# THE RE-EXPANSION OF THE ISLAMIC ORDERING PRINCIPLE IN A COMPARATIVE CONSTITUTIONAL PERSPECTIVE

## UNDERSTANDING POLITICAL CONSTITUTIONAL TRANSITIONS IN NORTH AFRICA

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## I. FACING AN "HERMENEUTICAL CIRCLE"

In the 21st Century we are witnessing a re-expansion of the Islamic ordering principle, both on a global and a metropolitan scale, as a result of a combination of several social and cultural factors, like the growth of Islamic population, the renaissance of religious identities, and the crisis of the leading role of the Western Constitutional models.

When studying this expansion from a constitutional point of view the scholars are found themselves facing two hermeneutical problems.

First: the Islam is not merely a religious faith.

Originally it is characterized by the strong interrelation between political and religious affairs in the public sphere. At least no public sphere is possible, on a strictly Islamic way of thinking, without that interrelation. This feature is becoming more and more relevant in the so called "Western" – i.e. global and de-territorialized – Islam. Especially young and well educated Islamic people are more affected by the universal Islamic affiliation than by the national one. In general it is not possible for a Governmental official, like a Mayor or a Secretary, to deal with the Islamic community as if it were a simple religious community. In an Islamic way of thinking, religious faith is not a private matter at all: Islam should have a relevant role in the public sphere. This is one of the reasons why it is very difficult for the Italian Parliament to pass a bill ruling an agreement between the Italian Republic and the Islamic Community.

Second: the Islamic expansion undermines our understanding of the relationships between the different subjects of the public space.

Despite all we can still largely consider public space as being of a "Westphalian" type, as it is based on the idea that the public sphere is made up of systems of individuals and states or inter-individuals and inter-states. In Islam, instead, prevails an universal and communitarian Weltanschauung of the public space - based on the concept of "ummah" - both at a metropolitan and at a global level.

In both cases the European constitutional scholars are dealing with a "hermeneutical circle".

We realize that some paradigms, which we considered eternal – as, for example, the "binomial" state/individual, the nation-state sovereignty, the restriction of religious affairs in the private sphere and so on - are more and more in crisis in the West, as well.

Globalization means the death of the "Westphalian model", i.e. the model of International regulation that ruled over Western countries after the peace of Westphalia, in 1648. On the basis of the Westphalian model, the world is made of sovereign states recognizing no superior authority where disputes among states are often settled by force.

Globalization involves the crisis of the nation-state model. But that's not a regular trend. Paradoxically, many countries and people, in the age of globalization, are looking for their identity in their traditions or in their past, or are finding new aggregation models no longer founded on the nation-state concept, but on ethnical, religious and communitarian traditions.

So the Globalization is leading the World towards a global integration as well as an unlimited 'communitarian' fragmentation.

I will argue that nowadays, also in the Western World, we are dealing with the crisis of the secular state-nation model, on which constitutional democracies have been built. The Globalization is changing the World's political paradigms: the crisis of the "State-nation" model is now a matter of fact, both for International relations experts and for jurists. In particular Constitutional scholars are dealing more and more with the increasing role of Religion in Public Affairs as an aspect of the growing of communitarian actors on the political-social scene.

Even more so, in analyzing constitutional experiences occurring in Islamic Countries, we should not adopt a schematic approach grounded on the presumption of the radical secularization of the public sphere as a *conditio sine qua non* for the affirmation of the Rule of the Law. We need a "hermeneutical-functionalist" approach to the Islamic Constitutionalism, also as an interdisciplinary perspective, and adopt the new analytical tools elaborated by the scholars in the field of cultural anthropology. Thanks to the developments of Comparative methods, we can deal with an interactive relationship between the European contemporary Constitutionalism and the Islamic one. For example the juridical definition of "Arab Spring" is possible only by critically discussing some European paradigms, like the close relationship between Secularization, Constitutionalism, and Democracy.

Also, we are experiencing in the West a "communitarian" representation in the political field (take for example the debate on positive actions for minorities and the positive role the 'malapportionement' in assuring the representation of the cultural communities in Legislative Bodies) and the irreducibility of religious affairs to the inner sphere.

