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FRAMING THE FUTURE:  
DRAFTING TUNISIA'S 2014 CONSTITUTION

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## **I. Introduction**

### **A. Research Question: The Importance of Process in Constitution Making**

In the past few decades, constitution-making processes have been set in motion by popular revolutions, political reform movements, and military occupations. The goals of constitution making have included nation building, conflict resolution, political transition, democratization, legal reform, and legitimization and entrenchment of the ruling order. Due to this incredible variation in modern constitution-making, context is highly important to understanding a constitution-making process.<sup>1</sup>

Despite this variation in constitution making, a clear constitutional goal for societies moving from authoritarianism to democracy is to establish a document that establishes rules for how to resolve disagreements that inevitably arise in national politics.<sup>2</sup> That primary disagreement—difficult under any circumstance—becomes particularly aggravated in societies with deep divisions, whether they are political, social, ethnic, or sectarian. In the Arab world, the division between Islamists and secularists and the recent history of government repression and political violence makes it tempting to view capturing the state, and the rules that govern the state, to be a zero-sum game.

It is impossible to ignore the bitter and often violent experiences of recent history in the Arab world. Although it is difficult to reach political agreements and accommodations, it is not impossible. But a destination may not be reached if the route taken to get there is poorly planned and managed. This paper explores the process implemented by Tunisians during their recent

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<sup>1</sup> Laurel E. Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 601, 604 (Laurel E. Miller & Louis Aucoin, eds., 2010).

<sup>2</sup> Nathan Brown, *Do Tunisians Agree on More Than They Realize?*, FOREIGN POLICY (Aug. 9, 2011), <http://www.foreignpolicy.com/2011/08/09/do-tunisians-agree-on-more-than-they-realize>.

constitution-making experience and identifies and explains key elements that contributed to the completion, adoption, and acceptance of the 2014 Constitution.

## **B. Argument**

The creation of a constitutional regime is at its essence a political decision.<sup>3</sup> The end product may be a legal charter and the process of that charter's formation may be governed by law,<sup>4</sup> but political power and political realities ultimately take precedence over the technical process. Indeed, the nature of popular sovereignty and the constituent power have frequently been cited to justify departures from the previous constitutional order or other legal arrangements in establishing the new constitutional order.<sup>5</sup> But that is not to say that questions of law or process are irrelevant. A failure to observe legal or procedural constraints designed to ensure a fair and inclusive political process can have delegitimizing effects and lead to conflict.<sup>6</sup>

This paper argues that inclusive processes that go beyond the mandate of one electoral cycle and that are premised on finding a basic societal consensus to move forward on can ensure that when there is an agreement to be found among diverse factions it has an excellent chance to be found. An inclusive process is one that is open to any interested constituency or significant social and political group, irrespective of the outcome of a preceding democratic election. A

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<sup>3</sup> See EDWARD MCWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* 12 (1981); see also Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 *CARDOZO LAW REVIEW* 191, 191 (1995) (“Behind the texts, however, are the most important political actors and forces of a given society, persuading some interpreters to take the view that constitution making represents the work of the political, of political politics, and of *le pouvoir constituant*.”).

<sup>4</sup> For a brief discussion of governing interim arrangements and decision rules, see Proceedings, “Workshop on Constitution Building Processes,” Princeton University, Mar. 4–7, 2008, BOBST CENTER FOR PEACE & JUSTICE, PRINCETON UNIVERSITY, IN CONJUNCTION WITH INTERPEACE AND INTERNATIONAL IDEA 5–14.

<sup>5</sup> Claude Klein & Andras Sajó, *Constitution-Making: Process and Substance*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 419, 420–25 (Michel Rosenfeld & Andras Sajó eds., 2012); Interview with Kais Said, Professor, Faculté des Sciences Juridiques, Politiques, et Sociales de Tunis; Vice-President, Association Tunisienne de Droit Constitutionnelle (Mar. 7, 2015).

<sup>6</sup> MARKUS BÖCKENFÖRDE, NORA HEDLING, & WINLUCK WAHIU, *INT’L INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE (IDEA), A PRACTICAL GUIDE TO CONSTITUTION BUILDING 2* (2011).

single democratic election may not always adequately reflect societal consensus for a new social contract, and the duty of elected representatives to consult with their constituents does not end with the closing of the polls. Thus, even democratically elected constitution-making bodies should stress inclusivity.

Aiming to achieve a basic societal consensus with a new constitution will also increase the likelihood that one is achieved and that the new constitutional order is viewed as legitimate. As noted above, constitution making is ultimately a political act, so it is left to the political forces of a nation to identify their interests and then define the parameters of a basic societal consensus. Political forces that attempt to fully pursue their own interests at the expense of finding a basic consensus, as both the Muslim Brotherhood and Armed Forces did in Egypt,<sup>7</sup> risk engendering further conflict and instability. Of course, no constitution-drafting process can prevent a powerful, determined political force from making a power grab or launching a coup, but procedural choices can reduce the likelihood that parties will come to see a constitution-making transition process as a zero-sum game rather than a grand political bargain.

For example, the Egyptian Muslim Brotherhood's heavy-handed approach to drafting the 2012 Constitution was partly in response to the reactionary political gambits undertaken by the Supreme Council of the Armed Forces (SCAF) and its old-regime allies throughout 2011 and 2012.<sup>8</sup> Yet the Muslim Brotherhood's approach marginalized other political parties and potential

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<sup>7</sup> The Egyptian military sought to control the post-Mubarak transition process and fought against its control or oversight by President Mohammed Morsi of the Muslim Brotherhood. See Ann M. Lesch, *Troubled Political Transitions: Tunisia, Egypt and Libya*, 21 MIDDLE EAST POLICY 62, 66–68 (2014). For its part, the Egyptian Muslim Brotherhood alienated liberal, Christian, and other potential allies, *ibid.* at 68, when it “took a majoritarian approach to power” that did not seek broad democratic participation or consensus. See Monica Marks, *How Egypt's Coup Really Affected Tunisia's Islamists*, MONKEY CAGE BLOG (Mar. 16, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/16/how-egypts-coup-really-affected-tunisia-islamists>.

<sup>8</sup> See Lesch, *Troubled Political Transitions*, at 66–68. Marc Lynch has also written about the complete breakdown of any agreement on the contours of the transition process or governing rules in Egypt during this time period. Marc

allies and fueled widespread distrust and resentment, which led to the mass demonstrations that provided a pretext for the military's July 2013 coup.<sup>9</sup> By contrast, the major Tunisian Islamist political party, Ennahda, built important relationships with other political parties and accepted some procedural restraints during Tunisia's constitution-making process.<sup>10</sup> This paper analyzes the making of the 2014 Tunisian Constitution to identify the major procedural factors that provided for an inclusive process and facilitated agreement on a basic societal consensus.

### C. Methodology and Framework

This case study on the drafting of the 2014 Tunisian Constitution and is heavily indebted to several constitution-making case studies that came before it. In particular, the examples found in *Framing the State in Times of Transition: Case Studies in Constitution Making* (Laurel E. Miller and Louis Aucoin, eds., 2010) provided a wide arrange of constitutional design theory and contextual factors that should be considered when analyzing a constitution-making process. Accordingly, this case study analyzes the following six factors as they related to the Tunisian process: (1) legitimacy and interim arrangements, (2) preconstitutional principles or framework, (3) representation and inclusivity in the drafting process, (4) public participation in the drafting process, (5) the role of experts, and (6) the role of nondemocratic institutions, such as the judiciary and military.

This paper makes use of such case studies to provide comparative models and to situate its analysis. It also draws upon the existing scholarship regarding the Tunisian transition and constitution-making process for both factual and analytical claims. It draws upon different

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Lynch, *Calvinball in Cairo*, FOREIGN POLICY (June 18, 2012), <http://foreignpolicy.com/2012/06/18/calvinball-in-cairo>.

<sup>9</sup> Lesch, *Troubled Political Transitions*, at 66–68.

<sup>10</sup> Jon M. Carey, *Why Tunisia Remains the Arab Spring's Best Bet* 1–2 DARTMOUTH COLLEGE (Aug. 27, 2013), available at [http://sites.dartmouth.edu/jcarey/files/2013/08/Tunisia-Carey-Aug\\_2013.pdf](http://sites.dartmouth.edu/jcarey/files/2013/08/Tunisia-Carey-Aug_2013.pdf).

primary source material, including contemporaneous newspaper reports, newspaper interviews of key actors, legal texts governing the transition process, and the results of public opinion polls and dialogues. It likewise draws from reports and articles prepared by civil society organizations, such as The Carter Center, Al Bawsala, and the Jasmine Foundation, to name a few. Finally, this paper includes interviews with several distinguished Tunisian law professors, participants to the transition process, and members and consultants within civil society.

## **II. Tunisia's Constitution-Making Process**

### **A. The Constitutional Context**

Although the history of Tunisia's 2011 Jasmine Revolution far exceeds the scope of this paper, three considerations touching the revolution must be borne in mind when analyzing Tunisia's constitutional drafting process. First, the Jasmine Revolution was a popular revolution challenging the legitimacy of the established order, and the decision to create a new constitution was made in that revolutionary moment. Laurel E. Miller explains why the context surrounding the decision to make a constitution matters:

The design of a constitution-making process must be matched to a country's particular political, economic, social, and other circumstances, and differences in circumstances at particular historical moments will require differences in approach. Context shapes constitution making in several ways: It determines the procedural options realistically available, influences the process design choices leaders make, and affects whether those choices serve the desired objectives.<sup>11</sup>

Simply, different constitution-making contexts, such as decolonization, popular constitutional reformation, nation building, or conflict resolution,<sup>12</sup> present different challenges than those

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<sup>11</sup> Ibid.

<sup>12</sup> See Proceedings, "Workshop on Constitution Building Processes," Princeton University, May 17–20, 2007, BOBST CENTER FOR PEACE & JUSTICE, PRINCETON UNIVERSITY, IN CONJUNCTION WITH INTERPEACE AND INTERNATIONAL IDEA 5–6.

posed by popular revolutions. For example, the legitimacy crisis precipitated by a popular revolution requires urgent political dealings to re-establish legitimacy that are absent at the start of popular constitutional reformation movements, such as Kenya's recent constitution-making process.<sup>13</sup>

Second, the Jasmine Revolution did not occur in a vacuum. Leaders of Tunisia's political opposition, including those in exile, had been talking to each other for decades under Ben Ali's regime.<sup>14</sup> In particular, the 18th of October Movement played an important role in drawing political leaders of different ideologies together in 2005.<sup>15</sup> Monica Marks details a number of other dialogues between Tunisian opposition leaders throughout the early 2000s, including future leaders of the three political parties (the troika) that would control the Tunisia's National Constituent Assembly during the constitution-making process.<sup>16</sup> These political contacts and dialogues provided a basis for the fairly consensus-oriented process taken by Tunisia's constitution makers.<sup>17</sup>

Third, Tunisian revolutionary politics have been marked by a division between secularists and Islamists.<sup>18</sup> Despite common ground between these two factions and their collaboration at the leadership level,<sup>19</sup> the relationship between the two groups is largely defined by fear and

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<sup>13</sup> See Alicia L. Bannon, Note, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE LAW JOURNAL 1825, 1832–34 (2007).

<sup>14</sup> Interview with Radwan Masmoudi, Founder and President, CSID (Apr. 8, 2015).

<sup>15</sup> *Ibid.*

<sup>16</sup> Monica Marks, *How Egypt's Coup Really Affected Tunisia's Islamists*.

<sup>17</sup> Interview with Masmoudi.

<sup>18</sup> Duncan Pickard, *Tunisia's Constitutional Process: Hurdles and Prospects*, OP-MED, Dec. 2013, at 1 (“The fundamental socio-political tension in Tunisia can be boiled down, if somewhat crudely, into these two camps: for Nidaa Tunis and a return to the progressive, French-style secularism of former president Habib Bourguiba, and for Ennahda and the rebirth of a Tunisian political identity rooted in Islam.”).

<sup>19</sup> Brown, *Do Tunisians Agree*.

mistrust of the other.<sup>20</sup> These three contextual considerations are crucial to the unfolding of Tunisia's constitution-making process.

## **B. The Question of Legitimacy and Interim Arrangements**

### *Continuity and Change*

The revolt against President Zine al-Abidine Ben Ali's put the legal and political legitimacy to control the country's politics in a state of flux. Within a month, the mass protests that broke out after Mohammed Bouazizi's self-immolation in the small Tunisian town of Sidi Bouzid on December 17, 2010 succeeded in ousting Ben Ali after twenty-three years in power. As Ben Ali was fleeing the country on January 14, 2011, Prime Minister Mohammed Ghanouche<sup>21</sup> was declaring himself the acting president under Article 56 of the 1959 Constitution.<sup>22</sup> Several lawyers immediately challenged Ghanouche's title to the presidency, arguing that Ben Ali's absence was permanent and that the provisions of Article 56 applied to temporary absences of the president.<sup>23</sup> The Constitutional Council agreed with Ghanouche's challengers, deciding that Article 57 provided for the Speaker of the Lower House, Fouad Mebazaa, to assume the presidency pending a special election to be held within sixty days.<sup>24</sup>

The day after Ben Ali's flight from the country, Ghanouche had acted to institutionalize the revolution by asking Yadh Ben Achour, a well-respected Tunisian jurist, to lead a High Commission for Political Reform consisting of eighteen other legal experts to reform the

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<sup>20</sup> Interview with Masmoudi.

<sup>21</sup> Not to be confused with Rashid Ghannouchi, the leader of Ennahda.

<sup>22</sup> Ahmed El-Sayed, *Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Tunisia and Egypt*, 2 ELECTRONIC JOURNAL OF ISLAMIC & MIDDLE EASTERN LAW 39, 39 (2014).

<sup>23</sup> Ibid; Emma C. Murphy, *The Tunisian Elections of October 2011: A Democratic Consensus*, 18 THE JOURNAL OF NORTH AFRICAN STUDIES 231, 232 (2013).

