North African Societies after the Arab Spring

North African Societies after the Arab Spring:

Between Democracy and Islamic Awakening

Edited by

Leila El Houssi, Alessia Melcangi,
Stefano Torelli and Massimiliano Cricco

Cambridge
Scholars
Publishing

North African Societies after the Arab Spring:
Between Democracy and Islamic Awakening

Edited by Leila El Houssi, Alessia Melcangi, Stefano Torelli
and Massimiliano Cricco

This book first published 2016

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-4438-9015-4
ISBN (13): 978-1-4438-9015-1

TABLE OF CONTENTS

INTRODUCTION

No attempt to define the Mediterranean as a region can overlook the multiplicity of political, religious and social forces at work along its shores. Responding to changes in the global and regional environment these forces have interacted in complex ways, as evidenced by their impact on the social, cultural, and political life of the states comprised between the covers of this collaborative volume. The peculiarity of the Mediterranean, as has been noted time and again, lies in its geographical position as a "sea in the middle of the land", where different religions and cultures vie for recognition and self-expression.

In the wake of the popular uprisings that have inflamed the region, beginning in Tunisia in December 2010, a drastic reorganisation of their respective state systems is coming into focus in Tunisia, Egypt, and Libya. Even in Morocco and Algeria, the least touched by such upheavals, popular discontent has led governments to introduce major political reforms. Though their paths do not run along parallel lines, they share a common denominator: the determination of their people to become the masters of their destinies, and to do so by grappling with new forms of democracy.

Almost five years later, after their rulers became the target of violent mass protests, Tunisia, Egypt and Libya are going through an exceptionally difficult transition, trying to accommodate their nascent constitutional forms to the new forces inspired by the Arab Spring. In the first two countries, the citizens went to the polls and voted for electing a constituent assembly leading to new types of state and forms of government. But this has only been the beginning of the story. Indeed, Egypt soon witnessed the return of the authoritarianism with the *coup d'état* conducted by General 'Abd el-Fattah al-Sisi against the democratically elected President Muhammad Morsi. After the coup, the new "strong man" has been elected President, after having banned the Muslim Brotherhood, causing an increasing polarisation and stopping the Egyptian transition process. On the other hand, Tunisia, even thanks to the Islamic party *al-Nahda*'s attitude, has been able to overcome the challenges and to adopt a new constitution in January 2014. Furthermore, at the end of 2014, Tunisia underwent its first actual democratic parliamentary and presidential elections, proving to be the only "success

story" among the countries affected by the so-called "Arab Spring". On the opposite side stand the Libyans, whose revolt against Gaddafi was much more violent, giving the conflict the characteristics of a true civil war. They have elected a parliament and a government too, but are still waiting for the elections of a constituent assembly, and the country is gradually collapsing into a new civil war.

In little less than four years, the regional landscape has gone through a sea of change, as seen in part by the emergence or the re-emergence of Islamic parties. In Tunisia, a traditionally secular country, the elections in 2011 consecrated the Tunisian Islamist party, which received a majority in all 27 electoral districts, as the greatest political force of the country. In Egypt, the 2012 presidential elections were won by Muhammad Morsi, the candidate of the Freedom and Justice Party (FJP), the political arm of the Muslim Brotherhood. With 51.73% of the votes over his main opponent Ahmed Mohamed Shafik, prime minister under President Hosni Mubarak, Mohamed Morsi won the run-off election on 24 June 2012 and remained in power until the struggle between secular and Islamist forces for the control of state institutions unleashed an unprecedented wave of violent protests across the country in June 2013.

In this context, the rising demands for political participation from religious and ethnic minorities – such as the Coptic Christian community, which accounts for about 10% of the Egyptian population – continue to be a source of conflict and discrimination, paving the way for serious acts of violence. The issue of minority rights remains unresolved. Between proponents of political secularisation and devotees of radical Islam, the space for compromise is rapidly shrinking. Given such circumstances, the recent overthrow of President Morsi by the Egyptian army on 3 July 2013 casts a sinister shadow over the future of this country.

In post-Gaddafi Libya, Islamic opposition parties have played an important role within the National Transitional Council (NTC), but in the July 2012 elections for the new parliament, the National Forces Alliance (NFA) - a coalition of 58 moderate and secular parties, led by the former premier ad interim of the NTC, Mahmoud Jibril – emerged triumphant, thus setting the stage for a power struggle between various Islamist militias, whose capacity for violence is well-established.

After decades of authoritarian rule, the reconstruction of a functioning state system, responsive to the demands of civil society organisations, is a major imperative. Equally important, but even more daunting, is building a political system where Islam would be given appropriate space, so as to become a key reference point in the making of public policies.

By what combination of circumstances, one might ask, has religion emerged as a central feature of the North African landscape? There are several answers. On the one hand, the religious revival is a response to rising demands on the part of national communities to regain ownership of an identity that had been taken away from them - an identity seen through the prism of a religious tradition in which Islam stands as the unifying element, as the embodiment and foundation of the society's collective values. On the other hand, it is precisely in the concept and implementation of secularism that the heart of the dispute lies. The former regimes, in fact, acted with the complicity of the secular western powers, most of which turned a blind eye to the countless violations of fundamental human rights perpetrated to quash the riots.

In the eyes of many, the solution needed to facilitate the transition to a new form of politics, reflecting the epochal shift of the Arab Spring, is to reward parties that never compromised with the old leaders and their western allies. Or one wonders whether there is a strong likelihood that the "shape-shifter" logic of the past will re-emerge in a new guise, with the rise to power of former supporters of the old authoritarian regimes, opportunistically riding the wave of riots, only to switch sides at the appropriate moment. Despite the uncertainties surrounding the complex political landscape of these countries, there is no denying the radical transformation of their political and social orders.

