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LAW AND THE LODESTAR: TUNISIAN CIVIL LAW AND THE TASK OF ORDERING PLURALITY IN THE AFTERMATH OF THE JASMINE REVOLUTION

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I. INTRODUCTION

As the Tunisian Constituent Assembly voted on the provisions of its new post-revolution constitution, international media reports—noting that the new constitution contains no express reference to Islamic law—ebulliently declared that Tunisia had rejected Islamic law and embraced secular civil law.[1] Shortly thereafter, on the same day the rhapsodic headlines were printed, the deliberation on the Tunisian constitution was suspended "after a deputy claimed he had received death threats because a colleague had accused him of being an 'enemy of Islam.'"[2] The issue of whether or not the Tunisian constitution would reference Islamic law had, throughout the preceding year, been the focus of intense and acrimonious debate within Tunisia and among international actors with an interest in Tunisia's post-revolution transition to

1. *See* RT, *Tunisia opts for civil, not Sharia law as assembly votes on new constitution* (Jan 5, 2014), http://rt.com/news/tunisia-rejects-islam-law-196/; *see also* AAP, *Tunisia's assembly has rejected Islam as the main source of law as it voted on a new constitution* (January 5, 2014): "Tunisia's Islamist-dominated constituent assembly has compromised in rejecting Islam as the main source of law as it voted on a new constitution for the country that spawned the Arab spring.http://www.sbs.com.au/news/article/2014/01/05/tunisia-mps-reject-islam-law"

2. *See Tunisia MPs reject Islam as law*, *supra* note 1.

democracy.[3] Therefore, when the new constitution omitted mention of Islamic law, it was viewed in certain circles as a triumph of progressive liberalism and, in others, a defeat of Islamic legal principles.[4] This article, in analyzing the domestic civil law in force in Tunisia, posits that, with regard to Tunisian civil law, neither conclusion is entirely true.[5] To the contrary, for well over a century, Tunisian civil law, a "mixed" civil law system which incorporates elements of continental civil law derived from European codes with Islamic law and Tunisian custom, has regulated the ordinary affairs of Tunisians in a manner that is consistent with both modern legal norms and the tenets of Islamic law.[6]

Illuminating this hybridity in Tunisian civil law is useful on a number of levels. From an academic perspective, in the context of Middle Eastern and North African civil law systems, recent scholarship (quite rightly) has focused on the work of Abd al-Razzaq Al-Sanhūrī, among the most accomplished comparative lawyers of the twentieth century[7] and the chief architect of many civil codes for countries in the Middle East and North Africa who

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3. Aziz El Yaakoubi, *Death threats disrupt Tunisia constitution debate*, Reuters, Jan 5, 2014: "Since the 2011 uprising, tensions over the role of Islam in Tunisia and the assassination of two secular politicians by hardline Islamist militants last year have widened divisions between Islamists and secular parties."

4. *Id.*

5. For an interesting discussion regarding the relevancy of such a clause, known as a repugnancy clause, *see* Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 WILLAMETTE L. REV. 427, 427 (2012).

6. There are numerous schools of Islamic law (or *madhabs*). Although the Maliki madhab prevails in Tunisia, *see* HALIM RANE, ISLAM AND CONTEMPORARY CIVILISATION 83 (2010), the Hanifi madhab is also very significant. Other minority madhabs, such as the Ibāḍī madhab, can also be found in Tunisia. *See, generally*, J.H. van Riel, *The Ibāḍī Traders of Bilād al-Sūdān* (Master's thesis, The American University in Cairo, School of Humanities and Social Sciences, 2012). As this article will demonstrate, in those areas where it draws on Islamic law, the Tunisian Code of Obligations and Contracts draws most significantly from the Maliki and Hanafi madhabs.

7. *See* Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing Your Asalah can be Good for You)* in RETHINKING THE MASTERS OF COMPARATIVE LAW 152 (2001).

were achieving independence in the aftermath of World War I.[8] Sanhūrī's work is notable for its masterful synthesis of European and Islamic legal principles and has come to serve as the archetype for Middle Eastern civil codes.[9] The Tunisian civil code, however, is an interesting example of North African legislation which predates Sanhūrī and which also seeks to reconcile Islamic law with continental civil law based on European codifications[10]—and a model which has influenced subsequent codifications in North Africa and the Sahel, specifically in Morocco and Mauritania.[11] The Tunisian legal experience, therefore, represents the genesis of a unique version of Middle Eastern and North African legal codification.

In addition, an understanding of Tunisian civil law can inform analysis of the current political situation in Tunisia as many of the ongoing post-revolution debates have revolved around the role of

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8. *Id*.

9. *Id*. It is worth noting that continental civil law has always demonstrated a unique capacity to be exported and assimilated into other legal milieus. Since the advent of the modern civil code, civil law jurists (and comparativists) in various places throughout the world have acted as "synthesists," working to create a civil code based on the French model but retaining a sufficient degree of organic legal substance so as to be faithful to the legal traditions of the jurisdiction. These "synthesists" include the Haitian-born Louisiana jurist, Louis Casimir Elisabeth Moreau-Lislet, who, as early as 1806, along with another jurist named James Brown, was charged with creating a civil code for what was then called "the Territory of Orleans." *See* ALAIN A. LEVASSEUR, LOUIS CASIMIR ELISABETH MOREAU LISLET, FATER OF LOUISIANA CIVIL LAW 80 (1996). As Professor Alain Levasseur demonstrates in his illuminative book on the topic, Moreau-Lislet was given the task of creating a civil code based on the laws in force in Louisiana at that time, the substance of which was Spanish in origin. He was charged with this duty almost contemporaneously with the promulgation of the *Code Napoléon*. *Id*. at 64. To accomplish this task, Moreau-Lislet was perhaps the first civil law jurist to synthesize the French civil code with non-French law (the Spanish law that was at that time in force). In this effort, "[a]nterior laws were repealed, so far only as they were contrary to or irreconcilable with any of the provisions of the new." *Id*. at 65. Such a method is akin to the method used in crafting Tunisian civil law.

10. *See* Mohamed Kamel Charfeggine, *Présentation* in LIVRE DU CENTENAIRE DU CODE DES OBLIGATIONS ET DES CONTRATS 1906-2006 (Mohamed Kamel Charfeggine ed., 2006).

11. *See Id*.

Islamic law in Tunisian society.[12] Understanding how Tunisian civil law accommodates Islamic law can render the analysis of such debates more meaningful by revealing the degree to which constitutional references to Islamic law actually influence the presence or absence of Islamic legal influence in contemporary Tunisian legislation. A review of that legislation and its history presents a far richer and more nuanced view of Tunisian law and its sources and, importantly, gives reason for Tunisians of all political and ideological stripes to find a measure of accord and acceptance of their civil laws and their legal and philosophical lineage.

II. TUNISIAN LAW AND ITS STRATEGIC CONTEXT

The past decade or so has witnessed a marked increase in the attention paid to legal systems in the Middle East and North Africa.[13] Wars, revolutions, and the increasingly expeditionary foreign policies of western governments in the 21st century (which viewed foreign instability as a threat to domestic national security) have drawn the study of these legal systems into the foreign policy calculus of major countries seeking to promote stability or otherwise assert influence in the region.[14] Most recently, the challenges faced by countries in the region in the aftermath of the

12. *See* Library of Congress, *The Role of Islamic Law in Tunisia's Constitution and Legislation Post-Arab Spring* (Jan 31, 2014), http://www.loc.gov/law/help/tunisia.php.

13. *See* CHIBLI MALLAT, IRAQ: GUIDE TO LAW AND POLICY XXI (2009):"A search in American and British law journals yielded 250 entries for articles and notes on Iraq since 2003. There was hardly a tenth that number over the previous 50 years." *See also* University of London SOAS, http://www.soas.ac.uk/cimel/: "The Centre of Islamic and Middle Eastern Law was established in 1990 at the School of Oriental and African Studies in recognition of the growing importance of law in both its Islamic and Middle Eastern dimensions."

14. For a discussion of the link between comparative law and stability operations carried out by U.S. armed forces, *see* Dan E. Stigall, *Comparative Law and Stability Operations: A Basic Overview and a Few Thoughts on Lésion,* Comparativelawblog (21 May, 2010), available at http://comparativelawblog.blogspot.com/2010/05/comparative-law-and-stability.html.

Arab Spring are beginning to draw attention to the legal systems of North Africa and the Levant.[15] This is, in part, because the deleterious effect of that series of revolutions on the domestic institutions of affected countries has made those countries more prone to "destabilizing ethnic and sectarian rivalries"[16] and "have created opportunities for extremist groups to find ungoverned space from which to destabilize the new governments and prepare attacks against Western interests inside those countries."[17] A major issue of concern for these various regions is the way in which law and legal institutions can effectively address the needs of heterogeneous and pluralistic societies which must co-exist in the context of a unified legal and national framework.[18] This is especially true in those countries which are currently crafting new constitutions, writing new legislation, and wrestling with the complex issues associated with the proper role of religion and religious law.[19] But such legal harmonization is a challenge at

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15. *See Islamic Law in Transitioning Arab Spring Countries Subject of June 4 Program*, http://www.loc.gov/today/pr/2013/13-091.html (noting that the Law Library of Congress and the Library's African and Middle Eastern Division hosted a panel discussion on the role and impact of Islamic law in the developing constitutions and laws of transitioning countries in the Middle East/North Africa region in 2013.).

16. *See* Woodrow Wilson Center, *U.S. Intelligence: Arab Spring Generated Threats* (March 15, 2013), http://www.wilsoncenter.org/islamists/article/us-intelligence-arab-spring-generated-threats.

17. *Id.*

18. *See* Lally Weymouth, *The Arab Spring's Last Hope: An interview with Rachid Ghannouchi, the leader of Tunisia's largest political party*, http://www.slate.com/articles/news_and_politics/foreigners/2013/12/rachid_ghannouchi_interview_the_tunisian_leader_of_the_ennahda_party_on.html (quoting Rachid Ghannouchi as saying: "I believe that Tunisia will be successful in presenting a successful democratic model because we have a homogenous society, with a small Jewish minority.") *See also* Euro-Mediterranean Network for Human Rights, *The Reform of Judiciaries in the Wake of the Arab Spring*, http://www.refworld.org/pdfid/515009ac2.pdf ("The 'Arab Spring' is not only 'Arab'. Due regard should be given to the role and contribution of the different ethnic and linguistic minorities in the region, such as Amazigh, Kurds, and many others who equally participated in the democratic uprising.").

