

DEMYSTIFYING HOW CONSTITUTIONS ARE MADE:  
EXTERNAL ACTORS' MODES OF ACTIONS IN THE 2014  
TUNISIAN CONSTITUTION

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*Scholars have acknowledged the significant transnational dimension of constitution-making. This paper sheds light on how the transnational dimension of constitution-making materializes by examining external actors' involvement in an understudied stage of constitution-making: constitutional drafting. Drawing on an in-depth examination of external actor involvement during the making of the 2014 Tunisian Constitution, this Article proposes a typology detailing how external actors' expertise was provided, elucidating the different modes of action of external actors involvement during constitution-making.*

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## INTRODUCTION

Despite the adoption of a new constitution in 2014, which was hailed internationally as a resounding success,<sup>1</sup> Tunisia is facing a multi-level crisis. Alongside a dire economic situation, several key institutions that were enshrined in the new constitution, such as the constitutional court and independent constitutional bodies, have yet to be implemented.<sup>2</sup> Tunisia, the great hope of democratization in the Middle East and North Africa (MENA) region, is now facing a deep crisis of governance.

The phenomena of making new constitutions, particularly in a sensitive context like a democratic transition, remains a black box. While consti-

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1. See Jackson Diehl, Opinion, *Tunisia Boldly Embraces Democracy*, WASH. POST (Oct. 26, 2014), [https://www.washingtonpost.com/opinions/jackson-diehl-Tunisia-boldly-embraces-Democracy/2014/10/26/8d86b19a-5adc-11e4-b812-38518ae74c67\\_story.html?utm\\_term=.d07b99a34a48](https://www.washingtonpost.com/opinions/jackson-diehl-Tunisia-boldly-embraces-Democracy/2014/10/26/8d86b19a-5adc-11e4-b812-38518ae74c67_story.html?utm_term=.d07b99a34a48) [<https://perma.cc/A2AN-RKPR>]; The Ed. Bd., *Tunisia's Remarkable Achievement*, N.Y. TIMES (Jan. 28, 2014), <https://www.nytimes.com/2014/01/29/opinion/tunisias-remarkable-achievement.html> [<https://perma.cc/5G56-X3TM>]; U.N. Secretary-General, *Statement Attributable to the Spokesperson for the Secretary-General on the Adoption of Tunisia's New Constitution*, (Jan. 26, 2014), <https://www.un.org/sg/en/content/sg/statement/2014-01-26/statement-attributable-spokesperson-secretary-general-adoption> [<https://perma.cc/VYD7-L4YC>]; H el ene Sallon, *Libert es, Droits des Femmes : Les Avanc ees de la Constitution Tunisienne*, LE MONDE (Jan 28, 2014, 9:55 AM), [https://www.lemonde.fr/tunisie/article/2014/01/27/des-avancees-majeures-dans-la-constitution-tunisienne\\_4354973\\_1466522.html](https://www.lemonde.fr/tunisie/article/2014/01/27/des-avancees-majeures-dans-la-constitution-tunisienne_4354973_1466522.html) [<https://perma.cc/FLN9-U4VP>].

2. See Camille Lafrance, *Blocage de la Cour Constitutionnelle en Tunisie : « les Modernistes sont Perdants »*, JEUNE AFRIQUE (Oct. 12 2018, 7:15 PM), <https://www.jeuneafrique.com/645040/politique/blocage-de-la-cour-constitutionnelle-en-tunisie-les-modernistes-sont-perdants/> [<https://perma.cc/V35G-Y3QB>]; Mohamed Haddad, *En Tunisie, le Parlementarisme en Crise*, LE MONDE (Oct. 2 2019, 8:00 PM), [https://www.lemonde.fr/afrique/article/2019/10/02/en-tunisie-le-parlementarisme-en-crise\\_6013984\\_3212.html](https://www.lemonde.fr/afrique/article/2019/10/02/en-tunisie-le-parlementarisme-en-crise_6013984_3212.html) [<https://perma.cc/235A-2GVZ>].

tution-making *tout court* has been the focus of significant scholarly attention, there is very little empirical work on how this process actually unfolds to date.<sup>3</sup> Further, much of the literature has a normative focus, with less engagement in descriptive work, thus providing minimal explanation of the actual creation of constitutional norms.<sup>4</sup> This lack of descriptive-level knowledge has normative implications, as constitutional actors and scholars alike actually know very little of what processes or content can lead to sustain the democratic ideals that trigger the constitution-making process. This is no fault of their own. The academic field of constitution-making, as a scientific-legal discipline and not a political practice, emerged only recently, at the end of the Cold War and the fall of the Berlin Wall.<sup>5</sup> Additionally, empirical approaches in comparative constitutional scholarship remain a minority, as the field is predominantly doctrinal.<sup>6</sup>

This paper aims to unpack how constitutions are made by shedding light on their transnational dimension. Indeed, the transnational dimension of constitution-making has been acknowledged as a key constitution-making feature. Cheryl Saunders has recently noted that foreign advising is the defining marker of constitution-making in the twenty-first century.<sup>7</sup> The process of writing a new constitution has, in fact, always been marked by a transnational dimension. To take an obvious case, constitutions adopted during decolonization were not drafted by ‘the people’ but by metropolitan authorities. Today, new constitutions are often developed by a body that represents the people, in the form of a national constituent assembly. But in recent cases of constitution-making—including Kenya (2010), Tunisia (2014), and Nepal (2015)—several external actors were present during the drafting stage, providing comparative expertise to constitution-makers. These external bodies included the United Nations (UN), the International

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3. For examples of empirical work on the constitution-making process, see, for example CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER (Gregory Shaffer, Tom Ginsburg & Terence C. Halliday eds., 2019); Bui Ngoc Son, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, 64 AM. J. COMPAR. L. 931 (2016).

4. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995).

5. See, e.g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999).

6. See, e.g., Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201 (2009); Ngoc Sun, *supra* note 3; Melissa Crouch, *Pre-emptive Constitution-Making: Authoritarian Constitutionalism and the Military in Myanmar*, 54 L. & SOC'Y REV. 487 (2020); David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153 (2016).

7. See Cheryl Saunders, *Constitution-making in the 21st Century*, INT'L REV. L., Apr. 2012.

Institute for Democracy and Electoral Assistance (International IDEA), and the European Commission for Democracy through Law, commonly known as the Venice Commission.<sup>8</sup>

Drawing on an in-depth examination of external actor involvement during the making of the 2014 Tunisian Constitution, this Article engages with the following question: how does the transnational dimension of constitution-making materialize in the constitution-writing process? The Article proposes a typology that details how external actors' expertise was provided in Tunisia, shedding light on the different modes of action, and it categorizes and catalogues formal and informal modes of action of external actors during constitution-making. To better understand how external involvement in constitution-making operates *in concreto*, the Article delves into an in-depth examination of the constitutional drafting phase in Tunisia, which took place between 2011 and 2014.

To unpack the transnational dimension of constitutional drafting, this Article relies on a single-case study as a method of social science.<sup>9</sup> While the

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8. See, e.g., Maartje de Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMPAR. L. 963 (2015); VIJAYASHRI SRIPATI, CONSTITUTION-MAKING UNDER UN AUSPICES: FOSTERING DEPENDENCY IN SOVEREIGN LANDS (2020).

9. A single-case study was mobilized as a social science method for answering this Article's research question. In addition to its exploratory nature, a case study provides empirical richness, moving away from idealized normative discourse. It is thus a suitable method given this Article's empirical legal approach and aim of describing specific legal phenomena. Among the diversity of case study options available, this paper revolves around a single case study. The drawbacks of a single case study, fuzziness and subjectivity, are also its major strength, allowing for insights and hypotheses to emerge that would not in large-N studies. A common criticism of a single case study is that the knowledge gained cannot be formally generalized because the findings are so context-dependent. Formally generalizable models, including large-N or small-N samples, are one of many sources of scientific progress, but certainly not the only one. Indeed, it is precisely the context-dependent nature of single case studies that allow them to go beyond generalizations and unpack what is actually unfolding—with empirically rich detail. An in-depth single case study can increase knowledge regarding a particular type of phenomenon. Given the exploratory and informal nature of external actors' action, a detailed analysis of the particular context was necessary to understand the specifics of the transnational involvement; this would have been lost or oversimplified in larger samples. In the case of a single case study, the justification of the choice is particularly essential. See this Article's Appendix for more information regarding Tunisia's value as a single case study. On the value of case studies as a specific social science method see Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, 12 QUALITATIVE INQUIRY 219 (2006); John Gerring, *The Case Study: What It Is and What It Does*, in THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 90, 94 (Carles Boix & Susan C. Stokes eds., 2007); Aikaterini Argyrou, *Making the Case for Case Studies in Empirical Legal Research*, 13 UTRECHT L. REV. 95, 95 (2017); Robert E. Stake, *Qualitative Case Studies*, in THE SAGE HANDBOOK OF QUALITATIVE RESEARCH 443 (Norman K. Denzin & Yvonna S. Lincoln, eds., 3rd ed. 2005). On the value of single-case study, see Michael Barzelay, *The Single Case Study as Intellectually Ambitious Inquiry*, 3 J. PUB. ADMIN. RSCH. & THEORY 305 (1993); Gerring, *infra* note

exact dynamic of external-actor involvement varies according to the local context, Tunisia, due to its relative embrace of external actors, offers useful insights into a common trend. Indeed, this case is particularly relevant as it is an example of constitution-making within the realm of democratic governance. The data collected include preparatory work of the National Constituent Assembly (NCA), institutional documentation published by external actors (e.g., project and annual reports), as well as twenty-two semi-structured interviews, conducted in French and English, carried out with internal and external actors.<sup>10</sup> The external actors described in this paper vary in size and scope, as does their involvement; the key criterion for inclusion was direct involvement in the constitution-making process, so some peripheral external actors were left out.<sup>11</sup>

A survey of the literature on the drafting of the 2014 Tunisian Constitution reveals that while the presence of external actors is marginally acknowledged, the precise dynamic of this involvement is absent—the constitution-making process is treated as “immune” from external involvement.<sup>12</sup> Overall, the constitution-making literature only minimally engages

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344, at 348. For recent scholarship on transnational legal orders that use case studies, see Bui Ngoc Son, *Globalization of Constitutional Identity*, 23 WASH. INT'L L.J. 463, 465 (2017).

10. For more details, see Appendix.

11. For instance, the European Union heavily supported the Tunisian democratic transition. But, it did not *per se* get involved in the constitution-making process, thus is out of the scope of our inquiry. See Assem Dandashly, *EU Democracy Promotion and the Dominance of the Security-Stability Nexus*, 23 MEDITERRANEAN POL. 62, 63 (2018); THE EUROPEAN UNION AND THE ARAB SPRING: PROMOTING DEMOCRACY AND HUMAN RIGHTS IN THE MIDDLE EAST ii (Joel Peters ed., 2012); Rym Ayadi & Emanuele Sessa, *EU Policies in Tunisia Before and After the Revolution*, at 13, Eur. Parl. (June 2016); Timo Tohidipur, *The European Union and the Constitution-making Processes in the Arab World: Observer or Actor?*, in CONSTITUTIONALISM, HUMAN RIGHTS, AND ISLAM AFTER THE ARAB SPRING 879 (Rainer Grote & Tilmann Röder eds., 2016). It is worth pointing out that the United States is also excluded from this analysis. Although supportive of the democratic transition, the United States was also not heavily involved in the constitution-making process. See Lotfi Ben Rejeb, *United States Policy Towards Tunisia: What New Engagement After an Expendable “Friendship”?*, in THE MAKING OF THE TUNISIAN REVOLUTION: CONTEXTS, ARCHITECTS, PROSPECTS 81 (Nouri Gana ed., 2013).

12. See, e.g., Rafaâ Ben Achour, *La Constitution Tunisienne du 27 Janvier 2014*, 100 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 783 (2014); Rafaâ Ben Achour & Sana Ben Achour, *La Transition Démocratique en Tunisie: Entre Légalité Constitutionnelle et Légitimité Révolutionnaire*, 92 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 715 (2012); DICTIONNAIRE DES TERMES ET EXPRESSIONS DE LA CONSTITUTION TUNISIENNE DE 2014 (Rafaâ Ben Achour & Hajer Gueldich eds., Tunis: Konrad Adenauer Stiftung 2017); Hatem M'rad, *The Process of Institutional Transformation in Tunisia After the Revolution*, in CONSTITUTIONALISM, HUMAN RIGHTS, AND ISLAM AFTER THE ARAB SPRING, *supra* note 11, at 71; Ahmed El-Sayed, *Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Tunisia and Egypt*, 2 ELEC. J. ISLAMIC & MIDDLE E.L. 39 (2014); Geoffrey Weichselbaum & Xavier Philippe, *Le Processus Constituant et la Constitution Tunisienne du 27 Janvier 2014: un Modèle à Suivre?*, 223 MAGHREB-MACHREK 46 (2015); ANTONI ABAT

in the subject of external actor involvement,<sup>13</sup> and the scholars who do discuss external actors in constitution-making processes do so without examining their precise modes of action.<sup>14</sup> Tom Ginsburg, in discussing transnational constitutional advising, offers a relatively comprehensive list of the actors present in Tunisia, but he does not delve into an analysis of modes of action.<sup>15</sup> The Venice Commission has received limited scholarly attention, with commentary focusing on its opinion on the draft of the Tunisian constitution.<sup>16</sup> Maartje de Visser provides a detailed examination of the Venice

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I NINET & MARK TUSHNET, *THE ARAB SPRING: AN ESSAY ON REVOLUTION AND CONSTITUTIONALISM* 145-58, 167-84 (2015); Mounira M. Charrad & Amina Zarrugh, *Equal or Complementary? Women in the New Tunisian Constitution After the Arab Spring*, 19 J.N. AFR. STUD. 230 (2014); Khedija Arfaoui, *Women's Empowerment: The Case of Tunisia in the Arab Spring*, in *MULTICULTURALISM AND DEMOCRACY IN NORTH AFRICA: AFTERMATH OF THE ARAB SPRING* 159 (Moha Ennaji ed., 2014). Several authors, while examining certain features of the constitution, incidentally focus on its process. See, e.g., Silvia Suteu, *Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits*, 6 GLOB. CONST. 63, 63-70, 72-100 (2017). Similarly, political scientists scarcely discussed the presence of external actors. See, e.g., Jean-Philippe Bras, *Le Peuple est-il Soluble dans la Constitution? Leçons Tunisiennes*, VIII L'ANNÉE DU MAGHREB 103 (2012); Éric Gobe & Larbi Chouikha, *La Tunisie Politique en 2013: De la Bipolarisation Idéologique au "Consensus Constitutionnel"?*, 11 L'ANNÉE DU MAGHREB 301 (2014); Alaya Allani, *The Post-Revolution Tunisian Constituent Assembly: Controversy over Powers and Prerogatives*, 18 J.N. AFR. STUD. 131 (2013); JOHN L. ESPOSITO, TAMARA SONN & JOHN O. VOLL, *ISLAM AND DEMOCRACY AFTER THE ARAB SPRING* 174-201 (2016); IBRAHIM FRAIHAT, *UNFINISHED REVOLUTIONS: YEMEN, LIBYA, AND TUNISIA AFTER THE ARAB SPRING* (2016); David M. Mednicoff, *A Tale of Three Constitutions: Common Drives and Diverse Outcomes in Post-2010 Arab Legal Politics*, 28 TEMP. INT'L & COMPAR. L.J. 215 (2014).

13. See, e.g., Darin E.W. Johnson, *Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Tunisia*, 50 WAKE FOREST L. REV. 1007 (2015); Farhat Horchani, *Islam and the Constitutional State: Are They in Contradiction?*, in *CONSTITUTIONALISM, HUMAN RIGHTS, AND ISLAM AFTER THE ARAB SPRING*, *supra* note 11, at 199.

14. For instance, see Arato's discussion of the legitimacy of external involvement with regard to constituent power and mentions Tunisia as an example. Andrew Arato, *Constitution Making*, in *HANDBOOK ON GLOBAL CONSTITUTIONALISM* 275, 285-86 (Anthony F. Lang, Jr. & Antje Wiener eds., 2017) ("What is important here is that influence does not violate autochthony and thus does not require authorization or limitation as to agency or scope.")

15. Tom Ginsburg, *Constitutional Advice and Transnational Legal Order*, 2 U.C. IRVINE J. INT'L, TRANSNAT'L & COMPAR. L. 5, 23 (2017) ("Tunisia, and Yemen featured an array of foreign actors. International IDEA, German NGO Democracy Reporting International, the UN, and the American party organizations—the National Democratic Institute and the International Republican Institute, were all involved in various countries. In Tunisia, various German foundations, such as the Konrad Adenauer and Hans Siedel Foundation, were also involved, as were French institutions, and the Max Planck Institute for Public Comparative Law and Public International Law, Heidelberg.")

16. See Marie-Sophie Berger, *La Commission de Venise et L'élaboration de la Constitution Tunisienne du 27 Janvier 2014*, in 1 MOUVANCES DU DROIT : ETUDES EN L'HONNEUR DU PROFESSEUR RAFÂA BEN ACHOUR (Tunis: Konrad Adenauer Stiftung, 2015); Francesco Duranti, *Constitution of Tunisia, Venice Commission and International Constitutionalism*, in *THE 'STATE' OF PIVOT STATES IN SOUTH-EASTERN MEDITERRANEAN: TURKEY, EGYPT, ISRAEL, AND TUNISIA AFTER THE ARAB SPRING* 123 (Loretta Dell'Aguzzo & Emidio Diodato eds., 2016).

Commission's role in Tunisia's constitution-making with useful discussion on internal procedure.<sup>17</sup> But while Visser refers to the involvement of the Venice Commission, her analysis is limited to formal involvement and thus misses the Venice Commission's informal modes of action.<sup>18</sup>

Other doctrinal works address the transnational dimension of the constitution-making process; but they only superficially discuss external actor involvement. Zaid Al-Ali provides a normative assessment of external actors' role in Tunisia in his piece on external assistance in the Arab Spring but does not touch on the transnational dynamics at play.<sup>19</sup> Rangita de Silva de Alwis, Anware Mnasri, and Estee Ward authored a study on the role of women in the making of the Tunisian Constitution, which offers valuable insights on transnational dynamics. However, their research focuses primarily on the interaction between international organizations and civil society organizations; external actors' modes of action is beyond the scope of their inquiry.<sup>20</sup> The authors note: "Tunisia's constitution, while hailed as a product of national interests and broad grassroots engagement, still garnered much international attention and received the benefits of much international expertise."<sup>21</sup> They argue that the human rights provisions of the 2014 Constitution are "the product of softer modes of international influence," and point to "the role of international actors in promoting liberal notions of human rights within Tunisia's civil society."<sup>22</sup> Similarly, Sripati details UN constitutional assistance in Tunisia, exposing the role of the UNDP in providing technical assistance but does not engage with the various modes of action.<sup>23</sup> Finally, both Tania Groppi and Carla Yared in their respective research explore whether the 2014 Tunisian Constitution illustrates the broader manifestation of the globalization of constitutional law but do not focus on the process of constitution-making or the presence of

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17. It is worth noting that de Visser mentions other external actors, but is neither systematic nor exhaustive. de Visser, *supra* note 8, at 979.

18. *Id.* at 979-81.

19. See Zaid al-Ali, *International Assistance to Arab Spring Transitions*, in *REVISITING THE ARAB UPRIISINGS: THE POLITICS OF A REVOLUTIONARY MOMENT* 141 (Stéphane Lacroix & Jean-Pierre Filiu eds. 2018). He considers, for instance, that "more involvement could have improved the quality of the draft." *Id.*

20. See Rangita de Silva de Alwis, Anware Mnasri & Estee Ward, *Women and the Making of the Tunisian Constitution*, 35 *BERKELEY J. INT'L L.* 90 (2017).

21. *Id.* at 114.

22. *Id.* at 133.

23. See Sripati, *supra* note 8, at 307-15.

external actors.<sup>24</sup> Though Yared mentions some of the modes of action identified in this paper, they are peripheral to her study that centres on the content of the Tunisian Constitution.<sup>25</sup>

Beyond shedding light on the transnational dynamic of Tunisia's 2014 constitution-making process, this Article contributes to the literature on constitution-making by detailing the specific mechanisms of foreign advising and external actors' modes of action. It focuses on a specific stage of the constitution-making process that has received little attention: constitutional drafting. The paper integrates INGOs and others (e.g., International IDEA), which have received only minor acknowledgement in the literature,<sup>26</sup> and it broadens the scope of inquiry by addressing informal modes of action.<sup>27</sup> Finally, this Article challenges the pervasive, idealized vision of constitutional foundations in the constitution-making literature. This is grounded in one of Angelica Bernal's key critiques regarding a foundationalist conception of democratic founding (which can be directly translated to constitutional founding), namely, that it "obscures the multiplicity of founding action and actors across time,"<sup>28</sup> ultimately erasing certain actors that do not fit the narrative of an 'authoritative founding moment' narrative and distorting the process by casting it as 'apolitical.'<sup>29</sup> Bernal contends that it is necessary to move away from the quasi-mythical figure of the founder—which in the context of constitution-making is the constituent power—to a more nuanced account of the deeply political dynamics and the broader range of actors immersed within.<sup>30</sup>

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24. See Tania Groppi, *La Constitution Tunisienne de 2014: Illustration de la Globalisation du Droit Constitutionnel?*, 114 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 343 (2018).