In Tunisia, for example, the institutionalisation of the *al-Nadha* party has produced a new way of understanding political Islam. In fact, after the elections held in October 2011, *al-Nadha* has placed itself between the agenda advocated by secular forces and that of the more radically inclined, religiously uncompromising elements of Tunisian society. Seen from this perspective, *al-Nadha* seems to stand as a harbinger of future ideological and programmatic mutations in the highly fluid universe of political Islam.

In Egypt, however, the new president has inherited the heavy legacy left by the previous regime. The country is beset by worsening social economic problems, resulting in the inability of Islamic movements to meet the promises set out in their political agenda; many Egyptians are now openly challenging the positions taken by Islamic parties, most of which, until now, formed the only significant oppositional movement, while at the same time providing a readily available ideological shelter in times of crisis.

In the wake of the elections in Libya, yet another pattern has come into focus: the interim regime has failed conspicuously to achieve the stabilisation that moderate political forces were hoping for, a hope largely shared by international stakeholders. Rather than immediately tackling the

serious problems facing the country, such as the resurgence of jihadist Islam and the deep divisions associated with conflicting territorial interests and tribal fights between armed militias, Libya has turned in on itself. Under the pressure of autonomous militias still present in the country, on May 5 2013 the new congress approved a "political isolation law", which prohibits anyone who has held public positions during the Gaddafi regime to hold political office. The massive purge did not spare even the first president ad interim, Mohammed Magarief, who was a former ambassador to India in the seventies but later founded a group of opposition to Gaddafi and was exiled for thirty years. Magarief resigned on May 29.

In light of all this, can we still define the Mediterranean as a "sea in the middle of the land" in which we find the space that, over the centuries, has been crucial in confrontation and dialogue between shores, or have recent events put to an end the characteristics of pluralism and inclusiveness? We will attempt to reconstruct the events that have produced an epochal transformation of the area and address these questions through the collection of essays this volume presents.

Leila El Houssi
Alessia Melcangi
Stefano Torelli
Massimiliano Cricco

PART I –

INSIDE THE NORTH AFRICAN ARAB SPRING: CIVIL AND POLITICAL ASPECTS

TUNISIA

CONSTITUTIONALISM, ISLAM AND CITIZENSHIP IN POST-REVOLUTIONARY TUNISIA: THE NCA'S ROLE IN BUILDING A NEW CULTURE OF CONSENSUS

PIETRO LONGO

Introduction

Constitution making is a complex set of practices that aims to draft a new constitution or substantially amend an existing one. In both cases, constitution making is an extremely uneasy transitional process that requires a high degree of cohesion among the involved political forces.[1] In fact, constitutional politics "has the potential to establish the legitimacy of a new democracy across a broad spectrum of social groups".[2] At the same time, it is dangerous because it could be employed in a majoritarian way to impose the agenda of a single social group, or even to consolidate the power of certain actors. Constitution making occurs when the legitimacy of a constitution is suspended and it is necessary to define a new fundamental law. In this case, constitutional law does not illustrate the best way to proceed, and the constitution making paradoxically starts without boundaries and outside any legal framework. Majoritarian instruments, such as plebiscites or referenda, could be employed to serve particular interests and shut down previous institutions. Moreover, in a deeply divided society, the constitution, once adopted, may be hampered by several factors such as weak institutions, the lack of democratic tradition, or because of the deficient role of civil society.[3]

While academic studies usually focus on the analysis of the revolutionary phase and the toppling of authoritarian regimes, few scholars pay attention to the phase of setting-up new institutions. As Landau argues: "Traditional legal theory compounds the problem [of restoring a constitutional order after a revolution] by viewing constitution making as a kind of legal black hole".[4] The way, how the state institutions are recovered after a

revolution is sensitive, especially if a legal outbreak occurs and the former constitution loses its validity.

In Tunisia, between 2010 and 2011, the Jasmine Revolution shook the regime led by the President Ben ‘Ali, and opened a political phase where constitutionalism, Islam and citizenship emerged as structural components of a potentially new democratic culture based on consensus. In this paper, I argue that the Tunisian approach to constitution making has been conducted in a proper way, favoring the rise of a dialectical arena where different positions clashed and consensus emerged, even if among several difficulties and some criticism. The final draft of the constitution has been adopted with a large majority of votes, providing evidence of the constitution making success. For this reason, the Tunisian constitution making, that represents a unique case even among the Arab world, could help to define the best practices to re-write a constitution, thus filling a vacuum in the academic studies in this regard.

Moreover, to show the merits of the constitution making in Tunisia, this paper focuses on two main aspects: 1) the role played by the Islamists of al-Nahda during the whole process; 2) the rise of a new constitutionalism in this country, especially in regard to the debate around citizenship rights. I argue that in Islam, constitutionalism and citizenship, far from being irreconcilable, represent the ideological substratum of the highly fragmented political arena of post-revolutionary Tunisian transition. I think that the clash over the constitution determines the way opposite actors interact and construct the basic institutions of the new regime, producing consensual outcomes and checking the authorities. In so doing, this paper answers the question as to whether Tunisian constitution making has been successful in minimizing the ability of individual groups to dominate the process, leaving the opposition at the margins.

