



CTDC
Centre for Transnational
Development and Collaboration



Policy Brief No. 7: January 2018

The Role of Civil Society in Advancing Gender and Sexual Rights in Tunisia

Recommendations for Civil Society

By Mustapha Gharbi

EXECUTIVE SUMMARY

This policy brief focuses on the situation of LGBTQI rights within the Tunisia legal framework. It also highlights the challenges facing LGBTQI activists and their supporters. It sets out several recommendations for Tunisian civil society groups and organisations that aim to improve their communication and advocacy around the rights of LGBTQI people, through awareness raising activities focused on the legal rights of LGBTQI people and on cultural perceptions of non-normative peoples in Tunisia.

“A change in the law alone will not solve the challenges facing non-normative communities”

Introduction

Although the “Jasmine Revolution” aimed to liberate Tunisians from the dictatorship of Ben Ali, individual freedoms in Tunisia remain under threat. The Tunisian police have attacked individual privacy and failed to protect private life and human rights. Minorities, and especially sexual minorities, are among the most affected by this. In particular, the LGBTQ community does not enjoy any rights and is persecuted by a series of legal texts that outlaw sexual relations between consenting adults of the same sex; sexual relationships between people of the opposite sex are also outlawed if they are not married. These laws are grounded in negative perceptions around sexual practices and gender performances that do not fit the norm of Tunisian society. These laws are enacted through a policy of repression, practiced from left to right, by politicians who lack the political courage to support any gender, bodily and sexual rights. This issue can therefore only be dealt with in relation to this wider context: a change in the law alone will not solve the challenges facing non-normative communities.

In the years following the revolution, several non-normative people were arrested. The most high-profile case was of Marouen, a young student who was sentenced to one year in prison for “sodomy” in the name of Article 230 of the Tunisian penal code. Marouen was also subjected to anal testing (considered by the Convention against Torture as a degrading and inhumane practice since the October 3, 2014). After Marouen, the police arrested six young students for committing acts of “sodomy”. They were sentenced by the court of Kairouan to three years in prison (which amounts to the maximum sentence possible under Article 230 of the Tunisian penal code). These individuals were also banned from visiting the city of Zaq for five years. All six have undergone anal testing. After this case, Hela, a young transsexual, was arrested in the name of Article 231 of the penal code for wearing make-up and for allegedly engaging in sex work, before being released after appeal. Recently, a film director and his partner were arrested for “sodomy” under Article 230 of the penal code. In these successive cases, civil society has actively opposed this wave of persecution, invasion of privacy, and the sanctity of the home. Civil society has repeatedly emphasized that the police have no right to enter a home (despite this being an interim measure permitted by the law of the state of emergency). It is through this opposition that several LGBTQ organisations came together to form a coalition, and to strengthen civil society in Tunisia. This coalition, which is made up of Mawjoudin, Damj, and Chouf, was also instrumental in feeding back to the United Nations Universal Periodic Review in 2017.

The Universal Periodic Review

The UPR is a key mechanism of the United Nations Human Rights Council, allowing the Council to periodically review the status of human rights in each of the UN member states.

During the 2017 UPR, the LGBTQ coalition in Tunisia highlighted the persecution of LGBTQ people as a cause for concern. This encouraged Human Rights Watch, Amnesty International, numerous other international organisations as well as several states to put pressure on the Tunisian government to protect individual rights. Furthermore, during the UPR, several states and international organisations criticised Tunisia for breaching several of its key human rights commitments as set out by international laws and treaties to

which Tunisia is party. Several states went on to encourage Tunisia to explicitly protect the rights of LGBTQ people by respecting the individual right to privacy and by prohibiting inhumane and degrading treatment. In particular, the UPR report prepared by the LGBTQ coalition advocated for the repeal of Articles 230/231/227/228 of the Tunisian penal code.

Regardless of the oppression that has stemmed from different regimes in Tunisia, Tunisian civil society has always sought to uphold and extend the basic freedoms most under threat by the penal codes. These include the right to privacy and the right to a life free from degrading treatment, which are routinely violated by police forces when it comes to their treatment of LGBTQ peoples. Civil society plays an important role in Tunisia, despite the crackdown on marginalised sexual groups and individual rights. For example, the former Minister of Justice Mr Salah Ben Aissa recently expressed a favorable opinion on the decriminalisation of the offense of blasphemy and homosexuality. However, following this, he was fired from the government. This demonstrates the continued for civil society to place pressure on government and mobilise support for individual rights.