<sup>24</sup> El-Sayed, *Post-Revolution Constitutionalism*, at 39–40; Sami Zemni, *Extraordinary Politics of the Tunisian Revolution: The Process of Constitution Making*, Mediterranean Politics, Jan. 24, 2014, at 16 n.4.

country's constitution and laws.<sup>25</sup> Upon ceding the interim presidency to Mebazaa and returning to his role as prime minister, Ghannouchi also invited eleven leading opposition members to join the government in a bid for national unity.<sup>26</sup> But the unity government quickly fell apart after three members of the UGTT—Tunisia's largest workers union—resigned from the government due to pressure from the union's members.<sup>27</sup> Other members of the political opposition either resigned from the cabinet or refused to join in the first place.<sup>28</sup>

Opponents to the regime distrusted the government's promises to carry out genuine reforms, viewed the parliament elected under Ben Ali as illegitimate, and worried that the presidential elections to be held within sixty days would not be fair and would not "guarantee any significant rupture with the former regime."<sup>29</sup> On January 20, a coalition of revolutionary and oppositional forces formed the "Front of January 14th" and began demanding elections for a Constituent Assembly as protests continued.<sup>30</sup> Ghannouchi responded the next day on Tunisian television by floating his own transition plan that would postpone elections by six months.<sup>31</sup>

Meanwhile, the High Commission for Political Reform, frequently referred to as the Ben Achour Commission, had begun meeting to discuss reforms to the current constitution.<sup>32</sup> Members of the Ben Achour Commission quickly grew convinced that it would be impossible to hold presidential elections within sixty days as required by Article 57 of the 1959 Constitution due to the ongoing demonstrations battering the country and the government's lack of

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<sup>25</sup> Murphy, *Tunisian Elections of October 2011*, at 233. Ghannouchi also created a commission to investigate embezzlement and corruption and a commission to investigate governmental abuses. *Un gouvernement d'union nationale est en place en Tunisie*, LE DEVOIR (Feb. 24, 2011, 3:04 PM), <http://www.ledevoir.com/international/actualites-internationales/314847/un-gouvernement-d-union-nationale-est-en-place-en-tunisie>.

<sup>26</sup> Murphy, *Tunisian Elections of October 2011*, at 233.

<sup>27</sup> *Ibid.*

<sup>28</sup> *See ibid.*; *see also* Sami Zemni, *Extraordinary Politics*, at 4.

<sup>29</sup> Zemni, *Extraordinary Politics*, at 4; Murphy, *Tunisian Elections of October 2011*, at 233.

<sup>30</sup> Zemni, *Extraordinary Politics*, at 4–5.

<sup>31</sup> *Tunisian PM Pledges to Quit Politics After Elections*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 22, 2011), [http://www.rferl.org/content/tunisia\\_pm\\_quit\\_politics/2283958.html](http://www.rferl.org/content/tunisia_pm_quit_politics/2283958.html); Zemni, *Extraordinary Politics*, at 5.

<sup>32</sup> Interview with Mounir Snoussi, Associate Lecturer, Faculté des Sciences Juridiques, Politiques, et Sociales de Tunis; Member, Ben Achour Commission (Mar. 5, 2015).

legitimacy.<sup>33</sup> Indeed, thousands of protestors from the provinces swept into Tunis on January 23 to demonstrate against Ghannouchi's government.<sup>34</sup> A couple weeks later the "Front of January 14th" merged with the UGTT, human rights organizations, the Lawyers Bar Association, and other actors to form the National Committee to Safeguard the Revolution (Conseil national pour la sauvegarde de la révolution).<sup>35</sup>

The Committee to Safeguard the Revolution, in a declaration signed on February 11 by twenty-eight different parties and organizations, demanded oversight of the government and the power to approve its ministers, oversight of the Ben Achour Commission (and the other post-revolutionary commissions) and the power to approve their proposals, and its own recognition through a decree issued by interim-President Mebazaa.<sup>36</sup> Mebazaa, who had been delegated the power to issue decree-laws under Article 28 of the 1959 Constitution, issued a decree less than a week later that aimed to merge the Ben Achour Commission with the Committee to Safeguard the Revolution, creating the High Commission for the Realization of the Goals of the Revolution, Political Reform, and Democratic Transition.<sup>37</sup>

Ben Achour became chair of the High Commission, while the former legal experts who made up the Ben Achour Commission became a non-voting experts committee within the High Commission.<sup>38</sup> The political committee of the High Commission, which would consist of 155

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<sup>33</sup> Ibid.

<sup>34</sup> Murphy, *Tunisian Elections of October 2011*, at 233.

<sup>35</sup> Zemni, *Extraordinary Politics*, at 5.

<sup>36</sup> Déclaration constitutive du conseil national pour la sauvegarde de la révolution (Feb. 11, 2011), *available at* [http://www.europe-solidaire.org/IMG/article\\_PDF/Tunisie-Dclaration-constitutive-du\\_a26965.pdf](http://www.europe-solidaire.org/IMG/article_PDF/Tunisie-Dclaration-constitutive-du_a26965.pdf).

<sup>37</sup> Décret-loi n° 2011-6 du 18 février 2011, portant création de l'instance supérieure pour la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique, JOURNAL OFFICIEL DE LA RÉPUBLIQUE TUNISIENNE, n° 013, p. 196, 1er mars 2011.

<sup>38</sup> Daniel L. Tavana, *Preparing to Draft a New Social Contract: Tunisia's National Constituent Assembly Election, 2011 2–3* (Princeton University Innovations for Successful Societies, October 2014), *available at* [http://successfultsocieties.princeton.edu/sites/successfultsocieties/files/DT\\_ELECTIONS\\_TUNISIA\\_0.pdf](http://successfultsocieties.princeton.edu/sites/successfultsocieties/files/DT_ELECTIONS_TUNISIA_0.pdf).

members,<sup>39</sup> was initially endowed with the power to study legislative texts and propose reforms to secure the revolution.<sup>40</sup> Under Mebazaa's decree, the High Commission was to make decisions by consensus, resorting to a majority vote only if consensus could not be obtained.<sup>41</sup>

On February 21, Ben Achour confirmed that Tunisia would miss the sixty-day deadline to hold presidential elections, citing the legal principle of *force majeure*, which refers to a superior force of unforeseen or uncontrollable events that prevents the fulfillment of legal obligations, to justify the anticipated violation of the 1959 Constitution.<sup>42</sup> That same day Ben Achour stated that Tunisians had yet to decide whether the 1959 Constitution would be retained with modifications or be discarded.<sup>43</sup> The technical committee offered four different scenarios to the public: (1) reforming the old constitution notwithstanding the violation of Article 57 and hosting new presidential and parliamentary elections in six months, (2) creating a new constitution at the hands of experts, (3) creating a new constitution at the hands of experts with a ratification through public referendum, or (4) creating a new constitution at the hands of an elected assembly.<sup>44</sup>

### *Rupture*

Massive popular protests and political demands for a complete rupture with the old system, fueled in large part by Prime Minister Ghannouchi's nomination of new provincial governors with ties to Ben Ali's RCD-party, dictated the final decision on how to proceed.<sup>45</sup> In a

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<sup>39</sup> Murphy, *Tunisian Elections of October 2011*, at 233.

<sup>40</sup> Décret-loi n° 2011-6 du 18 février 2011, art. 2.

<sup>41</sup> *Ibid.*, art. 5.

<sup>42</sup> Thomas Fuller, *Head of Reform Panel Says Tunisia Risks Anarchy as It Moves Toward Democracy*, N.Y. TIMES (Feb. 21, 2011), [http://www.nytimes.com/2011/02/22/world/africa/22tunisia.html?\\_r=0](http://www.nytimes.com/2011/02/22/world/africa/22tunisia.html?_r=0).

<sup>43</sup> *Ibid.*

<sup>44</sup> Interview with Snoussi; see also Asma Nouira, *Obstacles on the Path to Tunisia's Democratic Transition*, SADA – CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 30, 2011).

<sup>45</sup> Zemni, *Extraordinary Politics*, at 5–6.

momentous and unprecedented panel hosted by the Center for the Study of Islam and Democracy (CSID) on February 24, Ben Achour expressed his support for a constitutional assembly to the nearly 300-member audience during the panel's question and answer phase.<sup>46</sup> Ghannouchi, who had agreed to ban the RCD on February 21 in an attempt to calm the furor of protests, at last submitted his resignation on February 27 after around 100,000 protestors filled the streets of Tunis calling for his resignation.<sup>47</sup>

On March 3, interim-President Mebazaa announced that elections for a constituent assembly would be held on July 24 and that the assembly would draft a new constitution.<sup>48</sup> The political committee of the High Commission, which had pushed for the abolition of the old constitution and the creation of a new one during this turbulent period, welcomed the news.<sup>49</sup> Mebazaa soon followed-up his decision to abrogate the 1959 Constitution and hold elections for a constituent assembly with a decree-law that organized the public powers on a provisional basis until the election of the National Constituent Assembly (NCA).<sup>50</sup>

The provisional powers decree was prepared by what remained of the government, but the technical committee of the High Commission made some recommendations and generally pointed to Tunisia's provisional period from colonialism to independence as a useful framework.<sup>51</sup> In a move intending to placate protestors and the political opposition, the decree also proscribed interim-President Mebazaa from running in any future election and proscribed interim Prime Minister Béji Caïd Essebsi and other members of the government from running for

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<sup>46</sup> Interview with Masmoudi. For more information about the CSID panel, including video of the proceedings, see *Roadmap of Political Reforms in Tunisia*, CSID (Feb. 24, 2011), [http://www.csidonline.org/index.php?option=com\\_content&view=article&id=596%3Aroadmap-of-political-reforms-in-tunisia&Itemid=52](http://www.csidonline.org/index.php?option=com_content&view=article&id=596%3Aroadmap-of-political-reforms-in-tunisia&Itemid=52).

<sup>47</sup> Zemni, *Extraordinary Politics*, at 6.

<sup>48</sup> El-Sayed, *Post-Revolution Constitutionalism*, at 40.

<sup>49</sup> Interview with Snoussi.

<sup>50</sup> Décret-loi n° 2011-14 du 23 mars 2011, portant organisation provisoire des pouvoirs publics, JOURNAL OFFICIEL DE LA RÉPUBLIQUE TUNISIENNE, n° 020, p. 363, 25 mars 2011.

<sup>51</sup> Interview with Snoussi.

a seat in the NCA.<sup>52</sup> The decree's organization of provisional powers was to terminate with the election of the NCA and that body's decision on how to organize the powers of the state.<sup>53</sup>

The High Commission took on the task of organizing the NCA elections.<sup>54</sup> It quickly decided to strip the Ministry of Interior of any role in managing the elections and to establish an Independent High Authority for Elections (*Instance supérieure indépendante pour les élections*, or ISIE) consisting of sixteen commissioners.<sup>55</sup> Shortly following its first meeting in mid-May, the ISIE lobbied the High Commission and Prime Minister Essebsi for the election date of July 24 to be delayed by three months to ensure the elections were logistically sound and fair.<sup>56</sup> Although Essebsi and some parties in the High Commission expressed reservations over delaying the NCA elections, the parties eventually agreed to the delay and set the election date for October 23.<sup>57</sup> Much has been written regarding the ISIE's subsequent efforts to organize and run the NCA elections.<sup>58</sup> Here it is sufficient to note that the ISIE succeeded in asserting its independence<sup>59</sup> and running credible elections,<sup>60</sup> thus legitimizing the NCA.

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<sup>52</sup> Décret-loi n° 2011-14 du 23 mars 2011, arts. 11, 15.

<sup>53</sup> *Ibid.*, art. 18.

<sup>54</sup> Zemni, *Extraordinary Politics*, at 6; Tavana, *Preparing to Draft a New Social Contract*, at 3.

<sup>55</sup> Tavana, *Preparing to Draft a New Social Contract*, at 3.

<sup>56</sup> *Ibid.* at 3–5.

<sup>57</sup> *Ibid.*

<sup>58</sup> See, e.g., Tavana, *Preparing to Draft a New Social Contract*; Murphy, *Tunisian Elections of October 2011*. For an analysis of the legal framework for the NCA elections, see DENIS PETIT, INT'L FOUNDATION FOR ELECTORAL SYSTEMS (IFES), ANALYSIS OF THE ELECTORAL LEGAL FRAMEWORK OF THE ELECTION OF 23 OCTOBER 2011 OF THE NATIONAL CONSTITUENT ASSEMBLY OF THE REPUBLIC OF TUNISIA (2012).

<sup>59</sup> PETIT (IFES), ANALYSIS OF THE ELECTORAL LEGAL FRAMEWORK, at 5.

<sup>60</sup> INT'L REPUBLICAN INSTITUTE (IRI), TUNISIA CONSTITUENT ASSEMBLY ELECTIONS OCTOBER 23, 2011: ELECTION OBSERVATION MISSION FINAL REPORT 4 (2011) (finding “the results of the elections accurately reflected the collective will of the Tunisian people and were conducted in a competitive and fair electoral environment”); NAT'L DEMOCRATIC INSTITUTE (NDI), FINAL REPORT ON THE TUNISIAN NATIONAL CONSTITUENT ASSEMBLY ELECTIONS 6 (calling the NCA elections an “extraordinary achievement” with “trained poll workers, adequate procedures and orderly lines in most locations”); THE CARTER CENTER, NATIONAL CONSTITUENT ASSEMBLY ELECTIONS IN TUNISIA: FINAL REPORT 11 (2012) (indicating that “Tunisians turned out to vote in genuinely competitive elections in large numbers and that the ISIE was perceived as impartial and succeeded in building confidence among key stakeholders”).

### *Post-Election Legitimacy Concerns*

The NCA faced a meaningful post-election challenge to its legitimacy over its exercise of state powers and its allotted time frame for completing a new constitution. This challenge blended elements of the NCA's legal and political legitimacy. Although it was generally understood that the NCA would exercise broad sovereignty,<sup>61</sup> several Tunisian legal experts, including Ben Achour, argued that the NCA's primary task was to draft the new constitution.<sup>62</sup> This proposition was not necessarily contentious in and of itself,<sup>63</sup> but the NCA's decision to create and adopt a "mini-constitution" to organize the public powers on an interim basis attracted some criticism.<sup>64</sup>

Critics of the NCA's move conceived that the NCA could pass legislation but asserted that the assembly's "working process should not be hampered."<sup>65</sup> Thus, redefining the provisional powers of the state was seen by some as an unnecessary distraction that threatened to delay the completion of a new constitution. Critics were also concerned by the refusal of the NCA to include a time limit to the mini-constitution's application or to the NCA's work period for finishing the new constitution.<sup>66</sup> The NCA's refusal to set a deadline for its work conflicted with the view that the assembly only had twelve months to make a new constitution.

This view was grounded in two documents created before the NCA elections. First, interim-President Mebazaa's May 20 decree-law calling for the NCA elections set a time frame

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<sup>61</sup> See, e.g., INT'L FOUNDATION FOR ELECTORAL SYSTEMS (IFES), ELECTIONS IN TUNISIA: THE 2011 CONSTITUENT ASSEMBLY—FREQUENTLY ASKED QUESTIONS 8 (July 2011); Sadok Ayari, *Constitutional Lawyer: Danger if Constituent Assembly Outlasts One Year*, TUNISIA LIVE (Nov. 4, 2011), archived at <http://web.archive.org/web/20120105020305/http://www.tunisia-live.net/2011/11/04/the-tunisian-constitution-should-not-take-more-than-one-year-to-be-written>.

<sup>62</sup> Interview with Snoussi.

<sup>63</sup> Interview with Masmoudi.

<sup>64</sup> Interview with Snoussi.

<sup>65</sup> Ayari, *Constitutional Lawyer*.

