

Policy paper on repealing article 230 of the penal code



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جمعية تقاطع من أجل الحقوق والحريات

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Executive Summary

This policy paper highlights three constitutional breaches of Article 230: inequality before the law and rights to fair trial, the violation of the presumption of innocence and the use of anal examinations as evidence of a practice which considered as a form of torture.

It also examines the impact of articles 230 which goes beyond discrimination, arbitrary arrests, forced confessions. Additionally, it tackles the financial and social costs that burden the state budget and prison overcrowding due to the application of article 230.

Finally, it also proposes multifaced approach the Tunisian state can adopt in its way of repealing article 230 of the penal code.

Repealing Article 230 of the penal code

The legal framework of the Tunisian state keeps on imposing restrictions on individual liberties adopting repressive laws like the decree of 54 which suppresses the freedom of expression supposedly to fight against fake information. not forgetting the penal code provisions criminalizing public morals offenses and the continuous unjustified enforcement of article 230 of the penal code. This legal policy reflects the drift to weaken civic space and broaden the control of the state over freedoms.

In this regard, it is obvious that public policy suffers from a lack of legislative will to repeal Article 230 of the Penal Code, which criminalizes sodomy and lesbianism and the use of anal examinations as a means of proving this crime, despite its unconstitutionality, and the reform initiatives in this regard and the proposal of alternatives by the Committee on Individual Freedoms and several political and human rights parties and the repeated, periodic UN recommendations, these steps did not receive serious attention at the legislative level or were not among the priorities of the legislative authority, which makes the LGBT community more vulnerable than others. This laxity may be explained by fears stemming from the state's insistence on preserving religious and social identity.

Legal grounds for the urgent need to repeal article 230

Tunisian legislation tackled homosexuality acts under Article 230 of the penal code which states "Sodomy or lesbianism, if not taking the form expressly noted, is punishable by up to three years in prison". Article 230 acknowledges explicitly the forms of homosexuality whether between males or females. However, the Tunisian legislator did not define these notions, which raises fundamental issues as to what acts that may constitute acts of sodomy or lesbianism.

Vagueness & Elasticity

This vagueness or elasticity confers the police or the judicial authorities the power to consider as to their own interpretation any act as homosexual.

Thus, this ambiguity allowing multiple interpretations has engendered a serious breach of constitutional principles of the penal code (Section 1) and poses a major risk on individual liberties enshrined in international treaties violating Tunisia legal commitments (Section II)

Section 1 - Article 230 contradicts the constitutional principles of the penal code

Article 230 breaches fundamental rights such as equality before the law, right to fair trial (Paragraph 1), the presumption of innocence (Paragraph 2) and the relevancy of evidence (Paragraph 3).

Paragraph 1: The infringement of the principle of equality before the law & the right to fair trial

Equality before the law & the right to fair trial are fundamental components in the Tunisian criminal justice system and the legal system in general.

Equality before the law is a principle enshrined in international and domestic law. If someone is accused with a crime, he has the right to a fair trial to determine whether he is innocent or guilty, this is an internationally recognized human right. Fair trials and equality before the law establish the truth and are vital for everyone involved in a case. They are cornerstone of democracy, helping to ensure fair and just societies, and limiting abuse by government and state authorities. It was described in *Matadeen v. Pointu* as one of the building blocks of democracy.

Moreover, it has been called "as the starting point of all other liberties". According to article 26 of the international covenant on civil and political rights "all persons are equal before the law and entitled without discrimination to the equal protection of the law". Similar provisions are contained in article 3 of the African Charter on Human Rights and Article 24 of The American Convention of Human Rights. Further, Article 20 (1) of the Statute of the International Criminal Tribunal of Rwanda and Article 21 (1) of The Statute Of the International Criminal for Former Yugoslavia provide that "all persons Shall be equal before these Tribunals" that is to say that equal protection should not be denied by any governmental structure, in other meaning, an individual must be treated in the same manner as others in the same conditions and circumstances. "All human beings are born free and equal in dignity and rights".

This principle was also incorporated in the new constitution of 2022 precisely in article 33 which states "All accused persons are presumed innocent until proven guilty, following a fair trial which provides them with all the guarantees essential to their defense during the various stages of the prosecution and trial". Furthermore, it is noteworthy that any distinctions of any kind are prohibited, which could be read as meaning that no differences at all can be legally tolerated.