Legal Contradictions and the Space for LGBTQ Rights in Tunisia

Following the revolution, the Tunisian constitution was amended to guarantee human rights for all. This change in the constitution has created an opportunity to modify the outdated penal code that prohibit non-normative sexual practices in a way that is inconsistent with the rights set out by the new constitution. For example, and following the Kelsen pyramid in the hierarchy of legal norms, Articles 227/228/230/231 of the Tunisian Penal Code clearly contradict the higher standards of the new Tunisian constitution of 2014.

The Penal Codes are Anti-Constitutional

A series of articles of the Penal Code contradict the Tunisian Constitution of 2014. In particular:

Article 21 states "Citizens are equal in rights and duties and are equal before the law without any discrimination. The State guarantees freedoms and individual and collective rights to all citizens, and provides all citizens the conditions for a dignified life"

Article 23 states "The State protects human dignity and physical integrity, and prohibits mental and physical torture. Crimes of torture are not subject to any statute of limitations"

Article 24 states "The State protects the rights to privacy and the inviolability of the home, and the confidentiality of correspondence, communications and personal information. Every citizen has the right to choose their place of residence, to free movement within the country and the right to leave the country"

In contrast to these norms, the Tunisian Penal Code condemns "offences against public morality" (Article 227), "indecent assault" (Article 228), "Sodomy", and male and female homosexuality in the Arabic version (Article 230) as well as "soliciting and prostitution" (Article 231). Breaching Article 230 is punishable by 3 years imprisonment. All of these articles contradict the new constitution since they infringe the right to privacy. Moreover, for the Tunisian government to enforce these articles, particularly Article 230, an anal test or similarly invasive forms of 'evidence gathering' must be carried out to prove homosexuality or sex work. This is a major breach of the principle of respect for human dignity, the inviolability of the human body as well as respect for private life. These principles are strongly defended by the articles of the Constitution of 2014 mentioned above, effectively making the Tunisian penal codes in breach on human rights and the Constitution of 2014.

For this reason, the Constitutional Court, which is planned to begin operations in early 2018, should be encouraged to play an important role in synthesising the penal codes with the principles of the Tunisian Constitution of 2014.

“The Constitutional Court should be encouraged to play an important role in upholding the principles of the 2014 Constitution”

The Penal Codes Breach International Law

These same articles of the Tunisian penal code also contradict major international conventions to which Tunisia is a signatory, such as the Universal Declaration of Human Rights. In particular, Article 12 (protection of privacy) and Article 5 (prohibition of torture) are violated by the implementation of Article 230 and 231 – which typically result in the use of anal and vaginal testing, both considered a gross breach of rights. Tunisia is also a signatory to the International Covenant on Civil and Political Rights, making its penal code incompatible with Article 7 (the principle of non-discrimination and the principle of equality of rights) and Article 17 (the prohibition of torture and degrading treatment). The penal code is also incompatible with Article 1 of the International Convention against Torture.

Despite the fact that several of these rights are also protected by the Tunisian Constitution of 2014, the penal codes continue to be in contradiction with international convention obligations to which Tunisia is signatory.

How the Penal Codes Violate Rights

International organisations have frequently noted how the Tunisian penal codes have violated rights and limited overall rights protections under Tunisian law. For example, as Amnesty International observed in 2016, the bodily rights of women victims of sexual violence are violated by penal code articles that “criminaliz[e] sexual violence as an assault on personal decency rather than a violation of the victim’s bodily integrity.” With regards to LGBTI people, the same report noted that:

