

The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring

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I. Introduction

During the process of drafting the new Tunisian Constitution, which commenced in February 2012, there was considerable debate between Islamic political groups, represented by the Nahda Islamic Party (al-Nahda), and secular movements, represented by the Congress Party for the Republic and the Democratic Forum for Labor and Liberties, known as Ettakatol.¹ Three of the main topics of this debate were (1) the role of Islamic law in the Tunisian Constitution and in domestic legislation, (2) the prohibition of blasphemy in both the Constitution and the Penal Code, and (3) the constitutional and legal rights of women. Each of these topics is addressed below, drawing primarily on news sources and analysis by commentators.

The drafting process was interrupted for some time owing to the assassination of the secular opposition leader, Shoukri Belaid, on February 6, 2013. A first draft of the Constitution was issued on December 14, 2012,² and this was followed by a second draft on April 22, 2013.³ According to news reports, on May 20, 2013, the Tunisian Prime Minister announced that a draft of the constitution has been presented for public discussion and that legislative elections will take place by the end of year.⁴

II. The Role of Islamic Law in the Constitution

Concerning the role of Islamic law in the new Tunisian Constitution, it is important to note that the word "Islam" is mentioned four times in the April 2013 draft: one time in the preamble and three times in the body of the Constitution itself, in articles 1, 72, and 136.⁵

The influence of religion on society has become more prominent under the current Tunisian administration than it was under the regime of ousted President Zine El Abidine Ben Ali. Throughout the Ben Ali era, the ruling party, known as the Constitution Democratic Rally, tried to curb any religious influence on Tunisian society by prohibiting the formation of any religion-

¹ Asma Ghribi, *Role of Islamic Law in Tunisian Constitution Provokes Debate*, TUNISIALIVE (Mar. 22, 2012), <http://www.tunisia-live.net/2012/03/22/role-of-islamic-law-in-tunisian-constitution-provokes-debate/>.

² Draft Constitution of the Republic of Tunisia (2012), available at http://www.constitutionnet.org/files/tunisian_consitution14_dec_2012-english-undp.pdf.

³ Draft Constitution of the Republic of Tunisia (2013), available at http://www.chambre-dep.tn/site/main/AR/docs/projet_constitution_avril_2013.pdf (in Arabic).

⁴ *Tunisia is in the Right Path Despite the Challenges: PM*, THE PENINSULA (May 21, 2012), <http://thepeninsulaqatar.com/qatar/238043-tunisia-on-right-path-despite-challenges-pm.html>.

⁵ Draft Constitution of the Republic of Tunisia (2013), *supra* note 3.

based political parties.⁶ However, following the revolution of early 2011, more room was created for religious political parties to operate in the country. In fact, the role of the religious parties was enhanced after al-Nahda's win in the elections for the Constituent Assembly in October 2011.⁷

After winning 41% of the seats in the Constituent Assembly, representatives of al-Nahda proposed a constitutional provision declaring Islam to be "the main source of legislation"⁸ with the goal of unifying all Tunisian legislation under the rule of Islamic law.

Al-Nahda representatives have also asserted on many occasions that Tunisian legislation and international treaties approved by the Parliament should be in conformity with Islamic law standards.⁹ For instance, some of the al-Nahda members in the Constituent Assembly rejected a proposed initiative to abolish the death penalty on the grounds that such an initiative would violate Islamic law.¹⁰ They also offered a bill that would criminalize eating in public during the Islamic holy month of Ramadan¹¹ and abolish Law 27 of 1958, which allows for the adoption of a child,¹² since al-Nahda leaders consider adoption of a child to be forbidden under Islamic law.

On the other hand, secular political parties operating within the Constituent Assembly, including the Congress Party for the Republic and Ettakatol, opposed al-Nahda's attempts to incorporate additional references to Islamic law in the Constitution. Representatives of these parties announced that al-Nahda's proposed constitutional provision emphasizing Islam as the main source of legislation was unacceptable because al-Nahda did not identify which interpretation of Islamic law Tunisians should follow.¹³

⁶ Colleen McCullough, *Tunisia: Islamists and the Upcoming Election*, THE MAGRAB CENTER STUDENT BLOG (June 24, 2011), <http://themagrabcenter.wordpress.com/2011/06/24/tunisia-islamists-and-the-upcoming-election/>.

⁷ Habib Toumi, *Al Nahdah Wins Historic Tunisia Elections*, GULF NEWS (Oct. 28, 2011), <http://gulfnews.com/news/region/tunisia/al-nahdah-wins-historic-tunisia-elections-1.919988>. See also Morgan Lorraine Roach, *Tunisia's Hizb Al-Nahda: A Nightmare for Some and a Blessing for Others*, THE FOUNDRY, THE HERITAGE FOUNDATION (Sept. 16, 2011, 12:08 PM), <http://blog.heritage.org/2011/09/16/tunisias-hizb-al-nahda-a-nightmare-for-some-and-a-blessing-for-others/>.

