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« *HURRIYAT AL-DAMÎR* » [FREEDOM OF CONSCIENCE]

A CHALLENGE FOR ARAB-ISLAMIC AUTHORITIES

In the Arab world, birthplace and still central home for religious scholars from the wide world gathered for acquiring skills in Arab language, “Islamic sciences” and “Islamic jurisprudence and right”, the notion of « *Hurriyat al-damîr* » [Freedom of conscience] has been a matter of contestation between liberal thinkers (some of them having a dual training –religious and secular-), on the one hand, and integral thinkers including a majority of “*rijâl al-dîn*” [Religious men], on the other, for a century. According to the Egyptian Gamâl al-Bannâ (1920-2013), brother of Hasan al-Banna, the founder of the Muslim Brotherhood, religious authorities, like the Ulamas and other *fuqaha*-s, had always been subjected to the interests of political powers and, as such, they were deliverers of legal advisory opinion [*fatwa*-s] and legal theories that were each more problematic than the last. In an essay dedicated to “freedom” and to “laymanship,” he defended “freedom of belief” and “freedom of thought” to a great extent. He also stated that: “philosophers, scholars and thinkers took the place [of the messages of the prophets] and revealed “conscience” [*damîr*], they established conscience [*wijdân*] through which they invented works of art”¹. G. al-Bannâ knew that the word “liberty” was not included in the Quran but he was convinced that the value could be derived from the spirit of the text, going against a significant part of the Islamic tradition. This “liberal” statement was unacceptable by men who, with some major success since the end of the 1950s, fought to preserve the integrity of the Islamic “*‘aqîdâ*” [doctrine], rejecting any external influence, saying that “Islam” gave already a global and intangible framework as well as tools for specific answers to each issue. They especially challenge the fact that right could be based on individuals: their “integral” statement means that only groups pre-defined by the Islamic jurisprudence get rights... In this contribution, I will highlight some historical phases of this liberal-integral divide on freedom of conscience with some references taking in the early centuries of Islam.

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In early Islam, echoing some previous debates on responsibility of man before God ², only the Mu’tazilah school of thought established a principle according to which the human being got the “*taqdîr*” [determination] of his own acts. Excluded from the core of the Islamic power in the middle of the 9th century, it was later overtaken by the Ash’arite school of thought, which left this issue responsibility in its “mystery” section everything that falls within the scope of the All-Powerful Divine.. Ash’arî (d. 935) provided a consistent and coherent doctrine which infused all the Sunni

¹ G. AL-BANNA, *al-islâm wa al-huriyya wa al-‘almâniyya*, Cairo, Dar al-fikr al-islâmî, s.d., p. 18.

² V. COMERO, “La défense argumentée du libre arbitre dans la tradition musulmane. Hasan al-Basrî et ‘Umâra b. Wathîma al-Fârîsî”, *Revue de l’histoire des religions*, Janvier-Mars 2013, tome 230, fascicule 1, p. 66.

juridical schools, he accused supporters of the Mu'tazilah school of thought to assume that men could dictate their will to God himself³. Both conceptions, however, was also connected with the notion of *fiṭra*, a hapax in the Quran (xxx, 30) which was traditionally interpreted in the light of a *hadith*, "Every infant is born according to the *fiṭra*; then his parents make him a Jew or a Nazarene [i.e. Christian] or a Magian"⁴, meaning for these religious men that Islam was the religion of the unspoilt nature. This was Abū Ḥāmid al-Ġazālī's (d. 1111) conception given in *Al-Munqid min al-ḍalāl*. He refuted Christian doctrine⁵ as well as some Muslim trends qualified as "heretics", but called to distinguish between "sciences of relations" for the relations with the Jews, "sciences of unveiling" for their salvation and "jurisprudence" for their legal status⁶.

