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ISLAM AND HUMAN
RIGHTS: THE
CONSTITUTIONAL
DEBATE IN TUNISIA

MAZEN SHAQOURA
ANNALI KRISTIANSEN

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Authors: Mazen Shaqoura
Annali Kristiansen

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Denmark's National Human Rights Institution
Wilders Plads 8K
DK-1403 Copenhagen K
Phone +45 3269 8888
www.humanrights.dk

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CHAPTER 1

1 INTRODUCTION*

What is – and what should be – the role of Islam in Tunisian law? This has been a central question in recent years' heated debates on the country's new constitution; a debate that has been influenced by on the one hand the ideological rift between conservative/Islamist and secularist/modernist thinkers, and on the other hand by the more technical conflict between scholars/experts, who advocate an abridged version of the constitution, containing general guidelines (as in the French legal system), and human rights activists who advocate a detailed Constitution that minutely spells out human rights provisions (as in South Africa). While these are very broad brush strokes, this outlines the two main parameters that influenced the constitutional debate.

For a better understanding of the role of Islam in contemporary constitutional debates, it is useful to place the debates in their historical and socio-political context. That is the aim of the present paper. The paper seeks to provide an analysis of the role of Islam in the Tunisian constitutional debates after the Arab uprising in 2011, describing the constitutional process and the actors taking part in this and zooming in on central areas of disagreement in these debates.

After nearly two years of debate about the rule of Tunisia, 2014 commenced with the National Constituent Assembly (NCA) adopting the Constitution article by article. Looking back, it is possible to characterise the NCA as a political tool that created contemporary democratic processes, and to see how civil society in a broad sense was essential to informing the debates through which the new legal foundation – the Constitution of Tunisia – was created, building largely on the rule of law and human rights.

The purpose of this paper is to provide a brief and concise overview of some of the main actors who took part in the constitutional debate of Tunisia;¹ it is not a comprehensive analysis of all aspects of the constitutional process in Tunisia.

The paper is divided into three parts: the first part provides a historical perspective; the second part presents the context, process and actors of constitution-making in Tunisia;

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and the third part addresses the discussion of the role of Islam in the drafting and in the final result of the 2014 Constitution of Tunisia. The paper ends with some concluding remarks on the Tunisian case.

CHAPTER 2

2 ISLAM AND THE LAW IN TUNISIA: A HISTORICAL PERSPECTIVE

With a Muslim population of approximately 98 per cent, Islam is the religion of the vast majority in Tunisia. Jewish and Christian minorities make up most of the remaining two per cent. Islam first took root in Tunisia in the second half of the 7th century, when North Africa was conquered by Muslim Arabs. Since then Islam has played an important role in Tunisian society, both as a religion, a culture and a source of law, including during and after the mid-19th century Ottoman reforms.

At the beginning of the 19th century, the judicial scene was characterised by the coexistence of Sharia courts applying Islamic law to the Muslim majority and rabbinical courts applying Jewish law to the Jewish minority. A reformist movement led by Arab and Muslim scholars called for reforms of the existing legal systems, seen by the movement to be inferior to Western systems. Such claims, combined with pressures from influential Western powers, resulted in the adoption in Tunisia of the Fundamental Pact of 1857, which enshrined ideas of freedom and fundamental rights. This was followed by the Constitution of 1861, which established new principles of State organisation, such as those limiting the absolute power of the monarch and enshrining the separation of powers. Justice was also reorganised by separation of Sharia courts and secular ones.² In Ottoman times the working relationship between the State and Muslim scholars and jurists was close.³

The role of Islam was unabated by the French Protectorate era (1881-1956) as the French did not dismantle existing institutions, maintaining instead the degree of self-rule established by the Turkish monarchs, known as the *Beys*. During the protectorate era, the religious courts – including Sharia courts – made rulings in matters of personal status alongside the French courts applying French law, which had gained pre-eminence through a series of reforms that had an important impact on Tunisian law.⁴

Following independence in 1956, the new Tunisian authorities implemented a range of legal reforms that gave the Tunisian legal system its current shape. In 1956, Sharia courts (and later rabbinical courts and French courts) were abolished, and the Code of Personal Status (CPS) was adopted. Tunisian courts were thus unified and the same law applied to all persons under Tunisian jurisdiction. French law was thus a basis for

Tunisian law reform, particularly civil law. Most of these reforms were generally viewed as having a modernist and secularist orientation: the CPS suppressed core aspects of Sharia law (such as regulation of polygyny and marital repudiation), and Sharia was no longer considered a formal source of law.

Despite this, Islamic law still had social and political legitimacy, and lawmakers sought to make room for its continued influence. For instance the CPS was presented as result of *Ijtihad*⁵ and the code maintained certain provisions inspired by Islamic law, such as matters of inheritance for instance. In the same way magistrates to a certain extent continued to apply Islamic law as a basis for interpretation of the CPS. In short, Islam remained an important social factor and inspired important provisions of Tunisian law; one could even, to some extent, call it a material source of the law.