A Repressive Weapon

Domestically article 230 of the penal code is considered as a repressive weapon. In the absence of any legal definition of the act of "sodomy" which has caused a lot of ambiguity in delineating to what elements that could fall under the sphere of condemnation, LGBT persons 'are at constant risk of arrest and "permanent risk of being censored" by police authorities.

Paragraph 2: The violation of the presumption of innocence principle

Considered as the bedrock of any modern criminal justice system, the presumption of innocent principle is supposed to be applied consistently in every step of the criminal justice administration. Already present in international treaties; Article 14 (2) of ICCP provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law”. Article 7(1)(b) and 8 of the ACHPR and article (6)(2) of The European Convention on human Rights all also guarantee the right to presumption of innocence and article 11(1) of the Universal Declaration of Human Rights safeguards the same right for everyone “charged with penal offense Until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense”.

As noted by the Human Rights committee in General Comment No.13, “the principle of presumption means that “the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.

Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.” This principle is also incorporated in an article 33 of the 2022 constitution, “A defendant shall be presumed innocent until proven guilty in a fair trial in which he/she is granted all guarantees necessary for his/her defense throughout all the phases of prosecution and trial”.

In a general sense, one could easily define that law enforcement officials should not start with the preconceived idea that one has committed the offense charged. As such, the prosecutor has the burden of proof, and the accused has the benefit of the doubt. However, translating it into practice is not as easy as defining it.

In many cases, individuals are arrested based on gender stereotypes essentially for appearance and behavior or effeminate look not even for engaging in the same sex act. Most often, the conditions of arrest, detention & prosecution are so degrading & inhuman. The issue of Article 230 is not about criminalizing the same physical sexual act but about criminalizing a whole identity. Every aspect of a person's sense of self is criminalized, stigmatized and subject to shame.

Paragraph 3: The irrelevance use of Anal tests as evidence to prove sodomy

As expressed by international treaties Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, that no one shall be subjected to torture or to cruel or inhuman treatment, la comité des droits de l'Homme in article 7 expressly prohibits the submission of a person even with his own consent to medical and scientific experiments that could impair his health. The constitution of 2022 in article 25 asserted that the state protects physical integrity, prohibits mental and physical torture. However, the vagueness surrounding the definition of sodomy in article 230 is causing a fundamental problem.



Consequently, this paved the way to allowing any random evidence like subjecting any suspected person engaging in same sex activity to anal examination. Nevertheless, this practice has been condemned as medically worthless and amounts to torture or ill treatment. In this regard, The National Council of Tunisian physicians which observes the respect of medical ethics in Tunisia expressed their discontent about the forensic examination carried out without a person's approval. Sexual orientation falls within the realm of individual sexual privacy.

In the case of Marwan, a 22-year-old man who faces a harrowing situation and was sentenced to one year in prison for engaging in same sex activity after being forced to undergo an anal examination to establish "proof" of anal sex by the forensic department in Farhat Hached Hospital in Sousse at the request of the court and after police officers slapped him and threatened to rape him and charge him with murder if he did not confess.

As stated by the CAT in its report on Tunisia "that persons suspected of being homosexual are forced by a judge's order to submit to an anal examination conducted by a forensic physician to prove their homosexuality". Furthermore, the guilt in this case, there isn't a meaningful consent that could be considered. In its recommendations the CAT called for the prohibition of this intrusive examinations and highlighted the fact that there isn't any way that could guarantee the free performance of conducting these tests.



In conclusion, Anal tests constitute a form of torture that violates one's integrity "moral, physical, psychological" and are considered as a form of rape in many cases. Overall, the true scale of application of Article 230 remains unknown. In essence, the existence of this article undermines three main constitutional principles that the penal code is based on; Equality before the law and the right to fair trial, the presumption of innocence and the irrelevance of evidence; conducting anal tests the use of presumptions against the person.

Comparative Law

In comparative law, the Kenyan situation offers an essential contrast. A court of appeal of Mombasa ruled on March 22, 2018, that conducting forced anal examination on people who are accused of same sex relations is unconstitutional. The ruling reversed a 2016 high court decision that had upheld the Kenyan authorities' use of forced anal exams to attempt to provide evidence of homosexual conduct.

"The ruling affirms the dignity of two Kenyans who are subjected to these horrific exams, and it reinforces the understanding that the constitution applies to all Kenyans, regardless of their sexual orientation or gender identity."

