

**Transitional Constitutionalism: The Role of INGOs in Tunisia's  
Constitution-Making Process**

by

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## ABSTRACT

### TRANSITIONAL CONSTITUTIONALISM: THE ROLE OF INGOS IN TUNISIA'S CONSTITUTION-MAKING PROCESS

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**This thesis is the investigation of International Non-Governmental Organizations (INGOs) and their role in Tunisia's constitution-making. While the literature acknowledges that external actors may influence the development of a constitution within the context of regime change, there is a lack of empirical investigation into the particular role of INGOs and a theoretical discussion of the implications. Using Tunisia as a case study, this project conducts a small-n qualitative study in order to fill these gaps. This research finds that INGOs directly and indirectly influenced the constitution-making process through constituent members and the constituent assembly, and through local civil society. This research also finds that while this influence raises theoretical concerns, it was normatively beneficial as it enhanced the democratic legitimacy of the constitution and the state more broadly.**

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The growing influence of International Non-Governmental Organizations (INGOs) in domestic constitution-making is unprecedented. Moreover, this involvement seemingly occurs in states that are undergoing regime change<sup>1</sup>. What makes INGO involvement in this process interesting is the fact that contemporary theorizing about constitution-making strongly resists external influences and, instead, continues to rely upon the notion that only citizens have the authority to construct and amend a domestic constitution. Constitutionalism scholarship emphasizes that the power to write the constitution (*pouvoir constituant*) ought to remain with the “nation” so as to not risk its democratic legitimacy. In Tunisia, however, this assumption has been challenged by the influence wielded by INGOs. As part of its democratic transition, Tunisian actors ratified a new constitution and voluntarily allowed INGOs to provide expertise and trainings to constituent members and local NGOs, and engage in advocacy. Despite this level of participation in constitution-making, the literature fails to explore the role of INGOs during the constitution-making process. In order to fill these gaps, this research asks: What type of role did INGOs play in Tunisia’s constitution-making? How did their involvement influence the constitution? And did INGOs exercise *pouvoir constituant*? I argue that INGOs influenced the Tunisian constitution-making process and, at times, the text itself. Furthermore, as self-interested actors, the constitutionalization of their interests was often a priority concern. Due to the support of the state, as well as the agency and resources they possess, INGOs were able to directly and indirectly influence the constitution-making process. Moreover, INGO influence on the text exhibits that they exercised *pouvoir constituant*. Since the state and INGOs were both interested in constitutionally ensuring a democratic Tunisia, this influence was tolerated.

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<sup>1</sup> Egypt, Nepal and Tunisia are notable cases of INGO involvement in constitution-making during state transition.

The research finds that five interrelated factors influenced INGOs' direct involvement in the constitution-making process: 1) the inexperience of the state and its actors; 2) the openness of the state; 3) the inexperience of local NGOs; 4) the expertise of INGOs; and 5) the political climate during Tunisia's constitution-making. I assumed that INGOs needed to network with local NGOs in order to leverage access to the drafting process. However, this was not the case. INGOs, through the "*Assemblée Nationale Constituyente*" (National Constituent Assembly, ANC) and constituent members, had considerable access; this, coupled with extensive resources and expertise, allowed for these actors to unilaterally influence the constitution-making. Yet, the research finds that INGOs networked with local actors nonetheless. While the INGOs included in this study networked with local actors to aid in the development of local civil society, they also networked for the purposes of utilizing these actors as means of ideationally, materially, and financially influencing the constitution-making process. This research finds that INGOs operated on two fronts, utilizing both direct and indirect means to influence the process.

This study is situated within transitional constitutionalism, an interdisciplinary area of study where political science has an important contribution (Hirschl, 2014). Transitional constitutionalism, which focuses on constitution-making within the context of regime change, is a response to what some consider deficiencies in more classical conceptions of constitutionalism (Allen, 2014; Dalmau, 2015; Sadurksi, 2016; Sharlet, 2014; Teitel, 1997; Turner, 2015; Yeh & Chang, 2009). While there are a number of aspects of "classical constitutionalism" that transitional constitutionalism challenges, its rejection of external actors is most pertinent. Transitional constitutionalism argues that classical constitutionalism is usually Eurocentric, and its founding principles are developed through experiences that are often not generalizable. The resistance to international actors in constitutionalism further does not speak to the realities of

modern constitution-making in states typically outside of the West, where this process often occurs as a result of decolonization or democratic transition. Transitional constitutionalists argue that international assistance in constitution-making is a regular occurrence in this context and is often warranted. Catherine Turner (2015) states that constitution-making in a post-conflict state can no longer exist in a vacuum and this was likewise true for Tunisia (pg. 273-4). Geopolitical complexities and international law often peak the interest of international actors and afford them the right to be invested in the outcomes of the constitution-making.

Although transitional constitutionalists accept external influence during constitution-making, there is a lack of empirical work determining what types of external actors are involved and how they engage in constitution-making. The literature seemingly assumes homogeneity within “external actors” when, in fact, there are various types of organizations, groups, or movements with differing capacities for coerciveness that cannot be captured within the definition of “external actor” (Teitel, 1997; Turner, 2015; Yeh & Chang, 2009). As of now, transitional constitutionalism is yet to extensively examine the multitude of actors and their varying means of influence.

As a theoretical matter, transitional constitutionalism further fails to consider the implications of international influences. Transitional constitutionalists argue that foreign actors can justifiably influence a given state’s constitution within the context of regime change (Allen, 2014; Martínez Dalmau, 2015; Sadurksi, 2016; Sharlet, 2014; Teitel, 1997; Turner, 2015; Yeh & Chang, 2009). There is, however, no formal recognition of how this conflicts with foundational theoretical concepts in constitutionalism, most prominently *pouvoir constituant*. Engaging in these discussions is important as it strengthens the overall relevance of this body of literature. As

such, this study intends to contribute to the continued empirical and theoretical development of transitional constitutionalism.

In order to better understand how INGOs may have influenced constitution-making in Tunisia, this research utilizes INGO and *pouvoir constituant* literatures to understand the role of INGOs in the state and the external exercise of *pouvoir constituant*. Both bodies of literature, however, likewise fail to examine the role of INGOs during constitution-making and their ability to exercise *pouvoir constituant*. In relation to INGO scholarship, it seems that INGO involvement in constitution-making may not exist, despite the fact that these actors currently access the state with ease. INGOs possess an unprecedented amount of agency and have the ability to penetrate the state unilaterally and at any time. Although scholars are fully aware of the fact that INGOs often become directly engaged with the state during domestic policymaking, their role in constitution-making has not been considered (Abbott et al., 2015; Aikman, 2017; Ahmad, 2006; Anderson, 2001; Brown et al., 2012; Cooley et al., 2002; De Silva, 2017; Gomez, 2005; Keck & Sikkink, 1999; MacDonald, 2016; Madon, 1999; Murphy, 2000; Nichols, 2013; Thomas, 2001). Sheila Aikman (2017) describes how INGOs in Tanzania work hand in hand with the government to ensure that safe and effective health policies are ratified by the state. This is not a phenomenon that pertains to states outside of the West; scholar Kenneth Anderson (2001) scolds the former George W. Bush administration in his book for accepting the counsel and recommendations of INGOs during its tenure. Though firmly against the infiltration of INGOs in the state, he concedes that they are often the “driving force behind policy” (Anderson, pg. 371, 2001).

The literature has developed various theories further explaining how INGOs participate in and affect policy goals. However, these are not conceptualized within the context of

constitution-making. Margaret Keck and Kathryn Sikkink (1998) discuss the “boomerang effect”; this theory explains that local actors seek the assistance of INGOs if access to their particular government is restricted. By making use of their influence and resources, INGOs take the stead of local actors and pressure the government to ensure any given policy measure is heard and accepted. While this is effective in policymaking, it is not considered during constitution-making. Other scholars even examine the structure of INGOs as a means of influencing policy and the growing tendency of these organizations to establish regional offices in order to better domesticate their governance goals (Ahmad, 2006). The scholarship is aware that INGOs have developed and utilized various means of policymaking, either directly or indirectly, yet this is not examined within the context of constitution-making.

Unlike INGO literature, *pouvoir constituant*, and constitutionalism more broadly, have considered external actors in constitution-making. This scholarship, like all others, features a number of debates, however the notion that constitution-making must exclude international actors often goes undisputed (Colón-Ríos, 2010; Colón-Ríos, 2011; Ginsburg et al., 2009; Landemore, 2015; Loughlin, 2013; O’Donoghue, 2014). This is most evident in the discussion of *pouvoir constituant*; the power to write a constitution belongs solely with the people. Although *pouvoir constituant* itself is hotly debated, proponents and challengers conceptualize this concept only within the confines of the polis (Colón-Ríos, 2010; Colón-Ríos, 2011; Dyzenhaus, 2012; Dyzenhaus, 2007; Loughlin, 2013; Partlett, 2012; Preuss, 1993; Preuss, 1991; Threlfall, 2008; Wandan, 2015).

The insular use of *pouvoir constituant*, however, has been challenged by a small set of contemporary constitutional scholars, arguing that international actors may in fact exercise this power (Dann & Al-Ali, 2006; Mead, 2015). This, however, is a mere recognition of what

happens, rather than an endorsement of the external exercise of *pouvoir constituant*. Sarah Mead (2015) stresses that if *pouvoir constituant* is exercised internationally, the given state's constitutional regime will be fundamentally damaged. Mead (2015) and others further suggest that countries challenge international involvement, since constitution-making is inherent to state building. As such, any external participation is usually through force or only exercised by a foreign expert (Dann & Al-Ali, 2006). Every other instance of external involvement in constitution-making either fails to constitute the exercise of *pouvoir constituant* or damages the democratic legitimacy of the state. Thus, these scholars strongly discourage what they call "internationalized *pouvoir constituant*", arguing instead for very limited opportunities for international influence on constitution-making.

The Tunisian constitution-making process, however, suggests that the limiting the reach of *pouvoir constituant* fails to capture what occurs in practice. INGOs in this study, without coercion or intimidation, occasionally influenced the constitution. Regardless of their designation as foreign experts, they contributed to the text in some capacity. International actors, such as INGOs, act similarly to that of their local counterparts, yet their influence is assumed to be democratically illegitimate simply for being foreign. Constitution-making in Tunisia suggests, however, that illegitimacy may not be inherent to international actors that are involved. Furthermore, since the interests of INGOs and the state aligned in this case (they both wanted a democratic Tunisia), influence on the text was accepted. As such, it is the aim of this research to utilize these bodies of literature to fill the gaps of these, and transitional constitutionalism.

Thus, to reiterate, this research asks: What type of role did INGOs play in Tunisia's constitution-making? How did their involvement influence the constitution? And did INGOs exercise *pouvoir constituant*? I found that INGOs were strategic actors during the constitution-

making process, influencing state actors, local NGOs, and the constitution itself. As such, empirically, INGOs in this study played an important role and theoretically, some INGOs exercised *pouvoir constituant*. Normatively, I suggest that such participation is appropriate and perhaps even necessary.

In order to investigate this question, a case study was conducted with 8 constituent members, 7 INGOs, and 11 local organizations. These participants were asked semi-structured questions in interviews that lasted approximately of an hour. Participants from each of these three groups were chosen for purposes of triangulation, as well as their ability to speak to the work of the *Assemblée Nationale Constitunante* (National Constituent Assembly, ANC) during constitution-making, and the networking patterns of INGOs. Snowball sampling was utilized followed by selective methods in order to attain a representative sample group. There were, however, noteworthy limitations to this method, primarily regarding access to unstable local actors and deeply religious civil society actors. Despite these, the methodology produced data that are reliable, valid, and can accurately speak to the constitution-making process in Tunisia.

Ultimately, exploring the influence of INGOs on Tunisia's constitution-making is a major contribution to the literature, as it challenges assumptions concerning the involvement of external actors in this state-building exercise. Contrary to norms of constitutionalism, the involvement of INGOs in Tunisia greatly aided in the implementation of democracy.

This thesis will be divided into six (6) chapters. The first is the literature review. The purpose of this chapter is to establish the gap within the scholarship pertaining to INGO involvement in constitution-making. I will discuss transitional constitutionalism and exemplify how this emerging field works to understand the peculiarities of constitution-making within the context of regime change, particularly relating to the involvement of external actors. I will,

however, demonstrate that transitional constitutionalism fails to consider “external actors” exhaustively, thus failing to consider INGOs and its unique means of influence. In order to better understand how INGOs may influence constitution-making, I examine the means of influence they utilize during policymaking and whether *pouvoir constituant* can apply to such actors.

The second chapter will discuss the methodology in more depth. I will explain why Tunisia should be explored within the context of transitional constitutionalism and then consider the methods used for the project. I further discuss why the project is still valid despite its obvious limitations.

The third chapter will familiarize the reader with relevant aspects of Tunisia’s recent history. I will briefly discuss the Arab Spring in Tunisia, the conflicts that, at times, defined the constitution-making process, and its eventual conclusion in early 2014. I will also briefly discuss the role of local NGOs during the process and touch on INGOs as (co)builders of civil society’s capacity.

The fourth chapter will discuss the direct and indirect means through which INGOs influenced the constitution-making process. I argue that INGOs main priority was the constitutionalization of their interests. In order to do so, they worked directly with constituent members through the dissemination of expertise, workshops, and travels to foreign governments. Further, INGOs openly advocated for interests they believed required constitutional protection. Five factors that allowed for their direct influence to occur effectively will also be discussed in depth. INGOs also protected their interests through indirect means, primarily via civil society actors. The behaviour of INGOs can be explained using Kenneth Abbott, Philipp Genschel, Duncan Snidal, and Bernhard Zangl’s (2015) “indirect governance” theoretical perspective; through ideational, material, and financial means, INGOs were able to reach their constitutional

goals. This chapter also briefly discusses instances of influence on the text both directly and indirectly.

The fifth chapter analyzes *pouvoir constituant* and its viability in relation to INGOs influence on the text in Tunisia's constitution-making. I argue that some instances of direct and indirect influences on the constitution resulted in the exercise of internationalized *pouvoir constituant*. I further argue that INGO influence on the text was tolerated because its general interest to help with constitutionalizing democracy in Tunisia was shared with state actors.

Finally, the sixth chapter is the concluding chapter. I return to the research questions and reiterate the arguments presented throughout the thesis. I state that INGOs in Tunisia influenced the constitution directly and indirectly. Furthermore, this resulted in the exercise of *pouvoir constituant*. I further discuss areas of future research and my contributions to the literature.

## Chapter 1: Review of the Literature

As revealed through the Tunisian case, INGOs were involved in the constitution-making process and, at times, influenced the text. It is possible, however that this may commonly occur within the context of regime change. Transitional constitutionalism, a subsection of the broader constitutionalism literature that focuses on constitution-making during transition, assumes that external actors become involved in this process. This is in contrast to a more classical conception of constitutionalism, where foreign actors are not to be involved in constitution-making. While transitional constitutionalism may be different in this respect, it is yet to exhaustively consider what types of external actors become involved constitution-making and the extent of their influence. Specifically, the role of INGOs in particular and the ways they may influence during constitution-making is not known. Exploring this gap in the literature further leads to another. Although transitional constitutionalism expects external influence, the scholarship is yet to engage in the theoretical debate about foreign actors and their place in constitution-making. In order to explore these gaps, and have a better understanding of how INGOs may have engaged in Tunisia's transnational constitution-making, this review considers INGO literature and their behaviour in policymaking, and the concept of *pouvoir constituant*.

INGO literature is useful as it explores the behaviour of these actors in domestic policymaking. There is extensive academic work recognizing the ability of these actors to gain access to the state and effectively influence policy, however, this is not considered within the context of constitution-making (Abbott et al., 2015; Aikman, 2017; Ahmad, 2006; Anderson, 2001; Brown et al., 2012; Cooley et al., 2002; De Silva, 2017; Gomez, 2005; Keck & Sikkink, 1999; MacDonald, 2016; Madon, 1999; Murphy, 2000; Nichols, 2013; Thomas, 2001). In order to further contribute to the discussion concerning foreign actors and constitution-making, this review considers the concept of *pouvoir constituant*. There remains a general agreement that

international actors are not to exercise this power (Colón-Ríos, 2010; Colón-Ríos, 2011; Dyzenhaus, 2012; Dyzenhaus, 2007; Loughlin, 2013; Partlett, 2012; Preuss, 1993; Preuss, 1991; Threlfall, 2008; Wandan, 2015). In the more traditional conception of constitutionalism, the few scholars that do recognize the inevitability of external exercising of *pouvoir constituant* strictly limit its capacity and claim that foreign use is democratically illegitimate (Dann and Al-Ali, 2006; Mead, 2015).

This literature review therefore aims to explore these gaps in more detail. The chapter will begin with a discussion on transitional constitutionalism and I will demonstrate the gap. The following bodies of literature, INGO literature and *pouvoir constituant*, will be utilized to better understand the gaps in transitional constitutionalism.

### 1.1. Transitional Constitutionalism: A New Understanding of Constitution-Making

As discussed, this study is situated within the scholarship on transitional constitutionalism. This burgeoning area of study is appropriate as it focuses on states that are drafting constitutions amidst regime change. Transitional constitutionalism clashes with the more classical conception of constitutionalism on a number of pertinent points. Most notably for this study, however, is transitional constitutionalism's acceptance of external actors. The scholarship within this subfield argues that external actors are often necessary during constitution-making within this context as a means of importing expertise and international norms and values. Moreover, as members of the international community, they have a vested interest in ensuring that transitioning states are successful (Turner, 2015). Thus, foreign involvement is inevitable. Transitional constitutionalism as an area of study, however, has some notable deficiencies pertaining to the conceptualization of external actors and their role. Though transitional

constitutionalists accept and encourage the involvement of external actors in constitution-making, there remains an empirical study about whom this includes, the various ways through which these actors are engaged, and to what extent they can acceptably become involved. Studying INGOs is particularly interesting because of their agency. There are no international laws or conventions governing their actions and behaviour, and they can freely enter and exit most countries in ways incomparable to other external actors. Investigating this more closely can help understand not only how they act during constitution-making, but also the implications.

Theoretically, transitional constitutionalism further fails to discuss the normative consequences of allowing foreign actors in constitution-making. In particular, there is yet a discussion concerning *pouvoir constituant*, the power to write a constitution, and whether this is exercised internationally within the context of transition. Thus, this research intends to contribute to this body of literature both empirically and theoretically. This section begins with a general discussion concerning transitional constitutionalism and intends to further situate the study within this emerging scholarship.

Before discussing the substantive components of transitional constitutionalism, transitional constitutionalists define what this field of study intends to capture. Wojciech Sadurski (2016) states that there are three ways to determine whether the “political-legal-constitutional system” of a specific state is in fact transitional (Sadurski, pg. 338, 2016). The first is simply that the system represents the space between a given state’s move from point A to point B. This space is transitional, as the polity is not intended to remain there permanently. This form of transition, what Sadurski (2016) calls the “temporal approach”, is what is most likely commonly assumed when considering the term. A transition from authoritarianism to democracy, for example, exemplifies such an approach. This notion of transition is helpful

because it is rather simple and straightforward. It is this simplicity, however, that also makes it ambiguous. Through a temporal approach, transition is a rather open-ended term, suggesting that any change, no matter how insignificant, may be viewed as transitional. Any number of political-legal-constitutional systems, through the temporal approach, may be regarded as transitional. As such, Sadurski (2016) encourages a more specific conceptualization of “transition”.

The second approach, the “inductive approach”, represents a more scientific method in establishing whether the system is transitional. Determining what would be distinguished as transitional “intuitively and pre-theoretically” and then observing common characteristics, whether they are institutions, tools, or procedures, allows for the capacity to make generalizable claims about transitional systems (Sadurski, pg. 339, 2016). Once these constitutional characteristics are identified, it is easy to determine which states and systems are, in fact, the systems transitional constitutionalism intends to capture. This approach allows for the examination of cases that are specific and “value-neutral” (Sadurski, pg. 339, 2016). Sadurski (2016) includes states in post-Communist Eastern Europe, states in Latin America, and post-apartheid South Africa as transitional states that share common constitutional characteristics.

The final approach, the “functional approach”, responds to the limitations of the inductive approach. This approach identifies the actions that are typical within a transitional system. Sadurski (2016) states that transitional systems perform specific functions that are unique; determining these suggests that a political-legal-constitutional system is transitional. The most obvious function of a transitional system is to ensure legitimacy. The *ancien régime*, by reason of its nature and prominence, had legitimacy for a time. When old elites are replaced by a new order, there must be some level of legal continuity in order to gain legitimacy. This is when

constitutions are developed. Ensuring legal continuity through the development of a constitution fills a “legitimacy vacuum” (Sadurski, pg. 340, 2016).

All three approaches to determining transitional systems can explain the political-legal-constitutional system in Tunisia during the constitution-making process. In relation to the temporal approach, Tunisia is clearly a state in transition. The Jasmine Revolution ended the authoritarian regime’s 53-year hold on power and began the process of transforming Tunisia into a democratic state. This marks a clear “point A to point B” transition. As per the inductive approach, Tunisia shares common characteristics with other states that have been deemed transitional such as countries in Latin America, South Africa, and countries in Eastern Europe post-Soviet Union (Sadurski, 2016). Finally, while the functional approach is more difficult to determine without research, I will speculate that Tunisia, like many other transitioning countries, needed to fill a “legitimacy vacuum” following the flight of Ben Ali. Overall, Tunisia was, and in many ways still is, a state in transition. With this more precise conceptualization of “transition” within transitional constitutionalism, the components of transitional constitutionalism can be further explored.

Catherine Turner (2015) observes that there has been a “gradual incorporation of principles of constitutionalism into the discourse of transition” (pg. 269). Within transitional constitutionalism, constitution-making does not represent the end, but rather a part of the transition. Constitutions provide either a short or long-term structure through which transition can occur. Rather than codifying consensus, transitional constitutionalism assumes this does not exist (Turner, pg. 269, 2015). As such, constitution-making “helps construct the political opening that allows transition” (Teitel, pg. 2058, 1997). Transitional constitutions negotiate the political shift from authoritarianism to democracy and construct times for liberalizing political change.

Constitution-making during transition has a more transformative purpose, guiding the state rather than immediately entrenching principles. Due to its unique purpose during transition, the initial constitution developed during a period of transition is not likely to remain the permanent constitution. Transitional constitutions often endure a number of major amendments or redrafts before the final constitution is entrenched. Sadurski (2016) proposes that this happens for four reasons: it allows for the state to experiment institutionally; it allows courts to determine the legality of some of the constitutional components; it establishes the institutional framework for transition quickly; and it provides a form of consensus (Sadurski, pg. 352, 2016). It is possible that constitutions drafted during constitution-making withstand changes but this is not usually the case (Yeh & Chang, 2009). Furthermore, many states in transition do not experience a “constitutional moment”. Due to this societal “uncertainty and social disintegration”, constitutional moments fail to emerge and constitutional changes are simply not the “end-results of political transformations” (Yeh & Chang, pg. 149, 2009). It is rather assumed that constitutionalism creates this consensus and establishes new norms and values.