Of course the situation is still uncertain and full of contradictions. For instance, the policy adopted by the French Government - the Assimilation Model - has been criticized both by the public opinion and by the scholars. Newsworthy events, as the revolt of Muslim women against the prohibition of the 'veil', showed the precariousness of this policy. In the case of the United Kingdom the policy chosen by the Government, the so-called paradigm of the 'difference' based on the community model, has been considered fallacious as well. The model has allowed the Sharia courts by a rule since 1996. In other countries, like Belgium and Germany, Sharia courts are *de facto* tolerated. In this respect, the European Commission has been approached with several parliamentary questions about the application of Sharia Law in Europe. The various written responses do not appear to reveal distinct and clear positions. They reaffirm especially the right to religious freedom within the European Union, and they define Sharia as a comprehensive term to cover various legal issues, and it is then subjected to different interpretations, by the experts in the countries where it is applied.[1]

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[1] E-001463/2011; OJ C 294 E - 06.10.2011.

In Italy there is a ban on the establishment of extraordinary or special judges and therefore it does not seem to be possible to allow a 'parallel Law' with a special jurisdiction on the Islamic communities.

(Constitution, art. 102: «Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary. / Extraordinary or special judges may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary. / The law regulates the cases and forms of the direct participation of the people in the administration of justice».)

As you know, in Italy, freedom of religion is recognized, with "all religious denominations" having "the right of self-organization according to their own statutes, provided these do not conflict with Italian law"; "[t]heir relations with the State are regulated by law, based on agreements with their respective representatives" (article 8). As of 2015, the Italian government has signed thirteen such agreements and eleven have been approved by the Italian Parliament and signed into law, including those with the following denominations (Union of Methodist and Waldensian Churches, Evangelical Christian Churches Assemblies of God in Italy, Italian Union of Seventh-day Adventist Christian Churches, Union of Jewish Communities in Italy, Evangelical Reformed Baptist Churches in Italy, Lutheran Evangelical Church in Italy, Holy Orthodox Archdiocese of Italy and Exarchate of Southern Europe, Church of Jesus Christ of Latter-day Saints in Italy, Apostolic Church in Italy, Italian Buddhist Union, Italian Hindu Union, Christian Congregation of Jehovah's Witnesses in Italy, oka Gakkai International of Italy (endorsed in 2015, not yet signed into law).

But it seems very hard to stipulate this kind of agreement with the most import important no-catholic religious community in Italy: the Islamic one!

## II. The so-called decline of the Westphalia model and the challenge of Islam to the Western Constitutional Culture

Anyone with a modest knowledge of Islamic History could appreciate the cultural impact of the demographic expansion of Islam at a global scale and at a national one, as well. We are facing not just a religion, but a civilization, with its own philosophy of public space organization, that has a constitutive *vis expansiva.*

Moving from the metropolitan scale to the global one, the question for the constitutional scholar became more and more complex.

We can argue until we want, that "Islam" and "the West" are just two conceptual abstractions with which we refer to for several political, as well as cultural experiences, that are very different among each other. As a matter of fact, a significant part of the world's population believe in that dualism and, without caring too much of the fact that cities like Vienna or Warsaw are east of Nouakchott and Algiers, use the expression "West" to indicate the Euro-American civilization as a whole, often in a polemical sense.

Certainly, there are many leading 'Muslim' thinkers who are struggling to overcome that dualism, claiming a secularization of the Islamic world. But, generally speaking, these battles are winning within those who already are out of that dualistic view of the world, while the vast majority of Muslims still poses a major challenge - sometimes even an antagonistic and confrontational one - towards the values and the institutions of the Western world.

When facing this challenge Western Constitutional Scholars have to deal with the problem of rethinking the global order in a "post-Westphalian" key with an asymmetrical articulation of the Global System of checks and balances, which are distributed not only among states or inter-state systems, but also among cultures, peoples, communities, ethnic groups and religions - as it recently has been amply demonstrated by Henry Kissinger[2].

We exemplify this difficulty with the case of the failure of the so-called doctrine of the Greater Middle East.

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[2] H. Kissinger, "World Order: Reflections on the Character of Nations and the Course of History", New York: The Penguin Press, 2014.

The doctrine of the "Great Middle East" has been officially announced at the 2004 G8 summit, but had already been elaborated after the breakdown of Communism and *de facto* adopted by the US Administration and its Allies since the terrorist attack of September 11th 2001.

