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INTRODUCTION

The aim of this paper is to discuss the concept of Islamic constitutionalism and analyze some aspects of the Constitutional politics adopted in Tunisia since the fall of the former President, Ben 'Ali. While the definition of "Constitutional politics" is defined as «those practices that aim to frame a set of ideas, values and institutions into national or collective identities», the notion of Islamic Constitutional law will be employed to indicate all the provisions derived from the sources of Islamic law related to the organization of the Islamic polity (sometimes called the Islamic State).² More problematic is how to define the so-called "Islamic constitutionalism". Some scholars referred to it as meaning the modern constitutional history of the Muslim world that started with the adoption of the first Constitutions, during the XIX century, imitating the West. This constitutionalism is "Islamic" because, even though based on foreign models, it showed certain original elements, such as the fact of proclaiming Islam as the official religion. Moreover this approach fails to consider *Shari'a* as a system of law and does not consider the constitutional norms and principles that collectively referred to as Islamic Constitutional law.

Sometimes the notion of Islamic constitutionalism is employed to indicate the doctrine produced by Muslim jurists in relation to the political environment of the community. Before the adoption of the first Charters and the transition of the Islamic system of law from *jurists' law* to *statutory law*, the State was termed

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² For the definition of "Constitutional Politics" see: A. von Bogdandy, S. Häußler, F. Hanschmann, R. Utz, *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches*, Max Planck Yearbook of United Nations Law, Vol. 9, Brill, Leiden 2005, p. 597; J. Habermas, *The Inclusion of Others. Studies in Political Theory*, Massachusetts Institute of Technology, Cambridge 1998, p. 225.

Caliphate. After its decline and fragmentation, it was replaced by the (Islamic) State(s).³

Islamic constitutionalism, in other words, groups all the provisions extracted from the sources of Islamic law, the jurisprudence and the doctrines elaborated by the scholars, connected to the public sphere. At the same time, this notion identifies the methodological approach adopted in the modern world by institutions, such as the Supreme Constitutional Court of Egypt, to apply the *Shari'a*, making it justiciable. This circumstance is possible only in those Muslim countries whose Constitutions refer to the Islamic law as source of legislation.

The Tunisian Constitution adopted in 1959 did not contain such provisions, although it sanctioned Islam as official religion. Under that Charter, Tunisia was a confessional State but, as *Shari'a* was neither enforced nor codified, it did not respect the idea of Islamic State. The current debate on the new institutional framework is dominated by two opposite visions: secularism vs Islam. The fear that the Islamic parties apply the *Shari'a* is felt even if the moderate Islamists promised, for example, to maintain the laws that regulate personal status. Accounting the Islamic constitutional provisions, I will try to establish a relation between the debates that occurred in the Tunisian National Constituent Assembly, to show a potential role that Islamic constitutionalism could play in the process of Constitution-drafting.

In the first part of the study, I describe briefly the substantive rules of Islamic Constitutional law, stressing the fact that the prominent sources of the Islamic law (Quran and *sunna*) do not contain a huge number of provisions. Thus Islamic Constitutional law was the result of the scholars employment of third sources of Islamic law: the consensus. Accounting for the substance of Islamic Constitutional law allows us to define a framework of principles upon which the Islamic polity is supposed to be based upon.

³ A. Layish, "The Transformation of the Sharī'a from Jurists' Law to Statutory Law in the Contemporary Muslim World", in *Die Welt des Islam*, Vol. 44, No. 1, Brill, Leiden 2004, pp. 85-113.

In the second part of this study, the still on-going process of Constitutional drafting that took place in Tunisia after the Ben 'Ali's overthrow is outlined. The Islamic moderate party al-Nahda gained the majority of seats in National Constituent Assembly. Its deputies are debating with the opposition to define the nature of the new State, setting out also its religious nature. Some debates provoked harsh criticism, such as the one related to the status of women or the one connected to the criminalization of blasphemy. At the very top stands the problem of whether Islamic sources of law should be considered general sources of the Constitution. Starting from assumptions fixed in the first part, the paper aims to figure out the role of Islamic Constitutionalism in the Tunisian constitutionalization process.

THE ISLAMIC CONSTITUTIONAL LAW: A SHORT ACCOUNT

Islamic Constitutional law is composed by those norms and regulations extracted from the sources of law: the Quran, the *sunna*, the consensus of the jurists and the analogical reasoning, related to the administration of the State, hence qualified as Islamic. As Ann Elizabeth Mayer points out «Islamic constitutionalism is constitutionalism that is, in some form, based on Islamic principles, as opposed to the constitutionalism developed in countries that happen to be Muslim but which has not been informed by distinctively Islamic principles».⁴ To the opposite of its Western counterpart, supposed to be secular, Islamic Constitutional law has a religious nature.

The notion of Islamic constitutionalism is nevertheless modern. It indicates a philosophy that emerged in the late nineteenth century whose first aim was to set-up the State on Islamic grounds.⁵ While, from the Western perspective, the term constitutionalism defines a theoretical doctrine whose aim is to limit the

⁴ A.E. Mayer is quoted in: N. Hosen, "In Search of Islamic Constitutionalism", in *The American Journal of Islamic Social Sciences*, Vol. 21, No. 2, Association of Muslim Social Scientists of North America, Herndon 2006, pp. 1-24.

⁵ S.A. Arjomand, "Islamic Constitutionalism", in *Annual Review of Law and Social Sciences*, Vol. 3, Annual Reviews, Palo Alto 2007, p. 116. Islamic constitutionalism developed by scholars like Khayr al-Din al-Tunisi (1822-1890), Ahmad Ibn Abi Diyaf (1804-1874) in the Ottoman context, and the Ayatollah al-Na'ini (1831-1936) in Persia.

public powers, making them accountable to each other, Islamic constitutionalism also tries to find a place for the *Shari'a* inside the institutional architecture.⁶

Neither Islamic constitutionalism nor Islamic Constitutional law defines a unique form of government. They indicate several doctrines, which are applicable to monarchies or republics, parliamentary and even presidential systems. Quoting Tamara Sonn: «the question of the proper Islamic form of government remains open. Is it one that is simply headed by a Muslim, regardless of its form? Is it one in which only Muslims participate? Is it one that is based on models derived from a particular era of Islamic history? Is it, indeed, one? Is there a single Islamic form of government?».⁷

Historically, the Islamic State has been called Caliphate and was headed by the Caliph. However, the Quran never relates this word to a political meaning. Rather, it identifies someone who succeeds someone else. In Quran II,30 the Arabic word *khalifa* (Caliph) is related to Adam, the first man.⁸ Properly, Caliph is whoever accepts Islam, becoming Muslim and thus following the others.

The Egyptian scholar Muhammad Sa'id al-'Ashmawi (1932-) relates the word *khalifa* to all the human beings because of their *niyaba*, the act of being a *na'ib* or the representative of God upon the earth, bearing the evidence of his existence.⁹ The majoritarian position of Muslim scholarship underlines that Islam, covering all the aspects of the faithful's life, is "integralism" of religion and State. In his treaty on Islamic Constitutional law, scholar Abu al-Hasan al-Mawardi (972-1058 CE) affirmed that the Caliphate, as a political system, mainly reaches two

⁶ Constitutionalism is composed by: government according to the constitution; separation of power; sovereignty of the people and democratic government; constitutional review; independent judiciary; limited government subject to a bill of rights; controlling the police; civilian control of the military;

⁷ T. Sonn, "Elements of Government in Classical Islam", in M.A. Muqtedar Khan, *Islamic Democratic Discourse. Theory, Debates, and Philosophical Perspectives*, Lexington Books, New York, 2006, p. 21.

⁸ Quran II,30 states: «"Indeed, I will make upon the earth a successive authority" [...]».

⁹ According to the Spanish scholar al-Qurtubi (1214-1273 CE), the Prophet Muhammad used to call his fellows as *khala'if al-ard* (*khala'if* is the plural of *khalifa*) that means Caliphs of the earth. This expression was employed in connection with Quran VI,165 where God calls the human beings as followers of the ancient generations of man and inheritors of the land. In Quran VII,69 God calls the human beings as followers of the people of the Prophet Noah.

aims: protecting the religion and governing the earthly world. Separation between religion and State, then, is not allowed.¹⁰

But if the Quran and the *sunna*, the first two sources of Islamic law, do not provide clear norms and regulations on what the Caliphate (or the Islamic State as a whole) should be, why is it argued that an Islamic Constitutional law exists? And, if it does exist, which are its substantive rules?

The Islamic system of law recognizes a third source, the *ijma'*, or judicial agreement provided by the doctors of law (*fuqaha*).¹¹ This source is linked to the second one, because according to his *sunna* (customs, behavior), the Prophet Muhammad is reported to have said: "my community never agrees upon the mistake". From this statement, scholars deduced that when the community agrees on a disputed issue, the agreement becomes law. The Islamic Constitutional law then, encompassed into the doctrine of the Caliphate, is entirely the result of the doctors' agreement, starting from few verses of the Quran.¹²

Before discovering the peculiarities of the Islamic Constitutional law, it is useful to distinguish between *Shari'a* and *fiqh*. The word *Shari'a*, meaning the "path that leads to the water", indicates properly the revealed law of Islam. The word *fiqh*, deriving from the verb *faqaha* (to know or to understand), indicates

¹⁰ Abu al-Hasan 'Ali ibn Muhammad Ibn Habib al-Basri al-Baghdadi al-Mawardi, *al-Ahkam al-Sultaniyya wa'l-Wilayat al-Diniyya*, Dar al-Kutub al-'Ilmiyya, Beirut 2006; E. Fagnan, edited by, *Les statuts gouvernementaux ou Règles de droit public et administratif*, Typographie Adolphe Jourdan, Paris 1915; H.K. Sherwani, *Studies in Muslim Political Thought and Administration*, Procupine Press, Philadelphia 1977, pp. 101-102; E. Tyan, *Institutions du Droit Public Musulman*, Tome Deuxième Sultanat et Califat, Sirey, Paris 1956, p. 303.

¹¹ J. Schacht, *An Introduction to Islamic Law*, Clarendon Press, London 1983, p. 30 and 114; T. Sonn, op. cit., p. 25. The establishment of the third source of the Islamic law is attributed to the scholar al-Shafi' (d. 820 CE) who held that only the consensus of the entire Islamic community was considered authoritative.

¹² As N.J. Coulson stated «The legal scholars were publicly recognized as the architects of an Islamic scheme of State and society [...]». See: N.J. Coulson, *A History of Islamic Law*, Edinburgh University Press, Edinburgh 1964, p. 37. This observation points out to the key element of Islamic governance, the centrality of law, and it explains why a comprehensive political theory did not present itself until the early eleventh century.

only the jurisprudence, what is produced by the *fuqaha'*, the scholars.¹³ The Islamic system of law has been described as a *jurists' law*: even if judicial agreement produced jurisprudence, as it was a source of law, in practice it allowed scholars to legislate. The doctrine of the Caliphate, describing the functions of the Islamic State, its main organs, the duties of its executive bodies, the process of decision-making and the duties and rights of citizens, represents the Islamic Constitutional law.¹⁴

What is relevant, even when distinguishing between executive and legislative/judicial authorities, is that any Islamic political theory is second to the legal one. The *Shari'a*, being revealed law, precedes the State. Thus, a single model of Islamic government is neither a defect nor a weakness according to Islamic theory but, at the same time, it is impossible to achieve, as it represents the unity of the community based on a common religious law rather than on a shared political structure. As Tamara Sonn states «Just as political theory is second to legal theory, political unity is secondary to legal conformity».¹⁵ Not only differences in political structures are inevitable but also diversity is justified in the context of a moral and a spiritual unity.

