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## Implications of Tunisia's New Constitution on Religious Freedom, Associated Rights & Governance

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*Cornerstone Series: Implications of Tunisia's new constitution on religious freedom and associated rights, governance, and national and regional stability*

*This Cornerstone Series invites experts, advocates, and analysts to expound on the implications of Tunisia's new constitution for citizens as well as the stability and security of the country and the region.*

Tunisia has made significant steps toward building a secular model of the state whose fundamental cornerstones were established during the first years following its achieving formal independence from France in 1956 and challenged through a popular revolution calling for democracy and freedom in 2011. This revolution opened a framework of transition resulting in changes that may affect Tunisian society and the region as a whole.

Tunisia has experienced dramatic changes in constitutional freedoms and protections, from the original 1959 constitution of the country's independence, to the 2014 constitution of the revolution, to the most recent 2022 constitution initiated by President Kais Saied and adopted by popular referendum on July 25, 2022. Among these changes are the relationship between the State and religion and the protection of freedom of religion and associated rights.

Since the country's independence, freedom of religion has always been a question of crucial importance in the Tunisian context. Unfortunately, the latest constitution has clearly regressed — not only compared to the 2014 constitution, but even compared to the constitution of 1959 — especially in the context of freedom of religion and associated rights. After President of the Republic enforced article 80<sup>1</sup> of the 2014 constitution on July 25, 2021, and addressed the people on national TV declaring

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<sup>1</sup>«In case of imminent danger threatening national integrity, security or independence of the country, and hindering the regular functioning of public powers, the President of the Republic may take the measures imposed by the state of exception, after consulting the head of the government, the president of the Assembly of People's Representatives and after having informed the President of the Constitutional Court. He announces these measures in a speech to the people. These measures must aim to ensure, as soon as possible, the return to the regular functioning of the public authorities. During this period, the Assembly of People's Representatives is considered to be in a state of permanent session. In this situation, the President of the Republic cannot dissolve the Assembly of the Representatives of the People and no motion of censure against the government can be issued. Thirty days after the entry into force of these measures, and at any time thereafter, the constitutional court can be seized, at the request of the president of the Assembly of People's Representatives or thirty of its members, to rule on the maintenance of the state of exception. The court delivers its decision in open court within a time limit not exceeding fifteen days. These measures end as soon as the reasons founding them take end».

exceptional status<sup>2</sup>, public and academic opinion was split between those opposing and supporting<sup>3</sup> his actions. Opponents of the President have become more numerous after the issuance of decree 2021-117 of September 22nd, 2021, relating to exceptional measures, since it revealed the intention of the President to replace the 2014 constitution. Civil society organizations and human rights defenders expressed their concern about these developments. They argued the state transitioned to a “dictatorship”<sup>4</sup> that threatens human rights and endangers the democratic transition process that Tunisian people tried to build for more than a decade.

Indeed, these fears have been confirmed. President Saïed’s constitution marked a new paradigm for understanding the relationship between State and religion compared to the whole political and constitutional history of independent Tunisia. It revealed a political choice that jeopardizes all individual freedoms and rights, especially freedom of religion, because it has made them guaranteed only through the lens of Islamic goals enshrined in article 5. This clause expressly makes the Islamic law (sharia), for the first time in independent Tunisia, a formal source of laws.<sup>5</sup>

### **Freedom of Religion and Associated Rights**

Pursuant to article 27 of the current constitution, “the State guarantees freedom of belief and freedom of conscience”.<sup>6</sup> An interpretation of this clause independently from the rest of the text may result in praising the statement’s simplicity and clarity compared to the complexity of Article 6 in the 2014 constitution pursuant to which “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 takfir and the incitement of violence

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<sup>2</sup>Referring to Michael Troper: “We call status of exception, a situation in which, by referring to the existence of circumstances particularly dramatic, exceptional events and the need to deal with them...we temporarily suspend the application of the rules which ordinarily govern the organization and functioning of public authorities and we apply others, obviously less liberal, which lead to greater concentration of power and restrictions on fundamental rights”, in *“L’état d’exception n’a rien d’exceptionnel,”* Droits et cultures. Mélanges en l’honneur du Doyen Yadh Ben Achour. C.P.U., 2008, page 1143.

<sup>3</sup>Professors Amin Mahfoudh and Sadock Belaid, in addition to the National Labour Union UGTT, supported this decision aiming to cut with the economic and social failures that characterized the previous successive governments, including the government’s failure to address the COVID-19 crisis. People manifested in the street and started burning the Islamist party offices, which was the political party in power and held the majority in parliament.

<sup>4</sup> See second chapter relating to separation of powers in 2022 constitution.

