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Religious establishments and authoritarianism are quasi-universal in the Arab Middle East. In most of the Middle East, state authorities proclaim themselves the main religious authorities, and the state is the custodian of Islam, constitutionally and otherwise. In particular, Middle Eastern states financially and administratively sustain their Islamic institutions (for example, places of worship, religious education, and Islamic law), which they also strive to control and regulate. In this sense, most Middle Eastern states are "Muslim states." In Egypt and Tunisia, two countries where democratic transitions were put in motion after the 2011 uprisings, the religious establishments remained as strong as ever. Their persistence is not the result of the Islamist electoral victories that occurred after the fall of Ben Ali and Mubarak but rather the consequence of a broad and long-held agreement between Islamists and non-Islamists on the necessity of the state's being "Muslim."

In this chapter, I discuss the debates that took place in the 2012–14 National Constituent Assembly (NCA) that drafted Tunisia's 2014 constitution.[1] Many of these debates focused on what it meant for the state to be Muslim and democratic, revealing broad agreement among constituents on maintaining a religious establishment. Constituents all agreed on ascribing the custodianship of Islam to the state, as well as on the state's having to sustain religious institutions to protect Islamic values and ways of life. However, these debates also revealed a disagreement on the nature, strength, and extent of the religious establishment, a disagreement arising from three seemingly irreconcilable understandings of the religious establishment, forming an ideological cleavage that did not strictly follow the divide between Islamists and their political adversaries: a strong establishment that would operate as a tool for the management and control of Islam and that would restrict the influence of Islamist ideologies on society, a strong establishment that would aim at expanding the presence of Islam in public life and at restricting

non-Islamic ways of life, and a light, nonlegislative and merely identity-related establishment that would not interfere with individual ways of life. Amid extreme tensions, a compromise was reached that recognized that the state could very well be Muslim without the constitutionalization of shari`a. Such a state of affairs would allow citizens to be Muslim in different ways, albeit within limits. On the one hand, Islamists, who viewed Islam as an essential counter-power constraining the state in democratic governance renounced making shari`a law the (or even a) source of legislation so long as the constitution guaranteed Muslim ways of life through the state's custodianship of Islam. On the other hand, their political adversaries, while agreeing with the state's custodianship of Islam, desired that freedom *from* religion be guaranteed by the introduction of the notion of "freedom of conscience" in the constitution, a rarity in the Middle East. These two opposite guarantees limited each other and reflected an original compromise, albeit one that contained significant contradictions, foreshadowing potential future problems and conflicts.

The analysis of the 2012–14 Tunisian constitutional experiment is of particular interest because it took place in a democratic context in which Tunisians could, for the first time, freely express their vision of an ideal Muslim state, describing its implementation and its concrete consequences. This provides us with an invaluable entry into the intricate process of shaping what they saw as a democratic and Muslim state. Although some have hypothesized the impossibility of a modern Muslim state (Hallaq 2013), one thing is certain: After 2011, Tunisians actively debated how they could ensure that their modern and newly democratic state would remain a Muslim state. This democratic transition made these debates the most introspective such moment in Tunisia's modern history. Wael Hallaq has argued that the modern state cannot be Muslim, because it is necessarily devoid of the moral content essential to Islamic governance.

Even so, in 2012–14, Tunisian constituents drafted a constitution that established what they viewed as a modern and Muslim state and that, although it did not include any mention of shari`a, made Tunisians part of what they saw as a Muslim community—from a moral as well as a political point of view.

Whether they succeeded in establishing a "true" and "authentic" Muslim state is not the topic of this chapter, even supposing that such a thing could be ascertained. Rather, I examine the debates that took place from February 3, 2012, when the NCA started its deliberations, until the NCA's adoption of the constitution on January 26, 2014.[2] In the first section, I describe the main political actors, and I analyze the Islamist al-Nahdha Party's renunciation of shari`a in the constitution as well as the persistence, after 2011, of the 1950s authoritarian constitutional compromise about Islam and the state. In the second section, I analyze the main points of agreement in the NCA (a democracy, a Muslim identity, a "modern Islam" and a religious establishment) and the main points of disagreement on nonreligious issues. In the third section, I delineate three competing understandings of the religious establishment put forward by the constituents, as well as the divide within al-Nahdha on this issue. In the fourth section, I analyze how the constituents reached an innovative but perilous compromise in which the state was at the same time the main custodian of Islam and the protector of freedom of conscience.

1-The Issue of Shari`a as "Source of Legislation": Implementing a Muslim State without Shari`a

Authoritarian postcolonial Tunisia, although often hastily considered one of the most "secular" Middle Eastern states, explicitly defined itself as "Muslim" early after independence. The 1959 constitution included an ambiguous clause that made Islam the religion "of the state"

or "of Tunisia," depending on how one interpreted article 1, which read: "Tunisia is a free, independent, and sovereign state. Its language is Arabic, its religion is Islam and its regime is the Republic."[3] It also guaranteed freedom of creed (*hurriyat al-mu`taqad*) and of religious worship (*hurriyat al-qiyam bi'l-sh`a'ir al-diniyya*) within the limits of "public order" (article 5), and it never mentioned shari`a law. After the uprisings of 2011, Tunisia began a political transition that led to the first free and fair elections of its history.[4] The 1959 constitution was abrogated, and Tunisians freely elected a National Constituent Assembly (NCA) that reexamined the place of Islam in the constitution.

The Constituents: Islamists and Non-Islamists

October 23, 2011, saw the election of a 217-member NCA comprising 61 women and 156 men. Islamist party al-Nahdha won 89 seats (41 percent of the total), of which 41 were won by women.[5] The electoral law enforced gender parity by requiring electoral lists in each district to alternate between men and women, but the vast majority of the lists (93 percent) placed a male candidate in first position. Because al-Nahdha was the only party to win multiple seats in more than two districts (thirty of thirty-three districts), no other party actually came close to gender parity. Center-left party Congress for the Republic (CPR) won 29 seats (13 percent of the total), and 26 seats (12 percent of the total) went to Al-Aridha al-Chaabiya (The Popular Petition), a populist coalition of electoral lists whose leader had been a member of al-Nahdha until he left the movement in 1992. Social–democratic party Democratic Forum for Labor and Liberties (Ettakattol) obtained 20 seats (9 percent of the total). Other parties included the Progressive Democratic Party (PDP), a leftist party with old Baathist roots (16 seats, for 7 percent of the total) and *al-Moubadara* (The Initiative), a vestige of the former ruling single-party RCD (5 seats, for 2 percent of the total). In addition, the Modernist Democratic Pole (PDM), a coalition

of leftist parties such as al-Tajdid, a remnant of the Communist Party, explicitly campaigned against Islamism on a "modernist" platform but won only 5 seats (2 percent of the total). Overall, these electoral results reflected a clear rejection of the previous authoritarian regime as well as an endorsement of Islamism and, to a lesser extent, of political opposition parties that had not been previously coopted by Ben Ali's regime.

Al-Nahdha and the Popular Petition can both be classified as "Islamist": Unlike other parties, they claimed this label for themselves and were broadly recognized as such. Yet labeling other parties as "secularists" would be misleading, for very few members of these parties would call themselves "`*ilmaniyyin*," although some of them were so labeled by their Islamist political adversaries. Non-Islamist parties often called themselves "modernists" (*hadithiyyin*), a label also claimed for themselves by some Islamists. Even the leftist PDM coalition, after having campaigned on an anti-*Nahdha* theme, toned down its anti-Islamist rhetoric, perhaps in light of its meager electoral results. The views of a minority of sympathetic intellectuals notwithstanding, these non-Islamist political parties shared with their Islamist political opponents the assumption that Islam must be established in the state. They did not argue for separation of religion and state. For lack of a better word, I will therefore call them "non-Islamists" rather than "secularists."

After the elections of October 23, 2011, the "Troika," an alliance between al-Nahdha, CPR, and Ettakattol, governed the country from December 14, 2011, to January 9, 2014. In a context of unprecedented freedom of expression, of renewal of political elites, and of economic crisis and social unrest, the issues of the relationship between Islam and the state, as well as of the role of shari`a in legislation, came to the fore in public discussions and in the media. Tunisian society, as well as the NCA, was split into two seemingly irreconcilable camps: On the one hand, Islamists wanted to recover a Muslim identity that, they argued, had been muted by more than

fifty years of authoritarianism and that must be reasserted as the foundation of the state and of legislation. On the other hand, non-Islamists saw signs of progress and modernity in the policies adopted by the postcolonial state in the religious domain. This deep and ancient cleavage crystallized around a number of key questions, including references to Islam and shari`a law in the constitution, women's rights, and freedom of conscience and expression. Even the governing coalition reflected this divide, with Islamists (al-Nahdha) and non-Islamists (CPR and Ettakattol) opposed in the Troika—although, as we will see, some CPR MPs leaned toward an understanding of the state close to that espoused by al-Nahdha.

