces a vigorous civil society.”

The civil society thesis received a mixed response of admiration, skepticism, and criticism. Some scholars criticized Putnam’s argument over the decline in democratic participation and civic engagement in established democracies and in particular in the United States (see Ladd 1996).⁴ Levi (1996) argues that Putnam’s work fails to establish the mechanism through which participation in civil society produces social capital and democratic-minded citizens. Tushnet (2000) refers to a paradox at the heart of the civil society thesis, which the extant literature has not yet explained in a satisfactory manner. That is, while the institutions of civil society are expected to function as a check on the government, they are themselves regulated and constituted by the government. For Tushnet (2000, 382), the civil society thesis failed to explain how exactly civil society institutions can be sources of influence on the government when the threat of government regulations endangers their existence. Perhaps the strongest criticism of the civil society thesis came from Fiorina (1999, 396), who argued that “civic engagement may not necessarily be a good thing.” For Fiorina, civic engagement and political participation in the United States is on the rise, and it is the main cause of a decline in political trust. This is because, Fiorina argues, “the transition to a more participatory democracy increasingly has put politics into the hands of unrepresentative participants—extreme voices in the larger political debate” (1999, 409)

Building on the critics of the civil society thesis, including Fiorina (1999), several Middle East scholars argue that the emphasis on civil society as

⁴ In another seminal study, *Bowling Alone*, Putnam (2000) writes explicitly on the decline of civil society in the United States.

a democratizing force in the region is overrated (Wiktorowicz 2000; Yom 2005). While there is some validity to these criticisms with regard to most parts of the Middle East, the role of CSOs in the region has shifted in the past two decades. A more recent scholarship, focusing mostly on labor unions in Tunisia, emphasizes the importance of CSOs for democratization (see, e.g., Angrist 2013; Bishara 2014; Beining 2016; Netterstrøm 2016). This proliferation of studies on civil society in the region is part of a broader and growing literature that explores the role of civil society in the breakdown of autocratic regimes around the globe (see, e.g., Lewis 1992; Stepan 2001; Bunce 2003). The mechanism through which civil society instigates democratic transitions seems simple and straightforward. Years of political repression under authoritarian rule trigger activism among CSOs, such as unions, syndicates, movements, and associations, which demand liberal reforms. Under the pressure for liberalization, the ruling elites are forced into bargains and soon transitional pacts ensue (Diamond 1999). Democratic transitions, however, are not as straightforward as O'Donnell and Schmitter's (1986) pacted transitions suggest, and CSOs play a more complicated role in democratic transitions than these studies presume.

I argue that civil society is the critical link between constitutional bargains and democratization. A limited, albeit very important, number of studies systematically explore the role of civil society in successful constitutional experiences. One of the most influential works is Andrew Arato's (2000) book examining the impact of different constitution-making methods on democratic constitutions and institutional outcomes in transitioning states. Arato (2000) differentiates between civil society as movements and civil society as institutions, arguing that civil society movements that are weakly institutionalized may interfere with the emergence of workable political parties which are crucial for new democracies. CSOs, as such, facilitate democratic constitutions only if they are institutionalized, particularly during moments of transition. This institutionalization in turn facilitates democratic consolidation (Linz and Stepan 1996).

Strong and independent CSOs, thus, have several key roles. They contribute to the emergence of workable political parties (Arato 2000). Also, in the absence of strong political parties, CSOs can translate popular participation into democratic constitutional text (Hudson 2020). When institutionalized, they can steer public debates on constitutions. As Putnam (1993, 90) contends, "[p]articipation in civic organizations inculcates skills of cooperation as well as a sense of shared responsibility for collective endeavors. Moreover, when individuals belong to 'cross-cutting' groups with diverse goals and members, their attitudes will tend to moderate as a result of group interaction and

crosspressures.” These “skills of cooperation” and “moderate attitudes” are crucial for successful democratic transitions. To play these functions, however, CSOs should be institutionalized, organized, and independent from state pressure, a quality that very few CSOs in the region possess, including the Tunisian UGTT.