We can summarize this doctrine as follows: the security and the interests of the West may be assured by exporting or by strengthening the democratic - liberal constitutionalism in a very large area, inscribed in a sort of inverted triangle, with its vertices, respectively, in the Maghreb, in Kazakhstan and in the Horn of Africa.

The Groundwork of this doctrine is contained in two concepts developed in Europe, and are expressed, respectively, in the philosophy of the Nineteenth Century and in the Twentieth-Century Constitutional thought: the "End of History" and the "Exhaustion of the Constituent Power". The latter is, in some way, the juridical update of the former  (formulated before the publication of "The End of History" in 1992). By definition, the constituent power is an unlimited power. But, if liberal democracy is the culmination of the evolution of civilization, the Constituent Power has no more *raison d'etre*. Despite any popular will or geopolitical interest, the limits of any political order (and of any revolution) are fixed once and for all, and coincide with the principles of the Western Constitutionalism (the separation of powers, the primacy of individual rights, secular state, economic freedom, etc.).

The decline of the "Great Middle East"–doctrine is more and more evident. The disastrous outcome of the political-military campaigns "Operation Enduring Freedom" and "Iraqi Freedom" will suffice to remind us the failure of the aforesaid doctrine. But it would be very simplistic to consider that failure just as a simple geopolitical and military *deflaians*.

Basically, from a purely military point of view, things have worked out. But today no one would speak of a "success" of the Western democracy in those geographical areas.

Even if there would come, miraculously, in 2015, a democratic stabilization, the death toll and damage of various kinds caused both to those people and to the Western countries would be more than enough to dampen any enthusiasm. The question is cruel and inevitable: was it worth it? The answer is obvious. So a coherent and sensible

description of that failure is only possible by recognizing the exhaustion of the theoretical groundwork of the doctrine of the "Great Middle East". Once again - in more than three centuries and a half from the Westphalia Peace - History tells us that without the "neutralization" of the public space it is not possible to build a modern State, and without a Western type of State it is not possible to build a constitutional democracy. In other words, you cannot have a constitutional-based political system on rule of law without eliminating the political relevance of religious, ethnical and cultural - i.e. "communitarian" - affiliations. But this model – the so-called "Westphalian" model - cannot be applied on a universal scale. According to many scholars in global society, it also works badly in Western Countries - especially where the political authority has to manage the social and judicial problems related to the multi-ethnical society and the various kinds of neo-communitarian affiliations. *A fortiori* it is in crisis in areas where it has been adopted recently. It is the case, for example, of North Africa, where the political subjects grown in the socio-political dimension of state (parties, military elite, etc.) are dealing with the phenomenon of re-expansion of the Islamic ordering principle, sometimes by rationalizing it (see Tunisia), sometimes by fighting it with violence (see Egypt), without, however, being able to erase it. From a geopolitical point of view, the crisis of the Western model is characterized, therefore, by the emerging of transnational and geopolitical perspectives, which are potentially antagonistic towards the West, like, for example, the neo -Ottoman agenda of Erdogan or the Euro-Asiatic evolution of the initial Panslavism of Putin.

So, the western constitutional liberal-democracy, rather than a global destiny, would seem to be more and more a political order characterizing a specific era of a particular Civilization (after all, Huntington has genially resumed some theories developed in Germany, between the two World Wars). It could be possible for the Western scholars to be compelled to express a judgment on an order based on the people's will, but in conflict with the principles and interests of the West, or choose between the interests of the West and the reasons for the law. Again, we have to deal with an "irreconcilable struggle among opposing values" (Max Weber, again…).

There is a lively debate among Western scholars, on the crisis of the liberal-democratic constitutionalism. At the same time, in the Islamic World, and in particular among young people, there is a growing appreciation of the Islamic community

paradigm, as an alternative to the state-individual paradigms of the Western-liberal culture.

New generations people, in general, tend not to care about the specific national (Tunisian, Egyptian, etc.) heritage of their Fathers, more often preferring, instead, to develop their own Identity-Strategies as members of the global "umma" in a trans and post-national perspective[3].

This milieu spreads and reinforces the belief that, even with the support of research and studies of unquestionable scientific relevance, the models proposed by European and American politicians are permanently in crisis, not only because they are poor or entirely without ethical foundations, but also because they are no longer able to ensure social justice and democratic representation.