The Issue of Shari`a as "Source of Legislation"

As the NCA drafting committees began drafting the new constitution in early 2012, a public debate that had started a year earlier about shari`a law in the constitution gained traction. The Salafi currents born after January 14, 2011, but excluded from the 2011 elections, as well as the right wing of al-Nahdha, demanded the inclusion of shari`a as "a" or "the" source of legislation in the constitution, demonstrating in front of the NCA in spring 2012.

At the time, and in convergence with most other Arab countries, several opinion polls showed that the overwhelming majority (almost 80 percent) of Tunisian men and women alike wanted legislation to be partially or wholly founded on shari`a.[6]

On February 28, 2012, political parties, coalitions, and independent MPs presented their conceptions of the future constitution of Tunisia, providing a valuable window into the main parties' ideal representations of state–religion relations. MP Sahbi Atiq spoke for al-Nahdha. This graduate of the Zaytuna University, born in 1959, presented al-Nahdha's ideal state as an "Islamic state" that was also a "civil state" and in which shari`a would play a central role. He did not specify, however, what the institutional workings of such a state would be. In a style

reminiscent of the Muslim Brothers' ideology, he invoked Islam as "a doctrine [`aqida`], a worship [`ibada`], a morality [khuluq], an integral shari`a [shari`a mutakamila], and a way of life [manhaj li al-hayat]." He added: "Politics, as we conceive of it, is an activity situated at the most elevated level of worship, and religion cannot be a private affair in the internal conscience of the individual person [sha'nan khassan fi al-dhamir al-dakhili li al-insan]." Overall, he presented a more comprehensive conception of Islam than could be found in al-Nahdha's October 2011 electoral platform, which did not include references to shari`a (perhaps to keep from frightening parts of the electorate and derailing the transition). For Sahbi Atiq, Islam needed to be present "in the structures of the state, and not be a mere slogan." He added, "Islam relates to the life of the individual, to the affairs of the family, to society's rules, to the foundations of the state, and to the relations with the world."[7] He also made a reference to the seventh-century Charter of Madina as the first "constitution" of Islam. Although he did not explicitly argue in favor of mentioning shari`a as source of legislation in the future constitution, his argument could easily be interpreted in such a way.

During the same session, representatives from the (Islamist) Popular Petition articulated the same type of pronouncements and envisioned a state and a legal system founded on "Islam." One of its MPs, Mohamed Hamdi, proposed to make "Islam the main source of legislation" and presented an understanding of the political system in the Islamist vein, but with a more pronounced focus on social justice and economic redistribution than al-Nahdha. He argued for the use of "Islam" rather than of shari`a, "because Islam's meaning is broader than . . . the meaning commonly given to the term shari`a."[8]

In contrast with Islamists, non-Islamist parties either rejected mentioning shari`a in the constitution explicitly or avoided speaking about this issue. Social–Democratic Ettakattol MP

Mouldi Riahi explicitly rejected including shari`a in the constitution as "the" source or "a" source of legislation because for him, the content, sources, and limits of shari`a were subject to too many different interpretations, which could threaten the unity of the nation and its religious integrity. In his view, it was sufficient to use article 1 of the 1959 constitution and to know that Tunisian legislation had been founded in part on shari`a, the Personal Status Code's having been inspired by Islamic law. On the other hand, leftist PDM MP Fadhel Moussa did not address the issue of shari`a and only spoke of the Islamic and Arab identity of the country. Rather than invoking a constitutional Islamic genealogy, as al-Nahdha did, he anchored the constitutional history of Tunisia in the precolonial legal reforms—the 1857 Security Pact (`ahd al-aman) and the 1861 constitution. In contrast, CPR MP Abdelraouf Ayadi criticized the 1857 Security Pact as having been drafted "under foreign pressures" and insisted on the Islamic and Arab identity of the nation without invoking shari`a law.[9] He also underlined that the constitution had to be founded on general principles rather than on overly specific ones, perhaps with an eye to justifying his refusal to invoke shari`a law.

In sum, the expositions of each party's understanding of the future constitution revealed a broad agreement on the Muslimness of the state and on the Muslim identity of Tunisia but showed a clear divide between Islamists and non-Islamists on the role of shari`a (or of Islam) in legislation.

Al-Nahdha's Renunciation of Shari`a in the New Constitution: The Role of the Electoral Law in the Engineering of a Compromise

At the end of March 2012, contradicting the pronouncements of al-Nahdha MP Sahbi Atiq, al-Nahdha's president, Rached Ghannouchi, announced that his party would not ask for a reference to shari`a in the new constitution. This decision came after a vote in the Founding

Committee of the party: According to Rached Ghannouchi, thirteen committee members voted against and fifty-three for.[10] Before this vote, a preamble draft that originated from al-Nahdha and that included shari`a as "one of the main sources of legislation" had been circulated.[11] Al-Nahdha's renunciation of shari`a in the constitution was openly opposed by some of its prominent members. On social networks such as Facebook, and in street demonstrations, Islamist activists also insisted that shari`a be the source of legislation and that the constitution inscribe this principle as a perennial rule (as in most other Arab countries).

What drove al-Nahdha leaders' renunciation of shari`a in the constitution after their party had been consecrated the primary political force in the country? And how can we explain al-Nahdha's having gone against a public opinion so clearly in favor of inscribing shari`a in the constitution?

We must note, first, that although al-Nahdha gave a strong electoral performance, it did not win an outright majority of the NCA seats, and its two center-left coalition partners were not in favor of shari`a in the constitution. This electoral outcome, and the necessity for the eventual winner to compromise as part of a coalition, had been engineered *ex ante* through the new electoral law crafted after the fall of Ben Ali. The NCA was elected pursuant to a system of proportional representation with closed lists in one round, using the largest remainder method (also called Hare's method) and no formal vote threshold. This specific electoral system was deliberately chosen by the transitional elites to accomplish a particular aim: Aware of the potential electoral strength of al-Nahdha, and afraid of a winner-takes-all situation, they sought to constrain the likely winner into a coalition and a compromise.[12]

Al-Nahdha also faced resistance from a great number of adversaries, not only in the political arena but also in civil society, such as from organizations for the defense of women's

and human rights and, particularly, from the UGTT labor union (Union Générale Tunisienne du Travail). The UGTT converged ideologically with the center-left and was staunchly opposed to al-Nahdha's ideology. It often organized strikes and demonstrations against the Troika government. Al-Nahdha's decision was thus pragmatic, aimed at minimizing tensions in a period of political transition in which social instability was omnipresent, especially considering the high rate of unemployment.[13] There were repeated episodes of violent conflicts in the street between rival political constituencies.[14] Al-Nahdha's decision made it possible to defuse conflicts, albeit at the cost of producing divisions between the party's liberal and pragmatic current on the one hand and its more conservative and radical wing on the other.

Implementing a Muslim State without Shari`a: The Postcolonial Authoritarian Compromise and the Quasiconstitutional Status of the 1956 Personal Status Code

Al-Nahdha leadership's renunciation of shari`a may also have had a deeper rationale: the recognition that the institutions of the modern state made the implementation of a Muslim state conceivable without recourse to shari`a in the constitution. This recognition fell in line with the postcolonial authoritarian compromise embodied in the 1956 Personal Status Code (PSC) and in article 1 of the 1959 constitution. However, the 2014 constitution gave more flesh to the meaning of this compromise.

After independence, Bourguiba's regime chose to eliminate shari`a courts and to unify the judicial system, in line with his broader project of economic and social development. Shari`a was absent from the 1959 constitution, although the preamble proclaimed the people's representatives' "faithfulness to the teachings of Islam." Islam was also mentioned in article 1 in an ambiguous formulation that left open whether Islam was the religion "of the state" or "of Tunisia." Article 5 guaranteed freedom of belief and of religious practice within the limits of

"public order." A Personal Status Code (PSC) proclaimed in August 1956—even before the new constitution was drafted—antagonized conservatives by prohibiting unilateral repudiation and polygamy. Yet, because inheritance regulations still conformed to Islamic law, others argued for a further modernization of the code. For the regime, especially when it began confronting its Islamist opposition in the 1970s, the PSC became a law endowed with a quasiconstitutional status. For the elites in power, it could not be amended—neither to accommodate conservatives' demands to make it conform more strictly to shari`a law, nor to satisfy those who wanted to make it more progressive and to further gender equality.