DESCRIBING THE LAW OF THE CALIPHATE

The pillar of the Islamic Constitutional system is sanctioned in Quran IV,58-59.¹⁶ In the first verse, God commands the men to judge with righteousness. In

¹³ N.J. Coulson, op. cit., p. 63. *Fiqh* is composed by the *usul al-fiqh*, the roots of jurisprudence, and the *furu' al-fiqh*, its branches. The first indicates the sources of the juridical knowledge (Quran, *sunna*, consensus, analogical reasoning). The second refers to the several sectors of jurisprudence/law: *'ibadat* (acts of worship) that regulate interactions between men and God (like the prayers, feastings, rituals) and *mu'amalat* (negotia) that regulate the interactions between men (also occurred with non-Muslims). See also: J. Schacht, *Origins of Muhammadan Jurisprudence*, Clarendon Press, London 1979.

¹⁴ A. Layish, *The Contribution of the Modernists to the Secularization of Islamic Law*, in *Middle Eastern Studies*, vol. 14, no. 3, Taylor & Francis, Abingdon 1987, pp. 263-277.

¹⁵ T. Sonn, op. cit., p. 33.

¹⁶ 'Abd al-Razzaq al-Sanhuri, *Le Califat. Son Évolution vers une Société des Nations Orientales*, Librairie Orientaliste Paul Geuthner, Paris 1926; D. Santillana, *Istituzioni di diritto musulmano malichita, con riguardo anche al sistema sciafiita*, Istituto per l'Oriente, Roma 1925, Vol. 2. Quran IV,58-59 states: «Indeed, God commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which God instructs you. Indeed, God is ever Hearing and Seeing (58). O you who have believed, obey God and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to God and the Messenger, if you should believe in God and the Last Day. That is the best [way] and best in result (59)».

the second one, he also commands to obey his word (i.e. the Quran), the Prophet (i.e. his *sunna*) and to those in authority among the people. The expression “those in authority” is reported with the words *ulu al-amr* meaning those who possess the *wilaya*, the authority to command and to be obeyed.¹⁷

The office of the Caliph is meant to be a contract stipulated between two parts: the one who is placed in authority and those who choose him.¹⁸ The electors, or *ahl al-hall wa'l-'aqd* (literally those who can bind and unbind), represent the entire community and act for its interest.¹⁹ They are required to be just, learned and wise to choose the suitable candidate. No requirements based on ethnicity, or even gender, are prescribed. On the other hand, those who are in place to become the Caliph must be honest, male, Muslim, learned, not devoid of intellectual faculties, adult, brave, free (meaning not slave) and descendant of the tribe of the Prophet (the Quraysh). All of these provisions were cited in the classical jurisprudence, even if consensus upon them was never too strict.²⁰

There are two ways to appoint the Caliph: the free choice on the agreement of the electors and the appointment by the Caliph himself before the end of his mandate, normally before his death.²¹ The Islamic Constitutional law did not elaborate any precise electoral system: the electors are not specified in their number and, in analogy to the contract of marriage, they have to be two at least.²² Historically the role of the electors lost importance when, after the first

¹⁷ For a comprehensive account of the possible meaning of the expression *ulu al-amr*, see: A. Asfaruddin, “Obedience to Political Authority: An Evolutionary Concept”, in M.A. Muqtedar Khan, op. cit., pp. 37-60.

¹⁸ S. Akhavi, “Sunni Modernist Theories of Social Contract in Contemporary Egypt”, in *International Journal of Middle East Studies*, Vol. 35, No. 1, Cambridge University Press, Cambridge 2003, pp. 23-49.

¹⁹ The *ahl al-hall wa'l-'aqd* and the *ulu al-amr* upon whom the Quran prescribes the obedience are often equated, and refer to the scholars or the most learned. In modern times, several scholars such as Rashid Rida, or Abu al-A'la al-Mawdudi, enlarged that group, also encompassing journalists, thinkers and politicians.

²⁰ During the “farewell pilgrimage” the Prophet said: «*all people are equal, as equal as the teeth of a comb. The only basis for preferring an Arab over a non-Arab, a white over a non-white or a male over a female is that of piety*».

²¹ M. Khaddouri, “The Juridical Theory of the Islamic State”, in *The Muslim World*, Vol. 41, No. 3, The Hartford Seminary, Hartford 1951, pp. 181-185. See also: T.W. Arnold, *The Caliphate*, Clarendon Press, Oxford 1924.

²² According to al-Mawardi the scholars agreed on a minimum number of six electors. Others agreed on the number of three participants. See: ‘Abd al-Razzaq al-Sanhuri, op. cit., p. 80

four successors of the Prophet (the so-called rightly guided Caliphs), the second method was preferred to the first and the Caliphate turned into a kind of dynastic monarchy, until its fall in 1924.²³

Once chosen, the Caliph must obtain the allegiance (*bay'a*) of the community: the special allegiance is given by the electors, while the general, or public, one is given by all the citizens in the first public appearance of the newly appointed Caliph.²⁴ The electors can revoke their allegiance, if the Caliph governs outside the law, committing a sin or becoming a tyrant, or if he fails to afford his duties, such as preserving Islam, enforcing all the provisions of the law, protecting the State and collecting the taxes.²⁵ The community holds the right of legitimate revolution, if the governor loses the requisite of probity. Thus the Islamic Constitutional system, almost in theory, contains certain tools to check the absolute power of the government and to make it accountable. In addition other public offices, like the Minister, the Sultan and the judges, assure the separation of powers.²⁶

THE SEPARATION OF POWERS IN THE ISLAMIC STATE

The Islamic State recognizes several public bodies. From this evidence, scholars underline the fact that the Islamic State is based on the separation of powers.²⁷ The Sultan, historically, detained the power of coercion, leading the army. Even controlling a piece of empire, he had to proclaim his allegiance to the Caliph who, in turn, recognized him officially. The Amirs were the governors of the provinces. They were appointed by the Caliph but if an Amir challenged the

²³ The first four Caliphs, after the Prophet Muhammad, were, in order: Abu Bakr, 'Umar, 'Uthman and 'Ali. The last one was the cousin of the Prophet. Their governments (632-661 AD) are recorded as the golden age of the Islamic history. See: W. Madelung, *The Succession to Muhammad*, Cambridge University Press, Cambridge 1998.

²⁴ A.Y. Al-Hibri, "Islamic Constitutionalism and the Concept of Democracy", in *Case Western Reserve Journal of International Law*, Vol. 20, No. 1, 1992, p. 11.

²⁵ T. Sonn, *op. cit.*, p. 26.

²⁶ The right of legitimate revolution is based on different chapters of the Quran where it is stated to command the right and to forbid the wrong, such as in Quran III,110 «*Ye are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in God*». See also: M. Cook, *Commanding the Right and Forbidding the Wrong in Islamic Thought*, Cambridge University Press, Cambridge 2000.

²⁷ *Ivi*, p. 28. A.Y. Al-Hibri, *op. cit.*, p. 20.

caliphal authority, conquering a region, the Caliph was obliged to recognize his self-imposition, giving him legitimacy.

The Minister (in Arabic *Wazir*) was the counselor of the Caliph. Law recognized two main types of Minister: executive and delegated.²⁸ The executive Minister was a mere advisor and he was not given the power to make independent decisions. A non-Muslim could be appointed for this office. The delegated Minister, instead, held a broader power: he assumed independent decisions, inside the boundaries of his delegation. He had to be chosen among the Muslims only.

These officials were given executive powers mainly, where the legislative authority, as stated previously, was under the control of the scholars. The scholar Abu Ma'ali al-Juwayni (1028-1085 CE) underlined that they did not get their authority from the Caliph but from their knowledge. Moreover, scholars always were volunteers: everyone was allowed to enter in their ranks, provided the willingness to study the Arabic language, logic and the Islamic law.²⁹ As Wael Hallaq underlines, the original schema of the Islamic government can be considered as populist because it allows anyone accessibility to its highest ranks.³⁰

THE LEGISLATIVE POWER AND THE PROCESS OF DECISION-MAKING

According to Islamic Constitutional law, the legislative authority is encompassed in the sources of law, especially in the Quran and the prophetic *sunna*. As these sources are not always clear and do not cover each aspect of the daily life (especially new situations of modern times), they must be taken into account and cannot be neglected but their analysis and interpretation are needed. Thus from a traditional perspective, people are not entitled the power to

²⁸ H. Bruno, M. Gaudefroy-Demombynes, *Le livres des magistratures d'El Wancherisi*, F. Moncho, Rabat 1937, pp. 11-12; M. Aslam, edited by, *Muslim Conduct of the State based upon the Suluk-UI-Muluk*, University of Islamabad Press, Lahore 1974, pp. 57-59.

²⁹ J.D. Luciani, *El-Irchad par Imam el-Haramein*, Imprimerie Nationale, Parigi 1938, pp. 356-357.

³⁰ W. B. Hallaq, "Was the Gate of Ijtihad Closed?", in *International Journal of Middle Eastern Studies*, Vol. 16, No. 1, Cambridge University Press, Cambridge 1984, p. 5. By the same token, other western scholars have called it elitist, due to the degree of training required to become a qualified scholar.

legislate, in its Western meaning. Scholars can only extract norms and regulations from a given and immutable law. This action is called *ijtihad*, meaning the effort to interpret the sources of law.³¹ Even if in Islam there is no church, that is a permanent institution, only the scholars hold the science to produce *ijtihad* and also the Caliph who was required to be trained to produce legal reasoning. The act of *ijtihad* is not always possible: scholars distinguished between prescriptions of the Quran and the *sunna* which are totally clear and indisputable (i.e. the prohibition of drinking alcoholics) and those which are unclear and thus disputable (i.e. the act of wearing the female veil).³² In the first case, *ijtihad* is forbidden because the ruling is already stated. In the second case, *ijtihad* is compulsory and the scholars have the duty to decide upon unknown cases. To understand how legal reasoning proceeds, consider the following example: if the Quran forbids explicitly alcoholics, nothing is said for drugs. In modern times, scholars applied analogical reasoning (in Arabic *qiyas*) to forbid any substance that induces psychotic disorders, starting from the assumption that *ratio legis* of banning alcoholics was not the substance *per se* but the temporary mental instability that it provokes.³³

Historically the Caliph (and the Sultans) issued some edicts, regulations and rulings, when direct prescriptions in the sources were absent, providing they did not contrast the *Shari'a*. In other words aside from the laws produced by scholars, and by the Caliph acting as a scholar, a secular legislation always

³¹ T. Ramadan, "Ijtihad and Maslaha: The Foundations of Governance", in M.A. Muqtedar Khan, op. cit., pp. 12-14. Islamic scholars disagree on the minimum conditions for practicing *ijtihad*. For al-Shatibi, a level of *ijtihad* is attained when two qualities are present: 1) a deep understanding of the aims of the *Shari'a*, 2) a real mastery of the various methods of deduction and extrapolation based on knowledge and understanding. The "five essentials" (*al-daruriyyat al-khamsa*), explained in the following chapter, as well as the necessary distinction between the indispensable, the necessary or complementary (*haji*) and the embellishments (*tahsini*) constitute the framework provided by God to guide the practice of *ijtihad* and represent its fundamental terms of reference.

³² B. Weiss, "Interpretation in Islamic Law: the Theory of Ijtihad", in *American Journal of Comparative Law*, Vol. 26, No. 1, American Society of Comparative Law, Ann Arbor 1977, pp. 199-212. The prescription of stoning the adulterers is not prescribed by the Quran but it is contained in the Prophetic *sunna* which was compiled by some fellows of the Prophet. While the most pieces of the prophetic *sunna* are considered true, others are not fully reliable. See: A. Quraishi, "Who Says *Shari'a* Demands Stoning of Women? A Description of Islamic Law and Constitutionalism", in *Berkeley Journal of Middle Eastern & Islamic Law*, Vol. 1, Berkeley 2008, pp. 163-177.