⁸ Sarah J. Feuer, *Islam and Democracy in Practice: Tunisia's Ennahdha Nine Months In*, MIDDLE EAST BRIEF 5 (Crown Center for Middle East Studies, Brandeis University, Sept. 2012), <http://www.brandeis.edu/crown/publications/meb/MEB66.pdf>.

⁹ Ghribi, *supra* note 1.

¹⁰ Asma Ghribi, *Efforts to Abolish Death Penalty in Tunisia Impeded by Islamic Law*, TUNISIALIVE (Mar. 28, 2012), <http://www.tunisia-live.net/2012/03/28/efforts-to-abolish-death-penalty-in-tunisia-impeded-by-islamic-law/>.

¹¹ Ghribi, *supra* note 1.

¹² Pelin Gönül Şahin, *Women's Liberties and Gender Equality in Tunisia: The Asthma of the Arab Spring?*, 11 TURKISH POLICY QUARTERLY 165, http://www.turkishpolicy.com/dosyalar/files/vol_11-no_4%20sahin.pdf.

¹³ Duncan Pickard, *The Current Status of Constitution Making in Tunisia*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 19, 2012), <http://carnegieendowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia/ah1s>. See also Patrick Goodenough, *Sharia Rises in Tunisia's Constitution-Drafting Process*, CNSNEWS.COM (Mar. 2, 2012), <http://cnsnews.com/news/article/shari-rises-tunisia-s-constitution-drafting-process>.

During 2012 it was reported that the al-Nahda party agreed that there is no need to insert a special provision declaring Islam the main source of legislation because article 1 of the old Constitution of 1959 already mentions that “Islam is the religion of Tunisia.”¹⁴ After months of debate and negotiations, on March 26, 2012, al-Nahda announced that it would no longer press for the inclusion of this provision. Most of the secular and religious political parties agreed to keep article 1 of the old Constitution, which explicitly states that “Tunisia is a free, sovereign and independent state, whose religion is Islam.”¹⁵

In addition to article 1, Islam is referenced in article 72 of the April 2013 draft Constitution, which states that any presidential candidate must be a Muslim.¹⁶ Religion is also mentioned in article 136, which provides that no constitutional amendment shall harm Islam as the religion of the State.¹⁷

III. Prohibition of Blasphemy

The second area of debate concerned whether or not to include the crime of blasphemy in both the Constitution and the Penal Code. The idea of criminalizing defamation of religion and holy religious figures gained ground in June 2012 after the opening of an art exhibit in the capital Tunis that was deemed offensive to Islam.¹⁸

Al-Nahda condemned the exhibit and in a statement urged the Constituent Assembly to add a provision to the Penal Code criminalizing blasphemy. In addition, the party proposed inserting a constitutional provision to prohibit blasphemy. The stated reason for such a proposal was to protect Tunisia's Islamic identity.¹⁹ In an official statement, al-Nahda announced that it endorses freedom of expression; however, such freedom must adhere to Islamic values and pay appropriate respect to religion and religious figures.²⁰

In opposition, secular parties and civil society groups rejected both proposals submitted by al-Nahda. They considered the suggested provisions to be new restrictions on freedom of

¹⁴ *Tunisia's Constitution Will Not be Based on Sharia: Islamic Party*, AL ARABIYAH (Mar. 27, 2012), <http://www.alarabiya.net/articles/2012/03/27/203529.html>. See also Maya Manaa, *Tunisia's Constitution: The Battle for Islam and Democracy*, FAIR OBSERVER (Dec. 7, 2012), <http://www.fairobserver.com/article/tunisias-constitution-battle-islam-democracy>.

¹⁵ Carolyn Lambole, *Tunisia's Leading Party Reaffirms Commitment to Arab-Muslim Identity*, TUNISIALIVE (Mar. 25, 2012), <http://www.tunisia-live.net/2012/03/26/tunisias-leading-party-reaffirms-commitment-to-arab-muslim-identity/>.

¹⁶ Draft Constitution of the Republic of Tunisia art. 72 (2013), available at http://www.chambre-dep.tn/site/main/AR/docs/projet_constitution_avril_2013.pdf (in Arabic).

¹⁷ *Id.* art. 136.

¹⁸ Monica Marks, *Speaking on the Unspeakable: Blasphemy and the Tunisian Constitution*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Sept. 4, 2012), <http://carnegieendowment.org/2012/09/04/speaking-on-unspeakable-blasphemy-tunisian-constitution/drca>.