Civil Society in the Arab World

Tunisia’s “democratization through constitutionalism,” which was the way regimes transitioned in the Third Wave in Eastern Europe and Latin America (1973 until about 2000), may prove exceptional worldwide in the present era of authoritarian backsliding. Tunisia, in contrast to other Arab Spring cases, such as Egypt, is distinguished by strong and independent CSOs like labor unions. The Tunisian Bar Association, the Tunisian League for Human Rights, the UTICA, and the UGTT, for example, are among the oldest and most organized CSOs in the whole region and played a significant role in Tunisia’s recent transition toward democracy and won accolades for stewarding the country’s democracy through constitutionalism (Chayes 2014).

The Egyptian state, by contrast, subordinated CSOs, rendering them incapable of channeling people’s demands for democracy. As Stepan and Linz (2013) argue, associational life and civil groups play an important role in the destruction of authoritarian regimes and the construction of democracy. Although several Egyptian CSOs were successful in mobilizing protesters against President Hosni Mubarak, they were less effective in shaping the country’s transition (Meisburger 2012). The existence of independent and strong interest groups in Tunisia, however, allowed Tunisians to participate, in a way Egyptians could not; even though the social media participation of Egyptians, who “liked” the 2012 constitution in record numbers on Facebook, was unprecedented (Maboudi and Nadi 2016).

The case of Egypt is typical in the region, where the proliferation of associational life since the 1990s has mostly been a function of authoritarian regimes’ strategy for controlled liberalization under pressure from Western countries and international organizations (Yom 2005). The MENA nations, which are often said to base political identities on ethnic and tribal clans and “the politics of the belly” (Jean-François 1993), are better described as having a weak civil society. The region’s lag in democratization (Norton 1993, 1995), the robustness of its authoritarianism (Bellin 2004), and its economic underdevelopment (Kuran 2004) can be (at least partially) attributed to the weakness of civil society. Timur Kuran, like many other economists, argues that weak civil society in the region is the unintended consequence of institutions historically rooted in Islam, particularly “the strict individualism of Islamic

law and its lack of a concept of corpora [written laws] which hindered organizational development and contributed to keeping society weak” (2004, 71). This is, however, not to say that Islamic law contradicts the formation of civil society and interest groups but rather that Islamic institutions (both formal and informal) had monopolized associational life for centuries, hindering the development of nonreligious CSOs in most parts of the region (Yom 2005). As anthropologists and historians indicate, mosques have historically been sources of social, political, educational, and even medical activities in the region (Al-Sayyid 1995). More recently, however, there has been a boom of volunteer and professional organizations in the Middle East, and Islamists comprise only a portion of these groups (Antoun 2000). Women’s movements transcending particular religious interests were the cornerstones of the 2009 Green Movement in Iran and the 2011 Jasmine Revolution in Tunisia. And while the business groups in Egypt and Jordan have strongly represented economic interests, students’ movements in Morocco have forced the state to take unprecedented steps to improve the socioeconomic status of the youth.

The success of civil society in translating societal demands into constitutional language does not, however, lie in the sheer number of these organizations. While before the Arab Spring, Egypt, Morocco, Algeria, Lebanon, and the Palestinian territories had the largest per capita CSOs (Yom 2005, 16), for the most part, these institutions were “more an instrument of state social control than a mechanism of collective empowerment” (Wiktorowicz 2000, 43). CSOs can translate social demands into a constitutional language only when they have political weight and function in favorable circumstances. The Tunisian UGTT, in that sense, is a unique organization in the Arab world. The union is considered one of the most important political players in Tunisia, particularly after the fall of Ben Ali’s regime, which in alliance with other CSOs could steer the constitutional debate and effectively act as a third-party mediator when negotiations reached a deadlock. What can then explain the failure of UGTT’s counterparts in other countries to act as effective third-party mediators and champions of people’s will? I argue that several factors can render civil society ineffective.