³³ R. Peters, *Crime and punishment in Islamic Law: Theory and practice from the Sixteenth to the Twenty-First Century*, Cambridge University Press, Cambridge 2005, p. 53.

existed in the history of Islam. The notion of *siyasa shar'iyya*, or politics practiced inside the framework of the *Shari'a*, rose quite soon in order to justify the deficiencies of the revealed law. Decisions taken in this way framed the *qanun* that, today, means the positive legislation.³⁴

Another pillar of Islamic Constitutional law is the principle of consultation (*shura*). Scholars indicate Quran III,159 and Quran XLII,38 as evidence that Islamic decision-making is based on consultation and opinion sharing.³⁵ In modern times they use this argument to justify the democratic nature of Islam. Democracy, however, in its Western meaning, is not only a set of procedures but it is also a culture that presupposes pluralism and that gives sovereignty to the people or to the nation.³⁶ Recalling the doctrine of the Caliphate, Muslim scholars reply that the Caliph was not conceived as a king, his right to govern being not divinely given but based on a social contract. He was a *primus inter pares*, elected by the community and himself subdue to the *Shari'a*.

From this perspective, popular sovereignty is rediscovered, unless it is of a limited kind: people are allowed to legislate only under the shape of *ijtihad* and applying consultation but they cannot abrogate the *Shari'a*, nor contravene to its rulings. According to the scholars, the so-called Islamic democracy is supposed to be more worthy than the Western one: whereas a parliamentary majority is entitled to legislate in each area it desires, an Islamic parliament cannot legislate

³⁴ H. Laoust, *Essai sur les doctrines sociales et politiques de Taki-d-Din Ahmad b. Taimiya*, Institut français d'archéologie orientale, Cario 1939. Ibn Taymiyya (1263-1328 CE) summarized the principles of the *Siyasa Shar'iyya* in an essay entirely devoted to this topic.

³⁵ In the first verse God stated «So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon God» and in Quran XLII,38 «And those who have responded to their lord and established prayer and whose affair is determined by consultation among themselves, and from what We have provided them, they spend». Historically, the Prophet used to consult his companions before taking all the decisions. There is one major incident in which the Prophet followed the majority view against his own wisdom and one majority incident when he defied the views of the majority. Critics of the *shura* underline the fact that only the head of the State is entitled to initiate it.

³⁶ The notion of democracy provided by R. Dahl is here employed. See: R. Dahl, *A Preface to Democratic Theory*, University of Chicago Press, Chicago 1963; A. Stepan, "Religion, Democracy and the Twin Tolerations", In *Journal of Democracy*, Vol. 11, No. 4, The Johns Hopkins University Press, Baltimore 2000, pp. 37-57.

in opposition to certain prescriptions.³⁷ As the Egyptian scholar Yusuf al-Qaradawi (-1926) stated: «the Islamic law should borrow democratic procedures from the West but not its philosophy».³⁸ According to his view, the Weimar Syndrome could not affect the Islamic polity because the governor is not given absolute powers, his authority being constrained by Quran, *sunna* and the need for consultation.³⁹

THE AIMS OF ISLAMIC LAW: THE THEORY OF THE *MAQASID AL-SHARI'A*

The medieval scholar Abu Ishaq al-Shatibi (-1388 CE) developed the doctrine of the aims of the *Shari'a*. According to his view, the Islamic law provided the protection of several aspects of the believer's life. Five elements, conceived as necessary for people, enjoy highest protection: religion, life, intellect, progenies and proprieties. In a second rank, the law safeguards what produces benefits for the community and, then, its moral values. In more recent times, the Tunisian scholar Ben Ashur (1879-1973 CE) renewed this doctrine, mentioning freedom among the group of the necessities.⁴⁰

Contemporary scholars have extracted several other constitutional principles from the sources of law. According to them, the Islamic State is based on justice, consultation, and equality.⁴¹ Some others add obedience, unless the governor rules outside the revealed law. Other constitutional principles are: freedom, unity of the believers, legality and responsibility of the governors. Considering

³⁷ A. El-Affendi, "Democracy and Its (Muslim) Critics: An Islamic Alternative to Democracy?", in M.A. Muqtedar Khan, op. cit., pp. 227-232.

³⁸ Yusuf al-Qaradawi, *Min Fiqh al-Dawla fi'l-Islam* [Constitutional Jurisprudence in Islamic Law], Dar al-Shuruq, Cairo 2001, p. 37; R.W. Baker, "Worldly Islam: the Islamic Wasatiyyah and the Quest for Democracy" in *Oriente Moderno*, Vol. 2, Istituto per l'Oriente, Roma 2007, p. 345.

³⁹ The "Weimar Syndrome" indicates authoritarianism that springs in a political system, even if devices of checks and balances are recognized by the Constitution. See: C. Klein, "Defence of the State and the Democratic Regime in the Supreme Court", in *Israel Law Review*, Vol. 20 No. 2, Hebrew University of Jerusalem, Jerusalem 1985, p. 397.

⁴⁰ A. al-Raysuni, *Imam al-Shatibi's Theory of the Higher Objectives and Interests of Islamic Law*, The International Institute of Islamic Thought, London 2005.

⁴¹ Some Constitutions inscribe these principles in specific articles: art. 18 Constitution of Qatar, art. 7 Constitution of Kuwait, art. 9 Constitution of Oman, art. 8 Statute of Saudi Arabia.

that Islamic law has a religious nature, ethics and moral values, such as equality, brotherhood and charity, are given a fundamental role in the political sphere.⁴²

ON SOVEREIGNTY, RESPONSIBILITY AND LEGITIMACY

As previously illustrated, the Islamic conception of sovereignty is quite different from its western counterpart. Popular (or national) sovereignty is a modern and Western concept. Medieval Islamic scholars did not elaborate it until XIX century, during the process of reform of the Ottoman Empire known as *tanzimat* (1839-1876) that culminated with the adoption of the first Islamic Constitution. In this context, jurists started to explore the principle of sovereignty under the influences of some Western, basically French, British and Italian, legal philosophies.⁴³

According to Islamic law, God is sovereign because he created the world. Scholars have referred to the caliphal authority in terms of *niyaba* or *wikala* that are two legal devices related to the idea of acting on the behalf of someone else. Being *na'ib* or *wakil* means the act to represent the others pursuing their interest and not personal desires. Under Persian influences, also the idea of the divine appointment of the Caliph developed, but it represented a minor doctrinal position. Sometimes the Caliph was called “the shadow of God on the earth” meaning that he acted on the behalf of God but, for the sunni majoritarian doctrine, he never was given supernatural powers.⁴⁴

⁴² N.J. Brown, *Constitutions in a Non-Constitutional World, Arab Basic Laws and the Prospects for Accountable Government*, State University of New York Press, 2002, p. 161; Id, “Sharia and State in the Modern Muslim Middle East”, in *International Journal of Middle East Studies*, Vol. 29, No. 3, Cambridge University Press, Cambridge 1997.

⁴³ The Ottoman Constitution, adopted in 1876, was followed by the Persian Constitution, adopted in 1906. For the first time, in the Islamic world, these texts ascribed the legislative power to elected assemblies which were also given powers of accountability. In the Persian case, legislative powers were also vested in a committee composed by five Muslim scholars. They had the duty to scrutinize all the laws and regulations in order to keep them in conformity with the revealed law. This model is enforced even under today's Iranian Constitution, adopted after the Islamic Revolution led by Ayatollah Khomeini. See: S.A. Arjomand, op. cit., p. 116.

⁴⁴ H. Rahman, *Islamic Concept of State*, Hamdard Academy, Karachi 1978, pp. 7-11.

Commonly, scholars deny any divine intercession for the appointment of the Caliph, recognizing a popular sovereignty aside God's sovereignty (*hakimiyya*).⁴⁵ Rashid al-Ghannushi, the founder of the Tunisian Islamic party al-Nahda and one of the leading contemporary scholars, also developed a syncretic view, called the *istikhlaf*, that is the divine choice in favor of the human beings. Signing a contract with God, human beings accept a role of subordination and recognize his sole sovereignty. At the same time, they become a source of authority, which is constrained by the revealed law.⁴⁶ To demonstrate that the Islamic State is not theocratic, Rashid al-Ghannushi stresses that a theocracy is based on the relation God-governor-community. In Western democracies the relation becomes of the type "community-governor" and in the Islamic State it is "God-community-governor".⁴⁷

According to Majid Khaddouri the Islamic State applies the double contract theory elaborated by the German philosopher Otto von Gierke (1841-1921). On the one hand, people agree to subdue to a governor who receives exclusive power, taking charge of the defense and protection of individuals. On the other hand, after the society is formed, the second contract is signed, defining the terms and the limits within which the authority can be exercised. While the first contract is concluded between human beings and God, through the mediation of the Prophet, the second contract involves the community and the governor, formerly the Caliph.⁴⁸

⁴⁵ In Quran II,107 it is said «Do you not know that to God belongs the dominion of the heavens and the earth and [that] you have not besides God any protector or any helper?» and in V,18 «But the Jews and the Christians say, "We are the children of God and His beloved." Say, "Then why does He punish you for your sins?" Rather, you are human beings from among those He has created. He forgives whom He wills, and He punishes whom He wills. And to God belongs the dominion of the heavens and the earth and whatever is between them, and to Him is the [final] destination».

⁴⁶ Popular sovereignty is enforceable under certain boundaries (*hudud*) imposed by God, as stated in Quran LXV,1 «when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period and keep count of the waiting period, and fear God, your Lord. Do not turn them out of their [husbands'] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality. And those are the limits [set by] God. And whoever transgresses the limits of God has certainly wronged himself».

⁴⁷ Rashid al-Ghannushi, *al-Hurriyyat al-'Ammah fi'l-Dawla al-Islamiyya* [Public Freedoms in the Islamic State], Markaz Dirasat al-Wahda al-'Arabiyya, Beirut 2001, pp. 96-98 and 322.

⁴⁸ M. Khaddouri, *War and Peace in the Islamic Law*, The John Hopkins University Press, Baltimore 1955, pp. 9-11. On the double-contract theory, see also: Otto von Gierke, *Natural Law and the Theory of Society*, Cambridge University Press, London 1934.

The principle of responsibility is derived from Quran XXVI,151-152.⁴⁹ As the Caliph had to be righteous in order to obtain the office, the community is not legally constrained to decisions issued by a tyrant or a sinner. What counterbalanced the principle of the just revolution is the necessity to avoid secession and the spread of anarchy.⁵⁰ This is the main reason why the *de facto* authority has characterized the Islamic history. Moreover, Islamic law does not provide any specific account on the way political powers have to be checked or the responsibility enforced.

Even if devices to make government accountable exist, *Shari'a* does not even describe how to put them in operation. The believers are only entitled to drive their governors, as Abu Bakr (573-634 CE), the first Caliph after Muhammad, stated: «I have been given authority over you but I am not the best of you. If I do well help me, and if I do ill, then put me the right».⁵¹

ON THE ISLAMIC CONCEPTION OF FREEDOM

Islamic law recognizes full legal capacity to whoever is *mukallaf*, meaning who is Muslim, adult, not slave and free of permanent mental diseases. Slavery existed in pre-Islamic Arabia and the new religion maintained it in order to preserve the tribal societal equilibrium. However slavery showed some differences if compared, for example, to the Roman system of law where the slave was a mere thing (*res*)⁵². Quran XLVII,4 to underline the military nature of slavery and also the evidence that, in the Islamic empire, that slaves led the congregational prayers every Friday and they enjoyed the possibility to become mufti or to ascend to other public offices.⁵³

⁴⁹ The verse states: «And do not obey the order of the transgressors, Who cause corruption in the land and do not amend».