Consensualism, Constitution making and Constitutional politics

Constitution making is a set of legal practices that aim to found a new body politic, fixing its values, ideas and institutions in a fundamental law.[5] Any constitution making process deals with certain basic questions, such as: who is to be involved in the process; when should it take place; and how will the actors proceed to formulate, discuss, and approve the final text.[6] The last question is related to the democratic legitimacy of the constitution, which is higher when direct and representative forms of democracy are combined. Sieyès, founding the concept of “original constituent power”, underlined that the power to make a constitution rests only on the

people who have the right to alter the institutions of a political order.[7] Ackerman distinguishes between ordinary and constitutional politics: governments exercise ordinary politics, while the people enforce constitutional politics, which is higher than the former.[9] Constitutional politics is characterized by a distinctive process, a particular timing, and a deliberative decision-making because constitutions should promote deliberative democracy "an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason-giving".[10] For some scholars, however, the negotiations that characterize constitutional politics are conceived mainly in political terms and, thus, constitution making is seen as an extension of ordinary politics, even if it aims at rebuilding the political order.

According to Elster, the central challenge for constitution making is to draft a constitution that reflects rational procedures and impartial arguments.[11] In other words, a constitution must reflect the public interest, rather than a narrower conception of specific interest. Constitutional politics mobilizes all political groups in front of the citizenry and thus, their selfish attitudes, which govern ordinary politics, dissipate.[12] Framing the fundamental law of the state, constitution making acquires great importance, especially in the aftermath of a revolution when the need for "political constructivism" is higher. Rawls utilizes this term to describe the emergence of constitutional consensus during the constitutional drafting and the progressive moderation of the parties involved, which narrow their ideological differences.[13] Because constitutional designers operate outside any legal framework and without knowledge of their future political fate, they are supposed to pay greater attention to the public wellness than to their selfish interests. As Ginsburg, Elkins, and Blount state: "On the one hand, if one believes designers will act in their own self-interest, one might want to ensure maximum participation in the process to counter this tendency. On the other hand, if one believes that designers can take the public interest into account, one might design a process with more limited involvement so as to facilitate elite deliberation."[14]

Since the XX century, constitution making in the Arab world has been monopolized by specific groups (like military juntas), which employed the constitution as a tool to reinforce their own power.[15] Constitutions of the Arab countries lacked proper means of constitutionalism because of the absence of checks and balances among the state powers. In particular, the chief executives grouped huge prerogatives that were totally unchecked by the parliaments.

Apart from a few exceptions, consensualism was never taken into account in the constitution making processes enforced in the Arab countries.

Scholars recognize the absence of a unique and infallible path for drafting a constitution, but at the same time, stress that the constitution making process must be as inclusive as possible.[16] On this path, Preuss only considers those constitutions adopted after wide negotiations between all the societal cleavages as being legitimate.[18] He argues that procedures are more important than substantial norms contained in a constitution, as he writes: "The authority of constitutions rests largely upon the legitimacy of the process through which they are generated; substance, although of course important, plays a secondary role". I suggest that, while constitution making must be a democratic exercise, this condition alone is not sufficient. A constitution could be the result of a democratically elected assembly, but to encompass shared values it is necessary that all the political forces are represented, and each article is adopted with a high degree of consensus.[19]

This perspective is not accepted by several scholars, who underline the dangers of popular constitution making, and opt for "parliamentary constitution making" processes.[20] Legislatures of these kinds are entitled to discuss the constitution and, at the same time, to enact sensitive ordinary laws, such as electoral or media laws. Scholars who oppose this doctrine argue that reaching a large consensus is fundamental to creating stable institutions, as constitutional politics differs from ordinary politics and prohibits a polarization between majority and opposition.[21] To avoid the overlapping of qualitatively different competencies, constitution making must take place in specific chambers, such as elected constituent assemblies, rather than in ordinary legislatures. Deputies must be elected with proportional systems of representation, because they allow the participation of those actors who were traditionally excluded from the political arena.[22] Such systems also avoid the over-representation of most popular political forces. After serving in the assembly, the elected deputies must be ineligible for subsequent elections.

When constitution making does not aim at building up consensus, it turns from a "transformative" into a "preservative" process. This usually happens within ordinary legislatures if a political party (or a coalition) monopolizes the constitution making process. However, scholars disagree on this point and Arato underlines that parliamentary constitution making is useful to ensure legal continuity and avoid ruptures of the constitutional tradition of a country.[23] Moreover, ordinary legislatures may serve as a primary check on executives to avoid the resurgence of authoritarianism in fragile democracies or in countries that come out from decades of dictatorship.[24]

Ordinary legislatures are easily checked by the judiciary, while constituent assemblies, being "sovereign dictatorships", escape any control. In this regard, the example of the Egyptian constitutional transition, started in March 2011 by the election of a Parliament instead of a constituent assembly, is highly explanatory.[25] Supporting this view, Partlett argues that constituent assemblies are inferior to ordinary legislatures because they are not totally controlled and may lead to the drafting of authoritarian constitutions.[26] I agree with Landau that if the constitution making main concern is to avoid any unilateral exercises of power, then this debate is irrelevant, because constitutional politics could be checked in either constituent assemblies or ordinary legislatures.[27] It is true that in the minds of people, constituent assemblies are totally absolute bodies, but constitution making is not always safer if exercised by ordinary parliaments. The Tunisian National Constituent Assembly (NCA) demonstrates that self-limitation is possible.