The 1956 PSC was described by some, and by state official voices in particular, as conforming to "shari`a" and even as deriving from it. According to the official interpretation, the PSC was the result of an *ijtihad* based on Islamic texts and was thus in conformity with shari`a. In an effort to underline the Islamic foundations of the PSC, the first editions of the code included many footnotes that made reference to Hanafi and Maliki interpretations of shari`a, highlighting the work that had been carried out to codify shari`a law (Zeghal 2013a). For those opposed to it, however, the PSC did not adhere to shari`a, and the references to shari`a were purely symbolic.

The 1956 Constituent Assembly did not discuss the PSC other than indirectly, and Bourguiba imposed it authoritatively, even before the constitution was drafted, without submitting it to any real public debate. Several `ulama criticized the PSC but did not succeed in substantially influencing its content.[15] It was not the process of codification as such that irked the `ulama at the time—they did not seem to be opposed to the principle of *talfiq*, which allowed drawing on various schools of law to legislate. Rather, they were opposed to the new contents of

the law that were in blatant contradiction with Islamic law. They also resented not having been called on to contribute to the codification project.

The regimes of Bourguiba and Ben Ali promoted the PSC as a distinctive symbol of Tunisian modernity and also kept insisting on its conformity with shari`a. Consequently, progressive and conservative Tunisian jurists continued to argue about interpretations of the PSC as it applied to specific legal cases that came before the tribunals. Describing the PSC as being "modern" because it sustained women's rights while being in conformity with shari`a by being based on an interpretation of Islamic law allowed the regime to maintain a balance between liberal and conservative interpretations of the code with no regard for those who, rejecting all compromise, either wanted to modernize it completely or wanted to return to the prescriptions of Islamic law that had been eliminated from it. No real public and open debate took place on this question, and the authorities kept a lid on it until the uprisings of 2010–11.

The Postcolonial Authoritarian Compromise Persists after 2011

After Ben Ali's fall in 2011, the debates between Islamists and their opponents on the issue of shari`a produced little clarity about its precise legal content. This might be explained by the absence—under Bourguiba's and Ben Ali's authoritarian regimes—of any public and free reflection on the content of shari`a, whose meaning remained elusive. Another reason might be that shari`a as a practiced legal institution (the teaching of fiqh and *usul al-fiqh* and its practice in the shari`a courts) had essentially disappeared after the judicial system unification, although some judgments still referred to it.[16]

On the PSC issue, the post-2011 public debates quickly resulted in a compromise: Immediately after his return from exile, al-Nahdha's leader Rached Ghannouchi declared that his party would not call for any modifications to the PSC. In this sense, he was in Bourguiba's

regime continuity, although he remained very critical of Bourguiba's policies regarding Islam. Also for this reason, NCA discussions about gender were not as prominent as were debates about shari`a or about freedom of conscience. As a result, they seemed less contentious. The PSC remained unchanged after 2011, although several Islamist MPs explicitly disagreed with their non-Islamist counterparts, and also with past state elites, on the ideal content of the law, as we will now see.

2-Agreements and Disagreements in the 2012–14 NCA Debates

The discussions that took place in the NCA from 2012 to 2014 were public, being transmitted on live television and accessible in video format on the NCA website.[17] In addition, the constituents chose not to resort to an experts' draft but broadly consulted with civil society and with Tunisian and international legal and political experts, giving MPs and civil society ownership of the process and thus of its outcome. As al-Nahdha MP Nabiha Torjmane pointed out with satisfaction, the new constitution was "not written in the corridors of foreign embassies."[18] This made compromises more acceptable to all parties, as Mustapha Ben Jaafar, the president of the NCA and the leader of Ettakattol, publicly declared.[19] However, it had the disadvantage of lengthening the drafting process. NCA committees were set up to draft specific chapters of the constitution. Their composition mirrored the NCA's, featuring an Islamist majority in each committee. This produced tensions and delays. Recognizing that the constitution could only be drafted by finding sufficient common ground, a consensus committee was formed in 2013 that represented all NCA political sensibilities equally, paving the way for a compromise.

The NCA drafting committees held their meetings behind closed doors, and the content of their deliberations largely remained unknown to the public. Although some compromises were

reached before any public discussion actually took place in the NCA, the public debates

nonetheless clearly reflected the lines separating the different parties. In fact, as some MPs told

me, the NCA public debates were less conciliatory than the drafting committees discussions,

precisely because political parties exploited the publicity of the debates to showcase their

specificities.[20]

The political events taking place in Tunisia and elsewhere in the Middle East at that time

weighed on the debates, particularly the assassination of two leftist members of the Tunisian

political opposition in 2013 and the emergence of Salafi groups that demanded more

Islamization.[21] The news of the summer 2013 Egyptian military coup also undoubtedly pressured

the constituents to reach a compromise and hasten the drafting process. The fear of an "Egyptian

scenario," which was reminiscent of the January 1992 Algerian military coup, was palpable in

the NCA and led its members to find a consensus on the most contentious issues, particularly

those involving Islam.

Although a compromise was eventually reached, divisions ran deep in the NCA. It was

widely recognized that a compromise was reached in spite of profound disagreements about the

role of Islam. Al-Nahdha MP Nabiha Torjman acknowledged the high polarization among MPs,

saying, "Each camp fears for its identity."[22] There were numerous violent disputes, and many

sessions were interrupted and adjourned. For instance, leftist Mouvement des Patriotes

Démocrates MP Mongi Rahoui accused al-Nahdha of monopolizing Islam and reproached the

president of the NCA for giving preference to Islamists during the debates: "Islam is common to

all of us and does not belong to any party."[23] Al-Nahdha MP Mounira Omri addressed the

opposition harshly before the president of the NCA interrupted her for being too polemical: "Say

it honestly! You refuse Islam! Say it with courage! Say that you want to uproot Islam from

society and that you want to remove it from all laws to build a secular state (*dawla la'ikiyya*)! I do not like this allergy to Islam. Aren't the MPs ashamed?"[24] At the end of July 2013, tensions reached their apex. After the assassination of leftist MP Mohamed Brahmi and while the repression against the Muslim Brothers was raging in Egypt, a group of about seventy opposition MPs suspended their participation in the NCA and demanded the removal of the Troika government. There were also tense moments during which MPs traded insults, and in at least one instance the national hymn was sung by non-Islamists while Islamists countered by reciting Al-Fatiha.[25] These theatrics were surely encouraged by the NCA debates' transmission on live public television, making the NCA sessions perfect opportunities for MPs to stage political spectacles and publicize their political stances.

Some MPs eventually expressed a sense of "fatigue" about the religious discussions, which they thought had become sterile if not downright absurd. Center-left CPR MP Hasna Marsit argued that there was too much debate on religion: "If we accept that in Islam there is no religious state [a statement made many times by both Islamist and non-Islamist MPs], then the Islamists versus secularists conflict is sterile. This is a struggle that threatens to divide our society."[26] In the same vein, leftist PDP MP Mohamed Gahbich argued that when the Tunisian people rose for its revolution, they did not ask themselves, "Who are we?" In his view, "too much effort [had] been wasted in sterile discussions about identity. Since the Tunisian people [were] attached to their Islamic identity and history, these discussions [were] irrelevant."[27]

The Main Points of Agreement: A Democracy, a Muslim Identity, A "Modern" Islam, and a

Religious Establishment

The NCA debates revealed a number of important points of agreement: breaking with the authoritarian past, building an electoral democracy based on the separation of powers and on the

independence of justice, having political alternation, and putting in place a constitutional court.

For the constituents, the new democratic regime should guarantee individual rights and

freedoms—although, as we will see, the issues of freedom *of* religion and freedom *from* religion

proved highly contentious.[28]

When it came to Islam in the constitution, the constituents all spoke of Islam as shaping

"the identity [*huwiyya*] of Tunisia" and the "personality" (*shakhsiyya*) of its people. They all

associated—or equated—the values of Islam (*qiyam al-islam*) with "universal values" (*qiyam*

kawniya) and human rights (*huquq al-insan*). There was an agreement that the kind of Islam

envisioned was a "modern Islam"—or, phrased differently, that Islam was compatible with

"modernity." The notion of modernity (*hadatha*) had been invoked by postcolonial regimes to

legitimize their repression of Islamists. However, during that time, it was also rehearsed by the

non-Islamist political opposition, which advocated for a reformist and democratic agenda. After

the fall of Ben Ali, Islamists rehearsed that same concept, refusing description as "antimodern."