¹⁹ *No Blasphemy Clause in Tunisia's New Constitution*, AL ARABIYA (Oct. 12, 2012), <http://english.alarabiya.net/articles/2012/10/12/243289.html>.

²⁰ Feuer, *supra* note 8, at 3.

expression.²¹ Representatives of the secular parties stated that it is difficult to define “holy” as a general term. Accordingly, they saw no need to criminalize blasphemy or insert an antiblasphemy provision in the Constitution or the Penal Code.²²

Ultimately, for the second time, the secular forces within the Constituent Assembly prevailed and the proposed antiblasphemy provisions in both the Penal Code and the new Constitution were dropped.

IV. Legal and Constitutional Rights of Women

The rights of women in regard to both current Tunisian legislation and the new Constitution have been points of heated contention in the Constituent Assembly.

After the fall of Ben Ali, Islamic political factions insisted that constitutional provisions and domestic legislation related to women adhere to what they view as Islamic law. For instance, Islamic political parties supported the right of Tunisian women to wear the veil, a practice that had been banned by Law 108 of 1981 and Law 102 of 1986.²³ Members of al-Nahda also demanded that article 18 of the Family Law, which bans men from having more than one wife at a time, be amended to allow multiple wives.²⁴ Furthermore, al-Nahda representatives vowed to abolish Law 75 of 1998, which allows children born out of wedlock to be registered under their mothers' last names.²⁵ Those representatives argued that such legislation promotes adultery in an Islamic country.²⁶ Finally, they also proposed a new constitutional provision suggesting that women have a complementary role to men in family life rather than being their equals.²⁷

In response to such proposals, women's rights activists affiliated with secular movements and nongovernmental organizations accused Islamic political parties of impeding women's rights that had been acquired since the country's independence.²⁸ Likewise, members of secular political parties rejected the calls to amend article 18 of the Family Law to permit having multiple wives.

²¹ Antoine Lambroschini, *Blasphemy Clause to Be Dropped from New Tunisian Constitution, Speaker Says*, THE GLOBE AND MAIL (Oct. 12, 2012), <http://www.theglobeandmail.com/news/world/blasphemy-clause-to-be-dropped-from-new-tunisian-constitution-speaker-says/article4608262/>.

²² Megan Radford, *Blasphemy Article Moved to Constitution Preamble*, TUNISIALIVE (Oct. 13, 2012), <http://www.tunisia-live.net/2012/10/13/blasphemy-article-moved-to-constitution-preamble/>.

²³ Muneir Al Suwisy, *The Veil is Coming Back to Tunisia Despite the Prohibition Imposed by Bu Reqeba*, ALHIWAR.NET (Dec. 3, 2010), <http://www.alhiwar.net/ShowNews.php?Tnd=5030> (in Arabic).

²⁴ Law 70 of 1958, *Al-Ra'ed Al-Rasmi*, July 4, 1958, vol. 52, pp. 693–94.

²⁵ Law 75 of 1998, *Al-Ra'ed Al-Rasmi*, Oct. 28, 1998, vol. 87, p. 2119.

²⁶ Amal Al-Hilali, *Ennahda Members Make Conflicting Statements About Women's Rights in Tunisia*, AL ARABIYA NEWS (Nov. 13, 2011), <http://www.alarabiya.net/articles/2011/11/13/176916.html>.

²⁷ Alvin Powell, *A Warning from Inside Tunisia*, HARVARD GAZETTE (Sept. 8, 2012), <http://news.harvard.edu/gazette/story/2012/09/a-warning-from-inside-tunisia/>.

²⁸ Maaïke Voorhoeve, *Tunisia: Protecting Ben Ali's Feminist Legacy*, THINK AFRICA PRESS (Jan. 31, 2013), <http://thinkafricapress.com/tunisia/future-state-feminism>.

They also organized street protests against the proposed constitutional provision, claiming it would undermine gender equality.²⁹

As a result of this strong opposition, Islamic political parties were not able to insert the proposed wording related to the complementary relationship of men and women in the new Constitution. They also failed to amend article 18 of the Family Law or abolish Law 75 of 1998.³⁰

V. Conclusion

Despite the legislative power al-Nahda now holds by controlling 41% of the seats in the Constituent Assembly, the party has so far failed in its attempts to implement a stronger role for Islamic law in either the Constitution or the domestic legislation of Tunisia. This failure appears to be the result of fierce opposition from secular forces not only in the Constituent Assembly itself, but also in the streets of the country in the form of public protests.

²⁹ Lasaad Ben Ahmed, *Women Power in Tunisia?*, AL-AHRAM WEEKLY ON-LINE (Aug. 22, 2012), <http://weekly.ahram.org.eg/2012/1111/re6.htm>.

³⁰ Voorhoeve, *supra* note 28.