⁵⁰ M. Khaddouri, *op. cit.*, 1955, p. 13. See also: B. Lewis, *The Political Language of Islam*, The University of Chicago Press, Chicago 1988, p. 70.

⁵¹ A.M. Farsakh, "A Comparison of the Sunni Caliphate and the Shii Imamate", in *The Muslim World*, Vol. 59, No. 1, The Hartford Seminary, Hartford 1969, pp. 50-63. See: M. Gaudet-Demombynes, *Les Institutions Musulmanes*, Ernest Flammarion Éditeur, Parigi 1921.

⁵² L. Gardet, *La Cité Musulmane. Vie Sociale et Politique*, Librairie Philosophique J. Vrin, Parigi 1976, pp. 72-74.

⁵³ Quran XLVII,4 prescribes «So when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either

From a theological perspective, all human beings are made free in front of God: the dogma of the uniqueness of God (*tawhid*) makes individuals equal and free.⁵⁴ Freedom then is a natural right, given to human beings from their divine origins. Moreover, if Western philosophy distinguishes between positive and negative rights and liberties, in the Islamic system of law, rights are positive and are enforced by *interpositio Legislatoris*.⁵⁵

Quran XLIX,10 stipulates equality among the believers.⁵⁶ Scholars underline that this verse does not mention the Muslims alone but all the believers, meaning whoever follows a monotheistic faith. Islamic law guarantees full protection for non-Muslims and their freedom of worship and of practice through rituals. Even if they enjoy freedom of thought and expression, they do not, however, enjoy full political rights. Being protected (*dhimmi*), they are not allowed to exercise authority over Muslims, nor participate to the consultation or become Caliph. They are only allowed to serve as executive Ministers.⁵⁷

Freedom of opinion and of faith are guaranteed by Quran IV,148, Quran II,256 and Quran CIX,6. Scholars underline that apostasy was considered a crime only during the birth of Islam when the Prophet and his fellows had the duty of protecting the religion, preventing its disappearance.⁵⁸ Under this light, they justify what Quran II,193 states, calling for fighting the unbelievers.⁵⁹

[confer] favor afterwards or ransom [them] until the war lays down its burdens. That [is the command] [...]».

⁵⁴ In Quran XLIX,13 it is said «O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of God is the most righteous of you. Indeed, God is Knowing and Acquainted».

⁵⁵ In Quran XXVI,29 the story of Pharaoh underlines the possibility of imprisonment «[Pharaoh] said, "If you take a god other than me, I will surely place you among those imprisoned"».

⁵⁶ This verse is quoted as the best example of equality in Islam. It states: «The believers are but brothers, so make settlement between your brothers. [...]».

⁵⁷ B. Rutherford, "What do Egypt's Islamists want? Moderate Islam and the Rise of Islamic Constitutionalism", in Middle East Journal, Vol. 60, No. 4, Middle East Institute, Washington 2006, pp. 707-731.

⁵⁸ Quran IV,148 states «God does not like the public mention of evil except by one who has been wronged. And ever is God Hearing and Knowing» while Quran II,256 «There shall be no compulsion in [acceptance of] the religion». Quran CIX,6 states «For you is your religion, and for me is my religion».

⁵⁹ Quran II,193 «Fight them until there is no [more] civil strife and [until] worship is [acknowledged to be] for God. But if they cease, then there is to be no aggression except against the oppressors».

The last point to be considered here is the attitude of Islamic law towards gender equality. The Quran, stressing the physical difference between men and women, ascribes to them different social roles.⁶⁰ At the same time, as reported earlier, they are equal in front of the law, as they both are *mukallaf*. In the field of political rights, women are not denied the right to vote.

Muslim scholars, usually, divide general and special authority. Special authority is ascribed to women and is related to limited duties, such as the custody of children or the administration of the family balance. General authority refers to the capability to decide upon common interests or the common good. Within certain interpretations this is forbidden for women. Considering that they were not allowed to become Caliph, some scholars still deny the possibility for them to cover the highest political roles. Both Yusuf al-Qaradawi and Rashid al-Ghannushi agree on a gender practice of *ijtihad*, allowing women to interpret the sources of law.⁶¹ Giving women full rights to legislate, these scholars pave the basis for a comprehensive political equality between the sexes, even if they are aware that political activism or public roles can be exercised by women subject to the fulfillment of traditional feminine roles of caring for the family and for the house, being above all good mothers and wives.

CONSTITUTIONAL POLITICS IN POST-REVOLUTIONARY TUNISIA: A TRANSITION ON BOOTSTRAP?

Following the January 2011 protests that brought down the regime of President Zine al-Abidin Ben 'Ali, the election of a National Constituent Assembly (hereinafter NCA) took place on October 23, 2011. The Islamist party al-Nahda, illegal under the former regime, gained 41% of the votes and obtained 89 out of

⁶⁰ Quran IV,34 states «Men are in charge of women by [right of] what God has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what God would have them guard. But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, God is ever Exalted and Grand».

⁶¹ Rashid al-Ghannushi, *al-Mar'a bayna al-Qur'an wa-Waqi' al-Muslimina* [The Woman between the Quran and the Peculiarities of the Muslims], Dar al-Mujtahid li'l-Nashr wa'l-Tawzi', Beirut 2011.

217 seats of the Parliament.⁶² In December 2011, a coalition between al-Nahda and two secularist parties, the Congress for the Republic (CPR) and the Democratic Forum for Labor and Liberties (*Ettakatol*) was formed.⁶³

The coalition, called Troika, divided relevant offices to its members: Hamadi Jebali of al-Nahda became the Prime Minister, Moncef Marzouki of CPR obtained the Presidency of the Republic and Mustapha Ben Jaafar of *Ettakatol* was appointed speaker of the NCA. A provisional law setting authorities for the offices was passed, while the NCA started drafting the Constitution.⁶⁴

The transition toward a new constitutional order, as it was argued, started *on bootstrap*. On 15 January 2011, the Tunisian Constitutional Council officially declared Ben 'Ali's abandonment of power. The speaker of the lower house of Parliament, Fu'ad Mabazza', was appointed as interim President, calling for elections in two months. This procedure resulted through the application of Article 57 of the 1959 Constitution which settled a timeframe of 45-60 days for urgent reforms. The last meeting of the Parliament, elected in 2009, authorized Mabazza's ruling through decrees. Then it voted its own suspension and the self-dissolution.⁶⁵ Article 28 of 1959 Constitution ascribed legislative power to the

⁶² A. Allani, "The post-revolution Tunisian Constituent Assembly: controversy over powers and prerogatives", in *The Journal of North African Studies*, Vol. 10, No. 1, Routledge, London 2012, pp. 2-3; Id, "The Islamists in Tunisia between confrontation and participation: 1980-2008", in *The Journal of North African Studies*, Vol. 14, No. 2, Routledge, London 2009, pp. 257-272; Sarah J. Freuer, *Islam and Democracy in Practice: Tunisia's Ennahdha Nine Months In*, Crown Center for Middle East Studies, Brandeis University, September 2012, p. 2.

⁶³ Al-Nahda's success is ascribed to various reasons: the use of religious references; the fragmentation of the left and liberal parties; the persecution that the Islamists were subjected to under Ben Ali's reign; the fear of voters to return to the Constitutional Rally (the ex-ruling party); al-Nahda leaders' commitment to respect the Personal Status Code in place (represented by their pledge not to force women to wear a particular clothing, not to restrict those who frequent bars, not to ban alcohol and bikinis and not to interfere with the work of foreign banks). See also: S. Waltz, "Islamist Appeal in Tunisia", in *Middle East Journal*, Vol. 40, No. 4, Middle East Institute, Washington 1986, pp. 651-670.

⁶⁴ The NCA anticipated that it would not respect its original deadline, scheduled for October 23, 2012. It assured that it would complete the draft by February 2013, in time for legislative elections in March 2013.

⁶⁵ Democracy Reporting International, *Overcoming Obstacles to Democratic Elections in Tunisia: a Preliminary Analysis of Constitutional Provisions*, Briefing Paper no. 8 January 2011, pp. 1-6. Article 57 states: (1) In case the Presidency of the Republic becomes vacant on account of death, resignation, or total incapacity, the President of the National Parliament immediately is invested temporarily with the functions of the Republic for a period of at least 45 days and at most 60 days. (3) The interim President of the Republic discharges the functions of the President of the Republic, however, without

President under necessity and after parliamentary delegation, while the dissolution of both chambers was justified by the absolute majority of Ben 'Ali's fellows.⁶⁶ On 23 March 2011 Mabazza' adopted Decree no. 14 suspending the Constitution.⁶⁷ This text underlined the popular desire to exercise sovereignty under a new constitutional architecture: Article 1 allowed the interim phase in the exercise of powers, till the election of the NCA. Article 2 dissolved both the chambers of the Parliament, the Economic and Social Council and the Constitutional Council.

Transition, however, started in a real undemocratic way, as Article 4 of the same decree, ascribes legislative authority to the Council of Ministers and to the President. Article 5 defines the fields of legislative competence: ratification of international treaties, amnesty, human rights, electoral law, media and freedom of press, party system and legal fundraising, taxes, social and security rights.⁶⁸ The executive was allowed to adopt legislation on «la procédure devant les ordres de juridiction et à la détermination des crimes et délits et aux peines qui leur sont applicables ainsi qu'aux contraventions pénales sanctionnées par une peine privative de liberté».⁶⁹

Decree no. 14, describing the organization of powers, represents an interim Constitution. Its main organs are: the President, the Council of Ministers and the

resorting to referendum, dismissing the Government, dissolving the National Parliament, or taking the exceptional measures provided for in Article 46. (5) During the same period, presidential elections are organized to elect a new President of the Republic for a term of five years.

⁶⁶ P. Scholz, "Legal Aspects of the Political Change in the Middle East", in *Orient*, Vol. 3, No. 52, German Orient Institute, Berlin 2011, p. 12. Article 28.2 states: (2) The National Parliament may authorize the President of the Republic to issue decree-laws within a fixed time limit and for a specific purpose which must be submitted for ratification to the National Parliament upon expiration of that time limit.

⁶⁷ An unofficial translation of Decree no. 14 dated 23 March on provisional organization of the public authorities can be found at the following link: http://www.wipo.int/wipolex/en/text.jsp?file_id=245403.

⁶⁸ An unofficial translation of Decree no. 35 dated 10 May on the Election of the National Constituent Assembly can be found at the following link: <http://aceproject.org/ero-en/regions/africa/TN/tunisia-decree-no.-35-dated-10-may-on-the-election>. On the role of Tunisian media after the revolution, see: F. Cavatorta, R.H. Haugbølle, "Vive la grande famille des médias tunisiens. Media reform, authoritarian resilience and societal responses in Tunisia", in *The Journal of North African Studies*, Vol. 17, No.1, Routledge, London 2011, pp. 97-112.

⁶⁹ The last provision allows the executive bodies to amend the criminal law, in both the substantial and the procedural spheres, over-extending the authorities given to the executive. The reason for these provisions lies in the security problem the country faced after the revolution.

Prime Minister. The President has the task to oversee the execution of decrees; he can exercise regulatory powers directly or through ministers (Article 7). Moreover he holds the chieftaincy of the army; he ratifies treaties, declares peace and war, concedes amnesty, appoints and removes the Prime Minister and, under his advice, other ministers. He also appoints civil and military officers, having consulted the Prime Minister.⁷⁰

The Prime Minister and the Council of Ministers were reduced to a marginal role of cabinet as they are able to decide only upon «the administration and public coercion». For the judiciary, Article 17/Decree no. 14 recalls the enforced laws, maintaining this organ unaltered. The decree law ends stating a self-limitation: its effects will expire only by the adoption of a permanent Constitution.

