Ramy Khouili
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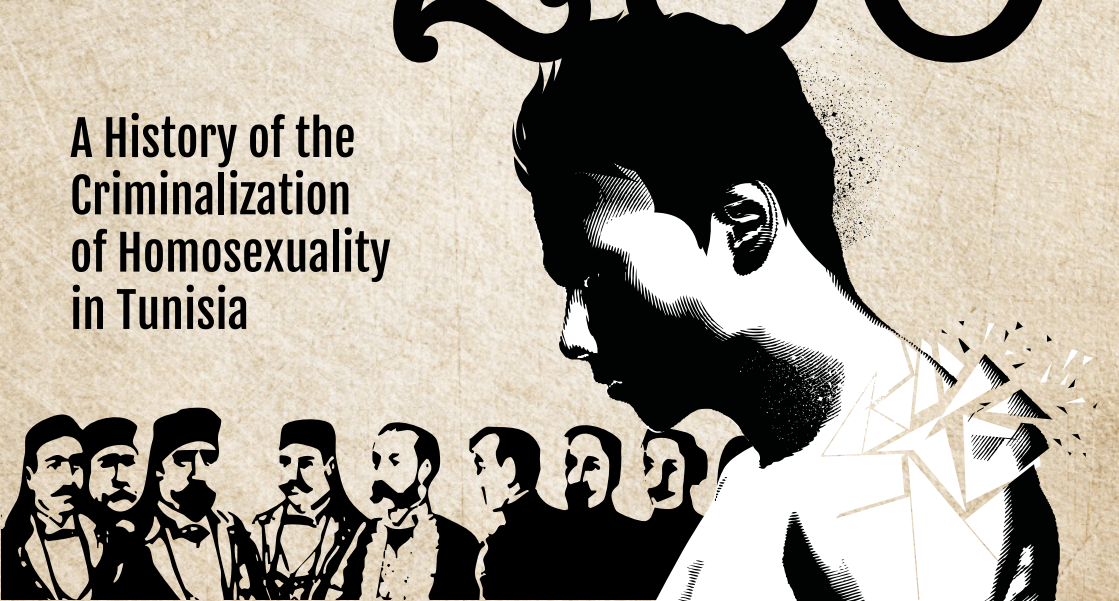
Article 230

A History of the Criminalization of Homosexuality in Tunisia



Acknowledgments

To the LGBTQ Tunisians who courageously shared their stories, experiences, and reflections with us, we dedicate this report to you. Over the course of our research, dozens of you spoke to us of arrests, anal examinations, social marginalization, sexual violence, psychological trauma, and discrimination under the color of law, as well as of the remarkable efforts of the Tunisian LGBTQ community to organize, defend itself, and fight back. We fully recognize the difficulty of sharing such painful testimonies, and the significant risks inherent in speaking with us, and we remain profoundly grateful for your willingness to share your stories. It is our hope that this report will serve as an advocacy tool for Tunisian LGBTQ activists and allies, in their struggle for LGBTQ equality and the decriminalization of homosexuality in Tunisia.

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Chapter 1 : The Origins of

On December 4, 2015, less than two years after Tunisia made international headlines with the promulgation of a Constitution widely hailed as the most progressive in the Arab world, Tunisian police arrived at a university student apartment in Rakkada, a small town just outside of Kairouan in central Tunisia.[1] [2]

Ostensibly searching for a missing college student, the officers arrested all six men found in the apartment, each between the ages of 18 and 21.[3] [4] According to the official report, police made the arrests after receiving information about "homosexuals" using a house in Kairouan for "sodomy," and discovering dresses, an unused condom, and a laptop containing homosexual pornography in the apartment.[5]

After a night of abusive interrogations at a Kairouan detention center, the men were taken to a nearby hospital the following day and forced to undergo an "anal examination," in which doctors use a "thin, transparent tube" or their fingers to "test" whether or not someone has been anally penetrated.[6] At trial on December 10, the judge condemned all six defendants to three years in prison followed by a five-year banishment from Kairouan.[7] [8] Their crime? Violations of Article 230 of the Tunisian penal code: "Sodomy."