Millions of women and men around the world believe, in a measure directly proportional to the level of education, that the Western model of constitutional democracy is everything but without alternatives; even - and, in some respect, especially - after the collapse of Communism and the end of the Cold War Era. This belief applies to the organization of public space at all levels, from the urban to the global one.

The problem for those who feel part of the 'global umma' is not whether or not Islam is the answer to the supposed "crisis of the West", but in what way such a response should be elaborated. In this regard, positions, which often conflict among each other, range from those more inclined to dialogue and integration, up to the more extremist and violent ones, passing through the conservative ones (in particular with regards to religious piety and family ethics), in which, also, the vast majority of Muslims would seem to recognize themselves with.

As in the past, since the end of the Cold War era, a sort of Civil War around the re-expansion of the Islamic principle-issue is being carried out, but nowadays the scenario is no more Regional, as it used to be in past Islamic History, but Global.

The Arab Spring, the jihadist attacks in the West and North Africa, the escalation of the conflict between Shiites and Sunnis, the geopolitical success of the black Caliphate, bloody internal rivalries among the factions of the Global Islamist Onset, the Collapse of

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[3] P. Mandaville, "Transnational Muslim Politics. Reimaigining the umma", London & New York: Routlege, 2001

Libya; these and other connected phenomena can be read in a unified way: as signals of a single one, complex and contradictory but steady, movement of re-expansion of the "Ordering Islamic Principle".

## III.     FINDING THE ISLAMIC ORDERING PRINCIPLE (IOP) IN A INDUCTIVE-HERMENEUTICAL WAY

The radicalization of the anti-Western ideology is perceived as a threat by most of the Islamic public opinion, so much so that many Arab media insist on calling the Islamic State "tanẓīmad al-Dawla 'Islamiyya" "the [so-called Islamic State] Organization", to emphasize the fact that it is a terrorist group, not a legitimate political entity. That effort shows how the danger of a global Islamic onset is anything but utopia. This awareness is shared by both Western and Islamic scholars. In particular, it is the basis for juridical-dialogue between the two shores of the Mediterranean Sea, promoted by scholars from both Europe and North Africa.

Therefore it is very important for both Islamic scholars and European ones, to focus on the constituent elements of the Islamic Ordering Principle in order to avoid, or at least, limit the risk of spreading a violent and aggressive interpretation of it. At the same time for Italian Constitutional scholars the comparison with the constitutional experiences of contemporary Islam represents a very tempting opportunity to deal with the above-mentioned crisis of the constitutional culture.

The fact that Islamic legal experience shows itself as a complex and changing phenomenon does not mean that we cannot find in it some constant elements. Indeed, speaking in an Aristotelian way, it is through the identification of these constant elements that you are able to understand and appreciate the complexity and changing nature of the phenomenon.

Normally it is easier to grasp the constitutive elements of the Ordering Principle of Islam in times of geopolitical crisis than in quiet times.

Following I'm going to propose a list of these elements as I could extrapolate them from my Studies on Constitutional changes which took place in North Africa between 2010 and 2014.

a) The political-religious "polarity"

It is the paradigm by which popular Islam aims to build the public sphere. The Din wa Dawlah (literally. "Religion and society/public sphere/ empire"), is often interpreted as theocratic paradigm. That's a misunderstanding. In the Islamic public Law sovereignty lies with God. No political power could be self- based, while, as we know, this is possible in the Western political way of thinking. "*Regis voluntas suprema lex*" - this principle, which is the basis of the European Absolutism, is unthinkable in Islamic Public Law. Popular Islam advocates a democracy on the basis of the sovereignty of God, whose will shall be carried out by people. There is a strong difference between this way of political thinking and Theocracy. The latter is characterized by the fact that only a few religious leaders represent God (Irene Oh). On the contrary, in Islamic democracy, which is interpreted by popular-Islamic thinkers, every person can act as a representative of God. Theoretically any individual in an Islamic society may enjoy the right to a governmental role, up to the highest ones. This is the main reason for the important role – almost as a watchdog against any abuse of power – played by the courts in Islamic Mediterranean societies, as witnessed by the Egyptian case. This aspect of Islamic heritage is also enhanced by the movements for civil rights and, in general, from political groups hostile to both militarism and fundamentalism.

b) The "nomadic" construction of public space.