Before turning to the analysis of Tunisian constitutional politics, I support the idea that, from a theoretic perspective, constitution making takes place in two main shapes: by direct election of a constituent assembly (or ordinary parliament), or by the adoption of non-negotiated constitutional declarations that define the framework for the adoption of a permanent constitution. Even if constitution making requires a broad democratic legitimation, being the highest form of lawmaking, constitutions are not always fully negotiated.[28] This happens because any single "best practice" in constitution making is still lacking, and, as Suntein states, only "an incompletely theorized legal agreement" exists.[29] Statistically, constitutional drafters were popularly elected in 65% of the constitution making processes that have taken place in the world since 1987, while they were unilaterally chosen by the executive during closed doors sessions in 12% of the cases.[30]

Building consensus: comparing different models of constitution making

While several scholars distinguish between the above mentioned models, reality seems to be different. The Tunisian case is a hybrid example of constitution making, because even if it took place in the NCA, its election was preceded by the adoption of several quasi-constitutional laws.[31] Moreover, whether the election of a constituent assembly is more consensual than the unilateral adoption of interim constitutional declarations, the latter could produce consensual outcomes, too.[32] Empirical findings demonstrate that constitution making could be hijacked by individuals, re-

gardless of the process employed. In Russia, Yeltsin succeeded in switching the elected legislature into a specialized assembly to easily manipulate it. In other countries, such as Belarus and Kazakhstan, popular constitution making processes generated authoritarian outcomes.[33] On the other side, after the adoption of two constitutional declarations, the 2011 Egyptian constitution making process started by free and fair elections of an ordinary legislature. A specialized assembly, composed of 100 deputies, was framed inside the parliament and was totally captured by the Islamic parties, both affiliated to the Muslim Brotherhood and the Salafi party of Al-Nur, as they gained the majority of seats in the parliamentary elections.[34]

These examples demonstrate that each model of constitution making could be manipulated when inside the assembly if sufficient diversity is not assured and if the leading actors are free to act without being checked by external institutions.[35] Thus, a high degree of diversity among deputies and a stable balancing powers are two *condicio sine qua non* for the constitution making process to be successful. A fragmented constituent assembly, which is commonly seen as an obstacle, is important because when a party does not control enough seats to make unilateral decisions, it is obliged to compromise with other forces. Participatory process does not produce divisive effects, unless consultation is not carefully designed. In this regard, Samuels underlines that: "The more participatory and inclusive processes were seen to broaden the constitutional agenda and avoid the process degenerating into a mere division of spoils between powerful players".[36] Moreover, electing a constituent assembly gives direct voices to the citizenry, who represents the only legitimate power and is entitled to lead the entire process of constitution making. When new and more actors are included, bargaining and negotiations become more intensive as "inclusion ensures not only that individuals are physically present in the decision-making forums, but that they have an effective opportunity to influence the thinking of others".[37] Participatory constitution making recognizes the public as a resource for democratization, as even international conventions recognize the right to participate in constitutional drafting.[38]

Constitution making by ordinary legislatures could be safer because legislatures are checked by the courts or by the parliament itself. In this case, unilateral exercises of power by a single party or a group of deputies could be challenged by the balancing role played by other institutions. In both cases, political parties could manipulate the drafting of the electoral law and influence various parts of the machinery of government. Usually, large parties prefer majority voting in single-member districts, whereas smaller parties insist on proportional elections.[39] As Elster argues "[…] when large parties argue for majority voting, they do not refer to the inter-

ests of large parties, but to the interest of the country in having a stable government. Conversely, small parties arguing for proportional elections do not refer to the interest of small parties, but to the values of democracy and broad representation. Parties with a strong presidential candidate regularly argue in terms of the country's need for a strong executive. Other parties refer instead to the dangers of a strong executive". This passage enucleates the reasons why Elster considers constitution making processes through constituent assembly to be the best choice, rather than constitution making through ordinary legislatures. In addition, another difference is related to the fate of the institution that designs the constitution: usually constituent assemblies are elected only to draft a constitution and then disband, while ordinary legislatures are parliaments that take on the added task of constitution making.[40]

Hybrid constitution making processes seem a good way to avoid the dangers of both the models described above. The transitions that occurred in post-soviet European countries demonstrate (with the exception of Hungary) that constitution making that mixes ordinary and irregular mechanisms could generate stable and democratic outcomes.[41] Empirical findings clearly show that executive-centered processes lead to stronger executives in the resulting constitutions. Conversely, a constitution making process more centered in the assembly is supposed to produce a balanced fundamental law.[42] Thus, even if I agree that comprehensive constitution making should always be a priority, I also think that the constitution making outcomes depend more on whether the constituent assembly (or the ordinary legislature) is checked, and how.[43] Landaus is right in underlining that, in the 2011 Egyptian constitutional transition, two factors were crucial: asymmetric organization of political forces, and the sovereign nature of the constituent assembly.[44] I add that the absence of previously defined "sunset clauses" allowed the army to preserve its strong authority in leading the transitional process.[45]

As Jackson points out, the goal of constitution making should be understood, not only as producing written constitutions, but also as promoting constitutionalism, too.[46] In this regard, Tunisia faced a more balanced transition, because the election of the NCA was preceded by the adoption of decree-laws enacted by unelected body-governments that fixed several sunset clauses. The distribution of the ballots cast for the NCA was fair: the Islamists of Al-Nahda gained a relative majority of seats, and thus needed to create a big coalition, even with secular parties.