25. See Carla Yared, *La Construction du Constitutionnalisme Tunisien: Etude de Droit Comparé* (Jan. 22, 2021) (Ph.D. dissertation, Université de Bordeaux) (on file with the *Michigan Journal of Law & Society*).

26. See, e.g., Christina Murray & Cindy Wittke, *International Institutions, Constitution-Making and Gender*, in CONSTITUTIONS AND GENDER (Helen Irving ed., 2017).

27. If one examines the making of the Tunisian Constitution through the notion of constituent power, it fills all the criteria, and the involvement of external actors is not relevant to study the constitution-making process. Indeed, the constitution was adopted by the National Constituent Assembly.

28. ANGÉLICA MARIA BERNAL, *BEYOND ORIGINS: RETHINKING FOUNDING IN A TIME OF CONSTITUTIONAL DEMOCRACY* 4 (2017).

29. *Id.* at 2 ("It is also a distorting picture. Most troubling, it renders flat contingency and power struggle in the making of political orders, and masks the disagreements, conflicts, injustices, violences, and exclusions present in the original founding events of constitutional democracies.").

30. *Id.* at 10.



Several important caveats are in order. First, the typology offers the most comprehensive account based on the data gathered. This account is not exhaustive, but it does shed light on what has remained a complete black box. Second, while the paper distinguishes between formal and informal pathways for heuristic purposes, both are deeply intertwined. Formal modes of action are not independent of informal modes—they operate as a *trompe l'oeil*, hiding the informal interactions that also take place in the background. Third, this typology focuses on how expertise was delivered to constitution-makers. Constitution-makers are embedded within political parties, which are themselves embedded in their own specific transnational network. For the purposes of this typology, these networks have not been addressed in detail but should still be kept in mind. Finally, no attempt has been made to quantify the actual impact of external actors on the constitution-making process.

This Article first provides some context on the making of the 2014 Constitution (Part I). It then moves to analyzing the making of the 2014 Tunisian Constitutions by providing a typology of the modes of actions used by external actors during constitutional drafting (Part II).

## I. TRANSNATIONAL INVOLVEMENT DURING CONSTITUTIONAL DRAFTING

This Part provides context on the Tunisian constitution-making process and introduces the external actors present in Tunisia. It first details the process from a domestic perspective in Section A before introducing the external actors that were present in Tunisia between 2011 and 2014 in Section B.

### A. *Drafting: The Domestic Perspective*

#### 1. From Amending the 1959 Constitution to the NCA

The new constitution was the final result of a four-year, revolutionary process that began on December 17, 2010, with the self-immolation of

Mohamed Bouazizi following the confiscation of his wares and the humiliation he suffered from the police.<sup>31</sup> This desperate act ignited the “Dignity Revolution,” whose motto was “Work! Freedom! National dignity!”<sup>32</sup> While scholars have pointed to a variety of factors at the revolution’s origin, they often point to the economic conditions of Tunisia,<sup>33</sup> high youth unemployment, and the corruption of Zine El Abidine Ben Ali’s regime.<sup>34</sup> On January 14, 2011, Ben Ali fled to Saudi Arabia, an unexpected act that surprised Tunisian political elites. The immediate aftermath of Ben Ali leaving the country was characterized as “constitutional cacophony.”<sup>35</sup>

During this pre-constitution-making period, spanning from Ben Ali’s departure until the adoption of the first provisional transitional law on March 23, 2011,<sup>36</sup> Tunisia remained under the 1959 Constitution, which had been in place since the country’s independence from France. On March 3, 2011, the President, Fouad Mebazaa, announced that elections for the NCA would be held on July 24, 2011.<sup>37</sup> On March 23, 2011, a decree law relating to the provisional organization of the public authorities

31. See Nouri Gana, *Tunisia*, in *DISPATCHES FROM THE ARAB SPRING: UNDERSTANDING THE NEW MIDDLE EAST* 1, 8 (Paul Amar & Vijay Prashad eds., 2013).

32. See Mouldi Al-Riahi, *The Establishment of the National Constituent Assembly and the Launching of its Work*, in *THE CONSTITUTION OF TUNISIA: PROCESS, PRINCIPLES AND PERSPECTIVES* 109 (U.N. Dev. Programme ed., 2016), [<https://perma.cc/2HR4-XXZQ>]. Many scholars have commented on the revolutionary process, see, for example Frédéric Brun, *La Révolution en Tunisie*, *MULTITUDES*, no. 1, at 22 (2011); CHRISTOPHER ALEXANDER, *TUNISIA: FROM STABILITY TO REVOLUTION IN THE MAGHREB* 70-81 (2d ed., 2016).

33. The Tunisian economic miracle that existed until the 2000s was waning in and experienced a significant gap between labor and demand. See Bichara Khader, *Tunisie et Libye: Paradigme et Contre-Paradigme D'une Révolution Heureuse*, 78 *RIVISTA DI STUDI POLITICI INTERNAZIONALI* 199, 205 (2011). According to the 2012 report of the United Nations Economic Commission for Africa, “with 70% of those out of work aged under 30, unemployment among young people and in particular those graduating from higher education was already a major problem before the revolution.” *AFR. DEV. BANK ET AL., AFRICAN ECONOMIC OUTLOOK* 227 (2012). On the kleptocratic bureaucracy see SARAH CHAYES, *THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY* 191-211 (2015); Béatrice Hibou, *LA FORCE DE L'OBÉISSANCE: ÉCONOMIE POLITIQUE DE LA RÉPRESSION EN TUNISIE* (2006).

34. Amin Allal, *Retour Vers le Futur: Les Origines Économiques de la Révolution Tunisienne*, *POUVOIRS*, no. 156, at 17 (2016).

35. For a detailed analysis of Tunisian provisions, see Ben Achour & Ben Achour, *supra* note 12, at 717.

36. Décret-Loi 2011-14 du 23 mars 2011 portant organisation provisoire des pouvoirs publics [Decree-Law 2011-14 of March 23, 2011 relating to the Provisional Organization of the Public Authorities].

37. *Tunisie : le Premier Ministre Veut Relancer une Économie “au Bord du Gouffre”*, *LE MONDE* (Mar. 4, 2011, 7:21 PM), [https://www.lemonde.fr/afrique/article/2011/03/04/tunisie-le-premier-ministre-veut-relancer-une-economie-au-bord-du-gouffre\\_1488325\\_3212.html](https://www.lemonde.fr/afrique/article/2011/03/04/tunisie-le-premier-ministre-veut-relancer-une-economie-au-bord-du-gouffre_1488325_3212.html) [<https://perma.cc/4NDU-ZCLW>].

was adopted, resulting in the suspension of the 1959 Constitution.<sup>38</sup> The Parliament was dissolved, as well as the Constitutional Council.<sup>39</sup> Legislative power was exerted through “Decree-law” by the interim President and its government,<sup>40</sup> with the President also exercising executive power.<sup>41</sup> The interim government’s main task was to put in place an NCA,<sup>42</sup> and the announcement of elections marked a pivotal moment in the choice to adopt a new constitution rather than amend the 1959 Constitution.

### 1. Drafting, Agreement, and Adoption of the 2014 Tunisian Constitution

Drafting the 2014 Tunisian Constitution began after the election of the NCA on October 23, 2011, and ended with the adoption of the new Constitution on January 26, 2014.<sup>43</sup> The NCA held its opening session on November 22, 2011.<sup>44</sup> In an atmosphere of solemnity, the President of the NCA, Mustapha Ben Jaafar, stated:

It has placed on our shoulder a trust and given us the responsibility of protecting the country and working for its higher good . . . our main duty, as you know, is the drafting of a new Constitution for a new Tunisia, which will enable us to found a second, pluralist and democratic republic.<sup>45</sup>

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38. Décret-Loi 2011-14, *supra* note 36, at art. 1. A Decree-Law (Décret-Loi) is a norm enacted by the executive branch but that enjoys legislative status.

39. *Id.* art 2.

40. *Id.* art. 3 (“Legislative texts are promulgated in the form of decree law. The interim President of the Republic enacts these decree laws after deliberation by the Council of Ministers and ensures their publication in the Journal Officiel de la République Tunisienne.”) (Official Journal of the Republic of Tunisia) (translation provided by *Michigan Journal of Law & Society*).

41. *Id.*

42. The Higher Authority for Elections ISIE was created on April 18, 2011. Décret-Loi 2011-27 du 18 avril 2011, portant création d’une instance supérieure indépendante pour les élections [Decree-Law 2011-27 of April 18, 2011 establishing an independent higher body for elections].

43. For a study of the Tunisian constitution-making process according to democratization studies see Amal Jamal & Anna Kensicki, *A Theory of Critical Junctures for Democratization: A Comparative Examination of Constitution-Making in Egypt and Tunisia*, 10 L. & ETHICS HUM. RTS. 185 (2016).

44. *Tunisie: Première Séance Solennelle de l’Assemblée Constituante Éluë*, L’OBS (Nov. 22, 2011, 2:51 PM), <https://www.nouvelobs.com/topnews/20111122.AFP9428/tunisie-premiere-seance-solennelle-de-l-assemblee-constituante-elue.html> [<https://perma.cc/TAD6-JMH8>].

45. Al-Riahi, *supra* note 32, at 6.

This Section discusses the constitution-making process from the domestic perspective, first by highlighting the polarization that characterized the process following the NCA election results, and then analyzing the rules that framed constitutional drafting, before finally delving into the drafting stage itself.

#### a. NCA Election Results, a Polarized Process

The NCA election marked a shift in the country's leadership. From Ben Ali's flight up to the NCA election, the country's leadership was in the hands of former regime members and "secular" Tunisian legal scholars.<sup>46</sup> The elections resulted in the Ennahdha Party, a Muslim democratic party, winning a plurality of votes for the NCA. Indeed, Ennahdha won eighty-nine seats—forty-one percent. The other parties' votes were fragmented, with the Congress for the Republic (CPR) as the second-most-voted-for party (twenty-nine seats); non-partisan Popular Petition coming in third (twenty-six seats); Democratic Forum for Labour and Liberties (known as Ettakatol) coming in fifth (twenty seats);<sup>47</sup> and the Progressive Democratic Party with sixteen seats. The "Initiative" and the Democratic Modernist Pole both won five seats each. Afek Tounes and the Tunisian Workers' Communist Party won four and three seats, respectively. The last twenty seats were spread among the remaining parties, which won between one and four seats.<sup>48</sup> It is worth noting that political parties fragmented during

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46. For a discussion regarding the danger of transposing a Western understanding of secularism to the Tunisian case, see Jean-Philippe Bras, *Un Etat « Civil » Peut-il être Religieux? Débats Tunisiens*, POUVOIRS, no. 156, at 55 (2016).

47. Ettakatol and the Congress for the Republic lie on the center-left of the political spectrum. Sam Bollier, *Who are Tunisia's Political Parties?*, AL JAZEERA (Oct. 27, 2011), <https://www.aljazeera.com/features/2011/10/27/who-are-tunisia-political-parties> [<https://perma.cc/554J-674C>].

48. INSTANCE SUPÉRIEURE INDÉPENDANTE POUR LES ÉLECTIONS, *Rapport Relatif au Déroulement des Élections de L'assemblée, NATIONALE CONSTITUANTE* (Feb. 2012), <https://aceproject.org/ero-en/regions/africa/TN/tunisie-rapport-relatif-au-deroulement-des> [<https://perma.cc/2YZH-8RVB>]. Order of the Central Committee of the Independent High Authority for Elections relating to the proclamation of the final results for the election of National Assembly members, November 15th, 2011 (November 13th, 2011 through November 13th, 2011). Hereafter is the detail of the twenty remaining parties. They won one (Sowat al mostakbal, Almostakel, Pour un front national Tunisien, El amal, El wafa, Lutte sociale, Équité, El wafa aux martyrs, Parti Libéral Maghrébin, Parti de l'Équité et de l'Égalité, Parti de la Lutte Progressiste, Parti du Néo-Destour, Partie de la nation démocrate sociale, Parti de la Nation, Culturel et Unioniste, Union Patriotique Libre, Mouvement des Patriotes Démocra-

the constitution-making process, leading to twenty-eight political parties in 2014.<sup>49</sup> A coalition government (known as “Troika”) was focused around Ennahdha, Ettakatol, and CPR;<sup>50</sup> but the parties deeply distrusted each other, as the chosen electoral system led to an asymmetrical distribution of power given the number of seats won by Ennahdha and the fragmentation of the other parties.<sup>51</sup>

Overall, the entire process was characterized by deep polarization across religious issues, with the Islamist Ennahdha on one side and self-labelled “secular democrats” on the other.<sup>52</sup> It is important to understand that the Tunisian constitution-making process was marked by deep polarization. Eric Gobe and Larbi Chouikha describe the NCA as “los[ing] itself in the complexities of a drafting process eminently conflictual, revealing the ideological cleavage between secularists and Islamic-conservatives.”<sup>53</sup> The “democrats” saw themselves as the guardians of a Tunisian social model that was threatened by the “backwards” plans that Ennahdha wanted to implant. They blamed Ennahdha for the delay in the Constitution’s adoption, but delay was only possible because they had made sure there would be no binding timeframe following the election of the NCA.<sup>54</sup>

As the NCA’s work continued, the gap between Ennahdha and the “democrats” continued to widen. Selma Mabrouk observed that NCA representatives from Ettakatol saw the “threat to this model of course from the

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tes), two (Mouvement populaire and Mouvement des Démocrates), three (Communiste des Ouvriers de Tunisie) or four seats (Afek Tounes) (translation by the *Michigan Journal of Law & Society*).

49. Vincent Geisser & Déborah Perez, *De la Difficulté à « Faire Parti » dans la Tunisie post-Ben Ali*, CONFLUENCES MÉDITERRANÉE, no. 98, at 21, 34 (2016).

50. Ettakatol secured the presidency of the NCA (Mustapha Ben Jaafar), in December 2011, representatives of the NCA elected Moncef Marzouki as President of the Republic (Moncef Marzouki) and Hamadi Jebali became the Head of Government. See Mouldi Riahi, *La Constitution: Élaboration et Contenu*, POUVOIRS, no. 156, at 31, 33 (2016).

51. See Mohammed Hachemaoui, *Tunisia at a Crossroads: Which Rules for Which Transition?*, S.W.P. RSCH. PAPERS, Aug. 2013, at 5, 11.

52. This binary distinction does not account for the diversity of different movements represented, but on the issues explored in this contribution the so-called ‘moderates’ were a unified front. While there were other cleavages, commentators have insisted on the religious divide. On other cleavages such as the neoliberal agenda shared by some parties and others, see SRIPATI, *supra* note 8, at 314 (citing Mathieu Rousselin, *Is Religion Truly the Main Source of Cleavage in the Tunisian Party Landscape?*, in *THE TUNISIAN CONSTITUTIONAL PROCESS: MAIN ACTORS AND KEY ISSUES* 7, 40 (Mathieu Rousselin & Christopher Smith eds., 2015)).

53. Gobe & Chouikha, *supra* note 12, at 305 (translation by Author).

54. NADIA CHAABANE, *CHRONIQUE D’UNE CONSTITUANTE*, 2011-2014, at 214 (2018).

Islamic movement.”<sup>55</sup> This religious polarization pervaded every aspect of constitutional drafting, and the successive drafts of the constitution reveal antagonisms within Tunisian society.<sup>56</sup> This polarization has been widely observed by doctrinal scholarship on the Constitution in articles relating to the place of religion,<sup>57</sup> women’s rights,<sup>58</sup> and the choice of political regime.<sup>59</sup> This polarization resulted in the adoption of a “consensus constitution,”<sup>60</sup> as it has been labelled by several commentators.<sup>61</sup>

### b. Adopting the Legal Framework of Constitution-Making

The constitutional-drafting stage took place after the adoption of several key pieces of legislation that framed the NCA’s own activities.<sup>62</sup> Indeed,

55. SELMA MABROUK, *LE BRAS DE FER, 2011–2014*, at 127 (2018).

56. Gobe & Chouikha, *supra* note 12, at 306; Hachemaoui, *supra* note 51, at 25.

57. One of them is, for instance, Article I of the 2014 Constitution, which is identical to its counterpart in the 1959 Constitution. These elements of polarization in the constitutional text have been widely commented on. *See, e.g.*, Charrad & Zarrugh, *supra* note 12, at 235-36; Ghazi Gherairi, *The Civilian Character of the Tunisian State*, in *THE CONSTITUTION OF TUNISIA*, *supra* note 32, at 102; Walid Larbi, *Le Concept de Dawla Madanyya dans la Pensée Islamiste*, in *ETUDES EN L'HONNEUR DU PROFESSEUR RAFAA BEN ACHOUR*, TOME III, 643 (Konrad-Adenauer-Stiftung, 2015); Rory McCarthy, *Protecting the Sacred: Tunisia's Islamist Movement Ennahdha and the Challenge of Free Speech*, 42 *BRIT. J. MIDDLE E. STUD.* 447 (2015); David M. Mednicoff & Joanna E. Springer, *The Rule of Law and Political Liberalization in the Arab Gulf*, in *GULF POLITICS AND ECONOMICS IN A CHANGING WORLD* 79, 87-96 (Michael Hudson & Mimi Kirk eds., 2014); Mazen Shaqoura & Annali Kristiansen, *Islam and Human Rights: The Constitutional Debate in Tunisia* (Danish Inst. for Hum. Rts., Working Paper No. 2015/9, 2015). For an example of religious polarization in the constitution-making of other Arab Spring nations, see Mohammad Fadel, *Islamic Law and Constitution-Making: The Authoritarian Temptation and the Arab Spring*, 53 *OSGOODE HALL L.J.* 472 (2016).

58. *See, e.g.*, Charrad & Zarrugh, *supra* note 12, at 235-36.

59. The type of regime also sparked deep controversy among the NCA. Ennahdha favored a parliamentary system while the other parties defended a presidential system with some safeguards. Riahi, *supra* note 50, at 45.

60. The 2014 Constitution is characterised by several indeterminacies that will be construed by the constitutional court, whose judges have yet to be nominated. *See Tunisian President Resists Parliament's Bid to Create Constitutional Court*, REUTERS (Apr. 6, 2021), <https://www.reuters.com/article/uk-tunisia-politics/tunisian-president-resists-parliaments-bid-to-create-constitutional-court-idUSKBN2BT1PF> [<https://perma.cc/836P-RMTV>]. The constitutional court will, according to art. 146, construe those indeterminacies “in harmony” “in indissoluble whole.” TUNISIAN CONSTITUTION Feb. 10, 2014, tit. 9, art. 146.

61. For a discussion on how different strands reached a compromise, see Abrak Saati, *Negotiating the Post-Revolution Constitution for Tunisia—Members of the National Constituent Assembly Share Their Experiences*, 7 *INT'L L. RSCH.* 235 (2018).

62. Alongside the drafting of the Constitution, the Provisional Organisation of Public Authorities Constitutional Law tasked the NCA with other attributes, including the exercise of legislative power, the election of the NCA President and the President of the Republic, as well as controlling governmental action. Alongside the constituent committees that will be discussed here, there were also eight legisla-

The NCA was not bound by any existing legal rule and thus chose to start the process from scratch, scrapping the 1959 Constitution in favour of a *tabula rasa*.<sup>63</sup> First, the NCA replaced the Provisional Organization of the Public Authorities decree-law of March 2011 with a new transitory provisional law. The procedure to adopt the constitution was laid down in the Provisional Organization of Public Authorities Constitutional Law (OPPP Law) adopted on December 16, 2011.<sup>64</sup> Article 3 stipulated that the draft constitution had to be adopted by two-thirds of its members or would, after two failures, be submitted to a popular referendum.<sup>65</sup>

The Rules of Procedure, adopted after heated discussions on January 20, 2012,<sup>66</sup> provided the framework for the Constitution's drafting and adoption.<sup>67</sup> Six constitutional committees were created.<sup>68</sup> Each constitutional committee was composed of twenty-two NCA members on the basis of proportional representation of elected seats.<sup>69</sup> Alongside the six constitutional committees, a Joint Committee for Coordination and Drafting (Joint Committee) was created to, *inter alia*, coordinate their work.<sup>70</sup> It was composed of the President of the NCA, the Constitution General Rapporteur and his assistants, as well as chairmen and rapporteurs from the other

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tive committees that were created given that the NCA was also tasked with exercising legislative power. LOI CONSTITUANTE 2011-6 DU 16 DÉCEMBRE 2011, RELATIVE À L'ORGANISATION PROVISOIRE DES POUVOIRS PUBLICS [Constitutional Law on the Provisional Organization of Public Authorities dated December 16, 2011, suspending provisions of the Constitution of 1959 and provisionally organizing the public powers] [hereinafter LITTLE CONSTITUTION].

63. Riahi, *supra* note 50, at 33.

64. LITTLE CONSTITUTION art. 27. This law was commonly referred by Tunisian constitutional scholars and actors as the 'little constitution.' It suspended the 1959 Constitution and set the attributions of the NCA.