Transitional constitutions are also not overly specific. Ruti Teitel (1997) argues that they are instead entrenched with normative ideas, particularly concerning human rights. Establishing human rights in this manner is intended to transform the state and shape the polis towards a “liberal, democratic identity” (Teitel, pg. 2063, 1997). Transitioning states often look outward for “best practices” from other states and apply them to the constitution. Turner (2015) further argues that in order to attain these liberal norms and values, constitutions written during transition typically reflect international law. International law has an increasing influence on the nature of constitutions throughout the world, particularly so during transition. This process allows for significant international assistance, more so than other political processes. During

transition, international actors, the bearers of international law, have an unprecedented amount of influence from the outset of the constitution-making process. These actors provide expertise in regards to the framework and substance of the constitution. As such, international law, through transitional constitutionalism, becomes more legally relevant. Turner (2015) argues that drafters of the constitution “must increasingly take account not only of domestic priorities, but of the interests of the international community” (pg. 274). She argues that the discourse of transition has become internationalized, allowing for international forces to influence domestic constitutional processes (Turner, pg. 274, 2015).

Although transitional constitutionalists acknowledge the involvement of international actors in constitution-making, there remains a failure to discuss the nature of this role and the extent of their acceptability. It is also unclear who these international actors are and precisely how they influence the constitution. INGOs for instance are actors that act in a distinct manner, often for the purpose of influence. These actors employ various direct and indirect methods in an effort to influence policy in a given state and their methods of influence are not comparable to other states, international organizations, or individual positions. Transitional constitutionalists, however, are yet to consider these. As such, the examination of external influence within this context remains cosmetic and unsubstantial. Assuming that “external actors” are a cohesive, homogenous group does not accurately depict the diverse means of state interaction and influence of specific foreign actors. In this respect, transitional constitutionalism requires more robust research and this study aims to contribute to this development.

Furthermore, the more complex components of constitutionalism more broadly are seemingly ignored. Transitional constitutionalism scholarship, at this point, does not tackle its conceptual conflicts with classical constitutionalism, particularly in regards to *pouvoir*

*constituant*. This is an important concept in constitutionalism literature and continues to ground and perpetuate the notion that constitution-making ought to include state actors only. In recognizing and advocating for external involvement in constitution-making, transitional constitutionalists can, and should, discuss the viability of internationalizing *pouvoir constituant*. If international influence is a normal process of constitution-making within a state, do these actors exercise *pouvoir constituant*? If so, what are the implications of this influence? Scholars such as Sarah Mead (2014), state that this renders a constitution democratically illegitimate. Transitional constitutionalism is yet to answer these questions and consider the normative consequences of international influence. This research will additionally contribute to transitional constitutionalism in this respect and consider whether INGO influence in Tunisia ought to be considered *pouvoir constituant*.

Transitional constitutionalism is a useful means of understanding constitution-making within a transitioning state. The literature, however, requires further development, particularly pertaining to external actors. It is important to consider actors not as a cohesive, homogenous group, but as distinct from one another; various external actors have different means of influence and engagement with the state that are important to consider individually. Further, if transitional constitutionalism accepts and encourages the role of external actors, engaging in relevant theoretical discussions and considering its particular implications is necessary.

In order to fill these gaps in the scholarship, this paper focuses on the role of INGOs in Tunisia's constitution-making. While external actors are typically not considered in constitution-making, this is especially so for INGOs in spite of their ability to easily access the state and affect policymaking. Thus, the following section explores the behaviours of these actors and the

ways through which they influence policies and may likewise influence constitutions and constitution-making process.

### 1.2. International NGOs: Effective Domestic Policymakers and Pragmatic Indirect Governors

Despite continued debates regarding the legitimacy of their role, scholars acknowledge that INGOs are relevant, and become and actively remain involved in the policy-making of a given state (Abbott et al., 2015; Aikman, 2017; Ahmad, 2006; Anderson, 2001; Brown et al., 2012; Cooley et al., 2002; De Silva, 2017; Gomez, 2005; Keck & Sikkink, 1999; MacDonald, 2016; Murphy, 2000; Nichols, 2013; Thomas, 2001). These actors quickly situate themselves within a given state and are able to influence outcomes relevant to their various causes. Despite the awareness of INGOs and their relative ease in accessing the state and its institutions, the literature fails to consider their involvement beyond the stage of policymaking. INGOs' effective means of influence are yet to be considered within the context of constitution-making. In this section, I argue that INGOs can influence constitution-making through their structure, behaviour, and “indirect governance”.

INGOs are “private organizations whose membership and support come from one country and whose political activities cross national borders” (Thomas, pg. 390, 2001). Typically INGOs, and the literature relating to them, are associated with the development context; though important, this pays little attention to the unique relationship between these organizations and the state institutionally and politically (Keck and Sikkink, 1998). It is the surprising ability of these organizations to influence the domestic policy of a given state that makes them particularly open to criticism, resulting in fierce debates over their role (see Anderson, 2001 and Thomas, 2001). Initial work on INGOs suggests that these organizations are altruistic, negating self-interest and

focusing on helping others throughout the world (Heiss & Johnson, pg. 529, 2016). Scholarship recognizes INGOs as norm entrepreneurs, a role that is becoming increasingly developed in the literature. Andrew Heiss and Tana Johnson (2016), however, suggest that this is not always the case, arguing that INGOs “act like firms and follow their own interest” (pg. 530). While these arguments are not to be taken as general claims about the motives of INGOs, it is nevertheless possible for these organizations to be both principled and self-interested.

INGOs are often presumed to be unable to survive the international sphere because they lack military and significant economic resources (Thomas, pg. 391, 2001; Anderson, 2001; Madon, 1999). This assumption, however, has proven to be inaccurate; although INGOs do not possess the resources common to that of states, they effectively gain legitimacy by “identify[ing] with the language and purposes of international law” and developing substantial expertise on specific issues (Thomas, pg. 390, 2001). Being armed with expertise and backed by international law, they are far more effective and useful than many scholars would assume (Anderson, 2001; Macdonald, 2016). The nature of INGOs provides an agency, flexibility, and influence that is often incomparable to that of states. These actors have the ability to become involved in processes that, logistically, would be difficult for states. Despite the fact that the scholarship is aware of such influence wielded by INGOs, there is no examination of their role in constitution-making. The structure and behaviour of INGOs in the state during policymaking is frequently discussed, yet there remains no consideration of how these actors may influence constitution-making (Abbott et al., 2015; Aikman, 2017; Ahmad, 2006; Anderson, 2001; Brown et al., 2012; Cooley et al., 2002; De Silva, 2017; Gomez, 2005; Keck & Sikkink, 1999; MacDonald, 2016; Murphy, 2000; Nichols, 2013; Thomas, 2001).

In his work, James Gomez (2005) found that INGOs often “fill the gaps” of civil society through simply writing a report about the action of a government. INGOs, depending on the context, usually do this before local actors, thus forcing them into action (Gomez, 2005). As such, what may be deemed as simple report can actually prove to be an influential tool for these actors during policymaking. The literature, however, has not considered if this occurs during constitution-making and whether it is effective.

Sheila Aikman (2017) discusses her findings relating to the ways through which INGOs attempt to better their access to the state and influence policy. Again, this fails to consider how this applies to constitution-making and its implications. Aikman (2017) argues that INGOs advocate effectively for various policies in different countries through restructuring their organizations in order to maximize their impact. Instead of simply having a headquarters, regional offices are established in various parts of the world. These offices help INGOs to better “domesticate advocacy and campaigning” by taking into consideration cultural differences, ultimately causing their methods to produce their desired results (Aikman, pg. 502, 2017). Whether based on common goals and equality or pushing the boundaries of what is appropriate, INGOs have relationships with state institutions and the structuring or restructuring of these organizations enables this (Aikman, pg. 507, 2017). It is, however, unclear how effective these restructuring and domesticating methods are within the context of constitution-making.

Organizational theory, as discussed by Heiss and Johnson (2016), is another means through which INGOs behaviour is examined. This looks specifically at the structure and behaviour of these actors. One of the more popular perspectives related to this larger theory is the boomerang pattern. Even though INGOs are capable of directly interacting with state institutions, these actors occasionally rely on local groups and organizations. According to

Margaret Keck and Kathryn Sikkink (1998), it is common for INGOs to form or become aligned with transnational networks that have shared norms and values, and work together to implement these by putting pressure on governments and institutions (pg. 90). The overall goal of these networks is to change policy through the introduction and implementation of new norms, ideas, and discourses. The desire to organize, however, is not always instigated by external organizations, but by local actors. A common way through which transnational networking opportunities occur is through the local civil society of a state and the triggering of a “boomerang effect”. When channels that were previously open to civil society for government access become blocked, these actors look abroad to international actors for assistance in accessing and influencing the domestic policy (Keck & Sikkink, pg. 12, 1998). These international actors, often times INGOs, provide access, leverage, information, and money to the local civil society (Ahmad, 2006). The boomerang effect demonstrates the strength of INGOs as they, as a foreign actor, are able to penetrate the state at times when local actors cannot. They are powerful, influential, and effective. Yet this perspective is not applied to constitution-making.

Another theoretical perspective that examines the behaviour of INGOs is indirect governance. While this model does not consider INGOs within the context of constitutionalism, it perhaps best articulates the actions of INGOs during Tunisia’s constitution-making process. Indirect governance suggests that governors (an external actor), for various reasons, will choose to delegate tasks to an intermediary (typically a non-state actor within the state) (Abbott et al., 2015). External governors seek to use these intermediaries for distinct reasons including: coopting their renowned expertise; making use of their experience in agenda setting; to make themselves appear more credible and legitimate; and to gain optimal access. Governors are generally states or large international organizations. On the other hand, intermediaries can be

either internal or external actors, but are oft times NGOs. It is assumed that these intermediaries work on behalf of the governor and effectively carry out their interests. Within this notion of indirect governance, there have developed two theoretical perspectives: principal-agent theory and orchestrator-intermediary theory. The principal-agent theory suggests that the governor is in control of their agent and if the agent does not act in accordance with their interest or has become a disturbance in anyway, the principal can reprimand the intermediary. According to Kenneth Abbott, Philipp Genschel, Duncan Snidal, and Bernhard Zangl (2015), this relationship is defined by delegation.

This theoretical perspective recognizes, however, that many intermediaries are fairly independent and have a significant amount of agency. As such, the governor may not have sufficient clout vis-à-vis the agent to restrict their operations. This leads to the other, very recent conceptualization of indirect governance, orchestrator-intermediary. Abbott and his colleagues (2015) define this relationship by orchestration, suggesting that the governor is aware of the fact that they are unable to control their intermediaries. As such, intermediaries are recruited voluntarily. A partnership develops between the orchestrator and the intermediary and the orchestrator typically gives ideational and material support to strengthen their joint efforts. It is through these means that the governor is able to influence the intermediary. This theoretical perspective best describes the indirect role of INGOs during Tunisia's constitution-making process.

Contrary to scholars such as Shirin Madon (1999), INGOs do not simply have "limited to small-scale" contributions to development projects (pg. 253). INGOs are an international political force; whether that is desired or not will remain debated in the literature (Anderson 2001; Cox, 1983; Macdonald, 2016; Thomas, 2001). As mentioned, however, these important

and relevant actors are not discussed in relation to constitution-making. INGOs undoubtedly have access to the state and its institutions, actively advocating and campaigning for a number of issues. The lack of examination in relation to constitution-making assumes that INGOs do not become involved in the process, which is simply not the case. If INGOs have the power to become the driving force behind particular policy making, why is this not considered to be the case in relation to constitutions? This is a problem in both this literature and transitional constitutionalism. While in transitional constitutionalism there is a general lack of such examination, in the context of INGO literature, it seems constitutionalism's core principle, the constitution represents the consent of the governed, has embedded the assumption that constitution-making does not involve international actors. Nevertheless, Tunisia's constitution-making process suggests that INGOs influenced constitution and the constitution-making process as easily as they do domestic policies and policy-making.

### 1.3. Internationalizing *Pouvoir Constituant*

The classical conception of constitutionalism assumes that external actors cannot exercise *pouvoir constituant*. This scholarship believes the power to write a constitution remains with and exercised by the people. External actors, however, do influence the constitution, as was the case in Tunisia and transitional constitutionalism endorses such influence. What then does this mean for *pouvoir constituant*? Although the concept is debated, it is recognized as being a national power void of foreign inclusion. A few contemporary scholars, however, discussed *pouvoir constituant* and its viability in relation to international actors (Dann and Al-Ali, 2006; Mead, 2014). While they agree that external actors may exercise this power, they state that this can only occur under specific conditions and, if exercised, will inherently damage the democratic

legitimacy of the constitutional regime. This research, however, suggests that INGOs influenced the constitution openly without damaging the democratic legitimacy of the state, perhaps even enhancing it.

Developed by Emmanuel Joseph Sieyès (1789) during the French Revolution, *pouvoir constituant*, or constituent power, represents the power of the nation to write the constitution. In his pamphlet “The Third Estate”, Sieyès argues that the constitution should not be established by the nobility or the clergy, the first and second estate, but by the “rightful possessor of constituent power is the *nation*” (Sieyès, 1789; Colón-Ríos, pg. 366, 2011). *Pouvoir constituant* is an inherently democratic concept; a *demos* determines exactly what form the state will take and the people that live under the set of laws are the people that determine the laws (Al-Ali & Dann, pg. 426, 2006; Colón-Ríos, pg. 209, 2010). Constituent power is, in its most basic form, the expression of freedom (Spång, pg. 28, 2014).

German constitutional scholar Carl Schmitt, almost 150 years after Sieyès, in a way radicalizes the term, stating that *pouvoir constituant* is valid only by the sovereign that deems it so. As such, *pouvoir constituant* is the political will of the sovereign (Colón-Ríos, pg. 366, 2011). Schmitt could not determine, however, whether this sovereign is the prince or the people (Spång, pg. 17, 2014). Mikael Spång (2014) argues that whether this power is of the prince or the people, sovereignty was crucial to Schmitt’s conceptualization of *pouvoir constituant*. Schmitt was also concerned with the understanding of “the nation”. Sieyès states that the pre-constitutional will of the people “is the source of the constitution and the constitution is the institutionalization of the nation’s will” and this nation shares commonalities in terms of laws, and are represented equally (Preuss, pg. 645, 1993). Schmitt argued, however, that since Sieyès did not specify “the people”, the nation must simply be stable and politically united in order to

wield *pouvoir constituant*. This does not help with Schmitt's conflict as to whether the *pouvoir constituant* is for the prince or the people, as both are capable of exhibiting stability and political unity. Nonetheless, Sieyès' use of the term "nation" directed Schmitt to this conclusion (Wandan, pg. 45, 2015).

Despite its relevance to the field of constitutionalism, *pouvoir constituant* continues to be debated in the literature (Dyzenhaus, 2012; Loughlin, 2013; Loughlin & Walker, 2007; Partlett, 2012; Preuss, 1991; Threlfall, 2008). Scholar Martin Loughlin (2013) is particularly curious about *pouvoir constituant* and its applicability during the constitution-making process. He states that legal positivists consider *pouvoir constituant* to be expendable since they believe there is no legal framework that allows for this exercise of power. He argues that the legal authority for constitution-making does not occur externally through *pouvoir constituant* but rather internally through what is regarded as *pouvoir constitué*<sup>2</sup>. It is through institutions and structures that Loughlin (2013) and other legal positivists believe constitutionalism ought to be examined. David Dyzenhaus (2012) concurs, arguing that *pouvoir constituant* may be overhyped within scholarship and there is no use in considering this power, as it exists outside of the legal framework. He argues, "there should be no competitor for the state within its territory" (Dyzenhaus, pg. 236, 2012). Examining from the inside is a more effective method of understanding law and legal structure (Dyzenhaus, pg. 233, 2012). He agrees that the notion of *pouvoir constituant* is interesting, stating, "there is something to it"; however, it should be theoretically rejected (Dyzenhaus, pg. 242, 2012).

Although *pouvoir constituant* is often debated, it remains rather ambiguous as it is unclear whom or what *pouvoir constituant* is intended to capture. One of the most relevant

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<sup>2</sup> *Pouvoir constitué* represents formal political institutions that are designated to exercise political authority.

ambiguities in relation to this research is the range of *pouvoir constituant*. Sieyès, as stated before, believed in the power of the nation. As opposed to “a people”, Schmitt interpreted this as stability and political unity. What neither could anticipate was how this ambiguity, coupled with constitutional and political changes due to modernity, could expand the concept. It can be argued that *pouvoir constituant* is up for interpretation; as long as the particular actor influenced the constitution, they have exercised this power.

Saki Bailey and Ugo Mattei (2013) state that *pouvoir constituant* was inherently intended for the unified people and the exercising of popular sovereignty. They argue, however, that the complexities of *pouvoir constituant* have made it so that relevant actors were forgotten or missed (Bailey & Mattei, 2013). Thus, the scholars argue that previously unconsidered actors, such as civil society actors and social movements, should be considered within the scope of *pouvoir constituant* (Bailey & Mattei, pg. 970, 2013). Jürgen Habermas (2012), in response to the ambiguities of *pouvoir constituant*, introduces *pouvoir constituant mixte* (Patberg, 2013). This new conceptualization of *pouvoir constituant* captures members of the European Union (EU), and other similar supranational structures, who possess *pouvoir constituant* in their home state as well as throughout the EU. These adjustments to the conceptualization of *pouvoir constituant* have evolved in response to new developments. However, the expansion is not as successful within the context of international actors that influence the constitution.

Scholarship is seemingly willing to expand *pouvoir constituant* but only to an extent. What makes these examples uncontroversial is the fact that the proposed exercisers of *pouvoir constituant* continue to remain subject to the constitution they intend to influence. This is ultimately not the case for international actors. Constitution-making, theoretically, is a “nation-building” process and implicitly excludes the influence of international actors for this reason

(Dann & Al-Ali, pg. 427, 2006; Mead, 2014). However, Sarah Mead (2014) argues that this exclusion is simply not the case; international influences on constitution-making are often a fact in practice. As such, the term internationalized *pouvoir constituant* is newly introduced to the scholarship, albeit with heavy skepticism.

Philipp Dann and Zaid Al-Ali (2006) acknowledges that the notion of external actors being involved in constitution-making is rather unsettling; since *pouvoir constituant* is inherently democratic, it seems as though internationalizing it takes away from the democratic power of the people. They argue, actually, that this has always happened but now external access to constitution-making is more frequent and becoming increasingly legitimized through the adoption of international law (Al-Ali & Dann, pg. 427, 2006).

As such, Dann and Al-Ali (2006) categorize external influence during constitution-making in three different ways: total, partial, and marginal. “Total influence” occurs when national actors play no role in drafting the constitution. This total influence represents the full exercise of internationalized *pouvoir constituant* (pg. 429). “Partial influence” occurs when international influence is not always voluntarily requested but is limited to the involvement of foreign experts (Dann & Al-Ali, pg. 430, 2006). The power to draft and adopt the constitution remains, therefore, in the hands of the national actors and they continue to have the final say on the constitution-making process. *Pouvoir constituant* is not entirely surrendered to international actors however it is not wholly intact (Dann & Al-Ali, pg. 430, 2006). They state that “control...is shared” between the local and international actors (Dann & Al-Ali, pg. 430, 2006). “Marginal influence”, towards the other end of the spectrum, sees minimal international influence. Locals may consult external actors voluntarily however constitution-making remains

unquestionably with national actors (Dann & Al-Ali, pg. 429, 2006). They argue that in this instance, internationalized *pouvoir constituant* is not applicable.

This spectrum is useful and attempts to create better understanding for a developing concept. There are, however, aspects of their categorization that is problematic. First, the categories are fairly arbitrary and assumed to be mutually exclusive. It is quite possible that there are other viable categories or subcategories and these will continuously overlap one another as a result of the complexities of constitution-making. As such, the categorization may be premature and in need of more research to better convey what the scholars are attempting to understand. Second, there is no specific discussion about how external actors use *pouvoir constituant* and how to determine if it has been exercised. It can, by all accounts, be similar to that of national actors. Finally, the “foreign experts” distinction is not well defined. This reads as an attempt to limit the types of influencers in the constitution-making process, however, fails to acknowledge that a wide range of actors can provide foreign expertise. Further, it should not be concluded that “foreign experts” are the only external actors involved during constitution-making. INGOs may or may not be captured within Dann and Al-Ali’s (2006) conception of foreign experts; nevertheless, INGOs were involved in constitution-making.

Even in its infancy, the notion of internationalized *pouvoir constituant* has so far proved to be rather controversial within scholarship. Sarah Mead (2014) argues that external influences during constitution-making is unavoidable for some states, however the exercise of internationalized *pouvoir constituant* must be managed as it can damage the democratic legitimacy of the constitution-making process. Since external actors will not be subject to the constitution, *pouvoir constituant* theoretically should not be extended to them (Mead, pg. 588, 2014). Expanding the conceptualization of *pouvoir constituant* to international actors harms the

connection that constitution-making has to the people of the state. Ensuring this connection within scholarship makes the constitution stronger and more valid, with infractions against the constitution deemed more serious (Mead, pg. 591, 2014). Despite concerns about international actors during constitution-making, Mead (2014) recognizes that neither maintaining the more classical conception of *pouvoir constituant* nor allowing a broader conception is a positive step for the literature. Rather, she suggests ensuring that there is a distinction between external use of *pouvoir constituant* and external influence on constitution-making. She argues that if external actors exercise *pouvoir constituant*, the democratic legitimacy of the constitution is threatened; conversely, if external actors influence a constitution, this does not amount to such an overstep and may rather enhance it (Mead, pg. 592, 2014). Mead (2014) admits, however, that determining when influence becomes exercising *pouvoir constituant* is difficult but attempts to do so following the spectrum provided by Dann and Al-Ali (2006).

As the influence increases, the exercise of *pouvoir constituant* is more likely. This would eventually amount to what Dann and Al-Ali (2006) call “total influence”, and represents the external use of *pouvoir constituant*. The “partial influence” on the spectrum produces what Mead describes as a grey area (Mead, pg. 593, 2014). Within this area, it is difficult to determine if influence is simply influence or the exercise of *pouvoir constituant*. Referencing Carl Schmitt, Mead (2014) states that the people that are subject to the constitution determine it and that is what makes a constitution valid (Mead, pg. 588, 2014). As such, she reasons that internationalized *pouvoir constituant* is exercised when an external actor determines the content. Finally, minimal influence is simply external influence, which is not equated to the exercising of *pouvoir constituant*. If a constitution is subject to external *pouvoir constituant*, the democratic

legitimacy of the constitution does not have to remain in disrepute; amendments by the people helps to reclaim their *pouvoir constituant* and, in turn, their legitimacy.

Although Mead (2014) attempts to limit the exercising of internationalized *pouvoir constituant*, the constitution-making process has many ambiguities. If, for example, a national government is trained entirely by external actors and this government entrenches a constitution according to what they learned, can this simply be regarded as influence? How, also, can one categorize external funding? Can funding also be merely influence and if so, how is this more democratically legitimate than Mead's (2014) understanding of exercising internationalized *pouvoir constituant*? These issues are complex but most importantly, they occur in practice. Influence and exercising internationalized *pouvoir constituant*, like Dann and Al-Ali's (2006) spectrum, may not be entirely mutually exclusive.