Though striking in the severity of its initial sentence, the case of the Kairouan Six is not unique in post-revolution Tunisia. Less than three months prior to the students' arrest, police in Sousse arrested 22-year-old Marwan after discovering his number on the phone of a murder victim. Though Marwan originally believed officers intended to question him regarding the murder, the interrogation took a different turn—he endured physical abuse, continuous questions regarding his sexuality, and an anal examination.[9]

The trial judge sentenced Marwan to one year in prison under Article 230, citing the results of the anal examination as evidence. But following an enormous outcry from Tunisian civil society and significant international attention, the court of appeals commuted the sentence to two months. His dramatically shortened sentence on appeal largely mirrors what happened to the students in Kairouan—the appeals court commuted each of their sentences to one month and eliminated the initially imposed "banishment."

The prosecutions of Marwan and the Kairouan Six shocked many, both in Tunisia and across the globe. If the international community had continuously praised the country following the promulgation of the 2014 Constitution—four Tunisian organizations received the Nobel Peace Prize in 2015—widely-publicized arrests under Article 230 served as a harsh reminder of the strange legal reality of contemporary Tunisia. Namely, courts and police continue to enforce a wide range of laws and legal codes that clearly contravene the newly promulgated Constitution.[10] But for many in the Tunisian LGBTQ community, the case of Marwan and the Kairouan Six revealed something far more fundamental—"sodomy" is actually a criminal offense. According to Tarek, a 23-year-old Tunisian LGBTQ activist and university student, the Kairouan case "really changed our perception. We didn't know that you could go to prison. We knew homosexuality was not socially acceptable, but we didn't know it was illegal."[11] Aziz, a nurse and LGBTQ activist, similarly described the shock of learning of the existence of Article 230: "I understood that in my country, I was considered a criminal serving a suspended sentence."[12]

Beyond generating awareness of Article 230, the Kairouan Six and Marwan cases are notable for the powerful responses they engendered. In both instances, the reactions from civil society organizations and national and international human rights organizations came swiftly and powerfully.[13] Tunisian lawyers, journalists, activists and others publicly denounced the continued enforcement of Article 230, shedding light on the violent arrests, anal examinations, and long prison sentences—prominent international media outlets and NGOs rapidly picked up the stories.[14] And in a post-revolutionary climate marked by meaningful advances in freedom of expression and association, the responses to both cases were indicative of the growing effectiveness of Tunisian LGBTQ activists and their allies. As Joachim Paul, former Director of the Heinrich Böll Foundation in Tunis, explained, the "clear and strong reactions" to the arrests marked a "turning point" in the history of the Tunisian LGBTQ movement.[15] LGBTQ activists and their supporters had generated widespread attention and indignation around the arrests and trials of Marwan and the Kairouan Six, and had ensured that defendants received *pro bono* legal counsel. Their efforts undoubtedly played a role in ensuring that the initially long sentences were reduced on appeal.

As the criminalization of homosexuality in Tunisia attracted increasing levels of attention both domestically and internationally, a growing number of activists, journalists, and academics began to scrutinize the history of Article 230. Why did the Tunisian penal code include a sodomy law? How to explain the divergence between the French version, which criminalizes "sodomy,"

and the Arabic version, which criminalizes "male and female homosexuality?" What were the origins of the law's three-year prison sentence?

The article itself provides more questions than answers. The full text of the French version of Article 230, as originally drafted in 1913, reads as follows: "Sodomy, if it does not fall into any of the cases specified in the previous articles, is punishable by three years in prison."[16] The authoritative Arabic version, however, replaces "sodomy" with "*Liwat*" (masculine homosexuality) and "*El Mousahaka*" (female homosexuality). Thus, unlike its French counterpart, the Arabic version appears to criminalize homosexuality itself rather than anal penetration.[17] As discussed below, lawyers dispute whether Article 230 criminalizes an (ill-defined) sexual act, or whether it covers homosexuality more broadly.