It is evident that Article 57 of the 1959 Constitution has been partially applied: under its provisions, the transitional phase should be employed to elect a new President in case of a power vacuum. The same text limits interim prerogatives, prohibiting a referendum, the removal of Ministers and amending the Constitution. While these limits are expected to avoid an excessive concentration of powers in the hands of the interim President, their derogation was justified as an act of sovereignty, manifested in the election of the NCA and in that of Marzouki as President, on 12 December 2011.⁷¹ Article 57 of the 1959 Constitution was dismissed also because the election of NCA was not perceived as a violation of the prohibition of amending the basic law: the former Constitution, mentioning its amendment only, allowed the adoption of a new text. The convention of the NCA, elected by the people, ended the exercise of the legislative authority by the executive bodies.

⁷⁰ To avoid the concentration of power in the hands of a single organ, article 11/decree no. 14 prohibited the interim President to run for the election to the Constituent Assembly and to any other office. Such prescription, however limited to the Constituent Assembly, has been applied to all the members of the government, pursuant to Article 15.

⁷¹ On the notion of acts of sovereignty, see: R. Cristi, "Carl Schmitt on Sovereignty and Constituent Power", in *Canadian Journal of Law & Jurisprudence*, Vol. 10, No. 1, University of Western Ontario, Ontario 1997, pp. 189-201.

TRANSITION - PHASE TWO: THE ROLE OF THE HIGHER COMMISSION FOR THE ACHIEVEMENTS OF THE REVOLUTION AND THE NATIONAL CONSTITUENT ASSEMBLY

After the revolution, transition was based on some specific principles defined by the Higher Commission for the Achievements of the Revolution. This institution, led by law Professor Ayyadh Ben 'Ashur, served as the main framework for parties, associations, and prominent civil society actors.⁷² It is not a mistake to argue that the Higher Commission acted as un-elected constituent power, because it adopted some pieces of legislation that were supposed to be necessary for a successful transition. Even lacking an official mandate, the Commission acquired huge moral authority on the point that all the transitional governments followed its opinions, even without them being compulsory.⁷³ Here the “bootstrapping” transition shows a real paradox: an unelected body, like the Higher Commission, chose to demand the duty of drafting the Constitution to an elected Assembly.

Since its election, the NCA has been criticized for its composition, as Islamists prevailed in its composition. Also the government that followed the election shows an overwhelming majority of al-Nahda members: of a total of 41 ministries, al-Nahda represented 19 and its supporters 11. Non-aligned parties shared the rest of the ministries. Islamists also gained the most important ones, such as Foreign Affairs, Interior and Justice. The NCA's main functions are settled in Fundamental Law no. 6, dated December 2011, on the provisional organization of powers, and in its internal regulations adopted in January 2012. Both texts impose constraints on executive and legislative authorities.⁷⁴ Law no.

⁷² P.J. Schraeder, H. Redissi, “Ben 'Ali's Fall”, in *Journal of Democracy*, Vol. 22, No. 3, The John Hopkins University Press, Baltimore 2011, p. 16.

⁷³ Among the most important decisions taken by the Higher Commission is the replacement of the Ministry of the Interior with an *ad hoc* Commission for overseeing the elections. For this end, the Higher Commission adopted several texts and regulations.

⁷⁴ A. Stepan, “Tunisian's Transition and the Twin Tolerations”, in *Journal of Democracy*, Vol. 23, No. 2, The John Hopkins University Press, Baltimore 2011, p. 91; B. Karray, *Acts organizing the Provisional Public Authorities, Legal Analysis and Political Extension*, Tunisia Constitutional e-Forum, 2 October 2012, pp. 1-5. Decrees regulating the functioning of the NCA can be found on the Assembly official website: <http://www.anc.tn/site/loi/AR/index.jsp>. See the NCA internal regulations and the fundamental law no. 6 dated December 2011 on the provisional organization of public powers. For

6 declares the NCA's aim of drafting a new Constitution (Article 1.2). It also exercises legislative powers, appoints its President and the President of the Republic and monitors the work of the government.⁷⁵ The right to propose draft laws belongs to at least 10 NCA deputies and to the executive.⁷⁶

The fourth chapter of the same law defines the role of the President of the Republic. Article 9 requires candidates to be Muslim, Tunisian and at least of the age of 35. The confessional provision is taken from Article 40.1 of the 1959 Constitution. According to Article 10, the presidential election is secret and requires the absolute majority of the NCA members. The President represents the State and defines foreign policy, in agreement with the Prime Minister (art. 11.1). He also ratifies laws and regulations and appoints the Prime Minister.⁷⁷

The NCA is allowed to remove the President from his duties, deciding with absolute majority (Article 13). This is a clear instrument of checks and balances between the powers directed to the government. Moreover, Article 15 of the same Law no. 6 seems to set up a parliamentary system, as it gives the President the duty to appoint the Prime Minister, after having consulted the majoritarian coalition in the Parliament. The Prime Minister-designate forms a government and informs the President of the Republic, not exceeding fifteen days from the date of the assignment.⁷⁸ Thus, the executive is divided between the President

the electoral legislation, see the decrees no. 72 dated August 2011 and the decree no. 35 dated May 2011 (both of them are in Arabic only).

⁷⁵ The constitutional draft must be approved by the absolute majority of the NCA members, voting each single article (art. 1.3). After that, a relative majority approves the final text. A second reading is held after a month from the first reading. Then the draft is submitted to the nation for an approval through referendum.

⁷⁶ Law no. 6 distinguishes between fundamental laws which require an absolute majority and ordinary laws which require the majority of the present deputies, providing at least 1/3 of them.

⁷⁷ This law ascribes the following powers to the Head of the State: he declares war and peace in accordance with the NCA, being the commander in chief of the army he issues martial law if circumstances arise disrupting the normal functioning of public authorities and after consultation with the Prime Minister and the President of the NCA. He seals treaties ratified the National Constituent Assembly, concedes amnesty, appoints and removes senior military officers in accordance with the Prime Minister. Other powers are contained in Art. 11, 1-14.

⁷⁸ The Prime Minister also indicates the ministers and he must submit a brief statement about his political program.

and the Prime Minister, as stated in Article 17.⁷⁹ However, comparing the prerogatives given to the Council of Ministers at the start of the transition with those assigned by Law no. 6, al-Nahda's preference for parliamentarianism, during the institutional debate, is clearer. The adoption of presidentialism was demanded by other parties of the troika, less represented in the NCA.⁸⁰

The Prime Minister is given five general prerogatives: he heads the Council of Ministers, is able to create, modify or delete ministries, public institutions, enterprises and administrative departments. He also appoints senior civilian positions in consultation with the minister concerned and with the whole of the Council of Ministers. The President of the NCA and at least 1/3 of deputies can ask for a vote of confidence, which must be approved by absolute majority. In the case of a withdrawal of confidence, government members resign and the President assigns the task to form a new cabinet to the party leader with the second largest number of seats.

Under Article 22 of Law no. 6, the judiciary is independent. The NCA issues a law, establishing its composition, powers and mechanisms, and a law providing transitional justice (Article 24). Lastly, Article 26 provides for the appointment of the Governor of the Tunisian Central Bank: the Head of the State decides after having consulted the President of the NCA and the Prime Minister. Appointment is effective after being ratified by a majority of members of the National Constituent Assembly. The debate on the election of the Governor of the Tunisian Central Bank shows the political attitudes of the Islamists: While al-Nahda proposed a governmental election for this office, other members of the troika asked for a shared mechanism in order to make the choice independent. As A. Allani states, throughout discussions of the laws regulating public authorities,

⁷⁹ The article states that government shall exercise the executive authority, except what has already been attributed to the President of the Republic. The government ensures the implementation of laws and it also can issue orders having force of law after deliberation of the Council of Ministers.

⁸⁰ N.J. Brown, *Constitutional Rebirth. Tunisia and Egypt reconstruct themselves*, United Nations Development Program, 11 August 2011. The institutional debate, at the NCA, created tensions between al-Nahda and other parties. Islamists opt for the parliamentary choice, believing that a presidential system can easily turn into authoritarianism.

Islamists tried to adopt a reconciliatory and consensual approach to the views of the minority.⁸¹

According to the NCA's internal regulations, deputies must declare their affiliation or their will to join a coalition (Article 16) in order to make clear their political program. The President legally represents the NCA and executes its internal regulations (Article 24). The task of drafting the new Constitution is divided between six committees (Article 22) while the power to legislate is given to eight legislative committees, composed by twenty-two members each.⁸² The vote is strictly personal and different majorities may be required, depending on the issue at vote (Article 94).⁸³

Under Article 114 of the internal regulations, the NCA oversees the government. Each deputy is allowed to raise questions to the executive. The Prime Minister must answer within a month. Moreover, the NCA establishes a monthly session with the ministers to discuss the development of political processes (Article 117). Article 118 contains a strong accountability tool allowing opposition to the government in case of violation of the program. This is in line with the administrative and economic independence, granted to the Assembly by Articles 139-140.⁸⁴ The composition of the NCA reveals the will of the Islamists to firmly respect the statements made during their electoral campaign. Of the total number of deputies, 70,51% are men and 29,49% are women. Al-Nahda is represented by 41 women and 48 men, while *Ettakatol* and CPR hold only 3 and 5 women respectively.

⁸¹ A. Allani, op. cit., p. 4.

⁸² The committees are divided according to the part of the Constitution that each one is deputed to draft: 1) fundamental principles and amendment of the Constitution, 2) freedoms and rights, 3) legislative and executive authorities and their reciprocal relations, 4) the judiciary, 5) the Constitutional Council, 6) local administration. The eight legislative committees are related to: 1) rights, freedoms and foreign policy, 2) general legislative authority, 3) finance and economic planning, 4) productive sectors, 5) services, 6) infrastructures and environment, 7) social issues, 8) education.

⁸³ The vote of confidence requires the absolute majority, as the removal of the President of the Republic or that of the President of the NCA. The vote on each single article of the Constitution is bound by reaching consensus of an absolute majority.

⁸⁴ Article 140 of the internal regulations allows the NCA to determine its expenditure, drafting a budgetary decree.

The requirement that half of the candidates for the NCA must be women signals that the Islamist leadership values the representation of traditionally marginalized groups.⁸⁵ But despite the number, Islamist women deputies do not cover any leading role: only two women hold the presidency of sub-committees while three have the role of speakers.⁸⁶ Among men, eighteen cover relevant roles: four are presidents of sub-committees, four are vice-presidents and fourteen are speakers or at least secretaries. Al-Nahda holds the presidency or vice-presidency of two strategic sub-committees: the committee that decides on the fundamental principles and the amendment procedure, and the one that decides over the executive and legislative powers.⁸⁷ As illustrated in the following paragraph, the first sub-committee, where al-Nahda is represented by nine deputies over a total of twenty-two, discussed the possibility of inserting the *confessional* and the *repugnancy clauses*.⁸⁸ The Islamists' predominance easily could have succeeded in adopting both of them but their voluntary rejection reveals that al-Nahda, more than outside, had to contain opposition within itself.

Even in the sub-committee related to the executive and legislative powers, al-Nahda holds 9 out of 22 deputies, followed by a block of six deputies not associated to any coalition. Among them, three are members of the party *Pétition populaire* (PP), which is not openly Islamic but near to al-Nahda.⁸⁹ PP holds the third largest number of representatives (26), after CPR (29).

⁸⁵ See the website of the NCA: www.anc.tn/site/main/AR/docs/composition/compos_s.jsp. See also: A. Stepan, op. cit., p. 93.