19. *See* Clark Lombardi, *Fierce Contest: Constitutional Islam and the Arab Spring*, World Politics Review, 08 October, 2013, http://www.worldpoliticsreview.com/articles/13280/fierce-contest-constitutional-islam-and-the-arab-spring: "The struggle between liberals and

every level. As Professor Mireille Delmas-Marty notes: "Ordering multiplicity without reducing it to sameness, admitting pluralism without giving up on building common law with a common measure for fair and unfair, can therefore seem an unattainable goal."[20]

Developments in Tunisia are of particular interest due to the fact that Tunisia, more than any other country in the region, is emerging as a model for Arab Spring countries seeking a successful transition to democracy. Tunisia, after all, was the genesis and the epicenter of the Arab Spring (which began as the "Jasmine Revolution").[21] While outcomes throughout the region have varied, in the aftermath of those tremorous spasms of discord and political upheaval, commentators have noted Tunisia's relatively successful transition from autocracy.[22] This success is due, in no small part, to the fact that Tunisia experienced a regime change but retained its vital state institutions[23] and has, throughout its process of transition, maintained relative (though imperfect) stability whereas neighboring countries have not.[24] As a result, Tunisia's very real potential for success has redefined it on the

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conservative Islamists often intensifies when constitutions are being drafted or amended. The Arab Spring has thus ushered in an era of fierce contest."

20. *See* MIREILLE DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD 1 (2009).

21. *See Tunisia and Democratic Transition*, Global Brief (March 9, 2011).

22. *See* Judy Woodruff, *Tunisia, birthplace of the Arab Spring, struggles to reset its democracy*, PBS, November 23, 2013, http://www.pbs.org/newshour/bb/world/july-dec13/tunisia_11-25.html.

23. *See* QUERINE HANLON, THE PROSPECTS FOR SECURITY SECTOR REFORM IN TUNISIA: A YEAR AFTER THE REVOLUTION 5 (U.S. Army War College, Strategic Studies Institute, September 2012).

24. *See* Aziz El Yaakoubi, *Tunisia starts voting on new constitution*, Reuters, Fri Jan 3, 2014: "[Tunisia's] final steps to full democracy have been widely watched as a possible model in a region where Egypt, Libya and Yemen, which also ousted their leaders in 2011, are struggling with violence and instability as well as resurgent Islamism."

world stage as a regional anchor, a lodestar for countries in transition, and "the Arab Spring's last hope."[25]

Central to Tunisia's transition from autocracy to democracy is the question of what law will apply and the sources from which that law is to be derived.[26] The major focus of analysis and debate in this regard has been on Tunisia's new constitution,[27] which, after intense national debate, was formulated without reference to Islamic law as a source of law.[28] Very little attention, however, has been paid to the domestic civil law in force in Tunisia and the sources of that law, the analysis of which demonstrates that Islamic law remains part of Tunisian civil law.[29] While the retention of Islamic law in the Tunisian legal corpus is most evident in its Personal Status Code, which is based on a progressive interpretation of Islamic law and Tunisian custom,[30] Islamic law is

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25. *See* Weymouth, *supra* note 18.

26. *See* Asma Ghribi, *Role of Islamic Law in Tunisian Constitution Provokes Debate*, Tunisialive, 22 March 2012, www.tunisia-live.net/2012/03/22/role-of-islamic-law-in-tunisian-constitution-provokes-debate/#sthash.mgLeAjgP.dpuf.

27. *See* Aziz El Yaakoubi, *supra* note 24.

28. Heba Saleh, *Tunisia finalises new constitution*, FT.com, January 24, 2014,http://www.ft.com/cms/s/0/b029551a-8498-11e3-b72e-00144feab7de.html#axzz3FDLndjuM: "The document says that Islam is the religion of the Tunisian state, but makes no mention at all of Islamic sharia law."

29. *See* Lombardi, *supra* note 19:

> The [Ennahda] party thus supported the adoption of a constitution that did not explicitly require the constitution to respect Islam—preferring to ensure that the constitution left room for Islamists to take power and impose laws that reflected their understanding of Islam. Ennahda appears, in fact, to favor a fairly liberal understanding of Islam, but one could imagine a more conservative group taking a similar path.

See also Thousands rally demanding sharia law in Tunisia, AFP, Mar 16, 2012.

30. *See* Jane Adas, *Tunisia's Personal Status Code and Modernity* (Development and Human Rights, Washington Report on Middle East Affairs, March 2007), at 42-43 (noting that "[e]lements of the code were promulgated in a 1939 draft based on Islamic canon law under the Ottoman Bey, when Tunisia was still under French control," and that:

> Mohamed Habib Cherif, minister of justice and human rights, observed that the Personal Status Code is deeply anchored in Tunisian society, where women have been an important presence since Queen Dido founded Carthage. The godfather of the Personal Status Code was Tunisian reformist scholar Tahar Haddad, who in 1930 published Our Women in Religion and Society. Elements of the code were promulgated in a 1939 draft based on Islamic canon law under the

also firmly entrenched in the ordinary civil law which regulates the daily transactions of Tunisian citizens. Importantly, however, an analysis of Tunisian civil law also demonstrates that the presence of Islamic legal influence in Tunisian civil law has not been a negative aspect or a harmful element, nor has Islamic law's presence in Tunisian civil law over the past century served to significantly alter the physiognomy of Tunisian society into something unrecognizable to Western secular sensibilities. To the contrary, the Tunisian code demonstrates how Islamic law can function in a modern context alongside continental civil law as part of a mixed jurisdiction in which domestic civil law is derived from a multiplicity of sources.[31]

This article, therefore, provides a focused analysis on Tunisian civil law and its role in post-revolution Tunisia, specifically focusing on the Tunisian Code of Obligations and Contracts, which, since its promulgation in 1906, has been described as "the first durable codification of Tunisian civil law."[32] Through an analysis of the history, sources, and operation of Tunisian civil

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> Ottoman Bey, when Tunisia was still under French control. The 1956 Code, Cherif said, erased discriminatory traditions, such as customary marriage and secret divorce, and reformed the judiciary by replacing the Islamic, Christian and Jewish courts with a uniform, secular system.).

31. *See* Seán Patrick Donlan, *The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture*, 4 J. CIV. L. STUD. 355 (2011) (describing "mixed legal systems" as "diverse state laws [that] emerge from different legal traditions, . . ."). *Id*. at 359-60, and noting that:

> Neither the hybridity nor the diffusion of laws is new. Within Europe, law predated the state and the creation of genuinely national laws; a legal "system" centered on the modern nation-state, and the elimination of competing jurisdictions and marginalization of non-legal norms was a very long historical process. Especially before the 19th century, there were multiple contemporaneous legal orders co-existing in the same geographical space and at the same time. Modern national traditions are unique hybrids rooted in diverse customary or folklaws, summary and discretionary jurisdictions, local and particular *iura propria*, the Romano-canonical "learned laws" or *ius commune*, and other trans-territorial *iura communia* (including feudal law and the *lex mercatoria*). *Id*. at 356.

32. *See* Kamel Charfeggine, *supra* note 10.

law, the article demonstrates that this body of law is remarkably well-suited to the task of accommodating a diverse society, parts of which might insist on or desire the application of certain Islamic legal norms.[33] Moreover, it is a historically important document as it is also an early example of legal fusion—"*une tentative de conciliation unique en son genre entre droits civils de pays européens et droit civil musulman.*"[34]

A. Tunisian Legal History: A Brief Overview

Before delving too deeply into Tunisian legislation, it is worth noting some key aspects of Tunisia's legal history which have served to shape and continuously influence the country's legal physiognomy. The geographic territory that we associate today with the modern country of Tunisia[35] is one with a rich history of diverse people and successive empires, all of which influence modern Tunisia's fascinating legal culture. The Punic Wars brought Tunisia under the Roman Empire in 149 BC.[36] Tunisia's subsequent "integration into the Roman and Byzantine Empires led to the Christianization of the region in the first several centuries CE."[37] Arab Muslim armies, however, "conquered Tunisia in the

33. *See* Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT'L & COMP. L. 293, 295 (2009-2010): "That the Muslim world is replete with political institutions and leaders (described herein, in their multitudinous varieties and approaches, as 'Islamist') who seek a greater role than this for the shari'a in the affairs of the state is obvious to anyone even faintly familiar with the region."

34. *See* Faouzi Belknani, *Code des obligations et des contrats et la codification* in LIVRE DU CENTENAIRE DU CODE DES OBLIGATIONS ET DES CONTRATS 1906-2006 at 17 (Mohamed Kamel Charfeggine ed., 2006).

35. Although this article, for the sake of clarity, consistently refers to "Tunisia," it is important to keep in mind Professor Lisa Anderson's admonition that "it is an anachronism to refer . . . to "Tunisia" and "Libya" when discussing the 19th century. Until they were occupied by the Europeans, these countries were known by the names of their capital cities, Tunis and Tripoli." LISA ANDERSON, THE STATE AND SOCIAL TRANSFORMATION IN TUNISIA AND LIBYA, 1830-1980 at 13 (1986).

36. *See* The Berkley Center for Religion, Peace, and World Affairs, *Tunisia: From the Roman Empire to Ottoman Rule*, http://berkleycenter.georgetown.edu/essays/tunisia-from-the-roman-empire-to-ottoman-rule.

37. *Id.*

late seventh century and initiated the spread of Islamic influences throughout the country."[38] Coextensive with that series of rulers, Roman law prevailed in the early history of the territory known today as Tunisia, until the Arab conquest in the 7th Century AD effectively replaced Roman law with Islamic law.[39] During that latter period, among the predominantly Muslim population, the Maliki school of Islamic law became most prominent during the Aghlabite dynasty, though a notable minority of adherents to the Hanafite school also existed in the region.[40] Islamic law, however, applied only to Muslims during this period. The Jewish population was still governed by Mosaic law and Christians by ecclesiastic law (which retained elements of Roman law).[41] Professor Faouzi Belknani, a legal scholar who has served on faculties in both Tunisia and Qatar, notes that, in the 12th century, Muslim jurists compiled collections fatwas and juridical opinions on diverse questions of law,[42] such as the Hanafite compilations of Alhindia and Alamkîrya or the Malikite collection called Al-Mi'yâr by the jurist al-Wanshârisi.[43]

The modern administration of Tunisia began in the 19th Century,[44] which saw the creation of multiple distinct jurisdictions and courts, the applicability of which depended on the religion of the party. For instance, Muslims had access to Malikite or Hanifite courts, while Jews had access to rabbinical courts, etc.[45] As a general matter, however, commentators note that, before 1885, civil law in Tunisia was largely regulated by Islamic law.[46] It was also during the 19th century that efforts to codify Tunisian law began. The Civil and Penal Code promulgated in 1861 by Sadek

38. *Id.*
39. *See* Afif Gaigi, *Tunisia* in YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 417 (1994).
40. *Id.* at 417-18.
41. *Id.* at 418.
42. *See* Belknani, *supra* note 34, at 12.
43. *Id.*
44. *See Id.* at 14 n.44.
45. *See* Afif Gaigi, *supra* note 39, at 418.
46. *See* Belknani, *supra* note 34, at 14.