The article's peculiar phrasing ("if it does not fall into any of the cases specified in the previous articles") stems from its placement within the Tunisian penal code. Unlike Article 226bis, for example, which criminalizes "gross indecency" committed in a public place, or Article 228, which criminalizes "indecent assault" committed against a person of the opposite sex without consent, Article 230 theoretically has an extremely specific application: "a crime 'committed' in private between two consenting adults, each at least 18 years old."[18] While Article 230 falls within the broader section entitled "Crimes against Morality," it should apply only to a narrow set of consensual acts between adults.

According to Wahid Ferchichi, a Tunisian law professor with expertise in anti-LGBTQ legislation, the specific language of Article 230 stems from a broader judicial philosophy running throughout the Tunisian penal code. For Ferchichi, the penal code's jurisprudential philosophy draws a "distinction between natural and unnatural sexual acts, a distinction which in reality concerns both heterosexual and homosexual relations."[19] Rather than limiting the "unnatural acts" to homosexuality, the penal code tightly circumscribes the limits of legally acceptable sex: "Only vaginal intercourse between men and women fit within the sphere of natural acts and every act outside of this category would be unnatural, even if practiced between individuals of different sexes, even if married."[20] In providing evidence for his claim, Ferchichi cites a 1997 ruling by a Sousse Appeals Court, in which a judge held that intercourse, even in the context of a married couple, must take place through the "natural [vaginal] passage," explaining that "obscene" and "odious" acts, including anal penetration, constitute a form of "gross indecency" (*attentat à sa pudeur*").[21] This paradigm, according to which all sexual acts with the exception of a married couple engaging in

vaginal intercourse fall outside the sphere of "natural" sexual relations, is not unfamiliar to prominent contemporary politicians. As Rached Ghannouchi, leader of Ennahda, Tunisia's Islamist Party and the largest bloc in parliament, argued in 2015, Tunisian law "forbids any relationship outside of marriage."[22]

Religious and cultural defenses of Article 230 invoked by Tunisian conservatives often center on the protection of Islamic or Tunisian norms from "Western" influence. But the legal prohibition of sodomy came into existence during the French colonial period (1881-1956). More specifically, Article 230 first appeared in the 1913 Tunisian Penal Code, a document which largely shares the "structure" and "values" of the 1810 French Penal Code.[23] Indeed, Article 230 has no clear analogue within pre-colonial Tunisian law. Previous Tunisian penal codes, such as the *Qanun Al Jinayat Wal Ahkam Al Urfya* (قانون الجنايات والأحكام العرفية), issued in 1861 under the Husainid dynasty, include no reference to sodomy or homosexuality whatsoever.[24]

The absence of explicit references to "homosexuality" in Tunisian criminal law prior to the French Protectorate, coupled with the fact that the 1913 Tunisian Penal Code largely mirrors the 1810 French Penal Code, lends credence to the idea that Article 230 is a pure product of colonialism, a relic of French rule with little relationship to Tunisia itself. But there is a potential flaw in this hypothesis—the 1810 French Penal Code makes no mention of "sodomy" or "homosexuality" either. Indeed, France had eliminated sodomy laws following the French Revolution in 1791, ninety years before the colonization of Tunisia.[25] And while the French justice system continued to persecute individuals suspected of homosexuality in numerous ways throughout the 19th-century, France had no sodomy laws on the books during the establishment of the Protectorate in 1881, nor during the drafting of the Tunisian Penal Code in 1913.[26]

The absence of "homosexuality" in the 1810 French Penal Code and 1861 Tunisian Penal Code raises a number of questions: Why did the drafters of the 1913 Tunisian Penal Code include a sodomy law? How did they decide upon a maximum three-year prison sentence as the appropriate punishment, given that said sentence has no basis in either French law, Tunisian law, or *Shari'a*? Should one read Article 230 exclusively as a product of colonialism, or might it be rooted in certain—potentially erroneous—conceptions of the requirements of *Shari'a* or Tunisian tradition?

This chapter represents our attempt to provide answers to the above questions. It is divided into the following sub-sections: 1) The 19th-Century Tunisian State and Legal System: An Overview; 2) Legal Reforms under

the French Protectorate from 1881-1913; 3) The Promulgation of the Penal Code and the Inclusion of the Sodomy Law; and 4) Why a Sodomy Law? Several Hypotheses. The first two-subsections provide important historical background information necessary to understand the context in which the 1913 Penal Code was adopted. The third subsection, largely based on archival research, provides an overview of the Commission tasked with writing the penal code and the process through which the code was drafted and edited. Lastly, the fourth section offers several hypotheses as to why the drafters may have ultimately chosen to include a sodomy law.