Thus almost all MPs agreed that Islam had to be "modern" in one sense or another.

For instance, Ahmed Nejib Chebbi, leader of the leftist PDP, spoke of Islam as a religion

"of this age," consciously avoiding the notion of *hadatha* (modernity) and replacing it with the

notion of `*asri* (of the age): "If we are realistic and look at ourselves, we, Tunisians, in our

national identity are Muslims of this age [*muslimin `asriyyin*] . . . . When we say that we belong

to this age, we mean that various cultures, arts, sciences, and ideas belong to us, that we interact

with them in our lives. . . . Therefore, we are Muslims of this age. As for the one who says I am

of this age [`*asri*] and I am not a Muslim from a civilizational point of view [*hadhariyyan*] . . . he

is guaranteed freedom of conscience. This is an individual issue. However, we belong to a

history. We have roots, we have a civilization, and we have values."[29] For Ahmed Nejib Chebbi,

Islam was to be present in the constitution as a civilization that interacted with others and as an identity, but also as a set of values. He also argued, in line with the postcolonial compromise on the PSC, that women's legal rights could not be altered—although some might think that they contradicted "our sacred heritage" (*mawruth muqaddas*).

Al-Nahdha's MPs also insisted that the constitution speak of a "modern Islam." For instance, Ahmed Mechergui stated, "These battles about the constitution are imaginary [*wahmiyya*]. We heard those who spoke about their fear for Islam, and we heard those who fear for modernity [*hadatha*]. I say that there are no contradictions between the spirit of Islam and the spirit of modernity."[30] Sadok Chourou, a prominent member of al-Nahdha who had initially advocated for shari`a as a "source for the codification of the law,"[31] underlined, a year later, the convergence of Islam and "modernity" when he accepted article 1 in its 1959 formulation without shari`a. However, he made it explicit that he interpreted article 1 as meaning that the state "derived its principles from Islam."[32]

That said, there were a few critiques of the notion of "modernity" by those who had long rejected its instrumentalization by Bourguiba's and Ben Ali's regimes against the Islamist opposition. For instance, center-left CPR MP Abd al-Raouf Ayadi spoke of the 1959 constitution as having built "a decor of modernity." In contrast with leftist PDP leader Chebbi, he disagreed with the image of a Tunisia situated "at the crossroad of civilizations," a formula he described as having been "imposed by the tyranny [of the previous regime]." He added, "Our constitution must start with our identity, our Arab and Islamic identity."[33]

Regarding the issue of the religious establishment, Islamists and non-Islamists agreed that the state should not be theocratic—that is, not be administered by religious specialists—and thus should be explicitly defined as a civil state. However, no NCA member clearly argued for the

separation of state and Islam.[34] The necessity of a religious establishment was recognized by all MPs but was most clearly expressed by al-Nahdha. "The civil character of the state [*madaniyyat al-dawla*] does not mean that religion is separate from the state," said al-Nahdha MP Soulaf Ksantini when explaining why she agreed with the notion of a "civil state" (*dawla madaniyya*).[35]

The Main Points of Disagreement on Nonreligious Issues

The main divisions (on nonreligious issues) between the NCA's various blocs and parties revolved around whether the regime should be presidential or parliamentary, with al-Nahdha leaning toward a parliamentary system as a shield against a presidential takeover and as a way to preserve the Islamist Party's presence and weight in future legislatures. Some of the non-Islamists leaned toward a mixed system or a strong presidential system. There were also divisions on the extent of state welfare provisions. Although no MP argued against the state's involvement in the economy or against state welfare, the Islamist Popular Petition and the parties on the far left argued in favor of more generous welfare. The NCA was also divided on Tunisia's stance toward the state of Israel. Arab nationalists and Islamists were particularly vocal in their demands to inscribe a prohibition of the normalization of Tunisia's relations with Israel in the new constitution.

3-The Competing Meanings of the Religious Establishment

Although there was no disagreement on the principle of a religious establishment, the most significant and visible contentions in the NCA revolved around the nature and extent of this establishment and on the limits it set on religious freedom and on freedom of conscience. The June 1, 2013, constitutional draft crystallized some of these contentions, with various articles in this draft invoking Islam explicitly or implicitly. Article 1 was left identical to its 1959 version.

Article 2 was new ("Tunisia is a civil state founded on citizenship, on the people's will and on the supremacy of the law"), and so was article 6 ("The state is the custodian of the religion [*ra`iyat al-din*], guarantees freedom of belief and conscience [*hurriyat al-mu`taqad wa al-dhamir*], and freedom of religious practice [*al-sha`a'ir al-diniyya*]. It protects sacred things [*muqaddasat*] and guarantees the neutrality of mosques and places of worship with respect to partisan instrumentalization [*al-tawdhif al-hizbi*]"). Finally, to clarify the 1959 formulation of article 1—which could be interpreted as stating "Islam is the religion of the state" or "Islam is the religion of Tunisia"—al-Nahdha's MPs introduced article 141, which stated, in particular, "No constitutional amendment can harm [*nala min*] Islam as religion of the state." All these articles remained in the final draft of the 2014 constitution, with some modifications, except for article 141, which was removed in the face of strong opposition. Although there was a broad agreement on the principle of a religious establishment, non-Islamists did not accept such a clear rejection of article 1 and rejected article 141. The discussions that led to this outcome and to the final constitutional draft in 2014 reveal three competing versions of the religious establishment. In so doing, they provide an invaluable window into the existing political cleavages on the issue of Islam and the state.

The Light Nonlegislative Establishment Envisioned by the Social–Democratic Ettakol Party

The Social–Democratic Ettakattol Party advocated for a light, bureaucratic, identity-related and nonlegislative establishment. In such an establishment, the state would provide a religious infrastructure to its citizens and manage religious institutions without imposing its own interpretation of Islam and while also ensuring religious freedom. Also, for Ettakattol, political activism and religion had to be kept as separate as possible in public life. A young member of

Ettakattol's leadership told me, "Article 1 does not mean much more than what it says. Whoever invented it was a genius. But it is out of the question that there be any article on shari`a being a source of legislation."[36] In other words, the very idea of shari`a was frightening for Ettakattol's leadership, whereas the broader notion of "Islam" was not, referring to a collective identity rather than to specific legal prescriptions. In line with past official interpretations, Social–Democratic Ettakattol interpreted the PSC as conforming to Islam but wanted to keep the very idea of shari`a at bay.

During the February 28, 2012, NCA session during which each party presented its conception of the future constitution, Ettakattol's general position was voiced by MP Mouldi Riahi, a high school teacher who held a master's degree in Islamic Philosophy from the University of Tunis. For him, Islam was "the source of [Tunisians'] unity" and represented "the identity of the people. . . . This identity interacts with the universal values [*qiyam kawniya*] described in the Universal Declaration of Human Rights." He also added that Islam needed to be kept away from "doctrinal contentions and from all political instrumentalizations." Mouldi Riahi underlined that the Tunisian Republic needed to be defined as civil, that it should not bear any resemblance to "republics that call themselves "Islamic republics," and that it should not be a military republic, either. However, in his view, the state needed to protect the people's identity. He did not question the state's management of religious institutions, but he outlined specific domains in which religion and politics should not interact. For him, the state needed to enforce the political neutrality of places of worship and needed to prohibit the use of religion in political activities. He also described himself as being against a state monopoly on religion and religious interpretations. For him, there was a risk that this monopoly might take the form of a "rigid and extremist reading of our religion," with the state "meddling with coercive methods in the private

lives of citizens" and thereby threatening to "harm their rights and freedoms." With this description, he seemed to refer to an "Islamic republic." On the other hand, Mouldi Riahi also stated that this monopoly might take the shape of an authoritarian "interpretation of modernity, which could lead to the elimination [*ilgha'*] of religion from public life in coercive ways," a description that seemed to refer to Ben Ali's regime, and perhaps to the Bourguiba era as well. This would, in his view, lead again to "a confrontation between the state and religion." Mouldi Riahi also categorically opposed the introduction of shari`a in article 1, arguing that shari`a had many interpretations and that Tunisians would be divided on its legal implementation, "all the more so [seeing] that we have based all our legislation on article 1 since independence, in particular our Personal Status Code and our Penal Code. We based this legislation on article 1 in accordance with the values of our tolerant religion [*dinuna al-samha'*] and by deriving [these values] from the great Koran and the sayings of its noble prophet."[37] Everything considered, Ettakatol argued for leaving article 1 unchanged from its 1959 formulation, reflecting a light version of religious establishment.