As in other Muslim-majority societies, the State controlled religion in the period from the mid-1940s to the 1970s, and it was only after this that 'Islamist attitudes became more prevalent in direct reaction to State policies, attempting to devise an overall language and programme of political control of religion, as well as all aspects of social, economic and cultural life'.⁶

During the Ben Ali regime (1987-2011), the situation in Tunisia did not change much. State authorities occasionally invoked an Islamic and Arab identity of the State while at the same time maintaining its secularist orientation. Religious policy did not change much and it was clearly autocratic.⁷ The regime insisted the post-independence reforms were important gains that should be kept, and resolutely pursued a modernist orientation of the State and society. This trend was highlighted by the confrontation with Islamists that characterised the Ben Ali period, including an increase in arrests and harassment of people who were considered radical,⁸ and a ban on political parties with even mildly Islamist policies; something which resulted in the exile of some of today's leaders of political parties in Tunisia.

CHAPTER 3

3 CONSTITUTION-MAKING IN TUNISIA: CONTEXT, PROCESS AND ACTORS

Following the uprising that led to the end of the Ben Ali regime on 14 January 2011, Tunisia entered a transition towards democracy. This included a constitution-making process that was launched after legislative elections were held on 23 October 2011, when the National Constitutive Assembly (NCA) was elected.

The NCA adopted a new law to govern the institutions of the State during the transitional period.⁹ It put in place a parliamentary political regime whereby the executive was shared between a prime minister, who headed the government and enjoyed more important powers than under the Ben Ali regime, and a president, who was the head of State with more symbolic powers. A coalition government was put in place, comprising the Islamist *Ennahda* party (the main winner of the elections), the centre nationalist party *Congrès pour la République* (CPR) and the socialist party *Ettakatol* (*Forum démocratique pour le travail et les libertés*), led by Mustapha Ben Jafaar, Chairman of the NCA in 2013-14. The NCA, the country's parliament in the period leading up to the first freely elected parliament in 2014, had both legislative and constituent mandates.

The adoption of a new Constitution for the country was at the heart of the NCA's mandate.¹⁰ The legal framework for the adoption of the new Constitution¹¹ was the Fundamental Law No 6 of 16 December 2012 on the Provisional Organisation of Public Institutions, which was adopted by the NCA to replace the old Constitution, suspended in 2011.¹² The Rules of the NCA further detailed the procedure for the adoption of the Constitution. The NCA was organised in six constituent commissions, each in charge of drafting a specific domain of the constitution. The first five dealt with the preamble and fundamental principles, local government entities, rights and freedoms, executive and legislative powers and relations between them, and justice and constitutional bodies. The sixth, a drafting and synthesis commission was to consolidate the efforts of the others into one document and harmonise them.

The process of drafting the Constitution started in the spring of 2012, following the establishment of the internal structures of the NCA. The process provoked heated debate on numerous issues, such as the identity of the State, the role of religion in the

State and in society, the nature of the political system, the place of human rights and the role of women in society. These questions were not always viewed in the same way by the different components of Tunisian society and political elites represented within the NCA. Yet the members of the NCA reached consensus on a range of important issues, such as Article 1 of the old Constitution, which defines the identity of the State and mentions Islam as its religion without identifying Sharia as a main source of law, as initially demanded by some Islamist representatives.

A preliminary draft of the Constitution was released by the NCA in August 2012. Between then and the adoption of the final document in January 2014, a further three versions were released for public debate and refinement. The Constitution drafting process was thus not completed within one year, as was originally planned, and had to continue well beyond its 23 October 2012 deadline. It was further delayed by a political crisis brought on by the assassination in July 2013 of the opposition figure Mohamed Brahmi, who was a member of the NCA.

Nonetheless, negotiations on the draft constitution continued. By June 2013, the NCA's political blocs had established a Committee of Consensus. Chaired by the chairman of the NCA, the committee comprised representatives of the main political currents in the NCA in a semi-proportional way, in addition to the General Rapporteur of the Constitution. While it is debatable whether the Committee of Consensus was formally speaking a legitimate actor, it is clear that, assisted by a panel of legal experts, it contributed to a number of agreements reached on disputed issues of the draft Constitution, gaining legitimacy and recognition for its endeavours.

Throughout the constitutional process, civil society played an important role in monitoring the process and voicing its opinion on a number of issues, substantial as well as more process-oriented. The observatory Marsad focused on monitoring the debates of the NCA,¹³ civil society was very vocal about women's rights, and the broader public followed the debate through the media, actively discussing developments. Nevertheless, the political crisis of the summer of 2013 made it clear that additional efforts were required to ensure that the objectives of the uprising were attained, and that a new democratic foundation for Tunisia would be created through the new Constitution.