The legitimacy of a political system, in the Islamic context, can be built only in a universalistic way. From the beginning of the Muslim history "Islamize" does not just mean winning a number of accessions to Islam in a political pre-existing sphere. Except for the case of the People of the Book (essentially, Christians and Jews), no pre-existent "public" space is recognized by Islamic scholars. Originally "Jahiliyyah" means "ignorance of divine guidance" or "the state of ignorance of the guidance from God". It is referring to the allegedly barbaric condition in which Arabs found themselves in pre-Islamic Arabia. In contemporary Islam, the meaning of this "term" is broader than in the past. Nowadays the term is usually associated to the lack of Sharia Law, without which Islam cannot exist. But, in this case, we are to understand "Islam" as a synonym for

"Public Space" and, in general, of Civilization. For this reason, tendentially, Islam does not recognize state-national boundaries, but just Communities (like, for example, the Christian or Jewish ones) entitled to be protected within the Islamic Umma.

The expansion of Islam itself is not thought of in geometrical terms, but, if you allow us, in a "Theo-metric" key.

In order to better understand this geopolitical Philosophy, we may represent the expansion of Islam not as the Roman model of geopolitical extension, which spreads out from the center towards the outside. We have to think, instead, of the biblical figure of "Pilgrim People", who sanctify the ground by walking on it.

Therefore we may speak of a "nomadic expansion" of the public space.

As mentioned above, this expansion does not recognize the existence of "other" symmetrically legitimate public spaces but "Communities". In this way the Muslim Brotherhood proposes an original Islamic version of the Religious Tolerance. In Egypt as well as Tunisia, Algeria and Morocco as in Libya itself the Brotherhood is often engaged in fighting the expansion of the fundamentalist Salafist Party, which has instead targeted forced Islamization of the institutions and the 'imposition of Shari'ah' both in public and private life. This way it is threatening the realization of an effective reconstruction of the public space on a Muslim-inclusive key (as it was typical in the Ottoman Empire Model).

c) The space-temporal universality of the Ummah.

Most of the difficulties in understanding Islamic Law from the Western legal point of view stem not only from the synchronic character of the universality of the Ummah, but also from its "diachronic" one.

Generally speaking, the relationship of Muslim people with the past is not "Historicist" but "Theological-political".

Hence the growing importance after the end of the Cold War of the Neo-Ottoman paradigm, whereby the re-expansion of the Islamic ordering principle is presented as a response to the crisis of paradigms of the "Western" policy (state-national, territorial and democratic -constitutional). There is a significant convergence of the

Muslim Brotherhood and the Salafists on this aspect of Islamic tradition, which is opposed by the nationalism of the political-military elite.

d) The primitive contractual nature of Political power.

To understand the tumultuous changes that occurred in North Africa between 2010 and 2014 and, in general, the political changes occurring in the contemporary Islamic world, one should take into account the primitive contractual nature of the Political power in the Mediterranean Sunni Islam.

In Islam, as mentioned above, sovereignty belongs only to God, whose will, ultimately, is at the top of the legislative sources. The Caliphate is a contract (*'aqd*) between the Ummah and the Caliph. The Caliph is responsible for "representing" God on the land, but we should intend this representation not in a large-political sense, but in a strictly "notarial" one. The Caliph is not a Vicar neither a Minister. He is appointed on the base of a Representation Agreement to make decisions regarding the Well-being of the «best nation brought out for Mankind, commanding what is righteous» [3:110].

That Agreement could be challenged by the Community, or by the voice of the judges or even directly by a political competitor. This element of the Islamic tradition lives on today in both the Muslim Brotherhood and the civil rights movements, in spite of the great differences between these two political-cultural movements on the role of religion in the public space.

e) The Contrast between "nationalization of Islam" and "Islamization of society".

In Islamic countries that have a strong geopolitical identity, such as Egypt, the ruling class has tried, with mixed success, to "institutionalize" the Islamic polarity through the "nationalization" of Islamic heritage. In other terms, that ruling class has tried several times - sometimes successfully, sometimes not - to inscribe the Muslim heritage in a legal framework, in order to control the subversive power of popular Islam. The political and electoral strength shown by popular Islam during the Arab Spring derives from its opposition to the policies of "nationalization" conducted by the authoritarian regimes; in fact it has built a social and political parallel world, which is neither secular nor religious, but Communitarian and Inclusive.