Generally, the implications of various interpretations (about the salvation of children for instance) were debated for a long time, it did not lead to a clear theological consensus. At the same time, some Sufis came back to early figures like Al-Ḥakīm al-Tirmidhī (d. 869) explaining that *fiṭra* was a capacity given to all human being by God in order to create the opportunity to answer to Him to the "original pact". In practice, the legal system became the following for a millennium: tolerance for some cults endowed with inferior rights (Judaism, Christianity, and, only in some specific places, Mazdeism, Buddhism and Hinduism) under the *dhimma* regime⁷; public persecution against others (Paganism, Manicheism); legal ignorance of diversity within Islam which meant that a Shiite could be tolerated under Sunni authorities but without recognition of a religious status; fight against free thought which could open to a contestation of the "*thawābit*" [immutable principles] in Islam and death penalty with some restrictions for those who attempted to abandon Islam.

The notion of "freedom of conscience" was unknown in Arabic before the 19th c. It came from Europe where this right was still heavily contended⁸. By measuring the strength of the idea of "*huriyyat*" [liberty or freedom], the Azharian, Rifā'a al-Tahtāwī (1801-1873), the first Muslim scholar who visited France in the Modern period, began delineating the potential of this value. He advocated the "freedom in relation to dogma" [*huriyyat al-mu'taqad*]. This was not to be understood as freedom in the belief of religion [*huriyyat al-i'tiqād bi al-dīn*], in the non-belief [*'adm al-i'tiqād*] or in the free choice of each individual as regards religion [*huriyyat ikhtiyār al-mar' li dīnihī*]." Rather, it indicated the classical free effort to comment on texts pursuant to the judgement of reason [*ijtihād*]⁹. However, he and some of his followers contributed to place the notion of "freedom" in a new semantic field insofar as the classical one was to define a legal status: the man who isn't a slave. In that sense, they initiated a movement of intellectual reform.

Under European influence and domination, and the formal or real authority of the Sultan in Istanbul, Cairo, Beirut, and to a lesser extent Tunis (where the first Arabic Constitution was enacted for three years 1861-1864) became then centers of an Arabic intellectual "Renaissance" which was called Nahda. The period referred to as *tanzimat*-s (1839-1876) in the Ottoman Empire, opened the way for

³ D. GIMARET, *La doctrine d'al-Ash'arī*, Paris, Cerf, 2007, p. 396-399.

⁴ D. B. MACDONALD, "Fiṭra", *The Encyclopaedia of Islam*, vol. II, Leiden, E.J. Brill, 1991 (new ed.), p. 931-932

⁵ Al-Ghazali, *Réfutation excellente de la divinité de Jésus-Christ d'après les évangiles, texte établi, traduit et commenté par Robert Chidiac*, préface de Louis Massignon, Paris, 1939.

⁶ Emmanuel Pisani, "Regards d'Abū Ḥamīd al-Ġazālī (m. 1111) sur les juifs", *Tsafon* 62, 2011, p. 63-95.

⁷ S. AL-DIN AL-HUSAYNI, *Mabādi' al-'alāqāt wa huqūq al-Aqliyya al-dīniyya*, Beyrouth, Dār al-Hādī, 2002.

⁸ Pope GREGORY XVI, encyclical *Mirari vos*, 1832, <http://www.papalencyclicals.net/Greg16/g16mirar.htm>.

⁹ R. AL-TAHTAWI, *al-murshid al-amīn lil-banāt wa al-banīn*, according to *Huqūq al-insān fī al-fikr al-'arabī. Dirāsāt fī al-nuṣūs*, Beirut, Markaz dirāsāt al-wahda al-'arabiyya, 2002, p. 897.

equality of rights that was hitherto irrelevant in the Islamic-based state structures. These institutional reforms came up against three limitations: subjects only existed in a community framework¹⁰; this community was systematically linked to a religious reference; only the conversion to Islam was acknowledged. Apostasy was -barred by all schools of law (Hanafi, Hanbalite, Shafiite, Malekite rites), and the death penalty for apostasy remained a threat, from which to escape only through exile, despite a new rule imposed under British-French powers¹¹ but not validated by the most important religious authority, the Sheikh ül-Islam.

