Religious freedom in a Muslim democracy: the case of the new Tunisian Constitution.

Introduction:

“The first battle for the Islamic Awakening and for the Islamic movement in our epoch is the battle of freedom. All fervent defenders of Islam should advocate freedom as their indispensable and irreplaceable cause.”¹ This is how sheikh Yussef Alqaradhaoui replied to essentialist islamists who consider Islam to be antagonistic to ideas of democracy and freedom, who raised the slogan of “there is no freedom in Islam,” there are only divinely revealed laws, and who perceive al Shariaa as a set of punishments and restrictions of freedoms that transcend historical boundaries. This standpoint is essentially due to centuries of political autocratic rule whose interests depended on the restriction of freedoms and the enforcement of obedience, and which relied for this on a bulk of jurisprudence produced under the hegemony of conservative religious authorities hostile to any innovative interpretation of the Scripts.

Theoretically speaking, the development of the theme of liberty is concomitant with the efforts of the political and religious movements during the Age of the Arab Renaissance in the 19th century for the renewal of the Islamic thought and for religious and political reforms in their attempt to answer to the question: why has the West progressed and why do we continue to lag behind? Two major vectors were fundamental in this movement of renewal. First, the belief in the dialectical interaction between the reason and Revelations in the understanding and the construction of the historical truth. And second, the theory of Maqasid al Shariaa, or the intent and purposes of the Islamic law, which provided the modern Islamic thought with an effective methodological instrument of analysis and constituted the conceptual framing theory for the question of rights and liberties from an Islamic perspective. Within this

¹ راضد الخلوشي, الحرية. نحو تأصيل مفاهيم معاصرة, ص.4.
intellectual debate, freedom constituted the basis and the reference of belief, thought and action. It has become obvious that there is no horizon for the establishment of a sound Islamic life, for the rebirth of an Islamic civilization, for the emergence of a rational Islamic jurisprudence, or for a new civilizational cycle, unless we liberate the minds and the lives of Muslims from legacies of political authoritarianism and cultural decadence.

In addition to this intellectual debate, the great political changes that accompanied the Arab rising since 2011 and the collapse of the authoritarian regimes brought to the fore again the question of individual and public freedoms. In Tunisia and for the first time in its modern history, a democratically elected Assembly, representing political sensitivities, sometimes profoundly antagonistic, agreed to ensure the primacy of law, the respect of the identity of the Tunisian people and the Islamic values, and the protection of freedom of belief. The role played by Ennahdha party, a civil party with an Islamic referentiality in such a consensus is undeniable, and this is due first to the way it addresses the relationship between reason and Revelation, Islam and democracy and Islam and modernity, and second to its political performance as the majority party in the Tunisian National Constituent Assembly during a fragile period of the democratic transition.
“Our intellectual project is built upon one value with which we entered political life: it is the value of freedom.” –Rached Ghannouchi-

I. The question of freedom in Ennahdha’s conceptual framework:

1- Maqasid al Shariaa and the dialectics of Reason and Revelation.

The question of identity constituted one of the most controversial issues in a post-revolution Tunisia. It was one of the first problems addressed by the Constituents in their examination of the social pattern, the nature of the State, and the referentiality of the legal system. Such a controversy was settled thanks first to dialogue and peaceful and consensual resolution of disagreements, and second to the nature of the intellectual insights themselves of Ennahdha, as a majority party whose decision is determining in the adoption of the new constitutional provisions. These insights have been expressed time and again in the party’s communiqués, its regulations and its writings long before the Revolution.

The party’s approach to the issue of religious freedom should then be put within the broader vision of the interpretation of the religious Script. Ennahdha, then, belongs to that school of thought which believes in the “togetherness of reason and Revelation and [which] causes them to be in a horizontal dialectics.”

There is a sort of dialogue between reason and the Script, says Sami Braham, a researcher in the Arab civilization, “since reason can never be independent of the text whatever is its nature, ‘religious, philosophical, literary or legal…’, neither reason is dispensable of the text of Revelation, nor is this latter separable from reason as the instrument of assessment, understanding and the deduction of...
meaning.” It is precisely this methodological prospect that Ennahdha’s thinkers deploy in their innovative, ijtihadi, conscious reading of the intellectual and civilizational heritage on one side, and the finest human accomplishments in general on another side, and this is in accordance with the national specificities and system of values of the country. Such a perspective is summarized in the regulations issued from the party’s tenth congress as follows:

The referentiality [of the party] relies on an innovative reading rooted in Islam’s major original references, namely, the Quran and the correct Sunnah (prophetic Tradition), benefiting in this from the Islamic cultural heritage and the large human knowledge achievements. It also believes that the implementation of the Islamic rules and instructions in real life cannot be done mechanically in all the situations. It should often be done on juristic deductions (ijtihad) that take into consideration the purposes (maqasids) allowing to avert evils and procure benefits within a moderate inferential approach joining reason and Revelations and balancing between plain reason and correct transmitted Scripts.