65. Politically speaking, no parties wanted to go through a referendum, as "the party unwillingly [sic] to make compromises during the drafting process would be perceived by the public as a consensus-hampering force, with the potential to suffer serious political losses." El-Sayed, *supra* note 12, at 43.

66. See Al-Riahi, *supra* note 32, at 8.

67. Rules of Procedure, Nat'l Constituent Assembly (2011) (Tunis.). These rules were subsequently amended in different instances on March 15, 2013, on November 4 and 27, 2013, and January 2, 2014. Alongside the constituent committees that will be discussed here, there were also eight legislative committees that were created, given that the NCA was also tasked with exercising legislative power. *Id.* art. 67.

68. *Id.* art. 64. ("1. The Committee for preparation, governing principles and constitutional amendment. 2. The Committee on rights and freedoms. 3. The Committee on the allocation of powers to the legislative and executive branches. 4. The Committee on legal, administrative, financial and constitutional jurisdiction. 5. The Committee on constitutional authorities. 6. The Committee on municipal and public authorities.").

69. *Id.* art. 8.

70. *Id.* art. 104.

constitutional committees. Its meetings were held in closed sessions, and its role was to coordinate the drafting between the different constituent committees and to prepare the general report of the constitution before its submission to the plenary.<sup>71</sup>

Finally, an *ad hoc* commission was created to address the crisis of summer 2013 (following the assassination of Mohamed Brahmi); the Consensus Committee was formally enshrined *ex post* through a modification of the Rules of Procedure, amended on January 3, 2014.<sup>72</sup> This was the day that the vote on the Constitution formally began. Both the Joint Committee and the Consensus Committee held their meetings closed to public scrutiny.<sup>73</sup>

### c. Drafting the Constitution

The work of the six constitutional committees began on February 14, 2012, and concluded with the adoption of the Constitution on January 26, 2014. According to members of the NCA—via their memoirs or interviews conducted—the overall process was characterized by the absence of a clear timeline and an urgency to get the constitution adopted, which the NCA President had promised within a year, even if the Rules of Procedure of the NCA did not provide a general timeline for the constitution’s adoption.<sup>74</sup> During March and April, 2012, there was no clear schedule set, and despite the work underway, “nobody knew when and how the serious business of drafting, debating, and adopting the Constitution would get underway.”<sup>75</sup> In May 2012, to NCA members’ surprise, Ben Jaafar demanded that the

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71. *Id.*

72. Arrêté 3275 du 29 novembre 2013 modifiant et complétant certaines dispositions du règlement intérieur de l’assemblée nationale constituante [Order 3275 of November 29, 2013 amending and supplementing certain provisions of the internal regulations of the National Constituent Assembly].

73. See THE CARTER CTR., THE CONSTITUTION-MAKING PROCESS IN TUNISIA: FINAL REPORT 2011-2014, at 33 (2015); Rules of Procedure, *supra* note 67, art. 104.

74. Adel Bsili, *Beginning and Organization of the Work of the Constituent Committees*, in THE CONSTITUTION OF TUNISIA, *supra* note 32, at 127, 127.

75. *Id.* at 129.



constitutional committees submit their drafts by the end of July with the goal of adopting the constitution in October.<sup>76</sup>

Additionally, as the Secretary General of the NCA, Adel Bsili, explains, there was significant procedural disruption following the submission of the first draft because there was confusion between the OPPP Law and the Rules of Procedure. While Article 3 of the OPPP Law referred to a discussion of the “entire constitution,” the Rules of Procedure implied the text provided by each committee that would be discussed.<sup>77</sup> Additional confusion sprung from the fact that the Joint Committee was “not authorised to combine the six texts into one unless it received express authorisation to do so from the plenary session.”<sup>78</sup>

The actual drafting of the constitution took place largely in the six constitutional committees, which distilled and synthesised different drafts throughout the process (August 8, 2012; December 14, 2012; April 23, 2013; and June 1, 2013).<sup>79</sup> The process was different for each committee, as there was no standard procedure; each committee was largely free to decide its own working method and schedule.<sup>80</sup> Adel Bsili recalls that Committees 1, 4, 5, and 6 worked on the basis of consensus for the first draft; Committee 2 worked to put the whole draft through a vote; and Committee 3 worked on four different drafts simultaneously.<sup>81</sup> By August 8, 2012, the first draft was released by the different committees, providing a “constitutional text with ‘six faces,’” given that each committee had worked independently without coordinating, which resulted in contradictions and inconsistencies.<sup>82</sup> The Joint Committee suggested comments on the different drafts that could be followed or rejected by the different committees.<sup>83</sup> Fol-

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76. *Principales questions juridiques discutées au sein de l'Assemblée Nationale Constituante de Tunisie (ANC) en vue de la nouvelle constitution: Juillet 2012*, Doc. No. CDL(2012)059-f, VENICE COMM'N (Sept. 10, 2012).

77. Rules of Procedure, *supra* note 67, art. 65.

78. Bsili, *supra* note 74, at 130; LITTLE CONSTITUTION art. 3.

79. See *Constitutional History of Tunisia*, CONSTITUTIONNET, <https://constitutionnet.org/country/tunisia> [<https://perma.cc/QBJ2-RMED>].

80. See Bsili, *supra* note 74, at 128.

81. Nadia Chaabane, *Petit Compte Rendu de la Réunion du 22 Août à Paris 11eme*, CONSTITUANTE (TUNISIE 2011-2014) (Aug. 26, 2012), <https://nadiachaabane.wordpress.com/2012/08/26/petit-compte-rendu-de-la-reunion-du-22-aout-a-paris-11eme/> [<https://perma.cc/347P-YVC6>].

82. Bsili, *supra* note 74 at 132.

83. See Rym Mahjoub, *From Division to Consensus: The Role and Contribution of the Consensus Committee*, in *THE CONSTITUTION OF TUNISIA*, *supra* note 32, at 246, 249.

lowing a two-day session in September 2012 led by the NCA on the draft content with 300 civil-society organizations, the NCA released its second draft in December 2012.<sup>84</sup> Given the deadline imposed on the NCA, the dialogue session with civil society did not result in actually changing the text, and “some committees kept their initial text virtually unchanged.”<sup>85</sup>

Between January and February, 2013, NCA representatives discussed the draft constitution with representatives from Tunisia’s twenty-four governorates and also with Tunisians living abroad in France and Italy.<sup>86</sup> This resulted in a detailed report regarding different proposals from citizens all over the country. The third draft, released in April 2013, sparked wide controversy and was rejected by all constitutional committees. In this case, the Joint Committee had overstepped its role and directly addressed the contentious question of the political regime, adding a tenth chapter on transitional provisions without consulting the six committees.<sup>87</sup> As a result of the public outcry, the NCA amended the Rules of Procedure.<sup>88</sup> The fourth and final draft was released in June 2013 by the Joint Committee. Described by Ben Jaafar as “the most beautiful constitution in the world,” it was met with wide criticism from NCA representatives who argued that it did not respect the contributions from each different constitutional committee.<sup>89</sup>

This fourth draft caused significant tensions within the NCA, bringing the entire constitution-making process to a stalemate and marking a displacement of constitutional drafting out of the constituent commissions. Each side of the political spectrum sought to maintain its version, with Ennahdha particularly resistant to compromise, justifying this action with their electoral majority, while the opposition referred to the “legitimacy of the street” to defend their position.<sup>90</sup> Protests halted the plenary session. As

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84. The NCA also launched a consultative mechanism on its official website to allow citizens to make suggestions on constitutional issues. CARTER CTR., *supra* note 73, at 35.

85. Bsili, *supra* note 74, at 131.

86. U.N. DEV. PROGRAMME, ÉVALUATION À MI-PARCOURS DU PROJET D’APPUI AU PROCESSUS CONSTITUTIONNEL, PARLEMENTAIRE ET AU DIALOGUE NATIONAL 17 (Aug. 13, 2014) [hereinafter ÉVALUATION À MI-PARCOURS].

87. THE CARTER CTR., *supra* note 73, at 36.

88. Despite the amendment, their meaning remained blurred. Bsili, *supra* note 74, at 132.

89. Nidhal Mekki, *Constitutional Impasse in Tunisia: the Ugly Side of “the Most Beautiful Constitution in the World”*, INT’L INST. DEMOCRACY & ELECTORAL ASSISTANCE (Mar. 23, 2021), <https://constitutionnet.org/news/constitutional-impasse-tunisia-ugly-side-most-beautiful-constitution-world> [https://perma.cc/137Q3-U4BR]. “La plus belle constitution du monde.” See CHAABANE, *supra* note 54, at 270.

90. Gobe & Chouikha, *supra* note 12, at 305.

a response, Ben Jaafar announced the creation of a new “Consensus Committee.”<sup>91</sup> This committee was created outside the framework of the Rules of Procedure and was thus without any formal status. It was composed of members from each committee. And, unlike the Joint Committee, it gave ample space to the opposition.<sup>92</sup>

The coup in Egypt on July 3, 2013, led Ennahdha to soften its stance,<sup>93</sup> and at the end of July 2013, following the political assassination of Mohammed Brahmi, leader of the People’s Movement, sixty NCA representatives halted their work at the NCA and joined protesters in the sit-in at the Bardo.<sup>94</sup> As one of these representatives, Rym Mahjoub, recalls:

When we withdrew from the Assembly, we began the Errahil sit-in, and we were joined by a huge crowd, with other opposition parties and supporters. The Consensus Committee had already been created at the start of the month, but the sit-in, the national dialogue and its results allowed progress to be made, and strengthened our political clout on the Committee.<sup>95</sup>

In March 2013, a technocratic government was appointed, headed by Ali Larayedh, in an effort to quell rising political tension and popular protests.<sup>96</sup>

The NCA’s stalemate led to a parallel process, referred to as the “National Dialogue.” Gathering four leading civil-society organizations (Quartet),<sup>97</sup> the National Dialogue was launched in July 2012, which engaged in a kind of political crisis management.<sup>98</sup> On July 29, Ennahdha refused a call by the Tunisian General Labor Union (UGTT) to participate in the

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91. Mahjoub, *supra* note 83, at 246.

92. *Id.*

93. Gobe & Chouikha, *supra* note 12, at 308.

94. *Id.* at 301, 310.

95. Mahjoub, *supra* note 83, at 249.

96. See Gobe & Chouikha, *supra* note 12, at 301, 309.

97. It gathered the Tunisian General Labor Union (UGTT, Union Générale Tunisienne du Travail), The Tunisian Confederation of Industry, Trade and Handicrafts (UTICA, Union Tunisienne de l’Industrie, du Commerce et de l’Artisanat), The Tunisian Human Rights League (LTDH, La Ligue Tunisienne pour la Défense des Droits de l’Homme) and The Tunisian Order of Lawyers (Ordre National des Avocats de Tunisie). See Hatem M’rad, LE DIALOGUE NATIONAL EN TUNISIE 47–48 (2015).

98. The National Dialogue was initiated in 2012 to create “a consensus among different parties from the political scene to accelerate the transition. It did not take place given the refusal of Ennahdha to participate.” Gobe & Chouikha, *supra* note 12, at 307-08.

National Dialogue.<sup>99</sup> In response, the President of the NCA demanded work be halted on August 6, 2012 until there could be further input from the National Dialogue.<sup>100</sup> At the end of August 2012, Ennahdha finally agreed to participate in the National Dialogue, and under the aegis of the Quartet, negotiations continued, which resulted in the NCA's activities re-starting. From this point forward, the NCA was tightly monitored by the National Dialogue and the Consensus Committee;<sup>101</sup> between July and December, 2013, the Consensus Committee was the locus of intense negotiation regarding the different drafts. The Constitution was finally adopted by the NCA on January 26, 2014.<sup>102</sup>

#### A. *Introducing the External Actors*

External actors were involved in Tunisia's democratic transition from the beginning of the Tunisian Revolution in 2010 to the adoption of the new Constitution in 2014. This Section details external-actor involvement in the constitution-making process, providing a comprehensive view of how this involvement manifests. Examining these other types of involvement is important, as they are intimately tied with the provision of expertise. As the UNDP employee highlights:

It is not enough to have experts, it's thanks to the trust and to the support we provided daily . . . first not on advice. First it was on their functioning, to help them operate . . . in their basic function-

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99. *L'UGTT Appelle à la Dissolution du Gouvernement et Fixe un Agenda pour L'adoption de la Constitution*, LEADERS (July 20, 2013) <https://www.leaders.com.tn/article/11953-l-ugtt-appelle-a-la-dissolution-du-gouvernement-et-fixe-un-agenda-pour-l-adoption-de-la-Constitution> [<https://perma.cc/KN8W-WH3M>]; Sarah Chayes, *How a Leftist Labor Union Helped Force Tunisia's Political Settlement*, CARNEGIE ENDOWMENT (Mar. 27, 2014), <https://carnegieendowment.org/2014/03/27/how-leftist-labor-union-helped-force-tunisia-s-political-settlement-pub-55143> [<https://perma.cc/9LLY-P7ZP>].

100. Najla Bouriel, *la Décision de Ben Jaafar est Insuffisante*, TUNISCOPE (Aug. 7, 2013), <https://www.turess.com/fr/tuniscopefr/29494> [<https://perma.cc/SQ6X-SYAE>].

101. Gobe & Chouikha, *supra* note 12, at 301, 313.

102. It was adopted by 200 votes pro, twelve against, and four abstentions. It followed Article 3 of the OPPP law on the provisional organization of public authorities that the different provisions of the constitutional draft are to be voted by absolute majority. The draft constitution had to be adopted by two-third of its members or would, after two failures, be submitted to a popular referendum. Hamadi Redissi & Rihab Boukhayatia, *The National Constituent Assembly of Tunisia and Civil Society Dynamics*, Working Paper No. 2 (Eur. Pol'y Ctr., 2015), [http://aei.pitt.edu/66141/1/working\\_paper\\_no.2.pdf](http://aei.pitt.edu/66141/1/working_paper_no.2.pdf) [<https://perma.cc/L9D6-URG7>].

ing . . . trust was built and then we have been able to provide advice on content.<sup>103</sup>

This Section examines the different external actors present in the early days of the transition and then highlights the different kinds of support that external actors provided during constitution-making.

### 1. The Configuration of External Actors in the Early Days of the Transition

External actors were involved in the Tunisian democratic transition from its early days in 2011. Welcomed by Tunisian authorities who were caught off guard by the social unrest, external actors were invited to provide expertise on the many questions that had to be decided in the immediate aftermath of Ben Ali's sudden departure.<sup>104</sup> The early period of the revolution was marked by an eagerness to ratify several international human rights treaties. As the Secretary General of the Government recalled, at the time "we wanted to show that Tunisia would break radically with its past."<sup>105</sup>

Between 2011 and 2014, Tunisia received significant international attention.<sup>106</sup> The revolutionary energy that was sparked by the so-called Arab Spring<sup>107</sup> was seen as a unique opportunity for democratization in the

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103. Skype Interview with U.N. Dev. Programme Emp., (Dec. 20, 2018) ("It's not enough to have experts and so it's thanks to the trust and the fact that we supported them in their daily life and not on advice, first not on advice, first of all it's on their functioning, to help them to function, to reinforce, even beyond their capacities, really their basic functioning. . . . trust was created and therefore we were able to create advice as to content.") (Translation by Author).

104. Dimiter Chalev, Mazen Shaquoura & Abou Abass, *The Role of the United Nations in the Constitutional Process in Tunisia and the Outcome in Terms of Human Rights Guarantees*, in THE CONSTITUTION OF TUNISIA, *supra* note 32, at 384.

105. Interview with Sec'y Gen. of Government, in Tunis, Tunisia (Mar. 23, 2018).

106. While this Article focuses on the involvement of external actors during the time frame of the constitution-making process, many external actors are still present in Tunisia, and are involved in the "implementation phase" of the constitution.

107. See Rosemary Hollis, *No Friend of Democratization: Europe's Role in the Genesis of the 'Arab Spring'*, 88 INT'L AFFS. 81, 82 (2012) ("Arab commentators differ on whether the 'Arab Spring' is a satisfactory name for the series of uprisings that started in Tunisia in late 2010 and erupted in one form or another in most other Arab countries in early- to mid-2011. Some see the term as a western invention derived from earlier uprisings in Central and Eastern Europe and reject it because it does not capture the Arab essence of current developments. However, there seems to be no consensus on whether to

MENA region. The interest of external actors in the Tunisian transition manifested in a high level of international funding.<sup>108</sup> For instance, the United States allocated \$400 million in aid.<sup>109</sup> The European Union (EU) doubled its initial aid of \$240 million EUR between 2011 and 2013.<sup>110</sup> And EU development assistance ended up reaching \$455 million EUR.<sup>111</sup> INGOs, even with more restricted budgets, allocated significant funds to the Tunisian transition. DRI's budget in Tunisia varied between €350,000 USD (2011) and €500,000 EUR (2013), which represented, respectively, sixteen percent and eighteen percent of its total budget.<sup>112</sup>

The presence of external actors during Tunisia's constitution-making process did not occur in a vacuum. Back during Tunisia's decolonization process, under Habib Bourguiba,<sup>113</sup> foreign actors were already involved. As Bourguiba wrote: "Tunisian economic development is predicated upon association with the whole free world; that indeed is one of the reasons why Tunisia has decided in favour of association with the West."<sup>114</sup> Western support extended during the Ben Ali era, where the role external actors played was summarized as "optimist incrementalism"<sup>115</sup> following the

call the phenomenon an 'awakening,' the 'Second Arab Awakening,' the 'Arab revolutions,' or the 'Arab intifadas.'").

108. See KRISTINA KAUSCH, 'FOREIGN FUNDING' IN POST-REVOLUTION TUNISIA (2013).

109. SARAH SUNN BUSH, THE TAMING OF DEMOCRACY ASSISTANCE: WHY DEMOCRACY PROMOTION DOES NOT CONFRONT DICTATORS 194 (2015). The United States pledged 400 million USD in bilateral aid which was "the largest in dollar terms." *Id.* American political foundations' lack of transparency prevents us from knowing how much was specifically devoted to the constitution-making process.

110. *Tunisie Programme Indicatif National 2011-2013*, EUR. COMM'N 13 (2010).

111. The EU devoted 160 million EUR in 2011 and 2012 and 135 million in 2013. *Commission Européenne, Mise en Oeuvre de la Politique Européenne de Voisinage en Tunisie: Progrès Réalisés en 2011 et Actions à Mettre en Oeuvre* (May 15, 2012) SWD (2012) 123. For a detailed account, see Ayadi & Sessa, *supra* note 11.

112. Respectively 353,969.50 EUR in 2011 and 515,652.51 EUR (18%) in 2013. DEMOCRACY REPORTING INT'L, ANNUAL REPORT 2011, at 23 (2012); DEMOCRACY REPORTING INT'L, ANNUAL REPORT 2013, at 22 (2014).

113. Habib Bourguiba is considered the father of the nation and the author of the 1959 Constitution. See Charles Debbasch, *Les Assemblées en Tunisie*, 1 ANNUAIRE DE L'AFRIQUE DU NORD 81 (1962); Victor Silvera, *Le Régime Constitutionnel de la Tunisie la Constitution du 1 er Juin 1959*, 10 REVUE FRANÇAISE DE SCIENCE POLITIQUE 366, 379 (1960).

114. Habib Bourguiba, *Nationalism: Antidote to Communism*, FOREIGN AFFS. (1957), <https://www.foreignaffairs.com/articles/tunisia/1957-07-01/nationalism-antidote-communism> [<https://perma.cc/7WFP-A7TF>].

115. For an in-depth account of the constant support provided by every French Government since Tunisia's independence, see Amy Aisen Kallander, "Friends of Tunisia": French Economic and Diplomatic Support of Tunisian Authoritarianism, in THE MAKING OF THE TUNISIAN REVOLUTION, *supra* note 11, at 103. France "funded and facilitated Tunisian access to development loans and financial assistance via

Western rationale that, despite human rights violations by the Ben Ali regime, only an iron-willed, centralized power could support Tunisian development.<sup>116</sup> Over this period, there were programs concerning economic issues and rule of law reform. Scholars have observed that actors such as the United States and the European Union turned a blind eye to Ben Ali's repressive regime.<sup>117</sup> International financial institutions ignored widespread corruption and hailed Tunisia as a great economic success in the region.<sup>118</sup> For instance, in 2011, the World Bank considered that "Tunisia has made remarkable progress on equitable growth, fighting poverty and achieving good social indicators."<sup>119</sup> Similarly, a couple of months before the protest erupted, the UN Secretary General praised the "great initiative of President Ben Ali" in creating the "Year of Youth" at a time when Tunisia's unemployment was over twenty percent.<sup>120</sup>

When the sparks of the revolution ignited, external actors that had been present in Tunisia for decades redirected their activity away from economic issues or questions of judicial reform toward democratic assistance, while new actors quickly arrived to the scene. For example, several German political foundations had been present in Tunisia for decades before the revolution.<sup>121</sup> The Friedrich Naumann Foundation opened an office in Tunis (Tunisia's capital) in 1964.<sup>122</sup> The Konrad-Adenauer Foundation set

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supranational bodies such as the International Monetary Fund (IMF), the World Bank, and the European Union (EU)." *Id.*

116. ZAID AL-ALI, *THE COMING REVOLUTION* 292 (2021).

117. It was particularly acute in the context of the 'war on terror' and for migration purposes. See, e.g., Richard Falk, *Ben Ali Tunisia Was Model US Client*, AL JAZEERA (Jan. 25, 2011), <https://www.aljazeera.com/opinions/2011/1/25/ben-ali-tunisia-was-model-us-client> [<https://perma.cc/52CH-L2G4>].

