

Introduction

Major constitutional reforms were adopted throughout the Arab world following the outbreak of the so-called “Arab Spring.” During the protest movements, demonstrations and, in some cases, even revolutions that took place between the end of 2010 and the beginning of 2011 (but also in the following years), the Arab people not only called for profound political, social, and economic reforms but also demanded radical constitutional changes aimed at reinforcing safeguards for fundamental rights, strengthening the principle of separation of powers, and increasing the independence of the judiciary. A new wave of constitution-building thus began in the Arab world, one that – in the aspirations of the protesters – should have made a clean break with the previous autocratic or semi-autocratic regimes.

To what extent were the aspirations of demonstrators reflected in the post-2011 Arab constitutions and constitutional reforms? How were these documents drafted? What are the most significant elements of continuity and change within the new constitutional texts? What purposes are these texts designed to serve? To what extent have constitutional provisions been enforced? Have the principles of constitutionalism been strengthened compared to the past? These are some of the key questions this book addresses. Although the constitutional experiences of the Arab world were already objects of study in the past,¹ scholarly interest has developed significantly following the Arab Spring.² This can be partly explained by the

¹ Among the comparative volumes on *pre*-Arab Spring constitutions, see, for example, Bernabé López García and Cecilia Fernández Suzor, *Introducción a los regímenes y constituciones árabes* (Centro de Estudios Constitucionales 1985); *Les constitutions des pays arabes: Colloque de Beyrouth, 1998* (Bruylant 1999); Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (SUNY Press 2002); Maurizio Oliviero, *Il costituzionalismo dei paesi arabi. I. Le Costituzioni del Maghreb* (Giuffrè 2003); Chibli Mallat, *Introduction to Middle Eastern Law* (Oxford University Press 2007), 141ff.; Rainer Grote and Tilmann J. Röder (eds.), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press 2012).

² Among the comparative volumes on *post*-Arab Spring constitutions, see, for example, Antoni Abat i Ninet and Mark Tushnet, *The Arab Spring: An Essay on Revolution and Constitutionalism* (Edward Elgar 2015); Justin O. Frosini and Francesco Biagi (eds.), *Political and Constitutional Transitions in North Africa: Actors and Factors* (Routledge 2015); Luca Mezzetti, *La libertà decapitata: Dalle*

fact that, especially at the beginning, these protest movements generated many expectations, so much so as to have even raised hopes regarding a *fourth* wave of democratization.³ Furthermore, in some cases, important international actors were involved in the constitution-drafting processes: For example, the European Commission for Democracy through Law (known as the Venice Commission, the advisory body on constitutional issues of the Council of Europe) played a key role in the process that led to the adoption of the 2014 Tunisian Constitution, and the United Nations has been facilitating the current constituent processes in Syria and Libya. More generally, it was the magnitude of this new wave of constitution-building that attracted scholarly interest: In recent years, no regions in the world have witnessed the adoption of such a large number of new constitutions and constitutional reforms. These constitutional experiences often have many elements in common, although they are also characterized by significant differences. In some cases, these differences can be found even within the same country. One need only consider the differences in terms of the system of government, the place of Islam and *sharia*, gender equality, and the role of the constitutional court between the Egyptian Constitutions of 2012 and 2014, or between the Tunisian Constitutions of 2014 and 2022.

1.1 FOCUS OF THE BOOK

As indicated in the title, this volume focuses on the processes of *constitution-building* after the *Arab Spring* from a *comparative perspective*. What does each of these expressions specifically mean for the purposes of this book?