First, without an inclusive and participatory process, civil society cannot play its democratizing role. Noninclusive processes keep civil society out of the constitutional bargain and subsequently weaken their role in the democratic transition. Inclusive processes, by contrast, provide an opportunity for civil society to be part of the constitutional bargain. Though necessary, inclusive and participatory constitution-making is not a sufficient criterion for the success of civil society in its democratizing role. Besides constitution-making features, several other factors may create obstacles for civil society. At the onset

of the Arab Spring, most CSOs faced various endogenous and exogenous challenges, which undermined their work.

Most youth, women, and diaspora movements suffered from the lack of organizational capacity and essential political skills and training. Moreover, many of the established unions and NGOs that possessed organizational capacity were struggling with the lack of public legitimacy due to either state co-optation or foreign donors' influence. Besides these two endogenous challenges, most CSOs faced exogenous hurdles to their work. None of these groups were protected by formal or informal institutions such as constitutional guarantees or political norms, making them vulnerable to states' repressive apparatus. That is, they were not institutionalized. To make matters even worse, these weakly institutionalized CSOs had to operate in hostile political environments rife with ethnic, religious, regional, and ideological polarization as well as military and regional interventions.

Indeed, the predominance of regional divisions in Yemen and Libya and ethnoreligious divisions in Syria negatively affected the emergence of a strong civil society that could facilitate the constitutional bargain and democratic transition processes in these nations. Similarly, domestic and foreign military campaigns in Egypt and Bahrain muted civil society and rendered it ineffective. By contrast, when these exogenous and endogenous challenges do not exist, an organized, independent, and institutionalized civil society can emerge to steer the constitutional bargain in a direction that may resolve the social and political ills of authoritarianism.

Participatory and Inclusive Processes

I consider next the mechanism through which civil groups help consolidate democracy in nations where they operate by focusing on their participation in constitutional deliberations. As Landemore (2012) contends, we can differentiate among three forms of participation. The first is deliberative, emphasizing the centrality of "epistemic competence" (Landemore 2012, 254). The second form is participation through mere aggregation, where "strength in numbers" drives non-elite participation. The third form of participation, which is less optimal than formal deliberation but perhaps normatively superior to sheer aggregation, is elite bargaining and pacts. This approach is the form of interest group politics popularized by O'Donnell and Schmitter (1986) and also used later by Higley and Gunther (1992) and Brownlee (2007). In Landemore's (2012) view, bargaining is an inferior form of participation to formal deliberation because it leaves the door open for "strategic" communication, whereby actors are not sincere about their preferences.

Building on Landmore (2012), I argue that deliberation is the main mechanism through which CSOs can fortify democracy by moderating the constitutional discussion. However, this book argues that successful deliberation takes place through two distinct paths: individual-level participation and organized group inclusion. Indeed, without inclusion, civil society cannot be part of the constitutional debate, and without participation, it cannot create a public sphere for constitutional discussions. Going back to the self-enforcing thesis, both inclusion and participation are important for securing the necessary conditions for a self-enforcing constitution. An *inclusive* process guarantees a “fair” constitution, which is beneficial to most groups in the society. And a *participatory* process, following propositions of participatory constitution-making models, can create a consensus among citizens and a constituency of citizens that are willing to defend and support the terms of the constitutional bargain, which will exponentially increase the cost of renegeing on constitutional limits.

It is, therefore, important to first differentiate between *inclusion* and *participation*.⁵ With a few exceptions, including Horowitz (2013) and Eisenstadt and Maboudi (2019), most previous studies have either combined participation and inclusion or use the two terms interchangeably to refer to the same phenomenon. Participation refers to the inclusion of the mass or the general public in any stage of constitutional reforms processes. The most common form of public participation in constitution-making involves the popular vote (to elect a constituent assembly) and referenda (to vote on the final draft of the constitution). Most citizens get involved in constitution-making through these passive means, both of which are representative forms of democracy. But neither is educative: They provide only minimal levels of information and create at best a minimal sense of constitutionalism or constitutional attachment in the society. However, there is another – more active – form of public participation, rare although it may be, which is closer to the concept of direct democracy. Public deliberation on the content of constitutions can lead to democratically superior outcomes (Landmore 2017). What can be more democratic than people coming together to debate their own constitution and share its authorship? Yet, public deliberation is the least common type of public engagement in constitution-making. Only 12 percent of constitutions written since the Third Wave of democracy incorporated public deliberation.⁶ Most constitutional processes are participatory only in

⁵ Chapter 2 extensively discusses these two concepts and how they are measured in this study.