118. For instance, in 2005, the World Bank and the Islamic Development Bank published a report with the evocative title of "Tunisia: Understanding Successful Socioeconomic Development." See WORLD BANK & ISLAMIC DEV. BANK, *TUNISIA: UNDERSTANDING SUCCESSFUL SOCIOECONOMIC DEVELOPMENT* (2005).

119. *Tunisia: Country Brief*, WORLD BANK (Dec. 14, 2011), [https://www.worldbank.org/en/web/archives/archive?url=https%3A%2F%2Fweb.worldbank.org%2Farchive%2Fwebsite01244%2FWEB%2F0\\_MEN-2.HTM&mdk=23073931](https://www.worldbank.org/en/web/archives/archive?url=https%3A%2F%2Fweb.worldbank.org%2Farchive%2Fwebsite01244%2FWEB%2F0_MEN-2.HTM&mdk=23073931) [<https://perma.cc/PQS2-ZSMT>]; see also GEORGIE ANNE GEYER, *TUNISIA: A JOURNEY THROUGH A COUNTRY THAT WORKS* (2004).

120. AL-ALI, *supra* note 116, at 292.

121. See Pietro Marzo, *Supporting Political Debate While Building Patterns of Trust: The Role of the German Political Foundations in Tunisia (1989–2017)*, 55 *MIDDLE E. STUD.* 621 (2019).

122. *Tunis*, FRIEDRICH NAUMANN FOUND. FOR FREEDOM, <https://www.freiheit.org/tunisia-and-libya> [<https://perma.cc/WHZ4-7UEV>].

up in 1983,<sup>123</sup> the Friedrich Ebert Foundation in 1989,<sup>124</sup> and the Hanns Seidel Foundation in 1989.<sup>125</sup> Each also operated offices in Tunisia, and each shifted from economic issues to democratic-transition areas in the revolution's aftermath.<sup>126</sup>

The presence of UNDP in Tunisia can be traced back to 1987. Prior to 2011, UNDP centred its work in Tunisia on issues generally related to development, such as the Millennium Development Goals.<sup>127</sup> Soon after the revolution, UNDP launched several projects supporting the democratic transition, including elections and transitional justice. Tunisia was invited to join The Venice Commission in 2008<sup>128</sup> and became a full member in March 2010.<sup>129</sup> The Venice Commission significantly increased its engagement in Tunisia following the revolution. The democratic transition attracted a boom of new actors, all eager to get involved, including in the field of constitution-making. The OHCHR opened a country office in Tunis in April 2011.<sup>130</sup> International IDEA opened a regional office in Cairo to provide support to Egypt, Tunisia, and Libya in 2010.<sup>131</sup> In Tunisia, it was involved through its constitution-building program. The Council of Europe also established an office in Tunis in 2012,<sup>132</sup> strengthening its

123. See KONRAD-ADENAUER-STIFTUNG, 50 YEARS FOR DEMOCRACY AND FREEDOM WORLDWIDE: EUROPEAN AND INTERNATIONAL COOPERATION OF THE KONRAD-ADENAUER STIFTUNG (2012).

124. *Qui Nous Sommes*, FRIEDRICH EBERT STIFTUNG, <https://tunisia.fes.de/a-propos-de-nous/fes-en-tunisie> [<https://perma.cc/974J-Q8CL>].

125. *Tunesien*, HANNS SEIDEL STIFTUNG, <https://www.hss.de/weltweit-aktiv/afrika/tunesien/> [<https://perma.cc/5WB6-QR7L>].

126. Interview with Emp., Friedrich Ebert Stiftung, in Tunis, Tunisia (Mar. 26, 2018).

127. See U.N. DEV. PROGRAMME, OBJECTIFS DU MILLENAIRE POUR LE DEVELOPPMENT EN TUNISIE: 2009 (2010).

128. EUR. COMM'N FOR DEMOCRACY THROUGH L., VENICE COMMISSION ANNUAL REPORT OF ACTIVITIES 2008, at 5, 50 (2009) ("Tunisia was invited to accede to the Enlarged Agreement by the Committee of Ministers on 15 May 2008.").

129. EUR. COMM'N FOR DEMOCRACY THROUGH L., VENICE COMMISSION 2010 ANNUAL ACTIVITY REPORT, at 16 (2011).

130. *Background*, OFF. OF THE U.N. HIGH COMM'NR FOR HUM. RTS., <https://web.archive.org/web/20180207203606/https://www.OHCHR.org/EN/Countries/MENARegion/Pages/OHCHRTunisia.aspx> [<https://perma.cc/KB3K-V2M6>]. The opening followed a mission "in order to assess how the Office could accompany national efforts towards the establishment of a democratic society in Tunisia. Subsequently, and as per the invitation of the Tunisian Transitional Government, an OHCHR Country Office was established in Tunisia in April 2011 and inaugurated officially by the High Commissioner on 13 July 2011." *Id.*

131. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, A RECORD OF ACTIONS 2011, at 22 (2012).

132. COUNCIL OF EUR. & EUR. UNION, STRENGTHENING DEMOCRATIC REFORM IN THE SOUTHERN NEIGHBOURHOOD - FROM ASSISTANCE TO PARTNERSHIP: OVERVIEW OF THE



work in the area with its Neighbouring Policy in 2011.<sup>133</sup> Several INGOs opened offices in Tunis in late 2011 and early 2012, including DRI,<sup>134</sup> National Democracy International (NDI),<sup>135</sup> and the Carter Center.<sup>136</sup> Other organizations, including the Max Planck Institute and the Center for Constitutional Transitions, became involved in Tunisia following the revolution but did not have a physical office in the country.

Finally, Harvard Professor Noah Feldman provided informal foreign expertise. Regarding his involvement, he stated: “I made multiple trips to Tunisia during the country’s constitutional process, both to learn about democracy in action in an Arabic-speaking country and to offer such advice as a professor might give to newly-minted politicians who had turned into constitution-makers.”<sup>137</sup> Feldman was not working for any organization during this time.<sup>138</sup> His assistant noted:

It was really a research project but . . . we didn’t want just to kind of be [sic], we thought it was more interesting and got better access to decision-making if we offered something and not just asked questions. So, we would offer kind of our expertise and offer to do kind [sic] research project something like this. When we went, we met with a very broad range of actors from Ennahdha, all the political spectrum, Ettakatol, the PDP when we first went there, and also with organizations from Al Bawsala, the LTDH.<sup>139</sup>

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EUROPEAN UNION-COUNCIL OF EUROPE JOINT PROGRAMME’S ACHIEVEMENTS AND IMPACT (2012-2014), at 6 (2014).

133. *Council of Europe Neighbourhood Policy*, COUNCIL OF EUR., Doc. No. SG/Inf(2011)7-rev2 (Apr. 19, 2011).

134. Interview with Dir., Democracy Reporting Int’l, in Tunis, Tunisia (Feb. 27, 2018).

135. Skype interview with Dir., Tunis Off., Nat’l Democratic Inst. (Dec. 27, 2018). The work on Tunisia had previously started from abroad. “It actually began reporting our work in Tunisia in 2009, prior to the transition in 2010 or 2011. NDI was engaged with political parties, and a small group of women activists, however that work was outside of the country for obvious reasons.” *Id.*

136. THE CARTER CTR., *supra* note 73, at 16.

137. Noah Feldman, Opinion, *Tunisia Managed a Relatively Bloodless Transition to Freedom. That Left It Vulnerable*, NAT’L POST (Mar. 19, 2015), <https://nationalpost.com/opinion/noah-feldman-tunisia-managed-a-relatively-bloodless-transition-to-freedom-that-left-it-vulnerable/> [<https://perma.cc/E44Y-S3TP>] (“Tunisia managed a relatively bloodless transition to freedom. That left it vulnerable.”).

138. Skype interview with Noah Feldman’s assistant, Harv. L. Sch. (Oct. 3, 2018) (“Then I went back during my second year at Harvard with Noah and that’s when we got a research fund first from Harvard and from some institutional donors after that to go back to Tunisia.”).

139. *Id.*

## 1. External Actors and the Making of the 2014 Constitution

During the period spanning from the election of the NCA to the adoption of the Constitution, external actors provided various kinds of support to the constitution-making process. The provision of expertise—the most significant type of involvement for studying the transnational dimension of constitution-making—occurred alongside other types of activities. Not only did external actors provide significant financial support, they were also present in the NCA from day one of its operation, offering logistical and institutional support.

### a. Financial Support

The provision of financial support from external actors was a central part of their involvement in the Tunisian constitution-making process. Following the election of October 2011, the NCA installed itself in the Bardo Palace in Tunis, which was the headquarters of the former Chamber of Deputies.<sup>140</sup> Remember that the NCA was not only tasked to draft the constitution, but also to act as “parliament” and to control the government.<sup>141</sup> Despite its broad mandate, its budget was the same as what was allocated to the two-chamber parliament under Ben Ali<sup>142</sup> which was essentially an empty shell because all power was concentrated in the hands of the President. In 2010, the Parliament’s budget was just over \$20 million USD for both chambers of the legislature.<sup>143</sup> After the revolution, the amount allocated was divided by half. Given that the NCA was composed of only one

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140. The 2002 constitutional amendments of the 1959 Constitution introduced a bicameral system composed of the Chamber of Deputies and the House of Councillors (Senate).

141. LITTLE CONSTITUTION art. 2.

142. Under the 1959 Constitution, the legislative power was held by the Chamber of Deputies (Chambre des députés) and the Chamber of Advisors (Chambre des Conseillers). Constitution of Tunisia June 1, 1959, ch. II, art. 18. For an unofficial English translation of the 1959 Constitution, see *The Constitution of Tunisia*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/edocs/lexdocs/laws/en/tn/tn028en.pdf> [<https://perma.cc/9HA5-AY4S>].

143. The budget for the Chamber of Deputies was 17,800,000 TND, while the budget for the Chamber of Councillors was 9,138,000 TND. The combined budget was 26,938,000 TND (20,260,069 USD). Loi 2009-71 du 21 décembre 2009, portant loi de finances pour l’année 2010 [Law 2009-71 of December 21, 2009 concerning the budget for the year 2010], Official Gazette of the Republic of Tunisia. The USD to TND conversion rate fluctuated throughout 2010, with a high of 1.30 and a low of 1.55. *USD to TND Historical Chart 2010*, EXCHANGERATES.ORG, <https://exchange.rates.org/usd/tnd/in-2010> [<https://perma.cc/2KCC-57VL>].

chamber, its annual budget was \$11 million USD in 2012<sup>144</sup> and \$13 million USD in 2013.<sup>145</sup> Compare these figures with an external actor like UNDP, which has a budget of \$18 million USD for its constitutional assistance project in Tunisia (2011–2014) alone.<sup>146</sup> This figure shows how important financial support from external actors can be to constitution-making processes, especially in the context of democratic transition.

The NCA's lack of domestic financial support was apparent the moment it entered its new headquarters: it faced dire operational and logistical conditions. Its low budget meant, for instance, that NCA representatives did not receive assistants or basic technological equipment like personal computers.<sup>147</sup> Selim Ben Abdesslem, an NCA representative who had himself been a parliamentary assistant at the French National Assembly, recalls in his memoirs that NCA representatives were not provided “offices, computers, assistants, telephones or functioning printers.”<sup>148</sup>

#### b. Logistical Support

On top of financial support, external actors provided significant logistical assistance to the NCA and its constitution-makers. Once again, UNDP was the most prominent external actor here, launching its “Project of Support to Constitution-building, Parliamentary Development and National Dialogue in Tunisia” (Support to Constitution-building) as soon as the

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144. The 2012 annual budget was for 16,739,000 TND (11,185,501.97 USD). Loi 2011-7 du 31 décembre 2011, portant loi de finances pour l'année 2012 [Law 2011-7 of December 31, 2011 concerning the budget for the year 2012], Official Gazette of the Republic of Tunisia. The TND to USD conversion rate fluctuated throughout 2012, with a high of 0.67 and a low of 0.61. *TND to USD Historical Chart 2012*, EXCHANGERATES.ORG, <https://exchangerates.org/tnd/usd/in-2012> [<https://perma.cc/93AN-2HGC>].

145. 21,373,000 TND (13,741,129.16 USD). Loi 2012-27 du 29 décembre 2012, portant loi de finances pour l'année 2013 [Law 2012-27 of December 29, 2012 concerning the budget for the year 2013], Official Gazette of the Republic of Tunisia.

146. Between 2011-2012, UNDP's activities regarding democratic governance amounted to \$18,932,000, which was a stark increase from the \$1.5 million USD it spent pre-2011. ÉVALUATION À MI-PARCOURS, *supra* note 86, at 37.

147. MUSTAPHA BEN JAAFAR, UN SI LONG CHEMIN VERS LA DÉMOCRATIE. ENTRETIENS AVEC VINCENT GEISSER 166 (2014).

148. SÉLIM BEN ABDESSELEM, DU RÊVE AU CAUCHEMAR: GENÈSE DE LA CONSTITUTION TUNISIENNE ENTRE DEUX ÉLECTORALES - CHRONIQUE DE L'ASSEMBLÉE NATIONALE CONSTITUANTE VÉCUES DE L'INTÉRIEUR 64 (2018).

NCA was created.<sup>149</sup> As a UNDP employee recalls, “when I came to Tunisia for the first time, the NCA had not yet been elected. The doors of the premises, which had been closed following the revolution, were opened to us. We were there from the very beginning.”<sup>150</sup> Throughout its involvement, UNDP provided the NCA with electronic voting systems, computers, and printers,<sup>151</sup> and generally supported the modernization of the NCA’s information and communication technology (ICT) by conducting a needs assessment in July 2012<sup>152</sup> and again in December 2012.<sup>153</sup> They acquired video equipment to bring the infrastructure up to standard and introduced a Web TV channel.<sup>154</sup> The ICT materials were acquired in 2013,<sup>155</sup> including thirty desktop computers, sixty laptops, and seventy printers.<sup>156</sup>

Another area that required support was the method for tracking electronic votes. An Al Bawsala employee recalls that the NCA would take photos of the votes in order to keep track of them.<sup>157</sup> Accordingly, in August 2012, the UNDP provided the NCA with an “updated and supplementary electronic voting system” to ensure the proper identification of voters; UNDP also provided attendance software.<sup>158</sup> Logistical support further in-

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149. ÉVALUATION À MI-PARCOURS, *supra* note 86. To that end, UNDP signed a Memorandum of Understanding with the NCA. Dimiter Chalev, Mazen Shaquoura & Abou Abass, *The Role of the United Nations in the Constitutional Process in Tunisia and the Outcome in Terms of Human Rights Guarantees*, in THE CONSTITUTION OF TUNISIA, *supra* note 32, at 386. These are non-binding legal instruments. For a general discussion, see CHARLES B. ROGER, THE ORIGINS OF INFORMALITY: WHY THE LEGAL FOUNDATIONS OF GLOBAL GOVERNANCE ARE SHIFTING, AND WHY IT MATTERS (2020).

150. Skype Interview with Emp., U.N. Dev. Programme Emp. (Dec. 20, 2018) (Translation by Author).

151. U.N. DEV. PROGRAMME, PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, PARLIAMENTARY DEVELOPMENT AND NATIONAL DIALOGUE IN TUNISIA: ACTIVITY REPORT MAY 2012 – SEPTEMBER 2014, at 30 (2014) [hereinafter PROJECT OF SUPPORT TO CONSTITUTION-BUILDING].

152. *Id.* at 25.

153. *Id.* at 26.

154. *Id.* at 25.

155. The procurement notices of the UNDP were released from April 2013 onwards. *Procurement Notices*, U.N. DEV. PROGRAMME (Apr. 26, 2013), <http://procurement-notices.UNDP.org/index.cfm>; see also *ITB Case 600084 - Supply, Installation and Commissioning of LED Television, Touch Screen, and Video Projector for UNDP Tunis, Tunisia*, U.N. DEV. PROGRAMME (Apr. 26, 2013), [https://procurement-notices.undp.org/view\\_notice.cfm?notice\\_id=11226](https://procurement-notices.undp.org/view_notice.cfm?notice_id=11226) [<https://perma.cc/L39U-KBET>]; *Acquisition and Implementation of a Transcription Solution for Legislative Debates in Support of the Tunisia National Constituent Assembly (NCA)*, U.N. DEV. PROGRAMME (Apr. 26, 2013), [https://procurement-notices.undp.org/view\\_notice.cfm?notice\\_id=13323](https://procurement-notices.undp.org/view_notice.cfm?notice_id=13323) [<https://perma.cc/5M2V-D8UV>].

156. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 30.

157. Interview with Emp., Al Bawsala, in Tunis, Tunisia (Mar. 15, 2018).

158. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 26, 30.

cluded organizing discussions with citizens between December 2012 and January 2013. During this period, eighty NCA representatives met with 5,000 citizens during sessions held in Tunisia's twenty-four governorates, as well as the two countries with a significant diaspora (France and Italy).<sup>159</sup> In June 2013, a report summarizing the different proposals from citizens was submitted to the NCA.<sup>160</sup> The logistical costs associated with this process were fully covered by UNDP, although the total cost of this support is not on record.

#### a. Institutional Support

In addition to covering basic material needs, external actors provided institutional support to the NCA as a parliamentary institution and to political parties that were involved in the constitution-making process. As the legal advisor to a NCA Committee recalls: “we did not have the necessary human resources—we were dead, dead tired—it was ruthless. I worked from 9 a.m. to 4 a.m.”<sup>161</sup>

The material needs discussed above were accompanied by a lack of organization or communication, which complicated the work of NCA representatives. Nadia Chaabane, an NCA representative, reflects on the organizational dysfunction of the NCA, noting that it was characterized by “last-minute convocation, no planning.”<sup>162</sup> Once again, UNDP was the principal actor providing institutional support to the NCA.<sup>163</sup> Its support to the constitution-building project was divided into three different pillars: (1) reinforcing the NCA as a parliament, related to its role as a watchdog of the government; (2) supporting the constitution-making process; and (3) sup-

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159. *Id.* at 6.

160. U.N. DEV. PROGRAMME, DIALOGUE NATIONAL SUR LE PROJET DE LA CONSTITUTION: LE RAPPORT GENERAL (2014) [hereinafter LE RAPPORT GENERAL].

161. Interview with Legal Advisor at the Nat'l Constituent Assembly, in Tunis, Tunisia (Mar. 13, 2018) (“On avait pas les ressources humaines nécessaires, on était mort, mort de fatigue c'était impitoyable. Je travaillais de 9h du matin jusqu'à 4h du matin.”) (Translation by Author).

162. Nadia Chaabane, *J'ai Renoncé à Comprendre le Fonctionnement de L'anc*, CONSTITUANTE (TUNISIE 2011-2014) (Apr. 22, 2012) <https://nadiachaabane.wordpress.com/2012/04/22/jai-renonce-a-comprendre-le-fonctionnement-de-lanc/> [<https://perma.cc/N95B-5YKS>].

163. ÉVALUATION À MI-PARCOURS, *supra* note 86, at 17.

porting civil society.<sup>164</sup> It was through the first pillar that the majority of the institutional support was provided; it did not deal directly with constitution-making matters. It should be noted that the first and second pillars of the UNDP program were directed by the same person.<sup>165</sup>

Throughout the constitution-making process, UNDP was physically present at the NCA headquarters; indeed, its primary Tunisian partner was the Bureau of the NCA.<sup>166</sup> NCA representatives and UNDP staff met almost weekly to discuss the step-by-step progress of the constitution-making process.<sup>167</sup> UNDP provided funding to cover the human resources necessary for day-to-day operations of the NCA, including a personal assistant, IT support staff, a communication manager for the NCA's Facebook and Twitter pages, and a parliamentary assistant "responsible for managing relations with international partners ha[d] also been recruited in support of the NCA President's office."<sup>168</sup> Primarily, UNDP provided capacity-building support for the NCA Secretariat; a series of events were organized between October 2012 and December 2013 at the NCA headquarters where representatives from Lebanon, Belgium, and France were present.<sup>169</sup> These events gathered NCA representatives and civil servants of the NCA administration.<sup>170</sup> In December 2012, a roundtable on the constitutional work of the constitutional committees was organized by UNDP.<sup>171</sup> In May and June, 2013, an expert sent by UNDP provided support to implement the changes in the NCA Rules of Procedure.<sup>172</sup> In April 2013, an expert was

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164. Skype Interview with U.N. Dev. Programme Emp. (Dec. 20, 2018) ("We had three pillars, a parliamentary pillar, a constitutional pillar, and a civil society pillar. We had another election project that was separate, and I brought in different people to oversee the thing.") (Translation by Author).