Constitution-building includes three main components, namely (1) the process of constitution-making or constitutional reform, (2) the substantive choices made by framers that are formalized in the new constitutional text, and (3) the process of constitutional enforcement. The analysis of these components represents the core of the book. The volume mainly focuses on seven national experiences of constitution-building, namely those of Morocco (constitution of 2011), Algeria (constitutional

Primavera arabe al Califfato (Editoriale Scientifica 2016); Rainer Grote and Tilmann J. Röder (eds.), *Constitutionalism, Human Rights, and Islam after the Arab Spring* (Oxford University Press 2016); Christophe Boutin, Jean-Yves De Cara, and Charles Nimer Saint-Prot, *Les constitutions arabes* (Karthala 2016); Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (Oxford University Press 2017); Zaid Al-Ali, *Arab Constitutionalism: The Coming Revolution* (Cambridge University Press 2021); Ciro Sbailò, *Diritto pubblico dell'Islam mediterraneo. Linee evolutive degli ordinamenti nordafricani contemporanei: Marocco, Algeria, Tunisia, Libia, Egitto* (Wolters Kluwer – CEDAM 2022); Tofiq Maboudi, *The "Fall" of the Arab Spring: Democracy's Challenges and Efforts to Reconstitute the Middle East* (Cambridge University Press 2022); *Journal of Constitutional Law in the Middle East and North Africa*, special issue on "Arab Constitutional Responses to the Revolutions and Transformations in the Region" edited by Rim Turkmani and Tamara El Khoury (December 2023), www.jcl-mena.org

³ See Samuel Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press 1991).

reforms of 2016 and 2020), Tunisia (constitutions of 2014 and 2022), Libya (draft constitution of 2017, and the on-going UN-facilitated constitution-making process), Egypt (constitutions of 2012 and 2014 – the latter being amended in 2019), Syria (constitution of 2012 and the ongoing UN-facilitated constituent process), and Jordan (constitutional reforms of 2011, 2014, 2016, and 2022). (In some cases, brief references will also be made to the constitutional experiences of other Arab countries.) The vast majority of these constitutional changes are directly related to the Arab Spring. However, even in those cases in which the link is less evident, there is still a connection with the 2011 uprisings. In Tunisia, for example, with the adoption of the 2022 constitution, President Kaïs Saïed aimed to mark a radical discontinuity with the 2014 constitution, which was one of the most important achievements of the 2011 Revolution. While some of the constitutional developments that have taken place in the region (e.g., in Yemen) have not been included in the book, the seven constitutional experiences covered in this work seem to be sufficiently representative in order to be able to identify the major features and trends characterizing this latest wave of constitution-building in the Arab world.

The *Arab Spring* is certainly not an accurate expression, especially from a scientific standpoint. When it was first used at the beginning of the 2011 uprisings, it was based on the presumption that the outcome of the transition processes in the region would be the establishment of a democratic regime, a fact that has clearly not occurred. The use of that expression shows that Guillermo O'Donnell's and Philippe C. Schmitter's teachings regarding the *uncertainty* of the outcome of transition processes had not been sufficiently considered. Indeed, in their seminal book *Transitions from Authoritarian Rule*, these two prominent scholars observed that

the high degree of indeterminacy embedded in situations where unexpected events (*fortuna*), insufficient information, hurried and audacious choices, confusion about motives and interests, plasticity, and even indefiniteness of political identities, as well as the talents of specific individuals (*virtù*), are frequently decisive in determining the outcomes.⁴

In the past, the inaccuracy of the expression Arab Spring had prompted me not to use it altogether.⁵ In this work, I have decided instead to rely on it nonetheless for two main reasons: First, after more than a decade, “Arab Spring” continues to be the most common and direct way to refer to the 2011 protest movements and revolutions throughout the region. Second, although it is imprecise and inaccurate, this

⁴ Guillermo O'Donnell and Philippe C. Schmitter, “Tentative Conclusions about Uncertain Democracies” in Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead (eds.), *Transitions from Authoritarian Rule* (The Johns Hopkins University Press 1986), 5.

⁵ See Justin O. Frosini and Francesco Biagi, “Transitions from Authoritarian Rule Following the Arab Uprisings: A Matter of Variables” in Frosini and Biagi (eds.) 2015, *Political and Constitutional Transitions*, at pp. 161–162.

expression is also widely used in leading *scholarly* works. Thus, it seems that the effectiveness of the expression has prevailed over its form.