Bey contained provisions inspired by Maliki and Hanafi schools of Islamic law,[47] but was short lived and was repealed by 1864.[48] In 1885, the promulgation of the Tunisian *Code foncier* marked the beginning of a process of progressive diminution of Islamic law's applicability in Tunisia.[49] The momentum toward codification had begun and would only garner force.

It is also worth noting that, in 1876, as the global movement toward codification began, perhaps the most significant early attempt at codification of Islamic law came with the promulgation of the Ottoman code known as the Mejelle.[50] That compilation would, however, have no immediate influence on the development of Tunisian law and was never fully in force in the region today associated with modern Tunisia—a region which, as noted, was deeply immersed in its own legislative initiatives by the time the Mejelle was promulgated.[51] In that regard, commentators note that the Ottoman legal reforms of the late 19th century occurred parallel to Tunisian legal developments, but did not have significant impacts in Tunisia, which "retained substantial autonomy under the rule of the Husaynid *Bey*. . . ."[52] Nonetheless, as discussed further below, the Mejelle would come to influence modern Tunisian civil law in later years.

In 1881, with the Treaty of Bardo, Tunisia's period as a French protectorate began. During this time, the Bey maintained power in theory, but was effectively under the power of a foreign (French) sovereign.[53] French legal influence became more pronounced in

47. *See* Afif Gaigi, *supra* note 39, at 418.
48. *Id.* at 419.
49. *See* Belknani, *supra* note 34, at 14.
50. *Id*. It is interesting to note that the Mejelle, though frequently characterized as the first codification of Islamic civil law, is predated in Tunisia by Sadek Bey's Civil and Penal Code of 1861.
51. *See* Maaike Voorhoeve, *Judges in a web of normative orders: judicial practices at the Court of First Instance Tunis in the field of divorce law* 52 (Ph.D. Thesis, University of Amsterdam 2011), available at http://dare.uva.nl/record/400650.
52. *Id.*
53. *See* Afif Gaigi, *supra* note 39, at 419.

1883 after signing of the Treaty of Marsa formally established the French protectorate and permitted France to directly undertake legislative reforms.[54] This opened the door to far more expansive and ambitious legal projects, among the first of which was an effort to codify Tunisia's civil and commercial law based on the French model of codification,[55] an effort which, for its successful completion, required a deep knowledge of continental civil law, sensitivity to local Tunisian custom, and expertise in Islamic law. This effort resulted in a remarkable piece of legislation which has now been in force for well over a century.

B. David Santillana and the Synthesis of Civil Law and Islamic Law in Tunisia

During Tunisia's time as a French protectorate, the task of developing a codification of Tunisian civil law ultimately fell on a codification commission composed of four French scholars and a Tunisian jurist named David Santillana.[56] Born in Tunis in 1855, Santillana came from a Jewish family of European ancestry.[57] Commentators suggest that Santillana's family fled to Tunisia after the fall of Grenada and the expulsion of the Jewish population.[58] Historical records note that his grandfather, David Diaz Santillana,

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54. *Id.* at 419.
55. *See* Charfeggine, *supra* note 10.
56. Santillana is a notable figure in legal history, whose life and circumstances paralleled, in interesting ways, that of Moreau-Lislet, in that both were civil law jurists whose presence in the jurisdictions where they were to have an impact was the result of displacement—making each something of an outsider, but not without a definite link with and affinity for their adopted jurisdiction. *See* LEVASSEUR, *supra* note 9, at 80.
57. *See* Nadhir Ben Ammou, *L'Avant Propos De L'Avant-Projet De Code Civil Et Commercial Tunisien* in LIVRE DU CENTENAIRE DU CODE DES OBLIGATIONS ET DES CONTRATS 1906-2006 at 65 (Mohamed Kamel Charfeggine ed. 2006).
58. *Id. See also Jewish History Sourcebook: The Expulsion from Spain, 1492 CE*, available at http://www.fordham.edu/halsall/jewish/1492-jews-spain1.asp: "In the spring of 1492, shortly after the Moors were driven out of Granada, Ferdinand and Isabella of Spain expelled all the Jews from their lands and thus, by a stroke of the pen, put an end to the largest and most distinguished Jewish settlement in Europe."

was born in Tunis in 1780 and served as a translator for the British Consulate General.[59] His father, Moses Santillana, succeeded his grandfather as consular interpreter[60] and became a close companion of Richard Wood, the British Consul in Tunisia, who saw to it that the younger David Santillana was educated in an Italian school in Tunis.[61] Thereafter, Santillana studied law in Rome and, after graduation, worked as an attorney both in Rome and Florence,[62] though still playing a role in controversial legal matters across North Africa, such as the legal defense of Ahmed Orabi, an Egyptian military officer who staged a revolt against the British and French presence in Egypt.[63]

Cultivated in such a cosmopolitan and learned environment, Santillana grew to become a comparative law scholar, a practitioner, and an expert in Islamic law who understood the potential for Islamic law's viability in a modern context.[64] As a result, when the Commission for the Codification of Tunisian Laws was established in 1896, Santillana was a natural choice to preside over the commission along with four French legal scholars. This commission would produce a draft civil code which would eventually become enacted in part as the Tunisian Code of Contracts and Obligations.[65] To create this remarkable piece of legislation, Santillana and his team would draw on a plurality of

59. *See* Great Britain, Parliament, House of Commons, Reports from Commissioners, Naturalization Commission, Appendix to the Report, at 9 (1869).

60. *Id.*

61. *See* Ammou, *supra* note 57.

62. *Id.*

63. ALEXANDER MEYRICK BROADLEY, HOW WE DEFENDED ARÁBI AND HIS FRIENDS: A STORY OF EGYPT AND THE EGYPTIANS 75 (1884) (referring to Santillana as "one of the most accomplished living Arabic scholars").

64. *See* Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 HUM. RTS. Q. 202, 213-14 (1990) (quoting Santillana as writing: "There is no doubt that the high ethical standard of certain parts of Arab law acted favourably on the development of our modern concepts and therein has its enduring merit.").

65. *See* GEORGE N. SFEIR, MODERNIZATION OF THE LAW IN ARAB STATES 39 (1998).

sources, namely the French civil code,[66] the German civil code,[67] several schools of Islamic jurisprudence (especially the Malikite and Hanafite schools),[68] and the Ottoman codification of Islamic law known as the Mejelle.[69] Commentators also note that their work was influenced by Tunisian custom, French jurisprudence, and the jurisprudence of French courts which were active in Tunisia during its time as a French protectorate.[70] The character of the Tunisian code, therefore, is as diverse and cosmopolitan as its principal author.

The creation of such a code—successfully addressing the needs of so diverse a polity—was a complex endeavor. An analysis of his work demonstrates that Santillana synthesized diverse sources of continental civil law with Islamic law and Tunisian custom through four primary methods. The first of these was by direct incorporation of Islamic law and legal devices into the codal text. The second method was through exploiting the natural parallelisms that exist between Islamic law and continental civil law. In that regard, scholars have noted that "Islamic Law is rooted in Arabic and Middle-Eastern legal traditions, but through its evolution, it has assimilated elements of Roman law."[71] The third method used by Santillana consisted of excepting Muslims from aspects of the civil law which might violate the tenets of Islamic law and, thereby, permitting certain transactions between Muslims to occur in a way that comports with Islamic law. The fourth method used by Santillana involved imparting a religious dimension to otherwise secular legal devices, a technique which, in the context of Tunisia, naturally tilts in favor of Islamic law. The result is a codification of civil law which, at the same time, adheres to the

66. *See* Belknani, *supra* note 34, at 18.
67. *Id.*
68. *Id.*
69. *See* Belknani, *supra* note 34, at 12.
70. *See* Voorhoeve, *supra* note 51, at 54.
71. *See* Ayman Daher, *The Shari'a: Roman Law Wearing an Islamic Veil?*, 3 HIRUNDO: THE MCGILL JOURNAL OF CLASSICAL STUDIES 91, 92 (2005).

modern civil law model inspired by the French civil code and is also uniquely Tunisian.

III. THE TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS

Tunisia's unique legal history and development resulted in a somewhat different approach to codification than what is seen elsewhere in civil law jurisdictions. Rather than a single, cohesive code governing all civil law—or even the "codal dualism"[72] that characterizes countries in the Middle East and North Africa with codes drafted by Abd al-Razzaq Al-Sanhūrī—Tunisian legal development has been characterized by what has been called "thematic codification."[73] For instance, Tunisian property law is now largely governed by the law of 12/2/1965 which enacted the Code of Real Rights,[74] the Personal Status Code governs "personal status law" such as marriage, divorce, and successions,[75] etc. As a result, among the most notable aspects of the Tunisian Code of Obligations and Contracts is its intensely subject-specific focus. Centered, as its name implies, on the formation of obligations and contracts, the Tunisian Code lacks provisions of broader applicability to persons and things that characterize most modern civil codes. In that regard, the Tunisian Code consists of only 1531 total articles which are divided into two books: Book I (Obligations in General);[76] and Book II (Different Contracts and Quasi-Contracts Relating Thereto).[77] Commentators have noted

72. For a discussion of "codal dualism," *see* Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, J. TRANSNAT'L L. & POL'Y 16, 47 (2006).

73. *See* Belknani, *supra* note 34, at 40.

74. *See* Afif Gaigi, *supra* note 39, at 426.

75. *See* Belknani, *supra* note 34, at 40. Given the diversification of codes in Tunisia, it must be emphasized that the Tunisian Code of Obligations and Contracts represents but one facet of the corpus of laws that comprise the entirety of Tunisian civil law. It is, nonetheless, a critical pillar in the architecture of the Tunisian legal system.

76. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Book I (Arts. 1-563).

77. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Book II (Arts. 564 – 1531).

that this division, in essence, divides the Tunisian code into a "general part" and a "special part," each of which reflects a diversity of sources.[78]

A. Sources of Law

As noted, the Tunisian Code of Obligations and Contracts is derived from a plurality of sources, though a study of the manner in which those sources are referenced or incorporated into the code reveals a fascinating array of legislative feats and codal compromises which were necessitated by the political environment in which the Tunisian code germinated. Interestingly, in contrast to the relatively meticulous and comprehensive approach which characterizes the rest of the Tunisian code, the legal provisions which concern the Tunisian code's sources of law (those which may be called upon in interpreting the code's provisions) tend to be somewhat recondite. In setting forth the sources of law that may be drawn upon for the proper interpretation of codal provisions, the Tunisian code states that, in applying the law, one shall give it no other meaning than that resulting from the ordinary meaning of the law's provisions and the intent of the legislature.[79] The code specifically states that "[w]hen the law is expressed in general terms, it must be understood in the same sense."[80] Likewise, where the law reserves a particular case, it applies to all other cases which are not expressly excepted. Where a case cannot be decided by a specific provision of the law, a court may look to the provisions governing similar cases.[81] If the solution is still in doubt, the Tunisian code states that a court may decide according to "general rules of law,"[82] a phrase which is conspicuously inexact and nebulous.