I. The 19th-Century Tunisian State and Legal System: An Overview

Ahmed Bey

Governed by the Beys of the Husainid dynasty, the 19th-century pre-colonial Tunisian state was relatively centralized, with a national governance structure and a developed administrative apparatus centered around Tunis, the capital. While theoretically remaining within the Ottoman empire, the Tunisian state functionally operated as a national monarchy, a trend that only increased as European powers sought to limit Ottoman influence in North Africa.[27]

Through his control of a bureaucratic administration, an army, and a "corps of *ulama*" (Islamic legal scholars), the Bey exercised significant control over the majority of Tunisian territory, in contrast to leaders in neighboring Libya and Algeria. Based in Tunis, the Bey administered the provinces through a system of *qaids,* regional governors who provided "a measure of administrative uniformity" across the country.[28] In spite of long-simmering historical tensions between the Bey and certain tribes in the country's interior, the 19th-century Beys levied taxes, enacted country-wide policies through a national bureaucracy, and governed an increasingly unified state.[29]

In the mid-19th century, as European states enjoyed increasing influence over Tunisian leadership, the Beylical government launched a series of "reforms aimed at centralization and developing nationwide institutions."[30] Seeking to transform Tunisia into a state capable of "resist[ing] foreign domination," Ahmed Bey—who ruled Tunisia from 1837-1855—embarked on an ambitious modernization programme, establishing a modern military academy, implementing major overhauls of the national education system and the administrative state, standardizing the system of tax-collection, financing numerous infrastructure projects, and abolishing slavery.[31] In purchasing "up-to-date weaponry," establishing a corps of Tunisian military officers trained to lead a modern army and navy, and conscripting the peasantry into the armed forces, Ahmed Bey sought to guarantee Tunisian sovereignty against foreign threats. France had conquered neighboring Algeria in 1830, and the Bey contended with increasing French and British efforts to exert control over Tunisian policy.[32]

Tunisia's 19th century modernization efforts included concerted attempts to reform the justice system. In 1857, Muhammad Bey signed the *Ahd Al-Aman* (the Security Covenant), an agreement that guaranteed civil and religious equality for all of the Bey's subjects, regardless of religious affiliation.[33] The Security Covenant additionally "commit[ted]" the Bey to formulate criminal and commercial codes and establish mixed courts to hear cases involving Europeans. It also announced the termination of state monopolies…[and] paved the way for sweeping economic and social changes."[34]

In 1861, Muhammad's successor, Muhammad al-Sadiq Bey, announced the promulgation of a formal constitution *(Qânun Al-Dawla)*, the first written constitution in the Arab world.[35] Though adopted partially with the objective of placing Tunisia on an equal playing field with European states—Muhammad al-Sadiq Bey sought Napolean III's approval of a draft of the constitution before its promulgation—the 1861 Tunisian Constitution is indicative of a broader modernizing tendency of the 19th-century Tunisian state. Largely following in the footsteps of the Ottoman *Tanzimat* (19th century reform program), the 1861 Constitution established a blueprint for a constitutional monarchy, in which the Bey's ministers were answerable to a 60-member Grand Council.[36] Its 13 sections established various ministries, officials, and bureaucratic positions, dealt with questions of finance, taxation, budgeting, civil service, and the separation of powers, and reiterated the Security Covenant's commitment to "legal equality regardless of residence, social position, and religion" for all Tunisians.[37] Several months after the passage of the Constitution, the Tunisian government announced the creation of a penal code *(Qânun Al-Jinayat Wal-Ahkam Al-Ôrfya)*; civil and criminal matters had previously been adjudicated on the basis of un-codified *Shari'a* jurisprudence. On the question of sodomy and homosexuality more broadly, the Tunisian code followed the newly promulgated Ottoman penal code, in which *zina* (unlawful sexual relations) laws disappeared entirely and no articles referenced homosexuality, sodomy, or effeminacy.[38] Like the Ottoman code, neither sodomy nor homosexuality appears in any of the Tunisian code's 664 articles.[39]