The petitioners contended that forced anal testing is cruel, inhuman, and degrading treatment that can amount to torture. The exams usually involve doctors or other medical personnel inserting their fingers and sometimes other objects into the anus of the accused. In other cases, victims are ordered to strip naked and bend over or to lie down with their feet in stirrups while doctors visually examine their anal regions. This landmark ruling underscored the significance of upholding the dignity of all Kenyans, regardless of their sexual orientation or gender identity, reaffirming the reach of the constitution.



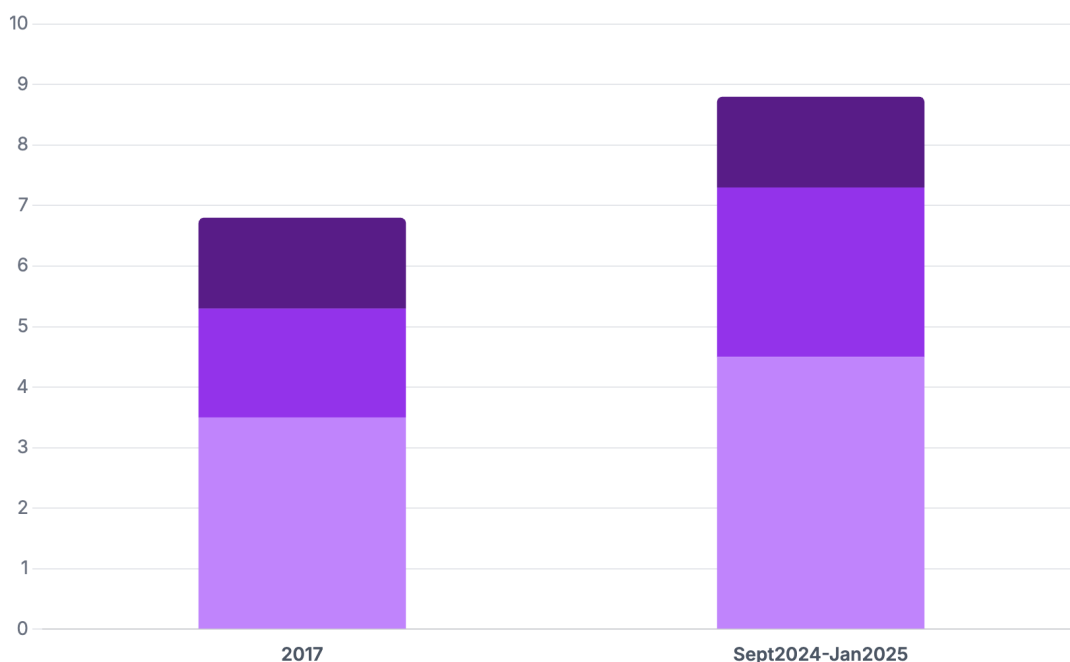
Section II: Indicators of the danger misuse of article 230 of the penal code in practice

↗ Wave of arrests:

The number of arrests has escalated since 2017 with a remarkable rise .This wave of arrests came after a massive online campaign that started on September 13, 2024, and spread discriminatory rhetoric and hate speech against vulnerable groups, activists and ngos, Inflammatory statements by well-known TV and radio personalities criticizing ngos and demanding their disbandment as well as the arrest of activists are also carried by traditional media channels.

According to Saif Ayadi, an activist at Damj, fears that the actual number of individuals arrested and prosecuted is higher than the numbers Damj was able to document. He explained: "Our numbers are based on the direct assistance we provide to members of the community including legal assistance; it is not exhaustive."

Most of individuals who are detained tell their attorneys that police officers unlawfully searched them and took away their phones. Because consensual same-sex relationships are illegal, individuals are more susceptible to police aggression and abuse. Police frequently take advantage of their fear of being arrested and prosecuted, and they may be subjected to extortion, blackmail, and occasionally sexual abuse. In certain instances, security guards used phishing and entrapment tactics on dating apps and social media to detain people.



Discriminatory prosecutions on “morality” and “indecenty” grounds

Those arrested have been detained and prosecuted under Article 230, which criminalizes same-sex relations (for “sodomy and lesbianism”), and/or Articles 226 and 226 bis of the Penal Code, which criminalize “indecenty” and acts deemed to be offensive to “public morals”.

These overbroad provisions and their subjective and discretionary application allow law enforcement to carry out sweeping arrests of individuals simply for failing to adhere to gender norms or having a non-conforming gender appearance or expression,” said Diana Eltahawy.