Back to the state of nature: The beginning of the Tunisian constitutional transition

The Tunisian constitutional transition started outside the legal framework of the previous regime, and developed through what Arato identifies as the return to the "state of nature".[47] Other scholars described the institutionalized phase between the departure of Ben 'Ali and the election of the NCA as "extraordinary politics", which caused the emergence of a new subjectivity based on citizenship.[48] In this regard, the Tunisian transition was different from the "velvet revolutions", such as those that occurred in Poland, Hungary, or Ukraine, which lacked clear breaks with previous regimes and "did not culminate in constitutional change of a foundational sort".[49] East European countries, in fact, show a high degree of constitutional continuity with soviet models, and some of these countries still rely on amended Communist-era documents, even if they adopted a free market economic system. Commenting on constitutional transitions in Eastern Europe, Teitel highlights that constitution making had less to do with delimiting state power than party power. It has been characterized by immediate constitutional changes, followed by subsequent transformations over a longer time period.[50]

In Tunisia, constitution making was successful because it dealt with both delimiting the power of the single party and reducing the arbitrariness of the state powers. For this reason I consider the Tunisian case a good example of "transitional Constitutionalism", a set of phases that disentrench the old political system and ratify new arrangements to liberalize political space, enabling a more liberal order.[51] At the same time, the elections of the National Constituent Assembly (NCA) created a new common faith based on shared values, which enabled the emergence of a strong consensus. In this sense, Tunisian constitution making has been a process of conflict transformation, as suggested by Hart. After the initial phase of street protests, this conflict was captured by the Front of January 14th, a group made up of different members of the opposition that explicitly asked for the election of the NCA.[52] Suddenly, after Ben 'Ali's resignation, Fu'ad Mabazza', the speaker of the Parliament, was appointed as interim President, pursuing article 57 of the 1959 Constitution. This article aimed at keeping constitutional continuity in the country, simply replacing the President without changing the political regime or the constitutional order as a whole. As a consequence, article 57 forbade any amendment of the constitution, its suspension, or abrogation. After the abuse of article 57 made by Ben 'Ali, the Constitutional Council proposed a creative, and courageous, interpretation of it that facilitated the pacific destitution of Ben 'Ali and

the start of the constitutional transition.[53] The Council reasoned that Ben 'Ali did not delegate his powers, nor did he resign officially from his duties. His departure from Tunisia and the impossibility to exercise the presidential prerogatives were the legal reasons for the constitutional transition to be started. In addition, the Council recalled the right to resist oppression as one of the natural rights belonging to the people.[54]

Muhammad Ghannouchi, appointed prime minister, tried to create a national salvation government, but his plan of a piloted transition was obstructed by massive popular mobilizations, known as Qasba 1 and Qasba 2. The former constitution provided 60 days in which to appoint the new President, a timeframe considered too short by the opposition to guarantee free and fair elections. Moreover, the election of a new President was deemed not sufficient to establishing a new political system based on democracy in opposition with the former regime.

After having appointed several provincial governors among the RCD members, the Ben 'Ali's single party, Muhammad Ghannouchi was forced to leave on 27 February. He was replaced by the old veteran of Tunisian politics Beji Caid Essebsi who framed a new government, abrogated the Constitution of 1959 and, on 23 March 2011, ratified decree-law no. 14 containing the provisional organization of public powers.[55] This document replaced the 1959 Constitution, becoming a non-negotiated interim fundamental law that broke with the precedent juridical order. It wasn't a political act more than a juridical one but, at the same time, it was a "happening with constituent nature".[56] Moreover, in response to the Ghannouchi's attempt to influence the transition, the opposition framed the National Council for the Protection of the Revolution (NCPR) in early February 2011. The Council, which demanded a decision-making role, was formed originally by 28 organizations, including the UGTT, the bar association, some centrist, leftist, and pan-Arab nationalist parties, and a number of NGOs. Al-Nahda expressed support for the Council but remained on its periphery. The Council, which was suddenly institutionalized by decree, came also as a popular response to Ghannouchi's Higher Political Reform Commission, created on January 2011.

Once appointed prime minister, Essebsi demonstrated his willingness to avoid any authoritarian outcome framing the High Authority for the realization of the objectives of the revolution, for political reforms and democratic transition (or simply the High Authority), led by the famous legal scholar Yadh Ben Achour and established by decree no. 6, on February 18 2011. The High Authority was born by merging the Higher Political Reform Commission with the NCPR, which thus enjoyed both institutional and revolutionary legitimacy. This body was given the duty to elaborate

the necessary laws to organize the elections of the NCA to create a significant break with the past.[57] Lastly, on March 3 2011, interim President Mabazza' officially announced the election of the NCA, scheduled for 24 July 2011 and postponed the following October.[58] The High Authority was composed of two commissions: one composed only by lawyers, judges, barristers, and scholars, while the other was composed of 155 representatives of the civil society and politics.[59]

Constitution making focused totally on the NCA, elected by universal suffrage on the 23th October 2011. Proclaiming the supremacy of the legislative branch over the executive, the Tunisian transition pursued a kind of democratic constitution making, and followed the model of the 1793 French Constitution. Under this model, limited government is best achieved when power is given to an elected body based on universal and rational values.[60] To reach this goal, usually, the constitution making process benefits from both upstream and downstream constraints. Upstream constraints are imposed on the process before its start, while downstream constraints follow the end of the process and are typically expressed by ratification of the permanent constitution.[61] As for upstream constraints, constitution making has two creators: institutions or individuals that take the decision to convene the constituent assembly, and the institutional mechanisms that select the delegates to the assembly. Downstream constraints depend on who ratifies the constitution, because their preferences cannot be ignored.[62] Both groups of constraints exercise control over the whole process and are able to alter the final outcome.