Though hopeful that a constitution might improve Tunisia's diplomatic clout, Muhammad al-Sadiq Bey inherited a dire economic situation. Seeking to raise revenue for a burgeoning state apparatus while struggling with growing international debt owed to European creditors, the new Bey dramatically increased taxes. When such measures ultimately pushed a restive Tunisian population into "full scale revolt" in 1864, the Bey capitulated, rescinding both the newly promulgated constitution as well as the tax increase.[40] [41]

In spite of its short life span, the 1861 Constitution exemplifies a broader "unifying objective" inherent in the codification efforts, particularly among the Tunisian elite. As law professor Sana Ban Achour explained, "The codifications speak to the idea that they introduce order where there was only disorder…the rules are the same for all, known by all, gathered in a single place: the law of the state."[42] Critically, the 1861 Constitution also makes clear that pre-colonial Tunisian authorities did not intend to criminalize sodomy.[34] Even following its repeal in 1864, there is no indication that Tunisian authorities sought to prosecute consensual homosexual relations between adults.

Historian Abdelhamid Larguèche, who has written widely on policing, arrests, and criminality in 19th-century Tunis, denied any pattern of prosecution for sodomy cases involving consensual homosexual relations. His book,

Les ombres de la ville, contains a chart detailing arrests between 1861-1865, which includes 62 cases of "sodomy."[44] But when questioned about these cases, Larguèche clarified that they referred to "rape cases, often involving minors."[45] He explained further that in pre-colonial Tunisia,

It was not the homosexual act in itself that was repressed, but rather the lack of consent from the other party, notably minors. Of course, if the [1861] penal code does not expressly mention homosexuality, whether feminine or masculine, it was nonetheless taboo, one of the forbidden practices hidden by the Sitr, a customary and moral principle of a society which hid in secret all practices that didn't conform with the customs recognized and accepted by everyone.[46]

In spite of the cultural importance of shielding socially unacceptable behavior from public view, Larguèche emphasized widespread awareness of the existence of same-sex relations, noting that "homosexuality was known to exist in various *milieux*, notably in the prince's court, but also in ordinary places in the city and the countryside, particularly in masculine spaces (workshops, artisans' stores, and the fields during the harvest)."[47] Moreover, same-sex love appeared often in "erotic literature and popular songs."[48] According to Larguèche, "Traditional societies were less repressive in terms of sexuality than modern societies."[49]

If 19th-century Tunisian governance can be partially characterized by a centralized administrative state and efforts towards increased unification, the civil and criminal justice systems remained relatively heterodox and disorganized. On the most general level, pre-colonial Tunisia had a bifurcated justice system, in which Tunisians and non-Tunisians were tried in entirely separate court systems applying radically different legal codes. Similar to other Ottoman provinces, Tunisia had granted "Capitulations" to Western powers, allowing foreign consuls in Tunisia to claim extraterritorial jurisdiction over their nationals.[50] In other words, the Italian, British, and French embassies operated courts to judge Tunisia's Italian, British, and French communities according to Italian, British, or French law, thus providing several European powers with "a form of sovereignty" in Tunisia.[51] Tunisians, on the other hand, fell within the jurisdiction of a multi-leveled "indigenous" court system under beylical control.

"Indigenous" courts were divided into three categories: *Shari'a*, Rabbinical, and *Ouzara*. *Shari'a* courts applied Islamic law to the Bey's Muslim subjects, ruling on personal status law (marriage, inheritance, divorce) and questions of property.[52] However, different *cadis*—*Shari'a* judges appointed by the Bey—applied jurisprudence from two different schools of Islamic jurisprudence, known as *madhhabs*. Namely, judges applied laws from either the Maliki or the Hanafi *madhhab*, leading to a reality of "double justice" in which different cases would be judged according to varying rules of jurisprudence and procedure.[53] *Cadis* had the right to refer certain cases to the *Charaâ* council, made up of both Maliki and Hanafi religious scholars and judges. Throughout the 19th century, the *Charaâ* council gathered every Sunday in the presence of the Bey, in order to discuss important cases or those involving capital punishment.[54] Though the Bey undertook important reforms in 1856 and 1876, the *Shari'a* judicial system remained extremely variable. Courts lacked uniform procedures and clear procedural codes, and judges exercised a high-level of discretion.[55] Moreover, Rabbinical courts applied *Halakhic* (Jewish religious law) personal status law to Jewish Tunisians, though property cases remained under the jurisdiction of the *Shari'a* courts.[56]