The Muslim democrats in Tunisia see that from a sound Islamic perspective and in a Muslim country there is no collision between the referentiality and the intent of Revelations and the referentiality of the reason or the interest. Even if Islam was self-sufficient in its sources (Quran and Sunnah), there have been many different interpretations, and this is due to the constant interaction of the lasting immutable Revelations with the civilizational and cultural facts of a given historical environment. “Islam is a number of scripts,” says Rached Ghannouchi, “and these scripts are to be appreciated by people. The more crystallized interpretations we get, the more the elected institutions are influenced in the programs and the policies they legislate.”

In this approach, Muslims have to establish a system that conforms to their beliefs and their values and to translate them into life systems that ensure
their freedoms and fundamental rights. It is in fact these very rights and freedoms that constitute al shariaa’s ultimate purposes as outlined by the Islamic theory of goals, first developed by Al Ghazali and Al Shatibi, and which evolved in the twentieth century, especially with Tahar Ibn Achour, whose contribution, in this context, paved the way for contemporary new theoretical insights. Al Shatibi’s “Almuwafaqat” and Ibn Achour’s “Maqasid Al sharia Al Islamia” constituted the foundation and the framework for the theory of rights and private and public liberties in an Islamic conception. In addition to the preservation of religion, of reason, of property, of souls and of offspring, Ibn Achour proposes that the universal purpose of Al Shariaa is also the preservation of the pure natural disposition (alfitrah) and the maintenance of equality and freedom.7

Building on this innovative vision of Al Shatibi and Ibn Achour, the Islamic movement in Tunisia considers that freedom is the major essential value that encompasses all the other social values. For them, Islam is a comprehensive liberating revolution in itself. It translates that pure natural disposition innate in the human being. Thus, “Man’s worshiping God, the contracts he concludes, and even his own humanity are meaningless in the absence of freedom,” says Ghannouchi.8 Freedom in this vision encompasses whatever relates to rights and private and public freedoms approved by divine as well as positive laws and underlined by the country’s Constitution, such as the freedom of thought and opinion, the freedom of expression, the freedom of conscience and the freedom of property. More importantly, “freedom gets its real meaning when it’s a part of an integrated and comprehensive conceptual system. Thereupon, Ennahdha Movement makes sure that this intrinsic value becomes a central principle and a beacon determining all the attitudes, the ideas, and the conceptions upon which

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7 محمد الطاهر بن عاشور. مقاصد الشريعة الإسلامية. تقديم حاتم بوسمة. مكتبة دار الكتاب اللبناني، 2011، ص227.
8 راشد الغنوشي. المواطنة نحو تأصيل لمفاهيم معاصرة، ص30.
the social project it aspires to, is built.” More than 30 years ago, the party’s rules of procedures mentioned among its objectives “the realisation of freedom as a fundamental value incarnating the essence of the human dignity as conceived by God, and this is by sustaining public and individual freedoms and the human rights, and by emphasizing the principle of judicial independence and the neutrality of the administration.”

This belief in the sacredness of liberty as the essence of the divine reverence of the human being, finds its reference in verses such as: “you are not a Musaytir over them” or “The Messenger’s duty is only to preach the clear (message).”

One of these human rights guaranteed by Islam is the freedom of belief or the religious freedom. Verses stressing this right are recurrent in the Quran, all denoting its primacy in achieving the humanity and the responsibility of Man as God’s successor on earth. “There is no meaning for a belief that does not stem from freedom”, insists Ghannouchi. Ibn Achour himself considers the principle of “there is no compulsion in religion” as a guiding and an absolute principle, since belief is based upon deductive reasoning and the enabling of discernment and choice. Ghannouchi believes that the essential arena of religion is not the State’s instruments; but rather the individual’s convictions. The State’s function is to serve people before anything else; people’s hearts and religiousness is a matter of God’s power. Judging from his reading of “no compulsion in religion”, he defends the principle of freedom in both sides: the freedom of getting in religion and the freedom of getting out of it, “as there’s no meaning in a piety built on coercion; there’s no interest for the Muslim community in adding a hypocrite who harbours disbelief and shows belief. Liberty is the essential value permitting people to get into Islam, since

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9. لواحي المؤتمر العالِم لحركة النهضة، ص 90.
10. بيانات تكريم التأسيس لحركة النهضة، ص 50.
11. Al-Ghashia, 88 vs 22
12. An-Noor, 24 vs 54
13. لإهامات الثورة، ص 254.
14. المرجع نفسه، ص 254.
pronouncing “al shahadatan” is an individual act of free will based on perception and clear evidence.”