This prompted four of Tunisia's old civil society actors to join forces in an attempt to strengthen the constitutional process. Commonly known as 'the quartet', the General Tunisian Union of Work (UGTT), the Tunisian Union of Industry, Commerce and Crafts (UTICA), the Tunisian League of Human Rights (LTDH) and the National Organisation of Tunisian Lawyers (ONAT)¹⁴ launched a national dialogue as a way of establishing a

common response to the urgent challenges of Tunisia that included the finalisation of the Constitution. While not necessarily sharing the same ideologies or values, the four organisations were united in their wish to drive the constitutional process forward. Outside the NCA, the quartet deliberated on and pushed consistently for the finalisation of the Constitution at a time when the potential for agreement inside the NCA did not seem possible.¹⁵

While the constitution-making process was driven nationally, involving in particular the NCA and Tunisian civil society, international organisations such as the various UN agencies of the UN Country Team (UNCT), the EU, and a number of international NGOs closely watched the constitutional process, trying to support it when possible. UN support was conducted mainly through the UNCT and the agencies comprising it, such as the Office of the High Commissioner for Human Rights (OHCHR) in Tunis. Under the leadership of the UN Development Programme (UNDP), the UNCT concluded a cooperation project with the NCA to support the transition in Tunisia. It aimed at enabling a successful process leading to the production of a final document with strong legitimacy, in order to lay a foundation for a new social contract.¹⁶ In addition, a series of activities were carried out in support of a participatory and inclusive constitution-making process.¹⁷ At the initiative of the OHCHR, the UNCT engaged in lobbying and advocacy activities for the inclusion of human rights standards and principles in the draft constitution. A joint letter containing recommendations on the application of international standards to guarantee human rights and the rule of law was sent to each member of the NCA in August 2012. Furthermore, the OHCHR had also reacted to the content of certain provisions in a preliminary draft with recommendations that the NCA integrate international standards in its draft. Following the draft of 1 June 2013, the OHCHR and UNCT sister agencies conducted a human rights-based analysis of the document, identifying progress and main challenges with regard to compliance with international human rights standards and the obligations of Tunisia. This analysis served as a basis for the UNCT to engage with Tunisian authorities, including Cabinet and NCA members, and to put forward recommendations aimed at improving the draft Constitution from a human rights perspective.

CHAPTER 4

4 THE DEBATE ON THE ROLE OF ISLAM IN THE CONSTITUTION

The debate on the role of Islam in the future Constitution was crucial, not only because of the historical and social role of Islam in the wider context of the Muslim and Arab world, but also because of the political context proper to Tunisia. The main objective of political Islam – and thus a common stance of Islamists – is that Islam should play a central role in society, not only as a source of social conduct and as moral, cultural and political guidelines, but also as a main source of law. This has important implications for the role that Islam will play within the State and for the relationship between the State and religion, as evidenced by the widespread cleavage within Arab and Muslim societies between religious conservatives and secular modernists. In Tunisia, Islamists (mainly Ennahda) have been an important opposition force to successive post-independence regimes in Tunisia since at least the 1970s, with the main point of discord between the two sides being precisely the role of religion in the State and society. Ennahda members had overtly opposed what they viewed as an anti-Islamic regime, vehemently attacking its secularist tendencies. In the time of Ben Ali (1987-2011), this was at the root of a political confrontation that led to the trials, jailing and exile of the Ennahda members who came into power as part of the 2012-13 Troika. The Ben Ali regime sought to curb religious influence on Tunisian society, prohibiting the establishment of religion-based political parties¹⁸ and keeping Islamist militants under tight watch. Since the uprising, the influence of religion on Tunisian society has become more prominent, contributing to the electoral victory of Ennahda, and bringing the question of Islam's role in the Constitution to the fore.

Since the NCA began discussing the Constitution in February 2012, the role of religion in the State – specifically the role of Sharia in the Constitution – was poised to be the most divisive political issue.¹⁹ Some Islamists, including members of Ennahda, called for the inclusion of an explicit reference to Islam as a main source of law. The secularist parties vehemently opposed any concession on the issue, insisting on the need to keep and consolidate the modernist gains of Tunisian society.²⁰ The stance of Ennahda was ambiguous: its leader, Rashid al-Ghannouchi, had announced before the elections that his party would not insist on the inclusion of a reference to Sharia as a source of law in Tunisia. Nonetheless, after much debate on the matter, the main political stakeholders reached a consensus on maintaining the provision of Article 1 of the 1959 Constitution

(suspended in 2011), which stated that: 'Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic, and its type of government is the Republic'.

The 1959 Constitution did refer to Islam, though in a muted fashion in the sense that Islam, while recognised as the main religion of Tunisia (Article 1), was not considered a primary or formal source of law. Apart from this and a few other references, e.g. those concerning requirements as to the religion of the head of State, the Constitution remained relatively neutral on the issue of religion. According to some, Article 1 of the 1959 Constitution simply indicated that the Tunisian people were in their great majority Muslim and that 'the Tunisian State did not ignore the sociological reality or certain peculiarities of Islam'.²¹

The preambles of the various drafts all insist on the Arab and Islamic identity of Tunisia and this has a particular legal significance as the drafts recognise the preamble as part of the Constitution.²² Moreover, all drafts recite the provision of Article 1 of the 1959 Constitution. Not only was consensus reached to maintain this article, it was also agreed that it would not be amended. Despite this consensus, the debate continued to rage over different provisions in successive draft Constitutions relating directly or indirectly to Islam and its role in society and the State, including the status of Sharia law, rights of women, criminalisation of blasphemy, and discrimination on the basis of religion, as shall be discussed in the following.