<sup>66</sup> Mohammed Hachemaoui, *Tunisia at a Crossroads: Which Rules for Which Transition?* 9 (German Institute for International and Security Affairs, Research Paper No. 6, Aug. 2013).

of one year for the NCA to draft a constitution.<sup>67</sup> The May 20 decree-law was later abrogated to allow the election of the NCA to be moved from July 24 to October 23.<sup>68</sup>

Second, most of the parties in the High Commission, including Ennahda and Ettakatol, signed onto the Declaration on the Transition Process (*Déclaration du processus transitoire*) in September 2011.<sup>69</sup> This declaration, which was signed after the abrogation of the May 20 decree-law fixing the NCA's term to one year, also provided for a one-year term of the NCA.<sup>70</sup> However, the declaration was largely described as a non-binding<sup>71</sup> "moral" or "political" commitment.<sup>72</sup>

Kais Said, a prominent Tunisian scholar of constitutional law, called the dispute over the NCA's authority and term a political question masquerading as a legal problem.<sup>73</sup> He denied that interim-President Mebazaa had authority to set a term for the NCA, arguing in part that the NCA was a primary, sovereign power that could not be chained by Mebazaa's provisional authority.<sup>74</sup> The NCA, as a constituent power, was *legally* empowered to exercise the legislative power of the country and to set its own timetable for drafting the constitution.<sup>75</sup>

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<sup>67</sup> Décret-loi n° 2011-582 du 20 mai 2011, portant convocation du corps électoral pour l'élection de l'assemblée nationale constituante, JOURNAL OFFICIEL DE LA RÉPUBLIQUE TUNISIENNE, n° 037, p. 756, 24 mai 2011.

<sup>68</sup> See Décret-loi n° 2011-998 du 21 juillet 2011, abrogeant les dispositions du décret n° 2011-582 du 20 mai 2011, portant convocation du corps électoral pour l'élection de l'assemblée nationale constituante, JOURNAL OFFICIEL DE LA RÉPUBLIQUE TUNISIENNE, n° 054, p. 1275, 22 juillet 2011.

<sup>69</sup> Sabra Mansar, *Les Partis Politiques Présents à la Haute Instance Signent la Déclaration du Processus Transitoire*, TUNISIE NUMERIQUE (Sept. 15, 2011, 9:59 PM), <http://www.tunisienumerique.com/les-partis-politiques-presents-a-la-haute-instance-signent-la-declaration-du-processus-transitoire/72860>.

<sup>70</sup> Ibid.

<sup>71</sup> DAPHNE MCCURDY, PROJECT ON MIDDLE EAST DEMOCRACY (POMED), A GUIDE TO THE TUNISIAN ELECTIONS 3 (2011).

<sup>72</sup> See, e.g., BILL PROCTOR & IKBAL BEN MOUSSA, INT'L INSTITUTE FOR DEMOCRACY & ELECTORAL ASSISTANCE (IDEA), THE TUNISIAN CONSTITUENT ASSEMBLY'S BY-LAWS: A BRIEF ANALYSIS 12 (2012); Noureddine Hlaoui, *Les Tunisiens Attendent des Signaux Forts du Nouveau Gouvernement et de l'ANC*, BUSINESS NEWS TN (Mar. 12, 2013, 7:59 PM), <http://www.businessnews.com.tn/Les-Tunisiens-attendent-des-signaux-forts-du-nouveau-gouvernement-et-de-l%E2%80%99ANC,519,36860,1>.

<sup>73</sup> Interview with Kais Said.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

But what about the political commitment signed by much of the High Commission? Political legitimacy is important and political commitments are taken seriously, particularly in transitional settings where legal authority is attenuated. Although the Declaration on the Transition Process may have only been a moral or political commitment, a large majority of the NCA voted against a proposal to extend the assembly's mandate beyond one year the week before the NCA's adoption of the mini-constitution.<sup>76</sup> The result of this vote was consistent with Tunisian public opinion.<sup>77</sup>

When it became apparent that the NCA might damage its credibility by passing its one year anniversary having only released a first constitutional draft,<sup>78</sup> the UGTT convened a national dialogue of political and civil society actors in mid-October 2012 to resolve, among other issues, the time frame for completing the constitution and holding new elections.<sup>79</sup> Ennahda and one of its partners in the NCA's governing troika, Congress for the Republic (CPR), boycotted the dialogue to avoid endorsing a procedural consensus to the detriment of the troika's electoral legitimacy.<sup>80</sup> Instead, the troika published its own road map the day before the

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<sup>76</sup> Of the NCA's 217 members, 153 voted against the proposal to extend the NCA's term beyond one year, 39 members voted for the proposal, and the remaining members abstained. Amine Ghali, *Tunisia's Constitutional Process: The Road Ahead*, SADA – CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec. 9, 2011), <http://carnegieendowment.org/sada/2011/12/09/tunisia-s-constitutional-process-road-ahead>.

<sup>77</sup> A survey conducted by the International Republican Institute (IRI) in late December 2011 and early January 2012 found that 44% of Tunisians believed the NCA should take one year or less to complete its mandate, compared to 30% who believed the NCA should take between one and two years and 14% who did not know or refused to answer. IRI, SURVEY OF TUNISIAN PUBLIC OPINION 10 (Dec. 24, 2011 – Jan. 6, 2012). The same survey found that 43% of Tunisians believed the country's next elections would occur in about a year. *Ibid.* The National Democratic Institute for International Affairs (NDI) also found that Tunisians who participated in their August 2011 focus groups preferred a drafting period of about six months to one year. NICOLE ROSWELL & ASMA BEN YAHIA, NDI, FRAMING THE FUTURE: CITIZEN ATTITUDES ABOUT ELECTORAL AND CONSTITUTION DRAFTING PROCESSES 19 (2011).

<sup>78</sup> *Exclusif: Pr Yadh Ben Achour à La Presse: «Nous Risquons Une Dictature Pire Que Celle de Ben Ali»*, LA PRESSE DE TUNISIE (Aug. 31, 2012), archived at <http://web.archive.org/web/20121228081138/http://www.lapresse.tn/31082012/54651/nous-risquons-une-dictature-pire-que-celle-de-ben-ali.html> (quoting Ben Achour as saying that the NCA will lose a much of its credibility and political moral legitimacy after the one year mark of its election).

<sup>79</sup> Hachemaoui, *Tunisia at a Crossroads*, at 12.

<sup>80</sup> *Ibid.* at 12–13.

conference to preemptively deflate any alternative approach, and the NCA proceeded onto the second draft.<sup>81</sup>

In the late summer and early fall of 2013, a political crisis gripped Tunisia after the assassination of NCA member and opposition leader Mohamed Brahmi. Brahmi's assassination was preceded by the assassination of NCA member Chokri Belaid in February. Two major opposition parties, Nidaa Tounes and the Popular Front, castigated Ennahda's leadership of the NCA and claimed that the Islamist party had lost its legitimacy for its failure to maintain security and complete the constitution-drafting process.<sup>82</sup> Despite considerable pressure from within his own troika not to do so, NCA President Mustapha Ben Jaafer shuttered the NCA amidst calls for its dissolution or the formation of a national salvation government after sixty-five opposition members walked out.<sup>83</sup>

The political assassinations came amidst wider concerns over security issues, popular discontent with the state of the Tunisian economy and the unemployment rate, and liberal and feminist anger with Ennahda's handling of the constitution-drafting process. This crisis was thus fundamentally a political crisis that had little to do with the drafting of the constitution.<sup>84</sup> It is true that there was a growing public concern with the security situation in the Tunisia connected to political assassinations, terrorism, and infiltration of the country's borders.<sup>85</sup> And while it is also true that Ennahda was seen as politically responsible for the country's security situation because it led the troika and because the Minister of Interior was a member of Ennahda,<sup>86</sup> the

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<sup>81</sup> Ibid. at 13.

<sup>82</sup> *Crisis Watch N°120*, CRISIS GROUP MONTHLY BULLETIN (Int'l Crisis Group), Aug. 1, 2013, at 12, available at <http://www.crisisgroup.org/~media/Files/CrisisWatch/2013/cw120.pdf>.

<sup>83</sup> Ibid.; Interview with Masmoudi.

<sup>84</sup> Interview with Salwa Hamrouni, Lecturer, Faculté des Sciences Juridiques, Politiques, et Sociales de Tunis; Member, Association Tunisienne de Droit Constitutionnel (Mar. 5, 2015).

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

opposition's withdrawal from the NCA and its charge that the assembly had become illegitimate (as opposed to incompetent) was part of a political tactic aiming to address three concerns.

First, parts of the opposition did not trust Ennahda to see the transition through and so advocated for a caretaker government to oversee the final phase of adopting the constitution and holding elections.<sup>87</sup> These opponents genuinely feared that Ennahda would rig the next elections or would otherwise mishandle the transition from a provisional government to a permanent one to the Islamist party's benefit.<sup>88</sup>

Second, other parts of the opposition recognized that Ennahda would receive credit for the adoption of the new constitution and that this credit, not malfeasance, would boost its electoral prospects.<sup>89</sup> These opposition strategists thus hoped to soften Ennahda's claim to success by installing a caretaker government before the new constitution was adopted.<sup>90</sup>

Third, opposition members affiliated with Ben Ali's defunct-RCD party, including Beji Caid Essebsi of Nidaa Tounes, were seeking to prevent the exclusion of former RCD members from the next government.<sup>91</sup> Former RCD members had been excluded from the NCA, and the NCA was discussing whether or not to continue the policy of exclusion.<sup>92</sup> Accordingly, the challenge to the NCA's political legitimacy and the call for its dissolution or the formation of a caretaker government also intended to galvanize the opposition and force Ennahda to make important political compromises.<sup>93</sup>

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<sup>87</sup> Interview with Masmoudi.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Roua Khelifi, *Ennahdha and Allies Reject Calls for NCA Dissolution*, TUNISIA LIVE (July 31, 2013, 4:26 PM), archived at <http://web.archive.org/web/20131003164606/http://www.tunisia-live.net/2013/07/31/ennahdha-and-others-reject-calls-for-nca-dissolution>.

<sup>92</sup> Ibid; Interview with Snoussi.

<sup>93</sup> See Khelifi, *Ennahdha and Allies*.

After the sixty-five NCA members withdrew following Brahmi's assassination, NCA President Ben Jaafer of Ettakatol decided to close the doors of the assembly. He was concerned that he would be forced to hold a vote on the final draft of the constitution, which had been released a couple months earlier, with nearly a third of its members absent.<sup>94</sup> Into this thicket stepped the UGTT, which recruited the Tunisian Union of Industry, Commerce, and Handicrafts (UTICA); the Bar Association; and the Tunisian Human Rights League to address the crisis.<sup>95</sup> The UGTT-led quartet led a national dialogue process to reconcile the political differences that had emerged.<sup>96</sup>

In the end, Ennahda agreed to resign from the government and to allow a caretaker government to come in and oversee new elections, but only after the new constitution was adopted.<sup>97</sup> A replacement Prime Minister, Mehdi Jomaa, was not identified until mid-December 2013 after months of negotiations.<sup>98</sup> Jomaa would take office two days after the adoption of the constitution and one day after the Ennahda government's resignation. A permanent ban preventing former RCD members from running in future elections was never enacted.<sup>99</sup>

### *Conclusions*

The political legitimacy of President Ben Ali and his regime may have eroded over a period of decades, but the Jasmine Revolution finally ended his regime's capacity to govern. Decades of RCD domination over the state and its repression of opposition voices destroyed any possibility for Prime Minister Ghannouchi or interim-President Mebazaa to govern or to control

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<sup>94</sup> Interview with Masmoudi.

<sup>95</sup> Hala al-Youssoufi, *Tunisia Labor Union Serves as Political Mediator*, trans. Sami-Joe Abboud, AL-MONITOR (Mar. 14, 2014), <http://www.al-monitor.com/pulse/politics/2014/03/tunisia-labor-union-political-balance.html>.

<sup>96</sup> *Ibid.*; Interview with Masmoudi.

<sup>97</sup> Interview with Masmoudi.

<sup>98</sup> *Ibid.*

<sup>99</sup> Interview with Snoussi.

the transition process. The massive protests of January and February 2011 destroyed the regime's political legitimacy and made it impossible to hold new presidential elections as required by Article 57 of the 1959 Constitution, destroying the regime's constitutional legitimacy as well.

To make up for their legitimacy deficit, Ghanoucchi and Mebazaa borrowed some revolutionary legitimacy by formally recognizing the opposition's High Commission for the Realization of the Goals of the Revolution, Political Reform, and Democratic Transition on February 18, 2011. But it was not enough. Within a matter of weeks, Ghanoucchi's government resigned and Mebazaa called for the election of a constituent assembly and a new constitutional order. Even then, interim-President Mebazaa and Ghanoucchi's successor, Prime Minister Essebsi, were now bound to treat the High Commission like an unelected parliament until the election of the NCA.<sup>100</sup>

The challenges to the legitimacy of the NCA after its election were largely a result of the split in Tunisian society between Islamists and secularists and the distrust and fear that each side has for the other. The political rhetoric over the NCA's authority and its time frame for completing the constitution was absent during Tunisia's previous Constituent Assembly, which was elected on March 25, 1956 and did not adopt a constitution until June 1, 1959.<sup>101</sup> In that period, the political context was defined by the favorable political position of Habib Bourguiba, who led the country through the process of decolonization and achieved Tunisia's independence.<sup>102</sup> During Tunisia's most recent constitution-drafting period, the UGTT's large political base and its historical reputation granted it a similar legitimacy to help the political

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<sup>100</sup> El-Sayed, *Post-Revolution Constitutionalism*, at 40.

<sup>101</sup> Interview with Said.

<sup>102</sup> *Ibid.*

parties resolve their political differences.<sup>103</sup> The other members of the Quartet were also regarded as “respected institutions.”<sup>104</sup>

Legitimacy becomes a crucial issue to the political transitions of revolutionary but divided societies such as in Tunisia. The narrowest consensus among the social and political forces behind the Jasmine Revolution was that Ben Ali and his regime had lost its legitimacy and must go. Beyond that point of agreement, Tunisia faced sharp political and social divisions.<sup>105</sup> This context can present a dual danger to governance and stability; the current political authority is illegitimate and no other legitimate political heir is readily apparent. A government-managed transition and constitution-making process was absolutely precluded after the Jasmine Revolution. But the commitment of Tunisians to democratic legitimacy and the principle of consensus allowed for the implementation of an effective constitution-making process that ended the country’s political transition with a new constitution and the beginnings of democratization.

### **C. Eschewing a Preconstitutional Statement of Principles**

#### *Introduction*

In some constitution-making processes, the parties to the process take some time at the outset to agree on certain principles that the new constitution will embody.<sup>106</sup> Modern constitution-making experiences suggest that such an exercise “in deeply divided societies . . . appear[s] to help in completing a transition without violence or process breakdown.”<sup>107</sup> For example, South Africa began drafting its 1996 Constitution in the midst of political negotiations

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<sup>103</sup> Interview with Hamrouni. For an extensive discussion of UGTT’s role as a mediator in the current constitution-making process, see Sarah Chayes, *How a Leftist Labor Union Helped Force Tunisia’s Political Settlement*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 27, 2014), <http://carnegieendowment.org/2014/03/27/how-leftist-labor-union-helped-force-tunisia-s-political-settlement>.