"LGBTI people faced discrimination in law and in practice, and were inadequately protected against violence based on their sexual orientation or gender identity. Article 230 of the Penal Code criminalized consensual same-sex sexual relations, punishing “sodomy and lesbianism” with up to three years’ imprisonment. Transgender individuals were at particular risk of arrest and prosecution on the charge of offending public morals. The authorities failed to conduct meaningful investigations into homophobic and transphobic crimes. A lesbian woman sought asylum abroad after she was subjected to four separate assaults during the year by men who attacked her on the street, beating her with their hands and feet and with broken bottles and on one occasion cutting her neck with a knife. She had been subjected to at least eight homophobic assaults over a period of nine years. She reported the latest assaults to police but they failed to identify and arrest her attackers and warned her that, as a lesbian woman, she could face prosecution and imprisonment. A male student was sentenced to one year in prison in September for engaging in “sodomy”. At the court’s request, he was subjected to an anal examination, in violation of the prohibition of torture and other ill-treatment. The examination was conducted by the forensics department in Farhat Hached Hospital in Sousse, supposedly to establish “proof” of anal sex. The student had initially been questioned by the police about his relationship to a murdered man. He said he admitted that he had had sex with the man after police officers slapped him and threatened to rape him and press murder charges if he did not “confess”. He was released on bail in November and his sentence was reduced to two months on appeal in December, which he had already served. In December, six students received maximum three-year prison terms after a court in Kairouan convicted them on charges of “sodomy”. The six, who were subjected to anal examinations after their arrest, were also sentenced to be banished from Kairouan for five years after they complete their prison sentences."

Amnesty International Report 2015/16 - Tunisia



Further Challenges Facing Civil Society

Despite the numerous challenges highlighted above, the struggles facing civil society and non-normative peoples also relate to cultural and social attitudes and ideas about sexual rights. In order to tackle these, civil society must take a multi-lensed approach to its advocacy efforts to ensure legal changes are supported by grassroots improvements in social and cultural attitudes.

In particular, there is a need for civil society to encourage a culture of openness and acceptance to counteract societal values that restrict freedoms and curb rights. This can be achieved through the development of close relations between Tunisian civil society and artists, directors and creatives capable of articulating an open, gender sensitive and sex positive discussion in society. This will allow civil society to capitalise on increased press and media freedoms that followed the revolution. However, these freedoms have also allowed societal values that oppose gender and sexual rights to become widely propagated through popular TV and news channels. Despite receiving criticism from the Independent High Authority for Audiovisual Communication (HAICA) and civil society, this demonstrates that even new opportunities bring with them new challenges in the fight for gender and sexual rights.

As the presidential and parliamentary elections of 2019 approach, several political parties and political individuals have begun to discuss equality, individual freedoms, and the rights of gender, sexual and bodily rights. However, there is a need for caution as the debate about sexual and gender rights can often be superficial, expressed with an eye to support party-political aims and rhetoric rather than long-term improvements. Although parties on the Tunisian left claim to be modern and progressive, they often step back from supporting or creating substantive change. Similarly, parties on the right are keen to mute discussions about gender, sexual and bodily rights, as demonstrated by recent debates in Tunisia about the proposed laws to protect women from gender based violence. In order to avoid any drift and exploitation of gender and sexual rights advocacy in the coming election, civil society must impose its views by demonstrating ambitious projects for the 2019 election without sympathising with any party, but through efforts that seek to bring closer the progressive parties and public personalities to promote a vision of progress in 2019.

Recommendations for Civil Society

In light of this policy brief, which has outlined the legal, political and social challenges and opportunities facing civil society in Tunisia, the following key recommendations should be adhered to so that sexual and gender rights and freedoms can be advanced:

- Civil society should focus on **legal based advocacy** to ensure that Tunisian law is aligned both with Tunisia's international commitments and the principles outlined in the 2014 Constitution. This includes repealing those Articles of the Tunisian penal code that contradict the higher legal principles of respect for human dignity, privacy and freedom from torture.
- Civil society should **form coalitions that focus on national, regional and international advocacy** to ensure the Tunisian government adheres to the principles of gender, sexual and bodily rights.
- Civil society should work together to **lobby Tunisian political parties** and the government, adopting an approach that is neutral in terms of party politics to ensure that the campaign for sexual and gender rights is not co-opted for party political gains.
- Civil society should work to **create a culture of openness** by collaborating with artists and creatives, and offer these individuals some trainings on how to raise awareness and acceptance of non-normative individuals in public spaces.
- Civil society should present an audiovisual report to the Independent High Authority for Audiovisual Communication that highlights cases of violence based on gender performance and sexual practices.
- The role of civil society during this period of state restructuring must be vigilant and active. To end all forms of discrimination based on gender performance and sexual preference, **civil society needs to investigate, document and advocate for human rights and individual freedom, including sexual freedom.**