The Contrasting Strong Religious Establishments Envisioned by Leftist PDM and Islamist

al-Nahdha

Within the opposition to the Troika, some non-Islamist parties advocated for a strong religious establishment that would be bureaucratic and identity-related and that would operate as a tool for the management and control of Islam. For instance, for MP Samir Taïeb, a member of the Political Bureau of the Tajdid Party (formerly the Communist Party) in the PDM coalition, the state had to manage and regulate religious institutions in a way that would explicitly restrict the influence of Islamist ideologies. When I met with him in summer 2012 in the NCA, he told me, "We are against secularism defined in the French way. We are against separation between

religion and state. The state cannot abandon the regulation of mosques. These mosques would fall into the hands of Islamists. If we did the same with education, we would have the Taliban. However, we want to separate religion and politics. . . . One can refer to religion in a political platform, but should not say that this or that verse of the Koran prescribe this or that behavior. We are against the instrumentalization of religion by the state. We need an independent administrative authority to watch over religion."[38] Like the Islamists, PDM MP Samir Taïeb argued for a strong bureaucratic establishment restricting freedoms, although it was the Islamists' freedom of expression that they explicitly aimed at restricting in order to protect society from Islamism. Note that although he firmly argued against separation of state and Islam, he advocated for keeping Islam out of politics, a pervasive trope of authoritarian Middle Eastern regimes, including Bourguiba's and Ben Ali's.

On the other hand, the Islamist version of the religious establishment aimed at expanding the presence of religion in public life. Although some Islamists did argue for restricting their political opponents' individual freedoms, Islamists did not want to circumscribe Islam and put it under state surveillance as envisioned by PDM MP Samir Taïeb. They advocated for the expansion of Islam to be implemented through the channels of education and legislation. Al-Nahdha MP Sadok Chourou provided a precise interpretation of article 1: "Islam legislates for all aspects of life and guarantees justice and dignity."[39] He added that Islam limited freedoms in order to prevent obscenity (*fahisha*) and apostasy (*khuruj `an al-din*). He argued that the sovereignty of the people derived from the sovereignty of God and stated, "Our highest constitution is the Koran and the highest sovereignty is to God before it is to the people . . . Since we are writing the constitution of a Muslim people, our article 1 should state that the highest sovereignty belongs to Allah." To further justify his demand, he added, "We would not be the

first ones to do that." He cited the example of Canada's constitution that mentions "the sovereignty of God,"[40] and asked, "Are we less Muslim than they are?"

We have seen earlier how al-Nahdha MP Sahbi Atiq argued for Islam's playing an integral role in the state. He also stated that legislation should not contradict the certainties contained in the Qur'an and the *Sunna*. He invoked freedom of religion, in particular freedom to choose one's way of life, and argued, "a democratic state does not have the right to meddle in people's lives, impose ways of life, doctrines, or tastes [*anmat al-hayat, `aqa'id, wa adhwaq*]." His conception of a state that should remain neutral with regard to religious doctrines converged with Social–Democratic Ettakattol's position described in the previous section. However, it was strikingly at odds with his own argument in favor of shari`a law. Sahbi Atiq did not seem to be aware of this contradiction, perhaps because by "the meddling of the state" in individual beliefs he referred to Bourguiba and Ben Ali regimes' repressive strategies toward al-Nahdha and Islamists' religiosity rather than to a state's religious establishment that would impose religious norms on society at large.

The Divide among Islamists

Al-Nahdha MP Sahbi Atiq had participated in the 18 October movement under Ben Ali's regime, as part of which, starting in 2005, prodemocracy activists from the center-left and al-Nahdha attempted to work on a broad agreement about a number of issues such as gender equality and freedom of conscience. Although this group found a modicum of commonality on the subjects of gender equality, freedom of conscience, and religion and state, even publishing common position papers on these issues, Sahbi Atiq published a dissenting position on the question of religion and state. The common position rejected the coerciveness of the existing religious establishment and the use of religion by the authoritarian regime but also advocated for

a relation between Islam and the state in the following terms: "A democratic state must award a special place to Islam, because it is the religion of the majority of the people, without monopolizing or instrumentalizing Islam. In addition, [this state must] guarantee the rights of all beliefs and convictions and the freedom of religious practice" (*Al-Mawqif* 2009, 5). Beyond the "special place" granted to Islam by the state, the common position did not offer more specifics on the exact structure it envisioned for the relation between Islam and the state, but in light of the 2012–14 NCA debates, it is likely that it imagined a light, nonlegislative establishment (as advocated by Social–Democratic Ettakattol). In his 2005 dissenting argument, Sahbi Atiq defended a stronger role for Islam as "the religion of the state."

Sahbi Atiq was representative of a conservative current within al-Nahdha that elicited strong reactions from non-Islamists. For instance, in reference to al-Nahdha MP Sadok Chourou, who called for the implementation of Islamic *hudud* against street demonstrators, Social–Democratic Ettakattol MP Ali Bechrifa argued during the January 23, 2012, session, "It is not acceptable that under the roof of this assembly there be calls to cut hands and legs. Tunisia must not be the country of the Taliban!"[41] In order to defuse this tension, some of al-Nahdha MPs often used the terms "*maqasid al-shari`a*" to underline that they were not intent on implementing the specific legal rules of shari`a, particularly the *hudud* penalties, but rather on implementing shari`a's "purposes." They claimed that shari`a represented the spirit of Islamic law, rather than its letter, as a way of reassuring their political opponents who were frightened by the idea of *hudud*. However, al-Nahdha MP Abd al-Majid Najjar vocally condemned his party's decision to renounce shari`a in the constitution and to focus on the spirit rather than on the letter of shari`a law. He argued that shari`a law was not a set of "purposes" but rather "a set of rules" and criticized his own party for contradicting one of the central tenets of its ideology.[42]

The Islamist Popular Petition MP Iskander Bouallag, on the other hand, argued for including "Islam as source of the law" in the constitution without invoking shari`a law.[43] Some sessions later, he stated that in his view, Islam was already the source of "99% of the laws" in Tunisia.[44] A year later, during the January 4, 2014, session, when article 1 was discussed for the final vote, the Islamist Popular Petition continued to defend this position, whereas al-Nahdha had already agreed to a compromise. In the end, out of the 74 MPs in attendance (of a total 217), only 3, all from the Popular Petition, refused to vote for article 1 in its 1959 formulation.[45]

Al-Nahdha's Compromise: Implementing a Muslim State without Shari`a, with Islam as a Counter-Power in Democratic Governance

Even the most conservative al-Nahdha MPs who had explicitly argued in favor of shari`a as the source of legislation in the constitution, such as Habib Ellouze and Sadok Chourou, voted for article 1 in its 1959 formulation.[46] This was the result of a political compromise—not only between Islamists and their political opponents but also within al-Nahdha itself. Indeed, the view that Islam was an integral set of values to be implemented in all domains of life was not shared by all members of al-Nahdha's leadership. Even more important, it became clear within al-Nahdha that implementing a Muslim state did not require constitutionalizing shari`a law.

It is particularly noteworthy that al-Nahdha's female MPs played a crucial role in building compromises with al-Nahdha's political adversaries, as well as within al-Nahdha itself, when it came to religious issues. About half of al-Nahdha's female MPs were new members of the party in 2011, although they had affinities with al-Nahdha's movement prior to their political careers in the NCA (Ben Ismail 2014). As a result, and in contrast with most al-Nahdha male MPs, who had been molded, often for decades, in the movement's doctrine, as newcomers to

political life, al-Nahdha female MPs had broader margins of maneuver and displayed more flexibility in their ideological orientations.