Target on Content Creators

On 27 October 2024, the justice ministry issued a statement condemning the increasing use of social media platforms such as TikTok and Instagram to spread content “contrary to public morals”. Few days after this statement, five content creators, including Khoubaib, who is gender non-conforming, were arrested and charged with “public indecenty, dissemination of content contrary to good morals” among other charges. They were convicted and sentenced on 31 October 2024 to prison terms of up to four and a half years.



Section III: The repercussions of referring to 230 of the penal code



Paragraph 1: Prison overload and its impact on public finances:

It's well known to the public that the state suffers from overcrowding in prison. According to Maak association, each prison costs the state between 21TND to 23.5TND per day, this includes of course food, health and supervision services. Lately in 2022, prisons and rehabilitation centers cost around 39.545 million TND.

This number exceeds prison capacity allowing human rights violations and increased financial burden for the state. one of the main reasons is the application of article 230 of the penal code. The excessive use of preventive detention with 50% waiting for trial. The application of this article entails additional costs for the state. Every year people are arrested, tried, and imprisoned based on their presumed sexual orientation.

🕒 Why address the issue now?

To answer this question, many factors should be considered. Firstly, the escalation of human rights violations is concerning, many individuals are facing arbitrary arrests and are being forced to anal examinations even though the state has claimed reform in this matter. Besides, the constitutional court isn't operating till this day allowing the abusive application of article 230.

Politically, the current regime has intensified repression against civil society and human rights defenders prioritizing morals over fundamental rights. Internationally, more countries are demanding the repeal of article 230 yet the state continues to give misleading justifications. Socially, civil society, activists and journalists are pushing into the repealing of art230. Furthermore, a legislative proposal for repealing article 230 was previously introduced in 2017 by the Mps of parliament which makes it a conducive environment for the emerging repeal of article 230.

Previous national attempts to repeal article 230 of the penal code. On the legislative level:

Following the circulation of the report of the Committee on Individual Freedoms and Equality and the controversy surrounding it, many MPs, in coordination with civil society organizations, rushed to prepare several draft laws, taking parts of the report in individual projects that were bold. Among the drafts that have been prepared and were expected to be deposited was a bill aimed at repealing Article 230 of the Penal Code.

The document explained the reasons for the draft law also relied on Article 23 of previous the constitution 2014 (Art 25 Now in 2022), which stipulates that “the state protects the dignity of the human person and the inviolability of the body and prevents moral and material torture, in addition to Article 49 (Art 55 Now in 2022), which stipulates that the law defines the controls related to the rights and freedoms guaranteed by this Constitution and their exercise in a way that does not compromise their essence.

Main goal behind repealing article 230 of the penal code: Penal policy aiming at promoting human right dignity through a legislation that protects individual rights.

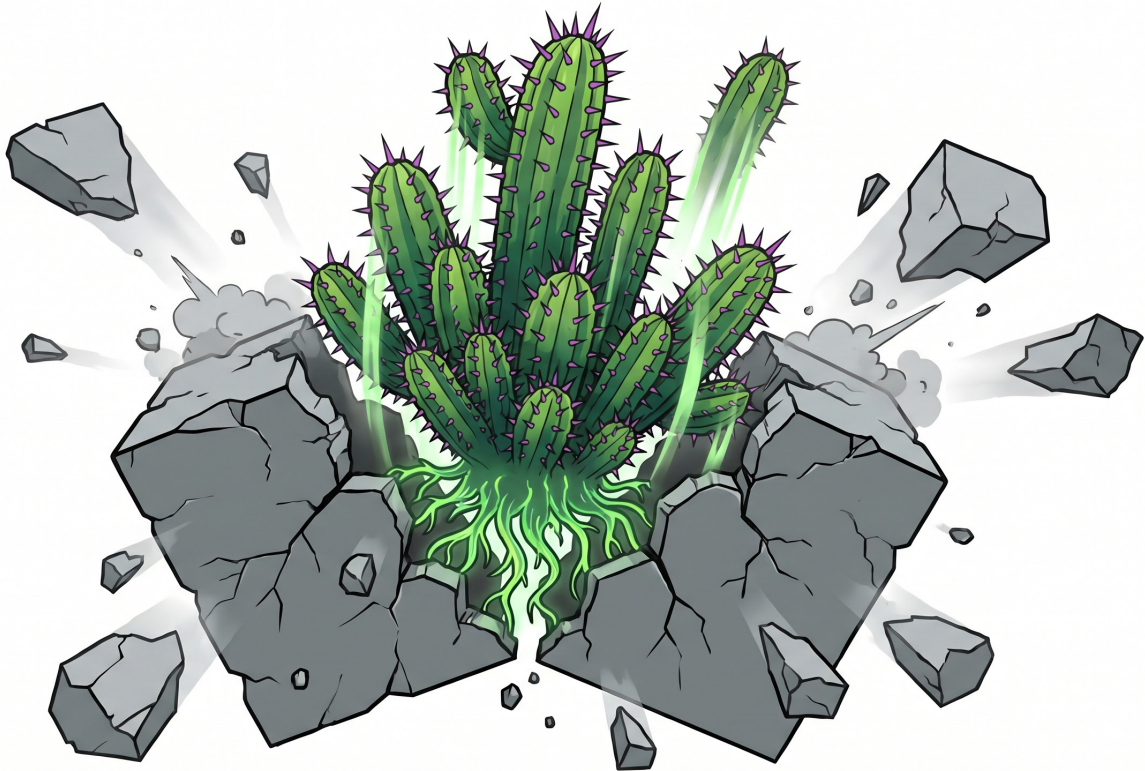
In comparative law, on the constitutional court of South Africa in *NCGL and other v. Minister of Home Affairs and others*, accepted the NCGLR the unconstitutionality of criminal legislation that criminalized same consented sex, relying on the argument of human dignity to interpret the principle of equality as guaranteed by the Constitution. The Court also adopted an individualized analysis of the impact of discrimination on homosexuals.