Although this volume focuses on the period from December 17, 2010 (when a young street vendor, Mohamed Bouazizi, set himself on fire in the town of Sidi Bouzid, Tunisia – an episode that is usually considered as the “official” starting point of the Arab Spring) to January 29, 2023 (when the second round of the December 2022–January 2023 parliamentary elections in Tunisia took place – elections that far from being an exercise in democracy will go down in history for record abstentionism), several references will also be made to the constitutional experiences in the region prior to the Arab Spring, thus showing both the *prius* and the *posterius*.

This book adopts a *comparative perspective*, which is essential in order to fully understand constitutional developments in the region. In particular, it compares and contrasts the seven national experiences referred to above through four analytical frameworks (rather than proceeding country by country). They are (1) constitution-drafting and constitutional reform processes; (2) separation of powers and forms of government; (3) constitutional justice; and (4) religion, women, and non-Muslims within the framework of citizenship. This approach *by topic* has appeared necessary in order to better examine the constitutional *trends* that followed the outbreak of the 2011 uprisings. A country-by-country analysis would have offered a wealth of details that a cross-cutting approach can hardly guarantee. However, it would most likely have hindered the identification and analysis of the trends prevailing throughout the region. Therefore, some details concerning the individual countries are missing, although the overall picture is probably clearer.

Ultimately, by providing a comprehensive comparative analysis of constitution-building processes after the 2011 uprisings, this volume aims to contribute to a more in-depth understanding of the social, political, and institutional dynamics in a region that has historically been very difficult to decipher.

1.2 METHODOLOGY

This volume adopts an interdisciplinary approach. Authoritative comparative legal scholars have repeatedly emphasized the crucial importance of such an approach in comparative studies. Pierre Legrand, for example, has stressed that the quality of comparison “not only depends on the brute knowledge” of foreign law but also “on the depth of a reflection which requires [the comparative scholar] to move to planets that are *a priori* unknown to him, such as anthropology, linguistics, sociology, history, cognitive psychology, and philosophy.”⁶ Without such an interdisciplinary approach, Legrand contends, the comparative scholar risks “regard[ing] social problems and their legal treatment as occurring in a cultural vacuum,” perpetuating “the kind of dreary positivism which relegates comparative legal studies to a technical

⁶ Pierre Legrand, *Le droit comparé* (Presses Universitaires de France 1999), 27.

exercise whose output is deeply flawed [...].”⁷ More recently, Ran Hirschl has argued that “the study of comparative constitutional law must open up to the social sciences,” toward “a more holistic approach to the study of constitutions across polities (comparative constitutional *studies*)” (emphasis in original).⁸

This book largely relies on the contributions of historians, political scientists, sociologists, and religious scholars. It could not have been otherwise, since in the Arab-Islamic world, all these subjects are intimately related to one another. Consider, for example, the role played by the king in the Moroccan legal system. The 2011 constitution vests him not only with temporal powers (as Head of State) but also with spiritual powers (as *Amir al-Mouminine*, i.e., Commander of the Faithful). His role as temporal leader and religious guide cannot be fully understood unless one considers that King Mohammed VI, as a member of the Alawi dynasty (which has ruled over the country since the mid-1600s), claims direct descent from Prophet Mohammed. Relying on different social sciences (particularly religious studies) is also necessary when examining the current challenges of citizenship in the Arab region. For example, certain categories of people – particularly women and non-Muslims – have thus far never been granted, *de jure* and *de facto*, the status of full citizens, also because of a certain interpretation of Islamic religious texts.

Thus, this volume seeks to present a comparison among “cultures,” as Peter Häberle puts it. Indeed, constitutional comparison only makes sense where it is immersed in the *culture* that forms the background to the different constitutional experiences.⁹ In order to carry out this kind of comparison, my field experience of work and research in the region have been essential. The book would not have been the same without it.

I.3 PLAN OF THE BOOK

The book is comprised of four chapters.