⁶ Chapter 2 discusses some potential reasons for why public deliberation is still uncommon in constitution-making.

the final stage of constitutional ratification through plebiscite (50 percent of cases). Even then, public participation can – and often does – serve functions other than a genuine form of democracy.

More often in authoritarian or hybrid regimes, but sometimes in democracies as well, political elites mobilize public participation for either window-dressing or populist ends. Public participation quickly turns into a political tool, rather than an expression of the people's will. Such processes focus more on giving the impression of participation than creating a public sphere for constitutional discussions. In this situation, CSOs (even if allowed to take part) and their work will most likely have little or no effect on engaging the public with constitutional bargaining. Moreover, by mimicking the characteristics of inclusive and/or participatory reforms, window-dressing and populist constitution-making processes can pose a danger to democratic movements.

Inclusion and participation, thus, should not be treated as the same. While participation entails individual decisions, as citizens individually try to make a change, inclusion aggregates individual voices into groups and associations that can better organize and channel people's voices at the constitutional negotiation table. For Horowitz (2013) and Eisenstadt and Maboudi (2019), this collective strength is the primary reason why inclusive processes are more successful in democracy-building than mere participation. Yet, inclusion and participation are not mutually exclusive, and a democratic constitutional process could and should entail both. Indeed, while inclusion matters significantly, without meaningful public participation, CSOs cannot improve the people's constitutional knowledge and engage them in the constitutional bargain. Empirical evidence, although limited, points to the importance of both inclusion and participation. Eisenstadt et al. (2015, 2017a) and Fruhstorfer and Hudson (2019) find empirical evidence that participation, especially in the early stages of constitution-making, yields more democratic outcomes. Both studies, however, combine inclusion and participation in one estimate. Eisenstadt and Maboudi (2019), by contrast, show that when participation and inclusion are measured separately, inclusion matters most for post-constitutional levels of democracy. In Chapter 2, I show that public participation also matters for the content of constitutions: More participation leads to more democratic provisions, especially individual and group rights, in constitutions.

Constituent assemblies (more precisely, coalitions with the majority of seats) may have several motives for initiating an inclusive and participatory process, but perhaps the most important one is to make credible commitments to the minority groups in the assembly. As the process of constitutional

renegotiation in Egypt (and the subsequent overthrow of the Muslim Brotherhood government by the military and angry protesters) shows, participation and inclusion raise the cost of renegeing on the constitutional bargain. This increased cost functions as insurance for the minority groups in the bargain.

A Mutually Reinforcing Mechanism

The three components of this thesis – constitutional design, civil society, and process – are most likely to be mutually reinforcing. Inclusive and participatory processes are likely to empower CSOs to take a meaningful part in the constitutional debate. At the same time, it is likely that a strong and independent civil society will increase the pressure for a more inclusive process. Indeed, more inclusion increases the number of interest groups with a wider range of “ideal points,” which exacerbates the coordination problem (Elkins et al. 2009), making it more difficult for civil society to work toward creating a national consensus on the most important constitutional issues. As will be discussed in Chapter 3, to overcome this challenge, anti-gridlock mechanisms should be institutionalized in the constitutional negotiation process.

It is especially important for civil society to create public interest and awareness about constitutional issues beyond those pertaining to ideological cleavages, which already mobilize large segments of society. Without these efforts, even with participatory processes, the general public will probably be less engaged in constitutional discussions. If, on the contrary, CSOs create a public sphere for constitutional debate, the constitutional design is more likely to address the concerns raised in these public fora. A constitutional design that addresses the social and political challenges is very likely to enhance democracy, which in turn, generates further inclusion and participation.