<sup>5</sup> Hans Kelsen, the Austrian jurist and author of “pure theory of law”, formulated the notion of hierarchy of norms in conformity with the principle of the rule of law. In fact, “positive law” is a set of hierarchical sources of legal rules occupying hierarchical ranks in the pyramid of laws. Every inferior source of norms must be in conformity with the upper source. At the summit we find the “grandnorm”, the constitution, then ratified international conventions, then statutes voted by parliament, then regulations elaborated by regulatory authorizes. These rules of positive law are the formal sources of law, so they are compulsory to individuals and institutions. Their implementation can be ensured by the judicial procedure.

<sup>6</sup> See article 27 of the 2022 constitution.

and hatred”. Article 6 was, in fact, the sum of the opposing positions of the modernist bloc<sup>7</sup> supporting freedom of conscience and conservative Islamic bloc supporting the protection of religion.

Freedom of conscience is a sensitive topic because of its perceived opposition to Islamic law and culture, and this topic created significant controversy inside and outside the constituent assembly. Before voting on this article, some associations<sup>8</sup>, political party members, and even the Mufti of the Republic opposed it.<sup>9</sup> Article 6 guaranteed freedom of belief, religious practices and freedom of conscience. However, it gave the State responsibility for protecting this right.

Lawyers and human rights defenders considered that this dangerous ambivalence may invalidate the freedom of conscience mentioned at the first paragraph of the Article 6, since the “protection of the sacred” is an ambiguous expression that cannot be legally delineated to define the borders of the sacred and the extent of the state protection. Neither does the state have the right to define “the sacred.” Individual understanding of the sacred can be so diverse that people who hold the belief that nothing is sacred are protected under the law.

If the State protects only what is sacred to Muslims, they violate freedom of conscience and article 21 relating to the principle of equality between citizens. If the State protects what is sacred to all people, it protects freedom of religion for all people equally. In this regard, it should be noted that article 146 of the 2014 constitution states that the constitution must be interpreted as a whole unity, and this gives us the key to a right interpretation of Article 6.

The expression “protection of the sacred” must have a compatible meaning in this regard. To this end, it is the duty of the state to protect citizen rights relating to freedom of religion against any assault that may affect what they understand as sacred within the democratic boundaries of restrictions on freedoms pursuant to article 49 which stated that “the limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defense, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that

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<sup>7</sup>“Modernist” or “progressivist” are categories of political parties and activists in Tunisia and describe those who are advocating for social democracy and are the secular state model. See classification of political families in Tunisia: Ahmed Tlili, “Les grandes familles politiques en Tunisie et paysage électoral,” [https://www.leaders.com.tn/uploads/FCK\\_files/file/Les%20grandes%20familles%20politiques%20en%20Tunisie.pdf](https://www.leaders.com.tn/uploads/FCK_files/file/Les%20grandes%20familles%20politiques%20en%20Tunisie.pdf)

<sup>8</sup> Religious associations such as the Tunisian Association for Charaite Sciences (الجمعية التونسية للعلوم الشرعية) and Tunisian Association for Mosque Imams (الجمعية التونسية لأنظمة الجوامع) issued a report in which it is said that voting for article 6 would be against the faith and religion. They distributed it to deputies and presented before the parliament in January 2014.

<sup>9</sup> See: Selma Mabrouk, *Le bras de fer*, Tunis, Arabesques, 2018, *see also* ; Yadh Ben Achour, *Tunisie, une révolution en pays d'Islam*, Tunis, CERES, 2017.

rights and freedoms are protected from all violations. No amendment may undermine the human rights and freedoms guaranteed in this Constitution”.

Article 49 is consistent with Article 12 Paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR) stipulating: “the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”.

Freedom of conscience, as defined in legal doctrine and Article 18 of International Covenant on Civil and Political Rights encompasses various dimensions of freedom of religion, including the freedom to adopt a belief of someone’s choice, the freedom to practice it either individually or collectively in public or private, the freedom to express it, and to teach it to their own children.<sup>10</sup>

In this way, freedom of religion is intimately related to freedom of thought, freedom of expression, academic freedoms and even freedom of art. Nevertheless, the 2022 constitution organizes religious practices in an independent clause in article 28, stating that “the State protects freedom of religious practices if they don’t violate public security.”<sup>11</sup>

It’s true that this limitation is compatible with Article 18.3 of ICCPR.<sup>12</sup> However, it would be better if this freedom was not specifically limited, it is enough to apply on it the general limitation conditions of article 55 applicable to the whole catalog of rights and that stipulates:

“Restrictions on freedoms and rights guaranteed in this constitution can only be established by a text of law because of a necessity needed in a democratic regime, in order to protect others’ rights or for public security or national defense or public health exigencies. These restrictions must not overcome the essence of rights and freedoms guaranteed by this constitution and must be justified by its goals, proportional with its causes.”

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<sup>10</sup> Article 18 of International Covenant on Civil and Political Rights of 1966:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.” Nevertheless, manifesting religion has been organized by an independent clause, stating that «the State protects freedom of religious practices if they don’t violate public security.

<sup>11</sup> See article 28 of the 2022 constitution.