Rather than assume that external influence occurs in rigid circumstances with intrinsic outcomes, it is important to consider its nuances. There are, of course, circumstances where international influence is too overbearing, with Iraq being a prominent example (Dann and Al-Ali, 2006). External actors writing and implementing a constitution did not make the state more democratic, but far less so. Dann and Al-Ali (2006), and Mead's (2014) conceptualizations of external influence are accurate in this account. However, these fail when considering a state that encourages involvement of international actors and accepts changes to the text they recommend. If this were the case, it is strange to deem this action illegitimate. Thus, context is important in our understanding of international influences on constitution-making. It is better to suggest that if a state and an external actor agree on the outcomes, the exercise of internationalized *pouvoir constituant* is possible without harming democratic legitimacy.

The concept of *pouvoir constituant* is controversial in the literature conventionally and even more so when expanded to include international actors. Even when expanded to international actors, scholars tirelessly attempt to weaken it. The limited amount of scholarship dedicated to this remains skeptical of internationalized *pouvoir constituant* and, while expanding it, aims to do so as minimally as possible. Regulating it to “foreign experts” or distinguishing influence from exercise misses the various other means through which international actors do become involved in a given states constitution-making process. The earlier discussion concerning the various means INGOs utilize to influence policy only suggests that these actors are capable of influencing in a variety of ways, many of which are not considered by constitutionalists. Accepting a broader conception of *pouvoir constituant* may be challenging for many scholars; nonetheless, it occurs and in order to be effectively examined, it must be properly considered.

Transitional constitutionalism, while open to external influence on constitution-making, fails to consider the crucial role INGOs may play, as exemplified in the Tunisian case. INGO literature shows us that these actors already enjoy unparalleled agency that allows these organizations the ability to access the state and develop effective means through which they influence policy within the state. To presume that these methods are applied to the constitution-making process for the purposes of influencing the text is not unreasonable. Neither INGO literature nor transitional constitutionalism, however, has explored this in detail. Furthermore, in spite of its acceptance of external influence on constitution-making during regime change, transitional constitutionalism is yet to challenge foundational theoretical concepts that strictly forbid foreign engagement in constitution-making. Most prominent is *pouvoir constituant*. While

maintaining that this power remains with the “nation”, scholars argue that exercise of internationalized *pouvoir constituant* is democratically illegitimate. Presumably, transitional constitutionalists disagree; these scholars, however, are yet to engage in these theoretical debates (Allen, 2014; Dalmau, 2015; Sadurksi, 2016; Sharlet, 2014; Teitel, 1997; Turner, 2015; Yeh & Chang, 2009). Thus, it is the intention of this thesis to fill these gaps in the literature. Using Tunisia as a case study, I explore the role of INGOs during its transitional constitution-making process and whether these external actors exercised *pouvoir constituant*. The following chapter discusses the methodology that was employed for this project.

## Chapter 2: Methodology

As demonstrated, transitional constitutionalism scholarship accepts international influence but fails to examine INGOs in particular and the implication of their participation. Moreover, the literatures intended to inform our understanding of INGOs in the state and external influence of constitution-making, likewise do not consider the particular role of INGOs during this process. These gaps in scholarship allows for INGO influence to continue unexamined. As such, this research intends to discuss and understand the role of INGOs during constitution-making, specifically a state in transition. In order to complete this research, I conducted a case study of the constitution-making in Tunisia. Before discussing my findings, this chapter will discuss the methodology used for this project and will give insights into how my conclusions were discovered. I argue that Tunisia fits within the framework of transitional constitutionalism, how the data was collected, and the sample groups in detail. In all, this chapter will ensure the validity of the project and justify its contribution to the literature.

### 2.1. Transitional Constitutionalism: The Case of Tunisia

Tunisia was, and arguably still is, a state in transition and can be identified as such by the three approaches classified by Sadurski (2016), namely temporal, inductive, and functional. Thus, transitional constitutionalism appears to be the most appropriate concept to frame Tunisia and examine its constitution-making process (See Table 1).

The most important principle of transitional constitution-making is that the constitution does not capture consensus, rather the constitution is drafted in order to help shape consensus within society. Consensus, of course, is a lofty goal but a general consensus as to the direction for the country is necessary in relation to classical constitutionalism. According to my research, citizens throughout Tunisia wanted democracy however there was no agreement as to how this

would occur and what that would entail. There was a portion of society that wanted a liberal democracy and secularism as their neighbouring states to the north, while another portion of society wanted democracy but not the secularism of the West. Alexis Arieff (2012) states accurately that “disputes over reform priorities, economic crisis, labour unrest, tensions between the privileged coastal region and relatively impoverished interior, and lingering insecurity are continuing challenges” (pg. 287). Tunisia drafted the most liberal constitution in the region that reflected the value international law and liberalism. It is through this constitution that the state intends to create unity and consensus amongst the people.

Another key characteristic of transitional constitutionalism relates to its content. Transitional constitutions typically have broad references to international law and institute or reinstitute constitutional courts with the power of judicial review. The Tunisian constitution openly and intentionally reflects aspects of international law. One of the participants in this study stated that Tunisia worked to uphold the values of the international treaties they signed on to. Constitutional courts were also instituted in the constitution and they likewise have the power of judicial review. Although this is listed as a characteristic, it must be noted that most constitutions, transitional or not, have instituted courts and empowered them with judicial review for a number of different reasons.

Table 1.

<b>Features of Transitional Constitutionalism</b>	<b>Tunisian Case</b>
Does not capture consensus, rather aims to create it	<ul style="list-style-type: none"> <li>• Issues relating to economy, security, and poverty exacerbated already obvious political and societal factions.</li> <li>• Constitution intended to create consensus within the state.</li> </ul>
References to international law in the text	<ul style="list-style-type: none"> <li>• International law, including international treaties, and norms and values, are respected in the constitution.</li> <li>• Constitution is a rights conscious text.</li> </ul>

	<ul style="list-style-type: none"> <li>• International law is at times regarded as higher law than domestic policies.</li> </ul>
“Looking back” function	<ul style="list-style-type: none"> <li>• Components of the constitution require particular transitional functions to occur.</li> </ul>
Unsustainability	<ul style="list-style-type: none"> <li>• It is yet to be seen if the Tunisian constitution will face future amendments.</li> <li>• If this happens to not be the case, Tunisia is still captured as applicable to transitional constitutionalism.</li> </ul>

The constitution’s function of “looking back” represents another characteristic worth mentioning. Within classical constitutionalism, constitutions are ever forward looking, however, within the transitional context, this is not the case. Constitutions serve the purpose of remedying the negative circumstances of the previous regime. This likewise accurately describes the Tunisian constitution. Another participant I interviewed stated that “transitional justice” needed to be, and was, included in the constitution. Currently, members of the government are conducting Truth and Dignity hearings throughout the state, as promised during the constitution-making process (El Gantri, 2015). In these hearings, members of society speak about the atrocities they endured during the Ben Ali regime. This method of “looking back” was constitutionally guaranteed and is now being implemented.

The final characteristic is the transitional constitution’s unsustainability. Transitional constitutionalism suggests that a constitution may be amended or totally re-drafted a number of times until consensus is reached within the state. As of now, the Tunisian constitution has not been amended or redrafted after its entrenchment in 2014. Bear in mind that prior to its entrenchment, there were a number of drafts in the almost two years of constitutional discussions. Nonetheless, this constitution was ratified three years ago. It is very possible that the constitution undergoes some changes, but it also may not. From the interviews I conducted and

the informal conversations I engaged in, a number of people believe that Tunisia needs a new constitution or that it should be amended in some way to address what they deem to be issues. However, time will tell if Tunisia's constitution remains, or if it will be amended or replaced.

In addition to its applicability in relation to "transition", Tunisia proved to be a well-timed case for this study. Requiring the case to have recently adopted a constitution was imperative as the actors involved, either members of parliament or civil society organizations, were more likely to be able to accurately recount the events of the constitution-making process. Since the constitution was entrenched two and a half years prior to the start of my research, numerous relevant civil society and political actors, including constitutional committee members, organizers of civil society within the ANC, and legal analysts of constitutional drafts, were still accessible and able to speak in detail about the process.

In order to complete this field research, I traveled to Tunisia from June to October 2016. This four-month fieldwork provided me with significant data that explains the role of INGOs in Tunisia's constitution-making process and the ways through which these organizations became involved.

## 2.2. Methodology: Creating Valid Research

This research project was a small-n study that used qualitative methods in order to understand the role of INGOs in the constitution-making process of Tunisia. I initially planned to complete 18 semi-structured interviews: 3-4 with INGOs, 6-8 with NGOs, and 5-6 with constituent members of the ANC. I also planned on conducting an additional 3 expert interviews. Before arriving to Tunisia, I created a list of organizations, local and international, I intended to

interview. Not included on this list were constituent members, although I was aware of the political parties I needed to include in my sample.

I chose these three sample groups because, in the case of the constituent members, they are best able to indicate who was involved in the constitution-making process and, in relation to the NGOs, would allow for the testing of my hypothesis. These groups further provide an opportunity to triangulate the data that I would gather from the INGOs. In order to obtain contacts, I planned to connect with *Le Centre d'Etudes Maghrébines à Tunis* (The Centre of Maghreb Studies in Tunis, also CEMAT), academics, journalists, and contacts I made while in Canada.

Upon arrival, I discovered this project was of significant interest to Tunisians and decided to substantially expand my interview limits. At the end of my fieldwork, I conducted semi-structured interviews with 26 participants: 7 with INGOs, 11 with NGOs, and 8 with members of parliament. An additional 4 expert interviews were also conducted. The INGO participants included Amnesty International, Article 19, and Lawyers Without Borders. The NGO participants included *Al-Bawsala*, *Mouriakboun*, and IWatch. Finally the political parties each constituent member belonged to included the *Ennadha*, *Ettakatol*, and the *Front Populaire*. As I had planned, I began my data collection with the list I made of INGO and NGO contacts through Tunisian contacts I made in Canada. When the list I made in Canada was exhausted, I inquired an academic, journalists, and informally through conversation with everyday citizens. In total, two participants from the INGO sample group and three from the NGO sample group were collected from the list that I made prior to the fieldwork.

After the initial contacts, I relied on snowballing for the purposes of data collection. Over the course of an interview, if a particular organization were discussed, I would typically ask for

their contact information. Participants were also eager to inform me of organizations they believed to be important to the research. In relation to the INGOs that I interviewed, two of the participants (29%) were collected through snowballing. For the NGO sample group, seven of the participants (64%) were retrieved through snowballing. Finally, for the members of parliament, two of the participants (25%) were collected through snowballing. The INGO and members of parliament sample groups did not rely on snowballing to the extent of the NGO sample. The primary reason being that NGO participants were initially more difficult to find than the other sample groups. As there are tens of thousands of NGOs registered within the country, I did not expect this group to be the most challenging. Despite the high quantity of NGOs in the state, many of them are not well established and essentially unknown. The common methods that I used to discover organizations, such as web searching, were ineffective due to the fact that they were not professionalized. This struggle, coupled with my limited data collection time, caused me to make a significant decision about the sample: rather than include only NGOs proper, I decided to interview a political movement, a union, a syndicate, and a political association. Opening up the sample, along with snowballing, created a more substantial sample group.

In general, acting on the advice of these participants was effective; the populations that I intended to study may not have been hidden per say, but direct contact was more difficult without recommendation. Through snowballing, I was given access to organizations that I may not have been able to interview otherwise.

#### 2.2.1. *Questions: INGOs, NGOs, and Constituent Members*

In order to fulfill the initial objectives of the research, I developed three sets of open-ended questions for the three sample groups. For the INGO questions, I wanted to determine the ways through which the participant organizations influenced the constitution-making process

and, if applicable, the text. The questions for the INGO sample group began with introductory questions asking when the organization began operations in Tunisia, the interests and activities of the organization, and where the organization is based. The following questions discussed the constitution-making process and the role they hoped to play, if INGOs had access to the ANC, and if the ANC appeared more willing to include local NGOs over INGOs. These were followed by questions relating to the networking between INGOs and NGOs and if their organization networked with local NGOs, if they funded NGOs, if they typically sought NGOs to network with or if they were sought out, and if networking benefited the organization's access to the constitution-making process. The interview concluded with questions asking if INGOs needed to network with NGOs to access the constitution-making process and if INGOs influenced the constitution. I was successfully able to determine the ways these INGOs influenced the process and the constitution and if they did so directly or indirectly. The findings will be discussed further in the following chapters.

The questions that I asked the NGO participants were very similar to the questions for the INGO sample group. I was interested in determining the possibility of indirect influences on the constitution-making process by INGOs and relevant networking patterns. I began with simple introduction questions, which determined the year in which the organization began operations in Tunisia, the activities and interests of the organization, and how long the participants had been members of the organization. I followed the background examination with a series of questions, which intended to understand the constitution-making process from the perspective of the specific organization. I asked what their role was, if the ANC effectively included civil society actors and whether the ANC appeared to prioritize some organizations over others. The next questions were to understand the networking between INGOs and NGOs during the constitution-

making process. I asked participants if they networked with INGOs during the constitution-making process, the ways through which this networking occurred, whether they received funding from INGOs, and if INGOs sought their organization or if they sought help from INGOs. I concluded with questions asking if INGOs influenced the constitution-making process and if NGOs facilitated this influence. These questions helped to understand the networking of INGOs with NGOs during constitution-making and the ways through which INGOs used this as a means of influence. As briefly discussed earlier, not all INGOs funded civil society actors, thus other forms of influence are possible. This analysis will likewise be discussed in further detail in the following chapters of this thesis.

Finally, the last set of questions for the constituent assembly group were very different from the two other sample groups. With these participants, I wanted to determine whether INGOs had a role in the constitution-making process from their perspective, and whether they had a direct influence on the constitution-making process. To begin, I asked introductory questions about why it was important for them to partake in the political process and what they believed needed to be included in the constitution. The next set of questions was about the role of civil society organizations more broadly. These questions did not distinguish between local and international organizations. I asked how they would describe the constitution-making process, which components of the constitution were most pressing for civil society, how civil society expressed their interests, and if civil society had adequate access to the constitution-making process. The next questions focused on INGOs and their role from the perspective of the ANC. I asked about the reaction to INGOs from the ANC, if the ANC faced pressures, how INGOs were received in comparison to local NGOs, and whether INGOs needed NGOs to access the constitution-making process. The interviews concluded with opinion questions asking if INGOs

influenced the constitution-making process of Tunisia and if they should. These questions were able to determine whether INGOs had direct access to the ANC and its members, and the ways through which they interacted with the constitution-making process. Again, the details of the data analysis will also be discussed in further detail in the following chapters of the thesis.

### *2.2.2. Coding*

In order to organize and then analyze the data, I labeled each sample group (e, i, n, and c), numbered each interview (for example, e1), and coded key words. Sample group “e” represents the four expert interviews I conducted in addition to the 30 interviews. These interviews are not a part of the findings, however, for the purposes of this thesis and later discussions, each interview was labeled e1, e2, e3, and e4. E1 is a professor (August 15<sup>th</sup>, 2016; Tunis), e2 is a legal analyst (July 27<sup>th</sup>, 2016; Tunis), e3 is a lawyer (July 12<sup>th</sup>, 2016; Tunis), and e4 is a former NGO worker (July 28<sup>th</sup>, 2016; Tunis). These interviews were very useful as they provided better insight into the constitution-making process and helped me to understand some of the concerns regarding the politicization of civil society and the “international agenda” of foreign actors, two opinions that recurred throughout interviews and will be discussed to some extent in the following chapters.

Sample group “i” represents the seven INGO interviews I conducted. I labeled each of these interviews i1, i2, i3, i4, i5, i6, and i7 (See Table 2). The participants varied in both their interests and roles. Participant i1 is a human rights advocacy organization that refrained from funding (August 1<sup>st</sup>, 2016; Tunis). Participant i2 is an energy organization that funded civil society organizations (July 13<sup>th</sup>, 2016; Tunis). Participant i3 is a freedoms advocacy organization that did not fund organizations (July 20<sup>th</sup>, 2016; Tunis). Participant i4 is a human rights, freedoms, and democracy organization that also refrained from funding (September 22<sup>nd</sup>, 2016;

Tunis). Participant i5 is a political foundation linked to unions that chose to fund members of civil society (August 5<sup>th</sup>, 2016; Tunis). Interestingly, a political party from their country of origin established this organization. Participant i6 is a civil society advocacy and monitoring group and that refrained from funding civil society members (August 24<sup>th</sup>, 2016; Tunis). A political party from their country of origin likewise formed this organization. Finally participant i7 is a legal organization that also refrains from funding civil society (August 23<sup>rd</sup>, 2016; Tunis). There are two facts that can be mentioned immediately: two of the seven (29%) INGOs that participated in this research funded local civil society and two of the seven (29%) INGOs were formed by political parties outside of Tunisia. Further, all of the INGOs interviewed were from outside of the Middle East and North Africa (MENA) region.

Table 2.

<b>INGO Participants</b>	<b>INGOs' Platform</b>
Participant i1	Human rights advocacy organization
Participant i2	Energy organization
Participant i3	A freedoms advocacy organization
Participant i4	Human rights, freedoms, and democracy organization
Participant i5	Political foundation linked to unions
Participant i6	Civil society advocacy and monitoring group
Participant i7	Legal organization

Sample group “n” represents the eleven NGO interviews I conducted. I labeled the interviews n1, n2, n3, n4, n5, n6, n7, n8, n9, n10, and n11 (See Table 3). As discussed, my initial intention was to interview NGOs proper; however, I also interviewed a union, a syndicate, a political movement, and a political association. Participant n1 is a union focused on the rights of workers (July 20<sup>th</sup>, 2016; Tunis). Participant n2 is an NGO focused on youth, with a subsection focusing on policymaking for women (September 6<sup>th</sup>, 2016; Tunis). Participant n3 is an NGO focused on citizenship and voting (August 11<sup>th</sup>, 2016; Tunis). Participant n4 is a monitoring

NGO (August 4<sup>th</sup>, 2016; Tunis). Participant n5 is a youth led monitoring NGO (July 28<sup>th</sup>, 2016; Tunis). Participant n6 is a human rights syndicate (August 16<sup>th</sup>, 2016; Tunis). Participant n7 is a political movement focused on the constitution-making process (August 17<sup>th</sup>, 2016; Tunis). Participant n8 is a monitoring organization aiming to preserve the goals of the revolution (July 15<sup>th</sup>, 2016; Tunis). Participant n9 is an NGO consisting of academics and scholars (September 8<sup>th</sup>, 2016; Tunis). Participant n10 is a feminist association (September 22<sup>nd</sup>, 2016; Tunis). Finally, participant n11 is a monitoring organization (August 5<sup>th</sup>, 2016; Tunis). Three of the eleven (27%) participants were active prior to the revolution; all of the other participants (73%) were formed post-revolution.

Table 3.

Local NGO Participants	Local NGO's Platform
Participant n1	Worker's union
Participant n2	NGO focused on youth, with a subsection focusing on policymaking for women
Participant n3	NGO focused on citizenship and voting
Participant n4	Monitoring NGO
Participant n5	Youth led monitoring NGO
Participant n6	Human rights syndicate
Participant n7	Political movement focused on the constitution-making process
Participant n8	Monitoring organization
Participant n9	NGO consisting of academics and scholars
Participant n10	Feminist association
Participant n11	Monitoring organization

Finally, sample group “c” represents the interviews that I conducted with constituent members of parliament<sup>3</sup>. I labeled these interviews c1, c2, c3, c4, c5, c6, c7, and c8 (See Table 4). The sample group was primarily gathered through selective methods to ensure that the varying political ideologies within Tunisia were captured. Participant c1 is a current member of

<sup>3</sup> In relation to the constituent sample group, the individual participants were not selected, rather the political parties the individuals were affiliated with.

parliament from a leftist political party (August 16<sup>th</sup>, 2016; Tunis). Participant c2 is a former member of parliament from a right, religious political party (August 17<sup>th</sup>, 2016; Tunis). Participant c3 is a current member of parliament from an ultra left political party (August 26<sup>th</sup>, 2016; Tunis). Participant c4 is a former member of parliament from a centrist, secular political party (August 15<sup>th</sup>, 2016; Tunis). Participant c5 is a current member of parliament from a right, religious political party (August 18<sup>th</sup>, 2016; Tunis). Participant c6 is an independent, non-elected legal council for the ANC (August 9<sup>th</sup>, 2016; Tunis). Participant c7 is a current member of parliament from a right, religious political party (August 4<sup>th</sup>, 2016; Tunis). Finally participant c8 is a former member of parliament from a centrist, secular political party (August 10<sup>th</sup>, 2016; Tunis). In total, two participants (25%) are from left leaning political parties, two (25%) are from centrist, secular political parties, three (38%) are from right leaning religious political parties, and one (12%) was an independent, non-elected legal council. All of the participants were members of parliament during the constitution-making process from 2012-2014. All but two constituent members lost their seats following the adoption of the constitution. The data collected from these participants will be analyzed extensively in the following chapters.

Table 4.

<b>Constituent Member Participants</b>	<b>Party Membership</b>
Participant c1	Current member of <i>Al-Massar</i>
Participant c2	Former member of <i>Ennadha</i>
Participant c3	Current member of <i>Front Populaire</i>
Participant c4	Former member of <i>Ettakatol</i>
Participant c5	Current member of <i>Ennadha</i>
Participant c6	Independent legal council of the ANC
Participant c7	Current member of <i>Ennadha</i>
Participant c8	Former member of <i>Ettakatol</i>

In terms of the answers from the participants, each was coded with a particular keyword. The tables feature examples of the coding process and what was coded in this particular study.

Table 5 depicts the process of identifying keywords from interviews and specifying these as a particular code. Some codes were far more relevant than others. For example, “expertise” was identified in most interviews while “observation” was less so. The first column on the left contains quotations; the next column identifies the substance of the quote, and the final column assigns a particular code:

Table 5.

<b>Response from Participant</b>	<b>Initial Code</b>	<b>Focused Code</b>
INGO: “There was a need for technical expertise. The organization worked with international and national expertise.”	- A need for technical expertise	“Expertise”
INGO: “INGOs brought expertise, and it was the best way to influence. It was a very big challenge. INGOs share experience, experts and technical expertise.”	- INGOs brought expertise... - technical expertise - Share experience - Share experts	“Expertise” “Share Experience” “Provide Experts”
INGO: “They give them expertise, and professionals to help them with this”	- Gave expertise	“Expertise”
NGO: “Expertise, technical support and recommendations were also a role of INGOs.”	- Role of INGOs was expertise - Role of INGOs was to give technical support - Recommendations	“Expertise” “Technical Support” “Recommendations”
NGO: “They said that they chose to do this to learn more from INGOs because they have expertise and they have funds.”	- INGOs had expertise - INGOs had funds	“Expertise” “Funding”
CM <sup>4</sup> : “They offered expertise, did comparison programs. Helped by observing the constitution making in Tunisia.”	- Offered expertise - Observed	“Expertise” “Observation”

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<sup>4</sup> CM – Constituent Member

CM: “They said, concerning INGOs, sometimes they provided expertise or had demands.”	- Provided expertise - Had demands	“Expertise” “Advocacy”
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Table 6 depicts samples of the coded responses. The column on the left features an abbreviated interview question and the column on the right features select abbreviated codes.