I acknowledge that there is a certain level of endogeneity to this argument. Given the cross-national nature of this study and the interaction of several endogenous and exogenous elements, this degree of endogeneity is unavoidable. Through a combination of robust statistical analysis and empirical case studies from the Arab Spring, however, I seek to show that the impact of this endogeneity on the major findings is likely to be minimal. The remainder of this chapter offers a very brief introduction to the Arab Spring uprisings and events that led to constitutional renegotiations in the MENA.

THE ARAB SPRING: CONSTITUTIONAL
CONTINUITY AND CHANGE

The most common narrative on the popular uprisings in the Arab world (the Arab Spring) is that the sequel of upheavals started on December 17, 2010, when a twenty-six-year-old street vendor, Mohamed Bouazizi, set himself on fire in front of a local municipal office in the city of Sidi Bouzid in central Tunisia after his property was confiscated by local officials (Brownlee et al. 2015). This action led to massive protests in Sidi Bouzid. President Zine El Abidine Ben Ali, the Tunisian dictator, initially ignored the protests, then called them riots. He finally recognized the severity of the circumstances and paid a visit to Bouazizi at the hospital, but his visit was too little too late. Bouazizi died a few days later, and his shocking death triggered massive protests across the country against unemployment, corruption, and government brutality. Under mounting pressure, President Ben Ali was forced to flee the country after the military refused to use force to put down the protests. A relatively peaceful democratic transition followed Ben Ali's departure, leading to the promulgation of the most progressive Arab constitution in January 2014.

The revolution in Tunisia spreads rapidly across the MENA. In Egypt, hundreds of thousands of protesters gathered in Tahrir Square and other squares around the country and demanded the departure of their own dictator, President Hosni Mubarak. Seeing Mubarak as a liability, the powerful Egyptian military forced the president to resign only eighteen days after the protests started. Soon it became clear that although Mubarak resigned, the military was less willing to give up power. The sweeping electoral victory of the Muslim Brotherhood and deep divisions between the Islamists and non-Islamists resulted in a controversial constitution in 2012, which led to mass protests against the democratically elected President Mohamed Morsi. The military capitalized on popular dissatisfaction with the Muslim Brotherhood government, staged a coup, and paved the way for a new constitution in 2014. The relatively democratic constitution of 2014 did not survive long, and in 2019, the Egyptian parliament approved a bill to amend the constitution, changing the length of presidential terms to six years with two-term limits. This change allows current President El-Sisi to potentially remain in office until 2030.

In Morocco, a group of youths (later named the February 20 Youth Movement) organized a mass protest in Rabat, Casablanca, and other cities on February 20, 2011 (Benchemsi 2012). Demonstrators called for major reforms including a new, more democratic constitution. In response to the

protests, King Mohammed VI gave a rare, televised speech, known as the “March 9 speech,” promising a “comprehensive constitutional change” featuring “the rule of law,” an “independent judiciary,” and an “elected government that reflects the will of the people through the ballot box,” making Morocco the first nation to change its constitution in response to the Arab Spring uprisings (Banani 2012, 11–15). In another relatively poor monarchy, Jordan, the protests started as early as January 2011. The fate of Jordan was very similar to that of Morocco. Protesters concentrated on unemployment, inflation, corruption, and real constitutional and electoral reforms to make the Hashemite kingdom a true constitutional monarchy. Like his Moroccan counterpart, King Abdullah II of Jordan was able to skillfully manage the situation by a series of constitutional changes in 2011, 2014, and 2016, which provided nothing but mere lip service to democracy.

In Yemen, violence escalated fast, as President Ali Abdullah Saleh was unwilling to give up power until he narrowly escaped an assassination attempt in June 2011. He eventually signed a power transition plan, prepared by the Gulf Cooperation Council (GCC), to relinquish power in November 2011. Yemen seemed to be on track for democratic transition with the appointment of Abdrabbuh Mansur Hadi as the interim president who took office in February 2012. But shortly after a draft constitution was introduced in January 2015, the Shia Houthis from the less affluent south, who were excluded from the constitutional renegotiation, rebelled and occupied the presidential palace. Soon, Saudi Arabia formed a Gulf coalition against the Houthi rebels, pushing Yemen further into a civil war, which has so far claimed thousands of lives.