<sup>104</sup> Chayes, *How a Leftist Labor Union*.

<sup>105</sup> See, e.g., Noura, *Obstacles*.

<sup>106</sup> Miller, *Designing Constitution-Making Processes*, at 626.

<sup>107</sup> *Ibid.*

to end apartheid.<sup>108</sup> The Multi-party Negotiating Process (MPNP), dominated by Nelson Mandela's African National Congress and the government's National Party but including others, negotiated an interim constitution to govern the transition process as well as thirty-four binding constitutional principles for the final constitution.<sup>109</sup>

The parties in the MPNP agreed to these thirty-four principles before South Africa's first democratic elections, and the principles were made enforceable by a constitutional court that was established under the interim constitution.<sup>110</sup> These principles, a product of political compromises to end apartheid, were precise enough to guarantee that fundamental aspects of the negotiated compromises were upheld, but not so detailed to completely preempt the work of the constitutional assembly.<sup>111</sup> It was the first time that preconstitutional principles were made binding and subject to judicial review.<sup>112</sup> Other countries, such as Namibia, have also used preconstitutional principles to kick-off their constitution-drafting process without making the constitution judicially reviewable in accordance with those principles.<sup>113</sup> In these circumstances, the preconstitutional principles may serve as important guidelines during the constitution-making deliberations.<sup>114</sup>

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<sup>108</sup> Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 111, 112–26 (Laurel E. Miller & Louis Aucoin, eds., 2010).

<sup>109</sup> *Ibid.* at 119–21.

<sup>110</sup> *Ibid.* at 125–27.

<sup>111</sup> *Ibid.* at 127.

<sup>112</sup> *Ibid.* at 127. Indeed, the South African Constitutional Court rejected a draft version of what became the 1996 Constitution. *See generally* *In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)* (holding that nine of the thirty-four agreed-upon constitutional principles had been violated, particularly those related to the power of the central government).

<sup>113</sup> Marinus Wiechers, *Namibia's Long Walk to Freedom: The Role of Constitution Making in the Creation of an Independent Namibia*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 81, 84–85 (Laurel E. Miller & Louis Aucoin, eds., 2010).

<sup>114</sup> *Ibid.* at 96 (“The 1982 constitutional principles were the guiding star of the assembly’s deliberations. They came to be known as the “holy cow” in the deliberations of both the assembly and the constitutional committee. Each time it was perceived that a proposal would offend the “holy cow,” the chairperson would immediately rule the proposal out of order.”).

## *The Tunisian Experience*

For the most part, important political actors in the Tunisian constitution-making process rejected the idea of developing a set of preconstitutional principles. Duncan Pickard acknowledges the NCA's failure to declare certain principles early on in the process and includes the importance of deciding fundamental principles or design questions at the outset as one of his lessons from Tunisia's constitution-making experience.<sup>115</sup>

There were two big opportunities for Tunisians to develop a set of preconstitutional principles to guide the remainder of the constitution-making process. The first big opportunity was presented to the parties within the High Commission, who could have negotiated certain preconstitutional principles before the NCA elections took place. After all, the High Commission was inclusive of representatives from across the political spectrum and civil society and other organizations.<sup>116</sup> Indeed, Ben Achour wished to develop a pact for the democratic transition within the High Commission before the NCA elections took place, but he was rebuffed for the most part by the resignation of Ennahda and CPR.<sup>117</sup> The Declaration on the Transition Process that Ennahda and most other major political parties in the High Commission did agree to before the election only provided "a minimum of direction" to the transition process.<sup>118</sup> As discussed above, the declaration's key provision limiting the work of the NCA to a term of one year was quickly ignored.<sup>119</sup>

Yet it would be a simplification to conclude that a set of preconstitutional principles were blocked in the High Commission solely by the political parties that expected to perform well in

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<sup>115</sup> Duncan Pickard, *Lessons from Constitution-Making in Tunisia*, RAFIK HARIRI CENTER FOR THE MIDDLE EAST ISSUE BRIEF (Atlantic Council), Dec. 13, 2012, at 1, 5, available at [http://www.atlanticcouncil.org/images/files/publication\\_pdfs/403/mec121213tunisia.pdf](http://www.atlanticcouncil.org/images/files/publication_pdfs/403/mec121213tunisia.pdf).

<sup>116</sup> Nouria, *Obstacles*.

<sup>117</sup> Hachemaoui, *Tunisia at a Crossroads*, at 13.

<sup>118</sup> Zemni, *Extraordinary Politics*, at 14.

<sup>119</sup> Hachemaoui, *Tunisia at a Crossroads*, at 9.

the NCA elections. The High Commission may have been marked by its inclusivity and its ability to reach consensus at defining moments, but it was also marked by deep political divisions.<sup>120</sup> Representatives in the High Commission clashed over how representative their faction was of Tunisian society.<sup>121</sup> Some parties to the High Commission, particularly civil society organizations, withdrew from the Commission because of their disagreements.<sup>122</sup> Others were either excluded from or marginalized within the High Commission, especially Tunisian youth and women.<sup>123</sup>

Even if the High Commission was inclusive and largely representative of Tunisian society, it was still an unelected body. The wide array of oppositional forces in the High Commission coalesced around the demand for an elected body to draft a new constitution early on in the Jasmine Revolution.<sup>124</sup> The political committee of the High Commission viewed the creation of a new constitution, at the hands of an elected body and with no participation of members of the old system, as the true rupture from the old system and the “democratic moment” of the revolution.<sup>125</sup> And despite political differences, the parties had made common cause and spoke in the language of consensus and compromises in the context of the revolutionary crisis.<sup>126</sup> These factors all contributed to undermine any desire or sense of urgency for the High Commission to draw up a set of preconstitutional principles.

The second major opportunity for the creation of a set of preconstitutional principles came in the aftermath of the NCA elections, but the NCA took no steps towards agreeing on a set

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<sup>120</sup> Nouria, *Obstacles*; Zemni, *Extraordinary Politics*, at 16 n.5.

<sup>121</sup> Nouria, *Obstacles*.

<sup>122</sup> Zemni, *Extraordinary Politics*, at 16 n.5.

<sup>123</sup> *Ibid.* at 10–11; Nouria, *Obstacles*.

<sup>124</sup> Interview with Snoussi.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

of principles or resolving fundamental issues at the outset.<sup>127</sup> Even though creating the new constitution was the NCA's primary task, the mini-constitution adopted by the NCA on December 16, 2011 included just a single article regarding the final constitution.<sup>128</sup> Article 3 of the mini-constitution related to the adoption of the final constitution and required two stages.

In the first stage, Article 3 provided for approval of the Constitution, article-by-article, by a simple majority of its members.<sup>129</sup> In the second stage, Article 3 required that two-thirds of the NCA, or a simple majority of voters in a public referendum if the NCA failed to adopt the entire constitution after a second reading, approve this edited constitutional draft for it to be adopted.<sup>130</sup> The mini-constitution included no substantive principles or guidelines to guide the drafting process. Nor did the NCA's rules of procedure, adopted on January 20, 2012, include any mention of preconstitutional principles, although some rules provided for the manner of drafting the constitutional text.<sup>131</sup> Rather, the NCA made it clear that it wished to commence the drafting process from scratch, and it rejected drafts submitted by organizations like the UGTT or Doustourna ("Our Constitution") as a starting point for discussions.<sup>132</sup>

Again, there are several factors that help to explain why the NCA did not see fit to adopt a set of preconstitutional principles at the beginning of its term. Underneath the real differences and the political posturing, Tunisians largely agreed on the foundational underpinnings of their state and what needed to change going into the transition process.<sup>133</sup> Prior to the NCA election, all of the major political parties, including Ennahda, publicly expressed a desire to maintain

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<sup>127</sup> See Pickard, *Lessons from Constitution-Making in Tunisia*, at 1, 5.

<sup>128</sup> [Constituent Law 2011-6, Related to the Provisional Organization of Public Powers] art. 3, JOURNAL OFFICIEL DE LA RÉPUBLIQUE TUNISIENNE, No. 97, p. 3111, Dec. 23 2011.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> PROCTOR & BEN MOUSSA, THE TUNISIAN CONSTITUENT ASSEMBLY'S BY-LAWS, at 11, 26–27.

<sup>132</sup> Interview with Hamrouni. Part of the NCA's rationale in excluding outside drafts was to avoid privileging any political faction over the other. Ibid.

<sup>133</sup> See Brown, *Do Tunisians Agree*.

Article 1 of the 1959 Constitution, which recognized Islam as the religion of the country but did not codify Shari'a.<sup>134</sup> The widespread agreement to maintain the formulation of Article 1 made a pre-drafting agreement on the identity of the state superfluous.

Ennahda appeared that it might backtrack on its promise to not mention Shari'a in the new constitution in the spring of 2012 when its Shura Council began to debate the issue,<sup>135</sup> resulting in weeks of pro- and anti-Shari'a protests.<sup>136</sup> But Ennahda's leadership has argued that the party had never before had the opportunity to convene and debate the issue and that those in favor of including a reference to "Shari'a" in the new constitution were always in the minority.<sup>137</sup> Although the debates over Shari'a in the spring and summer of 2012 delayed the NCA's consideration of many economic, social, and cultural rights,<sup>138</sup> it is difficult to imagine that any debate over Shari'a could have been avoided within Ennahda after its strong electoral showing. It is also difficult to imagine that a position on Shari'a agreed to by Ennahda's leadership at the outset of the process would have been seen as legitimate as the vote of the Shura Council to not include a reference to Shari'a.

There was also broad agreement among Tunisians that the President of the Republic was too powerful under the old system.<sup>139</sup> Yet there was strong disagreement on whether the country should retain a presidential system or adopt a parliamentary or semi-presidential system.<sup>140</sup> This disagreement was rooted in part by the expectations that the political parties had for their future

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<sup>134</sup> El-Sayed, *Post-Revolution Constitutionalism*, at 44.

<sup>135</sup> Monica L. Marks, *Convince, Coerce, or Compromise? Ennahda's Approach to Tunisia's Constitution 20–22* (Brookings Doha Center, Analysis Paper No. 10, Feb. 2014), available at <http://www.brookings.edu/~media/research/files/papers/2014/02/10-ennahda-tunisia-constitution-marks/ennahda-approach-tunisia-constitution-english.pdf>.

<sup>136</sup> El-Sayed, *Post-Revolution Constitutionalism*, at 44.

<sup>137</sup> Marks, *Convince, Coerce, or Compromise*, at 20–22.

<sup>138</sup> In a system governed by Shari'a, some of those rights would already be defined or have a specific meaning. Interview with Hamrouni.

<sup>139</sup> Brown, *Do Tunisians Agree*.

<sup>140</sup> Marks, *Convince, Coerce, or Compromise*, at 26–28.

electoral prospects.<sup>141</sup> Even after nearly three years of deliberations, the 2014 Constitution contains ambiguous language regarding the executive power of the state.<sup>142</sup> For example, it is unclear what is entailed by provisions requiring consultations between the President and Prime Minister in certain circumstances.<sup>143</sup> The persistent disagreement over the form of government makes it unlikely that this issue could have been resolved at the outset.

For all of these reasons, the development of a set of preconstitutional principles was never pursued as a useful or necessary starting point for the constitution-making process.

#### **D. Democratic Representation, Inclusivity, and the Drafting of the Constitution**

##### *Introduction*

The constitution-making process, particularly in societies with deep divisions, can create a tension between democratic representation and inclusivity because the usual objective of a constitution is to function as a nation's higher law beyond the fortunes of short-term election cycles.<sup>144</sup> On the one hand, democratically-elected representatives have played an important role in most modern constitution-writing exercises and tend to confer a sense of legitimacy on the process and accurately apportion the relevant groups to make a true social contract.<sup>145</sup> On the other hand, inclusivity is its own distinct value separate from representation,<sup>146</sup> and the influence

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<sup>141</sup> See *ibid.* at 27.

<sup>142</sup> Interview with Hela Mathari, Legal Consultant, formerly The Carter Center, currently UNDP (Mar. 4, 2015).

<sup>143</sup> *Ibid.*

<sup>144</sup> Miller, *Designing Constitution-Making Processes*, at 627–28.

<sup>145</sup> *Ibid.*; MCWHINNEY, *CONSTITUTION-MAKING*, at 33 (“It is . . . the constituent assembly – albeit a constituent assembly elected by direct, popular vote and therefore having its own direct political mandate and claims to political, as well as constitutional legitimation – that represents the culmination of the constitutional thinking of the Age of Enlightenment.”).

<sup>146</sup> Louis Aucoin & Michele Brandt, *East Timor’s Constitutional Passage to Independence*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 245, 245 (Laurel E. Miller & Louis Aucoin, eds., 2010).

of a dominant political force can undermine inclusivity and set the stage for continued conflict.<sup>147</sup>

### *Inclusive Representation in Tunisia*

The High Commission adopted three important rules related to the election of NCA members that aimed to resolve the tension between democratic representation and inclusivity and ensure that the NCA was as inclusive as possible. First, the High Commission agreed on a proportional representation electoral system with largest remainders rather than a “first-past-the-post” system for the October 2011 NCA elections.<sup>148</sup> The use of this electoral system had profound implications on the make-up of the NCA. Under this system, Ennahda won 37% of the vote and 41% of the NCA’s seats.<sup>149</sup> But under the other most common proportional representation electoral system formula, Ennahda would have won 69% of the NCA’s seats.<sup>150</sup>

The experts committee of the High Commission had proposed two different electoral systems to the voting members of the Commission’s political committee and explained all the consequences of how the lists would work.<sup>151</sup> The experts committee also made a distinction

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<sup>147</sup> Miller, *Designing Constitution-Making Processes*, at 627–28. For instance, the Fretilin political party was extremely popular at the outset of East Timor’s constitution-making process because of the party’s role in achieving independence first from Portugal and then Indonesia after the latter’s decades-long military occupation. Fretilin “was virtually assured of a landslide victory in the elections,” so other East-Timorese political parties, civil-society organizations, and religious organizations lobbied for a process where an unelected but inclusive constitutional convention or commission would draft the constitution in tandem with public consultations. The constitution would then be adopted by an elected constituent assembly in a two-stage process that combined democratic legitimacy with assurances that broad, diverse sectors of society were included in the process. Yet the calls for an inclusive process went unheeded, and Fretilin dominated the elected constituent assembly and pushed through a constitution with limited input from other key stakeholders. Outbursts of violence, presidential abuses of power, and calls for constitutional reform have punctuated the East-Timorese Constitution’s existence. Aucoin & Brandt, *East Timor’s Constitutional Passage*, at 246–53; 260–72.

<sup>148</sup> Alfred Stepan, *Tunisia’s Transition and the Twin Tolerations*, 23 JOURNAL OF DEMOCRACY 89, 93 (2012).