Table 6.

Categories	Code
The role of INGOs	“training”
	“technical assistance”
	“advice”
	“workshops”
What did INGOs advocate for?	“international law”
	“human rights”
	“rule of law”
	“independent judiciary”
Networking practices of INGOs and NGOs	“networked with civil society”
	“networked with INGOs”
	“sought and were sought”
Was the ANC open to civil society actors?	“an open ANC”
	“forced openness”

Participants from all three sample groups used these and other words most commonly when discussing the role of INGOs during constitution-making. The coded responses listed are particularly important as they were cited most often during the interviews. Identifying these codes efficiently organized the data and eliminated bias. For instance, many actors, particularly local actors, refrained from acknowledging that INGOs influenced the constitution-making process. These actors, however, communicated these coded responses and generally corroborated the statement of the two other sample groups.

### 2.2.3. Limitations

Despite the overall success of snowballing, there was one noticeable limitation: it proved difficult to capture contentious interests. Tunisian civil society is a very robust and diverse group. When I asked participants what civil society actors wanted to see included in the constitution, the general consensus was that civil society was concerned with every component. Organizations represented many aspects of society, including energy sectors, workers rights, human rights and freedoms, regionalism, religion, and women's rights. In order to increase the validity of this work, it was imperative that I form representative sample groups. Snowballing alone rendered that nearly impossible. Although organizations representing a wide range of interests co-exist within civil society, they very rarely intermingle. Many participants I interviewed discussed the divisions within Tunisian civil society with one participant articulating it as this: "...civil society is divided, modern and Islamic. First set [of INGOs were] from Europe and [the] West and the latter from [the] Gulf countries". This, as well as other less pronounced divisions, created gaps in the data collection that were exacerbated by snowballing. In order to address this, I used selective methods of data collection to fill the gaps that snowballing created. As such, three INGO participants (43%), one NGO participant (9%), and six constituent participants (75%) were retrieved through this method. I determined what was missing from the data that had already been collected and contacted specific organizations in an effort to create more representative samples. This method was most useful with the INGO and constituent member sample groups. The anomaly in this instance is the NGO sample group. This sample group exemplifies in this case that snowballing, in relation to interests, was representative and there was no need to be more selective.

Although the selection of participants are diverse, these participants are representative of what was described as the "modern, Western" fragment of civil society.

Despite my attempts, I was unable to access anyone beyond this segment. The validity of this research, however, is not jeopardized, as the ideologies of such organizations were not constitutionally relevant.

A related limitation regards INGO participant selection. The INGOs included in this study had regional offices in Tunisia. While the office often coordinated with the headquarters in their respective home states, their advocacy was different to those that did not establish an office in Tunis. As such, practices of INGOs that remained outside of Tunisia or their means of influence cannot be verified by this data set.

The final limitation I will discuss also relates to access. As I alluded to earlier, local NGOs were difficult to identify; they were often times small, remote, and unprofessional. The NGOs included in this study however were all active, independent, and professional. Thus, this sample group does not speak for the over ten thousand Tunisian NGOs instituted and legalized following the revolution. Despite the (over)saturation of civil society actors, many became heavily dependent on foreign funding and incapable of becoming unilaterally independent. There develops a noticeable power imbalance between the few professionalized local NGOs and the many nonprofessional NGOs. The powerful, established local NGOs in the state, some of which are included in this study, possessed an authority and sovereignty incomparable to that of smaller, less established local NGOs. The data set regrettably exhibits this power differential. I worked to access and contact a variety of local NGOs but many organizations were unknown, unidentifiable, and as such, unreachable. Truly, this segment of civil society is obscure and transitory. If and when international funding allows for their existence, access is possible, however, these local NGOs are fleeting and often short-lived. This was unfavourable for this research as the networking relationships these local NGOs created with INGOs are unable to

speak to the networking relationships of other, less powerful local NGOs. This deficiency in the data set however, is not detrimental to the research neither subjects it to invalidity. While the NGO sample group is incomplete, specifically in terms of data concerning the number of these local NGOs, the findings still allow for reliable assumptions to be made.

The findings of this research demonstrate the engagement of INGOs during constitution-making and the ways through which they influenced the text. The methodology of this project is both valid and reliable, accurately depicting processes that occurred in Tunisia that can be replicated if need be. The constituent member and INGO sample groups corroborate many of the claims that were made by the other during the interview process. The NGO sample group, however, was more biased. The hesitation is understandable; local actors rightfully claim ownership of the constitution-making process. Suggesting that INGOs likewise played a significant role in the drafting process was bothersome for a few, particularly older organizations. Notwithstanding, all participants were forthright and honest in discussing and sharing their experiences with me. In the next chapter, the data collected will be divulged and analyzed in depth. There are a number of significant conclusions that can be made about Tunisia's experience that will give insight into the empirical realities and normative complexities of INGOs involvement in constitution-making.

### Chapter 3: Tunisia's Constitution-Making

Before discussing how INGOs influenced Tunisia's constitution-making, I will take some time to consider the perspective of the state and the local NGOs during the process. The constitution-making occurred as a result of the state's radical change. The dictatorship that was sustained since independence quickly fell and many of the societal complexities that were masked by the regime proved, at times, to be unmanageable. On the other hand, civil society actors basked in the opportunity to work with and make demands of the state. Through INGO financial support, these actors worked inside and outside of the ANC in order to lobby and monitor the constitution-making process. This chapter explores what transition often looked like in Tunisia and the role of local actors.

### 3.1. Tunisia: From Authoritarianism to Democratic Constitutionalism

The 2010-2011 Tunisian "Jasmine" Revolution began a cascade of regime changes throughout the Middle East and North Africa, later referred to as the Arab Spring. The fact that the shift in what had become "normal" governance began in Tunisia was very surprising. Tunisia was believed to be one of the least likely countries in the region to experience a revolt as the one they faced at that time (Cavatorta and Haugbølle, g. 182, 2012). This was for three reasons: economic restructuring was believed to have worked well in the state; democratic processes were incrementally beginning introduced; and the application of the French policy of *laïcité*, which stresses modernization and secularism. Francesco Cavatorta and Rikke Hostrup Haugbølle (2012), however, argue that these were myths taken as truths by the United States and Europe (pg. 182). Prior to the fall of the regime, Tunisia was one of the most politically repressive states in the region, with Freedom House ranking them on par with Libya in relation to openness (Cross and Sorens, pg. 8, 2015). President Zine Ben Ali was fiercely consolidating his power,

alienating members of his party that had long been in power. In response, former Ben Ali supporters, typically secularists, began cooperating with the generally Islamist opposition. The state's financial struggles were also becoming more prominent. Economically liberal policies, and the abuse of finances by the President and his immediate and extended family were severely hurting already vulnerable people. That being said, Ester Cross and Jason Sorens (2015) state that Tunisia was a good candidate for a successful democratic transition because, as a state that does not produce oil, they did not have to contend with the difficulties of rentierism common in other states in the region (Arieff, 2012).

All of this peaked with the December 17<sup>th</sup>, 2010 attempted self-immolation by a 26 year-old street vendor following an encounter with the police (Arieff, 2012). This led to protests in his hometown, which quickly spread throughout the country. There was an initial response of force, however, when the army Ben Ali purposefully marginalized refused his order to repress the citizens, this bolstered the morale of the protestors and encouraged them to continue on (Angrist, pg. 550, 2013). Ben Ali attempted to placate the people, visiting the dying street vendor and speaking in the colloquial Tunisian dialectic as opposed to the formal form of Arabic. Finally, he vowed that he would step down from his presidency when his term was over in 2014. This, however, was not enough and on January 14<sup>th</sup>, 2011, he fled on his private plane to Saudi Arabia. Although Ben Ali was removed, the regime remained as many of his loyalists and party members retained power (El-Khawas, 2012). On Feb 27<sup>th</sup>, 2011, after weeks of continued protests, most of these loyalists resigned their positions and Béji Caïd Essebsi, the foreign secretary of former President Habib Bourguiba<sup>5</sup>, was appointed interim Prime Minister (Arieff, 2012). He eased

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<sup>5</sup> Habib Bourguiba served as President of Tunisia from its independence in 1956 until he was removed as the result of a coup led by Ben Ali in 1987.

restrictions on the media, banned almost 9,000 Ben Ali officials from running for government positions, and released political prisoners (Arieff, 2012; El-Khawas, pg. 8, 2012).

Once these issues subsided, establishing democracy was of most pressing concern for the state. Essebsi reasoned that it would be best to hold elections for a constituent assembly that would be tasked to write a constitution before the formal elections for the government. The High Authority was created in May of 2011 to oversee the development of the elections (Zemni, 2015). Though the High Authority was initially accepted, it was increasingly clear that the divisions between the citizens, so carefully masked by the regime, were becoming more obvious. Sami Zemni (2015) discusses a moment when mainly middle class Tunisians protested against “what they perceived as outrageous demands from workers and union militants; ... the diversity and antagonisms within ‘the people’ became visible” (pg. 10). He further states that as issues worsened within the High Authority, it seemed that decisions were made in the name of the people but increasingly without it (Zemni, pg. 10, 2015). There was no one group that spoke for the people and the question became, “who is the people”? This was not only a theoretical question for constitutionalists and legal theorists, but also a real question for Tunisia (Zemni, pg. 10, 2015). This false image of homogeneity created by Bourguiba and sustained by Ben Ali was coming apart at the seams (Zemni, pg. 12, 2015). It was clear that “the conflict between the two camps [was] not just a matter of cultural orientation but [was] riddled with complex class differences” (Zemni, pg. 13, 2015).

Almost nine months after the revolution, elections were held on October 23<sup>rd</sup>, 2011. *Ennadha*, the formerly illegal Islamist organization turned political party post-revolution, won 41% of the seats in the ANC and formed a coalition with *Ettakatol*, an older democratic party with 20 seats and *Congrès Pour le République* (Congress for the Republic, CPR), a centre left

party with 29 seats (Arieff, 2012). On December 16<sup>th</sup>, the newly elected constituent assembly implemented “the little constitution”, reiterating that the goal of the ANC was to write a constitution that reflected the goals of the revolution and discussed how the constitution would be entrenched, among other things. It was decided that each article needed to be ratified by an absolute majority and the whole constitution needed two-thirds support in the ANC or it would face a popular referendum. According to Alexis Arieff (2012), the developing of the constitution represented “the next step in the transition process” (pg. 295).

Following the ANC election, the focus was the constitution-making. The constitution was supposed to be completed in one calendar year; however, conflicts between differing groups in the state stagnated the process (Agrist, pg. 562, 2015). Arieff (2012) says that there were some obvious factions that were developing, and these were exacerbated politically following the election. These included, and were framed as, Islamists versus secularists, coastal elites versus interior governors, and youth activists who led the revolution versus older elected members.

One of the most politicized and enduring schisms within the state was certainly that between the Islamists and the secularists. Religion’s place in the public sphere had been a topic of controversy since independence. Upon gaining power in 1956, the first President of Tunisia Habib Bourguiba implemented a secularization project similar to that of France’s *laïcité*. Bourguiba closed religious schools, disallowed Imams as educators, banned the hijab and niqab in public places, and implemented the Personal Status Code<sup>6</sup> (Netterstrøm, 2012; Stepan 2012). As well, Islamism was firmly rejected, as *Ennadha*, at the time an organization, was banned from the state and its members were either sentenced to prison or exiled. Although the regime was undoubtedly repressive under both Bourguiba and Ben Ali, secularists felt protected because the

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<sup>6</sup> The Code of Personal Status was enacted in 1985 and proved to be revolutionary, as it was completely out of step with the norms of the region at the time. This Code gave women new rights including divorce, refusal to be obedient to husband, abolishment of polygamy, and legal gender equality (Cavatorta & Haugbølle, 2012; Netterstrøm, 2015).

two leaders ensured the implementation and maintenance of a civic, secular state (Donker, 2013; Pickard, 2014; Stepan, 2012). In interviews conducted for his work, Alfred Stepan (2012) notes that while there was wide support for the regime change, journalists and prominent secularists expressed fears that free elections in Tunisia could elect *Ennadha* and reduce the rights and freedoms they had come to enjoy (pg. 95).

The *Ennadha*, however, attempted to reassure secularists in the state that an Islamic state would not be established and “*shari’a* law” would not be implemented. The leader of *Ennadha* at the time, Rachid Ghannouchi, stressed that the politic party should not be compared to the Egypt’s Muslim Brotherhood, as they were a civic party, not a religious one (Stepan, pg. 95, 2012). While this may have been true, it is clear that this stance ensured that they remained in power, at least for a time, and may have prevented the chaos occurring in Egypt to likewise transpire in Tunisia. The divisions between secularists and Islamists in the Egyptian case were so severe, that these factions refused to work together during their own constitution-making process. Thus, the Muslim Brotherhood attempted to unilaterally implement a constitution that ended in their removal by the military and the loss of thousands of lives (Kirkpatrick, 2013; Khan, 2014; Netterstrøm, 2015). In Tunisia, the *Ennadha* wanted to avoid this at all costs. They conceded where they could and chose instead to work together with secularists rather than go without them (Angrist, 2013).

Although *Ennadha* vowed not to create an Islamic state, in March 2012, thousands of Salafists<sup>7</sup> marched in Tunis, demanding *shari’a* law be the source of the new constitution (El-Khawas, pg.19, 2012). *Ennadha*, however, rejected this faction and reiterated its commitment to maintaining secularism in Tunisia. Moreover, after a constitutional draft stated that women were

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<sup>7</sup> An ultra-conservative form of Sunni Islam.

complementary to men rather than equal, the *Ennadha* removed this provision following protests and strikes throughout the state (Marks, 2012). Abandoning things such as the adherence to shari'a law, making women complementary to men, and choosing to retain the Personal Status Code were intended to appease the secular aspects of the government (Guazzone, pg. 39, 2013).

Other issues put further pressure on the state and ultimately aggravated the factions. The state's security, for instance, was becoming more precarious. Most prominently, violent protests occurred at the US embassy following the release of an anti-Islam film, eight soldiers were killed in west Tunisia following clashes with an Al-Qaeda affiliated group, and a suicide bomber attacked on a beach in the resort town of Sousse, though there were no victims. The state was also falling into economic turmoil. Unemployment jumped 20%, with 25% of those recent university graduates and tourism had fallen 40%. Laura Guazzone (2013) argues that the security deterioration and socio-economic decline in Tunisia only exacerbated the political schisms (pg. 36).

The most distressing events that affected the constitution-making process occurred both at home and abroad. In February 2013, prominent human rights activist Chokri Belaïd was assassinated and in July of the same year, Mohamed Brahmi, a leftist constituent member opposed to *Ennadha*, was also assassinated (Angrist, pg. 563, 2013). These, coupled with the deteriorating situation in Egypt, created urgency from the government to complete the constitution (Angrist, pg. 40-1, 2013). The ANC, following a "roadmap" provided by the *Union Generale Tunisienne du Travail* (The Tunisian General Worker's Union or UGTT) and the broader National Dialogue Quartet, decided to have an expert committee with national actors to pass a liberalized constitution quickly. The government also vowed to step down in accordance

with the roadmap. On January 26<sup>th</sup>, 2014, 92% of the constituent members voted in favour of the new constitution.

### 3.2. The Tunisian Constitution: An Executive Summary

What followed this long, deliberate process was the adoption of the most liberal constitution in the region (Pickard, 2015). On January 26<sup>th</sup>, 2014, the final draft was ratified with 200 votes for, 12 votes against, and 4 abstaining. The constitution recognizes individual rights and collective rights, as well as negative and positive rights. There are ten titles included in the document, each focusing on a particular subject (see Appendix A). While the constitution is very liberal (Article 44 guarantees the right to water), it is also conservative (Article 7 states that the family is the nucleus of society and the state will protect it), making it confusing and contradictory at times. Local NGO participant n7 adds that the constitution is also “non-judicial” at times, as there are Articles that were seemingly added for the appeasement of various groups in society. For example, Article 8 says: “youth are an active force in building the nation”. Of course, as it is included in the constitution, it can be adjudicated in court. That being said, noting that the youth are an active force in the state is not a legal concern and was included for the sake of pacifying the youth that had claimed ownership of the revolution. The following discussion will briefly overview the constitution, and identifies some of the other debates that occurred during the constitution-making process, the text’s most prominent protections, and the possible future conflicts that may come to fruition.

The constitution begins with a lengthy preamble that expresses the importance of the revolution and the intentions of the text. Constituent member participant c6 states that the development of the preamble was a significant component of the constitution-making process as

it framed the overall document. The preamble states that Tunisia is a civic society committed to free elections, pluralism, balance of powers, the supremacy of law, respecting human rights, independence of the judiciary, and equality between citizens. One line of this preamble, however, depicts an obvious tension between individual and collective rights:

“Expressing our people’s commitment to the teachings of Islam and its aims characterized by openness and moderation, and to the human values and highest principles of universal rights...” (Preamble, Tunisia Constitution 2014)

In many ways, this represents the Tunisian constitution and the impending conflicts bound to occur in the Constitutional Court and in the parliament.

Following the preamble, Title One discusses “general principles”, including the country’s identity, stating specifically in Article 2 that it is a civil state and in Article 1, that its religion is Islam. This chapter further discusses taxation, the family, youth, social justice, and sustainability. Most controversially, however, Article 6 requires that the state protect both freedom of conscience and religion. This discussion was hotly debated during the constitution-making process. Civil society actors and secularists urged for the protection of freedom of conscience in the constitution, while religious components of the government wanted to ensure the constitutional protection of religion (Cross & Sorens, 2015; Netterstrøm, 2015; Stepan, 2012). Both, however, were recognized in the same Article. This is bound to create some contentious debates in relation to policymaking and judicial decision-making (Pickard, 2015). It is ironic that this is the case because it is argued that Article 6 was framed as such in response to MP Mongi Rahoui being called a “non-Muslim” during the constitutional debates and endured daily death

threats (Ghribi, 2014). In attempts to quell this, it seems that Article 6 may constitutionally allow these accusations to be proscribed in law (Ghribi, 2014; Pickard, 2015).

Title Two focuses on rights and freedoms. This section lists 28 different rights and freedoms Tunisians are granted in the state. This includes human rights, access rights, legal rights, and freedoms. The right to privacy, the right to be innocent until proven guilty, and freedom of opinion, expression, and thought are all included in this chapter. This chapter also faced a lot of debate during the constitution-making process. One of the most contentious was the decision about women and their place in the state and the constitution. The government initially drafted into the constitution that women are complimentary to men as opposed to equal. This triggered massive protests in Tunis, with men and women from across the country fighting for the protection of women's rights in the constitution. Following the demands from the people, the government scrapped this proposal and ratified Article 21, which states: "All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination" (Article 21, Tunisian Constitution 2014).

Another contentious point was the allowance of the death penalty in Article 22: "The right to life is sacred and cannot be prejudiced except in exceptional cases regulated by law". INGO participant i1 worked diligently for the abolishment of the death penalty and while several of their other recommendations were accepted, this in particular was rejected. Another interesting debate during the constitution-making process was that of freedom of expression. Before the discussions on this Article began, the ANC made it clear that the constitution would limit this freedom, whether expression or speech. There were concerns about how the sanctity of religion would be protected from freedom of expression and members of the ANC stated that this would be through limiting it. The ANC, however, surprisingly adopted the broadest form of

speech protection, the freedom of expression. Considering their initial hesitation and concern for religion, it is likely that lobbying and pressure caused the inclusion of freedom of expression as opposed to the more narrow freedom of speech. Finally, Article 49 gives the courts the authority to protect “rights and freedoms from all violations” (Article 49, Tunisian Constitution 2014).

Titles Three and Four states that Tunisia will have a dual executive and details the division of powers between the legislature and the executive. The legislature controls most of the operations of the state, develops nearly all legislation, and is represented the Prime Minister as the head of the government. On the other hand, the executive controls foreign policy, has some veto powers, and is represented by the President as the head of the state. The system was created for two reasons. First, it was a response to the decades of authoritarianism in Tunisia. Creating a political system that was decentralized was important for all participants included in the study. Second, this was a way of creating consensus between the Islamists and the secularists. Under the strong Presidential system of the previous 54 years, *Ennadha* members suffered disproportionately. Thus, they wanted to see a strong parliamentary system. Other secularist parties, however, feared that a parliamentary system would lead to increased Islamists dominance in the government. As such, they wanted a stronger executive. The constitution therefore accommodates both sides with the dual system.

Title Five discusses the judiciary and its role in the state. Article 102 begins this section, exclaiming that the judiciary remains independent and it protects the rule of law, the supremacy of the constitution, and human rights and freedoms. Other pressing judicial norms are included in this chapter such as neutrality, job security, and financial independence. One contradictory aspect, however, is found in Article 103: “They shall be held accountable for any shortcomings in their performance” (Article 103, Tunisian Constitution 2014). It is unclear who holds judges

accountable and determines if there are errors in their decision-making. This chapter also guarantees legal rights such as the right to a fair trial, the right to a speed and public trial, and the right to an attorney. The chapter also creates, most prominently, a Constitutional Court and guarantees judicial review for some articles, relating mainly to human rights and freedoms. Duncan Pickard (2014) expresses some concern over this particular court as judges are tasked to decipher between competing and often contradictory rights, while lack sufficient training to do so. Many justices served during authoritarianism and were coopted by the Ben Ali regime. As of now, the Constitutional Court is yet to be established thus it remains to be seen how judges will proceed in cases where rights are in conflict.

Title Six of the constitution enacts five independent constitutional bodies. The Elections Commission is responsible for managing elections and referendums. The Audio-Visual Communication commission develops an audio-visual sector that protects freedom of expression and access to information. The Human Rights Commission investigates human rights violations and works to ensure its protection. The Commission for sustainable Development and the Rights of Future Generations must be consulted when laws relating to social, environmental, and economic issues are drafted. Finally, the Good Governance and Anti-Corruption Commission helps to create and ensure the implementation of policies that promote good governance, “transparency, integrity, and accountability” (Article 130, Tunisian Constitution 2014).

Title Seven concerns local government and truly exemplifies how far the state went in ensuring decentralization. This chapter delegates the authority of municipalities have relating to budgets, shared and delegated powers, resources, and elections. Interestingly, Article 133 requires that there is mandatory youth representation and Article 139 requires the adoption of “mechanisms of participatory democracy” (Article 139, Tunisian Constitution 2014).

Title Eight outlines the amending formulas. The constitution can be amended through the recommendation of the President of the Republic or one-third of the Assembly of Representatives of the People. The request is sent to the Constitutional Court, who then determines its lawfulness. Articles 1 and 2 are not subject to amendments.

Title Nine discusses the final provisions, which essentially concludes the constitution and Title Ten are transitional provisions.