According to Sami Brahem, the denial of coercion in this verse “is expressed in a general manner which means there is no compulsion either in entering or in remaining in religion, in spite of the afterlife threat and intimidation that are often appended to such a behaviour.”15 In other words, the freedom of belief is expressed in the Quran as the will to believe or disbelieve. In the same context, Ghannouchi has, in many occasions, written about the necessity to reconsider and to reinterpret the question of the apostasy as a religious crime. He distinguishes between an individual apostasy and the political collective apostasy:

There should be a distinction between an individual apostasy that does not present any danger to the community and a collective apostasy that threatens the constitution of the community, similar to what happened in the dawn of Islam under Caliph Abi Bakr. This was a political armed rebellion threatening public order, which means a political crime. It was not just an idea that should be responded to by a similar idea. Such an analysis confutes the idea of Islam being opposed to the freedom of belief.16

In other words, the incident of apostasy was much more of a political rebellion, a sort of treason, to use the modern terms, provoked by a sort of “nostalgia to the rule of the tribe and the rejection of the State institutions established by Islam. The question of creed and belief was not the most important one, as no one reverted to idol worshipping. The refusal of Zakat is but an expression of the refusal of the State.”17 Even more, the rebels rejected that social and political direction that consecrates the authority of Quraish over the rest of the tribes.

Islam ensured to people from various beliefs the establishment of their temples and the performance of their rituals, carrying out, thus, the principle of religious freedom. The Islamic historical experience itself, particularly during

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15 سامي براهم، المرجع السابق، ص77.
16 راشد الغنوشي، إهادات الثورة، ص234.
17 ر. الغنوشي، الحرية نحو تأصيل مفاهيم معاصرة، ص59.
the prophetic rule, supports these coranic express values. The experience of Al madina under the dispositions of “Al Sahifa” was an exceptional experience of an ethnically and religiously pluralistic society, where, despite such a diversity, a social and political identity was constructed on the constitutional pluralistic premises of “Al Sahifa”. Though such an exemplar experience did not last long, “the Muslim societies in general have been, all along the history of Islam, pluralistic societies exempt from any kind of religious persecution or any wars of ethnic extermination. The most ancient Christian churches and Jewish synagogues are found in the Islamic world, and the Jews were persecuted only after the fall of Andalusia, and only in the Muslim societies did they find refuge from the European oppression”\textsuperscript{18}

Furthermore, Ennahdha’s intellectual conception of Freedoms is reinforced by a broader belief in the compatibility of Islam and democracy. The Tunisian Islamic Movement is characterized by bringing together the Islamic orientation and the advocacy of democracy. They consider themselves as a continuity of the reform movement in Tunisia, initiated by Khaireddine Pasha, Sheikh Thaalibi and Sheikh Tahar Ibn Achour, as well as their peers and students in the Orient and in the Maghreb. This tendency has been highlighted in most of their communiqués since the Movement’s establishment in 1981. They have made considerable efforts in rooting democratic pluralistic thought in the Islamic circles both in Tunisia and in the Arab and Muslim world in general. Values of freedom, justice and equality can only be achieved in a democratic system based on the association of freedom and citizenship. “Freedom, signifying the right to choose, a right with which Man becomes legally competent and responsible for his choices, and citizenship, signifying the non-differentiation between people in the social organization on the basis of their

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\textsuperscript{18} ر. الخنوشي, المواطنة نحو تأسيس لفهائم معاصرة, ص43.
beliefs and ideas. All are equal as far as they comply with the codes and the laws society endorses.”


1- Early intellectual precursors:

In November 2005, a forum of debate on the foundations of democratic project in Tunisia was established. It then gave birth to what has come to be known as the “18 October Coalition for Rights and Freedoms”, constituted of a number of political parties, human rights activists and civil society activists belonging to various political ideologies including Islamists, secularists and communists. The debate organized by this coalition addressed four major axes: gender equality, the case of corporeal punishments in the penal system, the relationship between the State and religion, and the freedom of belief and conscience. The objective of the coalition was to “reach a number of norms and principles with a universal vocation and which are compatible with the cultural and civilizational specificities of our Arab and/or Muslim societies.” In 2007, Islamists and secularists ratified agreements in which we find the seeds of the present Constitution in the declarations related to the liberty of belief and conscience, to gender equality and to relationship of the State and religion. The coalition was a moment of important evolution as it united the political spectrum in the opposition and paved the way for intellectual and political compromise during the constitutional debate after 2011.