Chapter 1 focuses on constitution-making and constitutional reform processes. After providing a brief historical overview of the four waves of constitution-drafting in the Arab world (which began in the mid-nineteenth century and spread into

⁷ Pierre Legrand, “The Same and the Different” in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003), 276–277. In a similar vein, see also Giovanni Bognetti, *Introduzione al diritto costituzionale comparato* (Giappichelli 1994), 178–179. On the challenges in the use of history and, more in general, of an interdisciplinary approach in comparative law, see Giuseppe Franco Ferrari, “Comparazione e storia” (2021) 2 *Diritto pubblico comparato ed europeo*, 281ff.; Arianna Vendaschi, “Diritto comparato e interdisciplinarietà: tra innata vocazione e incompiuta realizzazione?” (2021) 2 *Diritto pubblico comparato ed europeo*, 301ff.

⁸ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Cambridge University Press 2014), 191.

⁹ See Peter Häberle, *Verfassungslehre als Kulturwissenschaft* (Duncker & Humblot 1998), 28ff. In a similar vein, see also Paolo Ridola, *Esperienza Costituzioni Storia: Pagine di storia costituzionale* (Jovene 2019), 19ff.

the twenty-first century), this chapter examines closely the post-Arab Spring constitution-making and constitutional reform processes, focusing on the following elements: the body in charge of drafting the constitution and the role played by the ruling regime (“bottom-up” vs. “top-down” processes); the degree of openness and transparency of the process; the duration of the process; the role played by political parties; the role of civil society; the role played by external actors; the influence of previous domestic constitutions and their “reactivation”; and the influence of foreign constitutional models. The chapter shows that the vast majority of these processes were characterized by major flaws and shortcomings, a fact that not only contributed to weakening the democratic nature of the new constitutions but also had a negative impact on the legitimacy and sense of ownership of these texts and, ultimately, on the transition processes as a whole. Although it should not be idealized, the process that led to the adoption of the 2014 Tunisian Constitution was to a large extent a positive exception. Indeed, despite the extremely complicated political context and some serious episodes of violence, that process was characterized by a much stronger democratic spirit.

Chapter 2 discusses the systems of government and the distribution of powers under post-2011 Arab constitutions. It first examines the issue of the overconcentration of authority in the hands of the head of state (with the notable exception – again – of the 2014 Tunisian Constitution, which provided for a genuine semi-presidential system and a fairly robust system of checks and balances [at least on paper]). A special focus is placed on the emergency regimes: Despite some attempts to prevent abuses, the new constitutional provisions governing states of emergency continue to grant to the executive branch a significant degree of discretionary power. Furthermore, the chapter shows that not only horizontal but also vertical separation of powers has remained weak, and that this limited form of decentralization has favored the consolidation of authority at the central level. The last part of the chapter discusses the main reasons for the overconcentration of power, namely the constitutional tradition (characterized by two interrelated elements, i.e., the principle of unity of power and the historical dominance of the executive), the patriarchal family, the “top-down” constitution-making processes, and external influences. One of the major consequences of the overconcentration of authority was to undermine the principle of popular sovereignty. Indeed, far from belonging exclusively to the people, sovereignty in the Arab world continues to be *held* (and not only exercised) also by other subjects, namely political (and sometimes also military) leaders, around whom the entire system rotates.

Chapter 3, on constitutional justice, aims to establish whether the new Arab bodies for constitutional review have acquired the potential to subject the executive branch to adequate checks and thus contribute to the processes of democratization more effectively than in the past. In order to understand whether a new era for constitutional review in the Arab world has begun, the chapter first discusses the origins of constitutional review in the region, as well as the main reasons why,

before the Arab Spring, constitutional courts and councils rarely acted as “counter-majoritarian” bodies. These reasons include their limited independence vis-à-vis the executive branch, deference toward the executive branch, the nature of constitutional review bodies, the “stranglehold” on access, and the political and social context in which these bodies carried out their action. The chapter then turns to an analysis of the major changes in the field of constitutional justice introduced by the post-2011 constitutions, including a limited strengthening of the independence of constitutional review bodies, the vesting of these institutions with judicial status, the broadening of access to these institutions, as well as a further expansion of their jurisdiction. The chapter also examines the role that constitutional courts and councils played in the transition processes that followed the outbreak of the Arab Spring, showing that in some countries these bodies exerted a strong influence on the direction of political and constitutional transitions, while in others the role of these bodies was much more limited. In general, constitutional courts and councils evinced a high degree of deference to the political authorities and thus made only limited contributions to securing the principles of constitutionalism. There are a few cases, however, in which these bodies delivered judgments unfavorable to the ruling regime and demonstrated a serious commitment to protecting fundamental rights and freedoms. Finally, the chapter discusses the most significant obstacles that constitutional courts and councils still need to overcome in order to emerge as effective guarantors of the principles of constitutionalism.

