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## LGBT Rights and Freedom of Conscience in Tunisia, between Islamic Norms and Individual Rights

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LGBT rights and freedom of conscience in Tunisia are examined here by assessing the impact of Islam on the country's judicial system. Since the 2010 revolution, Tunisia's legal framework has significantly changed, yet the influence of Islam on legal interpretations continues to threaten individual liberties, especially for vulnerable groups such as women, LGBT individuals, and religious minorities.

- Judges and governmental authorities have cited Islamic principles to justify discrimination against women and non-Muslims in matters of religious freedom, marriage, inheritance, and child custody.
- In addition, vaguely worded penal clauses related to “good morals” and “decency” have been interpreted through a religious lens, leading to the persecution of LGBT individuals, blasphemers, and atheists. These groups are often targeted for allegedly defying the majority ethos and promoting *fitna* – a concept referring to societal division and corruption within the Islamic *umma*.
- Conversely, judicial interpretations eschewing religious considerations and upholding individual rights based on constitutional and international law have led to more equitable outcomes. These advances have not gone unchallenged, encountering resistance from conservative institutions.

### CONTEXT

*The current climate of autocratic tendencies and conservative populism raises concerns about the future of human rights in Tunisia. The new Constitution, emphasising the “objectives of Islam,” could further see religion impact the law and jeopardise the rights of vulnerable groups. A secular framework is crucial for guaranteeing freedom of conscience and protecting individuals from discrimination.*



## ISLAMIC NORMS VERSUS INDIVIDUAL RIGHTS IN THE TUNISIAN CONSTITUTIONAL ORDER

In 2010, the Tunisian revolution sparked a process of democratic change, which, for a time, allowed local and international observers to salute the country as the only successful model of the so-called Arab Spring. The 2014 Constitution established a framework for parliamentary democracy with a clear separation of powers, an autonomous judiciary, independent authorities, and constitutional guarantees of human rights and equality. Among these rights, freedom of conscience – *hurriyat al-damir* – was perhaps the most striking inclusion, which marked a crucial advancement for a Muslim-majority country. Indeed, freedom of conscience recognises the right of individuals not merely to hold religious beliefs but also any other sort of theistic, non-theistic, or atheistic convictions, including – in theory – the right to change, reinterpret, or criticise religions (Ben Achour 2015). This move, with the potential to challenge an entrenched orthodoxy, was unprecedented in a Muslim country (Avon 2017).

However, the jasmines of the Spring did not blossom for all. Certain segments of the population, including women, LGBT people, as well as religious and non-religious minorities alike continued to face rights abuses under the guise of societal morality, often informed by a certain interpretation of Islam. While Tunisian legislation is mostly secular from a formal standpoint, religion influences it through ambivalent formulations and judicial hermeneutics, as judges often incorporate Islamic norms into their rulings. This has had detrimental effects on LGBT rights and freedom of conscience.

From this perspective, the 2014 Constitution maintained and, to a certain extent, increased the ambiguities inherited from the 1959 charter. It retained Article 1's mention of Islam, which could be interpreted either as "the religion of Tunisia" (with a sociological connotation) or "the religion of the state" (with a legal one), but it limited its scope by defining Tunisia as a "civil state" (*dawla madaniyya*, Art. 2). Additionally, it paired the recognition of freedom of conscience and the prohibition of excommunication threats (*takfir*) with the simultaneous designation of the state as "the guardian of religion," tasked with protecting the sacred (Art. 6).

Far from being dispelled, this ambivalence was exacerbated by the 2022 Constitution, which was unilaterally drafted and promulgated by President Kais Saied after his 2021 coup. While removing the reference to Islam in Art. 1, thus making Tunisia the first Arab country not to constitutionally recognise Islam as the official religion, the new text includes provisions that lean in a theocratic direction – not in the Iranian style of clerical rule, but in the sense of establishing religion as the main source of authority (Lewis 2002: 113; Hirschl 2010: 2). In particular, the state is no longer characterised as a *dawla madaniyya* but rather as part of the "Islamic *umma*," and it is actively called upon to promote the "authentic goals of Islam" (Art. 5). According to several observers, this move has shifted the balance towards conferring legal significance on religion. Although it is too early to assess the effects of the 2022 Constitution on the judicial fora, legal experts and human rights organisations paint a concerning picture for minoritised individuals, such as women, LGBT people, and religious/non-religious minorities (Amnesty International 2022; Boukhatia 2023; Fédération internationale pour les droits humains 2022; Yadh Ben Achour, interview, 2022).

These demographics have arguably suffered the most due to religious arguments being used in court to deny them their freedom and equality. Yet a different jurisprudence, grounded in constitutional freedoms and international law, has emerged, and it shows that a more secular interpretation of existing norms can lead to more equitable outcomes. Examples of these two contrasting trends now follow.