<sup>149</sup> Ennahda was allocated 87 of the NCA’s 217 seats. Pickard, *Tunisia’s Constitutional Process*, at 2; John M. Carey, *Electoral Formula and the Tunisian Constituent Assembly* 1 DARTMOUTH COLLEGE (May 9, 2013), available at <http://sites.dartmouth.edu/jcarey/files/2013/02/Tunisia-Electoral-Formula-Carey-May-2013-reduced.pdf>.

<sup>150</sup> Carey, *Electoral Formula*, at 1.

<sup>151</sup> Interview with Snoussi.

between the purposes of a constitutional assembly and a purely legislative body and endorsed the proportional system to achieve the broadest range of views possible in the constituent assembly and avoid domination of the assembly by one or two parties.<sup>152</sup> The voting members of the High Commission, more concerned with ensuring elections in the first place and other aspects of their organization, agreed to the proportional representation with largest remainders system by consensus.<sup>153</sup>

Second, the High Commission decided to require that all party lists ensure that 50% of their nominations for the NCA were women.<sup>154</sup> This recommendation was championed by well-known defenders of women's rights among civil society organizations represented in the High Commission as well as prominent law professors within the committee of experts.<sup>155</sup> It was also accepted by the political committee of the High Commission without any significant controversy.<sup>156</sup>

Third, the High Commission granted a disproportionately high allocation of seats to lowly populated constituencies that had suffered from decades of underrepresentation.<sup>157</sup> Along these lines, eighteen NCA seats were reserved for Tunisian expatriates, allowing Tunisians who had been forced into exile or labor migration to participate in the constitution-making process.<sup>158</sup>

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<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Murphy, *Tunisian Elections of October 2011*, at 235.

<sup>155</sup> Interview with Snoussi.

<sup>156</sup> Ibid. Professor Snoussi recalled that in the aftermath of this decision, a representative of Ennahda promised that the Islamist party would have more women on the list than the other parties combined. The promise turned out to be a fairly accurate prediction. See Zemni, *Extraordinary Politics*, at 16 n.11 (“The discussion of gender parity was somewhat of a double-edged sword. While secular parties wanted to put pressure on Ennahdha, the latter had no problems accepting women on the electoral lists and was able to find enough candidates to fill up the positions, while many secular forces had to refrain from fielding lists in certain constituencies due to a lack of female candidates.”).

<sup>157</sup> Murphy, *Tunisian Elections of October 2011*, at 235.

<sup>158</sup> Ibid.

The outreach to Tunisians located abroad was considered to be a major reversal of the old policy excluding Tunisians (often forced) abroad from participating in the nation's politics.<sup>159</sup>

Against the advice of the technical committee of the High Commission, the voting members of the Commission decided to exclude a wide range of officials affiliated with Ben Ali's RCD party from standing for election in the NCA.<sup>160</sup> Some members of the technical committee believed that this exclusion was prohibited by Tunisia's obligations under international law, and others offered that members of the old party could be excluded through the political process (i.e. through not voting for them).<sup>161</sup> About 8000 people from the RCD were not allowed to stand for election in October 2011,<sup>162</sup> but they were still able to vote.<sup>163</sup>

The High Commission chose an electoral formula designed to achieve a broad range of political views in the NCA, and it also intervened to include groups historically marginalized in Tunisia, including women, voters from provincial constituencies, and Tunisians living in exile.<sup>164</sup> And while the exclusion of former RCD officials from the NCA exacerbated tensions during the summer 2013 political crisis,<sup>165</sup> these officials were still eligible to cast a ballot in the NCA elections, and the ban was lifted for the 2014 Tunisian presidential and parliamentary elections.<sup>166</sup> Tunisia thus struck a fair and workable balance between inclusivity and democratic representation.

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<sup>159</sup> Interview with Snoussi.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Zemni, *Extraordinary Politics*, at 16 n.12.

<sup>163</sup> Interview with Snoussi.

<sup>164</sup> As noted by Professor Snoussi, Tunisia is approximately 98% Sunni Arab and does not have significant sectarian or ethnic divisions. Ibid.

<sup>165</sup> Roua Khlifi, *Ennahdha and Allies*.

<sup>166</sup> Interview with Snoussi.

### *Representation and Inclusivity Inside the Constitutional Committees*

The Rules of Procedure of the NCA created six constitutional standing committees and provided for representation of parliamentary groups and independent members in these committees to be proportional to their representation in the NCA.<sup>167</sup> The committees were limited to twenty-two members, and each committee had a leadership bureau of five members.<sup>168</sup> They were organized around six themes: (1) the preamble and fundamental principles, (2) rights and freedoms, (3) the legislative and executive powers, and the relation between the two, (4) the judicial system, (5) constitutional bodies, and (6) local and regional authorities.<sup>169</sup> Ennahda chaired three of these committees, while CPR, Ettakatol, and the Democratic Bloc each chaired one committee.

The Constitutional Drafting and Coordination Committee (Drafting Committee), overseen by NCA President Ben Jaafer of Ettakatol and Habib Khedher of Ennahda, was charged with harmonizing and editing the draft constitutional texts.<sup>170</sup> A conflict over whether the Drafting Committee or the six constitutional committees had the right to incorporate amendments resulting from discussions in the NCA's plenary sessions was resolved in the committees' favor when the assembly's rules of procedure were amended in March 2013.<sup>171</sup> A Consensus Committee was established in June 2013 because the leaders of the troika wanted to ensure that there was consensus before bringing the constitution to a vote and because some party leaders were advocating for certain changes to the final draft.<sup>172</sup> The Consensus Committee was based on equal representation of the parties, not proportional representation, and it caused

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<sup>167</sup> PROCTOR & BEN MOUSSA, *THE TUNISIAN CONSTITUENT ASSEMBLY'S BY-LAWS*, at 24.

<sup>168</sup> *Ibid.*

<sup>169</sup> Pickard, *Lessons for Constitution-Making*, at 2.

<sup>170</sup> Interview with Mathari.

<sup>171</sup> *Ibid.*

<sup>172</sup> Interview with Masmoudi.

some controversy because it was not provided for by the NCA's rules of procedure until after it completed its work.<sup>173</sup> Nonetheless, the NCA largely held to the deals made in the Consensus Committee.<sup>174</sup>

## **E. Public Participation**

### *Introduction*

For the purposes of this paper and many other constitution-making case studies, public participation refers to direct public participation in the form of procedures for soliciting citizen input and for educating the public about decisions regarding the constitution.<sup>175</sup> Thus, elections for a constituent assembly or a mandated referendum for adopting the constitution necessarily involve public participation, but such procedures are not the focus of public participation here. With this understanding of public participation in mind, it is important to understand that public participation in the constitution-making process may be sought to serve one or both of two distinct values.

First, public participation is often justified as a means to create “the perception of legitimacy and the feeling of ownership among the population,” instilling a “culture of constitutionalism” among the public.<sup>176</sup> This is the most commonly cited reason for justifying public participation, and it is called the most “intuitively plausible” justification by Justin Blount.<sup>177</sup> Second, the purpose of public participation may be intended to “actually shape the constitutional text.”<sup>178</sup>

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<sup>173</sup> Interview with Said.

<sup>174</sup> Interview with Mathari.

<sup>175</sup> See, e.g., Miller, *Designing Constitution-Making Processes*, at 630.

<sup>176</sup> *Ibid.* at 636.

<sup>177</sup> Justin Blount, *Participation in Constitutional Design*, in *COMPARATIVE CONSTITUTIONAL LAW* 38, 39 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>178</sup> Miller, *Designing Constitution-Making Processes*, at 636.

Although public participation may seem to be an obviously valuable and desirable component for a constitution-making process to possess at first glance, it is difficult to assess if and to what extent participation actually produces feelings of legitimacy and ownership.<sup>179</sup> Most case studies also suggest that public comments have a limited influence on the actual text.<sup>180</sup> Moreover, some commentators have pointed out the potential pitfalls connected to public participation in constitution-making. For instance, Blount cites textual incoherence and the increased difficulty of reaching an agreement as practical concerns that may be exacerbated by public participation in the drafting process.<sup>181</sup>

Similarly, Alicia Bannon argues that public participation must be thought of in terms of cost and benefit and warns that the costs can be destabilizing.<sup>182</sup> Nonetheless, Bannon contended that broad participation was necessary to sustain constitutional legitimacy in Kenya's political context.<sup>183</sup> And while most cases suggest that public participation has a limited influence on the final constitutional text, important counterexamples do exist. Albania's constitution-drafting process included a series of public hearings throughout the country that heard hundreds of suggested changes to the draft constitution.<sup>184</sup> These hearings resulted in more than fifty changes affecting about 25% of the draft articles, including some amendments to high-profile subjects such as property restitution.<sup>185</sup>

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<sup>179</sup> *Ibid.* at 637.

<sup>180</sup> *Ibid.*

<sup>181</sup> Blount, *Participation in Constitutional Design*, at 40.

<sup>182</sup> Bannon, *Lessons from Kenya*, at 1842–44 (“One key lesson from Kenya is that public participation is a more equivocal value than many commentators have recognized. In Kenya’s political context, broad participation was necessary for legitimacy; yet under different political circumstances such participation would have been less valuable. Furthermore, even in Kenya, participation generated significant economic costs and social disruption. Designers of review processes should consider a country’s cultural and political context to evaluate whether broad participation is a practical necessity and to structure public participation to minimize costs.”).

<sup>183</sup> *Ibid.* at 1842.

<sup>184</sup> Scott N. Carlson, *The Drafting Process for the 1998 Albanian Constitution*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 311, 317 (Laurel E. Miller & Louis Aucoin eds., 2010).

<sup>185</sup> *Ibid.* For a robust defense of the right of the public to participate in the constitution-making process and several more examples of its effectiveness in meaningfully shaping constitutional texts, see Vivien Hart, *Constitution*

### *Public Participation in the Tunisian Constitution-Drafting Process*

Public participation in the Tunisian constitution-drafting process was defined by the NCA's lackluster public engagement and the efforts taken by civil society organizations to inject themselves into the process and to educate the broader Tunisian public. Pickard noted that the NCA's first major public outreach campaign did not come until after the publication of the second draft of the constitution in mid-December 2012, more than a year after the NCA's election and four months after its publication of the first draft.<sup>186</sup> In a report issued in May 2012, The Carter Center commented on the general lack of outreach and the lack of any formal mechanisms for the NCA to solicit public comments on the constitutional project.<sup>187</sup> In September 2012, the NCA launched a suggestion box on its official website to allow it to receive public comments and hosted a two day debate with civil society organizations to coincide with the release of the first draft.<sup>188</sup>

Finally, the NCA carried out an extensive, nationwide outreach campaign for two months after the release of the second draft.<sup>189</sup> The campaign included meetings between NCA members and the chairs of the constitutional committees and members of the public.<sup>190</sup> Attendance at these sessions ranged from 50 to 500 participants, and the meetings generated more than 10,000

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*Making and the Right to Take Part in a Public Affair*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 20 (Laurel E. Miller & Louis Aucoin eds., 2010).

<sup>186</sup> Duncan Pickard, *At Last, Public Participation in Constitution-Making in Tunisia*, ATLANTIC COUNCIL (Feb. 12, 2013), <http://www.atlanticcouncil.org/blogs/menasource/at-last-public-participation-in-constitutionmaking-in-tunisia>.

<sup>187</sup> THE CARTER CENTER, THE CARTER CENTER ENCOURAGES INCREASED TRANSPARENCY AND PUBLIC PARTICIPATION IN TUNISIA'S DRAFTING PROCESS 5–6 (May 11, 2012), *available at* <http://www.cartercenter.org/resources/pdfs/news/pr/tunisia-statement-051112-en.pdf>.

<sup>188</sup> THE CARTER CENTER, THE CARTER CENTER RECOGNIZES TUNISIA'S NATIONAL CONSTITUENT ASSEMBLY; CALLS FOR INCREASED PUBLIC PARTICIPATION, OUTREACH, AND TRANSPARENCY 4–5 (Sept. 26, 2012), *available at* <http://www.cartercenter.org/resources/pdfs/news/pr/tunisia-092612-full-statement-en.pdf>.

<sup>189</sup> Pickard, *At Last*. This campaign was supported by the United Nations Development Program (UNDP). *Ibid.*

<sup>190</sup> *Ibid.*

comments by the end of the two months.<sup>191</sup> Still, The Carter Center levied its harshest criticism at the NCA after this campaign, asserting that citizen awareness of the constitutional process remained low and that the NCA had failed to effectively and regularly communicate with the public throughout the process.<sup>192</sup>

The dialogues undertaken by the NCA do not appear to have been hugely important to the public as a whole.<sup>193</sup> Only some of the assembly members participated in the outreach campaign in early 2013, and much of the public was unaware or unconcerned that the public meetings and dialogues were even taking place.<sup>194</sup> But this is not to say that public participation mechanisms did not have important effects on the constitution-making process. Hela Mathari cites the addition of the rights of the opposition (Article 60 of the 2014 Constitution) to the text as a direct result of the national dialogues.<sup>195</sup>

Moreover, participation mechanisms may have failed to involve the population as a whole, but they did open the door for civil society organizations to be heard.<sup>196</sup> Particularly at the beginning of its term, the NCA was defensive of its legitimacy and contended that it did not need outside help as the people's elected body.<sup>197</sup> The Carter Center documented the inaccessibility of the NCA and the constitution-drafting process to civil society organizations throughout much of the NCA's first year.<sup>198</sup> Yet as the NCA and its members became increasingly open to public

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<sup>191</sup> Ibid. The Carter Center estimated that this campaign involved around 5,000 citizens. THE CARTER CENTER, THE CARTER CENTER CONGRATULATES TUNISIA'S NATIONAL CONSTITUENT ASSEMBLY ON FINAL DRAFT OF CONSTITUTION AND URGES SAFEGUARDS FOR HUMAN RIGHTS 5–6 (June 12, 2013), *available at* <http://www.cartercenter.org/resources/pdfs/news/pr/tunisia-full-report-061213-eng.pdf>.

<sup>192</sup> THE CARTER CENTER, CARTER CENTER CONGRATULATES TUNISIA'S NATIONAL CONSTITUENT ASSEMBLY, at 5–6.

<sup>193</sup> Interview with Mathari.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid. This was an observation echoed by Professor Hamrouni and Professor Snoussi.