78. *See* Belknani, *supra* note 34, at 14.
79. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 532.
80. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 533.
81. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 535.
82. *Id*.

Both the phraseology and the location of these articles of the Tunisian code are in striking discord with the articles addressing sources of law in most other civil codes, including civil codes in the Middle East and North Africa. In comparable codes, the sources of law are generally set forth in Article 1 of the civil code—an initial article which typically articulates a predictable hierarchy of sources.[83] For example, the Libyan Civil Code, Syrian Civil Code, Egyptian Civil Code, and Algerian Civil Code all contain an initial article (Article 1) which governs the sources of law and, in essence, states that the written provisions of the code govern all matters. In the absence of written provisions, Article 1 of those codes uniformly states that courts may adjudicate matters in accordance with the principles of Islamic law.[84] In the absence of an Islamic rule on a particular matter, the Libyan, Syrian, Egyptian, and Algerian codes permit courts to look to custom and the principles of equity.[85]

But the Tunisian code is different and does not reference Islamic law as a subsidiary source of law, nor any other specific body of law. In that regard, Tunisian courts have held that nothing in the Tunisian code permits recourse to Islamic law as a source of law,[86] and commentators have noted that the very ambiguous reference in Article 535 to the "general rules of law" offers little clarity with regard to other potential sources of law and may have been a purposive ambiguity deemed necessary in this early codification of Tunisian law.[87] Otherwise stated, it has been

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83. *See, e.g.*, LOUISIANA CIVIL CODE (LA CIV. CODE) art. 1: "The sources of law are legislation and custom;" LA CIV. CODE art. 4: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."

84. *See* LIBYAN CIVIL CODE, Art. 1, para. 2.; SYRIAN CIVIL CODE, Art. 1.

85. *Id*.

86. *See* STÉPHANE PAPI, L'INFLUENCE JURIDIQUE ISLAMIQUE AU MAGHREB 235 n.1273 (2009).

87. *See* M. Mohamed Kamel Charfeddine, *Esquisse sur la méthode normative retenue dans l'élaboration du Code tunisien des obligations et*

suggested that this is a simple prudence, designed to allow the code to take root and become integrated into Tunisian society.[88]

Interestingly, Professor Haider Ala Hamoudi, in his excellent work on post-conflict constitution drafting in Iraq, posits that when formulating national legislation such as a constitution in a post-conflict environment where key stake-holders may have pronounced "identitarian commitments," it is sometimes advantageous for drafters to permit such legislative lacunae to exist so that long-term solutions can be incrementally achieved.[89]

> [T]he solution well may be to proceed with constitution making, but on particularly difficult problems—namely those in which any view to the long term is likely to raise the prospect of intractable disputes based on quite inconsistent conceptions of statehood—to defer the problem for later, incremental resolution. In other words, on such matters of dispute, the solution might well be, counterintuitively, to push the problem off in a manner that will reduce the stakes.[90]

Santillana seems to have taken just such an approach with the Tunisian code insofar as it remains ambiguous as to which sources of law may be invoked by Tunisian courts. There are, however, other ways that a legal source can find influence in a civil code beyond express references. Even where a code does not expressly permit recourse to a certain body of law—such as Islamic law—elements from a legal tradition may still find relevance by being

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des contrats, 48 REVUE INTERNATIONALE DE DROIT COMPARÉ. 421, 440 (1996):

> *Ambiguïté voulue ou ambiguïté dictée par la crainte d'une mise en cause par les juges de l'œuvre d'unification législative du droit des obligations réalisée pour la première fois en Tunisie? A moins qu'il ne s'agisse que d'une simple prudence pour enraciner le nouveau code et permettre son intégration en imposant le respect strict de ses dispositions.*

88. *Id.*

89. *See* HAIDER ALA HAMOUDI, NEGOTIATING IN CIVIL CONFLICT: CONSTITUTIONAL CONSTRUCTION AND IMPERFECT BARGAINING IN IRAQ 224 (2013).

90. *Id.*

incorporated into the codal text or through more subtle mechanisms which permit those sources to exude influence. This is certainly true for Santillana's work in the Tunisian code which sought to incorporate Islamic legal principles and to blend those legal rules with European legal norms, effectively fusing two normative orders.[91]

B. Formation of Obligations and Contracts

Belknani notes that the general provisions relating to obligations in the Tunisian code are essentially drawn from the continental civil law tradition.[92] Continental civil law, in that regard, envisions an obligation as something more expansive than simply a contract (though a contract can certainly form an obligation). Deriving the concept of an obligation from Roman law, civil law theorists have maintained that an obligation is "a legal relationship that compels us to give, to do, or to not do something."[93] This allows for obligations that are bilateral (such as contracts) but also for unilateral obligations by which only a single party is bound.[94]

> In Roman law, according to a text by Gaius, all obligations derive from contract, delict, and several other causes. On that basis, the Corpus Juris asserts the existence of four sources of obligations which, as universally accepted by doctrine with almost no exception, are contracts, quasi-contracts, delicts, and quasi-delicts.[95]

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91. *See* Voorhoeve, *supra* note 51, at 54: "Santillana explicitly referred to the Ottoman Mecelle and Qadri Pasha's works as sources of inspiration, as well as Sahnun's Mudawwana and Khalil's Mukhtasar. When choosing between different solutions from Islamic law, the principle that was closest to French law was chosen."

92. *See* Belknani, *supra* note 34, at 21.

93. A.M. DEMANTE, 3 PROGRAMME DU COURS DE DROIT CIVIL FRANÇAIS 246 (1833).

94. DEMANTE, *supra* note 93, at 248.

95. SAÚL LITVINOFF, 5 LOUISIANA CIVIL LAW TREATISE, THE LAW OF OBLIGATIONS, §1.6, at 10 (2001).

The Tunisian code's first article states that obligations are derived from conventions and other declarations of will, quasi-contracts, delicts, and quasi-delicts.[96] Similarly, under Tunisian law, the elements necessary for a valid obligation are: (1) the capacity to form an obligation; (2) a valid declaration concerning the essential elements of the obligation; (3) a definite object that can be the object of an obligation; and (4) a lawful cause for the obligation[97]—requirements which echo civil law based on the French model and which adopt the continental civil law paradigm.[98] It must be noted, however, that these rules are also consistent with Islamic law which requires people entering into contracts to be of sound mind,[99] a lawful object for contracts,[100] and which requires contracts to have a lawful cause.[101]

Under Tunisian law, all persons have the capacity to form obligations unless declared otherwise by the law[102] and, notably, the Tunisian Code expressly states that religious differences between muslims and non-muslims has no bearing on the capacity to contract, nor do such religious differences impact obligations between muslims and non-muslims.[103] Importantly, however, the Tunisian code—as explained more fully below—contains a host of

96. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1. This article is almost identical in substance to Article 1757 of the Louisiana Civil Code which states that "[o]bligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other acts or facts. LA CIV. CODE art. 1757

97. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 2.

98. DEMANTE, *supra* note 93, at 252: "*Ces conditions sont au nombre de quatre: le consentement, la capacité, l'objet et la cause*."

99. MEJELLE, Art. 957 ("Infants, madmen and people of unsound mind (Ma'tuh) are of themselves prohibited from dealing with their property"), and Art. 966 ("When an infant has not understanding for business (Art. 943) even if his guardian give him permission, his verbal dispositions of property are fundamentally invalid.").

100. MEJELLE, Art. 197 ("The existence of the thing sold is necessary") and Art. 199 ("It is necessary that the thing sold should be [permitted by law].").

101. MEJELLE, Art. 211.

102. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 3.

103. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 4.

provisions that provide for exceptions in the case of contracts between muslims.

1. Unilateral Acts

Civil law doctrine recognizes, to varying degrees, the concept of a unilateral act.[104] Planiol attributed the more modern approach of permitting a unilateral declaration to form a binding obligation to German jurists.[105] While a relatively recent innovation during Planiol's era, unilateral acts are now well-founded in modern civil law doctrine. As Litvinoff noted, "under certain circumstances, the law may attach consequences to a merely unilateral declaration of will which is promissory in nature."[106] Under Tunisian law, while a mere promise does not operate to create an obligation,[107] a promise made by posters or other means of advertising which offer a reward to one who finds a lost object or accomplishes a task can create an obligation, and is deemed to be accepted by those who, even without having knowledge of the offer, find the thing or accomplish the task.[108] In such circumstances, the author of the promise is required to provide the promised reward.[109] Interestingly, while these provisions comport with the civil law model, they are drawn more from the German model than the French Code Civil and mirror quite closely the 1984 amendments to the Louisiana Civil Code, which "adopted the German-oriented

104. The degree to which unilateral declarations are considered sources of obligations varies among modern civil codes. *See, e.g.*, Pablo Lerner, *Promises of Rewards in a Comparative Perspective*, 10 ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 53, 57 (2004):

> If Puffendorf definitively installed the pactum as the central idea, it was Domat who simplified the problem by putting forth the agreement as the only expression of the autonomy of will. His ideas were adopted by the French legislator, and so the French code does not recognize the unilateral will as a source of obligation.

105. 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 273 (9th ed., 1923).
106. LITVINOFF, *supra* note 95, at 13-14.
107. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 18.
108. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 19.
109. *Id*.

solution, reserving the promise of reward only for the case of performance of a specific fact."[110]

Tunisian law further states that the promise of reward may not be revoked where the revocation occurs after execution has begun.[111] One who has set a deadline for the completion of the task envisioned by the promise is deemed to have waived the right to revoke the promise until the expiration of the time limit.[112] If several people have accomplished the task at the same time, the promised prize or reward is shared between them.[113] If they have done it at various times, the award belongs to the first to accomplish it. If they each accomplished a portion of the task, then the reward is shared proportionally.[114] If the reward cannot be shared but can be sold, then the price will be shared among the beneficiaries.[115] If this price or reward is an object that has no market value or can only be given to one person, then according to the terms of the promise, the decision is made by drawing lots ("*la décision est remise à la voie du sort*").[116] This latter provision is also taken directly from the German civil code,[117] thus demonstrating Santillana's reliance on a plurality of European civil law sources when drafting the Tunisian code.

2. Contracts (Bilateral Acts)

The notion of a bilateral act, of course, dates back to ancient times and was well-developed in Roman law.[118] Modernity and

110. Lerner, *supra* note 104, at 63.
111. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 20.
112. *Id*.
113. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 21.
114. *Id*.
115. *Id*.
116. *Id*.
117. *See* BGB, Art. 659(2):
> If the act has been undertaken simultaneously by more than one person, then each is entitled to an equal portion of the reward. Where the reward cannot be shared due to its quality, or if, according to the terms of the promise of a reward, only one person is to be given the reward, then the matter is decided by drawing lots.