4.1 THE STATUS OF ISLAM

As mentioned above, the preambles of the various drafts all insisted on the Arab and Islamic identity of Tunisia. All the drafts also recite Article 1 of the 1959 Constitution: 'Tunisia is a free, independent and sovereign State. Its religion is Islam, its language is Arabic and its form of government is the Republic'. The preamble of the first draft Constitution of 13 August 2012 refers to the aims of Islam as a source of inspiration and insists on the Arab and Islamic identity of the country. It recognises the State as the protector and guarantor of religion and of the freedoms of conscience and exercise of faith, as well as of the sacredness and neutrality of worship sites against partisan propaganda. Further, the final provisions indirectly enshrine 'Islam as the religion of the State' by stating that this provision is excluded from any possible amendment.

The second draft Constitution of 14 December 2012 declares that it is founded on the 'fundamental principles' (*thawabit*)²³ of Islam and that its aims are 'openness and moderation' based on the 'heritage of Tunisian people', and it also highlights the 'Islamic and Arab identity of the country'. The reference to the Islamic identity is nonetheless tempered by a reference to universal values as well as to the historical and cultural

heritage of Tunisia. The draft recognises Islam as the religion of the country, just as the previous draft did. It also recognises the State as ‘the guarantor of religion’, ‘freedom of belief, the practice of religion (...) and as ‘the protector of the sacred and the guarantor of the neutrality of places of worship in relation to partisan propaganda’ (Article 4).

The third draft Constitution of 23 April 2013 also includes Article 1 and recognises the role of Islam as the country’s main religion. Furthermore, the preamble also bases the Constitution on the ‘fundamental principles (*thawabit*) of Islam,’ stating that its goals are characterised by ‘openness and moderation’. It refers to the ‘noble human values and principles of universal human rights’ but only ‘insofar as they are consistent with the cultural specificities of the Tunisian people’. Compared to the previous drafts, this draft goes further in insisting on cultural specificity. The constitution-makers declare that the document was inspired by ‘our cultural heritage accumulated throughout our history, our enlightened reformist movement based on the elements of our Arab-Muslim identity and universal achievements of human civilisation, and commitment to national achievements that our people have achieved’.²⁴ These provisions of the preamble raised concerns among human rights proponents, arguing that they could have negative implications for the universality of human rights. Otherwise, this draft also maintains Article 1 and recognises the role of Islam as the main religion of the country.

In the fourth draft Constitution of 1 June 2013, the Arab-Islamic identity of Tunisia is again explicitly stressed in the preamble, along with other references. The drafters declare they are guided by the ‘teachings (doctrine) of Islam and its purposes characterised by openness and moderation, and the human values, the supreme universal human rights’,²⁵ and that they are ‘taking inspiration from our civilizational heritage along the successive epochs of our history, and from our enlightened reformist movements taking their foundation from our Arab and Islamic identity, and the achievements of human civilisation, and expressing the attachment to the national achievements realised by our People’.²⁶ Some openness and moderation is also stressed, along with the affirmation of Tunisian people’s ‘cultural and civilizational belonging to the Arab and Islamic Ummah (Nation)’. As with the previous versions, Article 1 is maintained and Islam recognised as the main religion of the country and the State.²⁷

As a result of agreements reached within the Committee on Consensus (established in June 2013), further amendments to this draft were proposed. These included a suggestion that the provision of the preamble that refers to the process as being founded ‘on the teachings of Islam’ was replaced by a softer provision highlighting ‘the attachment of our people to the Doctrine of Islam’. Another suggestion was the removal of Article 141,²⁸ which referred to Islam as the religion of the State. This would remove

all constitutional provisions referring explicitly to Islam as the religion of the State other than Article 1.

Further, whereas Article 141 had listed a number of elements that could not be amended, this was to be replaced by two similar provisions stating that Articles 1 ('Tunisia is a free, independent and sovereign state; Islam is her religion; Arabic her language and her rule is republican') and 2 ('Tunisia is a civil state based on citizenship and ruled by the will of the people and the rule of law') could not be amended. This, in addition to the fact that important human rights provisions had positively evolved as a consequence of these agreements – informed partly by the advocacy of human rights organisations – strengthened the status of the liberties and freedoms in the draft. The influence of the panel of experts assisting the Committee of Consensus may have been instrumental in this change as it was composed of experts with predominantly secularist orientation.