On July 6, 2013, al-Nahdha female MP and member of the Preamble Committee Sanaa Haddad, also a lawyer with her own practice and a PhD student in private law, explained the compromise made by her party on shari`a law. She interpreted article 1 as meaning that Islam was the religion "of the state." This, she added, did not make the state a "religious state": "In our Committee, we have defined the civil nature of the state. It means the supremacy of the law and the sovereignty of the people. Never ever will it mean that the state is secular, i.e.[,] that religion and state are separate and that religion and law are separate!" She also put into perspective the preamble committee's renunciation of Islam as source of legislation: "I do not want to say that we have changed the principle that Islam is a source of legislation, but I say that the party of the majority [al-Nahdha] in the NCA has decided that *article 1 was enough by itself to compel the state, with its institutions and its three branches of government, to respect Islam*. This article guarantees by itself the Islamic reference of the state."[47] Sanaa Haddad reminded her audience that this Islamic reference was not "foreign to our country," pointing to the PSC and to the Real Estate Code, as well as to a statement by the court of cassation according to which in case of ambiguity or obscurity in the codes of law, shari`a law should be referred to. She insisted that article 1 should be interpreted as meaning that Islam "is the religion of the people and of the state, not just of the people. [If it were merely the religion of the people] it would mean that Islam does not constrain the state in any way."[48] She added that an independent justice system would protect "against extremism . . . would anchor society in its values, and would protect us from being imposed a specific way of life." In sum, in Sana Haddad's conception of government, Islam constituted an essential counter-power constraining the state *and* a necessary ingredient of

democratic governance that guaranteed the preservation of Islamic values and ways of life. Obviously, this conception has its contradictions: The reference to Islam in the constitution is both democratic (it respects the desire of the majority of citizens to live as Muslims) and antidemocratic (it limits non-Muslim ways of life).

The Unresolved Disagreements about the Religious Establishment

The issue of whether to interpret article 1 as meaning that Islam was the religion "of the state" or "of the people" remained unresolved, and Islamists and non-Islamists insisted on rehearsing their own various interpretations until the very end of the drafting process. A few weeks before the final draft was passed, center-left CPR MP Rafik Tlili argued that article 1 was ambiguous: "Is it the religion of the people or of the state? Article 141 was proposed to lift this ambiguity by explaining that it is the religion of the state, but it almost caused the disintegration of the NCA and, with it, of the political experiment we are living right now."[49] For him, it was necessary to add to article 1—"Islam is the religion of its people"—because "it is the people who will have to face the last judgment day, not the state." Al-Nahdha MP Warda Turki disagreed with this suggestion, because for her, as for her fellow al-Nahdha MP Sanaa Haddad, Islam was the religion of all the institutions of the state, not merely the religion of the people, since the state must be "in unison with the aspirations of its people, and not be estranged from its people."[50] Earlier on, liberal Afek MP Rym Mahjoub had criticized this understanding of the state by describing it as a "doctrinal state" (*dawla `aqa'idiyya*) in response to al-Nahdha MP Sana Mirsni's argument that article 141 "represented the spirit and the philosophy of the constitution."[51]

Other al-Nahdha MPs, a few sessions before the final vote on the constitution's final draft, attempted to give more flesh to their party's interpretation of the relationship between

Islam and the state. For instance, on January 4, 2014, al-Nahdha MP Sonia Toumia explained the

phrase "the state is the custodian of Islam" in article 6 (which will be analyzed in more detail in

the next section) by the role of the state in religious guidance (*irshad*) to "help citizens make

choices." Al-Nahdha MP Mounia Gasri defined the term "sacred things" (*muqaddasat*) in article

6 as "the divine existence [*al-dhat al-ilahiya*], the heavenly books, the messengers and the

prophets, and the places of worship."[52]

It is also worth noting that other political parties that were not markedly Islamist also

shared al-Nahdha's conception of a state required to enforce Muslim norms in the public space.

For instance, Moubadara (an offspring of the single-party RCD formerly in power) MP Mouna

Ben Nasr argued that civil servants should conform to Islam by respecting the prayer schedule,

stating that she was against freedom of conscience.[53]

4-An Innovative but Perilous Compromise: The State as "Custodian of Islam" and

Defender of "Freedom of Conscience"

In the face of these strong disagreements about the meaning, nature and extent of the

religious establishment, the Islamist and non-Islamist camps, each fearing manipulations of the

constitutional language by the other in future legislatures, drafted mutually limiting clauses about

Islam in a newly introduced article 6. This was an innovative compromise, albeit one that left the

door open to potential future problems and conflicts.

Interpretative Ambiguities and the Fear of Future Constitutional Language Manipulations

The constituents accepted article 1's ambiguity perhaps because they knew, from past

experience, what to expect from it. Jawhara Tiss, a female al-Nahdha MP from a younger

generation, recognized that it was impossible to define once and for all what "Islam" meant in

article 1, and that the constituents had to live with this ambiguity. She argued, "The issue of religion remains, the issue of what Islam is, and of how Tunisian elites represent Islam today. *It is impossible to solve this issue in the constitution*. The NCA debates have revealed that there are those who see Islam as mere rituals [*tuqus*] and teachings that only matter for the relation between the individual and Allah. There is another view, however, that sees Islam as one of the sources of knowledge, and therefore, as one of the sources of the law."[54] She did not offer an answer to the issue of, in her own words, "what Islam is" and was willing to leave it at that. In that sense, she was at odds with an older generation within al-Nahdha that essentially equated Islam with "shari`a law."

When debating new constitutional language outside of article 1, each camp fearfully imagined how the other camp could use this language to impose its interpretation of the religious establishment and thus either rejected the new language or demanded more clarity.[55] For instance, reacting to the December 2012 preamble draft, which stated that the constitution was drafted on the basis of "the constants and the aims" of Islam (*thawabit wa maqasid al-islam*), center-left CPR MP and lawyer Samia Abbou argued that the term "constants" was difficult to interpret. She added, "The problem is, who will interpret these constants? The problem is that an extremist majority might have a wrong interpretation of Islam and might make the legislation it wants . . . For instance, today, an MP said that capital punishment [*qassas*] is part of the constants. This means that we might pass a law that will flog the [citizen] who drinks alcohol and will cut the hand of the thief. We might pass laws that violate freedoms and go against the constitution with the permission of the constitution."[56] For Samia Abbou, the notion of "constants" of Islam could be interpreted as meaning "the rules of shari`a law" and was therefore to be removed. Criticizing article 6 of the June 1, 2013, draft according to which the state

"protects the sacred" (*muqaddasat*), center-left CPR MP Hasna Marsit criticized the absence of definition of the meaning of "sacred" and the lack of explanation about the intent of the article, adding that this "might lead to a wrong use [of article 6]."[57] For leftist PDP MP Mohamed Baroudi, nobody doubted that the Tunisian people belonged to the Islamic and Arab identity. "However," he added, "we interpret the religious text in different ways and we fear that a day will come when the interpretation of the text will be influenced by a reactionary interpretation that will destroy what we have accomplished with the 1959 constitution."[58] In sum, non-Islamists either rejected proposed constitutional clauses or wanted them to be more specific in hopes of preventing future Islamist interpretations of the constitution.

Similarly, Islamists feared future manipulations of the constitutional language by non-Islamists. For instance, al-Nahdha MP Adel Ben Attia argued against the principle of freedom of conscience in the following terms: "The meaning of this kind of freedom [freedom of conscience] is not clear, and each school of thought has its own definition . . . I request a precise explanation of its meaning, and the introduction of a word [in the draft] that will show that there is no contradiction between the individual's freedom of conscience and the people's freedom of conscience." By "the people's freedom of conscience," he meant the Muslim identity and values of the Tunisian people.[59]

Article 6: Freedom of Religion and Freedom from Religion

The NCA was deeply divided on the issue of delimiting individual freedoms related to Islam, and this cleavage did not strictly follow the Islamist/non-Islamist divide. One camp wanted to inscribe limits to freedom *of* religion in the constitution—for example, by banning *takfir* (accusations of apostasy)—while their opponents wanted to limit freedom *from* religion—for example, by rejecting the right to freedom of conscience. Rather than leave the issue

unresolved (as had happened with article 1), each camp crafted explicit limits on the other

camp's conception of freedoms in article 6. The final version of article 6 complemented article 1,

and provided more specifics about the state's relation with Islam. It stated: "The state is the

custodian of the religion [*ra`iyat al-din*]. It guarantees freedom of belief, freedom of conscience

and of religious worship [*hurriyat al-mu`taqad wa al-dhamir, wa mumarasat al-sha`a'ir al-

diniyya*]. It ensures the neutrality of mosques and places of worship and protects them from

partisan instrumentalization. The state shall commit to spreading the values of moderation and

tolerance, to protecting sacred [things] [*muqaddasat*] and to preventing attacks on them. It shall

also commit to prohibiting *takfir* [accusations of apostasy] and incitements to hatred and

violence, and to confronting them." This article was augmented from its June 1, 2013, version by

prohibiting *takfir* (accusations of apostasy, presumably against those making use of their

freedom of conscience) but also by making the state the protector of sacred things (presumably

allowing the state to limit freedom of conscience and expression). It continued to designate the

state as the main agent of regulation and protection of Islam—"the" religion it clearly referred to

using the words "*ra`iyat al-din*." The word *ra`i* refers to the shepherd and, in the tradition of

classical Islam, to the ruler who watches over and leads his flock. Also related to the idea of

