



Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in TUNISIA

A Shadow Report

ACKNOWLEDGEMENTS

This shadow report on lesbian, gay, bisexual, and transgender rights in Tunisia was coordinated by Global Rights and Pennsylvania State University, The Dickinson School of Law.

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Introduction

The Pennsylvania State University's Dickinson School of Law Advanced Applied Human Research class is honored to have the opportunity to participate in the writing of this shadow report on the status of lesbian, gay, bisexual, and transgender (LGBT) persons in Tunisia. Working in cooperation with Global Rights and their contacts in Morocco and Tunisia, we gathered the information in this report with the hope that it would contribute to increased advocacy for the greater protection and promotion of rights of LGBT persons in Tunisia.

The Human Rights Committee regularly reviews submissions from every state party to the International Covenant on Civil and Political Rights (ICCPR). Tunisia ratified the ICCPR on March 18, 1969¹ and will present their regular report to the 92nd session of the Human Rights Committee on March 17, 2008. Non-governmental organizations may submit "shadow reports."

We hope that the findings in this report will be useful to the Human Rights Committee, as well as serving as a catalyst for future advocacy efforts.

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¹ United Nations, *Ratifications of the International Covenant on Civil and Political Rights*, available at: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>

Executive Summary

The principal violation of LGBT rights in Tunisia is penal code 230, criminalizing same-sex acts. Tunisia's "sodomy laws" punish male and female violators with up to three years in prison. Criminalizing homosexual acts is discrimination, and a violation of the International Covenant on Civil and Political Rights. Tunisia ratified the ICCPR in March of 1969 with no pertinent reservations or declarations. Article 32 of the Tunisian Constitution provides that "[t]reaties duly ratified have an authority superior to laws."² However, the Constitution has superiority over international treaties.

It is our hope that this shadow report will aid the Human Rights Committee in its evaluation of Tunisia's compliance with the legal obligations set forth in the ICCPR, as well as lead to the realization of LGBT rights and protections in Tunisia.

Substantive Violations of the Covenant

Articles 2(1) and 26 (Non-Discrimination)

Articles 2(1) and Article 26 set forth the non-discrimination articles of the ICCPR. Article 2(1) guarantee that State Parties will not discriminate in conferring Convention rights to its citizens. The article establishes that States undertake "to respect and to ensure" that the rights contained in the Covenant are recognized "without distinction of any kind, such as race, colour, sex, language, religion, political or opinion, national or social origin, property or other status." Article 26 recognizes that all persons are equal before the law and are entitled to equal protection under the law. Article 26 obligates State Parties to prohibit any discrimination, and confers a positive duty on State's to "guarantee to all persons equal and effective protection against discrimination on any ground."

Tunisian penal code article 230 criminalizes same- sex acts with a punishment of three years imprisonment.³ In criminalizing same-sex acts, Tunisia is perpetuating a social stigma, and the inevitable societal and legal discrimination of LGBT individuals. The penal code creates a discriminatory environment for LGBT individuals and perpetuates harmful stereotypes, whether or not the law is systematically enforced. Under Article 26 of the ICCPR, Tunisia has undertaken to guarantee to all persons protection from discrimination.

² Article 32, Constitution of Tunisia.

³ Tunisian Penal Code, Livre II, Titre II, Article 230, *available at*: <http://www.jurisitetunisie.com/tunisie/codes/cp/cp1200.htm>. (original text) "La sodomie, si elle ne rentre dans aucun des cas prévus aux articles précédents, est punie de l'emprisonnement pendant trois ans." Arab version, "L'homosexualité ou lesbienneté s'il ne figure pas dans l'un des cas prévu par les articles précédents son auteur est punie de 3 ans de prison."

The Tunisian Constitution guarantees “all citizens have the same rights and the same duties. They are equal before the law.” By failing to recognize LGBT rights, and criminalizing same-sex acts, individuals are not equal before the law based on their sexual orientation and gender identity, and are not guaranteed the same rights.

The Human Rights Committee has concluded that “the reference to “sex” in (the Covenant) articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”⁴ The Human Rights Committee has also called on States to include the prohibition of discrimination based on sexual orientation in their constitutions.⁵

In *Toonen v. Australia*, the Human Rights Committee examined the Tasmanian law criminalizing same-sex acts between consenting adults, and found these laws in violation of Article 2(1) and Article 17 of the ICCPR.⁶ *Toonen* further argued that his private life and his liberty were threatened by the continued existence of the Tasmanian criminal code.⁷ This is analogous to the situation of LGBT individuals in Tunisia. The constant impending threat of imprisonment and criminal sanctions for same-sex acts is a continuous threat to individual privacy and liberty.