All cases outside the jurisdiction of Tunisia's religious courts fell to the *Ouzara* courts. Divided into criminal and civil sections, *Ouzara* courts received individual complaints, examined various pieces of evidence, and conducted hearings. The head of each section (criminal or civil) subsequently issued a sentence, which required both the signature of the Prime Minister and the approval of the Bey.[57] The *Ouzara* system's extremely centralized structure, and the requirement that even relatively unimportant cases receive beylical approval, proved particularly arduous for those living outside of Tunis, many of whom spent months or years undertaking expensive trips to the capital over the course of their trial.[58]

In spite of certain weaknesses, it is important to remember that the pre-colonial Tunisian state remained relatively strong. Over the course of the 19th century, beylical governments implemented broad reform efforts through a comprehensive administrative apparatus. Even when certain initiatives proved unsuccessful or contributed to the state's growing debt, the Tunisian government's efforts constituted part of a broader modernizing effort, influenced both by European states and the Ottoman Empire. In the legal sphere specifically, attempts to overhaul the judicial system did not end with the promulgation of the 1857 Security Covenant or the 1861 Constitution and penal code. Recognizing the problems inherent in operating a legal system applying the law of two different *madhhabs*, reformist Prime Minister Khayr al-Din understood the importance of standardizing the Tunisian legal system. In 1876, he created a commission, made up of three religious scholars as well as a secular member, tasked with drafting comprehensive legislation to abolish distinctions between Hanafi and Maliki jurisprudence and establish

a uniform system of Islamic family law. While the effort ultimately failed, it is critical to note that, prior to French colonization, Tunisian reformers had already begun the process of building a centralized state with a uniform legal system.[59]

II. Legal Reforms under the French Protectorate from 1881-1913

"The establishment of the colonial administration in Tunisia did not result in the total destruction of the administrative hierarchy established by the Bey. Rather, it resulted in the appropriation, in the fullest sense of the term, of previously existing structures, connected by the colonial power to its economic project. Similarly, the law of the colonial power was not imposed heavy-handedly…[it was] received and disseminated in local form (beylical decrees)…the law of the conqueror had to adapt to the local reality."[60]

Sana Ben Achour, *Fait Colonial et Droit Tunisien*

Two years after French forces invaded Tunisia and reached the beylical Palace at Bardo in 1881, Ali Bey and Paul Cambon—a French diplomat and the first Resident-General *(Résident Général)* of the French Protectorate of Tunisia—signed the Marsa Convention, establishing French authority over Tunisia for the next three-quarters of a century.[61] Though "nominally recognizing the Bey's sovereignty," the Marsa Convention provided for French management of Tunisia's domestic affairs, placing effective control of the state in the hands of the Resident-General.[62] But the fact that Tunisia remained a French Protectorate rather than a colony is not insignificant. France never sought to incorporate Tunisia as a province, as it did with neighboring Algeria, and the Bey remained the nominal head of the Tunisian state. Rather than dismantle the beylical state, the French "essentially maintained the Tunisian administrative structure that they found when they occupied the country. They used it to govern the country and superimposed their own apparatus."[63]

Operating according to the theoretical principle of "co-sovereignty," the French sought to mold existing Tunisian governance structures to colonial interests without provoking an uprising due to perceived interference in the country's internal affairs and traditional customs. As historian Kenneth Perkins observed, the protectorate constituted a "middle ground" between two camps in metropolitan France, a compromise between those demanding full French sovereignty (i.e. straightforward colonial annexation) and those calling for a complete withdrawal of French troops. Perkins writes, "[The protectorate's] proponents believed that preserving the shell of indigenous government lessened the likelihood of stimulating the bitterness and hostility that political assimilation to France had produced among the indigenous people of neighboring Algeria. Moreover, maintaining such a façade allowed for the Tunisian funding of a French administration."[64]