In Syria, like Yemen, an armed rebellion against the regime was met with a violent response from the state and armed international intervention, which fueled the civil war. Unlike in Yemen, however, the Syrian protesters from Raqqa, a poor Sunni town and the birthplace of the uprisings, did not initially chant *Erhal* (Leave!) and were only demanding more rights and greater equality. From January to March 2011, the protests were minor and mostly concentrated in Daraa and other small Sunni-populated towns. Syria’s Alawi Shia dictator, President Bashar Al-Assad, however, reacted to these protests with an iron fist. In mid-March, major protests erupted in Daraa and Damascus in response to the Baathi government’s brutal crackdown of peaceful protests, such as the incarceration and torture of fifteen young students who were writing anti-government graffiti, including the thirteen-year-old Hamza Al-Khateeb, who was tortured and killed by the regime. A few months later, the rebel Free Syrian Army was created on July 29, 2011, marking the transition into an armed insurgency. President Al-Assad made some late

promises for change, including a new constitution adopted in 2012, which did not make any changes to the authoritarian status quo. The rise of the terrorist organization Islamic State of Iraq and Syria (ISIS) on the one hand, and increasing support from Iran, Hizbullah (the Lebanese paramilitary group), and Russia, on the other, eventually kept Al-Assad in power.

In the Gulf region, major protests erupted only in Saudi Arabia and Bahrain. In Saudi Arabia, in addition to constitutional reforms in 2013, King Abdullah moved quickly with co-opting the protesters by financial promises, including the creation of jobs for the youth, and managed to control the situation. Unlike the rest of the Gulf region, however, the protests in Bahrain were considered strategically important for regional and global powers, including Saudi Arabia and the United States. The small, Shia-majority island ruled by a minority Sunni dynasty is a close ally to Saudi Arabia and hosts the US Fifth Fleet in the Persian Gulf. Iran, which supports the Shia Bahraini, has historical claims over the island. Therefore, when the protests began among the Shia population for justice and equality, they were met with a government crackdown with the help of the Saudi militia. Despite Bahrain Emir's pledges for democratic reforms, constitutional changes in 2012 and 2017 did little in changing the status quo or satisfying popular demands for equality and justice.

Among all Arab leaders, Libya's Muammar Qaddafi had the worst fate. In Libya, uprisings started in February 2011 after security forces opened fire on a protest in the city of Benghazi. With the military remaining loyal to Libya's dictator, protests soon turned into a blood bath. After the UN Security Council authorized all necessary means to protect civilians in March 2011, NATO intervened by attacking Qaddafi's forces and military strongholds. After four decades in power, Qaddafi was captured and killed by a group of rioters in August 2011. The National Transitional Council (NTC), which led the revolt, became the de facto government of Libya between 2011 and 2012 and adopted an interim constitution (Constitutional Declaration) in 2011. Article 30 of this constitution called for the election of a national legislative body, the General National Congress (GNC), in less than a year. The to-be-elected GNC was tasked with appointing a committee to draft a permanent constitution in sixty days and submit the draft for approval in the GNC, with subsequent ratification coming through a public referendum. Political turmoil and concerns over the proportional make-up of the GNC, however, led the NTC to amend the Constitutional Declaration only a few days before the legislative elections (Gluck 2015). The outbreak of violence, with some 300 militia groups fighting each other, regional divisions, and lack of any constructive negotiations have so far prevented the creation of a permanent constitution that binds Libyans together.