## IV. UNDERSTANDING THE *TELOS* OF THE IOP

Once identified the elements – or, at least the most important elements – of the Islamic Ordering Principle, we should try to understand what is the Telos of the above-mentioned ordering principle, namely those that in the European constitutional doctrine are called the "General purposes (i.e. General Basis) of the Political order".

The "principles of Sharia" are a quite narrow panoply of assumptions of the legal System, and in the latter way the term is most commonly used in the Constitutions of Islamic countries.

These principles have never been listed in a systematic way, but they are obtained by legal induction, drawn from the Koran, the Sunna and the case-law. We must keep out of this speech the "five pillars", that are much more than mere "principles ". They are for Muslims the direct expression of the Will of God.

> We cannot give a complete description of these principles. We will try to apply the above-mentioned inductive method, choosing as a base a legal Sharaitic-document, which is quite recent and authoritative, like the Egyptian Constitution of 2012.

> The birth of the Egyptian Constitution of 2012, as we know, was very troubled as well as it was its cancellation, which occurred after the coup of 2013. As we know there is an ongoing debate among scholars on these matters. However, no discussion will deny two facts: the Assembly which approved the constitutional text was pluralistic,yeth with a Muslim majority; the Constitution was passed by Egyptian people in a referendum which, according to Western legal canons of electoral procedures, was held in an acceptable manner.

> In particular, we refer here to the legal-reconstruction of the fundamental freedoms and social rights on a Quranic ground.

> This re-construction moves from the definition of "freedom", which is a natural right, but above all, is a divine principle established by the Creator: "Freedom of thought, creativity, opinion, housing and property is a right. So is the freedom to choose between staying in a place or leaving. The Creator rooted this freedom in the movement of the cosmos and in human nature" (Preamble 4).

The people "is the source of all the powers" (Preamble 1) and "The system of government is democratic" (preamble 2). The dignity of the person is equivalent to the dignity of the homeland. In particular women, who are called "sisters" of men and 'partner' in duties and 'national responsibility' (Preamble § 3). For this, all citizens, "men and women", without discrimination, nepotism or "preferential treatment" are guaranteed "equality and equal opportunities" in both the "rights" as in "duties" (Preamble § 5).

Freedom, therefore, is based on the "right", which should "obey" even the state (Preamble § 6). This, then, must take special care to the family, "the basis of the Society" and "based on religion, morality and patriotism." In particular, the state protects the "genuine character of the Egyptian family, its cohesion and stability, protecting moral values, as determined by law" and provides free health care to mothers and children, taking on the duties of conciliation woman towards the family and towards work (art. 10). As for religious freedom, a special status is recognized religions "heavenly": Islam, Christianity and Judaism (arts. 3:43), whose "prophets" cannot be offended (prohibition of blasphemy, Art. 44). In summary, even more extreme can be said that an Islamic legal system if it is based on a natural law "positivist" Quran, from which it has a reconstruction in key EU rights and duties.

Despite a complex and unstable geopolitical context, Islam has been confirmed as an ordering principle in all the countries of North Africa: in Morocco the constitutional reform is based on the role played by the King, chief of the believers (not just Muslims) in force of the Maliki school heritage; in Algeria national reconciliation led to a cooptation of popular non-violent Islam in public life and a strengthening of the Islamic "identity" also in criminal law; in Tunisia the Islamist-popular party, Ennahda, has been confirmed to be a key subject in the public space, playing a vital role in strengthening both the parliamentary system and the principle of subsidiarity in the system of public powers; in Libya the Qaddafi-system has been dissolved and now Libyan society is facing the nightmare of the Islamic State, which is fought essentially by  two contending governments: the government in Tripoli, ruled by the Muslim Brotherhood and linked to Turkey; the government in Tobruk, ruled by a military elite and linked to Egypt; in Egypt the process of Grassroots-Islamization, which started with Morsi on the field of the heritage of the Muslim Brotherhood, was stopped abruptly with the coup of al-Sisi, who

overtook the traditional policy of nationalization of Islam that sees the political leadership in a key position in the religious Affairs, as well.