None of the draft constitutions referred to Islam as a formal source of law, despite demands to that effect from some Islamist actors. This may be explained by the relatively pragmatic stance of Ennahda, reflecting the particular characteristics of Tunisia as a relatively secularised society where religious faith is increasingly viewed as a personal matter rather than a community or clan issue.²⁹

The preamble of the final Constitution, adopted in 2014, emphasises the sovereignty of the people and the democratic, participatory and republican rule of Tunisia. As concerns the religious foundations, the Constitution expresses the attachment of the Tunisian people to the teachings of Islam and its objectives, which are characterised by values of openness and moderation. In addition, the Constitution states that Tunisia is a State of civil character, based on citizenship, the will of the people and the primacy of the law. The notion of a State 'of civil character', which is also found in other recent constitutions in the Middle East and North Africa, appears to determine that the authorities established by law shall resolve any violation of rights through the law.³⁰ Read in conjunction with Article 6, which defines the State as the guarantor of freedom of belief and conscience and of the free exercise of worship, the Constitution provides a framework based on citizenship and the rule of law, within which the State is to work for moderation and tolerance; both of which are considered to be values of Islam.³¹ Islam is thus the State religion, but this should not prevent freedom of religion for people of other faiths.

Finally it appears that the language of the 2014 Constitution has avoided a potentially adverse effect on human rights,³² by omitting any indication of the role of Islam or that of a religious authority as a legal source per se.

4.2 THE STATUS AND RIGHTS OF WOMEN

The status of women was another subject at the centre of the constitutional debates. Rights proponents raised concerns about the possible erosion of gains in terms of women's rights as a consequence of the dominant role of Ennahda in the NCA, and the increasing influence of Islamists in general. This issue acquired a special significance given the evolution that characterised post-independence Tunisia, which is traditionally viewed as a leading example in terms of the emancipation of women in the Arab world.³³

In the August 2012 draft, Article 28 referred to the roles of men and women as complementary. In fact, the constitutional subcommittee had approved the following wording by a vote of 12 to 8: 'The State guarantees the protection of women's rights and support of its [their] achievements as a real partner of man in building the nation. Their roles within the family are complementary'.³⁴ This raised a storm of controversy driven by the Islamist position that man has supremacy over woman or that females are subjugate to males. This vibrant debate saw human rights defenders, leading feminists of all ages and other components of civil society taking to the streets to advocate for equality. As a result of sustained pressure upon the NCA, Article 20 of the draft Constitution of 1 June 2013 recognised the equality of men and women in rights and duties, and before the law without any discrimination, although mainly in their qualities as citizens. It was subsequently adopted as Article 21 of the 2014 Constitution.

In addition, Article 46 provides that the State guarantees the protection of the rights of women and their gains (*Muktasabaat*) as well as the equality of opportunities between men and women in discharging various responsibilities. It also provides that the State will work towards parity between men and women; and that it will take all the measures needed to eradicate violence against women.

4.3 BLASPHEMY AND ITS RELATION TO THE FREEDOMS OF RELIGION, EXPRESSION AND CONSCIENCE

The recognition of Islam as the religion of the State on the one hand, while on the other hand the Constitution hailed the State as the protector and guarantor of the freedoms of conscience and of the exercise of faith, as well as of the sacred and of the neutrality of sites of worship against any partisan propaganda, raised some debate about the potential tension of this mix. This occurred against the backdrop of a series of events related to freedom of expression: a number of artworks were viewed by Islamists as blasphemous and as attacks on the sacred for instance. In addition, certain artistic

expressions and places of worship had been explicitly threatened and some holy shrines had even been destroyed.

Activists raised the concern that the pretension of the State to be the guarantor of the freedom of conscience could imply a limitation of the freedom of expression and be a potential pretext for undue interference of the State in the freedoms of conscience and creation. As the public debate became increasingly polarized and the media's reporting increasingly heated, reports of violence in various forms also increased. Again, a vociferous part of Tunisian civil society strongly contested this turn of events.

The attempt to criminalise blasphemy within the Constitution did not succeed, although the debate may resurface in the future. In the draft Constitution of 1 June 2013, Article 6 stated: 'The State is the guarantor of religion, protector of freedom of faith and conscience and of the exercise of religious rituals, protector of the Sacred, guarantor of the neutrality of mosques and worship sites from partisan instrumentalisation'. The fact that this provision was included in Chapter I, which dealt with general provisions, rather than Chapter II, which covered rights and freedoms, also raised some controversy, because it appeared to be a shrewd way to give the State leverage over freedom of conscience and pave the road towards a future theocracy, as well as to blur the line between the right holder and duty bearer, since freedom of faith and conscience is one of the non-derogable rights under international human rights law.

After an extended debate on whether or not to constitutionally prohibit blasphemy, the NCA adopted a Constitution that prohibits 'any harm to the sacred, campaigns accusing of apostasy (*ridda*), and incitement to hatred or violence' (Article 6). The text thus includes insult (*sabb*), abuse or vilification (*shatm*), denial (*takdhib or tajdif*), accusation and defamation (*ta'n*).

The State also 'guarantees the neutrality of mosques and places of worship against any partisan instrumentalism'. Moreover, it endeavours to disseminate the values of moderation and tolerance.

4.4 DISCRIMINATION ON GROUNDS OF FAITH

While the prohibition of extreme forms of discrimination in relation to religion is clear from the above, a more general prohibition of discrimination on the basis of religion is rather implicit and might only be inferred from the guarantee of freedom of belief. The implicit prohibition of discrimination based on religion may be seen as a consequence of placing this as a general provision and thus as an underlying value, rather than as a part of the chapter on human rights and fundamental freedoms. As the rule of law³⁵ is an

explicit constitutional principle, it could be argued that any potential conflict could be solved through the law.