118. PLANIOL, *supra* note 105, at 333.

commerce only increased the frequency of this method for forming obligations. Writing in the 19th century, civil law jurist A.M. Demante noted that, even during that era, the majority of obligations were formed through the creation of contracts.[119] The general rule in modern civil law is that a contract is formed by the consent of the parties to the contract.[120] Consistent with this theory, under Tunisian law, a contract is perfected only by agreement of the parties on the essential elements of the obligation, as well as on all other lawful clauses that the parties consider essential to the agreement.[121] Barring a provision to the contrary, changes by the parties by mutual agreement to the contract which occur immediately after its conclusion do not constitute a new contract, but are considered part of the initial agreement.[122] Even so, a contract is not perfected when the parties expressly reserve certain clauses to form the object of a subsequent agreement.[123] The agreement reached under these conditions, on one or more such clauses, does not constitute the conclusion of a contract, even if a preliminary agreement has been drawn up in writing.[124] In any case, reservations or restrictions which are not brought to the attention of the other party are not set aside or restrict the effects of the declaration of intent as provided for in its apparent expression.[125]

C. Transfer of Obligations

Consistent with the continental civil law tradition, the Tunisian civil code permits the transfer of obligations. As Litvinoff noted, "[a]s an asset in his patrimony, the creditor or obligee may transfer or assign the obligation to another if he so wishes. Also, the debtor

119. A.M. DEMANTE, 2 PROGRAMME DU COURS DE DROIT CIVIL FRANÇAIS 246 (1831).
120. PLANIOL, *supra* note 105, at 333.
121. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 23.
122. *Id*.
123. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 24.
124. *Id*.
125. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 25.

may substitute another person at his end of the relation. In both instances the obligation remains the same, however."[126] Under Tunisian law, the transfer of rights and claims of an original creditor to another person can take place, either pursuant to the provisions of Tunisian law or pursuant to an agreement between the parties.[127] Rights or claims that are not yet expired may be transferred,[128] though such a transfer may not operate for future rights.[129] Similarly, the transfer is considered null: where the right or claim may not be transferred by virtue of its constitutive title or by law; where it is intended that the rights or claims are of a purely personal nature; or where the debt cannot be subject to seizure or attachment—though when the right or claim is susceptible of being seized with the concurrence of a party or to have its value determined, the assignment of the right will be valued in the same proportion.[130] The assignment of a claim includes the accessories that are integral to the claim, such as privileges, with the exception of those that are personal to the assignor.[131] It includes wages, mortgages and sureties unless there is an express stipulation to the contrary.[132]

Notably, an assignment is also assumed to include accrued interest unless there is a stipulation to the contrary. This latter provision relating to interest, however, is not applicable between Muslims.[133] This exception pertaining to Muslims, of course, is due to the provisions of Islamic law which disallow the charging of interest in the course of transactions.[134] The authority for this doctrine in Islamic law—which is not interpreted with precise

126. LITVINOFF, *supra* note 95.
127. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 199.
128. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 200.
129. *Id*.
130. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 201.
131. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 210.
132. *Id*.
133. *Id*.
134. ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE ACCORDING TO THE HANAFI, MALIKI, SHAFII AND HANBALI SCHOOLS 294-95 (1911).

uniformity[135]—is from Quranic exhortations against the idea of *ribā* (or interest)[136] and sunna in which the Prophet is reported to have said as follows:

> (Sell) gold for gold and silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt of the same kind for the same kind and the same quantity for the same quantity, from hand to hand and if they differ from each other in quantity sell them as you like but from hand to hand.[137]

In permitting an exception to ordinary civil law for Muslims where interest is involved, Santillana adopts a civil law concept but in a way which permits compatibility with Islamic legal tenets.

D. Extinction of Obligations

The Tunisian code's articles on the extinction of obligations are drawn from civil law in that they incorporate civil law concepts of remission of debt, novation, compensation, and confusion. Notably, however, these articles also incorporate Islamic legal concepts that provide traditional protections and limit the civil law concepts to the extent their operability could transgress Islamic legal boundaries.

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135. RAHIM, *supra* note 134, at 294:
> The Hanafi doctors have interpreted the tradition to mean that whenever an article belonging to the description of similar of capacity or of weight is sold or exchanged for an article of the same species, neither party is allowed to receive anything in excess of the quantity sold by himself , in other words absolute equality in quantity is insisted upon. The Shafi'is hold that the law of riba only applies to articles of food and such things as constitute price, namely gold and silver.

136. YASIN DUTTON, THE ORIGINS OF ISLAMIC LAW: THE QUR'AN, THE MUWATTA, AND MADINAN 'AMAL 149 (2002):
> Ribā, like zakat, was another situation where the general judgment in the Qur'an as clear but the precise details problematic. The main prohibition against ribā comes in Q 2: 278-9 where we read that those who practice ribā should be aware that they have engaged in "a war with Allah and His Messenger," from which the "ulamā" derived the judgement that those who engage in ribā and refuse to repent are, if they have a power-base [are to be fought as rebels].

137. RAHIM, *supra* note 134, at 294.

1. Remission of Debt

A remission of debt, according to civil law doctrine, is a unilateral act by which a creditor renounces his or her rights against a debtor.[138] Such an act produces a liberation of the debtor, extinguishing the debt and all accessory obligations pertaining to the debt.[139] Tunisian law incorporates this concept, though alloyed with Islamic legal concepts. Under Tunisian law, an obligation is extinguished by the voluntary surrender of the obligation by a creditor that is considered capable of making a donation.[140] The remission takes effect as long as it has not been expressly refused by the debtor.[141] Tunisian law also notes, however, that the remission granted by an ill person to a third party during his or her last illness is valid up to a maximum of one-third of what remains in the succession after the payment of debts and funeral expenses.[142] This latter provision is derived from Islamic law which generally places a limit of one third of the estate on the amount which a person may bequest (preserving the remainder of the decedent's estate for family members)[143] and, therefore, placing cautionary limits on the ability of an ill person to alienate property and extinguish debts in excess of that limit. For instance, the Mejelle provides as follows:

> If someone in his mortal sickness has given something to one of his heirs and has died, if the other heirs do not allow it, that gift is not good.
> But if he has made a gift and delivered it to a person who is not an heir of his, and a third of his estate is sufficient for

138. PLANIOL, *supra* note 105, at 198.
139. *Id*.
140. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 350.
141. *Id.*
142. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 355.
143. *See, e.g.*, UN-Habitat, Islam, Land & Property Research Series, *Paper 6: Islamic Inheritance Laws and Systems*, at 10 (2005), available at ww2.unhabitat.org/programmes/landtenure/documents/ILP%206.doc: "[A] Muslim's ability to bequeath is restricted to only one-third of an individual's estate under certain rules with the remaining two-thirds devolving according to the compulsory inheritance rules."

> the whole of the gift, it is good.
> If it is not sufficient, and the heirs do not permit the gift, the gift is good up to the amount, for which the third of the estate is sufficient. The rest, the donee is compelled to return.[144]

The Tunisian code, therefore, incorporates the Islamic legal limitation of "one third of the estate" into the civil law concept of remission of debt and protections designed to maintain the integrity of Islamic inheritance law. Otherwise, the Tunisian codal language is largely consistent with other modern civil codes, holding that the release of any debt in general and without reservation cannot be revoked.[145] Special provisions, however, exempt the finality of such remissions made by an heir in the case of an inherited debt and where that remission was justified by fraud or deceit on the part of the debtor or other people acting in complicity with the debtor.[146] It is worth noting here, however, that many continental civil law jurisdictions, likewise, maintain the concept of "forced heirship" (deriving their rules in that regard from Roman law) and similarly prohibit bequests in excess of a certain portion of the decedent's estate.[147] The Tunisian, Islamic, Roman, and continental civil law rules tend to blur into one another at such legal intersections.

2. Novation

The concept of novation is drawn from Roman law but was adapted by civil law jurists throughout the ages so that it is applicable to modern contracts and obligations.[148] Under Tunisian law, novation is the extinction of an obligation due to the creation

144. MEJELLE, Art. 879.
145. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 356.
146. *Id*.
147. Joseph Dainow, *The Early Sources of Forced Heirship: Its History in Texas and Louisiana*, 4 LA. L. REV. 60 (1941) (Noting that in Louisiana "as in both French and Spanish law, excessive dispositions are not null, but are reducible to the disposable quantum.").
148. PLANIOL, *supra* note 105, at 178: "*La novation est un procédé d'origine romaine mais qui s'est bien transformé depuis l'antiquité*."

of a new obligation which is substituted for it.[149] Novation cannot be presumed and, to the contrary, the desire for a novation must be expressed.[150] Both the former obligation and the newly formed obligation must be considered legally valid obligations for novation to have effect.[151]

The Tunisian Code provides that novation occurs in three types of circumstances: (1) when the creditor and debtor agree to substitute a new obligation for the former, which extinguishes or changes the cause of the former obligation; (2) when a new debtor is substituted for the former who is discharged by the creditor (such a substitution may take place without the participation of the first debtor); and/or (3) where, by the effect of a new commitment, a new creditor is substituted for the former creditor, thus discharging the debtor vis-à-vis the former creditor.[152] Such a definition comports with the concept of novation as it appears in modern civil codes based on the French model.[153]

3. Compensation

Civil law doctrine maintains that when two people owe to one another similar obligations, it is not necessary that each one pay the other. Rather, it is simpler to consider each obligation reciprocally extinguished up to the amount of the lesser debt.[154] Litvinoff notes that, in civil law systems based on the French model, "[c]ompensation takes place by operation of law, that is, independently of the will of the parties. The two obligations extinguish each other reciprocally, to the extent of the lesser

149. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 357.
150. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 358.
151. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 359.
152. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 361.
153. *See, e.g.*, LA CIV. CODE art. 1881: "Novation takes place when, by agreement of the parties, a new performance is substituted for that previously owed, or a new cause is substituted for that of the original obligation. If any substantial part of the original performance is still owed, there is no novation."
154. PLANIOL, *supra* note 105, at 189; LA CIV. CODE art. 1893.

object, as soon as they co-exist."[155] In systems based on the German model, in contrast, "compensation does not take place automatically, but must be raised as a defense by the interested party. . . ."[156]

Tunisian law also recognizes this civil law concept, though with a typically Tunisian variant on the theme. According to the Tunisian Code, "[c]ompensation occurs when parties are mutually and personally creditor and debtor of the other. It does not take place between Muslims in cases where it would constitute a violation of religious law."[157] Santillana, therefore, again adopts a civil law concept but permits an exception to it for Muslims insofar as it might run afoul of the tenets of Islamic law. Otherwise, Tunisian law permits that compensation may take place between debts which have different causes or are of different portions.[158] When the two debts are not of the same sum, compensation is carried out up to a maximum of the lesser debt.[159] Consistent with civil law doctrine, Tunisian law provides that compensation takes place between debts of same kind and quality.[160] Tunisian law requires that the two debts must be liquidated and presently due, but it is not necessary that they be payable at the same place.[161]

4. Confusion

Planiol defines the civil law concept of confusion as the union of the two qualities of creditor and debtor in the same person ("*la reunion sur la même tête des deux qualités de créancier et de débiteur*") and notes that this concept most frequently finds application by the effect of a succession in which a creditor

155. LITVINOFF, *supra* note 95.
156. *Id*.
157. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 369.
158. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 377.
159. *Id*.
160. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 373.
161. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 374.

inherits a debt.[162] Under Tunisian law, when the qualities of creditor and debtor of an obligation is together in the same person, there is a confusion of rights which eliminates the relationship between creditor and debtor.[163] Consistent with civil law doctrine, the Tunisian code provides that confusion may be total or partial, depending on whether it occurs for the entire obligation or only a portion.[164] When the cause that produces confusion disappears, the credit-right is revived along with its accessories, for all persons, and confusion is deemed to have never occurred.[165] The Tunisian articles on confusion are scant, but maintain the civil law concept without modification.