<sup>12</sup> Article 18.3 of the ICCPR: “Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”

Compared to Article 49 of the 2014 constitution, these conditions are lacking another one: the conformity of the necessity interpretation with the civil state definition. To define a civil state, the 2014 constitution provided us with three elements in article 2: “citizenship, the will of the people, and the supremacy of law.” This notion was subject to a compromise that led after the promulgation of the constitution to a political compromise between Nidaa party and Islamist party in a common government<sup>13</sup>.

“Civil state” is opposite to a “religious state” and was wanted in previous article 49 to avoid subjective arbitrary limitations based on religious domination of the majority represented in power. The absence of this notion of civil state<sup>14</sup> in the 2022 constitution may undermine freedom of religion, its corollaries and the whole chapter of human rights, especially when it comes to the enforcement of Islamic goals prescribed by Article 5 of the 2022 constitution.

### **Democracy: Separation and Balance of Powers, Constitutional Supremacy, and an Independent Justice**

The text of the new Constitution promulgated on August 16, 2022 finds its place distanced from democratic logic, a logic which is based above all on a certain number of unavoidable and irreplaceable principles. Concerning the separation and balance of powers, the new Tunisian fundamental law establishes a *presidentialist* regime<sup>15</sup> which indeed reflects the 1959 constitution. It puts in place an omnipotent president, exempt from all political responsibility, benefiting from functional and criminal immunity, with a weakened parliament and a vulnerable justice.

Like article 37 of the 1959 constitution, article 87 of the 2022 constitution confers executive power (named executive function in the text) to the President of the Republic. The government and its chief have a mere support role. Article 100 is almost a copy of Article 49 of the 1959 Constitution, and confers the power to determine the general policy of the State to the President.<sup>16</sup>

Like article 50 of the 1959 constitution, the constitutional text of 2022 grants the president the power to appoint the head of government and the members of his team on the latter's proposal,<sup>17</sup> as well as the power to dismiss them. In addition, parliament has no role in this operation, and there is no confidence vote to be given by legislative power to the government team.

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<sup>13</sup> Ben Achour Yadh, Le compromis historique entre « Etat civil » et religion dans le néo-constitutionnalisme arabe post-révolutionnaire, See: <http://yadhba.blogspot.com/2014/09/le-compromis-historique-entre-etat.html>

<sup>14</sup> According to Article 2 of the 2014 constitution: “Tunisia is a civil state based on citizenship, the will of the people, and the supremacy of law”. For Islamists, civil character is not laicity. For the Islamic bloc, Islam can accept civil state. For progressivists, the civil state protects from the religious state and in favor of a secular state. It is “a war of meaning” in the expression of Yadh ben Achour. See Yadh ben Achour, *Tunisie, Une révolution en pays d'Islam*, Tunis Ceres, pp.252-259.

<sup>15</sup> A “presidentialist” regime refers to a system in which powers are unbalanced toward an advantage for the President of the Republic.

<sup>16</sup> In the 2014 constitution, it was assigned to the Chief of Government.

<sup>17</sup> See Article 101 of the 2022 constitution.

Indeed, as provided for in article 62 of the 1959 constitution, article 115 declares that the parliament can vote a motion of censure against the government, if it has not followed the general policy of the State provided for by the constitution, which is the policy drawn up by the president. It should be specified that such a motion of censure may represent either support for the president in his control of the government carrying out his policy or a disapproval of the president's policy by parliament choosing to attack the president via the team chosen by himself to assist him.

To thwart such a procedure, the government's dismissal is made almost impossible in the constitution. Indeed, article 115 requires first that the vote of the motion of censure against the government be done by the two chambers together (Assembly of People's Representatives and National Assembly of Regions and Districts). It then requires that this vote be made by a two-thirds majority. We have already experienced the difficulty of obtaining such a majority in a single chamber. One can imagine what can be with a bicameral parliament. The responsibility of the president's government is, in this constitution, purely nominal.

Still concerning the responsibility of the president, the 2022 constitution returns once again to the model of the 1959 constitution, based on separation between power and responsibility rather than the separation of powers. It removes the equivalent of article 88 of the 2014 constitution which grants the Assembly of People's Representatives the power to pass a motion to end the mandate of the president for serious violation of the constitution. Instead, article 110 grants to the President of the Republic immunity during and after the mandate for any act relating to his presidential mission.

### **Looking Ahead: The New Constitution and its Implications**

Addressing freedom of religion in the 2022 constitution cannot be disconnected from two important ideas: the presidentialist political regime and the duty of the state to implement Islamic goals according to article 5. The new constitution concentrates essentially all political authority within the office of the president. The introduction of *Islamic goals theory* is ambiguous and may open the door to an extension of both the meaning and interpretation of the law every time the ruler, the judge, or the legislator wants to widen the scope and application of Islamic sharia. The interpretation of article 5 and its application in the presidentialist system will be crucial in determining the political and legal future of Tunisia.

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