There is a lot to be said about this constitution. There are certainly conflicts throughout that will have to be adjudicated in the Constitutional Court. The balance between individual rights and collective rights is the most prominent. Often in the same sentence, there are competing rights. That being said, Duncan Pickard (2014) states that the international community should applaud Tunisia for constitution that he deems to be, at times, more liberal than most Western democracies.

### 3.3. Local NGOs: An Integral Component of Tunisia's Constitution-Making

Although this project is about INGOs and their influence, I would be remiss not to acknowledge the role of local NGOs. After many years of authoritarianism, the longsuffering civil society in Tunisia actively contributed to the constitution-making process. Tens of thousands of local organizations were established following the flight of Ben Ali. While civil society was certainly not a unified voice, they pressured the government and actively worked with members of the ANC and each other to ensure the drafters establish a democratic constitution and, in turn, a democratic state.

Like their international counterparts, local NGOs accessed the ANC through constituent members, but, unlike INGOs, were initially met with resistance. NGO participants n11 and n5

stated, respectively, that this was for two reasons: constituent members concern for “who [local NGOs] were for” and the perceived inexperience of local actors. NGO participant n5 stated specifically that it “...was not internationals over nationals, but more a question about expertise”. NGO participant n4 stated that the ANC was even more likely to talk to organizations formed prior to the revolution. These factors made it more difficult for local NGOs established post-revolution to directly interact with the state at the beginning of the process. Many participants stated, however, that local civil society forced their presence in the ANC. NGO participant n5 stated that the ANC did not do much to include NGOs in the constitution-making process: “the ANC did not have a choice, we were part of the landscape. The ANC and members could not exclude them, they were there and they stayed there. They took their [rightful] place”. Participant n11 noted that most ANC members were open to speaking with local civil society, but not in an official capacity and the participant added that some deputies told them to “go get a real job”. This organization, along with others, described gaining openness towards local actors in the ANC as a fight, or something they needed to push for.

Eventually, local NGOs benefitted from the same type of access as INGOs and pre-revolution local actors. These actors were expectedly invested in the constitution-making process, dedicating much time and effort to ensure the successful entrenchment of a liberal democratic constitution. Participant n3 stated that they made monitoring reports throughout the constitution-making process and distributed these to the political parties. Participant n4 stated that they actively monitored the ANC and its members and provided some advocacy when necessary. Participant n6 discussed lobbying the ANC in order to ensure substantive protections relating to human rights more broadly. Others discussed hosting roundtables, leading open public discussions, and having private meetings with the ANC members. Participants n3 and n4 in

particular talked about their work with the constitutional commissions, the bodies constituted by the ANC to work on sections of the constitution, including the Commission of Freedom where one participant was asked to participate in a discussion concerning women's rights in the constitution.

Their work did not remain at an institutional level; local NGOs worked along side citizens in ways only national actors could. One in particular, participant n7, stated that "civil society operated both in and out of parliament", with this organization writing its own constitution and delivering it to the ANC. They also led sit-ins in Bardo, where the parliament buildings reside. Two other participants discussed their local advocacy relating specifically to women's rights. Participant n10 called for a March for Women following the fall of the regime and participant n3 partook in the August 14<sup>th</sup>, 2012 march against making women complimentary, as opposed to equal, to men in the constitution. The worker's union also made mention of its calls for general strikes throughout the state at various times during the constitution-making.

Local actors also benefitted from the networking opportunities provided by INGOs. These actors trained local NGOs similar to that of constituent members. INGO participant i1 stated that their organization trained 45 Tunisian organizations on practical skills such as writing effective reports. Most INGOs in the study stated that their respective organizations worked with civil society to reinforce its capacity by disseminating technical expertise and organizing workshops on various issues. INGO participant i4 likewise stated that they would "provide expertise but the objective is to see that they are better experts in some issues. Now, there are NGOs that are very professional and are experts in their particular field. Issues were new [at the time and] no one worked on elections".

Local NGOs agree that INGOs were instrumental in the development of Tunisian civil society. Participants generally stated that the INGOs helped them to professionalize, write policy papers, navigate political issues, and build capacity. Participant n5 specifically discussed their work with National Democratic Institute (NDI). NDI helped to advance the practice of the participant's organization through training members on a particular monitoring methodology. In the participant's office, there were posters on the wall from NDI, with a diagram depicting the methodology that was taught. The participant stated that this is an example of the best practices that were taken from NDI and others.

Eventually, participants stated that the ANC and constituent members relied on local actors as they did INGOs. NGO participant n7 stated that ANC accepted the role of civil society over time and "then the ANC demanded them... Some articles have no judicial content... [they were] just [added] to make organizations happy that wanted it". A few participants further made note of the fact that the ANC made some institutional changes to accommodate civil society. A member organized how civil society accessed the constitution-making and would call organizations and discuss various issues with them. Networking may have, in ways, enhanced the viability of Tunisian civil society.

It is generally expected that international and local actors network during policymaking. Often the objective of international actors is to develop capacity and support or provide advocacy (Gomez, 2005; Keck & Sikkink, 1998). Jackie Smith (1997), though her work is primarily in relation to transnational social movement organizations, discusses the importance of domestic and international actors to one another. Smith (1997) states that it is important to the larger, transnational movement that likeminded domestic actors become involved in the cause. Furthermore, it is beneficial for the local counterpart to network internationally for access to

resources or expertise. The networking between the two groups can, as such, be mutually rewarding. At face value, it appears that this was the case.

Despite the involvement of numerous internal and external actors, constitution-making process was a triumph for local civil society. NGO participant n11 stated that “there was some lobbying and INGOs were giving advice but at the end of the day it was a Tunisian project”. Participant n1 stated that “NGOs and civil society had a say in the constitution-making and said everyone obviously has the right to be part of the process of making the constitution because we are all Tunisian... this was Tunisian blood and flesh”. Local actors rightfully took ownership of this constitution; they worked tirelessly and had more obstacles to consider than their international counterparts. Finally, participant n4 nicely frames the constitution-making in a way that other local NGO participants would surely appreciate: “We had a Tunisian constitution with a Tunisian spirit – a Tunisian spirit, Tunisian weirdness”. The role of local organizations is not lost in this project. That being said, this is more or less expected from national actors. A foreign actor such as INGOs becoming involved to the extent that they did, however, is unforeseen.

Tunisia’s constitution-making process occurred during regime change in the state and involved both local and international actors. Transitional constitutionalism assumes that in these circumstances, external actors will become involved in constitution-making. Following the flight of Ben Ali, the façade that Tunisia was a uniform, homogenous country was quickly collapsing. Social schisms developed into political schisms. Navigating through this proved to be challenging at times and created a constitution-making process that was often marred by contention and distrust but created the most liberal, though at times convoluted, constitution in the region. Simultaneously, Tunisian local actors were strengthening and lobbying the state for particular rights and freedoms. This work successfully occurred inside and outside of the ANC.

Through the support of INGOs, local actors were able to participate in prominent ways through the duration of the constitution-making. It is by these actors that INGOs were able to penetrate the state and influence the constitution-making. Understanding the context through which INGO involvement in the constitution-making occurred, allows for a better understanding as to why and how this occurred.

## Chapter 4: Direct and Indirect Influences on the Constitution-Making Process

The gaps in the transitional constitutionalism literature expose the fact that INGOs and their contributions are not considered adequately during constitution-making. In Tunisia, however, INGOs worked both directly and indirectly, influencing the process and the text. During its simultaneous regime change and constitution-making, Tunisia welcomed and arguably required the assistance of these organizations to ensure a successful democratic transition. Due to the fact that INGOs do not possess the traditional coercive powers of the state, their success in changing and implementing policy may be surprising. Daniel Thomas (2001) explains that INGOs, in lieu of military and economic resources, acquire expertise and export international law in order to attain and maintain their legitimacy within the state. This was certainly the case in Tunisia. INGOs gained the trust of constituent members and local NGOs due to their perceived expertise on democracy, human rights, and constitution-making more broadly. These actors effortlessly accessed the state and were given the authority to train, organize workshops that were attended by members and civil society actors, and take constituent members abroad to learn “best practices” from similar countries experiences or the functions of the particular INGO’s home state.

The findings of this research exemplify the proximity of INGO to the process, identifying empirical realities and its accompanying normative concerns. I begin by focusing on the empirical data and identify two specific findings: INGOs influenced directly and indirectly. By “direct”, I refer to INGOs participating with the state, its institutions, and its actors. The institution of consequence to this research is the *Assemblée Nationale Constitunante* (ANC), while the actors refer to the constituent members. Although direct access to the state by a non-state, foreign actor is out of the norm, it proved to be an effective method through which INGOs

engaged in the constitution-making process. The indirect means, in the case, refers to influence through local civil society actors.

In terms of the direct influence, I identify five interrelated factors that enhanced INGO involvement in constitution-making: 1) the inexperience of the state and its actors, 2) the openness of the state, 3) the inexperience of local NGOs, 4) the expertise of INGOs, and 5) the political climate during Tunisia's constitution-making. INGOs influenced through the dissemination of expertise, training, writing reports, among other things (Thomas, 2001). Indirectly, INGOs networked with local NGOs vis-à-vis ideational and material, and financial means, often with the intention of influencing the constitution. I argue that through direct and indirect means, INGOs influenced the process and the constitution itself.

#### 4.1. International NGOs and Constitutionalism: Exploring Influence through Direct Access

As bearers of expertise and international law, INGOs were granted full access to the ANC and its members during the constitution-making process. In fact, it can be argued that this access was at times better than that of local NGOs. INGOs were initially met with less skepticism than their local counterparts, as they were presumed to be more professional, experienced, and unlikely to have a political agenda. Most participants of the INGO sample group (5 out of 7) stated that they trained constituent members by providing them with expertise on interests that were specific to their INGO, and organizing workshops. INGOs also took constituent members abroad to countries of their origin or countries with similar experiences to learn how to manage a liberalized democracy and observe the functions of government. The states that were mentioned as hosts by constituent members included Belgium, Germany, and former Soviet Union states.

All constituent members interviewed corroborated what INGOs claimed relating to their relationship with the ANC and its members. The members did not resist these trainings, but rather welcomed the “expertise” that was provided. The members participated in workshops relating to rights, elections, freedoms, the judiciary, and decentralization, among others. Constituent member participant c1 stated, however, that it was hard at times to allow INGOs to become involved in the constitution-making: “...it was hard at the beginning. It was our sovereignty, what are they going to do with our country, our constitution. But we understand seeing other countries and other experiences all of them would help us to get through and not to fall for the same mistakes”. INGOs, of course, agreed that their role was vital for this purpose. The Tunisian constituent members had little experience in democratic values; thus, they perceived it as their duty to deliver this to the government. Constituent member participant c5 also stated, however, that the role of INGOs was not “to replace the ANC members but to train them and help them”. They further argued: “A country like Tunisia needed help at the time that it received help. Tunisia made decisions, it did not touch our sovereignty or independence”.

Constructing Tunisia as simply a country in need, however, does not sufficiently explain why INGOs became so actively involved in the constitution-making process. The research finds five interrelated reasons why INGOs participated in the constitution-making process to the extent that they did: the inexperience of the state; the openness of the state; the inexperience of local NGOs; the resources and experience of INGOs; and the political skepticism between the state and civil society.

#### 4.1.1. *Inexperience of the State*

The inexperience of the state was truly the catalyst for the INGO participation. As discussed, the authoritarian regime in Tunisia was in place for over five decades. Tunisian

constituent members were predominantly new to activism at the start of the revolution and likewise new to politics when elected. Expecting the formulation of a democratic constitution without prior experience was indeed a monumental task. Simultaneously, established, prominent INGOs began to prepare for fundamental changes to the state at the beginning of the revolution. INGO participant i1 in particular stated that they were carefully monitoring the situation in Tunisia before the fall of the regime. Once this occurred, participant i1 suggested that the ANC needed procedural and substantive assistance, stating that when the constitution-making began, they provided a plan to ensure that they “cut away all the wrong ways of the old system... and make sure they start going the right way and respect human rights and more in Tunisia”. Other INGO participants were more blunt, with participant i3 stating that “the ANC relied on [the organization] to be honest”, stressing that they were “involved and collaborated” with constituent members. This participant in particular provided the ANC with four legal analyses on the constitutional drafts and claims some ownership of articles 6, 32, 34, 35, 49, and 127 in the constitution.

The notion that INGOs are approached as custodians of expertise and knowledge is well studied in scholarship. Kenneth Anderson (2001), though critical of these actors, acknowledges that they are often the drivers of policy within a given state. According to Sheila Aikman (2017), the state may not have the capacity to achieve a policy goal, opting to look externally for assistance. She describes these relationships as multi-faceted, which may be formal or informal and long, or short (Aikman, 2017). She states that within the “cacophony” lies some level of cooperation and agreement for something better, and that this can continue to grow and be further understood in varying contexts (Aikman, pg. 509, 2017).

Constituent members agreed that this involvement was necessary, with one in particular arguing that the ANC sought the experience of these organizations. Reliance on an INGO during what is deemed a state-building project is surprising, but was effective in this context. As stated earlier, Tunisia was, for many years, an authoritarian state. Transitioning to democracy provided a practical challenge for many members, most of whom were never involved in politics prior to their election. Further, the majority of the citizens that had political experience were barred from participating. In order to successfully draft a democratic constitution, the state deemed it necessary to look outward for the experience and expertise that was believed to be missing internally.

#### 4.1.2. *Openness of the State*

This leads to the second finding, the openness of the state. As discussed, members were inexperienced; many of whom never formally participated in activism or politics until the fall of the regime. The ANC recognized this and promoted an open door policy during the constitution-making process. INGO participant i4 stated that while there was never a formal inclusion of local and international organizations (“no contracts were signed... this was never legalized”), INGOs and local NGOs had full access to the ANC and its members. All constituent members participants spoke to the ANC’s willingness to include international and local actors during the process. Participant c5 presented the ANC as a graceful actor, arguing that they had the electoral legitimacy to work behind closed doors but made a choice to work openly with everyone. The participant stated that the president of the ANC created an assistant specifically to organize international actors. Participants c2 and c6 claimed that the constitution-making process was cooperative, participative, and open to both national and international actors. In fact, participant

c8, a very prominent constituent member at the time of the constitution-making, stated that INGOs were “side by side with the ANC work”.

The constituent members were generally in agreement in relation to the openness of the state. One in particular, participant c4 stated that the ANC was inclusive and took a participative approach. The participant further stated that an INGO called Democracy Reporting International (DRI) was very involved in the constitution-making process, particularly in drafting the articles concerning the constitutional court. This participant continued, stating that at times INGOs “provided either expertise or demands but the demands were never out of step with the advocacy already occurring”. They would give their ideas to the constituent members who would then present them to the ANC.

There was an initial concern among some constituent members that INGOs may be too authoritative; however one of the participants stated that when these members observed that there was total cooperation between the ANC and INGOs, their suspicion subsided. Overall, constituent members concluded that the ANC was open, co-operative, and encouraged participation.

INGO participants fully agreed with this sentiment. The ANC, according to participant i1, cooperated with INGOs throughout the constitution-making process. While INGO participant i4 earlier stated that relationships were typically informal, some of these existed within a formal capacity. Participant i1 stated that at the beginning of the constitution-making process, “they contacted ANC members to make sure that they will respect human rights”, particularly ten recommendations that will be discussed shortly. This organization further communicated with ANC members and political parties directly, with the expectation that parties would pressure constituent members to votes in ways that would ultimately reflect the policies of the

organization. Participant i6 also stated that “members of the organization attended meetings with ANC members and expert meetings”. In fact, five to six members were listed as contributors on the first constitutional draft. INGOs agreed that the ANC fostered an environment of cooperation and participation and allowed INGOs to fully access and engage in the constitution-making process.

Participant i5 had a unique relationship with the state during the constitution-making process. The organization worked strategically with a political party and its leader and the worker’s union in Tunisia. Due to their alliance with the political party, they had substantial access to the constitution-making process and trained constituent members, most commonly through workshops. Again, while INGOs were never formally constituted to the ANC, they had incredible access, which, in turn, enhanced their “influencing capabilities”.

There is seemingly a misconception in the constitutionalism literature relating to the willingness of the state to allow external actors to participate in constitution-making. Sarah Mead (2014), and Phillip Dann and Zaid Al-Ali (2006) assume that excessive external influence is forceful and done so without the consent of the state. Although transitional constitutionalism expects such involvement, the scholarship regarding *pouvoir constituant* and constitutionalism more broadly does not. Prominent cases such as the constitution-making of Afghanistan, Iraq, Kosovo and Timor-Leste, where external actors captured from the polis the ability to create a constitution, have instead become pillar examples in the debates about foreign influence during this process (Dann and Al-Ali, 2006). The scholars do not consider that in contrast, international actors may be encouraged and requested to assist in drafting a constitution, as was the case in Tunisian. This study demonstrates that context is paramount and assuming that the state avoids

international involvement and external actors will seemingly by nature hijack the constitution-making process is simply not the case.

Through the perspective of the INGO literature, state openness to INGO engagement is not unusual. Earlier, Sheila Aikman's (2017) discussion about the state cooperating with INGOs presents this as a norm in particular contexts. Moreover, Kenneth Anderson (2001) irritatingly admits that the state is open to INGO contributions during policymaking and perceives them as legitimate actors. While this is something he detests, he does not deny that this is the case.

The openness of the state and its necessity to INGO involvement in Tunisia is important. Without an open ANC, the involvement of INGOs *may* have still been possible but with far more hostility and distrust (Anderson, 2001). As one of the constituent members noted, the state did not lose its sovereignty by including these organizations. The constituent members decided that allowing such assistance was a logical decision.

#### 4.1.3. *Inexperience of NGOs*

The third factor that contributed to INGOs involvement in constitution-making was the perceived weakness of local NGOs. Most NGOs that were established in the state were post-revolution. Thus, these organizations did not have the opportunity, as their international counterparts, to monitor the Tunisian situation as it unfolded and strategize accordingly. The perception of unpreparedness and inexperience, particularly in comparison to INGOs, followed local NGOs into the constitution-making process. Constituent member participant c6 argued that INGOs needed to be involved in the constitution-making process because "they came up with a certain [expertise] and our NGOs were not that strong... and [INGOs] had notoriety". Participant c2 stated that when Tunisian NGOs could not determine whether something was good or not, the internationals did. INGO participant i3 even goes so far to say that "local expertise at times was

not relevant... the ANC accepted international advice”. This can partially explain the ANC’s resistance to local NGOs in the constitution-making at the beginning. International expertise was valued while locals initially were not.

This was something that local actors, unsurprisingly, rejected. For the NGOs included in this study, the notion that they were incapable was both insulting and inaccurate. A local NGO participant reasoned that this statement represents a continued colonial mentality of Tunisians. This participant, n11, stated that many Tunisians believe that “everything international is better than the local”. Participant n9 stated that while INGO assistance was useful, Tunisia had the “essential expertise” to draft a constitution. Hence, the value of INGO expertise was overstated. The National Dialogue Quartet is testament to this. Four local organizations, *Union Generale Tunisienne du Travail* (The Tunisian General Labour Union); *Union Tunisienne de l’Industrie, du Commerce, et de l’Artisante* (The Tunisian Confederation of Industry, Trade, and Handicrafts); *La Ligue Tunisienne pour la Defense des Droits de l’Homme* (The Tunisian Human Rights League); and *Ordre National des Avocats de Tunisie* (The Tunisian Order of Lawyers), came together at a time of constitutional and political uncertainty and directed a path for the successful entrenchment of the constitution. These organizations, however, are very different from the tens of thousands that were created after the end of authoritarianism. All four were established long before the revolution and relentlessly opposed the regime for decades. These organizations, while very notable, are not representative of the conception ANC members had of the most recently established local NGOs.

James Gomez (2005) speaks at length about the INGOs and local civil societies. He argues that oftentimes INGOs are believed to be filling a gap that the local civil society is yet to address. He further states that INGO leadership is usually not sustained and this, in a way, acts as

an energizer to the local actors. What makes the Tunisian case exceptional is the fact that the work of international actors did not catapult civil society into action, rather the Tunisian revolution. Yet, INGOs continued to “fill the gap”. As such, I would add to Gomez’s (2005) findings and suggest that in this case, even the *perception* of a gap on the part of the state and INGOs, led to more external leadership in constitution-making.

Local NGOs were generally new and inexperienced. Coupled with the perceived inexperience of constituent members, INGOs assumed the role of expertise disseminators to the state. Although civil society was aware of the pressing issues and ready to work with the ANC, this perception that they were incapable made room for INGOs to seemingly take their place during the constitution-making process.

#### 4.1.4. *Expertise of INGOs*

In line with the previous discussion, INGOs became very involved in constitution-making because they possessed resources and expertise. In lieu of local NGOs, INGOs proved to be a convenient replacement. This worked well for INGOs in pursuit of their interests. While this is implicit in the other factors, it is particularly more explicit in this one. All of the INGOs and constituent member participants agreed on the work INGOs did, whether it was coordinating training sessions and organizing workshops, or even providing travel abroad for constituent members to understand and observe other constitutional regimes. Two INGO participants in particular stated that their organizations disseminated technical expertise to the ANC, held meetings with constituent members, and generally helped them during the constitution-making process.

Constituent members echoed this, with participant c3 stating that INGOs were observers, and always in attendance and giving suggestions. This participant suggested that INGOs did

influence because they disseminated norms and values concerning human rights, technical parts, judicial advice, decentralization, and knew how to maintain independence. Participant c6 also stated that “a lot of INGOs visited the assembly and gave us a lot of advice”, most of which was accepted because of their perceived experience. Participant c2 further stated that INGOs were oftentimes observing the constitution-making process, offered expertise, and organized comparison programs. NGO participant n11 cited Democracy Reporting International (DRI) as an INGO that presented reports to the assembly and worked closely with deputies, stating: “expertise, technical support, and recommendations were also a role of INGOs”.

Constituent members also discussed going abroad as an alternate means of education. Constituent member participant c7 stated that organizations such as “Human Rights Watch, UNFPA [were partners] in organizing a lot of hotel meetings, training, workshops, and we visited ... non-Tunisian parliaments to see how it works”. Constituent member c1 agreed that INGOs helped the ANC through training and further stated that these organizations took MPs to different countries “...[such as] USA to see how they made their constitution”.

While factors such as the inexperience of the state and local actors are considered prominent reasons why INGOs were so influential, a number of INGOs stated that their success was simply due to the fact that they were better prepared and experienced. Participant i1 stressed that INGOs generally had a better strategy than national NGOs: “the main differences were strategies for advocacy and communication strategies... and this organization in particular had clear strategies ... and experience unlike national NGOs that had no experience and limited resources”. INGOs were experienced in this type of advocacy and it was easier for them to actively partake in and influence the constitution-making process.