165. *Id.* ("And I took over the parliament and constitution pillar, and there was someone else who did the civil society pillar.") (Translation by Author).

166. *Id.* ("The bureau of the assembly, the president, the vice-president, the quaestors, which did not correspond to the Belgian quaestorship and *voilà*, then there were all the parliamentarians, the administration, the political parties, in various degrees.") (Translation by Author).

167. ÉVALUATION À MI-PAROURS, *supra* note 86, at 13-14. The steering committee, was supposed to give directions to the project, but it only met once since the project was launched in 2012.

168. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 32.

169. *Id.* at 18-20. European Parliament (July 2013, October 2013), France (December 2013), Lebanon (August 2012 and October 2012), and Belgium (October 2012). It included the participation of "Antoine El Hajj, Secretary of the Administration and Justice Commission of the Lebanese National Assembly, Robert Myttenaere, Honorary Secretary General of the Belgian Chamber of Representatives and M. Christophe Pallez, Director-General of Legislative services at the French National Assembly."

170. *Id.* at 20.

171. *Id.* at 6.

172. *Id.* at 20-21.

also sent to support the debate transcript.<sup>173</sup> In July 2013, the Director of Protocol for the European Parliament was brought to the NCA.<sup>174</sup>

External actors also supported the two significant dates when Tunisian citizens were invited to discuss the constitution. The first was on September 14 through 15, 2012, when the NCA welcomed 300 representatives from civil-society organizations to discuss the first constitutional draft, which was publicly released in August 2012.<sup>175</sup> The second was between December 2012 and January 2013, when meetings were held across Tunisia and in France and Italy.<sup>176</sup> UNDP organized twenty-four public forums throughout Tunisia, where deputies of the NCA (80 out of 217) could meet with Tunisian people; in total, these forums gathered 6,000 participants.<sup>177</sup> A UNDP report presented to the NCA contains a detailed account of the discussions held in each governorate and the main proposals that emerged from these discussions.<sup>178</sup> In March 2013, UNDP supported the drafting of a report based on consultations from seventy judges and other key actors of the NCA to make recommendations on specific legal areas of the draft constitution.<sup>179</sup>

Another dimension of institutional support related to trips and trainings organized for NCA representatives. UNDP organized a fact-finding mission to the European and Belgian Parliaments in June 2012,<sup>180</sup> as well as several missions with other parliaments to share best practices, including Canada (May 2013),<sup>181</sup> France (July 2013),<sup>182</sup> Belgium (July 2013), Switzerland (September 2013), Denmark (October 2013),<sup>183</sup> and the European Parliament (November 2013). In July 2012, the UNDP organized training for female parliamentarians on the operation of parliament, gathering other female parliamentarians from countries in the MENA region and Sub-

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173. *Id.* at 24.

174. *Id.* at 21.

175. LE RAPPORT GENERAL, *supra* note 160, at 1.

176. See Habib Khedher, *The General Rapporteur of the Constitution and of the Joint Commission for the Coordination and Drafting of the New Constitution*, in *The Constitution of Tunisia: Processes, Principles and Perspectives* 75, 78 (U.N. Dev. Programme ed., 2016), [<https://perma.cc/2HR4-XXZQ>].

177. ÉVALUATION À MI-PARCOURS, *supra* note 86, at 17-18.

178. LE RAPPORT GENERAL, *supra* note 160.

179. ÉVALUATION À MI-PARCOURS, *supra* note 86, at 18.

180. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 14.

181. *Id.* at 20.

182. *Id.* at 17.

183. *Id.* at 21-23.

Saharan Africa, but only four NCA representatives benefited from this training.<sup>184</sup> In January 2013, UNDP organized capacity-building activities for NCA representatives, training them to perform their constitutional roles.<sup>185</sup> Further trainings were organized in June 2013 regarding the rights and responsibilities of the parliamentary majority and the opposition.<sup>186</sup>

Other external actors provided institutional support specifically to the different political parties represented in the NCA. This was conducted largely by various international political foundations, including the U.S.-based National Democratic Institute (NDI), which provided significant support to political parties. The NDI worked “on a number of fronts from basic strategy setting and organizational skills that you can imagine established opposition parties and especially newly emerging political parties had very weak or limited structures.”<sup>187</sup> NDI Tunisia’s Director at the time noted that NDI

First and foremost, work[ed] with newly elected parliamentarians in the 2011 elections to understand how the parliamentary caucus and then the committee structure could work and function under the existing bylaws of the NCA. And then secondly, we organized for both members of what emerged to be the ruling coalitions, and opposition parties, a comparative look at political coalition both in government and in opposition.<sup>188</sup>

During the 2013 National Dialogues, NDI provided “technical assistance to the members of parliaments who would be responsible for managing those outreach sessions, on constituent outreach and engagement . . . nothing regarding the content of the constitution but how to present the draft content . . . NDI gave advice to MPs on how to organise themselves.”<sup>189</sup>

This survey of the different types of support external actors provided to the Tunisian constitution-making process reveals the significance of their involvement. Indeed, external actors contributed to the necessary condi-

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184. *Id.* at 14.

185. *Id.* at 12.

186. *Id.* at 15.

187. Skype interview with Dir., Nat’l Democratic Inst., *supra* note 135.

188. *Id.*

189. *Id.*



tions to hold a constitution-making process through their significant financial, logistical, and institutional support.

### I. TYPOLOGY OF EXTERNAL ACTORS' MODES OF ACTION

This section provides a typology of the modes of action employed by external actors in the Tunisian constitution-making process. To develop a typology of external actors' modes of action during constitutional drafting, this Part draws on James Gardner's concept of "infused legal transfer" as being:

[N]either invited nor imposed in the usual sense of those words, but in which premeditated initiative and encouragement come principally from the exporting legal culture, often with selective participation on the part of the recipient culture.<sup>190</sup>

These pathways are characterized by informality, to varying degrees, and apply to both IGOs and INGOs. The socio-legal approach is able to capture this informal involvement, where doctrinal approaches remain blind to these modes of action.

Based on the data collected, this Part proposes a typology of five modes of action to capture how expertise was provided. This Part and its Sections highlight formal modes of action, which refers to cases where external-actor involvement was legally framed and at the initiative of Tunisian constitution-makers. The modes of action identified include expert hearings in the constitutional committee (discussed in Section II.A), the Venice Commission advisory's opinion, framed by the Venice Commission's Statute (discussed in Section II.B), one-on-one constitutional advising (discussed in Section II.C), study trips (discussed in Section II.D), and events (discussed in Section II.E).

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190. JAMES GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 33 (1980).

A. *Expert Hearings in the Constitutional Committees*

As soon as the six constitutional committees were set up on February 13, 2012,<sup>191</sup> NCA representatives in each committee sought advice from experts outside the realm of the NCA, as per the Rules of Procedure.<sup>192</sup> Most experts were consulted by the committees during the first stage of the drafting. Expert hearings mostly took place between February and August 2012, when the first constitutional draft was released.<sup>193</sup> The NCA's Rules of Procedure did not formalize the role of experts (domestic or foreign),<sup>194</sup> so each constitutional committee chair expressed discretion in deciding which experts were invited to advise on which topics. Article 59 of the Rules of Procedure states that: "In order to achieve a deeper understanding of subjects under discussion, any committee may seek advice from whatever source, either by requesting reports on certain points or by inviting individuals or organisations to give evidence at hearings to be held at the Assembly's premises."<sup>195</sup> Overall, the data suggest the expertise provided by external actors during expert hearings was not significant and that foreign experts were overshadowed by Tunisian scholars.<sup>196</sup> Yadh Ben Achour and Kais Saïed both had a prominent role in the first phase of the transition and advised five of the six constitutional committees.<sup>197</sup> It is unsurprising, given Tunisia's long constitutional history, that constitution-makers relied on

191. THE CARTER CTR., *supra* note 73, at 34.

192. Rules of Procedure, *supra* note 67, art. 59.

193. Rifaâ Ben Achour, *Développements Constitutionnels Récents en Tunisie (octobre-décembre 2011)*, VENICE COMM'N, Doc. No. CDL(2012)003 (Feb. 2, 2012). Indeed, the president of the NCA, Ben Jâafar, announced the deadline of July 15, 2012, to have a draft from the constitutional committees. THE CARTER CTR., *supra* note 73, at 34.

194. *Id.* at 10

195. Rules of Procedure, *supra* note 67, at art. 59. Based on the unofficial translation from International IDEA. The Tunisian National Constituent Assembly (NCA) Rules of Procedure, 16 December 2011, CONSTITUTIONNET, [https://constitutionnet.org/sites/default/files/constituent\\_assembly\\_rules\\_of\\_procedure\\_-\\_english-final.pdf](https://constitutionnet.org/sites/default/files/constituent_assembly_rules_of_procedure_-_english-final.pdf) [<https://perma.cc/M97N-BUF9>] ("Commissions may study in-depth the topics submitted to them and be enlightened by the opinions of experts and specialists either through written reports on specific issues or through their hearings.") (Translation by Author).

196. The list of experts has been gleaned through the leaked published minutes of some NCA representatives and are available on Al Bawsala. They are complemented by press releases, interviews, and information available on social media. *See* Appendix.

197. MABROUK, *supra* note 55, at 150; Commissions, MARSAD MAJILES, <https://anc.majles.marsad.tn/fr/assemblee/commissions> [<https://perma.cc/B6CT-36BJ>]; *Agenda Avril 2012*, MARSAD MAJILES, <https://anc.majles.marsad.tn/fr/agenda/2012/4> [<https://perma.cc/3WYQ-AKRY>].

Tunisian constitutional scholars. What follows is a detailed account of expert hearings within each of the six constitutional committees.

In the “Preamble, Fundamental Principles, and Constitutional Review Committee,” no foreign expert was invited, although several local experts shared opinions.<sup>198</sup> The Tunisian experts that advised this committee were either constitutional legal scholars (Yadh Ben Achour,<sup>199</sup> Kais Saïed,<sup>200</sup> Hafedh Ben Salah,<sup>201</sup> and Sadok Belaïd),<sup>202</sup> or those who participated in the drafting of the 1959 Constitution (Ahmed Mestiri, Moustapha Filali,<sup>203</sup> and Ahmed Ben Salah).<sup>204</sup> Some members of civil society, including representatives of the Tunisian General Labor Union, were also invited to advise.<sup>205</sup>

198. Interview with Rep., Ennahdha Party, Nat'l Constituent Assembly, in Tunis, Tunisia (Apr. 12, 2018).

199. Mabrouka M'Barek (@mabmbarek), TWITTER (Feb. 27, 2012, 11:42 AM), <https://twitter.com/mabmbarek/status/174172541420707840> [<https://perma.cc/W2EY-JMHF>] (“Taking suggestions for expert hearing : Iyadh Ben Achour will be invited in Commission #preamble.”); Mabrouka M'Barek (@mabmbarek), TWITTER (Mar. 10, 2012, 6:25 AM), <https://twitter.com/mabmbarek/status/178441450307072000> [<https://perma.cc/B7VC-LUJC>] (“Meeting committee preamble fundamental principles Monday 12/03/2012 Hearing Mr Ahmed ben salah a 14h & Iyadh ben achour a16h30 #TnAC.”) (Translation by Author).

200. Mabrouka M'Barek (@mabmbarek), TWITTER (Mar. 27, 2012, 8:29 AM), <https://twitter.com/mabmbarek/status/184618056134307840> [<https://perma.cc/3WCH-Y4SE>] (“Tomorrow: hearing of Kais Saïd. Committee [sic] bureau will write 1st proposal of #preamble which we'll debate on Monday. Finally drafting. . .”).

201. Lobna Jeribi, FACEBOOK (Mar. 11, 2012), <https://www.facebook.com/LobnaJeribii> [<https://perma.cc/2TGW-8NCD>]. (“This week will be devoted to the hearing of our great experts on constitutions (Iadh Ben Achour, Sadok Belaïd and Hafedh Ben Salah) and of personalities who have an experience in constitution writing (Ahmed Mestiri, Mustfa Fileli and Ahmed Ben Salah). Tomorrow we receive Ahmed Ben Salah and Iadh Ben Achour.”) (Translation by Author).

202. Mabrouka M'Barek (@mabmbarek), TWITTER (Mar. 13, 2012, 6:36 AM), <https://twitter.com/mabmbarek/status/179516328040869888> [<https://perma.cc/5ZTV-HC9L>] (“For Prof Belaïd: dignity & participative democracy are fundamental principles in new constitution.”).

203. Lobna Jeribi, FACEBOOK (Mar. 11, 2012), <https://www.facebook.com/LobnaJeribii>. [<https://perma.cc/2TGW-8NCD>].

204. Mabrouka M'Barek (@mabmbarek), TWITTER (Mar. 10, 2012, 6:25 AM), <https://twitter.com/mabmbarek/status/178441450307072000> [<https://perma.cc/B7VC-LUJC>] (“Meeting committee preamble fundamental principles Monday 12/03/2012 Hearing Mr Ahmed ben salah a 14h & Iyadh ben achour a16h30 #TnAC.”) (Translation by Author).

205. *Audition de Mr Kaïs Saïd Ainsi que les Représentants de L'UGTT, Mme Ikbel Ben Moussa et Mr Mohamed Guesmi* [Hearings of Mr. Kaïs Saïd as well as representatives of the UGTT, Ms. Ikbel Ben Moussa and Mr. Mohamed Guesmi], MARSAD MAJILES, <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec252f1> [<https://perma.cc/U94M-Z9L2>]. Ikbel Ben Moussa and Mohamed Guesmi were heard on March 28, 2012.

Between February and July, 2012, the “Rights and Freedoms Committee” invited several Tunisian civil-society organizations to offer opinions,<sup>206</sup> including the Tunisian General Labor Union,<sup>207</sup> the National Council for Freedoms,<sup>208</sup> the Tunisian League of Human Rights,<sup>209</sup> the Union of Journalists,<sup>210</sup> the Unemployed Tunisian Association,<sup>211</sup> the Tunisian Organization for the Defense of Rights of People with Disabilities,<sup>212</sup> representatives from the arts,<sup>213</sup> the Tunisian Women’s Association for Democracy,<sup>214</sup> the Tunisian League for Women Voters,<sup>215</sup> the Tounisset Association,<sup>216</sup> two

206. *Les Auditions Effectuées au Sein de la Commission des Droits et Libertés de Février Jusqu’à Juillet* [Hearings for Experts and Civil Society before the Rights and Freedoms Committee], MARSAD MAJILES, <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25359> [<https://perma.cc/AN72-5YD9>]; the document to the Committee’s meeting minutes (in Arabic) is linked here [<https://perma.cc/BL28-5LMT>] [hereinafter Rights and Freedoms Committee Hearings]. Among them, on March 27, 2012, the Commission heard Imane Al Tariki, President of the Freedom and Justice Association. It also heard the President and representatives of the Tunisian Women’s Association.

207. *Id.* Attendees included: Mr. Mohamed Al-Qasimi and Ms. Iqbal Ben Mousa of the Tunisian General Labor Union, Mrs. Siham Ben Sedrine, Spokesman of the National Council for Liberties (CNES) on Tuesday (March 24th).

208. *Id.* March 27, 2012, Sihem Bensedrine, Representative for the National Council for Freedoms (Conseil National des Libertés en Tunisie).

209. *Id.* March 26, 2012, Abdessattar Ben Moussa et Zouhair El Yahyaou, President and member of the Tunisian League for Human Rights.

210. *Id.* On April 18, 2012, Najiba Hamrouni, President of the National Union of Journalists (Syndicat National des Journalistes Tunisiens); MABROUK, *supra* note 55, at 154 (“The president of the journalists’ union arrives for her hearing and the storm breaks out.”) (Translation by Author).

211. Rights and Freedoms Committee Hearings, *supra* note 206. On April 23, 2012, Mrad Salih and Ali Ben Assi. Mourad Salhi, President of the Tunisian National Association of the Unemployed, Mr. Ali Ben Assi, Presidents of the Unemployed Tunisian Association.

212. *Id.* April 23, 2012 Sami Ben Younes and Sami Bahri, representatives of the Tunisian Organization for the Defense of Rights of People with Disabilities (Organisation Tunisienne de Défense des Droits des Personnes Handicapées); MABROUK, *supra* note 55, at 176 (“Concerning the particular rights of people with disability, on April 17, we will hear the representatives of an association for the protection of the rights of people with disability, Sami Ben Younes is blind, while Fédi Bahri, his vice-president is mute.”) (Translation by Author).

213. Rights and Freedoms Committee Hearings, *supra* note 206; MABROUK, *supra* note 55, at 180-82 (“July 2012; Artists and Writers Association - “Mohamed Jebli (writer), Fadhel Jaibi (theater) et Abderrahmen Moutahbel (painter).”) (Translation by Author).

214. Rights and Freedoms Committee Hearings, *supra* note 206; MABROUK, *supra* note 55, at 181 (“[W]e finally receive the ATFD [Tunisian Association of the Democratic Women], obtaining this hearing having been an obstacle course because the Ennahda deputies were obstructing it, having a huge prejudice against this association.”) (Translation by Author).

215. Rights and Freedoms Committee Hearings, *supra* note 206. Basma Soutadni (Apr. 23, 2012); MABROUK, *supra* note 55, at 156 (“Hearing of the coalition of Tunisian women voters, created on 26 April 2011. Wafa Elloumi and Anouare Mansour.”) (Translation by Author).

216. *Id.* at 181 (“association Tounisset founded on November 4, 2011, “the representatives are of Islamist tendency and the subject is again women’s rights.”) (Translation by Author).

renowned Tunisian lawyers—Kamel Laabidi<sup>217</sup> and Radhia Nasraoui<sup>218</sup>—and the President of the Tunisian Association Against Torture.<sup>219</sup> The Committee decided early on to invite the expertise of local constitutional scholars, such as Yadh Ben Achour,<sup>220</sup> Kais Saïed,<sup>221</sup> and Sadok Belaid.<sup>222</sup> They also heard from former members of the 1959 Constituent Assembly: Ahmed Mesri,<sup>223</sup> Mustapha Filali, and Ahmed Ben Salah.<sup>224</sup>

In the “Rights and Freedoms Committee,” external actors represented approximately one-third of the total hearings. The Committee heard from representatives of UNESCO,<sup>225</sup> the Executive Director of the Centre for Law and Democracy (a Canadian NGO),<sup>226</sup> the Press Ombudsman of

217. *Id.* at 180–81 (“Kamel Laabidi (on freedom of expression), Unicef (on children’s rights), the Tunisian Association of Democratic Women (on women’s rights) and an artists’ association (on freedom of expression and creation) are on the programme for this month of July.”) (Translation by Author).

218. *Id.* at 147 (“At the end of the session, we decide on the list of experts to be interviewed: Mustapha Filali, Ahmed Mestiri and Ahmed Ben Salah to make the link with the 1959 constituents, Yadh Ben Achour and Kais Said as constitutional experts and Radhia Nasraoui and Amnesty International for the issue of the fight against torture.”) (Translation by Author).

219. Rights and Freedoms Committee Hearings, *supra* note 206. Monzer Al Charmi, Rapporteur for the Tunisian Association Against Torture.

220. *Id.*; MABROUK, *supra* note 55, at 150 (“Hearing of Yadh Ben Achour . . . He also proposes to design a Tunisian declaration of rights and freedoms suggesting the project of the Association of Constitutional Experts as a source of inspiration.”) (Translation by Author).

221. *Id.* at 147 (“Hearing of Kais Said . . . He insists that ‘the constitution is a political matter before being a matter of experts who should be called upon only for the drafting and for certain details’. He continues ‘One cannot write a constitution with the mindset that it is to be revised’. Recommends to provide for a Tunisian declaration of rights and freedoms in the constitution.”) (Translation by Author).

222. *Id.* 181 (“In the afternoon, we hear representatives of UNICEF and Sadok Belaid (constitutional scholar) on the subject of children’s rights.”) (Translation by Author).

223. *Id.* at 151 (Hearing of Ahmed Mestiri, March 13. “Constitutionalist of the Neo Destour . . . Then makes a severe criticism of the 1959 constitution, a rather unexpected attitude from him.”) (Translation by Author).

224. *Id.* at 147 (“Mustapha Filali, Ahmed Mestiri et Ahmed Ben Salah to make the link with the 1959 constituents, Yadh Ben Achour and Kais Said as constitutional experts and Radhia Nasraoui and Amnesty International for the issue of the fight against torture.”).

225. *Id.* at 155–56 (Hearing of UNESCO experts on freedom of expression and access to information: “We were presented with three different countries’ visions of the fourth branch of government . . . So the Canadian representative advocates a State that does not have the right to limit freedom of expression, but must, on the contrary, intervene to limit its restrictions through clear laws and judicial orders . . . the choice with regard to media supervision was made in favour of an agency for media development and pluralism, financed by the State and by private channels . . . As for Indonesia, as mentioned above, their expert reports on their experience of drafting the constitution, which was prolonged due to ideological tensions and could only be finalized thanks to the decision to use pressure from the military.”) (Translation by Author).