<sup>198</sup> THE CARTER CENTER, THE CARTER CENTER ENCOURAGES INCREASED TRANSPARENCY, at 3–4; THE CARTER CENTER, THE CARTER CENTER RECOGNIZES TUNISIA'S NATIONAL CONSTITUENT ASSEMBLY, at 4, 6.

participation dialogues, the NCA came to accept the role that civil society had to play.<sup>199</sup> Especially in the days leading up to the vote on the constitution in the NCA, civil society organizations were present and consulting with NCA members on aspects of the constitution.<sup>200</sup>

Many civil society organizations held their own public events in support of Tunisia's constitution-making process, including the Tunisian Association of Constitutional Law, the Research Association on the Democratic Transition, Doustourna, Al Bawsala, and CSID.<sup>201</sup> These organizations prepared panels and roundtables to encourage interactions between NCA members, civil society members, and citizens.<sup>202</sup> In addition to organizing debates between citizens and NCA members,<sup>203</sup> Al Bawsala advocated for the transparency of the NCA and the constitution-making process.<sup>204</sup> When the NCA failed to publish documents related to its work, such as the results of votes, the records and minutes of meetings, and attendance lists,<sup>205</sup> Al Bawsala created its own web portal to publish records related to the work of the NCA and the constitution-making process.<sup>206</sup>

CSID's efforts in support of Tunisian constitution-making can be traced back to before the Jasmine Revolution, and they demonstrate the facilitating role that civil society organizations can play in achieving a democratic, constitutional framework in divided societies. CSID, which was established in 1999 to focus on dialogue between Islamists and secularists, held two major

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<sup>199</sup> Interview with Mathari.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.; Interview with Snoussi.

<sup>202</sup> Interview with Mathari.

<sup>203</sup> Video clips from six debates hosted by Al Bawsala can be found at Al Bawsala, *Débats citoyens/élus*, YOUTUBE (last updated May 22, 2013), [https://www.youtube.com/playlist?list=PL229IPcYkr2\\_tK5PckM2Qa3MDbZYFyIXI](https://www.youtube.com/playlist?list=PL229IPcYkr2_tK5PckM2Qa3MDbZYFyIXI).

<sup>204</sup> See Dustin Palmer, *Case Study #4: Al Bawsala's Web Platform Marsad.tn*, OPENINGPARLIAMENT.ORG (Aug. 23, 2013, 11:30 AM), <http://blog.openingparliament.org/post/59109079880/case-study-4-al-bawsalas-web-platform-marsad-tn>.

<sup>205</sup> THE CARTER CENTER, THE CARTER CENTER RECOGNIZES TUNISIA'S NATIONAL CONSTITUENT ASSEMBLY, at 7.

<sup>206</sup> *Majles Marsad*, AL BAW SALA, <http://majles.marsad.tn/fr/anc> (last visited 21 Apr. 2015).

prerevolutionary conferences in Tunis in 2004 and 2009.<sup>207</sup> These conferences are examples of the prerevolutionary dialogue between oppositional forces holding diverse political opinions—a dialogue that Radwan Masmoudi and Monica Marks believed laid the foundation for a fairly unified, consensual approach to Tunisian constitution-making.<sup>208</sup>

CSID decided to focus its resources on the Tunisian transition and constitution-making process after the fall of Ben Ali and hosted roughly fifty public meetings over the course of the transition process (about two or three a month).<sup>209</sup> But its most effective events were those that directly targeted NCA members and leaders in political parties and civil society. On March 2, 2012, CSID invited Rachid Ghannouchi, the President of Ennahda, to give a lecture on secularism, religion, and the state; this lecture was followed by a discussion with the audience of about fifty attendees, which included activists, civil society members, and politicians across the political spectrum.<sup>210</sup> As discussed earlier, this lecture came at a time high tension over the possible inclusion of Shari'a in the draft constitution and virtually no NCA public outreach. Several opposition leaders in the audience expressed broad agreement with Ghannouchi's position in the lecture and their hope that his position on the issue was the one that Ennahda would take in the NCA.<sup>211</sup>

Similarly, CSID hosted a two-day national dialogue conference in early July 2012, which was months before the NCA hosted its first public dialogue.<sup>212</sup> The July 2012 conference, which was attended by more than 200 participants from the NCA, various political parties, and civil

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<sup>207</sup> Interview with Masmoudi.

<sup>208</sup> Ibid.; Marks, *How Egypt's Coup*.

<sup>209</sup> Interview with Masmoudi.

<sup>210</sup> Ibid. A transcript and link to the video of the lecture can be found at *Revisiting Rashid Ganoushi's Lecture on Secularism post-Arab Spring (March 2012)*, STRATA CONSULTING (Feb. 5, 2014), <https://strataresearch.wordpress.com/2014/02/05/revisiting-rashid-ganoushis-lecture-on-secularism-post-arab-spring-march-2012>.

<sup>211</sup> Interview with Masmoudi.

<sup>212</sup> Ibid.

society organizations, broke out into six workshops modeled after the NCA's six constitutional committees. The workshops highlighted the major differences in the committees and sought to either reach consensus on these controversial issues or to flag them as issues that needed to be resolved going forward.<sup>213</sup>

Yet CSID's series of twenty-five smaller dialogue workshops, which began after the release of the first draft of the constitution, had a greater impact on Tunisia's constitution-making process. These workshops lasted two-and-a-half days and brought participants usually to Hammamet—away from the capital—where they stayed together in the same hotel and took meals together.<sup>214</sup> Each workshop was built entirely around one constitutional article or issue of significant disagreement, and they were professionally facilitated by nine Tunisians who had spent one month of training under international experts on dialogue facilitation in conjunction with the German organization Transform e.V.<sup>215</sup>

The constitutional committee responsible for the issue under discussion would be invited to the workshop; typically, six or so committee members would attend the workshop. CSID would also invite the major political parties to send representatives to each workshop, and the top five parties were nearly always present. Finally, CSID would invite civil society organizations that were working with or concerned about the particular article or issue to be discussed.<sup>216</sup>

Participants in CSID's dialogue workshops usually came to an agreement by the end of the two-and-a-half days, but some particularly contentious issues were handled over multiple workshops.<sup>217</sup> For instance, CSID hosted multiple dialogue workshops on the issue of freedom

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<sup>213</sup> Ibid.

<sup>214</sup> Ibid. The dialogue workshops started out in Tunis but were moved to Hammamet to guarantee full-time attendance.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

of conscience, which focused on questions related to apostasy and street proselytizing, and the issue of a presidential or parliamentary system, which was the major outstanding area of disagreement by March 2013. NCA members of all stripes expressed their belief that such private meetings allowed them to escape the “political theater” of the NCA and find common ground.<sup>218</sup> Indeed, NCA constitutional committee members would approach CSID about hosting workshops on problematic issues after the release of the second and third drafts.<sup>219</sup>

The work of civil society organizations like Al Bawsala and CSID in Tunisia offered important public participation mechanisms for Tunisians, particularly civil society leaders and activists who were frustrated by the NCA’s late and modest public outreach efforts. As noted by The Carter Center, civil society can never provide a complete substitute for government outreach and transparency and should never be thought of as a replacement to a government-driven process.<sup>220</sup> But the efforts of civil society organizations filled in important gaps during the Tunisian process, and the dialogue workshop retreats hosted by CSID served as an important third-party service that facilitated discussion and agreement on critical issues.

The overall record of public participation in the constitution-making process is mixed. As cited above, the Tunisian public was not well informed of the NCA’s work regarding the constitution, even after the release of constitution’s final draft. There is a strong sense that the public as a whole did not have much of an impact on the final text.<sup>221</sup> Of course, public opinion polls demonstrate that the public had little interest in the new constitution and was preoccupied with normal political issues, such as the economy and unemployment. It might be tempting to blame insufficient public outreach for the public’s ambivalence to the constitution-making

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<sup>218</sup> Marks, *Convince, Coerce, or Compromise*, at 25.

<sup>219</sup> Interview with Masmoudi.

<sup>220</sup> See THE CARTER CENTER, *THE CARTER CENTER ENCOURAGES INCREASED TRANSPARENCY*, at 6.

<sup>221</sup> Interview with Mathari.

process, but the opinion polls demonstrate remarkable consistency between the height of revolutionary feeling in March 2011 and the release of the final draft in June 2013.<sup>222</sup> A supermajority of Tunisians were preoccupied with concerns over the economy and employment throughout the constitution-making process.

Yet public participation mechanisms also provided the means for civil society organizations and activists to have their voices heard.<sup>223</sup> And heard they were; according to Salwa Hamrouni, the 2014 Constitution would not be what it is today without the pressure of civil society organizations.<sup>224</sup> It took prodding from Tunisian civil society organizations and outside organizations such as The Carter Center and UNDP to open up the process, but the NCA became fairly open and inclusive of major civil society actors by the end of the process.<sup>225</sup>

## **F. The Role of Experts**

### *Introduction*

Like a preconstitutional statement of principles or public participation, the practice of using (or not using) experts or professional support staff has varied from process to process. At one end of the spectrum, the constitutional drafting process may be delegated to a panel of experts by the constitution-making body.<sup>226</sup> This method of constitution drafting was used effectively in Namibia, where the constituent assembly appointed three South African lawyers to

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<sup>222</sup> Interview with Masmoudi. In March 2011, 75% of Tunisians identified unemployment as one of the three biggest problems facing the country, compared to only 8% who mentioned the 1959 Constitution: 32% identified unemployment as the single biggest problem facing Tunisia, compared to only 2% who identified the constitution, 8% who identified political reform, and 1% who identified the legal system. IRI, SURVEY OF TUNISIAN PUBLIC OPINION 15 (Mar. 5–18, 2011). After the release of the final draft in June 2013, 68% of Tunisians identified unemployment as one of the three most important problems facing Tunisia and 55% identified the economy, compared to 3% who identified finishing the constitution. IRI, SURVEY OF TUNISIAN PUBLIC OPINION 12 (June 18–30, 2013).

<sup>223</sup> Interview with Mathari.

<sup>224</sup> Interview with Hamrouni.

<sup>225</sup> Interview with Snoussi.

<sup>226</sup> Miller, *Designing Constitution-Making Processes*, at 615.

present it with a first draft for its consideration.<sup>227</sup> Between this high level of involvement and no expert involvement runs a wide range of options that include seeking advice from jurists and scholars on substantive matters, asking for technical drafting assistance, and relying on a full-time professional support staff.<sup>228</sup>

### *Expert Advice in Tunisian Constitution Making*

As the constitutional committees of the NCA began to convene in February 2012, they initially took a fairly normal approach to seeking expert advice at the outset of constitution making. The committees conducted hearings with Tunisian and international experts and studied different reports on constitutional issues and drafting processes,<sup>229</sup> including copies of different constitutions from around the world.<sup>230</sup> Some members of the NCA took private study trips abroad, which were supported by UNDP.<sup>231</sup>

Despite this initial outreach, the NCA returned to an exclusive posture that was defensive of its prerogatives in drafting the new constitution, mimicking the same approach it took towards civil society and public involvement in the initial stages.<sup>232</sup> For instance, the Tunisian Association of Constitutional Law (ATDC) is the nation's preeminent professional constitutional law organization, but the NCA never sought to include it in the drafting process.<sup>233</sup> Other non-governmental organizations and civil society organizations, however, did use the ATDC as a technical resource for understanding and influencing the draft constitutions.<sup>234</sup>

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<sup>227</sup> Ibid. at 616.

<sup>228</sup> Ibid. at 616–18.

<sup>229</sup> THE CARTER CENTER, CARTER CENTER CONGRATULATES TUNISIA'S NATIONAL CONSTITUENT ASSEMBLY, at 2.

<sup>230</sup> Interview with Masmoudi.

<sup>231</sup> Interview with Mathari.

<sup>232</sup> Interview with Hamrouni.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

The NCA flatly refused to create a permanent committee of experts to assist with the constitution-making process even though many of the jurists in the technical committee of the High Commission expected to play that role.<sup>235</sup> Rebuffed in this regard, much of the technical committee founded the Research Association on the Democratic Transition (ARTD) to prepare recommendations on the draft constitutions. Like the ATDC, the ARTD worked with the media and civil society organizations to help them understand the content of the draft constitutions, and the ARTD hosted colloquiums and seminars with politicians, lawyers, activists, and civil society members. Although members of the NCA did not participate in ARTD's first colloquium, they began to participate in subsequent colloquiums due in part to media and civil society coverage; indeed, the President of the NCA and General Rapporteur for the Constitution both participated in ARTD's final colloquium.<sup>236</sup> After each colloquium, ARTD published a report and sent it to every NCA member.<sup>237</sup>

Each constitutional committee of the NCA was provided two legal advisors, but their use depended on the head of the committee and their effectiveness significantly varied.<sup>238</sup> As the constitution-making process evolved, the NCA became more open to receiving technical assistance on an *ad hoc* basis, and the Constitutional Drafting and Coordination Committee (Drafting Committee) and the Consensus Committee especially sought expert opinion.<sup>239</sup> However, the Drafting Committee and Consensus Committee were not transparent regarding the findings of outside specialists or any changes proposed by them.<sup>240</sup>

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<sup>235</sup> Interview with Snoussi.

<sup>236</sup> Ibid.

<sup>237</sup> Ibid.

<sup>238</sup> Interview with Mathari. The legal advisors have mostly performed administrative functions and have seldom functioned as actual advisors. Duncan Pickard, *Lessons from Constitution Making in Tunisia*, at 3.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

Overall, experts were still able to influence the final text through their work with civil society members, the media, and the NCA itself. The debate over a provision in the first draft that criminalized blasphemy demonstrates the ability of expert assistance to be used as educational tool and a political safety valve. Many Ennahda members felt strongly about the issue of blasphemy and initially fought for the provision's inclusion even after it proved controversial.<sup>241</sup> When Ennahda finally agreed to drop the blasphemy language, party members cited their discussions with constitutional scholars and experts as one of the main reasons behind their decision.<sup>242</sup> In particular, Ennahda NCA members emphasized that these expert consultations informed them that a constitution is not the proper place to include criminalizing language and that there are potential dangers to doing so.<sup>243</sup> Hamrouni also points to the text of Article 49 of the 2014 Constitution, relating to the limitations that may be imposed on the rights and freedoms guaranteed by the Constitution, as an example of ATDC influencing the drafting process.<sup>244</sup>

Several errors made by the NCA at the beginning of the process demonstrate the dangers of not consulting experts on legal or technical matters. For example, the mini-constitution adopted by the NCA did not include any provision regarding its amendment, which experts saw as a serious omission.<sup>245</sup>

The seriousness of the omission became apparent when the Prime Minister tendered his resignation and there was no provision in the mini-constitution providing for the nomination of

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<sup>241</sup> Marks, *Convince, Coerce, or Compromise*, at 24.

<sup>242</sup> *Ibid.* at 24–25.

<sup>243</sup> *Ibid.* (““On a personal level, I still feel that provocations against religion should be punished,” said Ennahda representative Mounia Brahim, pressing her hand to her heart earnestly. ‘But I heard from many experts in those meetings who talked about the dangers of putting language that criminalizes in a constitution. It was very difficult, but I had to step back and think about it.’”).

<sup>244</sup> Interview with Hamrouni.