"custodianship," article 39 stated that Islamic values should be disseminated to the youth in

public education ("the state ensures that the Arab and Muslim identity is rooted in the youth") in

combination with "nationalism" and with "the values of human rights."[60]

The notions of freedom "of belief" and freedom of religious worship were already

present in the earlier constitutional vocabulary of Tunisia. In contrast, freedom of conscience

was an innovation. Harking back to eighteenth-century Europe, the modern formulation of

freedom of conscience means "the person's freedom to choose their religious convictions for

themselves" (Sandel 1998) and is part of the conception of a secular state that adopts a theoretical position of neutrality toward all religions.[61] In that sense, the innovation brought by the NCA with article 6 added a radically new element to Tunisia's constitutional tradition: In addition to the freedom to exercise one's own religion, article 6 gave Tunisians the freedom to choose their religious convictions (as well as the freedoms not to believe and not to worship). However, article 6 also limited this freedom, for in its formulation, the state, as custodian of Islam and protector of sacred things, was not a neutral power vis-à-vis the religion of Islam. In addition, article 39 made explicit the pedagogical role of the state in inculcating Islamic values in its citizens. Freedom of conscience became a contentious issue for Islamists as well as for some non-Islamists, being understood as freedom *from* Islam and thus in blatant contradiction with article 1 and with the principle of the state's custodianship of Islam inscribed in article 6 itself.

Discussing the June 1, 2013, constitutional draft, Fidélité (an independent electoral list from Kasserine) MP Mabrouk Hrizi, who later joined center-left CPR, argued that article 1 (Islam as religion of the state and/or Tunisia), article 2 (defining the state as civil), article 6 (making the state the custodian of Islam and guaranteeing freedom of conscience), and article 141 (Islam as the religion of the state) should be interpreted as a whole and that they guaranteed necessary limits to freedom of conscience: "The question is: can freedom be absolute, without limits and without responsibility? Can freedom of conscience be without a conscience? Can workers go on strike without limits? Can freedom of expression be left without a watchdog [*raqib*]?"[62]

In the same vein, other non-Islamist MPs argued against freedom of conscience. Center-left CPR MP Rabii Abdi said, "We have reservations about freedom of conscience. Some will understand that we have reservations about freedom. There is no dispute about freedom. The

problem is not freedom of conscience but its consequences."[63] He then listed a series of

eclectic—and, in his view, problematic—examples of such consequences: objectors of

conscience, doctors refusing to perform abortions, gay marriage, magistrates refusing to apply a

law in which interest rates are involved, and legalization of radical Islamist group Ansar al-

Shari`a.[64] In his view, freedom of conscience was problematic not merely because the state was

Muslim or because Islam was the religion of the Tunisian people but also because "freedom of

conscience will contradict our legal structure."[65]

Azed Badi, another CPR MP, also argued against freedom of conscience, although his

reasons were more explicitly religious. He refused to accept the expression of atheism in public

and argued that freedom of conscience was "imposed by foreign agendas."[66] Leftist PDP MP

Iyad Dahmani, as well as liberal Afek MP Rym Mahjoub, opposed Azed Badi on this issue, with

Rym Mahjoub arguing against any limits to human rights.[67] In the same vein, Afek Party MP

Chokri Beaich underlined the contradiction between a state that protects freedom of conscience

and that is at the same time the "custodian of the religion." "Here," he added, "minorities are

ignored, even though they are very few."[68]

The statements of some CPR MPs against freedom of conscience were consistent with

those made by al-Nahdha MPs. For instance, al-Nahdha MP Kamel Ben Amara argued, "When

we speak of the civil nature of the state, we speak about it in the framework of civil human and

universal values, but not in the framework of the global universal values founded on absolute

liberalism and on the principles of secularism and *laïcité*."[69] For him, a notion of freedom of

conscience that would allow an individual to renounce his religion or chose any religion was

unacceptable. In his view, article 1 served to limit this type of freedom. Al-Nahdha MP Khalil

Belhaj also argued for limiting the extent of freedoms by invoking moral norms, which he

considered absent from secular constitutions: "Secular constitutions assert the absolute freedom of the individual without relating it to morality [*akhlaq*]. The freedom we want is a freedom constrained by our culture and our morals."[70]

Freedom of conscience was eventually introduced in the 2014 constitution and counterbalanced the conception of a state that was the custodian of Islam and the protector of "sacred things." This way, freedom *of* religion and freedom *from* religion were inscribed in the constitution, although each with strong limitations. The final version of article 6 was a compromise that kept in check the "extremists" of each camp—those who might accuse fellow Muslims of apostasy or restrict the freedoms of religious minorities on the one hand and those who might publicize anti-Islamic statements and practices on the other. This was a way for the state to guarantee that both camps could coexist in the new democratic polity, albeit with strong constraints on their respective freedoms. Article 6 could seem incoherent because of the contradictory functions it attributed to the state—guardian of the communal order defined as "Muslim" on the one hand and protector of individual freedoms on the other. However, it was coherent by reflecting the existence of a real and important cleavage in Tunisian society while attempting to mitigate the most dangerous manifestations of that cleavage.

The solutions provided by the NCA in the drafting of article 1 and article 6 were each of a different nature. Article 1 rehearsed an old and ambiguous constitutional clause that had been crafted under authoritarianism. In contrast, article 6 expressed an innovative but perilous compromise that had been reached in a democratic context. In this compromise, the state was the main caretaker of Islam and religious institutions, and freedom *of* religion and freedom *from* religion explicitly limited each other. However, article 6 did not specify the exact limits of these freedoms. Both articles deferred interpretative issues for future adjudication in courts of law and

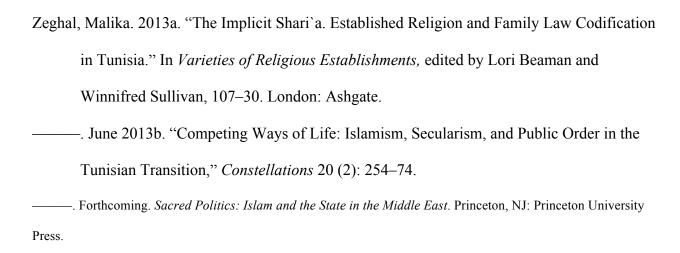in future legislative and public arena debates. They undoubtedly foreshadowed future problems and conflicts.

Conclusion

The 2014 constitution contained all the elements of a democratic polity—for example, the sovereignty of the people, free elections, separation of powers, judicial independence, and a constitutional court. Article 1 ("its religion is Islam") remained ambiguous and unchanged from the 1959 constitution, with the addition that it could not be changed. In addition, as in 1959, shari`a was never explicitly mentioned—in large part because shari`a was neither deemed necessary by al-Nahdha nor desirable by its political adversaries for implementing a Muslim state. Behind article 1 were three competing and seemingly irreconcilable conceptions of the religious establishment, forming an ideological cleavage that did not strictly follow the divide between Islamists and non-Islamists: a nonlegislative identity-related light establishment (Ettakattol), a strong establishment limiting and controlling Islam (PDM), and another strong establishment urging that Islam be expanded in public life and constitute a necessary counter-power in democratic governance (al-Nahdha). In spite of these differences, broad agreement held, among Islamists and non-Islamists alike, that Islam and the state not be separated. A compromise was reached in article 6, which took a middle path and allowed citizens to be Muslim in different ways so long as certain mutually constraining red lines—*takfir*, as well as, on the flip side, offenses against the sacred—were not crossed. It thus made the state the arbitrator of religious conflicts as well as the authority setting the lines differentiating between acceptable and unacceptable ways of life of its citizens.[71] It also carried with it obvious contradictions, as well as future potential problems and conflicts. Echoing numerous polls that demonstrated that

most Tunisians wanted "Islam and democracy," the 2014 constitution illustrated the desire for a democratic state whose custodianship of Islam set limits on freedom *from* religion.

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[1] To my knowledge, there are no available records of the debates that took place in the Egyptian Constituent Assembly that drafted the 2012 constitution that was later abrogated.

[2] These debates are available in video format on the NCA website at http://www.anc.tn/site/main/AR/docs/vid_debat.jsp?id=03022012&t=t and are published in the Republic of Tunisia's *Official Gazette*. At the time of writing, only a small number of debates were published, and most of the debates I used were available only in video form.