E. Vices of Consent

Continental civil law has traditionally held that "*le dol, l'erreur et la violence sont les trois causes qui vicient la volonté*."[166] As civil law jurist Saul Litvinoff noted when explaining this concept:

> Autonomy of the will is the basic idea that underlies the doctrine of juridical acts implicit in the civil codes of France and Louisiana. From the vantage point of that idea, a person's declaration of will produces the intended legal effects when the consent it expresses is informed by a reason, a cause, and is also free from interfering circumstances that frustrate its intention. As clearly stated in the Code Napoleon, consent is invalid when it has been given through error, extorted by duress, or obtained by fraud. When such is the case, though consent has come into existence, it is impaired, defective, it is tainted by a vice that affects its freedom.[167]

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162. PLANIOL, *supra* note 105, at 197.
163. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 382.
164. *Id*.
165. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 383.
166. PLANIOL, *supra* at 105, at 165.
167. *See* Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress, and an Epilogue on Lesion*, 50 LA. L. REV. 1, 6 (1989).

Islamic law, likewise, has long held that fraud,[168] error,[169] and duress[170] are grounds for rescinding contracts. These legal provisions, therefore, form an area of comparative overlap between Islamic law and continental civil law.

The Tunisian Code incorporates this framework for vitiation of consent—though clearly drawing its provisions principally from the French model. Accordingly, under Tunisian law, the consent of a party is annullable when it is given in error, when induced by fraud, and when it is obtained through violence.[171]

1. Error

Error, under the Tunisian code, can give rise to rescission when it is a legal error or a factual error.[172] With regard to legal error, such an error may result in rescission when (1) it is the sole or principal cause for the obligation; and (2) if it is excusable.[173] A factual error, likewise, may give rise to rescission when it bears on the identity, type, or quality of the object of the obligation.[174] Simple errors in calculation, however, do not give rise to rescission, but they must be rectified.[175]

2. Violence

The vice of consent termed "violence" in the Tunisian code is defined as "coercion without the authority of the law, and subject to which one brings a person to perform an act to which he or she did not consent."[176] Violence, under Tunisian law, gives rise to

168. *See* RAHIM, *supra* note 134, at 237; *see also* MEJELLE, Art. 20 and Art. 52.
169. *See* RAHIM, *supra* note 134, at 237; *see also* MEJELLE, Art. 29 and Art. 32.
170. *See* RAHIM, *supra* note 134, at 232-237; *see also* MEJELLE, Art. 52.
171. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 43.
172. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 44 and 45.
173. *Id*.
174. *Id*.
175. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 47.
176. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 50.

rescission when that violence was the principal cause for undertaking the obligation and when—having regard to age, gender, status of the person and their level of impressionability—the violence consists of acts that are of such a nature that they are likely to produce physical suffering, or profound mental suffering (from fear, exposing that person's honor or possessions to material injury).[177]

The fear inspired by the threat of prosecution or other legal channels generally will not give rise to rescission under Tunisian law unless the person making the threat does so in a way that qualifies as legally cognizable violence (the sorts of will-overtaking threats described above) and is done so in a way that abuses the position of the threatened party by seeking to extort excessive or undue benefits from him or her.[178]

Violence gives rise to rescission of the obligation, even if it was not exercised by one of the parties to the obligation[179] and even if it was exercised upon a person with which the contracting party is closely related by blood.[180] Reverential fear, however, does not give rise to rescission of an obligation unless also accompanied by serious threats or assault.[181]

3. Fraud

Fraud gives rise to rescission when the tactics or non-disclosures of one of the parties, or a person who represents or is complicit with that party, are of such a nature that without these tactics or non-disclosures, the other party would not have contracted.[182] The deceit practiced by a third party has the same effect, when the party that benefits from that fraud had knowledge

177. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 51.
178. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 52.
179. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 53.
180. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 54.
181. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 55.
182. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 56.

of it.[183] Fraud with regard to the accessories of the obligation and which was not central to the obligation can give rise only to damages and not rescission.[184]

4. Additional Bases for Rescission

There is reason to rescind when the party who contracted was in a state of drunkenness, which has troubled his faculties.[185] The reasons for rescission based on the State of disease and other similar cases, are subject to the discretion of the judges.[186]

Under Tunisian law, lesion does not give rise to rescission, unless it is caused by fraud by the other party, the other party's representative, or by one who acted for the other party.[187] The only exception to this is when the injured party is a minor or is incompetent, even though he or she would have contracted with the assistance of his guardian or legal counsel in the manner determined by law and although there be no fraud by the other party.[188] Lesion is defined as any obligation entailing a price differential beyond a third of the given price and the actual value of the thing.[189]

F. Contract of Sale

A review of the Tunisian provisions relating to the contract of sale reveal an equally interesting blending of continental civil law with Islamic legal precepts, both by incorporating requirements that adhere to the Islamic law of sales and by creating strategic exceptions where Islamic law and continental civil law diverge.

At the outset, the Tunisian code obviously incorporates classical civil law concepts into its provisions on the contract of

183. *Id*.
184. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 57.
185. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 58.
186. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 59.
187. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 60.
188. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 61.
189. *Id*.

sale. In the continental civil law system, "a sale is a contract by which a person, who is called the vendor, obliges himself to transfer the ownership of a thing to another, whereas the other person, who is the buyer, obliges himself to pay the value of the thing in money."[190] The necessary elements of such a sale are the consent of the parties, a thing to be sold, and a price to be paid.[191] Modern civil codes around the globe maintain this basic concept of the contract of sale. For instance, under the Louisiana Civil Code, a "[s]ale is a contract whereby a person transfers ownership of a thing to another for a price in money. The thing, the price, and the consent of the parties are requirements for the perfection of a sale."[192]

The Tunisian code incorporates this very model for the contract of sale. Under Tunisian law, a sale is a contract by which one party transfers ownership of a thing or a right to another contracting party for a price which the latter obligates himself or herself to pay.[193] A contract of sale is perfected between the parties, as soon as there is consent of the contracting parties (one to sell and the other to buy) and the parties agree on the thing, the price and the other terms of the contract.[194] The Tunisian code, moreover, requires that the selling price in a contract of sale must be determined. A contract of sale cannot refer the determination of the selling price to a third party or the price paid by a third party, unless the price is known to the contracting parties.[195] The contract may, however, refer to the fixed market price, or a determined rate, or the average of the market prices, when it comes to goods which do not have a variable price.[196] When the price is variable, contracting parties are presumed to be referring to the average

190. PLANIOL, *supra* note 105, at 462.
191. *Id*. at 464.
192. LA CIV. CODE art. 2439.
193. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 564.
194. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 580.
195. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 579.
196. *Id*.

market price.[197] These requirements are consonant with classical continental civil law insofar as the price must be fixed, but seem to gravitate more toward Islamic law in the rigidity of this requirement. As Planiol notes, continental civil law has long permitted the price in a contract of sale to be determined by outside experts or arbiters,[198] and modern civil codes based on the French model have permitted even more laxity with regard to prices set by third parties and even courts.[199] Islamic law, in contrast, has more adamantly required that the price be determined at the time of the formation of the contract.[200] This is due to the prohibition on *gharar* (the sale of "items whose existence or characteristics is not certain, the risky nature of which makes the transaction akin to gambling").[201] Commentators note that a sale in which the price is deferred is an example of *gharar*.[202] The Tunisian code, by expressly disallowing the selling price to be determined by third persons, thus, aligns more consistently with Islamic law than continental civil law.

Islamic law's influence on Tunisian law becomes even more pronounced in its articles which hold that a sale is considered null if it is for things that, by nature or circumstances, are unlikely to be delivered to the purchaser; for example: the fish in the water, the

197. *Id*.

198. PLANIOL, *supra* note 105, at 468, (1923): "*La fixation du prix est parfois chose difficile, et les parties conviennent de s'en rapporter pour son chiffre à l'appréciation d'un ou de plusiers arbitres ou experts. Ce procédé est licite. . . .*"

199. *See, e.g.*, LA CIV. CODE art. 2645: "The price may be left to the determination of a third person. If the parties fail to agree on or to appoint such a person, or if the one appointed is unable or unwilling to make a determination, the price may be determined by the court."

200. MEJELLE, Art. 237:"It is necessary that the price should be named at the time of the sale (Bey`). Therefore, if the price of the thing sold is not mentioned at the time of the sale, the sale is bad (Fasid)." *See also* MEJELLE, Art. 238: "It is necessary that the price should be known."

201. MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE 58 (2006).

202. Abdul-Rahim Al-Saati, *The Permissible Gharar (Risk) in Classical Islamic Jurisprudence*, 16 J.KAU: ISLAMIC ECON. 3, 8, available at http://balmeena.kau.edu.sa/Files/320/Researches/50833_20970.pdf (noting that "[d]eferment of the price to an unknown future date" is an example of a *gharar* sale).

bird in the air, the escaped animal.[203] This prohibition also relates directly to the prohibition on *gharar* sales. Commentators have noted that Islamic law, to varying degrees, has disallowed the sale of fish in the water and escaped things.[204] "Other hadiths, still of contemporary relevance, forbid the sale of a bird in the air, a fish in the water, an escaped animal or slave, or anything else that the vendor might be unable to deliver owing to lack of possession."[205] Perhaps even more strikingly, any contract of sale is, likewise, considered null if it is between Muslims and for things declared unclean by religious law (*la loi religieuse*) except the objects which "religious law" has authorized for trade, such as animal fertilizer for agricultural purposes.[206] Thus, Tunisian civil law expressly incorporates Islamic law into its law regulating contracts and prohibits contracts which would violate its precepts.