At this stage, the issue before the Court was whether the anti-sodomy provisions were aimed at the individual or the unanimous act, and the Constitutional Court confirmed the invalidity decision based on the right to equality, the right to dignity and the right to privacy. It ruled that the laws in question were unconstitutional. This where it is very crucial for the Tunisian state to release the operation of the constitutional court so that she guards the harmony between the penal code with the provisions of the Constitution.

Section III: Solutions

In Tunisia, the notion of human dignity occupies a central place in criminal law, in particular to guarantee the protection of the accused during legal proceedings. This is reflected in the constitutional principle of presumption of innocence and the rights granted to arrested persons, in order to humanize the conduct of criminal proceedings.

In addition, police officers are prohibited from using interrogation methods that violate the dignity of the accused, including questions attacking their honor, identity or sexual orientation. Vulnerable groups are exposed to an increased risk of harassment or ill-treatment during detention, underlining the importance of preserving human dignity in such cases.



Finally, it proposed to introduce legislative reform, by creating a specific chapter in the penal code to criminalize offenses against dignity, including discrimination based on sexual orientation and gender identity, in order to bring Tunisian laws into line with its constitutional commitment to protect human dignity.

In addition, the draft revision of the Penal Code called for the criminalization of all forms of discrimination, including those based on sexual orientation. The report proposed adding a chapter entitled "Discrimination", in which article 254-4 (new) would include discrimination based on sexual orientation among the prohibited forms.

In light of the systematic and daily violations of the human rights of homosexual persons, an urgent revision of criminal legislation was proposed, with the following measures: the total repeal of article 230, so that the act of "sodomy" is no longer the subject of a penal provision, and private sexual relations between consenting adults are decriminalized; the purification of the Penal Code of any provisions that could be used against homosexual people, such as acts criminalized under the expressions "indecent assault" and "outrage to public decency"; the repeal of homophobic laws and discriminatory provisions against homosexuals; the criminalization of homophobia through general anti-discrimination laws, including on the basis of sexual orientation and gender identity; and finally, the inclusion of homophobic and transphobic assaults as aggravating circumstances.

Section IV: Current Strategic proposal

1. Governmental body: presidency +Ministry of Justice +Parliament

Strategic intervention:

Reintroducing the repeal of article 230 in the parliament

Activities:

Relaunching discussions with Mps supportive of 2017+ political parties

Indicators & Results:

Number of the Mps supporting the repeal / Possibility of passing the repeal

Comparative experience:

Angola 2019 : Parliament repealed similar repressive law with fewer opposition, +
Mozambique 2015 removed criminalization

2. Public prosecution

Strategic intervention:

Clarifying judicial roles and prevention of abuse

Activities:

Reinforcing that legal qualification of cases goes back to judges only not a police mission/Ensure that legal defense rights not violated during detention+ conducting partnerships with civil society org for training sessions for better implementation of Law N°5

Results:

3. Police officers and judicial authorities

Strategic intervention:

Ensuring fair enforcement practices

Activities:

Ensure proper procedures for arrests and avoiding arbitrary detention+ respecting the lawyer's visits and its confidentiality (client-lawyer)