The notion of “freedom of conscience” was then penned by one of the greatest Arab intellectuals of the 19th century, Butrus al-Bustānī (1819-1883), a Maronite converted to Protestantism: “internal freedom is the freedom of will, the freedom of conscience [*huriyyat al-ḍamīr*], the freedom of the mind and the freedom of literature”¹². Religious scholars qualified as “reformists” abstained from addressing the issue head-on. For Muhammad ‘Abduh (1849-1905), it was necessary to awake Islam by introducing some training reforms, stressing on the role of the reason, reasserting the created character of the Quran, or man’s ability to know right from wrong meaning that an obtuse sinner was sent to the “eternal fire”¹³. . (). He promoted a classical interpretation of *fitra*: Islam was the “religion of the innate and reason”, so the human being was invited to faith in God, in the Quran and in the prophet Muhammad¹⁴. This explains why, despite a period of rise of liberal thought among some Islamic scholars in the Arab world between the end of the 19th c. and the middle of the 20th, the rights of individual freedom, and especially of “freedom of conscience” which meant the possibility to change religion –even Islam- or not to have one, was defended outside the religious circles by secular jurists, philosophers or ordinary citizens, with or without a religious training background.

To some extent, the legal change came under the colonial domination. The State of Greater Lebanon was proclaimed in 1920 under the authority of the power of the French Mandate. The original version of the Lebanese Constitution¹⁵, drawn up by Michel Chiha (1891-1954) in a Commission comprising twelve members, was French. Article 9 was formulated as follows: “Freedom of conscience is absolute. By paying homage to the Most-High, the State shall respect all religions and denominations, ensure free exercise of religious rites, and respect religious interests and personal status laws”¹⁶. However, in the Arabic translation, which became the official reference, it was not the expression *huriyyat al-ḍamīr* that was chosen, but *huriyyat al-’itiqād* which means “freedom of belief” and overlooked the possibility of being situated outside religion. At the same time in Syria, France faced a huge mobilization led by the Muslim scholars against the right of “freedom of conscience” and, eventually, failed to introduce it¹⁷.

The presence of a Lebanese man, Charles Malik (1906-1987), in the Committee that drafted the UDHR in 1948, was crucial in this respect, especially for the Article 18. According to his closest

¹⁰ J. MAZLOUM, “La question du statut personnel au Liban et en Syrie”, *Les conférences du Cénacle* 6 (1947), p. 10-13.

¹¹ S. DERINGIL, *Conversion and Apostasy in the Late Ottoman Empire*, New York, Cambridge University Press, 2012, p. 69-70.

¹² B. AL-BUSTĀNĪ, *Dā’irat al-Ma’ārif*, Beirut, 1877, Volume VII, p. 2-4.

¹³ Robert Caspar, “Le Renouveau du Mo’tazilisme,” *MIDEO* 4, 1957, p. 169.

¹⁴ A. ELIAS and Y. ASCHI, “Science et islam aux 19^e et 20^e siècles”, *Vingtième siècle* (130), April-June 2016, p. 36.

¹⁵ E. RABBATH, *The Lebanese Constitution. Origins, Texts and Comments*, Beirut, Publications de l’Université libanaise, 1982, p. 10 sq and p. 96 sq for Article 9.

¹⁶ Copy of the handwritten version of the Lebanese Constitution, *Michel Asmar Archives* (Beirut), Dossier 16, Volume 1.