The explicit reference to the Arab-Islamic identity of the State and of Islam as a religion of the State, if interpreted in a certain ('exclusivist') way, may be a source of concern with respect to the rights of minority groups. This applies specifically to Jewish and Christian minorities.³⁶ In this regard, it is to be noted that the various drafts of the Constitution, as with the Constitution of 1959³⁷, declare that the president of the republic has to be of Muslim faith.³⁸ Article 73 of the June 2013 draft and article 74 of the 2014 Constitution specify 'being a Muslim' as a prerequisite for presidential candidacy. This is discriminatory according to international human rights law standards, although its practical application appears limited.

CHAPTER 5

5 CONCLUDING REMARKS: THE PROCESS, THE BALANCE OF POWER AND INTERESTS BEHIND THE 2014 CONSTITUTION OF TUNISIA

Despite the fact that Tunisian Islamists, who can be considered as part of the global Muslim Brotherhood movement, were the main winners of the elections of the 23 October 2011 and have gained in influence in Tunisia since the uprising, the Constitution of Tunisia is not a typical 'Islamist constitution'. There are several reasons for this.

First, the outcome of the constitution-making process did not completely depend on Ennahda, insofar as the party did not represent an absolute majority in the NCA. The approval of the Constitution required two thirds of the council members while the Ennahda movement represented only 42 percent of the members.

Another important factor is the heterogeneity of the movement, reflecting a variety of different attitudes to the issues at stake, including the place and role of Islam in the future Constitution. A significant proportion of Ennahda's leadership leaned towards pragmatism, seeking consensus rather than conflict with the Francophone and West-oriented segments of Tunisian society. In their view, a form of Islamisation that would imply social agendas such as the legalisation of polygyny and the introduction of changes to the Personal Status Law to that effect was not only unrealistic, but also undesirable.

Third, Ennahda's partners in the coalition government were secular parties who insisted on the civil nature of the State. This factor was instrumental in building the consensus amongst the main, if not all, political forces to maintain the first Article of the 1959 Constitution. The capacity of liberals and leftists to influence domestic public opinion was higher than that of Ennahda, since they possessed or were backed by mainstream media as well as predominant voices on social networks.

Fourth, Tunisians were not necessarily inspired by the legal models or constitutions of their immediate neighbours like Algeria; rather, they were inspired by neighbours across the Mediterranean, especially France.³⁹

Fifth, and finally, a number of strong unions and other civil society entities – some of which played important roles in the struggle for independence, like the *Union Générale Tunisienne du Travail* (UGTT) and the *Ordre National des Avocats de Tunisie* (ONAT) – had strong secular backgrounds, and their influence on the constitution-making process should not be underestimated.⁴⁰

Civil society was, in a broad sense, essential to informing the debates through which the new legal foundation – the Constitution – was created that is largely based on the rule of law⁴¹ and human rights.⁴²

In conclusion, the work of the NCA in drafting the Tunisian constitution required consideration of Tunisian ideals and social norms. While the document reflects human rights as a set of legal norms enshrined in international law, the debate and process leading to the 2014 Constitution resulted in a document that in its outlook and ambition reflects the viewpoints and ideas that make up the Tunisia of today.

The Constitution of Tunisia does not refer to Islamic law; but with its reference to the teachings of Islam it points towards a cultural heritage of Islam that has developed into social norms in Tunisia and is perhaps a material source of law. While it encompasses human rights and their protection, the language of the Constitution creates some ambiguity in terms of a potential conflict of values, which might be formally resolved by the Constitutional Court and other human rights entities established by the 2014 Constitution.

As the supreme law of the land, the Constitution is a milestone in the founding of modern Tunisia, and only time will show how it will be applied and interpreted.

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ENDNOTES

¹ For further reading on this topic see e.g. Antonin Gelblat: De l'opposition constituante à l'opposition constitutionnelle: réflexion sur la constitutionnalisation de l'opposition parlementaire à partir des cas tunisien et marocain, *La Revue des Droits des Hommes*, no. 6, 2014; or Rahim Kherad: Quelques observations sur la place des droits fondamentaux dans les nouvelles constitutions tunisienne et égyptienne, *La Revue des Droits des Hommes*, no. 6, 2014. For a more broader analysis of constitutional reforms, see Álvaro Vasconcelos and Gerald Stang (eds.): *Constitutional reform in times of transition*, The Arab Reform Initiative, 2014. On the relationship between Islam and human rights, see Ann Elizabeth Mayer: *Islam and Human Rights: tradition and politics*, Westview Press, 2012. For insights into questions of democracy, see Hassan Krayem (ed.): *Revolutions for Deliverance from Authoritarianism: Case studies*, The Arab Network for the Study of Democracy 2014.