⁸⁶ While Farida el-Abidi, elected in Qayrawan, is President of the constituent committee for defining constitutional rights and freedoms, Yamina el-Zaghlamy, elected in Tunis, is president of a special committee for the martyrs of the revolution and general amnesty. See the NCA website: http://www.anc.tn/site/dep/AR/fiche_dep.jsp?cu=6744

⁸⁷ See the NCA website http://www.anc.tn/site/main/AR/docs/composition/liste_dep.jsp?cs=1&l=4&gr=1

⁸⁸ In the lexicon of the Islamic Constitutionalism, the *confessional clause* is the article which declares Islam as the official religion of the State and recalls the *Shari'a* as "one" or "the main" source of legislation. The *repugnancy clause* refers to that article that ascribes to a judicial body, usually to a Constitutional Court, the duty to scrutinize draft laws in order to reconcile them with the revealed law.

⁸⁹ NCA website http://www.anc.tn/site/main/AR/docs/commissions/liste_dep_commissions.jsp?cp=400&cc=403

DRAFTING THE CONSTITUTION I: THE DEBATE ON THE *CONFESSIONAL CLAUSE*

Building legitimacy for itself and the Constitution this is the Assembly's most important challenge.⁹⁰ As D. Pickard states, post-revolutionary Tunisia is divided over the role of Islam in the State. About 45% of respondents in a May 2012 opinion poll approved of non-secular government versus 40% who did not.

Shortly after the NCA was constituted, a debate broke out over whether to make Islamic law the basis of the new Constitution. Al-Nahda's electoral platform made no mention of *Shari'a*, and prior to the elections, Rashid al-Ghannushi had stated several times that his party would not seek to insert religious law into the charter. But after the party's victory, a group of deputies including some of al-Nahda's conservative members proposed adopting *Shari'a* as "a source among sources" of the law.

The President of the NCA, Ben Jaafar, threatened to resign if the proposal were adopted, and all secular parties asked the majoritarian blocks to clarify their position. Finally, al-Nahda announced its support for a similar article to Article 1 of the 1959 Constitution: «Tunisia is a free, independent, sovereign State; Islam is its religion; Arabic is its language; and the Republic is its form of government». This particular *confessional clause* was supposed to affirm Tunisia's Arabic and Islamic identity.

Another debate between Islamists and opposition took place when al-Nahda's deputies issued a formal statement calling for the criminalization of the offenses against religion. In opposition with initial statements, the party declared that the revolution was fought in the name of Tunisia's Islamic identity and that freedoms must be executed in accordance with these values.⁹¹ Ben Jaafar opposed another time, motivating his position as follows: «it is not because we have agreed to

⁹⁰ D. Pickard, "Challenges to legitimate governance in post-revolution Tunisia", in *The Journal of North African*

Studies, Vol. 16, No. 4, Routledge, London 2011, p. 637.

⁹¹ N.J. Brown, "Do Tunisians agree on more than they realize?", in *Foreign Policy Magazine*, 9 August 2011. Here the author wrote: «Tunisian elites expect that the real battles will take place over the country's identity. I am less certain. There are profound differences to be sure, but nobody seems to want to make fundamental changes in the formula developed at the country's independence [meaning the former art. 1]».

allow attacks on the sacred, but because the sacred is something very, very difficult to define». ⁹²

These two examples show how different are the Islamist and the secular conceptions of the State. But paradoxically a French-style secularism, that minimizes the role of religion in political life, also appeals to Islamists who see it as a good chance of liberating Islam from public constraints. When interviewed, al-Ghannushi manifested his willingness to compromise. He declared his party opted for the Anglo-Saxon model of State-church relations, whereby the State remains neutral on religion but is not unfriendly to it neither in private nor in public spheres. ⁹³ The enforcement of the *Shari'a* requires a preliminary stage during which the country is to be re-educated on its proper meaning. ⁹⁴

It is important to underline that the army has always played the role of the guarantor of Tunisia's secularism. During the revolution, the military leadership pursued a non-political strategy and was involved only after reaching the conclusion that Ben 'Ali himself, and his family, had become the principal obstacle to any kind of development. Thus, unlike the Egyptian case, the army refused to fire on protesters and withdrew from key locations or even placed itself between protesters and the police, protecting the former. ⁹⁵

To understand the importance of the *confessional* and the *repugnancy clauses*, it is necessary to look at their practical implementation. This, in turn, will define better the proper meaning of the so-called Islamic constitutionalism. As previously mentioned, this is defined as a methodology to put *Shari'a* in operation, inside the general framework of a constitutional State. Recalling the Quran and *sunna* among the sources of law does not only imply the *a priori* adherence to Islamic law. It also means the *ex post* application of the Islamic

⁹² Gulf News, *No blasphemy clause in new Tunisia constitution*, 29 October 2012.

⁹³ About Rashid al-Ghannushi's life and political thought, see: A.S. Tamimi, *Rachid Ghannouchi. A Democrat within Islamism*, Oxford University Press, Oxford 2001.

⁹⁴ M. Marks, "Ennahda's Rule of Engagement", in *Sada Journal*, 8 October 2012.

⁹⁵ E.C. Murphy, "The Tunisian Uprising and the Precarious Path to Democracy", in *Mediterranean Politics*, Vol. 16, No. 2, Routledge, London 2011, p. 302.

norms, for example when judges issue sentences or if cases rise in front of their courts.

Recently, scholars looked at the Egyptian Supreme Constitutional Court as the main example of legal reasoning based on Islamic law and jurisprudence to decide upon complaints.⁹⁶ The Supreme Constitutional Court, in a decision dated 15th May 1993, made it possible to distinguish between principles of the Islamic law that are immutable and unalterable and those which are malleable and alterable. For the principles of the first group, ordinary laws must be fully compliant under penalty of invalidity. In the second area, executive and legislative branches have wide autonomy but they are bound to the preservation of the aims of the *Shari'a*.⁹⁷

In Tunisia, the absence, in the 1959 Constitution, of the clause that recognizes the *Shari'a* as a source of law prevented the development of any Islamic constitutional doctrine. The Islamic nature of the Tunisian juridical system survived through other means, such as through the article that required the President of the Republic to be Muslim (Article 38) or certain articles of the civil code related to inheritance. Thus the justiciability of constitutional rights was pursued by traditional means. In the decision of the Court of Appeal of Tunis dated 14th June 2002, the judge denied the inability of succession based on religious reasons, appealing to the rejection of religious discrimination as a basic principle of the Tunisian order, founded on religious freedom of the Article 5 of 1959 Constitution, Articles 2, 16, 18 of Universal Declaration of Human Rights

⁹⁶ N. Brow, C. Lombardi, "The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: an Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)", in *American University International Law Review*, Vol. 21, No. 3, Washington College, Washington 2006, pp. 437-460; K. Balz, "La reconstruction séculière du droit islamique: la Haute Cour constitutionnelle égyptienne et la «bataille du voile» dans les écoles publique", in *Droit et Société*, Vol. 39, Lextenso Éditions, Paris 1998, pp. 277-291; F.E. Vogel, "Conformity with Islamic Shari'a and Constitutionality under article 2: some issue of the theory, practice and comparison", in E. Cotran, A.O. Sherif, edited by, *Democracy, Rule of Law and Islam*, CIMEL Book Series no. 6, School of Oriental and African Studies, University of London, London 1999, pp. 535-544.

⁹⁷ J. Murray, M. El-Molla, "Islamic Shari'a and Constitutional Interpretation in Egypt", in E. Cotran, A.O. Sherif, op. cit., p. 507; N. Brown, *The Rule of Law in the Arab World*, Cambridge University Press, Cambridge 1997; C. Mallat, "On the Specificity of Middle Eastern Constitutionalism", in *Case Western Reserve Journal of International Law*, Vol. 38, No. 13, Case Western Reserve University, Cleveland 2005, p. 32.

and of paragraph 2 as well as Article 2 of the Covenant on Economic, Social and Cultural Rights of 1966. Discrimination based on religion in matters of succession creates, the Court ruled, a pressure affecting the freedom of choice of religion and causes the creation of two classes of citizens, a fact that sharply conflicts with equality before the law proclaimed in Article 6 of the former Constitution.⁹⁸

Recognizing Islamic sources of law in the Constitution allows courts to apply the *Shari'a* to reach the same results pursued by international covenants or other positive legal means. Inserting Islamic law in the Constitution may produce benefits but, considering that not all the principles of the Islamic law are indisputable, the scholars, or the judiciary, must be given the task of performing judicial reasoning.⁹⁹ This, in turn, allowed the creation of a specialized body, a *Shari'a* council, in order to decide in this regard. In 2007, in the Egyptian Muslim Brotherhood's electoral platform, a *Shari'a* council was mentioned as a forum for reviewing legislation to ensure its compliance with Islamic law.¹⁰⁰ In an interview, Rashid al-Ghannushi made it clear that he saw this as an intrusion of religious authority into the realm of democratically constituted political authority, a violation of what A. Stepan has called the "twin tolerations". His party never pushed for such a body.¹⁰¹

The most notable advantage deriving from recalling the Islamic sources of law inside the Constitution is the possibility to have at disposal a normative universe that can be applied at the constitutional level and during the Constitution-making process itself. Of course, saving the *Shari'a* means that also those statements detrimental for human dignity (such as the criminal laws) are

⁹⁸ A list of significant rulings made by several Tunisian courts is collected in: Yadh ben Achour, *Introduction Générale au Droit*, Centre de Publication Universitaire, Tunis 2005, pp. 163-170. Also the decision of the Court of Appeal of Tunis dated 14 June 2002, cited here, is taken from this study.

⁹⁹ In particular, useful in this context could be the Islamic principle of forbidding anything compulsory within religion, stated in Cor. II,256 and other verses reported in the first part of this study, related to freedom of religion. If Islamic sources of law are recognized by the Constitution, a judge could appeal to these principles to avoid any constraints.

¹⁰⁰ N. Brown, A. Hamzawy, "The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?", in *Carnegie Endowment for International Peace*, January 2008.

¹⁰¹ A. Stepan, op. cit., 2011, p. 95.

recalled but they could be counterbalanced by providing that sources of Islamic law are a source among others. The first part of the analysis showed that principles like consultation, separation of powers, accountability, equality, freedom etc., are considered the fundamental bases of the Islamic policy. Moreover, recalling the distinction of the Egyptian Supreme Constitutional Court, they are supposed to be certain and unalterable. A part from specific areas, like gender issues, where a new *ijtihad* is necessary to provide women (and also non-Muslim minorities) with full participation in public life, the *Shari'a* can serve as *Grundnorm*, a set of inalienable supra-constitutional rights, inspiring the Constitution.¹⁰² As Muhammad Munir states, to determine the place of Islamic legal principles in a specific legal system, not only the status of Islam in Constitution must be taken into account, but also statutes and case law.¹⁰³

Using a Pakistani example, in the case of *Asma Jilani v. the Government of the Punjab (1972)*, Chief Justice Hamoodur Rahman noted that: «In any event, if a *Grundnorm* is necessary for us I do not have to look to the Western legal theorists to discover one. Our own *Grundnorm* is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty God alone, and the authority exercisable by the people within the limits prescribed by him a sacred trust. This is an immutable and unalterable norm, which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the “corner stone of Pakistan’s legal edifice” [...] it is one of the fundamental principles enshrined in the Quran».¹⁰⁴

¹⁰² On the concept of *Grundnorm*, see: H. Kelsen, *The Pure Theory of Law*, trans. by M. Knight, University of California Press, Berkeley 1967, p. 201. *Grundnorm* was defined as: «Coercive acts ought to be performed under the conditions and in the manner which the historically first Constitution, and the norms created according to it, prescribe. (In short, one ought to behave as the Constitution prescribes)».