226. Rights and Freedoms Committee Hearings, *supra* note 206. Hearing of Tony Mandell.

South Africa,<sup>227</sup> and a representative of Indonesia.<sup>228</sup> The Director of UNICEF's Tunisian office was invited to advise on children's rights.<sup>229</sup> The Committee also heard from several representatives from INGOs, including Article 19,<sup>230</sup> the International Association for the Support of Political Prisoners,<sup>231</sup> and the Director of Amnesty International's Tunisian branch.<sup>232</sup> The Max Planck Institute also sent a French expert to advise the Committee.<sup>233</sup>

In the "Legislative and Executive Powers and the Relationships Between the Powers Committee," Tunisian scholars were heavily mobilized regarding the discussion of "power sharing." Experts included Professors Ben Achour,<sup>234</sup> Amine Mahfoudh,<sup>235</sup> Slim Laghmani,<sup>236</sup> Haykel Ben Mahfoudh,<sup>237</sup> Mustapha Beltaief,<sup>238</sup> Mohamed Salah Ben Aïssa,<sup>239</sup> and Chafik Sarsar,<sup>240</sup> all of whom belong to the "faculty." The Committee also interviewed Tunisian political actors, including Mustapha Zaanouni, former Minister and former Mayor of Bizerte,<sup>241</sup> and Ahmed Ouerfeli, Counselor of the President.<sup>242</sup> Notably, the Venice Commission was the only external actor to appear in front of the Committee.<sup>243</sup> Different experts from the

227. *Id.* On July 2-3, 2012, Bimabanegh Harimurti discussed the role of media during the democratic transition.

228. *Id.*

229. *Id.*

230. MABROUK, *supra* note 55, at 155; *see also* Assemblée Constituante, *Les Commissions Étudent les Orientations à Prendre*, LA PRESSE DE TUNISIE (Apr. 25, 2012), <https://www.tuess.com/fr/lapresse/48838> [<https://perma.cc/6VYA-YTEU>]; Rights and Freedoms Committee Hearings, *supra* note 206.

231. *Id.* Sada El Akremi, President of the International Association for the Support of Political Prisoners.

232. *Id.* March, 24, 2012, Sundus Korbouj, President of Tunisia's branch of Amnesty International.

233. Telephone interview with Expert, Max Planck Inst. (Nov. 19, 2018).

234. TUNIS AFRIQUE PRESSE, *Les Commissions de l'ANC Poursuivent les Discussions sur les Orientations Générales de la Constitution*, TUESS (Apr. 24, 2012) <https://www.tuess.com/fr/tapfr/124330> [<https://perma.cc/CPW6-ZV7F>].

235. *Agenda Avril 2012*, *supra* note 197.

236. *Agenda Mai 2012*, MARSAD MAJILES, <https://anc.majles.marsad.tn/fr/agenda/2012/5> [<https://perma.cc/57VJ-TRH2>].

237. *Id.*

238. *Id.*

239. La Presse de Tunisie, *On Penche Vers le Régime Monocaméral*, TUESS (June 9, 2012), <https://www.tuess.com/fr/lapresse/51015> [<https://perma.cc/9UWG-4YC8>].

240. *Id.*

241. *Agenda Mai 2012*, *supra* note 236. Mohamed Salah Flis.

242. *Id.*

243. Venice Commission & Council of Europe, *Hearing of the Venice Commission by the National Constituent Assembly of Tunisia on Political Systems: Mechanisms, Advantages, Disadvantages*, EUR. COMM'N

Venice Commission—from France, Bulgaria, Portugal, and Georgia—were invited to advise the Committee.<sup>244</sup>

The “Judicial, Administrative, Financial, and Constitutional Justice Committee” began by hearing from experts from within the Committee itself.<sup>245</sup> The Chair of the Committee, Fadel Moussa, was the former Dean of the Law Faculty in Tunis. Half of the Committee members, from across the political spectrum, had legal training, including a former parliamentary assistant to the French Assembly, a professor at the Tunis Law Faculty, and several practicing lawyers.<sup>246</sup> The Committee also heard from civil-society organizations, including former Presidents of the Tunisian Bar,<sup>247</sup> as well as from the President of the Supreme Court (*Tribunal de Cassation*),<sup>248</sup> the President of the Administrative Tribunal,<sup>249</sup> and representatives of the Un-

FOR DEMOCRACY THROUGH L. (July 26, 2012) [hereinafter *Mechanisms, Advantages, Disadvantages*], [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2012\)053prog-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)053prog-e) [<https://perma.cc/9293-H5EU>].

244. They intervened on semi-presidentialism, direct democracy, and constitutional guarantees against authoritarian regimes. *Id.*

245. Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles [Administrative, Judicial, Financial, and Constitutional Committee], *Rapport D'avancement des Travaux au Sein de la Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles de Février 2012 Jusqu'à Mai 2012*, MARSAD MAJILES (July 13, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25355> [<https://perma.cc/9XCV-7F4B>]. The report in Arabic [hereinafter July 13 Report], can be found here. [<https://perma.cc/L3H8-C25L>].

246. *Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelle* [Administrative, Judicial, Financial, and Constitutional Committee], MARSAD MAJILES <https://anc.majles.marsad.tn/fr/assemblee/commissions/4f3cf973b197de624e000003> [<https://perma.cc/4Q4W-EQ5G>].

247. Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles [Administrative, Judicial, Financial, and Constitutional Committee], *Audition des Maîtres Abdeljelil Bouraoui et Abdessatar Ben Moussa, Anciens Bâtonniers de L'ordre National des Avocats*, MARSAD MAJILES (Apr. 3, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec252f9> [<https://perma.cc/CYA2-NVZ6>]; Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles [Administrative, Judicial, Financial, and Constitutional Committee], *Audition des Maîtres Lazhar Karoui Chebbi et Abderrazak Kilani, Anciens Bâtonniers de l'ordre National des Avocats* [Hearing from Maîtres Lazhar Karoui Chebbi and Abderrazak Kilani, former Chairpersons of the Bar], MARSAD MAJILES (April 4, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec252fd> [<https://perma.cc/D8VL-6P3D>]. See generally *Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles* [Judicial, Administrative, Financial and Constitutional Justice Committee], MARSAD MAJILES, <https://anc.majles.marsad.tn/fr/docs/coms/4f3cf973b197de624e000003?before=518e5bfc7ea2c422bec252f9> [<https://perma.cc/N7HD-7VMG>] [hereinafter Judicial, Administrative, Financial and Constitutional Justice Committee Main Page].

248. Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles [Administrative, Judicial, Financial, and Constitutional Committee], *Audition de Monsieur Ibrahim Mejri, Premier Président du Tribunal de Cassation* [Hearing of Ibrahim Mejri, first president of the Cour de Cassation], MARSAD MAJILES (Apr. 23, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec2530a> [<https://perma.cc/BXN7-X6Y9>]; LA PRESSE DE TUNISIE, *supra* note 230.

249. Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles [Administrative, Judicial, Financial, and Constitutional Committee], *Audition de Madame Raoudha Mechichi*,

ion of Administrative Judges and the Union of Judges.<sup>250</sup> Many Tunisian scholars, including Professors Belaïd,<sup>251</sup> Saïed,<sup>252</sup> Sarsar,<sup>253</sup> Salah Ben Aïssa,<sup>254</sup> Ahmed Soussi,<sup>255</sup> Ben Mahfoudh,<sup>256</sup> and Ben Achour were also consulted.<sup>257</sup> The only external actor identified was an expert sent by the Max Planck Institute, in June 2012, to advise on the constitutional court.<sup>258</sup>

The “Constitutional Bodies Committee” heard from representatives of Tunisian civil-society associations on elections (Chahed<sup>259</sup> and ATIDE<sup>260</sup>) and on media (the President of the Union of Media Owners<sup>261</sup> and the

*Premier Président du Tribunal Administratif* [Hearing of Raoudha Mechichi, First President of the Administrative Tribunal], MARSAD MAJILES (Mar. 12, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec252e0> [<https://perma.cc/2444-FTRT>].

250. Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles [Administrative, Judicial, Financial, and Constitutional Committee], *Audition des Représentants de l'association et du Syndicat des Magistrats* [Hearing of Representative of the Association and of the National Judges Association], MARSAD MAJILES (Mar. 5, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec252d5> [<https://perma.cc/K7DX-6CAX>].

251. July 13 Report, *supra* note 245, at 3.

252. TUNIS AFRIQUE PRESSE, *La Commission de l'ordre Judiciaire Auditionne Deux Experts en Droit Constitutionnel*, TURESS (Apr. 18, 2012), <https://www.turess.com/fr/tapfr/123929> [<https://perma.cc/6GRR-4WW9>]; July 13 Report, *supra* note 245, at 3.

253. TUNIS AFRIQUE PRESSE, *supra* note 252; July 13 Report, *supra* note 245, at 3.

254. Judicial, Administrative, Financial and Constitutional Justice Committee Main Page, *supra* note 247; July 13 Report, *supra* note 245, at 3; Commission des Juridictions Judiciaires, Administratives, Financières et Constitutionnelles [Administrative, Judicial, Financial, and Constitutional Committee], *Audition du Professeur Mohamed Salah Ben Aïssa et du Professeur Ahmed Essoussi* [Hearing of Prof. Salah Ben Aïssa and Ahmed Ben Essoussi], MARSAD MAJILES (Mar. 13, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec252e4> [<https://perma.cc/MNC9-RUBP>].

255. Judicial, Administrative, Financial and Constitutional Justice Committee, *supra* note 247.

256. July 13 Report, *supra* note 245, at 3.

257. *Id.*

258. Telephone interview with Expert, Max Planck Inst., *supra* note 233.

259. Commission des Instances Constitutionnelles [Constitutional Bodies Committee], *Audition des Représentants de l'Observatoire Chahed*, MARSAD MAJILES (Apr. 25, 2012) <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25314> [<https://perma.cc/2SNN-363M>].

260. Commission des Instances Constitutionnelles [Constitutional Bodies Committee], *Audition des Représentants de l'Observatoire ATIDE pour les Elections*, MARSAD MAJILES (May 29, 2012) <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25326> [<https://perma.cc/62PK-72PW>].

261. Commission des Instances Constitutionnelles [Constitutional Bodies Committee], *Audition de Madame Amel Zouabi, Présidente du Syndicat des Dirigeants des Médias*, MARSAD MAJILES (June 20, 2012) <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25342> [<https://perma.cc/5E6J-RGEV>]; Nadia Chaabane, *Compte Rendu de la Commission « Instances Constitutionnelles » Du 13 au 20 Juin*, CONSTITUANTE (TUNISIE 2011-2014) (June 20, 2012), <https://nadiachaabane.wordpress.com/2012/06/23/compte-rendu-de-la-commission-instances-constitutionnelles-du-13-au-20-juin-3/> [<https://perma.cc/53K9-HBQF>] (“Amal Mzabi ‘of the Tunisian Union of Media Executives’ accompanied by 3 other members.”) (Translation by Author).



Trade Union for Journalists).<sup>262</sup> The theologian Hmida Ennaïfar was also invited to comment on a constitutional draft.<sup>263</sup> Members of other institutions provided expertise, such as the President of the Electoral Commission<sup>264</sup> and the President of the National Instance on Reform in the Information and Communication Sector.<sup>265</sup> The Committee also heard from Tunisian scholars, including Professors Ben Achour,<sup>266</sup> Saïed,<sup>267</sup> and Sarsar.<sup>268</sup> Foreign experts advised the Committee, including an expert from the Max Planck Institute: a French professor who contributed to the democratic transition in South Africa.<sup>269</sup> An expert involved in the Portuguese process was also heard.<sup>270</sup>

In the “Regional and Local Public Authorities Committee,” various hearings were held with the Tunisian Urbanists Association,<sup>271</sup> the Director General of the Training and Support Center for Decentralization at the Ministry of the Interior,<sup>272</sup> and the Director General of Local Communi-

262. Commission des Instances Constitutionnelles [Constitutional Bodies Committee], *Audition des Représentants du Syndicat National des Journalistes*, MARSAD MAJILES (June 6, 2012) <https://anc.majiles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25333> [<https://perma.cc/6GBD-VAX8>] [hereinafter Constitutional Bodies Committee]; Chaabane, *supra* note 261 (“Najiba Hamrouni for the journalists’ union, she was accompanied by another member, a journalist at Radio Monastir.”) (Translation by Author).

263. CHAABANE, *supra* note 54, at 244 (“On September 4, 2012, the group of Islamist constituents in the commission prompted the academic and theologian Hmida Ennaïfar, to give his opinion on the draft but above all to convince us.”) (Translation by Author).

264. Constitutional Bodies Committee, *supra* note 261; TUNIS AFRIQUE PRESSE, *supra* note 234.

265. Commission des Instances Constitutionnelles [Constitutional Bodies Committee], *Audition des Représentants du Syndicat National des Journalistes*, MARSAD MAJILES (June 6, 2012) <https://anc.majiles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25333> [<https://perma.cc/6GBD-VAX8>]; Nadia Chaabane, *Une Instance Indépendante des Médias*, CONSTITUANTE (TUNISIE 2011-2014) (June 16, 2012), <https://nadiachaabane.wordpress.com/2012/06/16/une-instance-independante-des-medias-2/> [<https://perma.cc/VD49-V6RT>].

266. Chaabane, *supra* note 196.

267. *Agenda mai 2012*, *supra* note 235.

268. *Id.*

269. Telephone interview with Expert, Max Planck Inst., *supra* note 232; TUNIS AFRIQUE PRESSE, *La Commission des Instances Constitutionnelles Auditionne un Expert Français en Jurisprudence Constitutionnelle*, TURESS (June 26, 2012), <https://www.turess.com/fr/tapfr/128276> [<https://perma.cc/X3PE-4E28>] (“[B]enefit from his expertise in the development of the South African constitution and its contribution to the democratic transition in that country between 1994 and 2001.”) (Translation by Author).

270. Jamel Touir, *Independent Constitutional Bodies in the Tunisian Constitution (January 2014)*, in *THE CONSTITUTION OF TUNISIA*, *supra* note 32, at 479, 481.

271. LA PRESSE DE TUNISIE, *supra* note 229.

272. Commission des Collectivités Publiques, Régionales et Locales [Regional and Local Public Authorities Committee], *L’audition de Monsieur Mokhtar Hammami Directeur Général du Centre de Formation et D’appui à la Décentralisation au Ministère de l’intérieur*, MARSAD MAJILES (Apr. 17, 2012),

ties.<sup>273</sup> Tunisian scholars were also present, including an expert in administrative law,<sup>274</sup> as well as Nejib Belaid from the University of Sousse,<sup>275</sup> to testify on the history of local and regional entities in Tunisia.<sup>276</sup> The Committee heard from an international expert on the topic of participatory municipalities.<sup>277</sup> The Max Planck Institute also sent an expert to advise this Committee,<sup>278</sup> as did the Council of Europe's Congress of Local and Regional Authorities (the CoE Congress).<sup>279</sup>

#### A. The Venice Commission's Advisory Opinion

Tunisian constitution-makers also received formal external expertise from the Venice Commission. The President of the NCA formally requested an advisory opinion from the Commission on the final draft of the Tunisian Constitution on June 3, 2013.<sup>280</sup> Given the urgency, the Commission instructed the rapporteurs to deliver their observation to the NCA on July 17, 2013.<sup>281</sup> The advisory opinion was officially adopted at the Venice

<https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec25301> [<https://perma.cc/F266-7C5M>]. For meeting minutes, in Arabic, see Minutes no. 18 [<https://perma.cc/EPC5-U8AH>].

273. Commission des Collectivités Publiques, Régionales et Locales [Regional and Local Public Authorities Committee], *Intervention de Mr Hedi Zakhama, Directeur Général des Collectivités Locales Auprès du Ministère de l'intérieur* [Speech by Mr. Hedi Zakhama, Director General of Local Authorities and the Ministry of Interior], MARSAD MAJILES (Apr. 4, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec252fa> [<https://perma.cc/D497-W9HQ>]. For meeting minutes, in Arabic, see Minutes no. 17 [<https://perma.cc/9RVF-NTNX>].

274. TUNIS AFRIQUE PRESSE, *supra* note 234.

275. *Agenda mai 2012*, *supra* note 235; Commission des Collectivités Publiques, Régionales et Locales [Regional and Local Public Authorities Committee], *L'audition du Professeur Nejib Belaid, Spécialiste en Fiscalité Locale au Sujet des Garanties Constitutionnelles en Matière de Fiscalité Locale*, MARSAD MAJILES (May 14, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec2531d> [<https://perma.cc/LQ89-6BXB>]. For meeting minutes, in Arabic, see Minutes no. 24 [<https://perma.cc/Q8PS-BTWS>].

276. *Agenda mai 2012*, *supra* note 235.

277. *Id.*

278. Telephone interview with Expert, Max Planck Inst., *supra* note 232 (“At that time the assembly was drafting the different chapter of the constitution in the different committees and I went to the committee on the judiciary and particularly the constitutional court and another one on decentralisation.”).

279. *Mechanisms, Advantages, Disadvantages*, *supra* note 242, at 3; Skype interview with Expert, Cong. of Loc. & Reg'l Auths. (Feb. 13, 2019).

280. EUR. COMM'N FOR DEMOCRACY THROUGH L., *Opinion on the Final Draft Constitution of the Republic of Tunisia*, 96th Sess., Opinion No. 733, at 4 (2013).

281. *Id.*; EUR. COMM'N FOR DEMOCRACY THROUGH L., VENICE COMMISSION ANNUAL REPORT OF ACTIVITIES 2013, at 21 (2014). The opinion, CDL-AD(2013)32, “contains comments from the rapporteurs on the draft constitution of Tunisia finalised by the National Constituent Assembly of Tunisia

Commission's session on October 11 through 12, 2013.<sup>282</sup> The opinion, drawing on comparative constitutional law and international law, examined in detail the first five chapters of the Tunisian Constitution.<sup>283</sup> The CoE Congress focused on the sixth chapter, which covered decentralization.<sup>284</sup> The advisory opinion from the Venice Commission is characterised by formality, even though the NCA Rules of Procedure do not mention foreign opinions, the Venice Commission Statutes provide a formal advisory opinion request mechanism,<sup>285</sup> to which Tunisia, as a member of the Venice Commission since 2010, is formally bound.<sup>286</sup>

There were two formal modes of action through which expertise was delivered, following the request of Tunisian constitution-makers. Both of these modes—expert hearings in constitutional committees and the Venice Commission's advisory opinion—were formal pathways in the sense that they took place within the legal framework of constitutional drafting. These modes were not particularly significant and were overshadowed by input from domestic actors. Indeed, the informal pathways were much more characteristic of external actor involvement in the Tunisian constitution-making process.

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(NCA) on 1 June 2013. These comments were sent to the NCA on 17 July as the new constitution should have been adopted during the summer." *Id.*

282. See VENICE COMMISSION ANNUAL REPORT OF ACTIVITIES 2013, *supra* note 280, at 21 ("The text of the new constitution reflects a large number of the Venice Commission's recommendations.").

283. See Opinion No. 733, *supra* note 279. Commentators have noted how the Venice Commission provided very few direct commentaries on the content itself. For instance, Maartje de Visser notes regarding the content of the Venice Commission opinion that "one is struck by the general dearth of references to Venice Commission texts and foreign constitutional models . . . In the case of Tunisia, the opinion, unfortunately, fails to make optimal use of available Commission documents . . ." de Visser, *supra* note 8, at 980; *see also* Berger, *supra* note 15.

284. Skype interview with Expert, Cong. of Loc. & Reg'l Auths., *supra* note 278.

285. EUR. COMM'N FOR DEMOCRACY THROUGH L., *Resolution Res(2002)3 Adopting the Revised Statute of the European Commission for Democracy Through Law*, Doc. No. CDL (2002) 27, at art. 3, § 2 (2002). ("The Commission may supply, within its mandate, opinions upon request submitted by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, the Secretary General, or by a state or international organization or body participating in the work of the Commission. Where an opinion is requested by a state on a matter regarding another state, the Commission shall inform the state concerned and, unless the two states are in agreement, submit the issue to the Committee of Ministers.").

286. *Commission de Venise: La Commission Européenne pour la Démocratie par le Droit*, CONSEIL DE L'EUROPE, <https://www.coe.int/fr/web/tunis/commission-de-venise> [<https://perma.cc/CYV2-WPS2>].

A. *One-on-One Constitutional Advising*

The first mode of action identified is one-on-one constitutional advising. Included in this category are exchanges between external actors and individual constitution-makers within the realm of the NCA during which expertise was provided. Several external actors engaged informally with constitution-makers, providing what amounted to one-on-one constitutional advice. Far more so than via expert hearings, expertise was provided through informal encounters in the corridors of the NCA headquarters, which happened “organically,” as a top-level employee from DRI put it.<sup>287</sup> This expertise was “legally infused” in the sense that it was “neither invited, nor imposed.”<sup>288</sup>

These informal encounters were carried out through face-to-face meetings. For example, in 2012, DRI held seventy meetings “with individual NCA members from all parties,”<sup>289</sup> including working sessions with the “General Rapporteur of the Constitution and the chairs of various constitution-drafting committees.”<sup>290</sup> These meetings were largely conducted by a recent Tunisian law graduate working for DRI, who acted as a channel to stream the expertise developed by DRI’s constitutional experts toward constitution-makers.<sup>291</sup> As he explained, they were present in the Parliament, where they tried to absorb information that was being shared in the corridors.<sup>292</sup> He would then bring back the information gathered at the NCA, adding “when we saw there was a possibility or demand of expertise coming from the NCA representatives, this is when the international experts intervened directly to the Parliament.”<sup>293</sup> Similarly, the Carter Center, during its observation of the constitution-making process, also engaged informally with NCA representatives.<sup>294</sup> Alongside their transparency and participation recommendations, they were “doing one-to-one lobbying” to promote their own position.<sup>295</sup>

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287. Interview with Dir., Democracy Reporting Int’l, *supra* note 131.