While Daniel Thomas (2001), does not compare the skills of INGOs and local NGOs, he speaks highly of the ways through which these international actors gain power through knowledge. Thomas (2001) argues that INGOs are trusted and successful because they are deemed to not only possess expertise, but generally more so than internal actors on a given topic. As such, these actors are provided access to the state and can influence in unpredictable ways. Ann Fiorini (2009) further discusses the power of INGOs to influence policy. Without discussing the normative implications of this practice, she states that INGOs have the ability to affect the decision-making of very powerful states and alter the behaviour of those perceived to be weaker (Fiorini, pg. 9, 2009). This again, relies on the assumption that INGOs are professional experts in relation to their particular interests. State actors in Tunisia had the same assumption of INGOs; they are experts in their field and can be trusted.

It can be gathered that the same motivations that drive states to accept the advice and include INGOs during policymaking are likewise apparent during constitution-making. Tunisian constituent members trusted INGOs, empowered them through access, and relied on them in many ways due to their expertise in democracy more broadly. What is interesting to further consider is the fact that while constituent members sought expertise, INGOs pursued the constitutionalization of their interests. The state accepted INGOs advocacy and training because they assumed them to be the experts in their given fields. Thus, the interests that drive INGOs were often deliberated and at times ratified into the constitution. What made this acceptable in this case is the fact that the state and the INGOs included in this study wanted a similar end: a democratic Tunisia. INGOs working to achieve their interests were therefore tolerated as it was ultimately in the interest of the state.

#### 4.1.5. *The Political Agenda of NGOs*

The final factor allowing INGO to participate to the extent that they did was the political atmosphere post-revolution. As alluded at the beginning of this chapter, Tunisians were divided for a number of significant reasons, but most prominently regarding the place of religion in the state. Many culturally and economically powerful Tunisians were secularists and though they no longer supported the Ben Ali regime, they feared the influence of religion in politics, as is commonly the case in the region. To the surprise of many secularists, the Islamist *Ennadha* party, an organization previously banned by the first president Habib Bourguiba, won control of the ANC and thus the constitution-making. In Tunis, the political and economic hub of the country, many local NGOs were secularists and resented the election of Islamists. INGO participant i4 stated that the Islamist government of the day was always in opposition with, what the participant calls the more “left civil society”. As such, these “NGOs were seen as being very partial” and the government refused to work with them. Participant i1 concurred, stating that “the domestic [organizations] were kind of controlled by politics... but for INGOs that was not the case”. In addition to the confrontation with local civil society, the *Ennadha* could not work with any local constitutional experts and scholars as they were likewise secularists and in opposition to their government. Ultimately, the ANC needed expertise but could not work with nationals. The solution was to import this expertise vis-à-vis INGOs. The previous participant continued, stating that “INGOs were more neutral while local experts were not... INGOs, including this organization, gave substantive expertise and MPs were confident in INGOs”. The participant further stated that INGOs were not fearful of religion while local civil society was.

Certainly, local NGOs were aware of the government’s assumptions concerning their political affiliation. NGO participant n11 stated that deputies were constantly “worried about

local NGOs and who they were for”. The participant questioned the relevance of such an inquiry particularly since many organizations were ready and willing to work with the government. Participant n5 stated that in order to be trusted it was crucial that they remained politically neutral. The participant argued that it was through this neutrality that the organization was successful. All things considered, participant i4 reasoned that the composition of the government and the divisiveness of Tunisian politics between secularists and Islamists compelled international influence and inadvertently allowed for the inclusion of INGOs.

The political environment in Tunisia and the ANC’s subsequent deference to INGOs is, perhaps, the most interesting finding in this respect. It is not often that the state would actively seek external assistance in order to avoid local actors. Margaret Keck and Kathryn Sikkink (1998) discuss the tendency of local NGOs to network with INGOs as a means of putting pressure of the state. Further, scholarship generally depicts external assistance as either coordinated with or in place of totally absent internal actors (Ahmad, 2006; Aikman, 2017; Gomez, 2005; Keck and Sikkink, 1998; MacDonald, 2015). It is not usually the case that INGOs would be used to wholly replace or circumvent active civil society actors.

This finding is rather controversial but exposes the motivations of the state, at this particular point of the constitution-making process. The ruling Islamist party had misgivings towards “secularist” civil society and this initially could not be overcome, hence the decision to look outward.

The research finds that these interrelated reasons explain, or at least begin to explain, the deference to INGOs during Tunisia’s constitution-making process. All also speak to the perspective of the state during the constitution-making process. This was an actor that was intent on entrenching a democratic constitution, with its members stating that human rights, freedoms,

decentralization, and the judiciary being among the most prominent substantive concerns. These interests aligned with the interests of at least the INGOs included in this study. This, coupled with their initial struggles with civil society, made INGO involvement more attractive. Including INGOs in the constitution-making process was ultimately a strategic and arguably beneficial decision for the state.

#### 4.2. International NGOs and Constitutionalism: Indirect Governance through Civil Society

As demonstrated, this research finds that INGOs were permitted direct access to the state, specifically the ANC and the constituent members during Tunisia's constitution-making process. INGOs trained members and organized workshops on particular subjects in an effort to develop the capacity of the ANC more broadly and, to some degree, influence the constitution. Despite their proximity to the constitution-making process, INGOs also networked with local NGOs. Why, if direct access was so effective, were INGOs networking with local civil society? Engagement with the state was not an issue for these actors and influence was sufficiently materializing. For INGOs, however, networking with Tunisian civil society proved to satisfy their altruistic and self-interested motivations. Andrew Heiss and Tana Johnson (2016) argue that while these actors intend to be selfless, they are often like firms seeking to fulfill their interests. While building the capacity of civil society actors was a goal, this research finds that INGOs worked with local NGOs to sustain influence ideationally and financially. INGOs included in this study often did not choose between direct and indirect influences; rather, they used both means of influence differently but effectively.

I base my analysis on Kenneth Abbott, Philipp Genschel, Duncan Snidal, and Bernhard Zangl's (2015) theoretical framework of "indirect governance". This theoretical perspective

suggests that the external “governor” enlists the help of “intermediaries”, non-state actors, to implement their policy goals. The governors typically form two types of relationships: principal-agent (defined by delegation) or orchestrator-intermediary (defined by orchestration). Principal-agent theory argues that INGOs delegate tasks to local counterparts, signifying that they have considerable power and control over these actors. Orchestrator-intermediary theory, alternatively, recognizes that while the governor may be influential, so too is the intermediary and cannot be as easily regulated. The governor remains intent on influencing, however, chooses instead to do so through the provision of material and ideational support. The governor determines which relationship can more effectively accomplish its interests.

In this case, I assume that INGOs are the governors and local NGOs the intermediaries. INGOs in this study needed to navigate their relationships with local NGOs and determine whether delegation or orchestration was a more appropriate means of networking. Almost all INGOs and NGOs in this study developed relationships that can be defined by orchestration. These networking relationships typically saw INGOs providing ideational support, and creating what appears to be equitable, balanced relationships. That being said, the motivation for many of these INGOs was to see the constitutionalization of their various interests. Only one INGO participant’s networking patterns with local actors can be explained through delegation. This and other such relationships were typically defined by financial control. Indirect governance, which usually explains external actors’ means of impacting policymaking abroad, effectively explains how INGOs utilized the local actors in Tunisia to entrench their substantive interests into the constitution. This section begins by discussing the ideational means of influence, and continues with a discussion of the financial means of influence.

#### 4.2.1. *Ideational and Material Means of Influence*

The orchestrator-intermediary theory best explains how the majority of the INGOs included in this study utilized civil society actors. Furthermore, the local NGOs included in this study only formed networking relationships that more closely aligned with orchestration. Abbott and his colleagues (2015) argue that the governor mobilizes the intermediary “on a voluntary basis in pursuit of a joint goal” (pg. 722). The ideational and material support that the governor provides “strengthens the intermediary...[and] can nudge the intermediary towards governance goals that are compatible with its own goals” (Abbott et al., pg. 722, 2015). It must be emphasized however, that while the governor intends to influence, their control is limited and they are unable to coerce the intermediary (Abbott et al., 2015). Thus, the scholars state that this represents a more horizontal relationship and can be described as “soft influence” (Abbott et al., pg. 722, 2015). This accurately describes the intentions of networking by most INGOs included in this study and the means through which this could occur.

As discussed, INGOs did not require local NGOs assistance to access the ANC. Yet, INGO participants noted that the engagement with local civil society was necessary so as “to not go it alone”. Participant i4 stated that while the organization was keen on ensuring a network with local NGOs was established, this did not contribute to the betterment of their access as they already had direct access to constituent members. Thus, networking was for a particular purpose unrelated to access. INGOs in the study further admit that networking was not solely altruistic. A number of INGOs reasoned that networking with these actors would increase their legitimacy and in turn, help to advance their constitutional objectives. Simply put, networking provided an effective way for INGOs to accomplish their goals. According to INGO participant i7, the work

of INGOs would be unbeneficial and meaningless if they did not cooperate with the local NGOs. The participant stated: “generally we cannot do work without local civil societies so the project needs the civil society organizations because through them they will have a project”. Doing so directly was certainly effective, however, working through civil society actors also produced results.

For INGO participant i1, ensuring that their networking advanced their particular goals meant limiting the local NGOs they formally partnered with. While they trained 45 civil society organizations throughout the country, the participant’s organization chose to only work with prominent, post-revolution local NGO *Al-Bawsala*. This local organization is certainly the largest and most established of its kind in the state. Participant i1 worked solely with *Al-Bawsala* during the constitution-making process because the organization was “so professional and they agreed upon the goals of the INGOs”. Although the participant stated that the INGOs and local NGOs needed each other, it seems that this INGO decided what they needed and from whom.

Interestingly, INGO participant i6 stated this: “local networking is efficient. It is good to gather support... it is hard to go it alone [and] networking was a focus as it was an important component of our advocacy campaign”. This participant attributed the effectiveness of networking to the fact that the organization did, in fact, succeed through this manner. The participant stated that the organization worked with local civil society actors to make certain that an article representing freedom of religion and expression was constitutionalized and it was in article 6 of the constitution. The participant stated that the organization “helped civil society organize and helped civil society with Article 6 of the constitution”.

As much as the advancement of particular interests was the goal of these INGOs, local actors also shared these interests. Local NGO participant n4 stated that Democracy Reporting

International (DRI), Friedrich-Ebert-Stiftung (FES), and Konrad-Adenauer-Stiftung (KAS) were a few of the organizations that trained them. They chose to network with these particular INGOs because “they supported the transition period, they supported democracy, they supported human rights, and all of those principles”. This example acknowledges the fact that some local NGOs, particularly the ones included in this study, were professional and was involved in deciding the networking partnerships they were interested in developing. This does not bode well for INGOs attempting to create a relationship that resembles delegation. A few local NGO participants stated that they resisted networking with numerous INGOs because they were notably controlling and preferred to micro-manage. The local NGOs included in this study were evidently not as susceptible to power differentials between themselves and INGOs.

The networking practices of the INGO and NGO participants more closely resemble the orchestrator-intermediary theory. Although this appears to be an approachable, balanced means of interacting with local actors, the motivations were for the indirect influence on the constitution-making process. Most of the INGOs in this study, recognized that delegation and control might not have always been the most helpful means of influence. As such, the choice to orient local civil society in a particular fashion as opposed to imposing specific conditions simply represents a more effective means for indirect governance. Through teachings and trainings, INGOs indisputably aided in developing the capacity of local organizations and assisted in creating liberal, democratic factions within civil society. Many local organizations then utilized the advice and teachings of INGOs to advance joint interests during the constitution-making process.

#### *4.2.2. Financial Means of Influence*

Abbott and his colleagues (2015) further discuss principal-agent theory, or influence defined by delegation. According to the scholars, this occurs when a governor contracts the agent to complete governance tasks in its place (Abbott et al., pg. 721, 2015). The governor, as such, has the authority to punish or monitor the agent in an effort to ensure the accomplishment of its delegated assignments. This is described as a more hierarchical or vertical relationship. Abbott and his colleagues (2015) assume that the external actors this typically involves are states and international organizations<sup>8</sup> (De Silva, 2017). I, however, apply this to INGOs (governors) that fund local NGOs (agents) to lobby the government for specific substantive content in the constitution. The INGO has the ability to control the local NGO through funding by shaping their constitutional goals and, if unsatisfied with their performance, threatening the removal of this monetary assistance.

Funding was perhaps represents the most obvious way INGOs influenced constitution-making indirectly. The government did not have the fiscal capacity to financially support local NGOs in the state, thus most local NGOs were funded primarily by INGOs. This was not a problem from the perspective of NGO participant n4: “through funding and expertise, INGOs created a sustainable civil society”. In order for civil society to be effective, it was necessary that actors were financed. Had this monetary assistance not come from INGOs, many post-revolution local actors would have become obsolete. While this is important, there were clear power dynamics related to funding.

As alluded to in the earlier discussion, most of the INGOs in this study did not fund local actors; they focused solely on delivering ideational support. Two, however, did and these organizations differed in the way they utilized this. INGO participant i5 was arguably less

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<sup>8</sup> The United Nations would be an example of this.

interested in the objectives of the local actors they funded while INGO participant i2 monitored this very closely. On the other hand, most of the local NGOs in this study stated that they received INGO funding. All of the local actors included in this study, however, retained the authority to determine how these funds were used and in what capacity. While this was the case, funding remained a powerful tool for INGOs and most local NGOs spoke to this. In general, the participants agree that funding was an important, necessary component of advocacy for both international and local NGOs. That being said, local NGO participants held many reservations and suspicions about the INGOs that funded them, including where the money came from and what they were expected to do with it. Further, the experiences of actors outside of this sample group made them critical of INGOs and their tendency to financially sway local actors.

The INGOs that funded local actors would not entirely agree that they were overly burdensome on the local NGOs they funded. INGO participant i5 briefly discussed how the organization dealt with funding: “[we] were presented with papers after a have call for papers, and pay what they need”. This particular organization was withdrawn from the day-to-day affairs of the local NGOs they sponsored. While this particular INGO claimed to have immediately stepped away from sponsored NGOs’ operations, at times a hands-off approach to the funding relationship needed to be negotiated. Local NGO participant n11 stated that their organization was able to demand two concessions from potential sponsors: they asked for complete independence, and did not want to include logos of foreign donors on their marketing. These conditions were accepted by the INGOs that funded them. When asked why they believed these requests were received, participant n11 had a more nuanced response: “...some funders wanted to micro manage. They needed to build trust and it was also dependent on (our) product”. While the product and the developed trust likely contributed to the control this local NGO had over its

funding, the size and renown of this particular NGO is undeniable. Perhaps the acceptance of these demands was also more likely due to this factor.

Although local actors accepted the money, the concern of the INGO's agenda was ever present. Local NGO participant n7 discussed funding in more detail. The participant began, stating that the organization networked with INGOs and that "all the Tunisian organizations were sponsored by INGOs. They did not take money from states but from private organizations". In relation to the participant's own financial relationship with INGOs, they stated that:

"...it was an innocent relationship but then it was about figuring out agendas and the price of the freedom... It took time for [this organization] to get this big. Sponsoring is a huge networking process that we didn't know about. Big NGOs got more money." The participant continued: "The INGOs make it very difficult to get money... Big NGOs had more authority, and small ones were more easily manipulated. They accepted demands while others did not."

The suspicion from local NGOs relating to INGO money continued with different interviews. Participant n4 stated this:

"through financing [INGOs] can control the ideas of the NGOs... American sponsoring and the Western European generally they would go for the NGOs that speaks about human rights and stuff like that and give them money to make them stronger and guiding them for a certain way, the way of the European and American mind. The human rights side."

NGO participant n9 stated that their organization was trained by INGOs, and worked with them but not all of them: "INGOs were not here for Tunisians but for their agenda. But we did network with them". They, however, refused money from governments and specifically

Freedom House<sup>9</sup>. The participant further stated that they faced some pressures but would not go into detail. Another participant, n10, stated that their organization networked with INGOs that were members of an already long established network of organizations formed prior to the revolution. The participant stated that the organization remained with the historical networks because “the new people that came were very difficult to work with. They acted as though they should do the work of national civil society however this was not possible”. There were a lot of disturbing funding practices that disheartened this particular participant: “some NGOs were given conditional money and many NGOs disappeared following the constitution... money didn’t always reinforce civil society. Money may have negatively affected mobilization”.

NGO participant n8, however, was the harshest criticizer of both INGOs and the state for the financial neglect that allowed INGOs to fill the void. The participant stated that the ANC did not allocate a budget for the inclusion of civil society. They relied on budgets of INGOs and on their efforts to organize meetings. The ANC “relied on international assistance and they have interests”. The participant also suggested that INGOs controlled the narrative through INGOs funding NGOs. The process was harmed because “it did not develop in the way that represented Tunisians. It only echoed international standards”. The participant argued that “INGOs destroyed Tunisian civil society through funding.” They stated that “donors did not necessarily control but they had objectives... [Local] NGOs became experts on certain areas in an effort to get money from INGOs... Funding came with conditions, debates were clearly already determined by INGOs that organized the debates”. The participant lamented: “INGOs corrupted Tunisian civil society. Volunteerism is gone and it is now a huge market”. The local NGOs both appreciated

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<sup>9</sup> In fact, a number of local NGO participants expressed concerns over networking with Freedom House.

the funds that were provided to them but were also very suspicious of the INGOs. They believed funding was a means of accomplishing an objective, and in some cases this was accurate.

While most INGOs included in this study did not fund local actors, two did. One was briefly discussed above as an organization that stepped away from the daily operations of the local actors they sponsored. The other participant, participant i2, embodied the fears of most local NGOs included in this study. The participant stated that the organization specifically intended to influence the constitution through mobilizing their monetary resources and networking with NGOs in the state. The participant proclaimed that through this means, the organization successfully influenced articles 12, 13, and 136 of the constitution (See Appendix B). They did not subjectively choose which organizations they wanted to network with; they completed mapping with experts and contacted NGOs interested in the field. It was an objective selection process and it was open to anyone that was interested. They worked with around 30 local NGOs and 20 of those were funded. The participant stated that the organization would have a call for proposals and civil society actors would present their projects. The organization's Tunisian office coordinated with their offices in Washington and New York in order to decide which local organizations would receive organizational funding. The participant stated that "some [local NGOs] faced cuts if they could not achieve their projects" and the organization, overtime, determined which local NGOs to rely on. This was an important process; many organizations were established after the revolution and it was difficult to know whom to rely on. The objectives of the organization became the objectives of the local NGOs and if those could not be met, the locals would be cut. The participant stated that the organization "met their [constitutional] objectives through networking". The funding practices of INGOs post-revolution and particularly during the constitution-making process suggests that these organizations were

intending to accomplish something. While the local NGOs present this as sinister, this INGO insists that it was a means of reaching their objectives.

The principal-agent theory, can truly only define this particular networking pattern; every other participant included in this study formed relationships with their counterpart that resembled orchestration. As discussed, participant i2 stated that they funded local NGOs in an effort to lobby for the constitutionalization of their interests. The participant further stated that if a local NGO were ineffective, the financial support would be terminated. Although this represents one of the total participants, it is very likely that principal-agent relationships can explain the networking realities of a wider population of INGOs and NGOs for one reason in particular. In accordance with the limitations discussed in chapter two, the NGOs included in the sample were established, professional organizations. They were afforded the freedom to be selective about the external actors they networked with and accepted funds from. As discussed, one such local NGO stated that they set boundaries for the INGOs that funded them, such as refusing to display symbols that would demonstrate the partnership. The local NGO stated that they are transparent about their funding and where it comes from however they were not interested in being perceived as a creature of the INGOs that sponsored them. Four other well-established local NGOs further stated that they refused to network with two prominent INGOs<sup>10</sup> that were not included in this research, due to the fact that they were too controlling. The financial backing of INGOs with far less experienced local organizations was a concern for some NGOs included in this study. As discussed earlier, participant n10 stated that the “funding [practices of the new INGOs] destroyed civil society in Tunisia”, and made organizations reliant on foreigners. Participant n8 stated that the funding was harmful because the salaries were outrageously high

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<sup>10</sup> Open Society Foundation and Freedom House.

for Tunisian standards, at times as much as a doctor. As such, civic duty was lost and citizens, due to their economic circumstances, were forming organizations solely for financial gain. This ultimately gave INGOs the opportunity to control the narrative and politicize topics that were not of interest to Tunisians. Further, it is possible that the principal-agent theory was more frequent with INGOs that were not based in the state<sup>11</sup>. This research, however, only includes INGOs that had a regional Tunisian office and cannot speak to whether this is the case.

Overall, these accounts, coupled with the limitations of this project suggest, that it is likely that far more networking partnerships are comparable to that of the aforementioned funding relationship explained by principle-agent theory.

Networking, while it was beneficial in ways for Tunisian civil society, was also a means of influence for INGOs. Abbott and his colleagues (2015) state that governance typically operates in this manner. In order to be more efficient, effective, and legitimate, it is necessary of governors to partner with secondary actors in an effort to ensure that all objectives are successful (Abbott et al., pg. 719, 2015). Acting as governors, INGOs took advantage of the opportunity to alternatively influence the constitution-making process despite direct involvement.

#### 4.3. Direct and Indirect International NGO Influence on the Text

Direct and indirect involvement in the constitution-making process also, in some instances, led to the influence on the text (See Appendix B). Just as a reminder, by direct, I mean directly with the state and its actors, and by indirect, I suggest this occurs through a secondary actor. All of the INGOs that participated in this research agree that INGOs, to some degree, influenced the constitution. Two INGOs in particular, i1 and i3, discuss their direct role in

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<sup>11</sup> Open Society Foundation and Freedom House do not have regional offices in Tunisia.

developing the text. Participant i1 is an organization that focuses on human rights, freedom of speech, judicial independence, and death penalty abolition. Based in the United Kingdom, this organization has worked in Tunisia since before the fall of Ben Ali. Participant i1 trained organizations throughout the country, refrained from funding, and networked with two other prominent INGOs. The director explained that the organization had a copious amount of access, and put pressure on political parties and constituent members in an effort to ensure that the political parties and the government adopted their objectives. Of all their efforts, the most prominent regards the ten recommendations participant i1 made to the constitutional committees during the constitution-making process, seven of which were adopted. One recommendation was the removal of “the supreme/noble and universal human rights principles” from the preamble, as it suggests a hierarchy of rights. This phrase is no longer in the preamble. Another recommendation was the amendment of Article 19, to state that all international treaties recognized by Tunisia are above domestic laws. This is now Article 20 in the constitution and, in accordance with the recommendation, states that all international agreements are more superior to ordinary laws but are below the Constitution. The participant does not claim that the INGO is wholly responsible for the particular recommendations being adopted into the constitution; they state that the constituent assembly was intent on securing Articles that spoke to i1’s interests. Nonetheless, the INGO applied significant pressure necessary to ensure that these recommendations were included.

Participant i3, on the other hand, is an organization that focuses on freedom of expression, freedom of the media, and access to information. This organization is likewise based in the United Kingdom and entered Tunisia following the end of the Ben Ali regime. Participant i3 met with constituent members, advocating for the values they deemed to be necessary in the

constitution. While they informally networked with other INGOs and local NGOs, this, along with funding and training, was not their priority. Instead, participant i3 hosted hearings, released reports, and held press conferences for the purposes of advocacy. Four legal analyses of the constitutional drafts, however, proved to be participant i3's most significant action. The recommendations outlined in these analyses, such as an "...explicit protection of freedom on information and access to information" led to the adoption of Articles 6, 32, 34, 35, 49, and 127 in the constitution (Legal Analysis, 2013; See Appendix B).