Chapter 4 examines issues of citizenship and religion, with a particular focus on the status of non-Muslims and women. The chapter shows how contrasting conceptions and practices of citizenship are the most appropriate prism for understanding how residents of Arab societies experience constitutional provisions. More specifically, after discussing the problematic notion of citizenship in the Arab world, the chapter analyzes the specific meaning and scope of citizenship in the post-2011 constitutional systems. Since non-Muslims and women are the two categories of people who in the past never enjoyed the status of full citizens in the Arab world, their treatment provides a litmus test for understanding whether constitutional framers have truly embraced *equal* citizenship. The chapter shows, on the one hand, that despite significant improvements with respect to the past, non-Muslims and women are still excluded from full citizenship, which remains a prerogative of male Muslims. On the other hand, however, over the past few decades – and in particular over the past few years – not only thinkers, scholars, feminists, and reformers but also prominent religious leaders and institutions have called for a more equality-based approach toward citizenship’s rights for all people, irrespective of one’s sex and religious belief. Given the profound influence that religion exerts on law and society in Arab countries, these calls might well lead to the adoption of legal reforms aimed at removing (or at least reducing) discrimination against women and non-Muslims, and might represent a first step toward replacing the differentiated citizenships that currently exist in Arab countries, with one single, full, and inclusive citizenship.

Ultimately, this chapter shows how different the interactions and relations between the state and individuals are, especially depending on one's sex and religious beliefs.

Thus, the sequence in the topics for analysis is the following: Chapter 1 examines *constitution-writing processes*; Chapters 2 and 3 focus on *state institutions and how they interact with each other*; and Chapter 4 looks at *how the state interacts with the society*.

The conclusions of the book bring things together with an analysis of the key lessons drawn from the discussion in the preceding chapters (1, 2, 3, and 4). Three main aspects have emerged. First, there exist numerous ambiguities, discrepancies, and contradictions concerning the role and functions of post-Arab Spring constitutional texts. These include (1) the idea of the constitution as a “charter of values” or as an “instrument of government”; (2) the integrative function of the constitution vis-à-vis societal fragmentation; and (3) the written and the unwritten constitution (*constitutional dichotomies*). Second, several constitutional provisions – especially those dealing with fundamental principles as well as rights and freedoms – have often remained little more than a dead letter, a fact that has generated major resentment, frustration, and anger among Arab people (*constitutional enforcement*). Third, although post-2011 constitutions are still being squeezed in a context marked by constrained constitutionalism, the Tunisian constitutional experience during the 2011–2021 period showed that the possibility of breaking with the tradition of previous autocratic regimes is not simply a mirage (*constitutional wishful thinking?*).

1

We the People or We the Rulers?

*Constitution-Making and Constitutional Reform Processes*1.1 FOUR WAVES OF CONSTITUTION-DRAFTING
IN THE ARAB WORLD

According to the periodization proposed by Nathan J. Brown, the Arab world has experienced four waves of constitution-making, which began in the mid-nineteenth century and spread into the twenty-first century.¹ The first wave – which involved not only the Arab world but also the broader Middle East – was mainly provoked by fiscal crisis, domestic turmoil, and foreign pressure. This led to the adoption of a constitution in Tunisia (1861 – considered the first constitution in the Arab world), the Ottoman Empire (1876), Egypt (1882), and Iran (1906).² All these constitutional texts were adopted under very similar circumstances: These countries were experiencing both near (or actual) bankruptcy and European pressure, and internal rebellion was rising. It comes as no surprise, then, that the main purpose of these documents was also similar – namely, to establish “more effective political mechanisms to address fiscal and security crises.”³ Indeed, most of the framers’ concerns were related to the rationalization of administration of the country and the establishment of clear, accountable procedures for the use of public funds. The creation of a democratic government was certainly not the main issue, even though these constitutions did contain some traces of the principle of separation of powers as interpreted in the Western tradition (i.e., the separation of the three branches of government)⁴ and provided for the recognition of a few fundamental rights and constitutional