Additionally, the UN Committee on Economic, Social and Cultural Rights, the UN Committee on the Rights of the Child and the UN Working Group on arbitrary detention have “all affirmed the right to protection from discrimination based on sexual orientation.”⁸

The punishment for violating article 230 is three years of imprisonment. The United States Department of State found that Tunisian prison conditions generally do not meet international standards. Discriminatory and arbitrary measures, such as restrictions on family visits, worsened the conditions of detention.⁹ Accordingly, discrimination and disparate treatment of LGBT individuals are not likely to improve once entering the Tunisian prison system.

Tunisian law does not recognize any rights or benefits to same-sex couples.¹⁰ By not receiving recognition, LGBT couples face discrimination in many other arenas, from everyday situations to legal issues, such as inheritance rights and legal status changes.

⁴ *Toonen v. Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁵ International Commission of Jurists, *Presentation at Blue Diamond forum on “Nepal’s new constitution and the fundamental rights of minorities (based on sexual orientation and gender identity),”* available at: http://www.icj.org/news.php3?id_article=4248&lang=en (citing Concluding Observation: Namibia, CCPR/CO/81/NAM, July 30, 2004).

⁶ *Toonen v. Australia*, *supra* note 4.

⁷ *Id.*

⁸ International Commission of Jurists, *Presentation at Blue Diamond forum on “Nepal’s new constitution and the fundamental rights of minorities (based on sexual orientation and gender identity),”* available at: http://www.icj.org/news.php3?id_article=4248&lang=en.

⁹ United States Department of State, Country Reports on Human Rights Practices: Tunisia, (2006) available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78864.htm>.

¹⁰ Livre premier- Du Marriage, Tunisian Code of Personal Status, available at: <http://www.jurisitetunisie.com/tunisie/codes/csp/Csp1010.htm>.

Homosexuality in Tunisia exists, but remains hidden out of fear and the attachment of social stigmas.¹¹ *Realites*, a Tunisian newsmagazine, coined the homosexual Tunisian's motto as, "Vivons heureux, vivons caché," live happy, live hidden.¹² In perpetuating the stereotype of LGBT individuals in Tunisia, and criminalizing same-sex acts, the Tunisian government is not fulfilling its ICCPR obligations of providing equal and effective protection against discrimination. LGBT individuals are discriminated against by the criminalization of their sexual expression, and the denied existence of LGBT rights. Tunisia has a duty under the ICCPR to ensure LGBT rights are respected and protected.

Article 17 (Right to Privacy)

Article 17 of the ICCPR states that, "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." Similarly, the Constitution of Tunisia also guarantees the "inviolability of the home and the secrecy of correspondence."¹³

Activist website "Behind the Mask" reported a December 22, 1993 decision by the Appeal Court of Tunis, which dismissed a transsexual's request to change his civil status.¹⁴ The person had undergone surgery and changed his sex. The Court's decision was grounded in the argument that a "transsexual change is a 'voluntary' and 'artificial' operation, and thereby cannot justify civil status change."¹⁵ The fact that Tunisia does not recognize legal change of sex and name status of post-operative transsexual individuals interferes with the person's right to privacy, and his or her ability to exercise other rights, including citizenship rights, as a consequence of the serious risk of stigmatization and discrimination transsexual individuals may reasonably face if they are forced to disclose their condition to exercise their rights.

In *B. v. France*¹⁶, the European Court of Human Rights found that the refusal of the French government to allow the petitioner who underwent gender reassignment to change her legal sex and name constituted a breach of the right to private life as established by article 8 of the European Convention on Human Rights. The Court seriously considered the question raised by the applicant that "an increasing number of official documents indicated sex: extracts of birth certificates, computerised identity cards, European Communities passports, etc. Transsexuals could consequently not cross a frontier, undergo an identity check or carry out one of the many transactions of daily life where proof of identity is necessary, without disclosing the discrepancy between their legal sex

¹¹ *Realites*, available at:

<http://www.realites.com.tn/index1.php?mag=1&cat=/3555PROFIL/1La%20Grâce%20énigmatique&art=14342&a=detail1>, last accessed March 6, 2008.

¹² *Id.*

¹³ Article 9, Constitution of Tunisia.