In addition to these, although participant i6 did not detail the ways through which their organization influenced the constitution, the participant stated that experts of the organization were listed as contributors on the constitutional drafts. Considering the access INGOs had to the NCA and its members during the constitution-making process, it is no surprise that they were able to directly influence the text.

In terms of indirect influences, two INGOs gave specific examples of the work that they did through funding or networking with local NGOs. Participant i2, as recently discussed, stated that the purpose of networking with local NGOs was to influence the text of the constitution. A call for proposals was released, and qualified NGOs were given the funds to meet the objectives of the INGO. The participant states that the goals of the organization were met, as there are specific provisions in the constitution, Articles 12, 13, and 136, that were championed by the INGO through the work of their sponsored NGOs (See Appendix B). Participant i6 stated that the intention of their organization was to train local NGOs on what became Article 6 of the constitution (See Appendix B). They provided local NGOs with expertise, sent members to workshops, and trained them in effective ways to lobby the government for this provision in the constitution. This method of influence is different from that of participant i2 as this was all done

without funding a single local NGO. Blatant control through funding was not the only means of ensuring the entrenchment of a particular article. Partnerships as described by participant i6 were likewise wielded as tools for constitution-making.

This suggests that indirect governance was rather successful, both through orchestration and delegation. The INGOs that influenced in the text were very clear about their intentions during the constitution-making process. They both had particular interests that they foresaw as being best implemented through local NGOs and actively intended to accomplish this.

One point this chapter does not discuss in any capacity is the impact of the “Arab Spring” during constitution-making. In chapter 3, I discussed in particular the Egyptian crisis and its influence on the Islamist political party *Ennahda*. The secularists’ rejection of the Muslim Brotherhood in Egypt led to the military removing the ruling President Mohammed Morsi, and killing hundreds and imprisoning thousands of Muslim Brotherhood members. Since Ennahda were the governing party and as such in control of the constitution writing, its presumable that Egypt was a pertinent factor during the process and may have instigated the inclusion of INGOs. The data obtained from the sample groups, however, suggest that this may be overstated. None of the INGO, constituent member, or NGO participants discussed the Egyptian situation nor made reference to the broader Arab Spring. What may have been expected to be an important factor in Tunisia’s constitution-making was possibly not the case. According to this research, the inclusion of INGOs was not a result of the broader issues in the region, rather a reaction to what was needed in Tunisia during the drafting process.

Overall, this chapter demonstrates that INGOs 1) were actively involved in the constitution-making process and 2) used networking with civil society actors as a means of influence. INGOs benefitted from open access to the process and a state that tolerated the pursuit

of their interests as it aligned with their own. Further, networking was without a doubt beneficial for the local actors that received financial assistance and expertise. That being said, INGOs had ulterior motives and utilized local actors in order to influence indirectly. Although this was the case, the interests of the INGOs included in this study likewise coincided with those of civil society. It is for these reasons that it can be argued that INGO involvement may be perceived as “not very egregious”. Transitional constitutionalism believes that external actors become involved in constitution-making but due to its empirical deficiencies, cannot speak to whether this can be considered egregious or not. Now that there is empirical data depicting the self-interest of these particular actors, it is important to determine what this means in theory.

Chapter 5: Theoretical Discussions about the Results

The research finds that the INGOs included in this study without question influenced the constitution-making process in Tunisia and this engagement occurred directly and indirectly through local NGOs. Some INGOs were further able to influence the constitution itself. This chapter intends to explore what this data means in empirical and theoretical terms. Empirically, I argue that this data tells us two things: INGOs were self-interested actors and the state strategically allowed the involvement of INGOs. INGOs, on some level, worked with state and societal actors for altruistic purposes; however, this was overshadowed by their pursuit to constitutionalize their interests. The INGOs in this study worked with the state and local civil society during the constitution-making process in order to ensure that the constitution included provisions that satisfied their desires. Moreover, the data suggests that the state itself played an important role in the extent to which INGOs became involved in the constitution-making. The state was a strategic actor and looked abroad to INGOs for assistance in writing the constitution. In terms of the text, as discussed earlier, some INGOs influenced various articles in the constitution. I argue that these particular INGOs challenge the conception that only national actors can and should influence constitutions and exercised what Phillip Dann and Zaid Al-Ali (2006) call internationalized *pouvoir constituant*. Further, contrary to the fears of Sarah Mead (2015), this did not damage the democratic legitimacy of Tunisia's new constitutional regime because INGOs and the state both wanted to see the establishment of democracy in Tunisia.

### 5.1. What do the Empirical Data Tell Us?

Finding that the INGOs in this study influenced the constitution is significant, and it further reveals interesting points concerning the behaviour of the INGOs and the state during the constitution-making: INGOs were generally self-interested actors during the constitution-making

process, and the state, though strategic, was committed to establishing a democratic state. As discussed, INGOs are assumed to be philanthropic and self-sacrificing, but are often times eager and self-serving. Of course, INGOs commitment to developing a competent, vibrant civil society was consistent with the altruism they are typically associated with. The intent to influence, both directly and indirectly, however, was apparent. While the interests that INGOs were campaigning to entrench fell in line with the interests of the state, the ambition of these organizations cannot be ignored. INGOs believed they had an essential role to play in aiding the smooth transitional constitutionalism of the state and constituent members repeated and perpetuated this rhetoric. The strength of these INGOs as organizations with an abundance of expertise and experience allowed them the opportunity to directly and indirectly influence the constitution-making process. In relation to civil society, however, the skepticism was fervent in spite of their shared goal. Many NGO participants rejected the notion of INGOs influencing the constitution-making, stressing that Tunisians wrote the constitution through “blood and sweat”. One of the expert interviews state that the funding practices of many INGOs further disillusioned some local civil actors and they questioned if these organizations were attempting to implement an “international agenda”. INGOs were profoundly involved and particularly motivated, however the accusations of implementing an international agenda were by and large a response created by local frustrations. Notwithstanding, the interests that inspired the state and its actors likewise inspired INGOs, creating an opportunity for cooperation and the development of a democratic constitution.

INGOs keenness to become involved in the constitution-making process met the state’s strategic behaviour and general willingness to cooperate. While this willingness was precipitated in part by the distrust of local actors and inexperience of local NGOs and the state itself, the

openness of the ANC and the constituent members nevertheless suggests that the state remained focused on developing a democratic state through constitution-making. This is particularly fascinating considering the pervasiveness of classical constitutionalism. The notion that constitutions are written as a nation building exercise that excludes foreign actors, although challenged, is still enduring and persistent. Despite theoretical resistance to external influence on constitution-making, which has truly moved beyond the sphere of academia and permeated “real-life”, the state elected to involve international actors. As alluded to earlier, it is very likely that INGOs would have attempted to become involved in the constitution-making process without the state’s consent. These actors, however, would have been limited to indirect means of influence and frankly a more hostile environment. It is because of the state that INGOs were able to influence in the ways that they did.

Both INGOs and the state remained committed to the establishment of a democratic Tunisia through the constitution. Although constitutional scholars deem external influence inappropriate, it was acceptable and arguably necessary in this case. INGOs had an expertise in democracy and rights that the state and its actors wanted. INGOs disseminated this knowledge to members and civil society actors in an effort to ensure that democratic principles were established in the constitution. Furthermore, these actors lobbied the state in order to have particular norms and values entrenched in the constitution. What is important, and likely contributed to the success of INGOs, is the fact that their interests were not out of step with those of the state and Tunisians more broadly. Thus, international influence in constitution-making need not be a undesirable act. In Tunisia’s case, it was beneficial, timely, and helped contribute to the constitution that this now ratified in the state.

Although INGOs were influential, this should not diminish the role of local actors in Tunisia; many local NGOs, unions, and most notably the National Dialogue Quartet ardently pursued participation in the constitution-making process and, particularly in the case of the National Dialogue Quartet, salvaged and protected it. Despite initial debate concerning the government's "mandate to draft the constitution behind closed doors", the state remained open to all actors that vowed to assist in creating a democratic Tunisia.

Empirically, INGOs played an important role in the constitution-making process and normatively, in this case, it benefited the Tunisian constitution-making process. Modern constitution-making need not remain a solitary process. Sharing constitutional experiences and distributing knowledge ensured that Tunisia drafted a text that was rights conscious and democratic. Theoretically, however, the debate concerning international influence on constitution-making remains contentious. If INGOs influenced the constitution, did they exercise *pouvoir constituant*? I argue that the INGOs in this study at times exercised *pouvoir constituant*. While all influenced the constitution-making process to varying extents, three influenced the text itself.

## 5.2. What Then, Can Be Said Theoretically?

The data collected for this study demonstrates that many INGO participants had substantive objectives. This ranged from constitutionally respecting human rights to ensuring freedom of the press. The goal for many of the organizations during the process was to create and foster the conditions of liberal democracy and rights consciousness necessary to ensure the protection of such interests in the constitution. Any substantive suggestions, as participants stated regularly occurred, would be more likely to succeed within this context. Of the seven participants

interviewed, four discussed in detail the textual accomplishments of their particular INGO.

Through both direct and indirect means, these INGOs were able to influence the text itself. If a national actor exerted such influence, this would be regarded as the exercise of *pouvoir constituant*, and recognized as a right of said actor. Since INGOs are foreign, this exercise of *pouvoir constituant* is argued to have different, and more damaging implications.

Theoretically, there are valid concerns about international actors becoming involved in constitution-making as it allows for what is deemed inappropriate influence on the text. Transitional constitutionalism unfortunately is yet to contribute to this debate despite advocating for external involvement in constitution-making. As discussed, more traditional constitutional scholars generally argue that constitution-making is a state-building exercise thus international actors ought to remain outside of the process and especially should not contribute the text in any capacity (Colón-Ríos, 2010; Colón-Ríos, 2011; Dyzenhaus, 2012; Dyzenhaus, 2007; Loughlin, 2013; Partlett, 2012; Preuss, 1991; Preuss, 2014; Threlfall, 2008; Wandan, 2015). Even scholars that recognize what is called internationalized *pouvoir constituant* argue that this is only exercised in extreme cases of foreign intervention, without the consent of the state, and is democratically illegitimate (Dann & Al-Ali, 2006; Mead, 2014). None of the above conditions, however, can accurately describe post-revolution Tunisia. In fact, the state was willing and open to the include INGOs, particularly at the beginning of the constitution-making process. If INGO influence automatically equates to democratic illegitimacy as the scholarship suggests, the Tunisian state should be democratically illegitimate. I argue instead that INGO influence on the text as discussed in this study, represented the exercise of internationalized *pouvoir constituant*. Moreover, INGOs and the state had shared interests, namely the establishment of democracy in

the state. As such, exercising internationalized *pouvoir constituant* was tolerated and did not damage the legitimacy of the state.

### 5.2.1. *Direct Influence on the Text*

In the constitutionalism scholarship, there is a general sentiment that including external actors as legitimate claimants to *pouvoir constituant* threatens the acceptability and legality of the constitution. Further, the very limited body of literature that recognizes the reality of international actors' involvement in constitution-making does so only narrowly. According to Phillip Dann and Zaid Al-Ali (2006), the use of internationalized *pouvoir constituant* is applicable in two circumstances: when external actors take full control, leaving the state with little or no constitution-making authority; and, when the state shares decision-making authority externally, internationalized *pouvoir constituant* is exercised by foreign experts. The occasional times that states voluntarily seek out international assistance in constitution-making is not captured within their conceptualization of internationalized *pouvoir constituant*. This suggests that *pouvoir constituant* can only be exercised through some amount of force and through one type of actor. The data collected for this research, however, finds that INGOs were voluntarily given access to the constitution-making process and these very INGOs, in some cases, influenced the text. The assumption that external actors become involved in constitution-making because the state has no choice or the international actor has forcibly taken control was simply not the case in Tunisia.

Dann and Al-Ali (2006) further attempt to restrict the relevance of internationalized *pouvoir constituant* by regulating it to foreign experts. Although "foreign experts" is seemingly intended to limit the actors that claim internationalized *pouvoir constituant*, the term is left undefined, making it open for interpretation. Whether or not "foreign experts" was intended to

include INGOs, they played a role in the constitution-making process. The ANC was interested in including INGOs in the constitution-making as they provided them with expertise and democratic experiences that were not developed due to authoritarianism in the state. Tunisian constituent members permitted the importing of democratic norms and values by INGOs; these arguably helped to ensure a smooth and enduring transition.

Internationalized *pouvoir constituant* and how it is exercised is something that is also not clearly defined by the scholars. While Dann and Al-Ali (2006) avoid this discussion completely, Mead (2014) makes a distinction between external influence and exercising internationalized *pouvoir constituant*. It is not clear when influence becomes *pouvoir constituant*, however it is stressed that while external influence is tolerable in minimal amounts, exercising internationalized *pouvoir constituant* harms democratic legitimacy. As discussed, two INGOs included in this research discussed the direct advocacy work they accomplished, leading to the entrenchment of particular articles in the constitution. In both cases, *pouvoir constituant* was, arguably, exercised. According to Mead (2014), this harms Tunisia's democratic legitimacy. Since external actors are not bound to the constitution, "their involvement detracts from the process' democratic legitimacy" (Mead, pg. 588, 2014). Joel Colón-Ríos (2009) further argues that democracy is required at the "fundamental levels"; the absence of this puts the constitutional regime into question (pg. 11; Mead, pg. 587, 2014). The concern is empirically and theoretically justified; however, this matter need not be applied to the Tunisian context.

In terms of the literature, transitional constitutionalism argues that the transitional context does not require the polis to accept the constitution as legitimate at first; consensus, in this context, does not exist. As the new state continues to develop, however, the norms and values of the constitution shape the norms and values of the citizens; as such, it gains legitimacy.

Moreover, despite the concerns of international actors hijacking constitution-making, transitional constitutionalism at no time expects the state to relinquish control of the drafting process. Rather, the transitional state determines how the polis ought to be fashioned, and enlists the assistance of external actors to constitutionally establish this. Most importantly, according to the data, INGOs and the state shared interests. Both worked to ensure a democratic Tunisia and often worked together to achieve this. The ANC freely welcomed these organizations and their recommendations during the constitution-making process. Whatever the ANC deemed to be acceptable was entrenched into the constitution. This is not akin to a scenario where the constitution is written entirely by international actors, which has occurred under extraordinary circumstances. This, of course, harms the democratic legitimacy of the constitution; the Tunisian case simply cannot be compared.

Moreover, the inclusion of external actors in constitution-making is not inherently undemocratic. In Tunisia, INGOs were invited and included in the development of Tunisia's constitutional regime. Yet, according to Mead (2014), any textual influence on the part of INGOs, despite prior consultation and discussion, is democratically illegitimate by virtue of these organizations being external to the state. The two INGO participants that influenced the text through advocacy and campaigning, however, arguably exercised internationalized *pouvoir constituant* without harming the constitution's legitimacy. The rights and freedoms the INGOs advocated for were ultimately demonstrations of the norms and values the drafters wanted to include in the constitution. Tunisia's elected constituent members democratically accepted these recommendations.

When INGOs did not influence the text, particularly in their role as disseminators of norms and values, they did not exercise internationalized *pouvoir constituant*. As discussed in

the findings, all INGOs provided expertise to constituent members through trainings, workshops, and funded travels to democratic countries. The constituent members in this study likewise stated that they were trained by INGOs. This expertise helped to shape the norms and values of the constituent members and, in turn, the constitution; this unquestionably represents a level of influence during the constitution-making process. If this were to exhibit the exercise of internationalized *pouvoir constituant*, it must be assumed that democratic norms and values were solely a result of INGO intervention during the constitution-making process. This assertion simply cannot be made. While all constituent members in this study attest to being taught and trained by INGOs, the fact that the ANC enlisted the expertise of INGOs suggests that they were already inclined to constitutionalize democratic principles. The Tunisian constituent members were elected by the citizens of the state and after almost five decades of authoritarianism, welcomed democracy. INGOs undoubtedly acted as norm entrepreneurs; these actors fostered and developed the liberal democratic values of constituent members. While their expertise assisted in the establishment of Tunisia's constitutional regime, the extent is not measurable. Thus, INGOs cannot claim to exercise internationalized *pouvoir constituant* through disseminating norms and values to constituent members.

Ultimately, INGOs had direct access to the state, the ANC, and constituent members. Despite long-standing principles that constitution-making is a process “by the people, for the people”, constituent members democratic inexperience, coupled with their dedication to change, encouraged these actors to reach out to seasoned internationals. INGOs further did not hesitate to become involved in the constitution-making process. INGOs advocated and campaigned for particular principles to be included in the text and in three instances, including the aforementioned circumstance when a participant was named as a co-author, INGOs exercised

internationalized *pouvoir constituant*. INGOs employed their agency to assist constituent members, and the ANC more broadly, in ensuring that democratic principles were entrenched in the constitution; constituent members willingly accepted this contribution. As discussed by Catherine Turner (2015), rarely does state action exist in a vacuum. Tunisia's case suggests that state actors recognized this as well, inviting INGOs to participate in the constitution-making process, exemplifying that concerns regarding the democratic legitimacy of the inclusion of external actors directly, while valid, are not readily applicable in this circumstance. The Tunisian case suggests that the choice to involve external actors need not be a democratically encroaching one. INGOs were allowed direct access to the constitution-making process by the choice of constituent members, and in some instances exercised internationalized *pouvoir constituant*.

### 5.2.2. *Indirect Influence on the Text*

The INGOs included in this sample intended to influence the constitution not only directly but also indirectly through local civil society. The empirical evidence suggests as much and indirect governance effectively explains it. The INGO literature states that INGOs utilize numerous mechanisms, including networking with local NGOs, to change policy in a given state. The degree to which INGOs control their intermediaries may vary; the intent, however, is to ensure that through secondary actors, their policy objectives are realized. Although I suggest most, if not, all INGOs in the sample group intended to influence the constitution-making through their networks, two in particular detailed their textual influence citing indirect means.

What is of interest to me is whether networking for the purposes of indirect governance ought to be deemed the exercise of internationalized *pouvoir constituant*. *Pouvoir constituant*, by definition, recognizes the ability of an actor to write or change a constitution. It seems as though networking, when it adds or amends constitutional text, can theoretically be the exercise of

internationalized *pouvoir constituant*. The limited scholarship that considers the external exercise of *pouvoir constituant*, however overlooks the societal means through which international actors influence constitution-making. As discussed, Dann and Al-Ali (2006), and Mead (2014) remain cautious in their definition of internationalized *pouvoir constituant*, refusing to ambitiously expand the concept. Mead (2014) further makes a distinction between influence and *pouvoir constituant*. The difference between influence and exercising *pouvoir constituant* is defined entirely by harm; once democratic legitimacy is affected, internationalized *pouvoir constituant* has been exercised to a degree. By applying this understanding, it is possible that INGOs exercised *pouvoir constituant* through influencing the Tunisian civil society, however only if this was deemed to harm the democratic legitimacy of the constitution. If this was not the case, the work of INGOs was simply harmless influence. The degradation of democracy legitimacy vis-à-vis the involvement of external actors was earlier discussed in greater detail. This research suggests that while democracy at the “fundamental levels” is imperative, Tunisia’s constitution-making process cannot be likened to situations where democratic legitimacy is discernably threatened. Mead’s (2014) misguided acceptance of influence as comparatively more permissible than exercising internationalized *pouvoir constituant* will instead be the focus.

To assume that “influence” is not damaging to the extent of the international exercising of *pouvoir constituant* ignores the differing ways and degrees to which actors can influence. Mead (2014) states that influence may become *pouvoir constituant* but only if the democratic legitimacy of the constitution is challenged. If simply including external actors is the threshold for democratic illegitimacy, external influence, no matter the degree, ought to put the constitutional regime in doubt. Mead’s (2014) concern should be rather, at what point do external influences become intolerably democratically illegitimate? The justification for distinguishing

between influence and internationalized *pouvoir constituant* is inconsistent. As discussed earlier, and more extensively in chapter 2, INGOs utilize influence with the *objective* of changing policy in the state. Intent alone, in this instance, suggests that influence is not always considered “merely influence”. INGOs employ a variety of proven methods to ensure that their policy goals are adopted within a given state. INGOs are theorized as “firms” seeking to fulfill their interests. They often network for these purposes and this was certainly the case in Tunisia. Through influencing local actors ideationally or financially, INGOs perpetuated their interests. Influence is thus another means through which external actors exert governance within the state. To presume that this is more agreeable to democracy than external *pouvoir constituant* is to neglect the efficacious ways international actors can influence a constitution.

Considering all this, did INGOs indirectly exercise internationalized *pouvoir constituant* in Tunisia? Not all exercises of internationalized *pouvoir constituant* indirectly. In terms of the networking relationships that resemble orchestrator-intermediary theory, this should not constitute the exercise of internationalized *pouvoir constituant*. The orchestrator-intermediary theory recognizes the strength and capacity of the secondary actors the governors intend to work through. INGOs forming these networking relationships, while providing ideational and material support, do not substantially influence of the interests of the intermediaries. Constitutional outcomes become a joint venture.

In contrast, INGOs that created relationships similar to that of the principle-agent theory and veritably influenced the constitution, indirectly exercised internationalized *pouvoir constituant*. Thus, internationalized *pouvoir constituant* was exercised indirectly by one INGO in this study. This INGO participant largely determined the agenda of the NGOs they networked with through their funding practices. The participant essentially created domestic proxies as a

means of ensuring that their policy initiatives were constitutionalized. As one NGO participant stated, civic responsibility was corrupted because of INGO funding; “volunteerism is gone and is now a huge market”. While the principle-agent relationship represented 6% of the INGO and NGO sample groups, as discussed earlier, it is likely that this number is a fraction of the percentage of these networking relationships more generally. Although it is difficult to determine the extent to which this occurred, INGOs indirectly exercised internationalized *pouvoir constituant*.

Overall, this research suggests that internationalized *pouvoir constituant* was exercised by three of the seven INGO participants of this study. The others influenced the constitution-making process through trainings, workshops, and the general dissemination of norms and values to constituent members and civil society actors.

What the literature fails to acknowledge in its examination of internationalized *pouvoir constituant* is the agency of the state, particularly the state in transition. The focus remains on external actors that are generally more forceful and more powerful than the state and, as such, creates an opportunity to influence the constitution. In this case, however, Tunisia was open and encouraged international involvement during the drafting process. Tunisia was not subject to INGOs nor were they pressured to allow external participation. When asked if they faced these pressures, constituent members all agreed that this was not the case. The state, as a strategic and self-interested actor, opened the constitution-making process to INGOs. At times, INGOs exercised *pouvoir constituant* however, if not for the state, they would not have been quite as successful through direct means.

Furthermore, this body of literature underestimates the agency of external actors. In this case, the scholarship does not consider the indirect methods that INGOs utilized in an effort to influence the constitution. In Tunisia, INGOs funded local actors, and provided ideational and material support in order to create particular constitutional outcomes. For some INGOs, this was a very important aspect of their advocacy. This is largely ignored by scholars or regulated to simply influence. INGOs are effective policymakers and accomplish through a number of proven methods. A number of these can be considered the exercise of internationalized *pouvoir constituant*. In this case, certainly the theory of indirect governance within the context of constitution-making intends to exercise this power.