In the initial phase of the transition, the High Authority (and NCPR before of it) was a solid upstream constraint because it represented the revolutionary legitimacy and counter-balanced the power of the executive, vested in pieces of the old regime. This is clear looking at how frequently Ben Achour clashed with the government, and the members of the Authority had troubles in reaching a consensus among them. For example, in September 2011, Ben Achour informed Essebsi that several parties represented by the Authority had signed the "Declaration of the Transitional Process", a road map that scheduled the timing for elections.[63] In this case, the High Authority challenged the executive's authority, in the name of the sovereign legitimacy that it represented. Paradoxically, the CPR, one of the parties that formed the governing Troika after the election of the NCA, refused to sign the declaration.[64] Moreover, the High Authority succeeded in reforming the electoral law on a base of gender parity, and elected the Superior Independent Instance for the Elections (SIIE).[65] The Authority was also criticized because, instead of drafting a new electoral law, simply amended the existing one that was elaborated by technicians appointed by

Ghannushi. The electoral law was finally accepted on 11 April, less than a month after the High Authority was created. The instance opted for a proportional representation system to avoid one party control by the NCA.

As far as the High Authority's duties were accomplished, scholars noticed it was moving towards a "necessary politicization".[66] One strong signal of that was the "republican pact" proposed by some political forces to avoid further amendments of the personal status code and to reaffirm the general orientation of the Tunisian State toward modernity.[67] Considering the High Authority as an upstream constraint, this view is reaffirmed: the republican pact represented a series of values to which many parties proclaimed their loyalty. The Islamists, initially, threated to quit the Authority, denouncing its lack of consensus. The republican pact, they argued, was deliberately intended to favor the secular parties that claimed to represent all the citizens. At the same time, for the Islamists it was an occasion to demonstrate their commitments to democracy, gender equality, and human rights. Rashid al-Ghannushi stressed that the Authority was acting as a parliament, trying to adopt laws binding on all the people. According to al-Ghannushi, the Authority had to keep its role of discussion forum, struggling to create a real political constructivism, instead of engineering the transition.[68] This is confirmed by the fact that, finally, the Islamists pledged their guarantees to the republican pact and respected their commitments.[69] Moreover, the High Authority was not large enough to claim to be representative, and it was monopolized by the political and cultural élites from Tunis. Only four representatives of those involved in the popular mobilizations were included, out of 155 total members.[70] Even the Islamists were under represented. The fact that the Islamists denounced not the substantial issues of the republican pact but the procedures of its imposition is a confirmation of the on-going politicization of the High Authority, but also demonstrates the need for strong independent up-stream constraints during the initial steps of the constitution making process. I add that, in certain circumstances, the up-stream constraints could be generated by an ideological self-limitation of the players involved. Al-Ghannushi used the rhetoric of the moderate political Islam (*waṣatiyya*) to stress the need of a "consensual democracy", necessary to boost the economic development, to establish social justice and restore the societal equilibrium.

On 16 December, the Assembly ratified a new decree-law on the "provisional organization of public authorities", in which it stressed its mission to write a new constitution to realize the objectives of the revolution.[71] The elected MPs clearly saw the ANC as the emanation of popular sovereignty and thus as the only source of all powers. The ANC is not restricted by the 1959 Constitution, or by any previous legislation, as article 27 of the de-

cree-law no. 6 invalidated all the laws promulgated by the former regime. Decree-law no. 6 did not retain any time limit to the ANC's mandate. Moreover, the idea of a referendum on the proposed constitution, a demand of some oppositional parties, was accepted, but only as a last resort. According to the NCA's internal regulations, constitutional articles had to be ratified, article by article, by absolute majority, and the whole of the constitution had to pass by a two-thirds majority of the vote. If the Assembly failed to reach this qualified majority, a second vote was organized within a month. If the required two-thirds majority is still not obtained, the proposed constitution is submitted to the people by way of referendum.

It is true that, on many occasions, al-Nahda's top leaders have stated that their commitment to democracy is a matter of strategy, but the high consensus reached around the constitution demonstrates a slowdown in their Islamist agenda. Ajmi Lourimi, member of al-Nahda's communication bureau, stated that the political ideal of his party is the consultation of Medina, not the Greek agora. Hamadi Jebali, once the results of the NCA elections came out, inaugurated the start of the sixth Caliphate, and even al-Ghannushi clearly stated his personal commitment to a democracy that is Western in practice (i.e. procedures), but Islamic in theory (i.e. substantial issues).[72] At the same time, constitutional negotiations resulted in a fundamental law that is clearly less Islamic than any expectation. Al-Nahda has always declared its intentions to respect democracy, but some criticism emerged about its willingness to respect modern understandings of individual freedoms. In the following sections, I support that constitution making, through consensus building, resulted in a strong exercise of moderation for the Islamists, leading toward the empowerment of their conception of citizenship rights. If this moderation is the outcome of the dialectical confrontation, or if it is, in turn, a strategic choice, is a question that here simply does not matter because, in one way or another, it succeeded in keeping the acquis of the revolution.

Constitution making in operation: drafting the Tunisian basic law

Constitution making in Tunisia was not only a matter of building up consensus, but also of keeping and governing it once acquired. This was made possible by an ideological turndown of party politics, especially in regard to Islamism. Looking at the ANC parties' attitudes and considering that the constitution was adopted in January 2014 with 200 votes (out of 216), it is clear that a strong consensus has been reached. I consider this success the consequence of the rise of a renewed civic culture based on

citizenship.[73] The ideological turndown is clearer in the constitutional debates that preceded the adoption of certain specific articles, such as the first article that define the principles of the new state.