¹⁷ B. T. WHITE, *The Emergence of Minorities in the Middle East: The Politics of Community in French Mandate Syria*, Edinburgh, Edinburgh University Press, 2011, p. 162-197.

advisor, “the Lebanese delegation specifically emphasized certain significant rights and freedoms that were of particular importance depending on how they were perceived”. Among these elements were: “the right for every man to the freedom of thought, of conscience and of religion, as well as the freedom to change religion or belief”¹⁸. The Declaration did not receive any negative vote from United Nations Member States. Among the abstainers stood Saudi Arabia officially represented by another Lebanese Christian, Jamil Baroody (1906-1979)¹⁹, whereas Egypt and Pakistan voted in favor of it. Translation to Arabic left no room for ambiguity as there was translation by formula *hurriyyat* [...] *al-damīr*²⁰ and the explicit mention of the possibility to change one’s religion and/or one’s dogma [*‘aqīdatahu*]. A few years later, Camille Chamoun (1900-1987), the President of the Republic of Lebanon, boasted of how Lebanon was an exception throughout the Near-East: “This country is the country of freedom, freedom of thought, freedom of expression, freedom of conscience [*hurriyyat al-damīr*], freedom of economic activity”²¹.

What was the new trend under the growing influence of Saudi Arabia in the Arab world and a move to reject any influence of Europe designed as a (neo)colonial product? In 1963, the Declaration on the Elimination of All Forms of Racial Discrimination did not include the right to “the freedom of thought, of conscience and of religion”²². The International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966 did not include any mention of the “freedom to change religion” in its Article 18²³. The new Egyptian Constitution of 1971 acknowledged the “freedom of religious dogma [*hurriyyat al-‘aqīda*] and the practice of worship” ensured by the State²⁴, which meant the refusal of the abandon of Islam. The following were described as apostates – Muslims who became Christians, free thinkers (occasionally communists) who rejected the *sharī‘a*, Christians who converted to Islam and back again to Christianity, “any individual whose behavior constitutes a lack of respect for a prophet, a messenger from Heaven or the Holy Book” and, for certain jurists, Muslims who married non-Muslims. Following several cases in the 1970s, a draft Bill on apostasy was prepared then abandoned. As a result of failure to fall in line with modern law, “it was the Hanafi doctrine that became law pursuant to Art. 280 of Decree-Law 78/1931”²⁵, meaning that the death sentence is legally possible for the Muslim apostate but implying

¹⁸ K. AZKUL, “Musāhamāt Lubnān fī tashrī‘ al-Umam al-Muttahida”, *Les conférences du Cénacle* 9-12 (1951), Beirut, p. 216-217.

¹⁹ M. A. GLENDON, *A World made new. Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York, Random House, 2002, p. 148-154.

²⁰ *Huqūq al-insān, wa al-nuṣūs al dawliyya al-khāssa bihā*, Matb‘at al-markaz al-tarbawi lil-buhūth wa al-inma’, Sin al-Fil, 1980, p. 14.

²¹ Extract of the press conference of 21 May 1958, in S. AL-SULH, *Muzakkirāt Sāmī Bik al-Sulh*, Beirut, Manshūrāt maktabat al-‘arabī wa matba‘atiha, 1960, p. 495.

²² *United Nations Declaration of the Elimination of All Forms of Racial Discrimination*, 20 November 1963, consultable on the Internet at <http://www.un-documents.net/a18r1904.htm>.

²³ *International Covenant on Civil and Political Rights*, 23 March 1966, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>. See also M. LEVINET, *Théorie générale des droits et libertés*, Brussels, Bruylant, 2010, p. 309-335 and p. 357-365.

²⁴ Article 46 of the Egyptian Constitution of 1971 (see E. CANAL-FORGUES, *Recueil des Constitutions des Pays arabes*, Brussels, Bruylant – Cedroma, 2000, p. 242 for the original text and p. 110 for the French translation).

²⁵ S. A. ALDEEB ABU-SAHLIEH, *Non-musulmans en pays d’islam. Cas de l’Egypte*, Fribourg (Switzerland), Editions universitaires, 1979, p. 258-259.

since then prison terms, forced exiles²⁶ or extrajudicial killings, meaning that extenuating circumstances for religious reasons were asked for the killers of an “apostate” like Farag Fouda²⁷.