In document 4, relating to the relationship between the State and religion, the coalition defended a vision that “draws upon the creative interaction between the components of our Arab and Muslim civilization and the modern

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19 سامي براهم، المرجع السابق، ص80.
achievements of Mankind.”

They consider that the aspired democratic State can but be a civil state built on the principles of the republic and human rights and derives its legitimacy from the will of people, that politics are a human endeavour whatever were the beliefs and the convictions of the political actors, and that this State is based on the principles of citizenship, freedom and equality, and seeks to preserve the freedom of belief and opinion. It also fights all sorts of discrimination between citizens for motives based on belief, opinion, sex, social, political or regional belonging. The document asserts that the State should grant Islam a particular status as being the religion of the majority of Tunisians, without any monopoly or manipulation. It should also preserve the rights of the different creeds.

The nature of the State has thus become a matter of consensus between the different political tendencies and was clearly set out in the new Constitution, which states in its preamble that the political system in Tunisia is a “republican, democratic, and participatory system, in the framework of a civil State founded on the sovereignty of people, exercised through the peaceful alternation of power through free elections, and on the principle of the separation and balance of power.” Such a conception would then pave the way for the preservation of the citizens’ liberties.

Despite the diversity, and even the oppositions, between the conceptual and ideological references of the participants in the 18 October Coalition debate, three-month discussions permitted to give off elements of consensus upon the freedom of conscience. This freedom implies the right to adopt or not a religion and to affirm the convictions of one’s choice, as well as the freedom to manifest one’s religion or one’s convictions. The freedom of manifesting one’s convictions can only be subjugated to restrictions laid down by law in the

\[21\text{ Documents du collectif du 18 octobre pour les droits et les libertés.}\]
\[22\text{ Ibid.}\]
\[23\text{ Tunisian’s Constitution of 2014, p. 3.}\]
purpose of protecting public order or the fundamental rights of the Other. The document also underlines the necessity to ban, between citizens, equal in rights and duties, any form of discrimination founded on the religious belonging or the convictions. Although it strongly refers to the international human rights conventions, the document emphasizes the fact that universality is by no means synonymous of standardization, hence the necessity taking into consideration and respecting diversity.  

24 Documents du Collectif du 18 octobre pour les droits et les libertés.

2- The battle over identity:

The ideological and intellectual conflict and the battle over identity began since the very first weeks following the collapse of Ben Ali’s regime. On the one hand, the secular elite thought this was the occasion to complete the secularisation of the State; the Islamists, on the other hand, believed the revolution was the convenient time to disqualify what they perceive as westernization and secularism. The first went as far as proposing the removal of the allusion to Islam in the Constitution; the second wanted the inclusion of clear guarantees so as to protect the Arab and Muslim identity. With the beginning of the work of the National Constituent Assembly, and under the pressure of radicals on both sides, polarisation was at its peak with people, even inside Ennahdha, demanding the consecration of “Al Shariaa” in the Constitution. Eventually, Ennahdha put an end to this controversy by announcing that the Constitution would not adopt al sharia. They stipulated that the introduction of Al Shariaa in the Constitution as a principle source of Laws is a matter of drawing consequences from an accomplished fact, since the entirety of Tunisian laws are inspired from Islamic laws, and that the consecration of al sharia in the Constitution is in a way an application of its
consensual article one and which sets out that “Tunisia is a free independent, sovereign State; its religion is Islam, its language is Arabic […]”

Even more importantly, the constitutionalization of the civil nature of the Tunisian State represents a considerable progress, “a crucial breakthrough towards the legal modernity achieved by an Arab country.”25 By the concept of “civil State,” the constituents sought to set out the State of citizenship. Article 2 of the Constitution stipulates “Tunisia is a civil State based on citizenship, the will of the people, and the supremacy of law,” founding, thus, one of the main mechanisms for the preservation of rights and liberties on the concept of the civil State. In other words, the civil state can never, in this sense, “oppose believers to non-believers, women to men, the inhabitants of a given region to the natives of other regions, the proponents of a given ideology to the other political trends.”26

3- Article 6 and the logic of the compromise

During the two years of debate within the 18 October Coalition, agreement over the final signed declarations was reached thanks to dialogue and mutual efforts of compromise between the participating parties. Similarly, the crux of the matter of this historical compromise reached in the process of the Constitution drafting can easily be summed up in this move from the desire to include Al sharia in the Constitution as a major source of legislation to the adoption of the principle of the “freedom of consciousness”. Article 6 of the Constitution consecrates the principle of the freedom of conscience and belief in the following terms: “the State is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalisation. The State undertakes to disseminate the values of

moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfīr and the incitement of violence and hatred.”