<sup>245</sup> Interview with Snoussi.

his successor.<sup>246</sup> The adoption procedure for the final constitution also loaned itself to a potentially destabilizing public referendum if a two-thirds majority of the NCA failed to support the constitution.<sup>247</sup> Experts may have at least warned the NCA that modern practice demonstrates that even successful plebiscites do not build confidence in constitutions when political leaders publicly disagree on the constitution at the elite level, as in Egypt. These examples demonstrate the importance of expert assistance to democratic representatives.<sup>248</sup>

## **G. The Self-Restraint of the Undemocratic Institutions of Government**

### *Introduction*

Although the ideals of the Enlightenment might recognize that the basis for a constitutional system is “necessarily a political decision,”<sup>249</sup> the non-democratic institutions of government can play important—sometimes helpful, other times devastating—roles in constitution-making and political transition processes. Two powerful institutions deserve careful attention: the judiciary and the military. The South African process presented a case study of the judiciary playing a maximalist and yet helpful role.<sup>250</sup> Yet Laurel Miller maintains that it is the rare situation where the qualifications of the judiciary and the public’s respect for it and the rule of law might allow for such an approach in nascent democracies.<sup>251</sup> More often, national constitutional courts attempt to avoid applying existing constitutional or other laws that might

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<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> *But see* MCWHINNEY, CONSTITUTION-MAKING, at 134 (“[An expert or pure draftsmen] should respect his technical mandate and its political limits.”)

<sup>249</sup> MCWHINNEY, CONSTITUTION-MAKING, at 12.

<sup>250</sup> Miller, *Designing Constitution-Making Processes*, at 626–27.

<sup>251</sup> Ibid.

interrupt new constitution-making processes: an avoidance that is often crucially helpful to the process.<sup>252</sup>

The role of the military during constitution-making processes has received less attention. In many recent studies, it was probably the case that the military was subject to civilian and political control and so could not be conceived of as an independent institutional actor. But the process behind Brazil's 1988 Constitution demonstrates the military's oversized influence when it begins to function as an independent institutional actor.

In the Brazilian case, the military successfully lobbied the constitutional assembly to increase military appropriations and preserve the military's corporate privileges and its contingent of six cabinet positions, and it successfully opposed civilian control of the military and attempts to dismantle the National Security Council and National Information Service.<sup>253</sup> The military also successfully opposed a parliamentary form of government, land reform, and the extension of the right to strike to essential public services.<sup>254</sup> Unsurprisingly, military ministers achieved this success by publicly threatening a coup d'état to pressure members of the constitutional assembly to meet its demands.<sup>255</sup> Questions of process might seem trivial in the face of such an imposing force, yet a constructive lesson might be to recognize such realities and to adopt an appropriate course. Frustrated by the constraints imposed by the military, the Brazilian assembly provided for a plebiscite after five years to revisit the presidential or parliamentary nature of the state.<sup>256</sup>

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<sup>252</sup> Ibid. at 627.

<sup>253</sup> Keith S. Rosenn, *Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 435, 447 (Laurel E. Miller & Louis Aucoin eds., 2010).

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid. at 452–53. Amending the Brazilian Constitution of 1988 was also made only moderately difficult, allowing for a steady stream of amendments since its adoption, including important cutbacks on the military's influence. Ibid.

## *The Undemocratic Institutions of Tunisia*

In Tunisia, the military and the judiciary both played passive roles and allowed the political process of constitution making to unfold. The Tunisian military has historically been noninterventionist when it comes to the political affairs of the country.<sup>257</sup> It did not break from that historical behavior after the outbreak of the Jasmine Revolution.<sup>258</sup> The Tunisian military's history of professionalism and its dearth of economic or other institutional interests gave it little reason to enter into the political process, in contrast with the Egyptian military in 2013 and the Brazilian military in 1988.<sup>259</sup> Even during the political crisis that hit Tunisia in the late summer and early fall of 2013 in the wake of the coup d'état in Egypt, few expected any intervention by the Tunisian military.<sup>260</sup>

The Tunisian judiciary also refrained from wading into the transition and constitution-making process. Indeed, the Constitutional Council was dissolved in March 2011.<sup>261</sup> The Court of Cassation, which was Tunisia's highest court during the transition process, did not have jurisdiction to rule on the constitutionality of electoral laws.<sup>262</sup> The Administrative Tribunal steered clear of political disputes touching upon the constitution-drafting process.<sup>263</sup> However,

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at 455, 458. For a discussion on the “unitary constitutional act” and the alternative step-by-step pragmatic approach, see MCWHINNEY, *CONSTITUTION-MAKING*, at 42–46.

<sup>257</sup> Tarek Amara & Erika Solomon, *Tunisia Eyes “Egypt Scenario” After Assembly Freeze*, REUTERS (Aug. 7, 2013, 11:04 PM), <http://in.reuters.com/article/2013/08/07/tunisiacrisisgovernmentidINDEE9760DM20130807>.

<sup>258</sup> Ibrahim Sharqieh, *Tunisia's Lessons for the Middle East: Why the First Arab Spring Transition Worked Best*, JASMINE FOUNDATION (Sept. 2, 2014), <http://www.jasminefoundation.org/en/?p=966>.

<sup>259</sup> Sharan Grewal, *Why Tunisia Didn't Follow Egypt's Path*, MONKEY CAGE BLOG (Feb. 4, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/04/why-egypt-didnt-follow-tunisia-path>.

<sup>260</sup> Sharqieh, *Tunisia's Lessons*.

<sup>261</sup> Grewal, *Why Tunisia*.

<sup>262</sup> *Ibid.*

<sup>263</sup> Interview with Mathari.

Al Bawsala filed a lawsuit against the NCA in that tribunal under the country's Freedom of Information in August 2012, spurring the NCA to begin publishing more information.<sup>264</sup>

### **III. Conclusion**

The process of designing a constitution matters not only to shaping the final product but ensuring that the final goal is achieved in the first place. Process becomes all the more important in the era of constitutionalism, where constitution making often accompanies seismic political changes and holds the key to resolving potential conflict. A good process can safely guide drafters and the society they represent to the final outcome, while a bad process can preclude an otherwise obtainable national accord. This is not to say that a good constitution-making process will guarantee agreement on a constitution. Context matters, and the national state of affairs may preclude agreement on a constitution or force elements of it to be resolved at a later date even among sincere political actors. Nor is there any one "good" process that leads to a better outcome. Here too, context defines what is workable and unworkable at any given time and place. With those caveats in mind, the Tunisian experience offers several conclusions to understand its own success and to assist other constitution-making endeavors in the future.

First, popular revolutions that lack a unifying leader or ideology—such as in the Arab Spring states of Tunisia, Egypt, and Libya—have three distinct phases: the revolutionary phase, the interim phase, and the final transition phase. The revolutionary phase in aged authoritarian states is characterized by a deep legitimacy crisis. More than anything else, Tunisian revolutionaries wanted to sever the connection between the old regime and the state. Thus, the

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<sup>264</sup> Erik Churchill, *Profile: The Audacity to Dream Big in Tunisia*, VOICES AND VIEWS: MIDDLE EAST AND NORTH AFRICA (The World Bank, Mar. 25, 2013), <http://blogs.worldbank.org/arabvoices/profile-audacity-dream-big-tunisia>.

predictions that Tunisian constitution-writing would take one year or less, the broad agreement to not renegotiate the nature of the state, and the lack of public interest in the constitution-drafting process suggests that the demand for a new constitution was more about severing the connection to the past than building a bridge to the future.<sup>265</sup>

Yet severing the remnants of the previous order from the state poses two other legitimacy questions: who is to do the severing, and what comes next? Tunisian opposition and civil society leaders resolved these questions by unifying around the principle of consensus and demanding the reins of government for the primary purpose of organizing and running fair elections to determine a new constitutional order. Unlike the Tunisian example, the Supreme Council of the Armed Forces (SCAF) took control of the revolutionary phase in Egypt and dictated the contours of the transition process.<sup>266</sup> Meanwhile, the Egyptian opposition failed to lay the groundwork for an inclusive coalition to challenge the SCAF and later reach a new social contract, and the Egyptian process quickly devolved into a zero-sum game. Accordingly, would-be constitution makers should unite around the creation and supervision of the constitution-making process to prevent the early erosion of trust and the appeal of a winner-takes-all approach.

Second, the Tunisian interim phase was defined by the work of the National Constituent Assembly, which chose not to begin this process with a set of preconstitutional principles or guidelines. This did lead to process delays, but it is unclear whether attempting to resolve some of the more complicated issues at the outset would have been feasible. That being said, the

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<sup>265</sup> Interview with Snoussi.

<sup>266</sup> Stepan, *Twin Tolerations*, at 92.

Tunisian process could have benefited from the Spanish experience of agreeing to phases of the process at the outset,<sup>267</sup> if only to further the values of transparency and accountability.

Third, the Tunisian interim phase showed the importance of inclusivity and how to wed inclusivity with democratic legitimacy through proportional voting formulas and consultations with civil society. Elected representatives should be much more aware of the limits on their political authority in constitution making and transition settings. In Tunisia, the proportional voting formula used for the NCA elections and the formation of the ideologically-diverse troika government significantly reduced the likelihood of the parties adopting a zero sum, majoritarian approach. Still, civil society leaders complained about the NCA's exclusivity in the early phases of the process. Moreover, some of the first draft's controversial language, including that related to the principle of "complementarity," could have been avoided had civil society organizations been consulted from the start of the process.

Fourth, the interim phase also showed that civil society actors have important contributions to make to the constitutional text and the drafting process, as well as expectations of being heard by their representatives. In addition to defending the rights and interests of certain constituents, Tunisian civil society organizations demonstrated their value as mediators in a fractious political environment, from the success of CSID's retreats<sup>268</sup> to the Quartet's mediation of the 2013 political crisis.<sup>269</sup> Tunisian civil society organizations also played a key role in engaging the public in the drafting process and helping to ensure the accountability of the NCA.

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<sup>267</sup> Andrea Bonime-Blanc, *Constitution Making and Democratization: The Spanish Paradigm*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 417, 425 (Laurel E. Miller & Louis Aucoin, eds., 2010).

<sup>268</sup> Marks, *Convince, Coerce, or Compromise*, at 25 (Ennahda members cited "having opportunities to discuss the issue [of blasphemy] in more relaxing contexts outside the NCA (without filming equipment and microphones)" as a major factor that allowed them to reach key compromises. Indeed, "[a] number of . . . members from both Ennahda and opposition parties reported that such private meetings, away from the lights and cameras, enabled drafters to 'step back from political theater' and begin identifying their similarities.").

<sup>269</sup> Chayes, *How a Leftist Labor Union*.

Conversely, the SCAF's decision to target foreign-funded NGOs after the fall of Mubarak decimated Egyptian civil society and effectively sidelined such organizations.<sup>270</sup>

Fifth, it is important to give thought ahead of time to the final transition phase. The lack of trust that exists in divided societies might make it useful to consider making transition procedures—such as the technocratic government to oversee the final phase of the transition—automatic. If judicial review is going to be used to police the constitution-making process, then the scope of that review should be clearly agreed on by all the parties at the outset. Likewise, jurisdiction over constitution-making issues should be clearly denied to the judiciary if the parties do not agree to judicial review. It is especially clear to make this denial evident in countries with a strong, independent judiciary, or a judiciary with strong ties to the previous regime.

Finally, it is important to remember that not every exercise in constitution making needs to be a completely unitary act. The Brazilian experience demonstrates how constitutional designers can shift institutional power away from a powerful outside actor (i.e., the military) over time. Indeed, it is also important to remember that any democracy experiences highs and lows in terms of providing an open, democratic culture and protecting personal liberties: injustice and repression are not only found under authoritarian regimes. Along these lines, Kais Said has argued that Tunisia's most pressing need is to develop a culture of self-government, particularly at the local level, to establish republican accountability mechanisms to ensure the democratic redress of future grievances.<sup>271</sup> In sum, addressing concerns such as self-government and the precise allocation of power between the president and prime minister will likely play out for years to come in Tunisia—as similar concerns do in any healthy democratic system.

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<sup>270</sup> Interview with Masmoudi.

<sup>271</sup> Interview with Said.

## Bibliography

### Texts:

- “Exclusif: Pr Yadh Ben Achour à La Presse: «Nous Risquons Une Dictature Pire Que Celle de Ben Ali»,” *La Presse de Tunisie*, Aug. 31, 2012, archived at <http://web.archive.org/web/20121228081138/http://www.lapresse.tn/31082012/54651/nous-risquons-une-dictature-pire-que-celle-de-ben-ali.html>.
- “Majles Marsad,” *Al Bawsala*, <http://majles.marsad.tn/fr/anc> (last visited Apr. 21, 2015).
- “Revisiting Rashid Ganoushi’s Lecture on Secularism post-Arab Spring (March 2012),” *Strata Consulting*, Feb. 5, 2014, <https://strataresearch.wordpress.com/2014/02/05/revisiting-rashid-ganoushis-lecture-on-secularism-post-arab-spring-march-2012>.
- “Roadmap of Political Reforms in Tunisia,” *Center for the Study of Islam and Democracy (CSID)*, Feb. 24, 2011, [http://www.csidonline.org/index.php?option=com\\_content&view=article&id=596%3Aroadmap-of-political-reforms-in-tunisia&Itemid=52](http://www.csidonline.org/index.php?option=com_content&view=article&id=596%3Aroadmap-of-political-reforms-in-tunisia&Itemid=52).
- “Tunisian PM Pledges to Quit Politics After Elections,” *Radio Free Europe Radio Liberty*, Jan. 22, 2011, [http://www.rferl.org/content/tunisia\\_pm\\_quit\\_politics/2283958.html](http://www.rferl.org/content/tunisia_pm_quit_politics/2283958.html).
- “Un gouvernement d’union nationale est en place en Tunisie,” *Le Devoir*, Feb. 24, 2011, <http://www.ledevoir.com/international/actualites-internationales/314847/un-gouvernement-d-union-nationale-est-en-place-en-tunisie>.
- al-Youssoufi, Hala. Trans. Sami-Joe Abboud. “Tunisia Labor Union Serves as Political Mediator,” *Al-Monitor*, Mar. 14, 2014, <http://www.al-monitor.com/pulse/politics/2014/03/tunisia-labor-union-political-balance.html>.
- Amara, Tarek and Erika Solomon. “Tunisia Eyes ‘Egypt Scenario’ After Assembly Freeze,” *Reuters*, Aug. 7, 2013, <http://in.reuters.com/article/2013/08/07/tunisiacrisisgovernment/idINDEE9760DM20130807>.
- Arato, Andrew. “Forms of Constitution Making and Theories of Democracy,” *Cardozo Law Review* VOL. 17, 1995.
- Aucoin, Louis and Michele Brandt. “East Timor’s Constitutional Passage to Independence.” *Framing the State in Times of Transition: Case Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 245–74.
- Ayari, Sadok. “Constitutional Lawyer: Danger if Constituent Assembly Outlasts One Year,” *Tunisia Live*, Nov. 4, 2011, archived at <http://web.archive.org/web/20120105020305/>

<http://www.tunisia-live.net/2011/11/04/the-tunisian-constitution-should-not-take-more-than-one-year-to-be-written>.