In a postcolonial context of cultural tensions, the preference accorded to the “rights of God” [*huqūq Allah*] distinct from the “human rights” [*huqūq al-‘abd/huqūq al-insān*] was promoted as a defining element of Muslim jurisprudence²⁸ implying, unless otherwise indicated, that Muslims were prohibited from breaking from their religion²⁹. The Constitutions of Arab States expressed this tension as in a same text “freedom of belief and of opinion” and the reference to the *sharī‘a* were stipulated. The Cairo Declaration on Human Rights in Islam (CDHRI, 1990), which followed on from the Dhaka Declaration (1983)³⁰, enshrined “fundamental rights” and “civil liberties” in “Islamic faith”, and assimilated “rights” and “enforceable divine commandments, which God dictated in his revealed Books”. Article 10 referred to the identification between Islam and *fiṭra* according to which: “Islam is the religion of the *fiṭra*. It is prohibited to exercise any form of compulsion on man [i.e. Muslim] or to exploit his poverty or ignorance in order to convert him to another religion or to atheism”. The “integral” conception against the “liberal” one prevailed. Freedom was, as such, limited: “Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the *sharī‘a*” (art. 22)³¹. An intergovernmental group of experts, appointed to follow up this Declaration has not yet adopted any new position. In November 1996, The Arab League, in its founding text (15 September 1994), which guaranteed “freedom of belief, thought and of opinion” (Article 26)³² adopted a consolidated draft Criminal Code bill that explicitly provided for the death penalty for anyone who abandoned Islamic religion³³. This first version of the Arab Charter on Human Rights was never brought into force, but the second (May 2004) has been in force since 15 January 2008: Article 30 recognizes the “right to freedom of thought, of belief and of religion”, but not “freedom of conscience” or of changing religion³⁴.

It was Tunisia, but not Egypt where liberal thinkers were too weak to deal with the integral one, which made the change. After the fall of Ben Ali late January 2011, a fight against the integral

²⁶ A. DARWISH, “Professor Nasr Hamed Abu Zaid: Modernist Islamic philosopher who was forced into exile by fundamentalists”, *Independent*, 14/07/2010, <http://www.independent.co.uk/news/obituaries/professor-nasr-hamed-abu-zaid-modernist-islamic-philosopher-who-was-forced-into-exile-by-2025754.html>

²⁷ S. ABOU BAKR, “Farag Fouda; assassination of the word”, *Daily News Egypt*, 08/06/2013, <http://www.dailynewsegypt.com/2013/06/08/farg-fouda-assassination-of-the-word/>

²⁸ M. A. AL-MIDANI, *Les apports islamiques au développement du droit international des droits de l’homme*, Doctoral Thesis in Public Law, University of Strasbourg III, October 1987, p. 17-19.

²⁹ M. M. CHERIF, “La conversion ou l’apostasie entre le système juridique musulman et les lois constitutionnelles dans l’Algérie indépendante”, *Cahiers d’études du religieux. Recherches interdisciplinaires* (2011), consultable on the Internet at <http://cerri.revues.org/809>.

³⁰ M. A. AL-MIDANI (pref. Jean-François Collange), *Les droits de l’homme et l’Islam. Textes des Organisations arabes et islamiques*, Strasbourg, Marc Bloch University, Association of Publications of the Protestant Theology Faculty, 2003, p. 103 sqq. R. CASPAR, “Les déclarations des droits de l’homme en Islam depuis dix ans”, *Islamochristiana* 9 (1983), p. 65-73.

³¹ The Cairo Declaration on Human Rights in Islam, 5 August 1990, resolution 49/19-P of the Conference of Foreign Affairs Ministers, consultable on the Internet at <http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf>.