Under Tunisian law, the buyer acquires full ownership of the thing sold, as soon as the contract is perfected by the consent of the parties.[207] As soon as the contract of sale is perfected, the buyer may dispose of the thing sold, even before delivery.[208] Likewise, the seller may assign his or her right to payment, even before the delivery of the thing, unless there is a contrary agreement by the parties.[209] Such provisions align with continental civil law which does not require delivery of the thing in order to have transfer of ownership in a contract of sale.[210] Interestingly, however, the Tunisian code provides that these latter provisions relating to transfer of ownership prior to delivery are inapplicable with regard to the sale of foodstuffs among Muslims.[211] As noted above,

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203. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 571.
204. ABDULLAH ALWI HAJI HASSAN, SALES AND CONTRACTS IN EARLY ISLAMIC COMMERCIAL LAW 80 (2007).
205. DAVID EISENBERG, ISLAMIC FINANCE: LAW AND PRACTICE 2.69 (2012).
206. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 575.
207. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 583.
208. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 584.
209. *Id*.
210. DEMANTE, *supra* note 93, at 141 ("*La délivrance ou tradition n'est plus aujourd'hui requise pour transférer la propriété*[.]"
211. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 584.

Islamic law in regard to such contracts has very specific requirements with regard to *riba*[212] and, in this instance, the Tunisian code seems to partially codify the sunna admonishing believers to

> [sell] gold for gold and silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt of the same kind for the same kind and the same quantity for the same quantity, from hand to hand and if they differ from each other in quantity sell them as you like but from hand to hand.[213]

Moreover, Islamic law, as reflected in the Mejelle, is more limiting with regard to what one may do before delivery of the thing. The Mejelle permits a seller to "dispose of the price of a thing sold before he has received it,"[214] and, in the case of immoveable property that "the purchaser can sell to another, before delivery, the property sold. . . ."[215] Moveable property, however, cannot generally be sold to another before delivery.[216] The Mejelle, likewise, gives special significance to delivery in sales involving things sold in quantities that are weighed and do not suffer damage by division (such as corn) in that such a sale becomes final when there is delivery and the amount delivered is correct.[217] Otherwise, the buyer is given a right of option and may annul the sale or purchase the lesser amount.[218] Under the

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212. ABU-MUHAMMAD ABDULLAH BIN ABI-ZAYD & ABDUR-RAHMAN AL-QYRAWANI, THE GIST OF THE TREATISE ON MALIKITE JURISPRUDENCE 84 (1994):

> When grains, legumes, and preserved foodstuffs are bartered in kind, the quantity received should be equal to the quantity given; no delay in delivery is allowed in this exchange. It is forbidden to barter foodstuff delivered immediately for foodstuff to be delivered at a subsequent time, whether the exchange is in kind or not, whether the foodstuff is perishable or not.

213. RAHIM, *supra* note 134, at 294.
214. MEJELLE, Art. 252.
215. MEJELLE, Art. 253.
216. *Id*.
217. MEJELLE, Art. 223.
218. *Id*.

Mejelle's provisions, if there is excess in such a case, the surplus belongs to the seller.[219]

Belknani similarly highlights article 565 of the Tunisian code, relating to the sale of a thing by an ill person on his or her deathbed.[220] According to that article, the sale by an ill person on his or her deathbed ("during his last illness"), where it is made to one of his heirs with the intention to favor that heir (for example, the thing is sold at a price much lower than the real value of the thing) is governed by the provisions of article 354 of the Tunisian code,[221] which, in turn, states that a remission of debt made by an ill person on his or her deathbed to one of his heirs is valid only if the other heirs ratify the act.[222] In contrast, the sale by an ill person to a non-heir is governed by the provisions of article 355 of the Tunisian code[223] which states that a remission of debt granted by an ill person to a third party is valid up to a maximum of one-third of what remains in the estate after the payment of debts and funeral expenses.[224] Accordingly, under Tunisian law, such a sale could be limited depending on what debts and expenses remain after the death of the seller. Belknani notes that such a sale would be considered *mawküf* under Islamic law,[225] and a review of Islamic jurisprudence finds this provision of the Tunisian code to be derived from the Mejelle:

> If a sick person sells something to one of his heirs while he is in his death sickness, it is dependent on the permission of the other heirs, if, after the death of the sick person, they give permission, it takes effect, if they do not give permission, it does not take effect.[226]

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219. *Id*.
220. *See* Belknani, *supra* note 34, at 22 n.99.
221. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 565.
222. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 354.
223. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 565.
224. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 355.
225. *See* Belknani, *supra* note 34, at 23.
226. MEJELLE, Art. 393.

Similarly, the Mejelle provides that if a sick person while in his death sickness sells something, for a price less than the value of the thing and a third of his property "is not sufficient to provide for the benefit, the purchaser is compelled to make good the reduction in the price, and if he [does not] make [the reduction], the heirs can annul the sale."[227]

In addition, Belknani highlights article 576 of the Tunisian code, relating to the sale of a thing belonging to another, as an example of Islamic legal doctrine being incorporated into the Tunisian code.[228] According to this article, the sale of a thing belonging to another is valid: (1) if the true owner of the thing ratifies the sale; or (2) if the seller then acquires ownership of the thing. Where the true owner refuses to ratify the sale, the purchaser may ask for dissolution of the sale. The seller is liable for damages when the purchaser was unaware at the time of the sale that the thing belonged to another. The nullification of the contract, however, can never be opposed by the seller due to the fact that the thing belonged to another.[229]

G. Contract of Exchange

Civil law jurist A.M. Demante, writing in the 19th Century, noted that the contract of exchange is more ancient than the contact of sale.[230] While continental civil law recognizes the contract of sale, so does Islamic law, and the Tunisian code incorporates the concept of this contract in a way that permits it to comport with both legal traditions.

Under Tunisian law, a contract of exchange is a contract by which each party gives to another, as property, a movable or immovable thing, or an intangible right, against another thing or

227. MEJELLE, Art. 394.
228. *See* Belknani, *supra* note 34, at 22 n.99.
229. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 576.
230. DEMANTE, *supra* note 93, at 189.

right of a similar or of a different nature.[231] This comports with modern civil codes which retain this nominate contract and tend to define it as "a contract whereby each party transfers to the other the ownership of a thing other than money."[232]

Consistent with classical civil law, Tunisian law holds that a contract of exchange is perfected by the consent of the parties.[233] When, however, the contract of exchange regards buildings or other objects susceptible to mortgage, the provisions of the Tunisan code dealing with immoveable property are applicable[234] (namely the contract must be made in writing with a date that is certain and will have no effect vis-à-vis third parties unless it is registered in the registry of finance, subject to the special provisions relating to registered buildings).[235]

When the exchanged objects are different of values, the parties are permitted to make up the difference through cash payments or other objects, at that time or as a future sale. This provision has no effect between Muslims when the exchanged objects are commodities.[236] As with contracts of sale, this exception for Muslims relates to the Islamic rules relating to the sale of commodities and future contracts, which maintain very specific requirements which are occasionally at variance with the continental civil law rules.[237]

H. Deposit and Sequestration

A deposit is a contract by which a person surrenders a chattel to another person who undertakes to keep the deposited thing and

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231. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 718.
232. *See, e.g.*, LA CIV. CODE art. 2660.
233. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 719; DEMANTE, *supra* note 93, at 189: "*Dans les principes de notre Droit français ce contrat est consensuel aussi bien que la vente*."
234. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 719.
235. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 581.
236. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 720.
237. ABU-MUHAMMAD ABDULLAH BIN ABI-ZAYD & ABDUR-RAHMAN AL-QYRAWANI, *supra* note 212.

return it in its individuality.[238] A contract of deposit must be made in writing if it is of a value exceeding one thousand dinars. This rule does not, however, apply to a necessary deposit which is defined as one that was forced by a fortuitous event or force majeure event, such as a fire, a shipwreck or another event, the proof of which may be made by any means, regardless of the value of the object of the deposit.[239]

A person making or accepting a deposit must have the capacity to form obligations.[240] If, however, a person able to bind himself accepts a deposit made by an incapable person, that person is bound by all obligations arising from the deposit.[241]

The depositary is answerable for any foreseeable loss or damage to the thing when (a) he or she receives a salary for the custody of the deposit; and/or (b) when he or she receives deposits as a result of his or her status or according to his or her functions.[242] The depositary is not answerable for loss or damage caused (a) by nature or problems with the thing deposited or by the negligence of the depositor; or (b) in cases of force majeure or fortuitous events, so long as the depositary has not been already put in default for failure to return the thing deposited, or so long as the force majeure is not the depositary's fault or the fault of persons for which he is responsible.[243] Proof of force majeure or defect of the things is the depositary's burden, when the depositary receives a salary for the filing or when he received the thing by virtue of his status or pursuant to his functions.[244] Otherwise, the depositary shall ensure the custody of the deposit, with the same diligence that one would apply to things that belong to him.[245]

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238. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 995.
239. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1003.
240. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 998.
241. *Id*.
242. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1021.
243. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1022.
244. *Id*.
245. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1005.

Under Tunisian law, any agreement is void in which the depositary would be held responsible for fortuitous events or force majeure, except in certain circumstances, including those where the depositary receives a salary.[246] This last provision only applies between non-Muslims.[247] This exception for Muslims relates to Islamic law governing the delivery of things for safe-keeping, which generally hold a depositary liable for the destruction of the thing entrusted to him, except for cases of fortuitous events or force majeure. The Mejelle's provisions on this topic, for instance, provide that "if the contract for delivery [for safekeeping] has been made for payment to be made for the safe keeping, in case it is destroyed or wasted by a cause which it is possible to guard against, it becomes a cause of compensation."[248] When, however, the loss is not something that could be guarded against, then the general rule applies that "if it be destroyed or wasted without any [fault] of the person who accepts it and without any fault in the keeping of it, it does not become necessary to make compensation."[249] In providing an exception to the civil law rule, the Tunisian code permits this Islamic rule to become operational between Muslims.