¹⁰³ M. Munir, “Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan”, in *Islamic Studies*, Vol. 47, No. 4, Islamic Research Institute, International Islamic University, Islamabad 2008, p. 452.

¹⁰⁴ M. Munir, op. cit., p. 453. See also: S. Mullally, “‘As Nearly as May Be’: Debating Women’s Human Rights in Pakistan”, in *Social and Legal Studies*, Vol. 14, No. 3, SAGE, London 2005, pp. 341-358.

This theory recognizes the divine sovereignty of God alone. As reported previously, Rashid al-Ghannushi belongs to a more moderate school that accepts a kind of dual sovereignty: while God is fully sovereign, human beings acquire a residual capability of deciding for themselves. But, as anticipated, if inscribing the Islamic law in the general framework of the Constitution produces some benefits, it also carries negative consequences such as the enforcement of those provisions, for example in criminal law, where it openly violates human rights. Moreover providing the principle of the *Shari'a* as “one” or “the most important” source for legislation, does not exclude other sources of law, allowing covenants and international treaties to produce a balancing-effect. Equating *Shari'a* and *Grundnorm*, I refer to the possibility of instructing post-revolutionary legal systems with the general principles of the Islamic law more than with its effective rules.¹⁰⁵ Certain Islamic maxims could produce positive effects, even in the field of Islamic criminal law.¹⁰⁶ Under its provisions, punishments are to be avoided if there is ambiguity or doubt as to the evidence or criminal culpability of the accused.

DRAFTING THE CONSTITUTION II: THE DEBATE ON THE STATUS OF WOMEN

The evolution of the status of women in Tunisia is inextricably linked to the figure of Habib Burghiba, the first President who took power in 1957.¹⁰⁷ Burghiba was a leader in the nationalist Neo-Dustur party, which advocated independence from France, anticipating many post-occupation Arab leaders. Burghiba consolidated his power after independence, using the strategy of marginalizing the Islamic bloc inside the Dustur party, represented by the

¹⁰⁵ The *qawa'id kulliyaa* (general principles) are extracted from certain legal maxims and could be interpreted, with the above mentioned aims of the *Shari'a*, as the preconditions of the law or supra-legal principles governing the whole legal system. On this topic see the following study: Yusuf al-Qaradawi, *al-Qawa'id al-Hakima li-Fiqh al-Mu'amalat* [The General Principles that Govern the Jurisprudence about Transactions], Dar al-Šuruq, Cairo 2010. These principles are expressed in legal sayings as: «al-asl fi'l-'uqud wa'l-shurut al-ibaha» meaning that usual requirements of law are allowed to change under necessity and if the Quran or the *sunna* do not fix them in strict terms. Another saying is: «tahrīm akal amwal al-nas bi'l-batil» forbidding the waste of people's wealth, the one: «la darar wa la dirar» simply means «do no harm». The flexibility of the Islamic system of law is clearly displaced in this saying: «al-tahfif wa'l-taysir la al-tashdid wa'l-ta'sir». It prevents the law to endure and invites the mitigation, where possible.

¹⁰⁶ I. Rabbi, “Islamic Legal Maxims as Substantive Canons of Construction: Hudūd-Avoidance in Cases of Doubt”, in *Islamic Law and Society*, Vol. 17, Brill, Leiden 2010, pp. 63-125.

¹⁰⁷ M. Bouali, *Introduction à l'histoire constitutionnelle de la Tunisie*, En-Najah, Tunis 1963, pp. 20-33.

politician Salah ben Yusuf. Since the very start of his government, the President promoted some reforms of the Tunisian judicial system, merging religious and secular courts. This transformation paved the way to the adoption of a new Personal Status Code, which outlawed certain practices, provisioned by Islamic law, in areas such as marital law, heritage, and divorce. This code outlawed polygyny, ended the male right of repudiation, set minimum ages for marriage, and extended to women additional prerogatives in questions of child custody and inheritance. Burghiba also started a policy of marginalization of Islamists, putting the Mosques under the control of the State and placing the Zaytuna Mosque and other Islamic Universities under the authority of the Ministry of Education.¹⁰⁸ The goals related to gender issues were celebrated because they were perceived as radical changes towards the traditional roles that religion assigned to women.¹⁰⁹ Several changes to the Personal Status Code concerning women's status in society were pushed during the first years of independence to ensure full gender equality. Even Ben 'Ali, who came to power in 1987, reaffirmed the previous secular policies of his predecessor. Gender equality was reinforced and in 1993 the Personal Status Code was amended to abolish the wife's duty to obedience.

After the revolution, al-Nahda has advocated positions on women's personal freedoms that have provoked harsh criticism especially from feminist groups and from secular parties.¹¹⁰ Although al-Nahda promised to leave unchanged the Personal Status Code or the rules defining men and women as equal citizens, other members of the same party have proposed laws that mitigate some of the gains provided by the same Code. One demonstration of al-Nahda pluralistic positions on gender issues is the debate on the proposal of a NCA subcommittee, which defined women as "complementary to" rather than "equal to" men. The subcommittee approved the clause in question by a vote of 12 to 8. Nine of the

¹⁰⁸ D. Pickard, op. cit., p. 643.

¹⁰⁹ F. Cavatorta, R. H. Haugbølle, "The End of Authoritarian Rule and the Mythology of Tunisia under Ben Ali", in *Mediterranean Politics*, Vol. 17, No. 2, Routledge, London 2012, p. 190.

¹¹⁰ For a historical perspective on gender equality in Tunisia, see: A. Grami, "Gender Equality in Tunisia", in *British Journal of Middle Eastern Studies*, Vol. 35, No. 3, Routledge, London 2008, pp. 349-361; D. Pickard, op. cit., p. 640. The number of women overall puts Tunisia near the top of national assemblies worldwide in the percentage of women members, which is due to the electoral law.

twelve total positive votes were casted by al-Nahda. After strong demonstrations, the article has been replaced by Article 37 of the current Constitutional draft, which simply declares equal rights for men and women.

On 11 April 2011, Essebsi's apolitical government approved a gender parity law requiring an equal number of alternating male and female candidates on all party lists for the October elections for the NCA. As a result, 42 of the 59 women in the Assembly now belong to al-Nahda. The 2011 electoral platform affirmed the political equality of men and women, stating that women should be granted equal access to all public administrative and political positions.¹¹¹

Comparing al-Ghannushi's declarations with the decisions taken by his party in the NCA, it seems that al-Nahda is trying to distinguish political rights which are equal for all the citizens and their personal freedoms which are expected to change, due to gender or religious reasons, as they belong to individuals. From this perspective, the so-called Islamic democracy, interpreted as a mere procedure, consists in open contests for political offices, participation in fair elections, separation of powers, rule of law, and can survive even without any liberal philosophic substratum. This position is supported by Article 67 of the new Tunisian Constitutional draft which, requiring the Islamic faith for the eligibility of the President of the Republic and showing the influence of Islamic law. If Muslim women are allowed to run freely for public offices, this is not entirely true for religious minorities, such as the Jewish community. In addition, if the complementary status of women to men should not have really been perceived as a threat for the empowerment of Tunisian women, as predicated by the Islamist party, it is unclear why that provision, in the end, was removed from the draft.¹¹² The abandonment of that clause, maybe, reveals the double standard characterizing al-Nahda's constitutional politics, which aimed at balancing alliances and keeping the power conquered by the ballots.

¹¹¹ E. Byrne, *Tunisia's Islamist party unveils manifesto*, Financial Times, 15 September 2011. This article contains some reference to the al-Nahda's official pre-electoral manifesto, including the statements related to gender issues and the promise of leave the Personal Status Code unchanged.

¹¹² See art. 67 of the official draft of the Constitution as submitted by the ANC on December 2012. http://www.anc.tn/site/main/AR/docs/divers/projet_constitution.pdf

Also wearing the veil is no longer illegal in the country and may be worn in the photographs on national identity cards. Even in this case, al-Nahda moved from an opposite to the other one: the Islamists accepted the Personal Status Code but, at the same time, they called for the protection of “traditional” Islamic values, creating ambiguity on their real intentions.¹¹³

PROTECTION OF RELIGIOUS FREEDOM: CAN A CONFESSIOAL STATE BE DEMOCRATIC?

During the negotiations related to Article 1 of the Constitutional draft, al-Nahda disappointed some radical parties (*salafis*), which pushed to recall the *Shari'a* as the only source of the legislation. After the decision to maintain Article 1 as formulated in the 1959 Constitution, Jabhat al-Islah, one of the radical parties, was granted a license to operate as an official political party. Al-Nahda's actions suggested that violence is the only condition against which salafists should be judged: all the radical groups not embracing violence are allowed to participate in the political arena. Despite a long bargaining, Al-Nahda won the debate over Article 1: after the proposal to adopt *Shari'a* as “a source among sources” of law, the president of al-Nahda's bloc at the NCA proposed the *Shari'a* as “the main source of legislation.”

What is relevant is that, while quite all al-Nahda members in the Assembly supported inserting *Shari'a* into the Constitution, the party's top political council decided by an internal vote and only 12 out of 80 participating members agreed to mention Islamic law in Article 1. To avoid a dangerous division between the party leadership and its NCA deputies, the article was left unchanged. This debate contributes to clarify the attitudes of al-Nahda when tensions between Islamic values and secularism, emerge: al-Nahda tries to reach a consensus in order to adopt a middle way, asking for a society in which public life is guided by a collective and religious identity that prevails over individual freedoms. Coherently with this view, Rashid al-Ghannushi declared in several occasions

¹¹³ P.J. Schraeder, H. Redissi, op. cit., p. 18.

that his party's goal was to realize a "civic State, not a religious one", guided by ethics and moral values.

The debates that occurred inside and outside the NCA over the adoption of a law criminalizing blasphemy are also significant in this context. The question rose during the 9th General Congress of the party, held in July 2012, where Rashid al-Ghannushi was reconfirmed as its leader.¹¹⁴ During the same week a draft law circulated in the NCA, proposing to criminalize any blasphemy toward not only the Islamic faith but also toward all monotheistic religions, whether by statement, act, or image, regardless of whether the expression was intended as an insult or an effort at irony or sarcasm. The law provides punishments for such expression, such as prison sentences ranging from two years to four years for repeat offenders.

Criminalizing blasphemy is incompatible with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and, in addition, it discriminates the well-protected faiths (like the Abrahamic religions) from other attitudes toward spirituality, as Muslim dissenters, secularists, atheists and other non-recognized religious minorities. This approach is not only in contradiction with the human rights discipline, which prohibits any discrimination against select religions but it also contradicts those rules of the Islamic law themselves which prohibit coercion in the choice of religion and personal beliefs.¹¹⁵

Moreover, even if the law against blasphemy is harmful for the sphere of the freedom of speech, it is perceived as coherent with the draft of the Constitution, which states the freedom of belief and ascribes to the State the task of protecting the "religion" (Article 4).¹¹⁶ This article, mentioning the religion and not the "religions", could be interpreted as a reference to the only official religion of the

¹¹⁴ Robert C. Blitt, *Tunisia: Springtime for Defamation of Religion*, JURIST - Forum, 13 August 2012.

¹¹⁵ I refer in this case to the above mentioned statement of Quran II,256 which prescribes no compulsion in faith or Quran CIX,6 «For you is your religion, and for me is my religion».

¹¹⁶ The article, in Arabic, states: «al-Dawla ra'yya li'l-din» meaning that the State is the protector of the religion.