¹⁴ Behind the Mask, *available at*: <http://www.mask.org.za/article.php?cat=&id=601>.

¹⁵ *Id.*

¹⁶ Application no. 13343/87, 24 January 1992.

and their apparent sex.”¹⁷ As a consequence, it recognized a breach of the right to privacy.

More recently, in the case *Goodwin v. United Kingdom*¹⁸, the European Court reiterated its opinion that the refusal of the state to allow the amendment of the birth certificate of the post-operative transsexual constituted a violation of article 8 of the European Convention, as well as of the right to marry established by article 12 of the European Convention. The Court noted that the “serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (...). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.”¹⁹ In a similar case, in *L. v. Lithuania*²⁰, the Court also argued “that the circumstances of the case reveal a limited legislative gap in gender-reassignment surgery, which leaves the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his true identity.”²¹

Article 19 (Freedom of Expression) and Article 22 (Freedom of Association)

Article 19 of the ICCPR secures the right to freedom of expression, including “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.” Article 22 guarantees that “[e]veryone shall have the right to freedom of association with others.”

Finding information on LGBT issues in Tunisia is extremely difficult given the repression and surveillance of human rights defenders within the country.²² Freedom of association in Tunisia is a difficult achievement for general human rights organizations, let alone LGBT organizations. Tunisian law requires that NGOs apply to gain official recognition and to operate legally.²³ After applying, the NGO may operate freely while the government processes its application. According to the United States Department of State, “[t]he government routinely blocked registration of new independent NGOs by refusing to provide receipts for their registration applications. Without such a receipt, NGOs were unable to counter the government's assertions that they had not applied to register and therefore were not allowed to operate. In such cases, NGOs could be shut

¹⁷ *Id.*, at 59.

¹⁸ Application no. 28957/95, 11 July 2002.

¹⁹ *Id.*, at 77.

²⁰ Application no. 27527/03, 11 September 2007.

²¹ *Id.*, at 59.

²² Amnesty International Annual Report 2007, *Tunisia*, available at: <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2007&c=TUN>

²³ United States Department of State, Country Reports on Human Rights Practices: Tunisia, (2006) available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78864.htm>.

down, their property seized, and their members prosecuted for ‘membership in an illegal organization.’”²⁴ These obstacles violate the right to freely associate, and seek and receive information, as guaranteed in the ICCPR. Tunisia has undertaken to ensure these rights, and discrimination in NGO registration is a violation of the ICCPR.

A Ministerial Circular issued by the government forbids local NGOs from receiving any funding from foreign sources²⁵. This constitutes a serious obstacle for civil society organizations in general, and particularly for those ones placed in a disadvantaged position because of the nature of the topic they work on. In the case of LGBT rights, the prohibition to accede external funds might in fact be one of the main impediments to the development of LGBT civil society.

Additionally, the government “routinely monitored the activities, telephone, and Internet exchanges of opposition, Islamist, human rights activists . . . and also placed some under surveillance.”²⁶ The government also blocked many of the domestic and international human rights web sites, including Amnesty International and Human Rights Watch.²⁷ By denying access to human rights information and organizations, the realization of LGBT rights continues to be denied. LGBT individuals in Tunisia are not only blocked in assembling their own organizations, but they are also denied information and access to global organizations who could provide help in their struggle for rights.

²⁴ *Id.*

²⁵ Internal Communication, received on March 14, 2008.

²⁶ *Id.*

²⁷ *Id.*

Concluding Observations/ Recommendations

- Tunisia Penal Code Article 230 has criminalized homosexual and lesbian relations, thus effectuating the constant threat of three years of imprisonment.
- The implications of criminalization can reach farther into society, and create social stigma and inequality.
- Transsexual individuals are denied legal recognition of their gender identity, with serious consequences on the respect of their right to privacy.
- Obstacles to human rights and LGBT organizations' freedom of association violate Article 22 of the ICCPR.

Proposed Questions for the Government Delegation

- Please describe the justification for Penal Code Article 230 and its compatibility with the anti-discrimination articles in the ICCPR?
- What are the obstacles to a LGBT group obtaining recognition as a registered organization?
- What steps is the government undertaking to ensure that the right to privacy of transgender individual is respected?
- What steps is the government undertaking to ensure equal access and non-discrimination in terms of HIV/AIDS treatment and education for individuals regardless of whether they are involved in same-sex or opposite-sex sexual contacts?