Bannon, Alicia L. "Designing a Constitution-Drafting Process: Lessons from Kenya," *Yale Law Journal* Vol. 116, 2007.

Blount, Justin. "Participation in Constitutional Design." *Comparative Constitutional Law*. Eds. Tom Ginsburg and Rosalind Dixon. Northampton, MA: Edward Elgar Publishing, Inc., 2011. 38–56.

Böckenförde, Markus, Nora Hedling, and Winluck Wahiu. Int'l Institute for Democracy and Electoral Assistance (IDEA). *A Practical Guide to Constitution Building*. Stockholm: IDEA, 2011.

Bonime-Blanc, Andrea. "Constitution Making and Democratization: The Spanish Paradigm." *Framing the State in Times of Transition: Case Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 417–34.

Brown, Nathan. "Do Tunisians Agree on More Than They Realize?," *Foreign Policy*, Aug. 9, 2011, <http://www.foreignpolicy.com/2011/08/09/do-tunisians-agree-on-more-than-they-realize>.

Carey, Jon M. "Electoral Formula and the Tunisian Constituent Assembly," Dartmouth College, May 9, 2013, <http://sites.dartmouth.edu/jcarey/files/2013/02/Tunisia-Electoral-Formula-Carey-May-2013-reduced.pdf>.

Carey, Jon M. "Why Tunisia Remains the Arab Spring's Best Bet," Dartmouth College, Aug. 27, 2013, [http://sites.dartmouth.edu/jcarey/files/2013/08/Tunisia-Carey-Aug\\_2013.pdf](http://sites.dartmouth.edu/jcarey/files/2013/08/Tunisia-Carey-Aug_2013.pdf).

Carlson, Scott N. "The Drafting Process for the 1998 Albanian Constitution." *Framing the State in Times of Transition: Case Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 311–31.

Chayes, Sarah. "How a Leftist Labor Union Helped Force Tunisia's Political Settlement," *Carnegie Endowment for Int'l Peace*, Mar. 27, 2014, <http://carnegieendowment.org/2014/03/27/how-leftist-labor-union-helped-force-tunisia-s-political-settlement>.

Churchill, Erik. "Profile: The Audacity to Dream Big in Tunisia," *Voices and Views: Middle East and North Africa* (The World Bank), Mar. 25, 2013, 2013) <http://blogs.worldbank.org/arabvoices/profile-audacity-dream-big-tunisia>.

Déclaration constitutive du conseil national pour la sauvegarde de la révolution (Feb. 11, 2011), available at [http://www.europe-solidaire.org/IMG/article\\_PDF/Tunisie-Dclaration-constitutive-du\\_a26965.pdf](http://www.europe-solidaire.org/IMG/article_PDF/Tunisie-Dclaration-constitutive-du_a26965.pdf).

Décret-loi n° 2011-14 du 23 mars 2011, portant organisation provisoire des pouvoirs publics, *Journal Officiel de la République Tunisienne*, n° 020, p. 363, 25 mars 2011.

Décret-loi n° 2011-582 du 20 mai 2011, portant convocation du corps électoral pour l'élection de l'assemblée nationale constituante, *Journal Officiel de la République Tunisienne*, n° 037, p. 756, 24 mai 2011.

Décret-loi n° 2011-6 du 18 février 2011, portant création de l'instance supérieure pour la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique, *Journal Officiel de la République Tunisienne*, n° 013, p. 196, 1er mars 2011.

Décret-loi n° 2011-998 du 21 juillet 2011, abrogeant les dispositions du décret n° 2011-582 du 20 mai 2011, portant convocation du corps électoral pour l'élection de l'assemblée nationale constituante, *Journal Officiel de la République Tunisienne*, n° 054, p. 1275, 22 juillet 2011.

Ebrahim, Hassen and Laurel E. Miller. "Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid." *Framing the State in Times of Transition: Case Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 111–57.

El-Sayed, Ahmed. "Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Tunisia and Egypt," *Electronic Journal of Islamic & Middle Eastern Law* Vol. 2, 2014.

Fuller, Thomas. "Head of Reform Panel Says Tunisia Risks Anarchy as It Moves Toward Democracy," *N.Y. Times*, Feb. 21, 2011, [http://www.nytimes.com/2011/02/22/world/africa/22tunisia.html?\\_r=0](http://www.nytimes.com/2011/02/22/world/africa/22tunisia.html?_r=0).

Ghali, Amine. "Tunisia's Constitutional Process: The Road Ahead," Sada – Carnegie Endowment for Int'l Peace, Dec. 9, 2011, <http://carnegieendowment.org/sada/2011/12/09/tunisia-s-constitutional-process-road-ahead>

Grewal, Sharan. "Why Tunisia Didn't Follow Egypt's Path," *Monkey Cage Blog*, Feb. 4, 2015, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/04/why-egypt-didnt-follow-tunisia-path>.

Hachemaoui, Mohammed. "Tunisia at a Crossroads: Which Rules for Which Transition?" German Institute for International and Security Affairs, Research Paper No. 6, Aug. 2013.

Hart, Vivien. "Constitution Making and the Right to Take Part in a Public Affair." *Framing the State in Times of Transition: Case Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 20–56.

- Hlaoui, Nouredine. “Les Tunisiens Attendent des Signaux Forts du Nouveau Gouvernement et de l’ANC,” *Business News TN*, Mar. 12, 2013, <http://www.businessnews.com.tn/Les-Tunisiens-attendent-des-signaux-forts-du-nouveau-gouvernement-et-de-l%E2%80%99ANC,519,36860,1>.
- In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
- International Crisis Group. “CrisisWatch N°120,” *Crisis Group Monthly Bulletin*, Aug. 1, 2013, <http://www.crisisgroup.org/~media/Files/CrisisWatch/2013/cw120.pdf>.
- International Foundation for Electoral Systems (IFES). *Elections in Tunisia: The 2011 Constituent Assembly—Frequently Asked Questions*. Washington: IFES, July 2011.
- International Republican Institute (IRI). *Survey of Tunisian Public Opinion*, Dec. 24, 2011 – Jan. 6, 2012.
- International Republican Institute (IRI). *Survey of Tunisian Public Opinion*, June 18–30, 2013.
- International Republican Institute (IRI). *Survey of Tunisian Public Opinion*, Mar. 5–18, 2011.
- International Republican Institute (IRI). *Tunisia Constituent Assembly Elections October 23, 2011: Election Observation Mission Final Report*. Washington: IRI, 2011.
- Khlifi, Roua. “Ennahdha and Allies Reject Calls for NCA Dissolution,” *Tunisia Live*, July 31, 2013, archived at <http://web.archive.org/web/20131003164606/http://www.tunisia-live.net/2013/07/31/ennahdha-and-others-reject-calls-for-nca-dissolution>.
- Klein, Claude and Andras Sajó. “Constitution-Making: Process and Substance.” *The Oxford Handbook of Comparative Constitutional Law*. Eds. Michel Rosenfeld and Andras Sajó. Oxford: Oxford University Press, 2012. 419–41.
- Lesch, Ann M. “Troubled Political Transition: Tunisia, Egypt and Libya,” *21 Middle East Policy* Vol. 21, 2014.
- Lynch, Marc. “Calvinball in Cairo,” *Foreign Policy*, June 18, 2012, <http://foreignpolicy.com/2012/06/18/calvinball-in-cairo>.
- Mansar, Sabra. “Les Partis Politiques Présents à la Haute Instance Signent la Déclaration du Processus Transitoire,” *Tunisie Numérique*, Sept. 15, 2011, <http://www.tunisienumerique.com/les-partis-politiques-presents-a-la-haute-instance-signent-la-declaration-du-processus-transitoire/72860>.
- Marks, Monica L. “Convince, Coerce, or Compromise? Ennahda’s Approach to Tunisia’s Constitution,” *Brookings Doha Center, Analysis Paper No. 10*, Feb. 2014, <http://www.brookings.edu/~media/research/files/papers/2014/02/10-ennahda-tunisia-constitution-marks/ennahda-approach-tunisia-constitution-english.pdf>.

- Marks, Monica L. “How Egypt’s Coup Really Affected Tunisia’s Islamists,” *Monkey Cage Blog*, Mar. 16, 2015, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/16/how-egypts-coup-really-affected-tunisias-islamists>.
- McCurdy, Daphne. Project on Middle East Democracy (POMED). *A Guide to the Tunisian Elections*. Washington: POMED, 2011.
- McWhinney, Edward. *Constitution-making: Principles, Process, Practice*. Toronto: University of Toronto Press, 1981.
- Miller, Laurel E. “Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future.” *Framing the State in Times of Transition: Case Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 601 –66.
- Murphy, Emma C. “The Tunisian Elections of October 2011: A Democratic Consensus,” *The Journal of North African Studies* Vol. 18, 2013.
- National Democratic Institute (NDI). *Final Report on the Tunisian National Constituent Assembly Elections*. Washington: NDI, 2011.
- Nouira, Asma. “Obstacles on the Path to Tunisia’s Democratic Transition,” Sada – Carnegie Endowment for Int’l Peace, Mar. 30, 2011.
- Palmer, Dustin. “Case Study #4: Al Bawsala’s Web Platform Marsad.tn,” OpeningParliament.org, Aug. 23, 2013, <http://blog.openingparliament.org/post/59109079880/case-study-4-al-bawsalas-web-platform-marsad-tn>.
- Petit, Denis. International Foundation for Electoral Systems (IFES). *Analysis of the Electoral Legal Framework of the Election of 23 October 2011 of the National Constituent Assembly of the Republic of Tunisia*. Washington: IFES, 2012.
- Pickard, Duncan. “At Last, Public Participation in Constitution-Making in Tunisia,” Atlantic Council, Feb. 12, 2013, <http://www.atlanticcouncil.org/blogs/menasource/at-last-public-participation-in-constitutionmaking-in-tunisia>.
- Pickard, Duncan. “Lessons from Constitution-Making in Tunisia,” Rafik Hariri Center for the Middle East Issue Brief (Atlantic Council), Dec. 13, 2012, [http://www.atlanticcouncil.org/images/files/publication\\_pdfs/403/mec121213tunisia.pdf](http://www.atlanticcouncil.org/images/files/publication_pdfs/403/mec121213tunisia.pdf).
- Pickard, Duncan. “Tunisia’s Constitutional Process: Hurdles and Prospects,” Op-Med, Dec. 2013, available at [http://www.iai.it/sites/default/files/Op-Med\\_23.pdf](http://www.iai.it/sites/default/files/Op-Med_23.pdf).
- Proceedings. *Workshop on Constitution Building Processes*, Princeton University, May 17–20, 2007.

- Proceedings. *Workshop on Constitution Building Processes*, Princeton University, Mar. 4–7, 2008.
- Proctor, Bill and Ikbal Ben Moussa. Int'l Institute for Democracy & Electoral Assistance (IDEA). *The Tunisian Constituent Assembly's By-laws: A Brief Analysis*. Stockholm: IDEA, 2012.
- Rosenn, Keith S. "Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988." *Framing the State in Times of Transition: Case Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 435–66.
- Roswell, Nicole and Asma Ben Yahia. National Democratic Institute (NDI). *Framing the Future: Citizen Attitudes About Electoral and Constitution Drafting Processes*. Washington: NDI, 2011.
- Sharqieh, Ibrahim. "Tunisia's Lessons for the Middle East: Why the First Arab Spring Transition Worked Best," *Jasmine Foundation*, Sept. 2, 2014, <http://www.jasminefoundation.org/en/?p=966>.
- Stepan, Alfred. "Tunisia's Transition and the Twin Tolerations," *Journal of Democracy* Vol. 23, 2012.
- Tavana, Daniel L. *Preparing to Draft a New Social Contract: Tunisia's National Constituent Assembly Election, 2011*. Princeton University Innovations for Successful Societies, Oct. 2014, [http://successfulsocieties.princeton.edu/sites/successfulsocieties/files/DT\\_ELECTIONS\\_TUNISIA\\_0.pdf](http://successfulsocieties.princeton.edu/sites/successfulsocieties/files/DT_ELECTIONS_TUNISIA_0.pdf).
- The Carter Center. "The Carter Center Congratulates Tunisia's National Constituent Assembly on Final Draft of Constitution and Urges Safeguards for Human Right," The Carter Center, June 12, 2013, <http://www.cartercenter.org/resources/pdfs/news/pr/tunisia-full-report-061213-eng.pdf>.
- The Carter Center. "The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Drafting Process," The Carter Center, May 11, 2012, <http://www.cartercenter.org/resources/pdfs/news/pr/tunisia-statement-051112-en.pdf>.
- The Carter Center. "The Carter Center Recognizes Tunisia's National Constituent Assembly; Calls for Increased Public Participation, Outreach, and Transparency," The Carter Center, Sept. 26, 2012, <http://www.cartercenter.org/resources/pdfs/news/pr/tunisia-092612-full-statement-en.pdf>.
- The Carter Center. *National Constituent Assembly Elections in Tunisia: Final Report*. Atlanta: The Carter Center, 2012.
- Wiechers, Marcus. "Namibia's Long Walk to Freedom: The Role of Constitution Making in the Creation of an Independent Namibia." *Framing the State in Times of Transition: Case*

*Studies in Constitution Making*. Eds. Laurel E. Miller and Louis Aucoin. Washington: United States Institute of Peace, 2010. 81–110.

Zemni, Sami. “Extraordinary Politics of the Tunisian Revolution: The Process of Constitution Making,” *Mediterranean Politics*, Jan. 24, 2014.

قانون تأسيسي عدد 6 لسنة 2011 المؤرخ في 16 ديسمبر 2011 يتعلق بالتنظيم المؤقت للسلط العمومية [Constituent Law 2011-6, Related to the Provisional Organization of Public Powers] art. 3, *Journal Officiel de la République Tunisienne*, No. 97, p. 3111, Dec. 23, 2011.

#### Videos:

Al Bawsala. “Débats citoyens/élus,” *YouTube*, May 22, 2013,  
[https://www.youtube.com/playlist?list=PL229IPcYkr2\\_tK5PckM2Qa3MDbZYFyIXI](https://www.youtube.com/playlist?list=PL229IPcYkr2_tK5PckM2Qa3MDbZYFyIXI).

#### Interviews:

Interview with Hela Mathari, Legal Consultant, formerly The Carter Center, currently UNDP (Mar. 4, 2015).

Interview with Kais Said, Professor, Faculté des Sciences Juridiques, Politiques, et Sociales de Tunis; Vice-President, Association Tunisienne de Droit Constitutionnelle (Mar. 7, 2015).

Interview with Mounir Snoussi, Associate Lecturer, Faculté des Sciences Juridiques, Politiques, et Sociales de Tunis; Member, Ben Achour Commission (Mar. 5, 2015).

Interview with Radwan Masmoudi, Founder and President, CSID (Apr. 8, 2015).

Interview with Salwa Hamrouni, Lecturer, Faculté des Sciences Juridiques, Politiques, et Sociales de Tunis; Member, Association Tunisienne de Droit Constitutionnel (Mar. 5, 2015).