In the final draft of the 2014 constitution, article 1 reports as follows: "Tunisia is a free state, independent and sovereign; its religion is Islam, its language is Arabic, and its form is the republic. It is forbidden to amend this article". This formulation came after a long debate in the constituent assembly elected in 1956.[74] Negotiations were harsh because this text was perceived as the expression of all the national identities once Tunisia gained independence from the French protectorate. Habib Bourghiba, acclaimed as President of the Assembly, proposed this ambiguous definition as a way to balance the identity bloc, those who proposed to define Tunisia as an "Arabic and Islamic country" and the secular bloc, those who proposed to qualify the country simply as democratic. Various amendments were submitted: national poet Shadli al-Nayfr suggested to insert the adjective "Arab" to strongly reaffirm the Arab stream that blew from Egypt. Another MP, Bahi al-Adgham, refused any reference to Islam, trying to argue that Tunisia was only "free and independent". Recalling religion in the first article had, the MP said, ideological implications valid for other countries such as Morocco, but not for republics like Tunisia. Finally, Nars al-Marzuqi proposed to qualify Tunisia as an "Arab and Islamic independent state" and Ahmed al-Mestiri to insert the qualifiers in the preamble leaving article 1 for purely legal matters. Even if the constituent assembly was monopolized by the Bourghiba's stream of the Neo Dustur party, the minutes show a strong bargaining whose outcome was the article in its final formulation.[75]

The ambiguity of article 1 is mainly a question of semantics: when the MPs agreed to specify that "its religion is Islam", they left the open door to different interpretations. Is Islam the religion of the state or of Tunisian society? The second choice reminds to the majority of Muslims who are 99% of the national population. Instead, the first option may have legal consequences as, if Islam is the religion of the state, the latter is obliged to reflect it in policy making. In this case, the "confessional clause" infringes the public sphere.[76] Since its formulation, legal doctrine preferred the first interpretation of article 1, a "sociological interpretation", to quote Redissi, that allows Islam to reign while the state governs. The debate over article 1 in the first constituent assembly was quite instrumental: Bourgiba and his entourage prudently supported the monarchy, but they changed their minds quite soon after the election of constituent assembly, held on March 25 1956. On its first anniversary, April 8 1957, Bourghiba anticipated his shift in favor of the republic, arguing that: "Writing a constitution is an

uneasy task that requires time. The choice between monarchy and republic is a delicate one that requires severe reflections".[77] Three months later, the Assembly proclaimed the republic, and Bourghiba was appointed President. In his inaugural speeches, he focused on stressing the idea of popular sovereignty, a principle that clashed with the monarchical one. In this framework, the debate over the confessional identity of the state was of secondary importance, and recalling the sources of the Islamic law in the constitution, as the Egyptian Constitution did since 1971, was never truly considered.

The debate over the fate of article 1 in the 2011 ANC has been quite simple, but could be divided in various steps. In the end, all the MPs (with one exception) voted to keep this article as is, even if a group of Islamists, not only al-Nahda's deputies, proposed to recall *Sharī'a*. The interpretation of article 1 in terms of identity has been rediscovered, not only by al-Nahda, but even by all parties and independents that consider laicism as a Western imposition. Al-Nahda's top leadership warned against any possible amendment, and al-Ghannushi stated that article 1, as formulated in the previous constitution, well expressed the Tunisian identity. Jebali underlined that amending this text would have been perceived as a "serious mistake". Lourimi stressed that article 1 had a symbolic significance and was aligned with al-Nahda's project to set-up a civil state, not a theocratic one.[78] This is also in line with the doctrinal position of those Muslim scholars who belong to the *waṣatiyya* stream of thought. Since the end of the last century, scholars like Yusuf al-Qaradawi, Rashid al-Ghannushi, Muhammad Salim al-'Awwa, and many others, agreed on the compatibility of Islam and democracy, and developed an intense debate over the identity of the Islamic State as a "civil state governed by Islam".[79] Here, the adjective 'civil' is intended in opposition to military, and not as synonymous of secular. For these scholars, in fact, the debate over secularism is a weak one, as Islam, being a political religion per se, refuses any separation between public and private spheres.

Even the former Mufti of Tunisia, 'Uthman Batikh, proposed not to amend article 1 in an open letter he wrote on February 2011, addressed to the members of the NCA.[80] Batikh asked to preserve the national identity leaving article 1 untouched because this formulation keeps also freedom of religion as stated in the second sura of the Qur'an, verse 256. Moreover, the constitution must safeguard freedom of worship, as stated in Qur'an 109 verse 6, which encourages coexistence between Muslims and believers of other monotheistic faiths.

Looking at the final report of the NCA commission devoted to draft the preamble and the general principles of the new constitution (hereafter the

commission), there are only a few references to article one.[81] The document explicitly recalls the national dialogue, which pushed to keep the first article untouched. Several addendum and amendments were suggested, but in relation to other articles. There has been only one proposal to recall Islam as the principal source for legislation, but it was quickly rejected as inconsistent with the general spirit of the constitution.[83] This probably became possible because the commission was highly representative: apart from two MPs who joined the first constituent assembly, Ahmed al-Mestiri and Ahmed Ben Saleh, there were also celebrated scholars in constitutional law such as Yadh Ben Achour, Hafiz ben Saleh, and al-Sadiq Belaid. Moreover, there were representatives of the UGTT, of some local districts, and of the executive.[84] Among the Islamists, al-Saduq Shuru, one of the influential leaders of al-Nahda, was chosen to join the commission. Even if sometimes he was blamed for certain radical ideas, his position was to preserve article 1 as is.[85] Moreover, al-Subhi ʻAtiq is the president of the commission, while another influential intellectual of al-Nahda, ʻAbd al-Mağid al-Nağğar, is its spokesman. The commission was structured as to represent not only different political forces, but various social cleavages, local interests, and the executive, too.[86]

Concerning the task of drafting the general principles of the constitution, the commission relied on the following elements: previous significant constitutional experiences of other countries; sound opinions of experts who helped to outline the true significance of the general principles; the open debate among the members of the commission themselves; and the definition of basic values and ideas that the national identity has historically been built upon.[87] The commissioners crave out the specificities of the country, defining its identity. They also settled the nature of the state and its peculiarities. Focusing on the "nature of the state" (*tabiʻat al-Dawla*), the commissioners opened the floor to the interpretation of article 1, which institutionalizes Islam as an official religion. This, combined with article 6, which gives the state the duty to protect what is sacred (*muqaddasat*), may produce legal consequences on the orientation of future legislation and policies.