[3] Article 37 required that the president of the republic be a Muslim.

[4] For further analysis of the 2011 Tunisian elections, see Latiri and Zeghal (2012). In spite of some *ex post* irregularities, the results of these elections were widely accepted by Tunisians and by international observers. Moreover, unlike in previous Tunisian elections, the results were not predetermined *ex ante*.

[5] Born out of the Islamic Tendency Movement, the al-Nahdha movement (*ḥarakat al-nahdha*) was created in the early 1980s and until 2011 was relegated to illegal status by the authoritarian regimes of Bourguiba (1956–87) and Ben Ali (1987–2011). During that time, only sham elections took place, and legalized parties were either co-opted by the regime, being assigned a few seats in the legislature—as well as financial and other resources—or were repressed and lived on the margins of political life.

[6] Sigma Conseil, "Les Tunisiens, la politique et la religion," poll of May 3–4, 2012. Dalia Mogahed, "Arab Women and Men See Eye to Eye on Religion's Role in Law," June 25, 2012, http://www.gallup.com/poll/155324/Arab-Women-Men-Eye-Eye-Religion-Role-Law.aspx.

[7] NCA Morning Session of February 28, 2012.

[8] NCA Afternoon Session of February 28, 2012.

[9] NCA Morning Session of February 28, 2012. This is a common trope among anti-Western political actors, including some Islamists. The 1857–61 legal reforms were in fact both the product of foreign pressures and of indigenous projects. Moreover, both foreigners and Tunisians were ambivalent about these reforms. See Zeghal (forthcoming).

[10] *Al-sharq al-awsat*, March 29, 2012, no. 12175.

[11] Al-Nahdha Party, "Draft of a Constitution," Tunis, n.d. In this draft, article 1 remained the same as in the 1959 constitution. Article 10 read: "The Islamic shari`a is one of the main sources of legislation" (*al-shari`a al-islamiyya masdar asasi min masadir al-tashri`*).

[12] For further analysis of the deliberate choices made by the transitional elites during the crafting of the electoral law after the fall of Ben Ali, see Latiri and Zeghal (2012). For an empirical analysis of the benefits of closed list proportional representation systems, see Cammett and Malesky (2012).

[13] In the first quarter of 2012, official unemployment reached 18.1 percent nationally and was as high as 28.4 percent in the interior regions, according to the National Institute of Statistics of Tunisia (Al-Jumhuriyya al-Tunisiyya 2012, 2–4). For much higher estimates, see Latiri and Zeghal (2012).

[14] This was the case, for instance, with the mob attack against the Nessma Television offices on October 9, 2011, and with the violent street conflict between UGTT Trade Union members and the Leagues of Protection of the Revolution on December 4, 2012.

[15] For example, in August 1956, *al-Istiqlal*, the mouthpiece of the Old Destour, published an open letter to the government, carrying 137 signatures, asking whether the PSC were up for discussion and requesting that the `ulama participate in its drafting. See also *al-Istiqlal* 1, no. 47 (September 14, 1956): 1 for Shaykh `Abd al-`Aziz J`ayyit's response to a request for a legal opinion (*fatwa*) on the PSC calling for the removal of several articles.

[16] I thank Robert Hefner for suggesting this important argument.

[17] The Tunisian NGO Albawsala also tweeted the debates and collected and published on its website important information about the activities of the NCA; see http://www.marsad.tn/.

[18] NCA Session of July 11, 2013.

[19] NCA Session of July 1, 2013. Recognizing the existence of deep tensions around the question of Islam, he also argued that these anxieties were exaggerated, for the NCA eventually reached a compromise.

[20] Fieldwork notes, Tunis, June 2012.

[21] Chokri Belaid, leader of the Democratic Patriot Movement (left, 1 NCA seat) was assassinated on February 6, 2013. Mohamed Brahmi, member of the NCA and leader of the People's Movement (Arab nationalist left, 2 NCA seats) was assassinated on July 25, 2013. The Ministry of the Interior blamed radical Salafi groups for both assassinations.

[22] NCA Session of July 11, 2013.

[23] NCA Session of January 3, 2014. Mongi Rahoui was the only MP elected on the list of the Movement of the Democrats Patriots, which was led by Chokri Belaid, who was assassinated on February 6, 2013.

[24] NCA Session of July 8, 2013.

[25] NCA Session of July 1, 2013.

[26] NCA Session of July 6, 2013.

[27] NCA Session of July 11, 2013. Center-left CPR MP Bechir Nafsi made a similar statement during the same session.

[28] Mohamed Fadhel Moussa, referred to "rights of conscience" (*haqq al-dhamir*). NCA Morning Session, February 28, 2012.

[29] NCA Session of July 11, 2013.

[30] NCA Session of July 11, 2013.

[31] NCA Session of October 24, 2012.

[32] NCA Session of January 4, 2014.

[33] NCA Morning Session of February 28, 2013.

[34] The argument for separation of Islam and state was made by MP Salaheddine Zahaf (*Voix de l'Indépendant*, 1 seat) who argued in the July 2, 2013, session that Tunisians had revolted for

temporal and not for ideological or religious aims and that this required a "clear separation (*fasl*) between religion and state." However, he contradicted himself in the same session of the NCA when, criticizing article 6 of the draft under examination, he refused the principle of a state "custodian of Islam" and argued that the state should be the custodian of "all religions."

[35] NCA Session of July 6, 2013.

[36] Interview with a member of Ettakattol, Tunis, June 18, 2011.

[37] NCA Morning Session of February 28, 2012.

http://www.anc.tn/site/main/AR/docs/vid_debat.jsp?id=28022012m&t=m.

[38] Interview with Samir Taïeb, June 15, 2012, NCA, le Bardo.

[39] NCA Session of July 6, 2013.

[40] The Canadian Charter of Rights and Freedoms begins, "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . ."

[41] NCA Session of July 8, 2013.

[42] NCA Session of January 3, 2014.

[43] NCA Session of February 28, 2012. In the same session, another group argued in favor of "the Koran and the *Sunna*" as a main source of law.

[44] NCA Session of July 11, 2013.

[45] One voted against article 1, and two abstained. The only change from 1959 was the addition of the words "This article cannot be amended."

[46] http://www.marsad.tn/fr/vote/52c9ba0712bdaa7f9b90f436.

[47] NCA Session of July 6, 2013, emphasis mine.

[48] NCA Session of July 6, 2013.

[49] NCA Session of January 4, 2014.

[50] NCA Session of January 4, 2014.

[51] NCA Session of July 8, 2013. Salma Mabrouk (Ettakattol) also argued in the same session that article 141 threatened women's rights.

[52] NCA Session of January 4, 2014.

[53] NCA Session of January 4, 2014.

[54] NCA Session of July 8, 2013, emphasis mine. Jawhara Tiss, born in 1985, was one of the youngest members of the NCA.

[55] Hana Lerner similarly found in the cases of Israel, India, and Ireland that "ambivalent legal language and the inclusion of contrasting provisions in the constitution . . . allow the deferral of controversial choices" (Lerner 2011).

[56] NCA Session of January 18, 2013.

[57] NCA Session of July 6, 2013.

[58] NCA Session of January 4, 2014.

[59] NCA Session of July 8, 2013.

[60] Also, in continuity with the 1959 constitution, only Muslims voters can be candidates for president of the republic.

[61] Michael Sandel distinguishes between different definitions of freedom of conscience (as free exercise and as the autonomous individual's free choice) in the case of the US legal history (Sandel 1998). In the case of the Tunisian constitutional discussions, freedom of religion meant freedom to exercise one's religion (as previously understood in the 1959 constitution), whereas "freedom of conscience" meant freedom *from* religion.

[62] NCA Session July 11, 2013. Mabrouk Hrizi and nineteen other MPs from al-Nahdha and CPR also proposed the amendment of article 6 to suppress freedom of conscience.

[63] NCA Session of July 6, 2013.

[64] In Tunisia, abortion has been legal and subsidized by the state, up to the third month of pregnancy, since 1973.

[65] NCA Session of July 6, 2013.

[66] NCA Session of January 4, 2014.

[67] NCA Session of January 3, 2014.

[68] NCA Session of July 8, 2013.

[69] NCA Session of July 11, 2013. See also the July 8, 2013, remarks of Adel Ben Attia (Nahdha) against freedom of conscience.

[70] NCA Session of July 11, 2013.

[71] See Zeghal (2013b).