At first sight, the article bespeaks the persistent conflict between two referentialities. The conservative detractors of the article see it encourages apostasy, and its public manifestation would thus threaten social peace. The secular detractors, on the other hand, consider that asserting the State’s undertaking to protect the sacred is, in fact, a way of curbing people’s liberty of belief and expression. This article shows to what extent ideological polarisation and mistrust between Islamists and secularists prevailed over the political scene in a post-revolution Tunisia, where the Islamists’ and the conservatives’ fear of the return of a secular rule that would oppress, again, religion on one hand, and the secularists’ fear of the religious spreading out, especially after the ascension of the Islamists to power and the emergence of salafist radical movements. It translates most of what happened in relation to the question of religion, its role, its status in society, and its relations to the universal values during the process of the Constitution drafting. The reader here may easily discern a “conceptual contradiction” between, for example, “the protection of the sacred” on one hand, and the duty of the State to “prohibit and fight against calls for Takfīr and the incitement of violence and hatred” on the other hand. It is all about the consequences of compromise and mutual concessions between the different components of the intellectual and political scene in a transitional difficult conjuncture. Nonetheless, for Ghazi Gherairi, former general secretary of the International Academy of the constitutional law, “the dispositions, referring explicitly to religion, such as the article 6 […] , should be interpreted in the light of the civil nature of the State. This disposition (article 6) whose repercussions on the state of rights have aroused worries, can not be read in a disembodied

manner. It should be interpreted as an article of a Constitution that asserts in its preamble and in its article 2 that the Tunisian State is only conceived of as a civil State, understood in the sense of the State of citizens, the whole of its citizens.”  

Gherairi admits the fact that it is of a great importance that a conservative majority in the National Constituent Assembly conceded the inscription of the civil character of the State. He thinks that the consensual convergence between the conservatives and the modernists on this particular point, was an enlightened political decision.

Habib Khedher, the general rapporteur of the Constitution of 2014, believes there is no conceptual contradiction in article 6, “what we have is rather a kind of balance which relates the text to its context.” The article went through three phases and was amended three times. It first asserted the freedom of belief and conscience and the prohibition of calls for Takfir in an attempt to reassure secularists. Later on, and in response to the conservatives’ claims, the provision setting out the State’s undertaking to protect the sacred was added to the article. There is no contradiction in protecting the sacred while at the same time ensuring the freedoms of conscience and belief, insists Khedher, for whom these freedoms are intrinsic internal, affairs, and the freedom of manifesting them, in accordance with article 18 of the Universal Declaration of Human Rights, however is a different matter and was not adopted by the constituents. Khedher’s answer translates a conviction among the Tunisian Muslim democrats that the Tunisian Constitution was not written for a secular State in the Jacobian sense of the term, it was written for a Muslim people, in a Muslim country with a Muslim State. They equally believe that the universal conception of human rights and freedoms is based on an individualistic conception of the world that prioritises individual needs and interests without taking into consideration the needs and the interests of the community.

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In addition to the aforementioned intellectual background that paved the way for the adoption of particular controversial issues, the Constitution should also be read in the light of the complex political process that led to its adoption. The search for compromise and the mutual concessions undertaken by the different parts on the question of identity in general and the freedom of belief and religion in particular are very insightful. What is important for Rached Ghannouchi is that the Constitution “is not a party’s but a homeland’s Constitution wherein the different political, social and intellectual spectrum is reflected […]. It should take into consideration the country’s identity […] while at the same time building on the human values, since we are part of this humanity. That is why we need to broaden the scope of freedoms as much as possible, for, not only justice is one of the Maqasid of Islam but also is freedom. For this reason we should not fear freedom, we should rather fear dictatorship.”

The political actors in the National Dialogue have thus successfully undone a time bomb by settling a controversy that threatened to split the Tunisian society during a very fragile political transition. Now, more than five years after the adoption of the Constitution, the question of the freedom of belief is still resonating. Tunisia has embraced a progressive Constitution, but important intellectual issues are not to be resolved by legislators and politicians alone. The question of liberties needs time to take root and intellectuals will need to embark on a deep societal dialogue, free from the pressure of political constraints, and that will culminate in real compromises. For such a dialogue to succeed, Islamists should enhance juristic deductions (ijtihad), and secularists should make revisions towards the valorisations of the people’s cultural norms and value systems. Moreover, it will also be the responsibility of independent media, a vibrant civil society and the constitutional court to attend and usher this movement of reception, establishment and strengthening of these values.