I. Mandate

Under Tunisian law, a mandate can be special or general.[250] A special mandate is one that is given for one or more specified endeavors, or which confers only specific powers.[251] It gives power to act in specified endeavors and matters necessarily attendant thereto, according to the nature of the matter.[252] A general mandate, in contrast, is one which gives the mandatary the

246. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1023.
247. *Id*.
248. MEJELLE, Art. 777.
249. *Id*.
250. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1116.
251. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1117.
252. *Id*.

power to manage all the interests of the principal without limit, or which confers broad powers without limit in a particular case.[253] It gives the power to do all that is in the interests of the principal, according to the nature of the case and the usage of trade, and especially to recover what is due, to pay debts, to carry out conservatory acts, to bring possessory actions, and even enter into obligations to the extent necessary to carry out the affairs for which the principal is responsible.[254]

With regard to the sources of law used for the Tunisian rules on mandate, Belknani highlights article 1163 as an example of the integration of Islamic law into the Tunisian code.[255] According to that article, the total or partial revocation of the mandate cannot have effect toward third parties of good faith who have contracted with the mandatary before the revocation, except for the principal's recourse against the mandatary.[256] When the law prescribes a determined form for the establishment of the mandate, the same form is required for revocation.[257]

A review of the provisions of the Mejelle reveal similar provisions regarding *vekyalet*—a contract in which a person appoints another to conduct affairs on his or her behalf.[258] Those provisions make clear that the excesses of the person so appointed (the *vekyl*) do not prejudice third parties but, instead, inure to the detriment of the *vekyl*.[259]

*J. Oaths (*Les Serments*)*

Another area where the gravitational pull of Islamic law and Tunisian custom is evident is in the rules governing oaths. Continental civil law recognizes, among other things, the use of

253. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1119.
254. *Id*.
255. *See* Belknani, *supra* note 34, at 22 n.100.
256. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1163.
257. *Id*.
258. MEJELLE, Art. 1449.
259. *E.g.*, MEJELLE, Arts. 1470-1471, 1479.

oaths as a manner of proving the existence of facts relevant to civil litigation. For instance, Article 1357 of the French Civil Code provides for the use of judicial oaths (*le serment*). This has been described as "a remnant of the formalistic medieval procedure" which is used less frequently today.[260] There are three varieties of such judicial oaths in French civil law: the decisory oath (*serment décisoire*), the supplementary oath (*serment supplétoire*), and the *serment in litem* or *serment in plaids* which deals with damages.

The first of these (the *serment décisoire*) is an oath administered by one party to the other, upon which the result of the action is made to depend.[261] The *serment supplétoire* is the oath administered by the judge to one of the parties in order to determine an issue.[262] The last variety (*serment en plaids*, or *serment in litem*) is a kind of oath in which, under certain exceptional circumstances, the judge may to administer to a plaintiff in order to determine the value of the thing forming the object of the action.[263]

Tunisian law also recognizes two types of oaths for purposes of establishing facts in civil litigation: (1) one which a party refers to the other in order to make the case depend upon it (*décisoire*); and (2) one which is brought *ex officio* by the judges to one or the other of parties (*supplétoire*).[264] Although a lengthy discussion of these devices is beyond the scope of this article, it is worth noting that Tunisian civil law incorporates them, but also imbues them with a

260. *See* PETER EMILIUS HERZOG, CIVIL PROCEDURE IN FRANCE 358 (1967).

261. OLIVER EATON BODINGTON, AN OUTLINE OF THE FRENCH LAW OF EVIDENCE 72-73 (1904). Writing in 1904, Oliver Eaton Bodington noted that "the serment décisoire, or oath administered by one party to the other, may be administered by any party who has proof to make in support of his demand, or of his plea in defence." Importantly, such an oath can be made in a variety of judicial contests but can only be made in regard only to "things done by the person himself, or at the doing of which he was present." Bodington also noted that French courts and commentators have universally held "that the oath can only be administered in regard to facts which are of a decisive character, that is to say, a character which shall determine the issue."

262. *Id*. at 72-73.

263. *Id*.

264. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 492.

religious dimension that does not ordinarily exist in continental civil law. Specifically, Article 495 of the Tunisian code notes that "[t]he oath must always be taken in the mosque on Friday or in any other religious place which will be indicated by the party offering the oath and in conformance with the religious sect of the party."[265] If the place where the oath must be taken is further than three miles from the place where the Court sits, the part to which the oath is referred may refuse to go there. Notably, the party who refuses to be sworn in the indicated place is deemed to have refused the oath.[266] Such provisions—requiring an oath to be taken "in the mosque on Friday or in any other religious place"—imbues this procedure with a religious element that gives recognition to the role of religion in civil affairs.

K. Mouçakâte and Moughâraça

The Tunisian code's inclusion of the Islamic concepts of *mouçakâte* and *moughâraça* are also examples of how Islamic influences can sometimes become dominant traits within the codal text, especially in the code's treatment of agricultural contracts.[267] With regard to the first of these, the Tunisian civil code incorporates the device of a *mouçakâte* defining it as a contract by which the owner of a crop which is ready for cultivation charges another person, referred to as a colon, to do the necessary work of picking or harvesting in exchange for a determined share of the harvest.[268] This sort of arrangement is derived from the Islamic legal arrangement with the same name, also transliterated as *musaqah* or *musāqāt*, which is generally defined as a type of contract in which "an owner of trees or crops entrusts his trees or crops to a person to look after and water them until they bear fruit

265. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 495.
266. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 496.
267. *See* Belknani, *supra* note 34, at 23.
268. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1395.

or ripen [in exchange for] a specific portion of such fruit or crops."[269]

The Tunisian code also incorporates the device known as *moughâraça*, which it defines as a contract which forms an entity which has for its object the fruit trees or other crops with regard to which one of the parties, known as the colon, is responsible for their planting and care in exchange for an undivided share of the land and soil and the trees or crops.[270] This is obviously derived from the Islamic property device of the same name—also transliterated as *mugharisah* or *magharisah*—which endows the lessee with real rights and is typically defined as "a contract by virtue of which an owner entrusts land to a person who undertakes to plant it with fruit trees [in exchange for] receiving a portion of the land."[271]

Professor Lisa Anderson provides some context for how such a contract would order society in rural North Africa:

> In both Tunisia and Libya, the Sahil was often home of a contract known as the *magharisah*, in which property was confided to a land-poor farmer for development; upon its harvest, he was to receive half the land as his own. This type of contract was particularly characteristic of the tree-crop regions, where the first harvest of marketable produce was sometimes decades from planting. The *magharsi*—the developer—was tied to the landowner by numerous personal obligations. During the tenure of the contract, he was often obliged to ask for advances in money or in kind from the landowner, much of which he would not be able to return until the expiration of the agreement, and even then, he might find himself better served by a renewal of the contract than under the obligation to repay his debts.[272]

Inclusion of such traditional Islamic legal devices demonstrates the way in which Santillana sought to directly instill certain aspects

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269. *See* FARHAT J. ZIADEH, PROPERTY LAW IN THE ARAB WORLD 70-71 (1979).
270. TUNISIAN CODE OF OBLIGATIONS AND CONTRACTS, Art. 1416.
271. *Id.*
272. Anderson, *supra* note 35, at 45.

of Islamic law into the Tunisian code and to preserve both a sense of tradition, historicity, and legal continuity in its text.

IV. CONCLUSION

Tunisia is now emerging as a model for Arab Spring countries seeking a successful transition to democracy. Its recent success in completing its new, post-revolution constitution demonstrates its leading role in the region. As such, legal developments within Tunisia carry the potential for regional impact as other countries seek to emulate its successful transition.[273] Political contention relating to the role of Islamic law in post-revolution Tunisia, however, will not cease simply because a new constitution is now in force.[274] Rather, the issues of concern to Islamists in Tunisia and more secular Tunisians will continue to be debated in the corridors of Tunisia's newly democratic institutions. [275] Understanding that debate as it relates to Tunisian law necessarily requires an understanding of the domestic law in force in Tunisia, its sources, and its compatibility with Islamic law.

As this article has demonstrated, the fact that Tunisia's new constitution contains no express reference to Islamic law does not mean that Islamic law plays no role in Tunisia.[276] To the contrary, an analysis of Tunisian civil law demonstrates the historic and continuing presence of Islamic legal influence in Tunisian civil law. Importantly, this influence—which spans the history of modern Tunisia—has not been a negative aspect or a harmful element. Rather, the Tunisian code demonstrates how Islamic law can function in a modern context alongside continental civil law as part of a mixed jurisdiction in which domestic civil law is derived

273. *See* Woodruff, *supra* note 22.
274. *See* Ghribi, *supra* note 26.
275. *See supra* note 22; *see also* HAMOUDI, *supra* note 89, at 226: "Tunisia, for example, appears deeply split between a moderate Islamist movement that seeks a more enhanced role for Islam, and a strong secular movement significantly influenced by Tunisia's recent past, which regards such aspirations with uncommon fear."
276. *See supra* note 1.

from a multiplicity of sources,[277] namely the French civil code,[278] the German civil code,[279] several schools of Islamic jurisprudence (especially the Malikite and Hanafite schools),[280] the Mejelle,[281] Tunisian custom, French jurisprudence, and the jurisprudence of French courts which were active in Tunisia during its time as a French protectorate.[282] Equilibrium between continental civil law and Islamic law was achieved in that code through direct incorporation of Islamic law and Islamic legal devices into the codal text; exploiting the natural parallelisms that exist between Islamic law and continental civil law; excepting Muslims from aspects of the civil law which might violate the tenets of Islamic law; and through imparting a religious dimension to otherwise secular legal devices. The result is a codification of civil law which adheres to the modern civil law model inspired by the French civil code, but which is also uniquely Tunisian—and uniquely well-suited to the task of ordering plurality in Tunisia in the aftermath of the Jasmine revolution.

Understanding this aspect of Tunisian civil law informs our understanding of the ongoing debates surrounding the role of Islamic law in post-revolution Tunisia and the significance of constitutional references to Islamic law or the lack thereof. Islamic law has, to some extent, been a part of Tunisian civil law for over 100 years and, because Islamic law is interwoven into the fiber of Tunisia's foundational legal texts, it will continue to be part of Tunisian civil law under the aegis of the new constitution. As with other countries, however, its compatibility with Islamic law and its incorporation of traditional Tunisian legal devices in the context of a modern civil code has doubtlessly contributed to its institutional durability, and durable institutions of that nature will be needed to

277. *See* Donlan, *supra* note 31.
278. *See* Belknani, *supra* note 34, at 18.
279. *Id.*
280. *Id.*
281. *Id.*
282. *See* Voorhoeve, *supra* note 51, at 54.

maintain stability in a region undergoing such dramatic social and political upheaval. As Béatrice Hibou noted in the preface to the English edition of her excellent work on Tunisia entitled *The Force of Obedience*: *The Political Economy of Repression in Tunisia:*

> What is happening in Tunisia is important, over and above what this country in North Africa actually represents, with its small population, lacking any income derived from economy, energy sources or geopolitical clout, or any dominant position in the region. These days it benefits from the impact of the Tunisian 'revolution' on the rest of the region, in Egypt, of course, but also elsewhere in the Arab world and sub-Saharan Africa. But history has already shown how this 'little country' could serve as an example.[283]

The fact that Tunisia's mixed civil law system has persisted for over a century (and remains a celebrated facet of the country's legal culture) provides reason for optimism as Tunisia moves forward in its transition to democracy. Moreover, other countries in the region may also benefit from the Tunisian experience—the example of this "little country" which has changed the physiognomy of the Middle East and North Africa at almost every level—as they look to develop civil laws which are modern, yet compatible with their legal traditions, customs, and Islamic legal precepts. As noted in this article, it would not be the first time that this small country on the Mediterranean coast illuminated a path for others to follow.

283. BÉATRICE HIBOU, THE FORCE OF OBEDIENCE: THE POLITICAL ECONOMY OF REPRESSION IN TUNISIA xiii-xiv (2011).