## ISLAMIC INFLUENCE VERSUS INDIVIDUAL RIGHTS IN JUDICIAL PRACTICE

In the realm of family law, certain judges have used implicit (or constructed) references to sharia in the Code of Personal Status to conclude that a Muslim woman cannot marry a non-Muslim man and that a non-Muslim cannot inherit from a Muslim. Per se, there is no legal foundation in Tunisian positive law supporting any of these conclusions, especially since late President Beji Caid Essebsi annulled an administrative regulation requiring a certificate of conversion from the non-Muslim spouse. However, as the Personal Status Code refers to “legal” impediments to marriage using the adjective *shar’iyya* (instead of the more neutral *qānūniyya*), further to using an open formulation on the impediments to inheritance, some courts have delivered an interpretation grounded in Islamic law and denied these basic rights. More recent jurisprudence has instead reached the opposite conclusion, affirming that the liberty to choose a spouse and receive due inheritance regardless of religion are inalienable rights proceeding from freedom of conscience, as enshrined in the Constitution and international treaties (Gallala-Arndt 2021: 39).

A similar hermeneutical approach has led some judges to interpret vague penal clauses referring to “good morals,” “decency,” and similar in a religious light, and to use them to target different types of minorities, unified in their alleged defiance of the majority ethos. According to a 2012 verdict in a prominent blasphemy case, good morals equate to “the whole of moral rules, traditions, mores, religious prescriptions prevailing in society and which may not be contravened” (Mezghani et al. 2012). By this token, it becomes difficult to delimit the purview of the crime, which in fact has been weaponised against a wide plethora of individuals, including LGBT people, blasphemers, vocal atheists, and public violators of the Ramadan fasting – all lumped together as harbingers of *fitna*, a religious concept that refers to sowing division and corruption among a decent Muslim society (Virgili 2022: 124).

The government, as well, has mobilised socioreligious arguments in its attempt to shut down the pro-LGBT organisation Shams, whose activities, according to the head of state litigation, go “against the traditions of Tunisians who are Muslims” (Jelassi 2020: 240). The judge’s response in this case exemplifies the trend of referring to constitutional freedoms and international law: the Tunis Court of Appeal, in denying the government’s request, explicitly recognised sexual minorities as a protected category under international law and considered their protection a meritorious activity meant to “preserve human dignity and prevent aggression for having different sexual orientations” (Ferchichi 2019).

There were also positive developments in the criminal domain, where “male and female homosexuality” is a crime punishable with a three-year prison term under Art. 230 of the Penal Code. The Court of Cassation, albeit falling short of censuring the substance of the crime (as it could do by employing constitutional- and international-law arguments), has nevertheless established a pattern of enforcing procedural guarantees, which are all too often disregarded in the process of evidence acquisition. An especially inhumane tool widely employed to “prove” sodomy is the anal test, which, as of late, has started to be challenged by the courts as a violation of bodily integrity.

More progressive jurisprudence has also emerged as concerns the rights of religious minorities. An exemplary case is that of Tunisian Bahais, who have long tried to assert their right to establish their own religious association, only to be met with the government’s refusal. The latter was justified with fatwas from the Ministry of Religious Affairs, the Mufti of the Republic, and the Saudi-based International Islamic Fiqh Academy, who have all accused Bahais of heresy and of propagating *fitna* in society. The Administrative Court has rejected these arguments and affirmed the rights of Bahais to establish their organisation in accordance with Decree-Law 88/2011 on non-governmental organisations.

# THE IMPORTANCE OF A SECULAR FRAMEWORK FOR INDIVIDUAL LIBERTIES

Unfortunately, the progressive developments described above have met with resistance from conservative institutions. Despite the Bahais' legal victory, the government refuses to comply. Despite the judicial recognition of sexual minorities and an alleged ban on the anal test (News24 2017), the witch-hunt against homosexuals continues (Belhadj and Ferchichi 2023). Despite the legal advancements, the registration of unions between Muslim women and non-Muslim men is still opposed by officials on the grounds of their religious convictions and supposed shariatic impediments (Attalaki 2021: 8; Idrissi 2021: 137; Boukhayatia 2023). And despite the constitutional guarantee of freedom of conscience, the prosecution of alleged blasphemers has taken a dark new turn, with the invocation of anti-terrorist laws against them (Virgili 2022: 105).

The current political climate, marked by autocratic roll-back and the conservative populism of President Saied, is an additional cause of concern. The promulgation of new laws restricting civil liberties – such as Decree-Law 54-2022, which vaguely targets the spreading of “false information and rumours” – further threatens the already shrinking space for civil society action and therewith dissent. Coupled with preoccupations surrounding the 2022 Constitution and its potential to strengthen interpretations of the law rooted in Islam, this suggests that the path to safeguarding freedom of conscience and LGBT rights in Tunisia will be fraught with challenges. At the same time, the progressive judicial trend of moving away from religious references towards a more secular understanding of individual freedoms, anchored in constitutional and international law, offers glimmers of hope. This shift demonstrates that more equitable outcomes are possible even within the framework of existing legislation.

Overall, the Tunisian experience is caught between the *dawla madaniyya* and religious interference with the law, each producing opposing effects on vulnerable individuals: while religious arguments have led to discrimination and human rights violations, jurisprudence anchored in constitutional and international law has produced fairer results. The only way to resolve this conflict and protect individuals from the whims of religiously driven actors is the establishment of a robust secular (i.e. neutral) structure. To quote Tunisian scholar Wassim Belhedi, “it is legitimate to speak of a universality of secularism” (2011: 26), as this principle constitutes the foundation for guaranteeing freedom of conscience and equal rights for all, irrespective of gender, sexual orientation, and religion.

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