## V. RE-SETTING THE *VEXATA QUAESTIO* OF THE COMPATIBILITY OF ISLAM WITH DEMOCRACY IN A HERMENEUTICAL WAY

The "Arab Spring" is an interesting case-study for western scholars, who are compelled to face both the dynamic aspects of Islamic constitutional experiences and the crisis of the above mentioned Westphalian paradigms. In particular one should consider some clichés as being critical, like for example the presumed contradictions between Islam and constitutional democracy, as well as the dependence of the contemporary Islamic Public Law from the European Constitutionalism.

> Cross-cultural dialogue, as well as a comparative Study of the Law, would benefit from a Hermeneutical approach to the research. «The true understanding arises not from the imposition of a method onto an object, but rather from a dialectical process in which the "object" of inquiry also asks questions of the inquirer. Moreover, this dialogical process should not be viewed simply as a tool for humanistic understanding, but rather as the way in which humans actually exist in the world».[4]

Before joining legal Studies I used to be a Philosophy Scholar. My most important Mentor was Luigi Pareyson, one of the Fathers of the Hermeneutics of the 20th Century (by the way, it was him, who pushed me to study Constitutional Law, because according to him I did not have enough patience to be a Philosopher). The most important lesson I learned from my Mentor was that cultural dialogue and trust in the truth of their attitudes are not opposites, but they are merely two sides of the same coin. Dialogue with other cultures does not mean being relativist and be rooted in their history and their culture does not mean being intolerant: «In revealing thought the task is infinite, because truth offers itself to the word in as much as it is not completely

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[4] I. Oh, "The Rights of God: Islam, Human Rights and Comparative Ethics", Georgetown University Press: Washington D. C., 2007, 14.

expressible, and makes discourse possible only so long as, while present, it is not exhausted … [being] a continuous revelation»[5].

This means, for me, that a Constitutional scholar should not reduce their scope of research in order to avoid the crisis of its own Paradigms and Categories.

On this basis, once focused both the Islamic Ordering Principle and its Telos, I would propose the *vexata quaestio* of the compatibility of Islam with democracy in a hermeneutical way.

As you know, this question concerns many scholars, because it implies some dramatic political issues. I will make just two examples: a) Is it possible to build a democratic stabilization in North Africa in a sensible time-frame? b) Is it possible to allow in Western Societies the Islamic vision of public space without jeopardizing the Western legal system?

According to the most authoritative European Constitutionalist's doctrine, Islam is incompatible with a constitutional democracy. In particular, according to that doctrine, the failure of several attempts to conciliate Sharia and Constitutionalism depends on the fact that the nation-state, which is the basis of the Rule of the Law, does not have a solid autochthonous tradition in the Muslim World, given the Islamic "communitarian paradigm", which rules Islamic society.

According to the thesis of Panayotis J. Vatikiotis[6] in Islam the "State" is an ideological-religious, non-territorial concept. In fact, it includes the faithful (the Umma), wherever they are.

> "Vatikiotis conjectures that the European notion of the nation-state requires the identification of a national-cultural group within a defined territory. This national cultural group, or nation, may be defined by a sense of identity and loyalty to the territory. The state in this concept refers more to the construction of governmental and political Institutions, which contribute to supporting the territorial integrity of the nation. The nation-state in European terms is territorially based. This is in contrast with the Islamic theory of the nation-state:

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[5] L. Pareyson  "Existence, Interpretation, Freedom. Selected Writings" Davies Group Publishers:Aurora CO, 145.
[6] P. J. Vatikiotis, "Islam and the State", London:Routledge 1987.

A country in Islamic history is a place, and a nation is a people, or the umma, the community determined by religious belief.

Consequently, Islam and its ideal order are an ideological not territorial concept. Therefore, the concept of the nation-state appeared antithetical to the Islamic religious-political order by threatening to impose territorial barriers where none had existed before.[7]

In other terms, Islamic doctrine rejects the state territorial nation, based on nationality and nationalism (which integrates a national community with respect for secular law of the country, before which all citizens are equal, regardless of their religious beliefs).

According to Viatikiotis thesis, in Islam, the religious community is the basic unit (country) and includes several states that have formed throughout history: even the Arab nationalism developed as part of a pan-Arab and communitarian vision of world history, where both the centrality of the individual and neutralizing religious public space are unthinkable.