In his inaugural speech addressed to the NCA, officially opening the constitution making process, Mustafa Ben Ğaʻfar stressed that the constitution had to be a non-partisan one, a constitution for all the citizenry.[88] In the same day, each parliamentary block had to express its general ideas on the constitution, the general principles guiding the drafting process. The first to speak was al-Subhi ʻAtiq who, after a long introduction about the necessity for the constitution making to being carried in a spirit of mutual consensus and to oppose both colonialism and tyranny, stated that the con-

stitution had to be built upon Islam and its solid principles (*thawābit*), which had to influence future laws and regulations.[89] According to the MP, religion is not separated from politics because Islam is a public system that cannot be reduced to internal affairs only. At the same time, al-Nahda's view is for a civil, not religious, state, a polity based on free elections and citizenship, where the power is conferred to the people. Citizenship is also understood as a fundamental value of democratic polities that regulates freedoms and responsibilities. Muhammad Fadel Musa, spokesman of the democratic bloc, stressed that the civil society had to play a strong role to define the constitution. The drafting process is not only an affair belonging to jurists and lawyers, but also requires the extensive participation of the citizenry, too. On the general principles, the MP suggested to rely on the history of the country that identifies Arabic language and Islam as the most important pillars.[90] Substantially, the constitution must rely upon the rule of law, a strong empowerment of civil society and concrete measures to ensure dignity and equality. 'Abd al-Ra'uf al-'Ayadi, spokesman of CPR, stressed the necessity of drafting an effective constitution, a fundamental law concretely applied and respected. The MP, while accepting the identity built on Arabic and Islam, stressed the necessity to have a state based on citizenship and respect for human rights.[91] Al-Mawladi al-Riyahi, spokesman of Ettakatol, also agreed on the Tunisian identity, but recalled the reformist movement of the nineteenth century.[92] The Tunisian identity mixed nationalism and religion, and produced an original syncretism between them. Al-Riyahi referred to recalling the *Sharī'a* in the constitution: this is problematic because of the lack of a unique definition of *Sharī'a* across the centuries. Moreover, Tunisian legislation, such as the Personal Status code, was drafted as an act of *iğtihād* and is intended in accordance with the Qur'an and *sunna*.

During the evening session, Muhammad Najib al-Husni, an independent MP initially affiliated to the Freedom and Dignity bloc, explicitly stated that his group asked for a constitution that mixed liberal and Islamic values, unless this was not in contrast with human rights and international convention.[93] Al-Husni addressed Islam as the source of legislation, also underlining that the constitution had to encompass the sources of Islamic law (Qur'an, sunna, consensus of scholars, analogical reasoning). At the same time, the fundamental law had to guarantee freedom of expression, religion, and worship. In the same session, Muhammad al-Hamdi, MP of the religious block al-'Arīḍa al-Sha'biyya, in his discourse reiterated the same position, adding that Islam, not Sharia, had to be the source of legislation, because the first had a broader meaning. He also stressed the necessity to develop social rights for all the people, referring explicitly to men

and women without any distinction.[94] The MP identified some pillars that the new constitution had to build upon: the Islamic learnings based on Qur'an and sunna and the western liberal philosophy. He also asked to ensure equal rights for all the citizens without ethnic differences, directly addressing the rights of the Jewish community. The MPs of party al-Mubādara stressed the necessity to preserve the national identity, to enforce popular sovereignty, and to set up a civil state. On the same line, Muhammad Brahmi, by one token, quoted the Constitution of Madina as an example of a religious state, but at the same time he underlined that Tunisia had to be founded upon the values of the revolution. The constitution must recognize public and private freedoms and must prohibit *tafkīr* (accusation of unbelief) in both senses: propaganda in favor of secularism or religious fanaticism.[95] Ahmad al-Safi, independent MP, stressed that the shape of the constitution was the key point. Moreover, the constitution must be democratic and based on the strong role of the civil society. The state must be civic and not religious, as Tunisia is an Islamic country only because it was historically part of the Islamic empire. Thus, the MP vehemently proposed not to mention Islam as an official religion.[96] Exactly the opposite view was that of Ibrahim al-Hamdi, independent MP, who strongly asked the state to provide for the full application of *Sharī'a*.

Conclusion

Constitution making in Tunisia has been a successful process that resulted in the adoption of a consensual constitution. This paper relies on the idea that hybrid constitution making employed negotiated and also unilateral mechanisms that gave the whole process a deep legitimacy but, at the same time, avoided the possibility of majoritarian outcomes. Constitution making is a matter of power sharing and it may be seriously dangerous when it is wholly unchecked. If, on the one side, the 2014 Constitution was negotiated with the society, on the other side, democratic constitution making was limited by the adoption of quasi-constitutional laws and by the presence of unelected institutions, such as the High Authority.

Consensual constitution making, or the rise of political constructivism, as Rawls calls it, opened the floor to the rise of a new constitutionalism based on citizenship. This is clear looking at the debate over article 1 of the constitution, about the possibility to recall the sources of Islamic law. The ideological turndown of the Islamists helped this process, and the idea of keeping article 1 as formulated in the 1959 Constitution finally prevailed. Constitutionalism has been the leading ideology, pushed by all the parties. Even whether constitutional transition has been successfully com-