288. See GARDNER, *supra* note 189, at 33.

289. ANNUAL REPORT 2013, *supra* note 109, at 7.

290. DEMOCRACY REPORTING INT’L, IMAGINE THAT: ANNUAL REPORT 2012, at 11 (2013).

291. Interview with Former Emp., Democracy Reporting Int’l, in Tunis, Tunisia (Feb. 21, 2018).

292. *Id.*

293. *Id.*

294. See THE CARTER CTR., *supra* note 73, at 108-201.

295. Telephone interview with Pol. Analyst, The Carter Ctr. (Nov. 14, 2018).

On the fringe of the project supporting the NCA, at the request of the President of the NCA, UNDP also offered constitutional advice during the crisis of Summer 2013.<sup>296</sup> During this time, giant protests led to a sit-in, putting pressure on the NCA. Following this unrest, a deep-seated crisis unfolded, and the work of the NCA was suspended on August 6, 2013, reopening a month later.<sup>297</sup> As revealed by reports, UNDP provided discreet “in-depth technical assistance” to the NCA, “concerning some of the constitutional and legal provisions that were subject to intense negotiations during the National Dialogue.”<sup>298</sup> Since UNDP was physically based at the NCA and provided institutional support, they regularly dispensed informal legal advice on constitutional issues: “The idea, if there was support regarding the content of the constitution, it was mostly a support, to explain what exists everywhere, the different options possible, which can be integrated with the other provisions, and that’s it, after it is for them to choose.”<sup>299</sup>

Between September 2013 and January 2014, a foreign constitutional expert, who was both a constitutional scholar and a parliamentarian, was sent by the UNDP to provide direct and exclusive advice to the President of the NCA.<sup>300</sup> As the UNDP expert recalls: “I will be in Tunis, in a hotel. Prohibition to go to the Bardo, prohibition to meet political parties, colleagues, professors, constitution-makers. I only have contacts with the President of the NCA and his direct collaborators.”<sup>301</sup> The provision of expertise occurred informally:

So the President comes in the morning. He brings me work, if I may say so. Here, for instance, today it is the chapter on the judiciary. . . . At 5 p.m., he comes get the work that I typed on my com-

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296. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 4. The UNDP had some kind of formal bonds with the NCA as they signed a Memorandum of Understanding. But, when they engaged in the constitution-making process, they were outside of the bounds of what the program had set to accomplish.

297. Riahi, *supra* note 50, at 37.

298. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 4.

299. Skype interview with Emp., U.N. Dev. Programme (Dec. 20, 2018).

300. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 9.

301. Telephone Interview with Expert, U.N. Dev. Programme (Apr. 30, 2021) (Translation by Author).

puter, I give him his text and he gives me a new topic. And we work like that, well, in confidentiality.<sup>302</sup>

During these face-to-face meetings, external actors engaged in thematic issues regarding constitution-making. DRI's 2012 annual report outlines how it "engaged the members of the NCA in numerous meetings to jointly discuss thorny issues such as systems of government, means for legitimate limitations to human rights and the rights of the opposition."<sup>303</sup> As DRI writes, they delivered constitutional advice, "campaigning for institutional democracy *in the corridors* of constituent assemblies and parliaments and in the offices of policy-makers."<sup>304</sup> A former employee of the Carter Center claimed to have met individually with NCA members to promote recommendations concerning the process:

Once again, we were trying to make sure not to infringe upon sovereignty, upon the content of the text. There could have been, as I told you, a rare moment where we did it—it was at the end of the process on women's rights; otherwise, it was not on the constitution but on other bills that existed alongside, such as the law on immunization.<sup>305</sup>

Similarly, as the assistant to Noah Feldman recalls, the issues related to the constitution-making were discussed informally with constitution-makers:<sup>306</sup>

We worked closely with Ennahdha, I would say, it was, not the whole but some members, were the most interested in meeting with us on a regular basis and kind of, get what we had to say on constitutional issues. . . . But you know we would talk to some of the members we were closest with about systems of government, with really high level stuff, they were figuring out presidential vs

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302. *Id.* (Translation by Author).

303. IMAGINE THAT, *supra* note 290, at 11.

304. ANNUAL REPORT 2011, *supra* note 111, at 8 (emphasis added).

305. Telephone interview with Pol. Analyst, The Carter Ctr., *supra* note 295.

306. They also met with other parties. Skype interview with Noah Feldman, *supra* note 137.

parliamentary balance of power. It was really relevant to the problems they were having.<sup>307</sup>

One-on-one constitutional advice is an informal mode of infusing legal ideas in that there is premeditated initiative. External actors export certain “best practices” that could instrumentally lead to the adoption of a successful constitution. It should be noted that there was a de facto selection of the recipients of expertise in that those NCA representatives with international backgrounds were seen as being more receptive to these ideas. The effectiveness of this mode of action also stems from the fact that domestic actors did not see it as “interference” in the constitution-making process.

#### A. *Study Trips*

Another channel through which expertise was delivered was study trips abroad, funded by external actors, where constitution-makers were put in direct contact with particular foreign experts. These trips centred on discussions of key thematic issues of the constitution. Tunisian constitution-makers went on several trips; those who attended were self-selected on the basis of language ability (French or English).

Different constitutional committees undertook study trips to different countries. The “Constitutional Bodies Committee” visited the United Kingdom and Germany.<sup>308</sup> Reporting on her blog, the constitution-maker Nadia Chaabane outlines how their trip to Germany, organized by the Max Planck Institute, included not only visits to institutions such as the Constitutional Court but also presentations regarding other experiences of democratic transitions.<sup>309</sup> The “Regional and Local Public Authorities Committee” visited Germany, the Netherlands, and Turkey in June 2012.<sup>310</sup>

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307. *Id.*

308. Touir, *supra* note 270, at 481.

309. Nadia Chaabane, *Compte Rendu d'un Déplacement en Allemagne avec l'ANC Organisé par l'Institut Max-Planck dans le Cadre de Partenariat Germano-Tunisien Pour la Transition*, CONSTITUANTE (TUNISIE 2011-2014) (July 16, 2012) <https://nadiachaabane.wordpress.com/2012/07/16/compte-rendu-dun-deplacement-en-allemande-avec-lanc-organise-par-linstitut-max-planck-dans-le-cadre-de-partenariat-germano-tunisien-pour-la-transition/> [<https://perma.cc/9W4L-VQQ4>].

310. Commission des Collectivités Publiques, Régionales et Locales [Regional and Local Public Authorities Committee], *L'évaluation des Travaux de la Commission Lors de la Visite en Allemagne, Pays-Bas et Turquie* [Evaluation of the Commission's work during the visit to Germany, the Netherlands and Turkey],

During their visit to Turkey, they attended a forum on decentralization organized by the World Bank.<sup>311</sup> The National Democratic Institute also organized a “study mission for a number of elected MPs, ruling coalition and opposition, to travel to Ireland and to Brussels to look at those comparative building models.”<sup>312</sup> The Max Planck Institute, in the framework of the “Global Knowledge Transfer Programme,” organized an exchange between Tunisian constitution-makers and constitutional law professors from Morocco. In this context, the Max Planck expert recalls that it was an occasion where he sat down with members of the NCA and answered their questions.<sup>313</sup> As he put it:

The NCA had an opportunity for an in-depth exchange of views with the Moroccan expert to have an idea [of what] the new Moroccan constitution was all about. Those were the two occasions I went to Tunisia and sat with the members of the constituent assembly and answered their questions and discussed with them.<sup>314</sup>

Several meetings took place between NCA representatives, members of the Venice Commission (mostly law professors and former high ranking judges), and the CoE Congress in March, June, July, October, and December of 2012.<sup>315</sup> As an illustration, in March 2012, twelve members of the “Judicial, Administrative, Financial and Constitutional Justice Committee” undertook a trip to Germany and France (travelling to Karlsruhe and Strasbourg) to learn more about their judicial system. They were invited to discuss the judiciary at the Council of Europe’s European Court of Human Rights, followed by meetings in Karlsruhe, Germany, at the Federal Supreme Court and the Federal Constitutional Court.<sup>316</sup> These visits were followed by discussions of other chapters of the draft Constitution. In

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MARSAD MAJILES (July 2, 2012), <https://anc.majles.marsad.tn/fr/docs/518e5bfc7ea2c422bec2534d> [<https://perma.cc/FM9E-KHBZ>]. For meeting minutes, in Arabic, see Minutes no. 34 [<https://perma.cc/N24T-USFS>].

311. *Id.*

312. Skype interview with Dir., Nat’l Democratic Inst., *supra* note 135.

313. Telephone interview with Expert, Max Planck Inst., *supra* note 233.

314. *Id.*

315. EUR. COMM’N FOR DEMOCRACY THROUGH L., VENICE COMMISSION ANNUAL REPORT OF ACTIVITIES 2012, at 71 (2013); Skype interview with Expert, Cong. of Loc. & Reg’l Auths., *supra* note 279.

316. VENICE COMMISSION ANNUAL REPORT OF ACTIVITIES 2012, *supra* note 315, at 71.



June 2012, a meeting was organised between the Chairs of the six constitutional committees and members of the Venice Commission in the context of the Venice Commission 91<sup>st</sup> Plenary Session.<sup>317</sup> The setting was similar to the expert hearings at the NCA, where discussions centred on electoral systems at the municipal level, as well as principles of the autonomy of public bodies.<sup>318</sup>

In July 2012, a working meeting was organised between the CoE Congress and the “Regional and Local Public Authorities Committee,”<sup>319</sup> and in October 2012, during the 93<sup>rd</sup> Venice Commission Plenary Session, another meeting was held to discuss the first constitutional draft between members of the Venice Commission and a delegation of eight Tunisian constitution-makers, including the Chair or rapporteur of each constitutional Committee.<sup>320</sup>

Study trips thus constituted another informal channel through which constitution-makers engaged with experts. These trips aimed to show *de visu* how institutions in “developed” countries could lead Tunisia to a successful transition. Study trips are “infused” in the sense that they are not imposed or framed by law, and, importantly, not explicitly demanded by local actors. Rather, they are a method for external actors to influence individual constitution-makers in a novel and attractive way (i.e., all-expenses-paid foreign trips).

#### A. Events

During the constitution-making process, a variety of events were organized in the NCA’s headquarters and across Tunis, bringing together experts and participants in previous democratic transitions who were invited by external actors to engage with local constitution-makers. Selma Mabrouk, an

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317. *Id.* (“[I]t was decided to organize a meeting between a delegation of Chairpersons of Constitutional Committees and Members of the Venice Commission in parallel to the 91st plenary session of the Venice Commission in June 2012.”).

318. *Co-operation Activities in the Southern Mediterranean*, COUNCIL OF EUR., [https://www.venice.coe.int/WebForms/pages/default.aspx?p=03\\_Mediterranean&lang=EN](https://www.venice.coe.int/WebForms/pages/default.aspx?p=03_Mediterranean&lang=EN) [<https://perma.cc/XA98-4JVR>].

319. VENICE COMMISSION ANNUAL REPORT OF ACTIVITIES 2012, *supra* note 315, at 72; Skype interview with Expert, Cong. of Loc. & Reg’l Auths., *supra* note 279.

320. VENICE COMMISSION ANNUAL REPORT OF ACTIVITIES 2012, *supra* note 315, at 72. *See also Co-operation Activities in the Southern Mediterranean*, *supra* note 318.

NCA representative, recalled in her memoirs that her contact with experts outside the realm of the NCA “allowed us to get acquainted with other particular experiences of democratic transitions and constitutional drafting in other countries (Nepal, Poland, South Africa, Korea).”<sup>321</sup> These events were similar to the study trips discussed above, but instead of occurring abroad, they took place in Tunis. The Max Planck Institute discusses events of this nature in its “Ten Years of Global Knowledge Transfer” report: “Legal support will take the form of conferences, seminars and study visits for Tunisian lawyers and members of the *Assemblée Constituante*.”<sup>322</sup> Three kinds of events can be discerned: conferences at the NCA, high-level workshops, and public conferences.

First, external actors engaged with local constitution-makers through a series of events at the NCA itself. A plenary session took place in December 2012, with Jorge Sampaio, former President of Portugal, sharing the Portuguese experience.<sup>323</sup> At the NCA, UNDP organized a series of events, including a seminar on constitutional options in political regimes (June 2012),<sup>324</sup> a conference on the participation of women in political life (October 2012), a session on women’s civil and political rights with former South African constituent assembly representatives (March 2013),<sup>325</sup> and a workshop on drafting and amending constitutional provisions (March 2013).<sup>326</sup> A delegation from the Venice Commission held a session on the advantages and disadvantages of different constitutional systems in the hemicycle of the NCA.<sup>327</sup> In April 2013, the Center for Constitutional Transitions, at that time a legal clinic based at New York University School of Law, also organized a seminar at the NCA where it presented on the topic of constitutional courts, political parties, governance regulation, and semi-presidentialism—all of which were

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321. MABROUK, *supra* note 55, at 133 (“This allowed us to learn, in particular, about the experiences of democratic transitions and the drafting of a new constitution in other countries”) (Translation by Author).

322. RÜDIGER WOLFRUM, DANIEL GRUSS & TILMANN J. RÖDER, TEN YEARS OF GLOBAL KNOWLEDGE TRANSFER: PROJECTS AND RESEARCH 2002-2012, at 100 (2012) (emphasis added).

323. Agenda Décembre 2012, MARSAD MAJILES, <https://anc.majiles.marsad.tn/fr/agenda/2012/12> [<https://perma.cc/D8AN-YVCB>].

324. PROJECT OF SUPPORT TO CONSTITUTION-BUILDING, *supra* note 151, at 4.

325. *Id.* at 4-7.

326. *Id.* at 7.

327. *Co-operation Activities in the Southern Mediterranean*, *supra* note 317.

presented, as its Director at the time recalled, in front of “representatives from the assembly that were particularly interested in talking with us.”<sup>328</sup>

Second, several high-level workshops that were held closed to the general public took place in Tunis, where foreign experts brought in by external actors participated alongside constitution-makers and local experts. This is another element of the “infusion” of legal values as conceptualized by Gardner, which involves “selective participation on the part of the recipient culture.”<sup>329</sup> In June 2012, the Max Planck Institute co-organized a workshop with the Tunisian Association for Constitutional Law. As the Max Planck Institute explains, “the participants and target group were members of the *Assemblée Constituante*. International experts gave presentations on matters related to state structure during the three-day event.”<sup>330</sup> International IDEA also organized a series of seminars and workshops convening leading constitutional scholars, including Tom Ginsburg,<sup>331</sup> Sujit Choudhry,<sup>332</sup> and Jörg Fedtke.<sup>333</sup> Each of their contributions commented directly on the constitutional draft released in June 2013.<sup>334</sup> As International IDEA stated in its 2011 annual report on its future work in Tunisia, “the conclusions, recommendations and lessons learned will feed into the constitution drafting process.”<sup>335</sup> In the same vein, the Center for Constitutional Transitions also organized events, working with faculty members of the University of Tunis El Manar.<sup>336</sup> Finally, the Venice Commission also took part in different semi-

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328. Telephone interview with Emp., Ctr. for Const. Transitions (Nov. 15, 2018); see *CT Clinic Researchers Present Reports at University of Tunis*, CTR. FOR CONST. TRANSITIONS (Apr. 8, 2013) <http://www.constitutionaltransitions.org/clinic-Tunis-conference/> [<https://perma.cc/WN95-KZ9D>].

329. GARDNER, *supra* note 189, at 33.

330. WOLFRUM ET AL., *supra* note 321, at 100 (emphasis added).

331. Tom Ginsburg, *The Tunisian Judicial Sector: Analysis and Recommendations* (Int'l I.D.E.A. & Ctr. for Const. Transitions, Working Paper No. 5, 2013).

332. Sujit Choudhry & Richard Stacey, *Semi-Presidentialism as a Form of Government: Lessons for Tunisia* (Int'l I.D.E.A. & Ctr. for Const. Transitions, Working Paper No. 2, 2013).

333. Jörg Fedtke, *Tunisian Constitutional Reform and Decentralization: Reactions to the Draft Constitution of the Republic of Tunisia* (Int'l I.D.E.A. & Ctr. for Const. Transitions, Working Paper No. 3, 2013); Jörg Fedtke, *Tunisian Constitutional Reform and Fundamental Rights: Reactions to the Draft Constitution of the Republic of Tunisia* (Int'l I.D.E.A. & Ctr. for Const. Transitions, Working Paper No. 4, 2013).

334. *Consolidating the Arab Spring Working Paper Series*, CTR. FOR CONST. TRANSITIONS, <http://www.constitutionaltransitions.org/publications/consolidating-arab-spring/> [<https://perma.cc/SN64-YBRL>].

335. A RECORD OF ACTIONS 2011, *supra* note 128, at 32.

336. Telephone interview with Emp., Ctr. for Const. Transitions, *supra* note 328; *CT Clinic Researchers Present Reports at University of Tunis*, *supra* note 328.

nars, including an April 2013 seminar organized by the Arab Institute for Human Rights and the *Organisation Internationale de la Francophonie* that focused on a legal framework that could protect freedom of expression.<sup>337</sup>

Third, there were also events organized by external actors that were opened to the public, which gathered foreign and local experts, constitution-makers, and representatives of the NCA. As a member of the Tunisian Constitutional Law Association recalled, their encounter with external actors manifested through the organization of seminars, roundtables or colloquiums.<sup>338</sup> In these instances, Tunisian experts were brought into dialogue with foreign experts. German foundations appear in our analysis through this mode of action, with the Hanns Seidel Stiftung organizing a conference on decentralization.<sup>339</sup>

Many INGOs also organized public conferences on topics relating to their area of advocacy. A British human rights organization, Article 19, held a conference in September 2012 on the topic of constitutional bodies.<sup>340</sup> The International Federation of Human Rights organized a conference in May 2012 on the protection of economic and social rights.<sup>341</sup> Following each constitutional draft, different external actors organized an event aimed at discussing the text. DRI, International IDEA, and Hanns Seidel all held sessions following the release of the preliminary draft of the constitution in August 2012 and January 2013 and also after the contentious draft of June 2013.<sup>342</sup> An event organized in January 2013 to discuss the constitutional draft was co-organized by the Hanns Seidel Foundation and the Tunisian Association of Constitutional Law.<sup>343</sup>

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337. *Co-operation Activities in the Southern Mediterranean*, *supra* note 317.

338. Interview with Former President, Tunis. Ass'n of Const. L., in Tunis, Tunisia (Mar. 5, 2018).

339. Hichem Benzarti, *Décentralisation et Transition Démocratique*, TURESS (May 7, 2012), <https://www.turess.com/fr/lapresse/49381> [<https://perma.cc/SDT6-UCPN>].

340. Melek Lakdar, *Comment Constitutionnaliser la Création et L'indépendance des Instances Média-tique, Électorale et de la Magistrature? Séminaire «Article 19»*, TURESS (Sept. 20, 2012) <https://www.turess.com/fr/letemps/69911> [<https://perma.cc/6QPE-SG9W>].

341. TUNIS AFRIQUE PRESS, *Ben Jaafar: «La nouvelle Constitution Accordera la Priorité aux Droits Sociaux»*, TURESS (May 25, 2012), <https://www.turess.com/fr/tapfr/126211> [<https://perma.cc/L7FV-8KUW>].

342. Mounir Ben Mahmoud, *Tunisia's Latest Draft Constitution Under Review*, AL-MONITOR (Jan. 18, 2013), <https://www.al-monitor.com/pulse/Politics/2013/01/Tunisia-Constitution-Political-islam.html> [<https://perma.cc/6NJM-Y25N>]; IMAGINE THAT, *supra* note 289; AL BAWSA, *COLLOQUE DE LECTURE DU PROJET DU 1ER JUIN 2013* (June 7, 2013).

343. Mahmoud, *supra* note 342.

## CONCLUSION

The case of Tunisia and the analysis of external actors' modes of action illustrates that there are a variety of actors involved in the making of the constitution that have largely been ignored or at least under-studied in constitution-making scholarship. The socio-legal approach serves to expand the scope of actors involved in constitutional drafting beyond merely the National Constituent Assembly. Actors such as International IDEA and UNDP are rarely addressed by constitutional scholars as relevant to the making of constitutions. Further, the Article reveals other actors whose involvement is characterized by informality, such as the German political foundations (e.g., the Hanns Seidel Foundation and the Konrad Adenauer Foundation). This involvement is further complicated due to the fact that these foundations work directly with their respective parties in Germany. Almost all interviewees mentioned the involvement of these foundations, even if the annual reports of external actors do not refer explicitly to their activities. It is only by moving away from the lens of constituent power that the roles of these important external actors can be understood.