³² It has to be noticed that the English translation is wrong on the website of the UNHCR (<http://www.refworld.org/docid/3ae6b38540.html>) but correct on the website of the University of Minnesota (<http://hrlibrary.umn.edu/instree/arabcharter.html>).

³³ Sami A. Aldeeb Abu-Sahlieh, *Les sanctions dans l’islam, avec le texte et la traduction du code pénal unifié de la Ligue arabe*, St-Sulpice (Suisse), Centre de droit arabe et musulman, 2016, p. 25.

³⁴ *Al-Mīthāq al-‘Arabī li-huqūq al-Insān*, 23/05/2004, <http://www.lasportal.org/ar/legalnetwork/Documents/%D8%A7%D9%84%D9%85%D9%8A%D8%AB%D8%A7%D9%82%D8%A7%D9%84%D8%B1%D8%A8%D9%89%20%D9%84%D8%AD%D9%82%D9%88%D9%82%20%D8%A7%D9%84%D8%A3%D9%86%D8%B3%D8%A7%D9%86.pdf>

and liberal trends took place, especially on the issue of the autonomy of the subject vis-à-vis political and religious powers. Eventually, the first one, represented for instance by the exegete Muhammad Talbi –who, for years, advocated for a new understanding of the complex notion of *fiṭra*, pursuant to which all human being receives a spiritual spark by birth, argument by which he called to abolish forever the traditional legal status of *ḍimmī*³⁵-, won despite the opposition of Ennahda movement and lot of scholars. In January 2014 Tunisian representatives adopted a Constitution which included the right of “freedom of conscience” distinct from “freedom of belief” (Article 6)³⁶. It was one of the most controversial articles, and it has been passed only after one of the members of the majority said to another that he was “an apostate”, threatening a wide part of the national assembly whose members decided at the same time to “prohibit and fight against calls for Takfir” [i.e. excommunication]³⁷. The Constitutionalist and also religious scholar Yadh Ben Achour, who worked hard to help it reach this goal, said that this mention was the *sine qua non* condition to avoid a threat of theocracy³⁸: “Le sentiment d’humanité se trouve au cœur de la conscience islamique et préfigure l’idée moderne d’humanité, telle que formulée par l’école du droit naturel ou la pensée de Kant, idée d’humanité sans laquelle un droit de l’Homme ne pourrait pas se concevoir. Dit comme cela, l’argumentation est correcte, sauf qu’il ne s’agit ni du même droit, ni du même homme que ceux qui ont été à l’origine des grands documents modernes découverts par les Arabes au XIX^e siècle”³⁹. Ben Achour knew that this step needed a deep renewal of the religious sciences, religious law and anthropology, meaning an internal reform of Islam, before being accepted by Islamic scholars who immediately challenged the article 6.

³⁵ G. GOBILLOT, *La conception originelle. Ses interprétations et fonctions chez les penseurs musulmans*, IFAO Cahiers des Annales Islamologiques (18), 2000, p. 3-5.

³⁶ *Dustūr al-Jumhūriyya al-Tūnisīyya*, 26 January 2014, <http://www.arp.tn/site/main/AR/docs/constition.pdf>

³⁷ D. AVON and Y. ASCHI, “La Constitution tunisienne et l’enjeu de la liberté individuelle: un exemple d’accommodement au forceps”, 03/06/2014, <http://www.raison-publique.fr/article708.html>

³⁸ “Tunisie. Yadh Ben Achour: ‘Bientôt le RCD va aussi parler au nom de la révolution!’”, 20/03/2013, <http://www.lecourrierdelatlas.com/440620032013Tunisie-Yadh-Ben-Achour-Bientot-le-RCD-va-aussi-parler-au-nom-de-la-revolution.html>. See also

³⁹ Y. BEN ACHOUR, *Politique, Religion et Droit dans le Monde Arabe*, Tunis, Cérés Productions – Cerp, 1992, p. 234.