But also according to the Viatikiotis thesis, even the Western societies are tending to be more and more incompatible with the Western Constitutionalism, since the above-mentioned crisis of the Westphalian model as a basis of the European constitutional culture.

In short, our historicist-hermeneutics approach requires us to recognize that today the West is much less "Western" than it was in the past.

The problem is that there is a mixing of legal cultures, which now communicate more and more with each other. Our schemes seem going badly and sometimes break when we try to apply them to the Islamic world. Perhaps this is because these schemes, now, are also inadequate to understand the Western world.

We should analyze as case studies the recent constitutional changes in Egypt and in Tunisia, with particular regard to the role of Sharia, the Constitutional Review and the

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[7] S. Rohan-Jones, "In what ways did the European nation-state pose a threat to the Islamic religiopolitical order?" available at
http://www.o2c.com.au/pdf/pubs_sts/Europe_and_Islam.pdf.

relationship between the Executive and the Legislative power. Thanks to the above-mentioned "hermeneutical-functionalist" approach we can draw a dynamic map of the above-mentioned changes focusing on some issues, which are juridically incomprehensible from a strictly European point of view (e. g.: the role played by the Supreme Constitutional Court in Egypt, the battle of 'Ennhada' for a parliamentary system, etc.).

In Egypt the Supreme Constitutional Court has contributed to modernize the legal system by using the Sharia as a main source of the jurisdiction. President Morsi tried to reduce the power of the Court by recognizing to Al Azhar the role of the supreme supervisor of the legislation. But Al Azhar refused, preferring to contribute to the removal of President and supporting al-Sisi's project of to statalization of Islam.

In Tunisia, also in light of what happened in Egypt, Ennahda did not "fight to the death" to include the Sharia in the Constitution. It claimed instead the decentralization of the State and the de facto parliamentary form of government, in order to islamize the society by the popular consensus. The conquest of the State, after all, is not as important as the islamization of the society.

These here are examples of how our European constitutional categories need to be renewed, because with them we cannot reconstruct logically what is happening in the Islamic world and, in particular, in the societies of North Africa.

## VI. IS THE ISLAMIC STATE "SO-CALLED"?

Finally, we cannot avoid facing the question of the Islamic State.

The Islamic State, while not recognized, is a sovereign State. It is represented by a centralized Government that has sovereignty over a specific geographic area inhabited by a population, which is protected by the government in various ways from Health to Security. The Government of this singular State claims to represent all the Sunni World, aiming at reconstructing the Caliphate involving the Global Umma.

We know that just a minority of Muslim population follows the Islamic State, but, according to a Report of the Syrian Observatory for Human Rights, it is indeed a 'significant' minority.

«More than 120 leading religious scholars and academics from across the Muslim world have issued an open letter to the leader of the Islamic State, Abu Bakr al Baghdadi. The 17-page document condemns 24 acts committed by the extremist group that are in violation of Islam, according to the signatories. The letter also includes short summaries of the opinions of the overwhelming majority of Sunni scholars throughout Islamic history on issues including jihad, minority rights, women's rights, etc.». But the document does not misrecognize the Islamic nature of the IS.

Of course, we should not interpret the contemporary Islam through the black Caliphate. But I argue that we should not deny the fact that the IS is part of Islam. In an hermeneutical perspective this is a mistaken way of expressing respect for Islam.

Every civilization has its dark side, as Benedetto Croce wrote at the end of the Second World War. The Nazism is part of the dark side of European Civilization. So the IS is part of the Islamic Civilization as well as the Nazism was part of European Civilization: for this reason, according to the Islamic International Law, the Islamic State should be fought overall by Islamic Countries' troops, at least in the Boots on the Ground phase.

The rebirth of a civilization is not something peaceful, it does not happen quietly. This applies to Islam, but to the West also.

We, Constitutional Scholars, who study the events in Northern Africa, also learn a lot about our civilization.

That is why the legal dialogue between the two shores of the Mediterranean Sea is an important goal for our community of Comparative Law scholars.

We are aware, of course, that every spring is not without pain and without suffering, as a well-known poem by Thomas S. Eliot taught us.

«April is the cruellest month, breeding
Lilacs out of the dead land, mixing
Memory and desire, stirring
Dull roots with spring rain».[8]

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[8] T. S. Eliot, "The Waste Land", I. The Burial of the Dead, 1-4