To the western borders of Libya, protests started in Algeria from late December 2010 and continued until early 2012. The massive protests around the country had similar causes including unemployment, inflation, corruption, restrictions on freedom of speech, and poor living conditions. The Algerian government responded with a series of reforms and suppression of the protests. The first major reform was the lifting of the state of emergency in February 2011. During the initial months of the uprisings, President Bouteflika, Algeria's ruler since 1999, announced that he would initiate a series of democratic reforms in the country. Bouteflika appointed his minister of state and senior advisor, Ahmed Ouyahia, to undertake the constitutional reform process. After five years of consultations behind closed doors, constitutional amendments were introduced and approved by both legislative chambers in February 2016. The constitutional reform package included seventy-four amendments and thirty-eight new provisions. The most important change was made to Article 74, which since 2008 lifted a two-term limit on the presidency so as to allow Bouteflika to run for a third and fourth term. The 2016 constitution reinstated the presidential term limit, although it allowed Bouteflika to finish his fourth term in 2019 and to run for a fifth term if he wished. Although eventually the status quo did not change and Bouteflika weathered the uprisings, the 2016 revised constitution embodies more civil rights and liberties than its predecessors, including the recognition of the role of women and youth in society, freedom of the press, and more linguistic rights for the Imazighen minority (Maboudi 2019, 568–569).

Lastly, in a usually forgotten case, the Kingdom of Oman, minor protests had a significant impact on political and economic reforms. The demonstrations started with about 200 protesters gathering on January 17, 2011, against rising prices of goods, corruption, and low wages. The protests increased, on and off, until they peaked in April. The government managed the protests by initiating a number of social, political, and economic reforms including constitutional amendments in October 2011 and increasing the minimum wage. Although the status quo did not change and the position of Sultan Qaboos, the King of Oman, remained very strong, those small protests were strong enough to bring about reforms that were ignored for years in the kingdom.

As this brief overview shows, the Arab Spring uprisings were closely tied to constitutional reforms throughout the Arab world. While a number of these constitutional reforms did change the status quo, most failed in bringing about meaningful reforms. Nonetheless, this wave of constitutional reforms is unprecedented in a region, which boasts constitutional stability. As Table 1.1 shows,

TABLE 1.1 *History of constitutions in the Middle East and North Africa*

Country	Number of Constitutions	Earliest Constitution	Number of Constitutions since 1974	Average Durability of Constitutions
Afghanistan	6	1923	3	11.5
Algeria	3	1963	2	12
Bahrain	1	1973	0	14
Egypt	7	1882	2	12.5
Iran	2	1906	1	55
Iraq	3	1925	1	17
Israel	1	1958	0	57
Jordan	2	1946	0	34.5
Kuwait	2	1938	0	27
Lebanon	1	1926	0	82
Libya	2	1951	0	29
Morocco	4	1962	1	13
Oman	1	1996	1	19
Qatar	1	2003	1	12
Saudi Arabia	1	1992	1	23
Syria	5	1950	1	9
Tunisia	3	1861	1	19
Turkey	7	1876	1	15.5
United Arab Emirates	1	1971	0	44
Yemen	2	1970	1	14
Total	55	–	17	–
Mean	2.75	–	0.85	26

Source: Author's estimation based on Brown (2002) and Comparative Constitution Project data set (Elkins et al. 2009)

the average duration of the fifty-five constitutions adopted in the region from 1861 to 2019 is twenty-six years, which is seven years longer than the global average age of constitutions (Elkins et al. 2009). The most durable constitution in the region is the Lebanese Constitution of 1926, a constitution that was suspended and reinstated twice by the French colonial administration (Brown 2002, 71).⁷

What has changed since the first Arab constitution in 1861? As Nathan Brown (2002) noted in his seminal book, *Constitutions in a Nonconstitutional World*, while constitutions and constitution-making have evolved in the region over the

⁷ It was first suspended for two years between 1932 and 1934 and again between 1939 and 1943.

last century and a half, these constitutional renovations have not brought constitutionalism and rule of law to the Arab world. There was some hope that the constitutional wave of the Arab Spring might eventually establish constitutionalism and democracy in the region. But that dream very soon faded away as authoritarianism withstood the popular pressure for democratic reforms. The new constitutional order in the Arab world, with the exception of Tunisia, could not remedy the social and political ills that triggered the unprecedented uprisings in the region. This outcome was partly because of noninclusive and nonparticipatory processes and partly because of a lack of strong and independent civil society. The next chapter evaluates the relationship between democratic constitution-making processes and the democraticity of the constitution using empirical evidence from two cross-national studies.