Comparative experience:

Toonen v Australia 1994 "states cannot justify discriminatory enforcement on moral and public order grounds" / Selmouni v France 1999 : referring to CAT

4. Constitutional & Administrative courts

Strategic intervention:

Activation of the constitutional court / Litigation before the Admin Court

Activities:

filing a case law based on 230 before the constitutional court / filing a case law challenging anal examinations forced by police on detainees referring to the CAT

Comparative experience:

Bostwana: Supreme court ruled that criminalization violates fundamental human rights /
India 2018 : SC ruled criminalization unconstitutional based on privacy and dignity /
Lebanon : Military court rules anal examinations are illegal

Challenges: Hesitant political environment

The issue of repealing article 230 isn't seriously undertaken by the government since it is still dependent on the intervention of the political leaders:

UPR CYCLE 2012 & 2017

State Position & Statements:

cited that a national objective dialogue must be conducted but wasn't ready to adopt real strategies. Later in 2017, declared that a legal framework had been put in place to protect vulnerable groups, including LGBT people, from all forms of discrimination.

Countries recommendations:

Numerous countries recommended repealing or amendment of art 230 including France, Switzerland, Canada, Norway, Costa Rica, Denmark, Netherlands, Ireland, Germany, USA.

UPR CYCLE 2022

State Position & Statements:

Showed reluctance and made misleading statements about rectal examinations and the state's handling of Article 230 cases. "The purpose of rectal examinations is not to find evidence of homosexuality... Under article 230 of the Criminal Code, such examinations are conducted only with the consent of the person concerned, and there is no presumption that the person has perpetrated an offence."

Countries recommendations:

recommended repealing or the amendment Sweden / Spain / Australia.

References

- ▶ 1. The penal code, Art230.
- ▶ 2. Wahid Ferchichi, Law and Homosexuality : Survey and Analysis of Legislation Across the Arab World, Middle East and North Africa Consultation of the Global Commission on HIV and the Law, 27-29 July 2011.
- ▶ 3. The right to a fair trial. Fair Trials, (2022, October 19).
- ▶ 4. Metadeen v. MGC Pointu (The supreme court of Mauritius February 18, 1998).
- ▶ 5. Hersch Lauterpacht, An International Bill of the Rights of Man, Columbia University Press, 1945.
- ▶ 6. United Nations, Human rights in the administration of justice "The right to equality before the law and equal treatment by the law", New York and Geneva, 2003.
- ▶ 7. OHCHR, Article 1 of the universal declaration of human rights 1948.
- ▶ 8. The 2022 Tunisian Constitution, article 33.
- ▶ 9. Mohamed Amine Jelassi, Wahid Ferchichi, les processus de dépenalisation de l'homosexualité : expériences comparées et état des lieux en Tunisie, Association Tunisienne de défense des libertés individuelles.
- ▶ 10. Immigration and Refugee Board of Canada (IRB), 'Tunisia: Situation of sexual minorities, including their treatment by society and the authorities, legislation, state protection and support services'.
- ▶ 11. The right to be presumed innocent; the overall Guarantee From suspicion to conviction or acquittal.
- ▶ 12. The 2014 Tunisian constitution, article 27.

- ▶ 13. Observation Générale 20, Article 7 (quarante-quatrième session, 1992), Compilation des commentaires généraux et Recommandations générales adoptées par les organes des traités, U.N. Doc. HRI\GEN\1\Rev.1 (1994).
- ▶ 14. Nations unies (1994), Observation Generale 20, Article 7, Bibliothèque des droits de la personne de l'université du Minnesota.
- ▶ 15. Le conseil de l'ordre des médecins, Affaire du test anal sur un homosexuel », communiqué du conseil national de l'ordre des médecins de tunisie.
- ▶ 16. Committee Against Torture. "Concluding Observations on the Third Periodic Report of Tunisia," 75th Session of the Committee against Torture 31 October–25 November 2022.
- ▶ 17. Human Rights Watch. "Kenya: Court Finds Forced Anal Exams Unconstitutional," 22 March 2018.
- ▶ 18. Amnesty international, "Tunisia authorities step up crackdown on lgbti individuals with wave of arrests".
- ▶ 19. National Coalition for Gay and Lesbian and Others v. Minister of Home Affairs and Others II, 2000 (1) BCLR 39 (CC), 2000 (2) SRevue juridique Thémis, n°43, 2009, pp. 426-427.