State, which is Islam under Article 1.¹¹⁷ Article 4, not only allows the practice of the religious rituals, but also gives the State the duty to assure protection for “everything (...) sacred”. On the one hand, placing Article 4 on the top of the Charter, the draft shows a deep concern for the protection of the religious sphere. On the other hand, this provision, voluntarily formulated in a generic manner, gives the judges a huge discretionary power to define what is considered sacred and what is not and, consequently, to criminalize some offences in spite of others.

Even if the Constitution is not enforced, and then not justiciable, a panel of five Tunisian judges, in May 2012, convicted the communication magnate Nabil Karoui of “disturbing public order” and “threatening public morals” by broadcasting the French movie “Persepolis”, an animated film that contains an image of God. Some clerics protested that the movie insulted Islamic values by showing the face of God, who is depicted in the film as an old man with a white beard.¹¹⁸ Article 36 of the Constitutional draft guarantees freedom of opinion, expression, communication and also a special liberty of original creation (conceived mainly as artistic expression). The same text forbids any kind of censorship.¹¹⁹ Under the new Constitution, if enforced, in a case like that of Karoui, the State would face the necessity to balance its role of defender of “what is sacred” and the guaranteed freedoms of expression and communication. Moreover Article 36 adds that only law can specify the boundaries of exercising freedoms of communication and press, to ensure protection of the “rights of the others, their reputation, security and health”. While, in the case at issue, the movie “Persepolis”, had passed the regular scrutiny by competent authorities, before the revolution, receiving the allowance to be broadcasted, it is possible to argue that, under the new Constitution, the role of the State in the field of protection of what is sacred will prevail on its task to protect freedom of

¹¹⁷ The Arabic text of the Article 1 states: «Tunis dawla mustaqilla, dath siyada, dinuha Islam, wa'l-'arabiyya lughatuha, wa'l-jumhuriyya nizamuha». The following provisions ascribe sovereignty to the citizens who are identified as the sources of the powers.

¹¹⁸ M. Fisher, *Tunisian who showed 'Persepolis' on TV fined in free speech case*, Washington Post, 3 May 2012.

¹¹⁹ Even the former 1959 Constitution allowed the freedoms of expression, opinion and communication (Art. 8) within the conditions defined by the law.

expression, creating *de facto* a kind of censorship. As Islam is the official faith of the State, those unspecified “rights of the others”, without any clarification that they refer to the religious minorities, could easily coincide with the “rights of the majority”.

CONCLUSION

This study tried to analyze the Constitutional politics adopted in post-revolutionary Tunisia, under the light of the so-called Islamic constitutionalism. In the first part, it gave a brief description of what precisely is comprised under the label of Islamic Constitutional law. Highlighting that the Islamic Constitutional law does not encompass a specific, or unique, form of government, the majoritarian moderate Sunni doctrine was outlined, which considers the Caliphate as a historical product, the traditional shape of the Islamic polity.¹²⁰ The Caliphate represented the best way for the community to manage its political problems. The modern doctrine considers the principles of the Caliphate as applicable to monarchical or republican States whose systems of government are based on parliamentarianism or presidentialism, as conceived by the Western Constitutional law. It was also stressed that the Quran and the *sunna*, the most prominent sources of Islamic law, are quite silent on what is related to the Islamic polity and, as a consequence, the theoretical structure of the Caliphate was only the result of the jurisprudential efforts made by scholars, throughout the centuries.

The last judicial agreement on the Caliphate was reached between 1924 and 1926, when the collapse of the Ottoman Empire, and its disintegration in several national States, sanctioned the dispensability of the Islamic Constitutional law and its substitution by Western positive models.¹²¹ Since then, the Caliphate remained just a utopia, nothing more than a set of principles related to good

¹²⁰ A small group of Sunni scholars consider the Caliphate as the true Islamic system of government and, as consequence, a structure of power, which is necessary to restore. One important scholar, who supported this view, was Taqi al-Din al-Nabhani (1909-1977), the founder of the *Hizb al-Tahrir* or Liberation Party. This jurisprudential stream is rear to the imami sciite doctrine which is majoritarian in Iran and considers the Imamate to be compulsory.

¹²¹ On the judicial consensus related to the Caliphate see the minutes of the panislamic conferences held in Cairo on this topic: Sékaly A., *Le Congrès du Khalifat et le Congrès du Monde Musulman*, Éditions Ernest Leroux, Paris 1926.

governance, as contractualism between governors and governed, the principle of responsibility of those in charge with public offices, mutual consultation in decision-making, separation of powers and many others. The Islamic State, that is the only legal State from the perspective of Islamic law, quoting Yusuf al-Qaradawi, is «a civil State governed by the *Shari'a*».¹²²

Since the very start of the constitutional history of the Islamic world in its Western meaning, with the adoption of the Ottoman and the Persian Charters, the problem of inscribing the *Shari'a* in a positive legal framework has been solved through the *confessional* and *repugnancy clauses* and requiring the adherence of laws or regulations (and of the Constitution itself) to the Quran and the *sunna*. According to R. Hirschl, one of the positive aspects of this methodology is the justiciability of Islamic law, that is the possibility to conduct a judicial review of its provisions. As often judges are considered the defenders of secularism and modernism, the codification of *Shari'a* is supposed to reduce “theocratic policies”, contributing to improve a kind of juridical universalism, conceived as the protection of those values common to all human beings.¹²³ Stressing that laws are produced by man and not by God, even if *Shari'a* is recalled, R. Hirschl does not contradict what Yusuf al-Qaradawi means by describing the Islamic State as a civil (in spite of theocratic) polity ruled by religious law. In the mind of Muslim scholars, the rights and freedoms contained into Constitutions are not secular, nor derived from liberal philosophies. Freedoms derive from the voluntary submission to God that makes all the humans equal. In this respect, freedoms spring from the law of nature that coincides with the revealed law. For this reason, Muslim scholars believe that there is no contradiction between secularism and Islam: if constitutionalism could be intended as a civil religion, then, it is not at odds with Islam.

The evidence that an Islamic constitutionalism is possible lies in several decisions issued by the Egyptian Supreme Constitutional Court. The methodology employed by this court has been labeled *neo-ijtihad*, highlighting its

¹²² Yusuf al-Qaradawi, op. cit., p. 20. See also: K.A. Faruki, *The evolution of islamic constitutional theory and practice*, National Publishing House, Karachi 1971.

¹²³ R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Harvard 2010, p. 103.

totally Islamic coherence.¹²⁴ The process of interpretation is divided in two steps:¹²⁵ during the first phase, the Court defines the Quranic verses containing universal principles and indisputable norms, which are applicable to cases at issue. During the second phase, the Court establishes if a law, or a regulation, is in contradiction with the aims of the *Shar'a*, the public utility criterion and the general principles of the jurisprudence. Thus, the Court verifies the conformity of any piece of legislation with the whole spirit of the revealed law.

The second part of the study illustrated how transition after the revolution is managed in Tunisia. Laws and regulations adopted as well as the institutions that are leading Constitutional politics during this period were discussed. The author questioned the proposed view of accepting a bootstrapping transition, which implies a continuum with the previous constitutional order. Moreover, the Higher Commission for the Achievements of the Revolution, permitted the adoption of certain immediate reforms, led to the paradox of an unelected organ giving the task of drafting the basic law to an assembly. The moderate Islamist party, al-Nahda, having gained the majority of the NCA seats, succeeded in influencing both the process of constitutional drafting and the power to legislate. Focusing on three debates, the role of the Islamic law in the Charter, the status of the women and the problem of granting religious freedoms in the framework of a confessional State, it is evident that al-Nahda is struggling to remain coherent within its platform, as well as one of its leaders, Rashid al-Ghannushi who now is trying to enforce his project of a civil State based on religion. The debate on merging the *Shari'a* and Article 1 demonstrates the flexibility of the Islamist political discourse, which is prepared to sacrifice substantive demands in order to preserve the cohesion of the party.

¹²⁴ See, for example, the case Wassel v. Minister of Education, Case No. 8, Judicial Year 18, May 18, 1996. See also: F.E. Vogel, "Conformity with Islamic Shari'a and Constitutionality Under Article 2: Some Issues of Theory, Practice, and Comparison", in E. Cotran, A.O. Sherif, op. cit., p. 535-544.

¹²⁵ N.J. Brown, C. Lombardi, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law", in *American University International Law Review*. Vol. 21, No. 3, American University Washington College of Law, Washington 2006, pp. 431-433.

At this stage, a doctrine of Islamic constitutionalism, similar to that prompted in Egypt by the Supreme Constitutional Court, is unthinkable in Tunisia because it requires the sources of Islamic law to be recalled in the Constitution and a judicial body that is given the task of conducting *neo-ijtihad*. Also, the possibility of framing a quasi-judicial council of Muslim scholars given the duty to scrutinize laws and legislations is not in line with the current Tunisian Islamist views.

Does a place for Islamic principles of good governance, extracted from the doctrine of the Caliphate, exist in the post-revolutionary Tunisia? Could the principles of Islamic Constitutional law be relevant during the transitional process? And, in addition, could they represent a common ground between Islamists and secularists, in order to eradicate their reciprocal diffidence that is one of the main obstacles to democratic transition?

In a study devoted to modern Sunni political philosophies, S. Akhavi stressed the importance contractualism has assumed in the Islamic system of law.¹²⁶ Since the medieval era, *Shari'a* has been conceived as the law preceding the society. The State does not legislate but it only has the task to enforce a pre-existent law. Public officers, as caliphs, ministers, amirs, judges, are bound by that law. They are not given absolute powers and their duties are carried in the interest of the community. As already mentioned, officers acted as agents (*nuwwab*), pursuing the wellness of those which they acted on the behalf for. Islamic Constitutional law gives several indications in that respect: scholars specified that if the Caliph appoints a judge, the latter does not lose his office by the death of the former. Public officers are linked to each other but their relations are mediated by the community that holds sovereignty. What is arguable here is that, while Islamic Constitutional law contains those devices of accountability of political power usually referred to under the so-called liberal constitutionalism, it does not encompass elements of equality and freedom proper of the democratic constitutionalism.¹²⁷ The debates discussed above,

¹²⁶ S. Akhavi, "Sunni modernist theories of social contract in contemporary Egypt", in *International Journal of Middle East Studies*, vol. 35, no. 1, Cambridge University Press, Cambridge 2003, pp. 23-49.

¹²⁷ I refer to the definitions of liberal constitutionalism and democratic constitutionalism adopted in: M. Fioravanti, *Costituzionalismo. Percorsi della storia e tendenze attuali*, Laterza, Roma-Bari 2009.

occurring in the NCA and relating to gender or confessional issues, seem to corroborate this thesis.

Hirschl positions on the secularizing effects of the Islamic constitutionalism as enforced by the Supreme Constitutional Court of Egypt are based on legal reasoning that is clearly Islamic (i.e. conducted on the basis of Islamic sources and with religious explanations). Islamic constitutionalism could, however, produce, *per se*, liberal-democratic outcomes and the reason why it failed to succeed so far lies in the problem of interpretation of prominent sources (Quran and *sunna*). In other words, the main obstacle is methodological and not substantial: in the absence of a unique magisterium, which represents the only hermeneutical guide, the task of approaching the sources of law is abandoned to the conscience of the Islamic scholars (judges, jurists, muftis).

Reaching a consensus over considering *Shari'a* as the *Grundnorm* of a legal system opens the possibility to place above the Constitution, as above positive law, a set of immutable and shared principles that can orientate the act of legislation and the work of the judiciary. Moreover, recalling *Shari'a* in the Constitution allows the justiciability of these principles while the fact that it is not given the status of the only source of law, but that of "one" of the sources or even "the most prominent", realizes a juridical pluralism that could balance those provisions (as in Islamic criminal law) commonly considered dangerous or undemocratic. Under this light, not only the *confessional clause* could be a value and not a threat, but also democracy, freedom and human rights could agree with confessionalism.