² Kalthoum Meyiou, Rapport national tunisien, in Jorge A. Sánchez Cordero (ed.), *La culture juridique et l'acculturation du droit*, Washington DC: Académie Internationale de Droit Comparé, 2010, pp. 2-5.

³ Mohammed Arkoun: The State, the Individual, and Human Rights: A Contemporary View of Muslims in a Global Context. *The Muslim Almanac, the Reference Work on History, Faith and Culture, and Peoples of Islam*, Detroit: Gale Research Inc., 1995, pp.453-457.

⁴ One example of the co-existence of legal cultures was the use of *Dar Joued* in regard to conflicts of married life. It was a place of reclusion, correction and re-education for disobedient women that was used by the Sharia courts until the end of the French Protectorate. See Dalenda et Abdelhamid Larguèche: *Marginales en terre d'Islam*, Cerès editions, Tunis, 1992, EDIF 2000. Ch. 2.

⁵ "The word *sharia*, in its primary sense, denotes *path*. It is the path along which Muslims travel in accordance with their *ijtihad*, effort of reflection. Thus, in drawing up the legal rules governing life in society, Muslims will consider how best to adapt to their time". Mohamed Charfi, *Islam and liberty – the historical misunderstanding*, United Kingdom, Zed Books, London, 2005, p.35. The term *Ijtihad* has been defined as 'the endeavour of a Moslem scholar to derive a rule of divine law from the Koran and Hadith without relying on the views of other scholars'. By the end of the 10th century theologians had decided that debate on such matters would be closed, and consequently Muslim theology and law were frozen, according to the Free Dictionary Online. It adds: 'Some reform-minded Islamic scholars believe that reopening *ijtihad* is a prerequisite for the survival of Islam.' <http://www.thefreedictionary.com/ijtihad>

⁶ Mohammed Arkoun: The State, the Individual, and Human Rights: a Contemporary View of Muslims in a Global Context. *The Muslim Almanac, the Reference Work on History, Faith and Culture, and Peoples of Islam*, Detroit: Gale Research Inc., 1995, pp.453-457

⁷ Jonathan Fox: *Political Secularism, Religion and the State*, Cambridge Studies in Social Theory, Religion and Politics, Cambridge University Press, 2015, p.162

⁸ *Ibid.*, p.123

⁹ The Fundamental Law No 6 of 16 December 2012 on the Provisional Organisation of Public Institutions.

¹⁰ *Ibid.* Preamble and Section 2.

¹¹ In simple terms, a constitution is a binding legal document by which a society organizes a government for itself, limits those powers, and prescribes the relations of its various organs inter

se, and with the people. *The Constitutional Protection of Human Rights*, 2012, p.7; B.O. Nwabueze, *Constitutionalism in the emergent states*. Fairleigh Dickinson University Press, 1973 p.2.

¹² Chapter II, Section 3 of this law describes the constituent powers of the NCA. It states that: “The NCA adopts a Draft Constitution, section by section, at an absolute number of votes of its members, after which the entire draft Constitution is approved by a two thirds majority of the members of the Assembly and if this proves impossible, then the draft may be adopted in a second reading within a one month period following the first reading, and in the case of impossibility, the draft Constitution as a whole is presented for a general referendum in which case it is approved by the majority of voters”.

¹³ See <http://www.marsad.tn/fr/> (accessed on 21 July 2014).

¹⁴ All four had existed under the previous regime and in particular UGTT and UTICA were accustomed to meet at the negotiating table of the so-called social dialogues under the Ben Ali regime.

¹⁵ For this endeavour, the Quartet received the 2015 Nobel Peace Prize.

¹⁶ This covered strengthening the efficiency and transparency of the NCA through various capacity building and technical support initiatives. It also aimed at enabling the civil society to contribute meaningfully to the process and at promoting an inclusive and consensual reform process during the transition.

¹⁷ Such activities included supporting the NCA group in charge of relations with the public and civil society to elaborate a work plan for its action; presenting the NCA with different constitutional and institutional options for managing relations between executive and legislative powers in a democratic context; training in techniques of dialogue and public consultation; and organising consultative days (14 -15 September 2012) for the NCA to dialogue with civil society organisations on the work of the constituent commissions and their expectations.

¹⁸ George Sadek, *The Role of Islamic Law in Tunisia’s Constitution and Legislation Post-Arab Spring*, Washington DC: The Law Library of Congress, Global Legal Research Centre, 2013.

¹⁹ Duncan Packard, *The Current Status of Constitution Making in Tunisia*, Carnegie Endowment for International Peace, 19 April 2012, available at <http://carnegieendowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia/ah1s>

²⁰ For instance, the rhetoric of some members of Ennahda prompted Mustapha Ben Jaafar to declare that he would resign and withdraw the Ettakatol party from the ruling Troika coalition should Sharia appear in the Constitution in any form.

²¹ Mohamed Charfi, *Islam and Liberty: The Historical Misunderstanding*, Zed Books, London, 2005, p.12-13.

²² Article 145 of the 2014 Constitution indicates that the preamble is an integral part of the Constitution; moreover article 146 reads that the dispositions of the Constitution are part of and interpreted as a harmonious whole.