Examining the different modes of action reveals how the transnational dimension of constitution-making extends beyond the walls of the NCA, as evidenced by the case of Tunisia, and manifests via informal pathways: the many study trips where Tunisian constitution-makers interacted directly with external actors abroad is a clear example of this dynamic. Similarly, the constitutional draft was regularly discussed beyond the walls of the NCA—whether in external-actor-organized conferences in Tunis or directly between the President of the NCA and a foreign constitutional expert sent by UNDP.

Yet the Tunisian case also shows that, contrary to proponents of global constitutionalism—who tend to minimize the domestic dimension of constitution-making—domestic actors were highly significant. The NCA played *the* central role in adopting the constitution, because it was the actor with the power to actually adopt the constitution. While closer analysis of the domestic dimension of constitution-making lies outside the scope of the present study, an antifoundationalist perspective warns against an 'apolitical' understanding of the process.

The proposed typology of the external actors' different modes of action demystifies the constitution-making process; yet it also nuances the dominant understanding by emphasizing the transnational dimension. The Tunisian case shows that external-actor involvement is a significant feature of constitution-making that ought to be taken into account to develop an explanatory and empirically grounded model of the legal phenomenon, rather than an idealized theory of how constitutions are made.

The Tunisian constitution-making process demonstrates how external actors' informal modes of action are channels through which legal ideas travel through direct and indirect exchanges between experts and local constitution-makers. This empirical analysis yields important theoretical insights for law and society scholars and constitutional scholars in general. Overall, it reveals that informal practices are an essential topic to study in order to gain a comprehensive view of how legal ideas are reproduced, especially in the context of democratic transition.

Finally, these findings also point to normative and practical implications for domestic actors in the constitutional-drafting stage. For instance, the making of a Rules of Procedure for a constituent assembly is particularly important, as it sets the stage for the constitutional drafting process to unfold. But Rules of Procedures rarely account for transnational involvement, as was the case in Chile recently. Demystifying the making of constitutions clarifies blind spots that are outside of the common imagery of how constitutions are made. As was the case in Tunisia, constitution-making processes generally are very prosaic regarding the provision of expertise, and are generally silent regarding the provision of transnational expertise. The close examination of external-actor involvement in Tunisia's constitution-making process points to an area that could be borne in mind by domestic actors.

#### APPENDIX. METHODOLOGICAL CONSIDERATIONS AND DATA COLLECTION

To answer the research question, "How does the involvement of external actors unfold and what are their modes of action?", this paper draws on a method of social science to answer this legal question: a qualitative case

study.<sup>344</sup> First, this section justifies why the making of the 2014 Tunisian Constitution is an appropriate case (A); and then discusses the data collection strategy (B).

#### A. *Why Tunisia?*

The case study at the heart of this paper is the making of the 2014 Tunisian constitution. The unit of observation is the nation-state, and the timeframe is the constitution-making process—which ran from the election of the National Constituent Assembly in October 2011, to the adoption of the Constitution in January 2014. The analysis offered in this Article aims to uncover transnational involvement in the constitution-making process by providing a framework to identify it; if persuaded by the framework, future research could refine and enhance this approach with larger samples. These findings contribute to a broader understanding of the legal phenomena while calling for further research to refine the model proposed. All of the above rests on the justification of the case study chosen; as the empirical analysis of this study aims to elucidate broader theoretical questions, choosing the right case is crucial. Tunisia satisfied an obvious but necessary requirement to answer the research question: the presence and role of external actors in the constitution-making process. More specifically, the Tunisian case offers a unique window into the dynamics of the transnationalization of constitution-making.

Tunisia can be regarded as a typical case because it is representative of a common trend that can be observed in other recent constitution-making processes in contexts of democratic transition.<sup>345</sup> A typical case is a case where findings are expected to be valid for all other similar cases or a larger range of cases.<sup>346</sup> The presence of external actors has been acknowledged in

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344. See, e.g., John Gerring, *What Is a Case Study and What Is It Good for?*, 98 AM. POL. SCI. REV. 341 (2004); ROBERT K. YIN, *CASE STUDY RESEARCH AND APPLICATIONS: DESIGN AND METHODS* (6th ed. 2018); Flyvbjerg, *supra* note 9.

345. *Id.* at 299 (“The *typical case* study focuses on a case that exemplifies a stable, cross-case relationship. By construction, the typical case may also be considered a *representative* case, according to the terms of whatever cross-case model is employed. Indeed, the latter term is often employed in the psychological literature (e.g., Hersen and Barlow 1976, 24.)”) (emphasis in original).

346. Flyvbjerg, *supra* note 9, at 230 (“To achieve information that permits logical deductions of the type, ‘If this is (not) valid for this case, then it applies to all (no) cases.’”); ROBERT E. STAKE, *QUALITATIVE RESEARCH: STUDYING HOW THINGS WORK* 18 (2010).

Timor Leste,<sup>347</sup> Afghanistan,<sup>348</sup> Iraq,<sup>349</sup> Sudan,<sup>350</sup> Kosovo,<sup>351</sup> Kenya,<sup>352</sup> Nepal,<sup>353</sup> and even Bolivia, where the process had been characterized by local leaders as immune to foreign involvement.<sup>354</sup> As a former colonial territory, Tunisia is a critical case to study transnational involvement during constitution-making, as its colonial history is shared by most countries that have recently undergone a constitution-making process. Tunisia as a case captures the diverse facets of transnational practices at play; these may, of course, vary in other cases due to different geopolitical contexts. Tunisia also triggered the so-called ‘Arab Spring,’<sup>355</sup> and the latest wave of democratization and constitutional transformations in the MENA region,<sup>356</sup> which remains un-

347. Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant - Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK Y.B. U.N. L. 423 (2006).

348. Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a State at Risk: Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSNAT'L L. 819 (2006).

349. Dann & Al-Ali, *supra* note 347. ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ (2009).

350. Kevin Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. INT'L L. 667 (2012).

351. Oisín Tansey, *Democratization without a State: Democratic Regime-Building in Kosovo*, 14 DEMOCRATIZATION 129 (2007).

352. SRIPATI, *supra* note 8 at 280.

353. Swisspeace, *Case Study on Nepal-Observations and Reflections on the Peace and Constitution-Making Process* (2017); Chandra Dev Bhatta, *External Influence and Challenges of State-Building in Nepal*, 21 ASIAN J. POL. SCI. 21, 169 (2013).

354. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, A RECORD OF ACTIONS 2006, at 26-27 (2012); INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, A RECORD OF ACTIONS 2007, at 21 (2012); *Dialogo Sobre Derechos Indigenas e Interculturalismo*, U.N. DEV. PROGRAMME, (2005); Ginsburg, *supra* note 15, at 117 (“[E]ven governments that decry the role of transnational empire are customers for transnational constitutional advice, in this case from ideological allies in the country of the conquistadores, who were purer than the pope.”).

355. The term is commonly attributed to Marc Lynch in a piece in *Foreign Policy*. See Marc Lynch, *Obama's 'Arab Spring'?*, FOREIGN POL'Y (Jan 6. 2011, 1:44 PM), <https://foreignpolicy.com/2011/01/06/obamas-arab-spring/> [<https://perma.cc/T33G-Y7JL>] (“If these protests continue to spread, both inside of countries and across to other Arab countries, then we really could talk about this being Obama's ‘Arab Spring,’ only with the extra intensity associated with climate change.”). Many Arab commentators have been uncomfortable with the term as it refers to the ‘Prague Spring’ which took place in 1968 but was later ended by Soviet Tanks. It was later used by many Western media outlets. See Joseph Massad, *The ‘Arab Spring’ and other American Seasons*, AL JAZEERA, (Aug. 29, 2012), <https://www.aljazeera.com/indepth/opinion/2012/08/201282972539153865.html> [<https://perma.cc/N4ZG-LK8R>] (claiming that the term was “a US strategy of controlling their aims and goals”).

356. On the constitutional transformations in the MENA region, see Mohammed Torki Bani Salamah & Azzam Ali Ananzah, *Constitutional Reforms in Jordan: a Critical Analysis*, 24 DIG. MIDDLE E. STUD. 139 (2015); Omar Bendourou, *La Nouvelle Constitution Marocaine du 29 Juillet 2011*, 91 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 511 (2012); Ahmed Benchemsi, *Mohammed VI, Despote Malgré lui*, POUVOIRS, no. 145, at 19 (2013); Michèle Zirari-Devif, *Morocco*, 16 Y.B. ISLAMIC & MIDDLE E.L. 289 (2010-2011); Carmen Geha & Frédéric Volpi, *Constitutionalism and Political Or-*



derstudied by democratization scholars.<sup>357</sup> If the scope of external actors' action varies according to different contexts, Tunisia, by its geopolitical location and variety of actors involved, offers a picture not only of how constitution-making functions as a development enterprise, but also the different modes of action that are used by external actors in different settings.<sup>358</sup>

### A. Sources and Data Collection

To answer the research question, "How are external actors involved in constitution-making and what are their modes of action?" a different data collection strategy was employed, as it had to capture both informal and formal involvement. The data collected could not only rely on traditional sources of constitutional scholarship, such as the preparatory work of the National Constituent Assembly (NCA), as transnational involvement goes beyond the classic constitutional actors.

To adopt an external perspective on law, the research question required gathering extensive data to paint the most comprehensive picture possible of how transnational involvement in constitution-making occurs. As I entered the research without any prediction about the involvement of external actors, a significant amount of time was spent reconstructing what occurred during the drafting of the 2014 Constitution. To this aim, this project relies on a body of existing data (documentary data), but also field work, where I conducted a series of interviews with relevant external and domestic actors.<sup>359</sup> Regarding the existing data, I primarily engaged in institutional

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*der in Libya 2011–2014: Three Myths about the Past and a New Constitution*, 21 J.N. AFR. STUD. 687 (2016); Paul Williams, Tiffany Sommadossi & Ayat Mujais, *A Legal Perspective on Yemen's Attempted Transition from a Unitary to a Federal System of Government*, UTRECHT J. INT'L & EUR. L. 33, at 4 (2017); Darin E.W. Johnson, *Conflict Constitution-Making in Libya and Yemen*, 39 U. PA. J. INT'L L. 293 (2017).

357. Amel Ahmed & Giovanni Capoccia, *The Study of Democratization and the Arab Spring*, 6 MIDDLE E. L. & GOVERNANCE 1, 4 (2014); MEDNICOFF & SPRINGER, *supra* note 57, at 85.

358. In the same vein, see the justifications of the choice of Tunisia made by Quentin Deforge. Quentin Deforge, *La Fabrique Transnationale du Politique: Une Sociologie Historique du Champ Réformatriceur de la « Gouvernance » (1961-2019)*, 19 (Dec. 20, 2019) (Ph.D. dissertation, Université Paris-Dauphine) (on file with Author) ("But because of the size of the country, and the omnipresence of international actors, the case of Tunisia offered itself to research between 2014 and 2019 as the magnifying mirror of a transnational space entirely dedicated to the reform of state institutions.") (Translation by Author).

359. For an example of another author studying the transnational dimension of constitution-making, see Bui, *supra* note 3, at 971.

documentation content analysis. This included primary data from institutional documentation testimonies, documentation from Tunisia's National Constituent Assembly, and institutional documentation from external actors. This body of data was complemented by a series of interviews that generated new data. The data concerning the drafting of the Constitution starts on January 2011, when Zine El Abidine Ben Ali escaped Tunisia to take refuge in Saudi Arabia, and extends until the adoption of the Constitution. Special attention is devoted to the period during which the constitution was drafted, from the election of the National Constituent Assembly (NCA) on October 23, 2011, to the adoption of the Constitution on January 26, 2014.

Testimonies from Tunisian actors were an early source of data. While these testimonies are partial in the sense that they provide an account from the standpoint of specific actors, they were valuable for understanding the different issues that were important to each actor, and provide an internal perspective on the entire constitution-making process. The United Nations Development Programme (UNDP) published a book, *The Constitution of Tunisia: Processes, Principles and Perspectives* that aimed to "provide a space of neutral and impartial reflection, thus bringing together, in a constructive way, the various stakeholders who took part in the transition process, observers and experts, both national and foreign."<sup>360</sup> The text features insights from Tunisian actors (including political actors, civil society, and independent advisors) that were involved at every stage of the constitution-making process.<sup>361</sup> For instance, the presidents of different constituent commissions outlined the work of their respective committees.<sup>362</sup> Other ac-

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360. THE CONSTITUTION OF TUNISIA, *supra* note 32, at 6.

361. Testimonies include, among others: Yadh Ben Achour (President of the High Authority for the achievement of the objectives of the Revolution, Political Reform and Democratic Transition); Habib Khedher (General Rapporteur of the Constitution, NCA) Mouldi Al-Riahi (President of the parliamentary group Ettakatol, NCA); Badreddine Abdelkafi (Advisor to the President of the NCA, Head of relations with citizens, civil society, and Tunisians abroad); Rached Ghannouchi (President of the Ennahdha Movement Party); Houcine Abbassi (Secretary General of the Tunisian General Labor Union).

362. Fadhel Moussa (Chairman of the Constituent Committee on Judicial, Administrative, Financial and Constitutional Justice); Jamel Tourir (Chairman of the Constitutional Bodies' Committee); Mehrezia Laabidi (Vice-President of the NCA).

tors that feature in the book include UN representatives and members of international non-governmental organizations.<sup>363</sup>

The memoirs of Tunisian actors were also useful in detailing the intricacies of the constitution-making process. Three constituent assembly representatives have published memoirs: Nadia Chabaane, Selma Mabrouk, and Selim Abdeselem.<sup>364</sup> All three belonged to the “secularist” side of the political spectrum.<sup>365</sup> While the authors barely mention the presence of external actors, they provide valuable insight into the day-to-day workings of constitutional drafting. Nadia Chabaane also published a blog during her time as a constitution-maker that has benefited this study. Mustapha Ben Jaafar, the President of the National Constituent Assembly, also published an autobiography where he discusses his experience during the constitution-making process.<sup>366</sup> Another source was the political essay by Iyadh Ben Achour, *Tunisie: une révolution en Terre d’Islam*, which includes a detailed account of the first part of the transition.<sup>367</sup>

A traditional source of studying constitution-making for constitutional scholars is the preparatory work from a National Constituent Assembly.<sup>368</sup> Accessing this documentation in the Tunisian context was difficult.<sup>369</sup> According to the Rules of Procedure, a variety of information—such as dates of meetings, agendas of committees,<sup>370</sup> and reports of each committee—had

363. Jonathan Murphy (Former Chief Technical Advisor, Support to the Constitutional Process: Parliamentary Development and National Dialogue in Tunisia UNDP); Sahbi Khalfaoui (Expert in Parliamentary Development, UNDP); Jean-Raphaël Giuliani (Advisor in Constitutional Support and Parliamentary Development, UNDP); Dimiter Chalev, Mazen Shaquoura, Abou Abass (OHCHR); Mehdi Benchelah (Head of Office, UNESCO); Maria Luisa Fornara (UNICEF Representative, Republic of Tunisia); Marion Volkmann (Former Director, Carter Center).

364. BEN ABDESSELEM, *supra* note 148; SÉLIM BEN ABDESSELEM, DE LA FRACTURE AU COMPROMIS: GENÈSE DE LA CONSTITUTION TUNISIENNE ENTRE DEUX CAMPAGNES ÉLECTORALES - CHRONIQUE DE L’ASSEMBLÉE NATIONALE CONSTITUANTE VÉCUES DE L’INTÉRIEUR (2018); MABROUK, *supra* note 55; CHAABANE, *supra* note 54.

365. Nadia Chaabane belonged to the political party ‘*Pôle démocratique humaniste*’ and then joined the ‘*Voie démocratique et Sociale*’; Selma Mabrouk was elected under Ettakatol, then joined the ‘*Voie démocratique et Sociale*.’ Selim Abdeselem was elected under Ettakatol before joining Nida Tounes and finally becoming an independent.

366. BEN JAAFAR, *supra* note 147.

367. YADH BEN ACHOUR, *TUNISIE: UNE RÉVOLUTION EN PAYS D’ISLAM* (2018).

368. See, for instance, the doctoral dissertation of Carla Yared, whose study relies only on this data source. Yared, *supra* note 25.

369. More globally, the issue of transparency at the NCA has been raised by civil society organizations and constitution-makers. See CHAABANE, *supra* note 54, at 150; Amira Yahayoui, *Observing the National Constituent Assembly*, in *THE CONSTITUTION OF TUNISIA*, *supra* note 32, at 211, 212.

370. Rules of Procedure, *supra* note 67, art. 34.

to be published and publicly accessible on the National Constituent Assembly website.<sup>371</sup> At the time of writing, none of this information is available online. Despite the fact that there was an amendment of the Rules of Procedure of the NCA in March 2013 that mandated publishing transcripts of the constitutional committees online, these transcripts are still unavailable.<sup>372</sup>

I have provided the most detailed account possible, given the lack of transparency surrounding the constitution-making process and general issues relating to source availability. To access documentation from the NCA, I mostly relied on the platform from the parliamentary watchdog project “Marsad Majles” from the Tunisian NGO Al Bawsala (“The Compass”), created in June 2012.<sup>373</sup> As the President of the NGO, Amira Yahayoui, summarizes:

Such measures included finding out what members’ salaries, which were the subject of much wild speculation, really were; introducing vote traceability to find out how our Assembly members were voting; putting the Assembly’s diary online, when the Assembly itself published nothing on its website; publishing the biographies of Assembly members; publishing member absences, and live-tweeting the plenary sessions in French to enable dual nationals who did not have sufficient knowledge of Arabic to follow the debates.<sup>374</sup>

Al Bawsala published summaries of debates, information about the votes of representatives, minutes of meetings that were leaked by constituent representatives through Twitter or sent directly to them, and reports filed by the different constituent committees. Finally, another limitation that should be pointed out is the author’s lack of knowledge of Arabic. The documents of Marsad Majles that had not been translated have been put to

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371. *Id.* art. 62; *see also id.* art. 61 (“[T]he minutes of committee meetings and a record of a committee’s full deliberations shall be written in special registers, to be reviewed by each committee chairman and rapporteur and signed by them.”).

372. The NCA reacted to the filing of a complaint by Al Bawsala, Nawaat and OpenGovTn by amending the Rules of Procedure. The new article 157 stipulates that “the NCA had one month to publish commission transcripts after they were signed by the relevant commission president and rapporteur.” *Id.* art. 157; THE CARTER CTR., *supra* note 73, at 62.

373. MARSAD MAJILES, <https://majles.marsad.tn/fr/> [<https://perma.cc/MEX3-G25U>].

374. Yahayoui, *supra* note 369, at 3.

the scrutiny of an Arab-fluent speaker. It appears that external actors only appear in a limited fashion in these documents; this limitation does not hinder the data itself.

This project also relied on institutional documentation published by external actors, namely, projects and annual reports. To provide an internal perspective on external actors, I drew heavily on institutional documents available online or that were provided upon request. The institutional documentation available varied depending on the external actor. Concerning international organizations, I accessed annual reports, project reports, evaluations, and general content on websites; some organizations had publicly accessible information concerning budgets allocated. UNDP project reports are available online, while other actors, such as International IDEA, do not publish significant details online.

Concerning INGOs, the variation in accessible information was even starker. European-based INGOs, such as Democracy Reporting International, publish annual reports and monitoring reports on their websites. Information concerning donors and how funds were allocated, as well as results and involvement, is also available. Regarding Democracy Reporting International, this publicly available information was complemented by the personal archives made available by one of the experts who worked for an organization advising on the constitution-making process. German political foundations publish very little information online, while American political foundations publish annual reports but do not provide budgetary information or detailed accounts of their activities; indeed, the annual reports featured only brief accounts of involvement in Tunisia. Information that was published on the website and social media of these organizations was also relevant to this study.

The law and society approach undertaken in this paper required field work, specifically, interviewing the people involved in the constitution-making process to develop a more comprehensive picture of transnational involvement. Twenty-two semi-structured interviews, conducted in French and/or English, were carried out with internal and external actors to complement the other data. The interviews were conducted in person during fieldwork in Tunisia (February through April 2018) and during a research stay in the United States, while others were conducted over Skype (October 2018 through February 2019, and April 2021); the interviews lasted be-

tween eleven and seventy minutes.<sup>375</sup> The participants—domestic and external actors—were identified through expert sampling by asking internal and external actors to identify the most relevant external actors. These interviews were not coded, nor were they able to be triangulated, given that each actor often spoke about their own involvement; these interviews were used as an additional source of data. The data collected from the interviews has been recorded, transcribed, and safely stored on a separate data storage device.<sup>376</sup>

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375. Each interviewee was given a clear verbal explanation concerning the project and the purpose of the interview. Commitments to ensure confidentiality have been maintained by ensuring recordings are not shared, that transcripts are anonymized, and that details that can be used to identify participants have been removed from transcripts.

376. The transcripts were anonymized with reference made to the interviewee's professional affiliation. Data will be maintained until five years after the end of the project and then will be destroyed.