¹ See Nathan J. Brown, “The Unsurprising but Distinctive Nature of Constitution Writing in the Arab World” in David Landau and Hanna Lerner (eds.), *Comparative Constitution Making* (Edward Elgar 2019), 448–453.

² On these constitutional experiences, see Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (SUNY Press 2002), 15–34; Nathalie Bernard-Maugiron, *Droit contemporain des pays arabes* (Sirey 2023), 560–585.

³ Brown, “Constitution Writing in the Arab World,” at p. 449.

⁴ See Tilmann J. Röder, “The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives” in Rainer Grote and Tilmann J. Röder (eds.), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press 2012), 321. See also Chapter 2, Section 2.5.1.

guarantees.⁵ Most of these constitutions were short-lived, mainly because of a hostile international environment and domestic divisions. The 1861 Tunisian Constitution (called “Law of the Tunisian State” – *qanun al-dawla al tunisiyya*) remained in force for only three years, as it was suspended in 1864. Similarly, the 1876 Ottoman Basic Law (*al-qanun al-asasi*), which had “a lasting impact on Arab constitutional history in that it provided a starting point for many subsequent [constitutions],”⁶ was suspended in February 1878, after fewer than two years of operation, and then restored in 1908. In Egypt, the life of the 1882 Fundamental Ordinance (*al-la’iha al-asasiyya*) was even shorter, as it was repealed following the British occupation of the country in the same year. Only the 1906 Iranian Fundamental Law remained in force for quite some time – that is, until 1921.

The second wave of constitution-drafting in the Arab world began with the dissolution of the Ottoman Empire after World War I. One of the main reasons for issuing these constitutions was the desire to express national sovereignty.⁷ Indeed, Arab drafters aimed to assert as much autonomy from European control as possible, even though they were often forced to acknowledge this control. This aim is particularly evident in the constitutions of Egypt (1923), Iraq (1925), Lebanon (1926), Transjordan (1928), and Syria (1930), all of which continued either to acknowledge the British or French mandate (Lebanon, Transjordan, and Syria) or at least to protect the interests of the mandated powers (Egypt and Iraq). The inclusion of these types of clauses was due to the fact that all these constitutions were drafted with massive foreign interference. In some cases, the mandated powers directly issued draft constitutions, which were then submitted to the local constituent assemblies, and specified the “redlines” (which corresponded to the interests they still had in the country) that could not be crossed.⁸ In this second generation of Arab constitutions (which involved both monarchical and republican regimes), provisions on rights and freedoms were expanded compared to the previous generation, and the roles and functions of parliaments were partially strengthened. However, these constitutional guarantees were implemented only in rare circumstances.⁹

The end of World War II marked the beginning of the third wave of constitution-drafting in the Arab world. In some countries (e.g., in Jordan [1946], Libya [1951], Tunisia [1959], Kuwait [1962], and Algeria [1963]), the adoption of a constitution served the purpose, *inter alia*, of underscoring national sovereignty following decades of colonial dominance. Furthermore, unlike their predecessors, post–World War II

⁵ See, for example, Article 88 of the 1861 constitution of Tunisia (stipulating that all persons were equal before the law irrespective of the religion to which they belonged).

⁶ Nathan J. Brown, “Regimes Reinventing Themselves: Constitutional Development in the Arab World” (2003) 18 *International Sociology*, 36.

⁷ See Brown, “Constitution Writing in the Arab World,” at pp. 451–452.

⁸ See Brown, *Constitutions in a Nonconstitutional World*, at pp. 35ff. and 67ff.

⁹ Ibid.