²³ Etymologically, in Arabic the word *thawabit* refers more to ‘constant principles’ and does not share the same root with the word ‘fundamentalist’ (*ussouliy* derived from *ussouls* meaning ‘fundament’). The translation may therefore be misleading as it may suggest a more direct link between the wording used to translate *thawabit* and ‘fundamentalism’ as understood in its most current meaning. Such a link is not that obvious in Arabic.

²⁴ Preamble to the Constitution of Tunisia, 2014.

²⁵ Ibid. .

²⁶ Ibid.

²⁷ A state religion could potentially have an adverse impact on human rights if religious texts and their interpretation by the religious authorities are seen as legal sources of law that may prevail over human rights in the event of a conflict of norms.

²⁸ Article 141 states that the following elements may not be subject to constitutional amendment: Islam as the religion of the State, Arabic as the official language of the State, the republican system of government, the civil character of the State, the human rights and freedoms guaranteed in the Constitution and the number of times for extending the presidential mandate.

²⁹ Added to this is a context that was characterised by a balance of power that did not enable the Islamists to impose their will: while they had a relative majority in the NCA, the government consisted of a coalition of parties, and important media and economic powers were placed outside the control of the holders of political power. These parameters had to be taken into account during the transition phase and run-up to the next elections, and may have determined Ennahda's declared willingness to be open and to aim at a consensual Constitution.

³⁰ Civil state. (n.d.) *A Law Dictionary, Adapted to the Constitution and Laws of the United States.* By John Bouvier. (1856). Retrieved February 12 2015 from <http://legal-dictionary.thefreedictionary.com/Civil+state>

³¹ Article 6

³² The Constitution is considered the supreme law of the land where ratified international treaties have clearly been granted a supra-legislative place; that is, they are ranked below the Constitution but above the rest of the laws of the land. Art. 20, the Constitution of Tunisia (2014), 'infra-constitutionnel'.

³³ In fact, the modernist policies of the post-independence State had among their consequences the consolidation of the nuclear family as opposed to the extended family, something which has direct implications for individual choices.

³⁴ Sarah J. Feuer, *Islam and Democracy in Practice: Tunisia's Ennahda Nine Months.*

³⁵ Article 6

³⁶ According to Jonathan Fox 'Tunisia, while not closing existing minority places of worship, has rarely allowed new ones to be built since the 19th century'. Jonathan Fox: *Political Secularism, Religion and the State*, Cambridge Studies in Social Theory, Religion and Politics, Cambridge University Press, 2015, p.145.

³⁷ Article 38 of the Constitution of 1959 states that the 'The President of the Republic is the Head of State. His religion shall be Islam.' This provision is the one that had a direct normative value, although its significance need not be exaggerated given the context.

³⁸ Article 72 of the draft Constitution of 23 April 2013.

³⁹ For example Tunisian civil law is based on the French version.

⁴⁰ In addition to the above, it is worth mentioning that Tunisia's transition was crowned by presidential and parliamentary elections near the end of 2014, and all political forces, including Ennahda, had electoral calculations to make. All these factors united to contribute hugely in making the constitution-making process in Tunisia and its outcome different from that in other Arab Spring countries, such as Libya and Egypt.

⁴¹ 'The rule of law [...] refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency' (Report of the UN Secretary General, S/2004/616).

⁴² See endnote 32 and Art. 20 of the Constitution of Tunisia (2014).

BIBLIOGRAPHY

Legal texts

The Constitution of Tunisia, 1959

The Constitution of Tunisia, 2014

The Fundamental Law No 6 of 16 December 2012 on the Provisional Organisation of Public Institutions

Articles and literature

Arkoun, Mohammed: The State, the Individual, and Human Rights: a Contemporary View of Muslims in a Global Context. *The Muslim Almanac, the Reference Work on History, Faith and Culture, and Peoples of Islam* (Detroit: Gale Research Inc.), 1995

Charfi, Mohamed, *Islam and liberty – the historical misunderstanding*, United Kingdom, Zed Books, London, 2005

Feuer, Sarah J., *Islam and Democracy in Practice: Tunisia's Ennahda Nine Months*

Fox, Jonathan: *Political Secularism, Religion and the State*, Cambridge Studies in Social Theory, Religion and Politics, Cambridge University Press, 2015

Larguèche, Dalenda et Abdelhamid, *Marginales en terre d'Islam*. Cerès editions, Tunis, 1992, EDIF 2000

Meyiou, Kalthoum, *Rapport national tunisien*, in Jorge A. Sánchez Cordero (ed.), *La culture juridique et l'acculturation du droit*, Washington DC: Académie Internationale de Droit Comparé, 2010

Packard, Duncan, *The Current Status of Constitution Making in Tunisia*, Carnegie Endowment for International Peace, 19 April 2012.

Sadek, George, *The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring*, Washington DC: The Law Library of Congress, Global Legal Research Centre, 2013.

The Danish Institute for Human Rights, *The Constitutional Protection of Human Rights*, 2013.

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