In Tunisia, this is something that would admittedly be considered controversial. As much as INGOs were accepted during the constitution-making process, many participants rejected the notion of these actors actually influencing the text. As mentioned in the previous chapter, there were concerns about the state's sovereignty and INGOs becoming too authoritative. While these worries were subsided for the most part, they did not completely dissipate. When asked if INGOs influenced the constitution itself, very few believed that this happened, despite the evidence and knowledge of their significant participation. Participants were more willing to accept that this occurred indirectly, but not directly. It seems that textual influence by INGOs would have went too far for some participants. INGOs, however, went to Tunisia with substantive suggestions and recommendations and purposefully ensured that they were entrenched in the constitution. Three instances in this study exemplify this and ought to be considered the exercising internationalizing *pouvoir constituant*. Although I argue that, theoretically, this did not harm the democratic legitimacy of the Tunisian constitution, it remains to be seen if Tunisians would agree.

The *pouvoir constituant* and constitutionalism scholarship more broadly is justified in being cautious and guarded in relation to external influence on constitution-making. It is important, however, to remain thoughtful and open. Deeming international involvement in constitution-making democratically illegitimate ignores the various roles external actors play. Transitional constitutionalism is beginning to do so. This type of analysis and discussion however is yet to be had in this body of literature. If transitional constitutionalism is to recognize the inclusion of external actors in constitution-making, scholars must consider what this means theoretically. The inclusion of INGOs in Tunisia's constitution-making process exemplified a state prepared to ensure that democracy and the rule of law was accepted and entrenched; the interests of the INGOs aligned in this particular instance. These findings suggest that external influence was normalized in this case and may increasingly become so in future constitution-making.

## Chapter 6: Areas for Future Research and Contributions

Modernity has, in many ways, revolutionized constitution-making. Despite protests from a more classical conception of constitutionalism, external actors such as INGOs, due in part to possessing a great deal of agency and expertise, have the ability to penetrate and influence the state in constitution-making. This is arguably becoming more common within states experiencing regime change. Using Tunisia as a case study, this research finds that INGOs influence the constitution-making process both directly and indirectly. The INGOs included in this study worked on two fronts: they organized with constituent members and networked with civil society actors. The intentions of these actors were to ensure their interests, be it human rights or freedom of the press, were constitutionalized. It is also through these means that this research finds that some INGOs exercised internationalized *pouvoir constituant*. While the literature debates whether this work is democratically legitimate, in this case, the interests of the state and the interests of INGOs aligned.

Following the Jasmine Revolution, Tunisia's first priority was the implementation of a constitution. Elections for the ANC were on October 23<sup>rd</sup>, 2011 and the constitution-making process began shortly thereafter. Through constitution-making, the state wanted to reverse the detrimental effects of authoritarianism. Constituent members in the study agree, however, that the democratic deficiency of the previous 54 years left members, and Tunisians more broadly, without the tools and expertise to accomplish this unilaterally. As such, the state looked outward. INGOs were one of a number external actors welcomed by the polity. The purpose of external involvement was to disseminate knowledge to members pertaining to decentralization, rights, freedoms, the judiciary, and the rule of law, among others. INGOs were eager and ready to provide such advice; these actors organized workshops, trainings, and took members abroad to edify them in democratic principles. This study finds that INGOs did not solely act as a teacher

of democratic norms and values, but also as an exerciser of internationalized *pouvoir constituant*. INGOs were self-interested, advocating and campaigning for particular interests they believe required constitutionalization. These organizations wrote reports, conducted legal analyses, and held press conferences in an effort to draw attention to particular interests during the constitution-making. INGOs further networked with the local civil society as another means of influencing the constitution. They similarly trained civil society actors and additionally provided funding to most of these organizations. This is analogous to the effort that INGOs commit during policymaking; the scholarship features extensive empirical and theoretical work explaining the agency and behaviour of these actors. These, however, were not applied to constitution-making as it was assumed that INGOs do not engage in this process. The Tunisian case suggests that this presumption is not accurate. The proven methods that INGOs use in order to shape domestic policy are likewise utilized in constitution-making.

These findings contribute to the development of transitional constitutionalism. This emerging subfield differs from “classical constitutionalism” for a number of reasons. Most consequentially for this research, however, it anticipates and acknowledges the participation of international actors in the constitution-making process. It is theorized that states undergoing regime change feel compelled to adhere to international law and norms. Furthermore, the international community deems it in their interest to ensure the success of a given transitional state. Hence, external actors participate in constitution-making in ways that are inconceivable to constitutionalism. As it stands, however, transitional constitutionalism lacks an exhaustive examination concerning the type of external actors that typically become involved in constitution-making and the ways in which they partake in the process. Thus, this research

begins to fill this gap in the scholarship by determining the ways INGOs participated in Tunisia's constitution-making process.

### 6.1. Areas for Future Research

This research finds that INGOs were involved in Tunisia's constitution-making process. It also argues that external actors exercise *pouvoir constituant*. These findings, however, only initiate the further research that is needed to better explain INGOs during the constitution-making process and the implications of their involvement. In terms of this research, there were particular limitations that, with a longer timeframe and more experienced researcher, may be surmountable. The most significant is access to a greater number and more diverse group of local actors. This includes ensuring the local NGO sample group is more geographically and socially representative. The local NGO participants were largely established, professionalized NGOs and unions, generally missing the vulnerabilities common with that of a smaller, unsophisticated organization. Additionally, many of these organizations were liberal, secular, and centred in Tunis. Addressing these limitations may be conceivable in further research.

Beyond these drawbacks, I have become interested in other relevant queries as a result of this research. It would be interesting to determine to what extent INGOs influenced the state and local civil society. Moreover, conducting a study to compare and contrast how different external actors function during constitution-making acknowledges the fact that international actors vary in terms of their agency and behaviour with the state. Understanding the role of external actors outside of the transitional context, if applicable at all, would additionally produce fascinating research. Theoretically, further exploring the debate on *pouvoir constituant* would be very interesting. I argue that the exercise of *pouvoir constituant* was not harmful because the state and

INGOs had similar interests. If this were not the case, would Tunisia's democratic legitimacy be affected? Finally, critically examining strategic motives on the part of the state to include external actors during constitution-making is very interesting. The self-interest of INGOs is documented and that of other external actors is presumed; determining the strategy on the part of the state would be an interesting theorization. All of these are worth further exploration. There are, however, three topics in particular that should be subject to further research and will be discussed in more detail at this time: the rights consciousness of civil society and the state during transitional constitutionalism; the migration of constitutional ideas in contrast with the influence of INGOs; and the constitutional identity of collaborative, transitional constitutions.

#### 6.1.1. *Rights Consciousness in Transitional Constitutionalism*

The notion of right consciousness evaluates one's awareness of rights and the legality of accessing these. It is argued with the progression of globalization, "norms, practices, and belief's about law's efficacy" is likewise dispersed internationally (Aman Jr. & Nichols, pg. 421, 2012). Transitional constitutionalism, however, does not recognize the gradual transnationality of rights, rather arguing that external actors bring international laws and standards to the state. If this is the case, it must be assumed that the cognizance of rights and freedoms is deficient within a particular context. A number of scholars claim, however, that this awareness is developing globally. Observation suggests that the increasing demand for rights and freedoms throughout the world is evidence for such a claim. David Engel (2012) admits that despite this assertion, empirical data is yet to sufficiently support this argument and doing so is rather complex (Engel, pg. 423, 2012). Presently, rights consciousness is typically evaluated through vertical perspectives, specifically examining the links but local communities and their government, international organizations, or any other entity through which rights can be claimed. This is

further framed within neoliberalism and these vertical perspectives “exist inside an imaginary neoliberal culture” (Engel, pg. 427, 2012). Engel (2012) argues, however, that this method must be coupled with horizontal perspectives in order to gauge rights consciousness more effectively. Horizontal perspectives are necessary since vertical perspectives may compete with “other systems of norm enforcement and dispute resolution...”; it is “the constitutive outside of neoliberal culture” (Engel, pg. 423, 427, 2012). Together, rights consciousness can be more accurately measured.

Rights consciousness was alluded to in chapter 5 of this thesis. Evaluating the rights consciousness of local and state actors in Tunisia was speculative in this research. Although though INGOs impacted constitution-making through constituent members and local actors, the level to which this occurred is yet undetermined. The role of external actors in transitional constitutionalism is to bring such ideas to the state however this role may be rendered obsolete if the polis is claimed to be rights conscious. This, of course, leads to other questions however the most important, in terms of a scholarly contribution, is: if the polis has a higher level of rights consciousness yet external actors remain involved in transitional constitution-making, what is their role?

The findings of this research may help to understand the interests of the state and external actors during transitional constitution-making in a way that is yet to be conceptualized.

#### 6.1.2. *Judicial Decision-Making post-Transitional Constitutionalism: The Migration of Constitutional Ideas*

One of the most critical components that ought to be studied within the Tunisian case is judicial decision-making. At present time, the constitutional courts are yet to be formally established. The challenges of this are documented within the literature (Cross & Sorens, 2015; Pickard, 2015). When time to adjudicate, however, the migration of constitutional ideas may be

of great interest. American jurists have recently struggled in determining when or if it is appropriate to consult or cite foreign judicial decisions. The scholarship, however, debates what is proper international consultation as opposed to what is inappropriate. On one hand, the reference of international cases is acceptable, however, the judiciary binding the state to international agreements, for example, is deemed an overreach by the courts. Famously, the late Antonin Scalia rejected the influence of international cases as reference for American cases stating that American cases ought to be tried by, “the standards of American decency – not the standards of decency of the world, not the standards of decency of other countries that don’t have our background, that don’t have our culture, that don’t have our moral views” (Choudhry, pg. 7, 2002). Justice Breyer argues however that the moral other democracies may find in a United States Supreme Court citation is beneficial (Choudhry, pg. 9, 2002). What makes the debate particularly fervent in the American context is the notion that American law and the American constitution are distinctly American. Within the context of Tunisia, however, will the external exercise of internationalized *pouvoir constituant* obligate these courts to refer to international cases as precedence and constitutionally consider international laws? Breyer acknowledges that it is common within the transitional context for justices to cite international cases however fail to give further explanation as to why. Is this due to the internationalization that oft occurs during transitional constitutionalism? This question represents another aspect that is particularly important to literature.

#### 6.1.3. *Constitutional Identity, Without an “Identity”*

Constitutional identity is a core concept within the larger field of constitutionalism and contributes to the understanding that constitution-making is a nation-building exercise that justifies the use of *pouvoir constituant*. The most rudimentary understanding of constitutional

identity is that the constitution reflects the people it is written for. What, however, can be said of a constitution's identity when external actors exercise *pouvoir constituant*? The scholarship has no one interpretation of constitutional identity with the central debate concerning how and when to define identity (Corrias, 2016; Jacobsohn, 2006; Tushnet, 2010). What fails to be considered in depth is the influence of international actors. In the Tunisian context, the constitution, while influenced primarily by national actors, features elements influenced by INGOs. It can be argued that the state's allowance of foreign participation in the constitution-making process and, in turn, the text, nullifies a constitutional identity. This in itself is a debatable proposition. Local actors in particular argue that the constitution, despite evidence of internationalized *pouvoir constituant*, is Tunisian was written with "Tunisian blood and sweat". What then determines the identity of a constitution? Examining how to conceptualize the identity of Tunisia's constitution and the identities of constitutions that experience international participation expands theoretical debates in the literature and reflects the new realities of constitutionalism.

## 6.2. Contributions to the Literature

The scholarly aspects of this study are rather significant empirically and theoretically. The areas for future research suggest that this research topic is far-reaching and will lead to various interesting finding. The most significant contributions relate to the strategic nature of INGOs.

In regards to empirical contributions, this research finds that within the transitional context, constitution-making involves an array of external actors, including INGOs. This is direct contradiction to the scholarship. International actors must not forcibly gain a role in constitution-making; INGOs within the Tunisian context were invited and encouraged by the state to ensure

that Tunisia did not fall back into autocracy or into civil war, but rather began consolidating democracy. The literature does not investigate the engagement of INGOs and its significance, instead remaining convinced that external actors simply do not participate in constitution-making without combative or material pressure. Beginning this discussion is therefore a major contribution.

As alluded to in chapter 5, these findings suggest that the transitional state may ignore the fundamentals of constitutionalism to ensure that democracy is implemented. Tunisia chose to involve external actors for their presumed expertise and experience in democracy, qualities 54 years of authoritarianism disallowed. Kenneth Anderson (2001) criticized the Bush administration for its failure to disregard INGOs despite these actors' general proficiency in human rights policy; foreign non-state actors ought not rebuke the state, no matter the policy. The legitimacy asserted to INGOs during policymaking was unfathomable to Anderson. It is likely that he would argue against endorsing the involvement of INGOs during constitution-making. The transitional state, however, cannot rely on national actors in such a way as more democratically stable countries where democratic norm and values are deep-rooted. Tunisia required expertise in order to entrench the constitution. Although Tunisian scholars and organizations contributed significantly, INGOs provided assistance and support when necessary. Transitional Tunisia did not heed the counsel of the constitutionalism scholarship and it is likely that similar states, when the time comes, also will not. This is a significant contribution as it addresses the actions of state during transition. The scholarship should expect transitional states to court INGOs for expertise, support, and advocacy during constitution-making.

Finally, as discussed earlier, INGOs are presumed to be altruistic but are oft times self-serving. These actors have considerable agency and access to the state and capitalize on this to

pursue their interests. This research, however, finds that INGOs are equally as persistent in constitution-making as in policymaking. It can be argued that INGOs perceive constitution-making as an opportune moment to deeply entrench their interests within the state. The data suggests that INGOs apply methods and strategies effective in policymaking to the constitution-making process, allowing these actors an opening to influence the text. One such method, the boomerang effect, while not overly relevant within these sample groups, was applicable in a particular case. A local NGO looked internationally for assistance in lobbying the state and ensuring particular protections were entrenched into the constitution. Despite its infrequency, applying the boomerang effect to INGOs and local NGOs during constitution-making was yet to occur in the scholarship. More exploration is needed, however this finding encourages more empirical research involving this theory. Another method, that of indirect governance, was more commonly utilized during constitution-making. Once more, this theory in relation to constitutionalism is yet to be considered in the literature. Indirect governance assumes that external actors, or governors, are strategic actors with the intention of influencing policymaking in a given state. Doing so through secondary actors, for various reasons, proves to be a more effective means. The findings suggest that, in the same way INGOs influence policy indirectly, INGOs networked with local NGOs for the purposes of indirectly influencing the constitution. Applying these theories to the constitution-making process demonstrates that INGOs are strategic, effective actors that possess the agency to influence the state through ordinary policy and the constitution. These actors disregard the reverence typically afforded to constitutions. INGOs do not respect the “higher” nature of the law, rather deem it as a more durable protection of their interests. Conceptualizing INGOs in this manner and within the context of constitution-making has yet to occur within the scholarship. This particular contribution is noteworthy as it

speculates that INGOs during constitution-making, more often than not, work to implement particular in policies or, more debatably, exercise internationalized *pouvoir constituant*. This must not be malicious; the genuine concern for certain rights and freedoms may drive INGOs to deeply and keenly involved in the process. The findings yet imply that constitution-making provides INGOs the opportunity to embed specific norms and values into the state.

### 6.3. Concluding Remarks

Scholar Mattias Kumm (2002) warns against focusing too heavily on reality in constitutional work. He laments that “normative virtues of pragmatism and realism” are ignored by “contemporary scholars [who] emphasize their keen focus on what is actually going on and embrace discursive and deliberative nature of the practice they are describing” (Kumm, pg. 260, 2002). Accepting the new must be balanced with the understandings of the old. This study appreciates the fundamental principles of constitutionalism pertaining to foreign constitutional influence. When international actors exact power and control over a given state, this may be democratically damaging. External influence, however, is not inherently dominating and oppressing. Within the Tunisian context, often times INGOs worked in conjunction with the state and other local actors. It can be further argued that within the context of regime change, such participation is necessary. Nevertheless, it seems that when international actors participate in constitution-making, this need not always be precarious or threatening. In Tunisia, despite everything, the state remained in control.

Returning to Kumm’s (2002) comment, appreciating classical components of constitutionalism is beneficial however not so when the materials are inapplicable to “what is actually going on”. Constitutionalism should not remain solely theoretical; observing what is

occurring in reality and applying it to the existing scholarship exemplifies the good empirical research needed within the field.

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## Appendices

## Appendix A.

<b>Constitution Titles</b>	<b>Constitutional Content</b>
Title One: General Principles	<p>Article 1: Tunisia is a free, independent, sovereign state; its religion is Islam.</p> <p>Article 2: Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law.</p> <p>Article 6: The state guards religion, freedom of conscious, protects the sacred, prohibits calls for religious based violence.</p> <p>Article 7: The family is the nucleus of the state.</p> <p>Article 20: International agreements are superior to domestic laws.</p>
Title Two: Rights and Freedoms	<p>Article 21: All citizens, male and female, have equal rights and duties, and are equal before the law without discrimination.</p> <p>Article 27: A defendant shall be presumed innocent until proven guilty in a fair trial.</p> <p>Article 29: No person may be arrested or detained unless apprehended during the commission of a crime or on the basis of a judicial order.</p> <p>Article 32: The state guarantees the right to information and the right to access information.</p> <p>Article 33: Academic freedoms and freedom of scientific research shall be guaranteed.</p> <p>Article 34: The state seeks to guarantee women's representation in elected bodies.</p> <p>Article 36: The right to join and form unions, including the right to strike.</p> <p>Other prominent rights: culture, health care, education, work, and property ownership.</p>
Title Three: The Legislative Authority	<p>Article 53: Every Tunisian with at least 10 years citizenship and 23 years old can be elected.</p> <p>Article 54: Voting age is 18 years old.</p> <p>Article 56: Representatives are elected for a five-year term.</p> <p>Article 60: The opposition is an essential component of the Assembly of the Representatives of the People.</p> <p>Articles 65 and 66: Outlines the jurisdiction of</p>

	the legislature.
Title Four: The Executive Assembly	<p>Article 72: The President is the Head of State and symbol of its unity.</p> <p>Article 74: Every male and female voter who holds Tunisian nationality since birth, whose religion is Islam shall have the right to stand for election to the position of President</p> <p>Article 75: President elected to a five-year term</p> <p>Articles 77 and 78: Outlines the power of the President</p> <p>Article 89: Discusses the role of the government – there is a head of government</p> <p>Article 92: Outlines the powers of the head of government</p>
Title Five: The Judicial Authority	<p>Article 102: Establishes the independence of the judiciary</p> <p>Articles 112-117: Distinguishes four different types judiciaries: Supreme Judicial Council, The Judicial System, Administrative Judiciary, and Financial Judiciary.</p> <p>Article 118: Constitutional Court is an independent judicial body, composed of 12 competent members, three-quarters of whom are legal experts with at least 20 years of experience.</p> <p>Article 120: Lists what the Constitutional Court oversees.</p> <p>Article 121: Decisions of the Constitutional Court are passed within 45 days from the date of challenging constitutionality.</p> <p>Article 123: If the Constitutional Court decides that a law is unconstitutional, the law's implementation is suspended within the limits specified by the Court.</p>
Title Six: Independent Constitutional Bodies	<p>Article 125: The independent constitutional bodies act in support of democracy; and all institutions of the state must facilitate their work.</p> <p>Articles 126-130: Outlines the commissions and their roles.</p>
Title Seven: Local Government	<p>Article 131: Local government is based on decentralization</p> <p>Article 133: Municipal and regional councils are elected through general, free, direct, secret, and transparent elections</p> <p>Article 134: Local authorities possess their</p>

	<p>own powers, powers shared with the central authority, and powers delegated to them from the central government.</p> <p>Article 137: Local authorities shall have the freedom to manage their resources freely within the budget that is allocated to them, in accordance with the principles of good governance and under the supervision of the financial judiciary.</p>
Title Eight: Amending the Constitution	<p>Article 143: The President of the Republic, or a third of the members of the Assembly of the Representatives of the People, have the right to propose amending the Constitution.</p> <p>Article 144: The Constitution shall be amended upon to approval of two-thirds of the members of the Assembly of the Representatives of the People.</p>
Title Nine: Final Provisions	Article 145-147: Concludes the constitution.
Title Ten: Transitional Provisions	Article 148-149: Determines what is transitional in the constitution.

## Appendix B.

<b>INGOs that Influenced the Text</b>	<b>INGO Influenced Articles</b>
Participant i1	*No specific articles to reference.
Participant i2	<p>Article 12 of the Constitution:</p> <p>The state shall seek to achieve social justice, sustainable development and balance between regions based on development indicators and the principle of positive discrimination. The state shall seek to exploit natural resources in the most efficient way.</p> <p>Article 13 of the Constitution:</p> <p>Natural resources belong to the people of Tunisia. The state exercises sovereignty over them in the name of the people. Investment contracts related to these resources shall be presented to the competent committee in the Assembly of the Representatives of the People. The agreements concluded shall be submitted to the Assembly for approval.</p>

	<p>Article 136 of the Constitution:</p> <p>The central government shall provide additional resources for local authorities in order to apply the principle of solidarity, in a balanced and organized manner. The central government works towards achieving balance between local revenues and expenditures. A portion of revenues coming from the exploitation of natural resources may be allocated to the promotion of regional development throughout the national territory.</p>
Participant i4	<p>Article 6 of the Constitution:</p> <p>The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalisation.</p> <p>The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred.</p> <p>Article 32 of the Constitution:</p> <p>The state guarantees the right to information and the right of access to information and communication networks.</p> <p>Article 34 of the Constitution:</p> <p>The rights to election, voting, and candidacy are guaranteed, in accordance with the law. The state seeks to guarantee women's representation in elected bodies.</p>

	<p>Article 35 of the Constitution:</p> <p>The freedom to establish political parties, unions, and associations is guaranteed.</p> <p>In their internal charters and activities, political parties, unions and associations must respect the provisions of the Constitution, the law, financial transparency and the rejection of violence.</p> <p>Article 49 of the Constitution:</p> <p>The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.</p> <p>Judicial authorities ensure that rights and freedoms are protected from all violations.</p> <p>No amendment may undermine the human rights and freedoms guaranteed in this Constitution.</p> <p>Article 127 of the Constitution:</p> <p>The Audio-Visual Communication Commission is responsible for the regulation and development of the audio-visual communication sector and ensures freedom of expression and information, and the establishment of a pluralistic media sector that functions with integrity.</p> <p>The Commission has regulatory powers in its</p>
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	<p>domain of responsibility. It must be consulted on draft laws in its areas of competence.</p> <p>The Commission shall be composed of nine independent, neutral, competent, experienced members with integrity, who serve for one six-year term. One third of its members are replaced every two years.</p>
Participant i6	<p>Article 6 of the Constitution:</p> <p>The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalisation.</p> <p>The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred.</p>