If France aimed to preserve the appearance of beylical authority and non-interference, the colonial administration nonetheless expected total obedience, and worked to implement a range of reforms conducive to ensuring French control. On the national level, effective power remained in the hands of the French Resident-General, who remained part of the French Ministry of Foreign Affairs, and whose official responsibilities including ensuring the implementation of the Marsa Convention and serving as the foreign minister of the Tunisian government.[65]

On the local level, the French maintained the system of *qaids* that represented beylical authority in the provinces, but closely supervised their work through consuls and vice consuls as well as *controleurs civils,* French officers who managed contingents of Tunisian *gendarmes* and expected total obedience from their Tunisian administrators. The presence of Tunisian administrators, moreover, largely served to preserve the appearance of local rule.[66] *Qaids* who failed in tax collection duties, for example, could be relieved of their duties and replaced by French administrators.[67] Moreover, the French redrew the boundaries of the *qidayas*—provinces ruled by *qaids*—during the early years of the protectorate, structuring divisions based on geography rather than kinship.[68] Ultimately, under the "structural ambivalence" that characterized the protectorate, "Traditional structures were maintained only on the condition that they allowed for colonial management of Tunisian affairs."[69]

Partial deference to the pre-existing Tunisian administration did not make French colonization any less self-interested. If existing administrative structures and leaders, from the Bey down to the local *qaids*, formed the "major vehicle of colonization," then they would need to serve the interests of the French state with maximum efficiency.[70] The drive towards centralization and bureaucratization launched prior to French colonization required support and reinforcement. Building on prior institutions, French colonization would eventually concretize many attributes of the modern state, including "a hierarchical administration, a modernized justice system, and codified law."[71] At the same time, by operating primarily through existing structures and attempting to demonstrate respect for certain local customs, the colonial administration sought to avoid the anti-colonial uprisings that occurred in neighboring Algeria.

Perhaps nowhere was this tension more evident than in the law. If Tunisia's pre-colonial administration could generally be adopted to French ends, the complex "legal pluralism" of the beylical state presented immense challenges for colonial administrators seeking to ensure their grip on the protectorate.[72] As discussed above, the 19th-century Tunisian legal landscape was made up of numerous jurisdictions. Tunisian Muslims and Tunisian Jews, as well as Italian, French, and other foreign communities, fell under under the jurisdictions of different courts to be judged according to different laws. Curbing this legal polyvalence would remain a key French priority, as well as the objective of a number of Tunisian reformers, throughout the colonial period. Indeed, immediately after the instauration of the protectorate in 1883, the French government moved to end the "Capitulations," by which different European consulates maintained courts in Tunisia for members of their own communities. Following a beylical decree in 1883, Tunisia moved into a period of "dual jurisprudence," under which French courts would have jurisdiction over all foreigners, while Tunisians would continue to be judged under Tunisian (*Shari'a*, Rabbinical, and *Ouzara*) courts.[73]

If the French moved quickly to eliminate the judicial footholds of rival European powers, they showed meaningful restraint when dealing with central components of the law governing Tunisians themselves. Though it expanded and reshaped the bureaucracy and implemented key economic changes, the French colonial administration essentially "left family law in place" during the protectorate, cognizant of the enormous sensitivity around *Shari'a* and questions of religion.[74] If "foreign" justice was to be consolidated under French courts, an 1884 beylical decree guaranteed that Tunisian personal status and property cases would still be judged by *Shari'a* and Rabbinical courts, while civil and criminal cases remained under the *Ouzara* system.[75]

But French sensitivity regarding Tunisian sentiments could not stand in the way of reforms required for economic dominance, particularly on questions of agriculture and land tenure. Prior to French colonization, the fact that property disputes fell under the jurisdiction of *Shari'a* courts had allowed Tunisians to use their knowledge of Islamic jurisprudence to block foreign attempts to purchase land, and to acquire title to contested pieces of land. The Resident-General appointed a commission, a third of whose members served as officials in the beylical government or in the *Shari'a* legal system, tasked with codifying property laws. In 1885, the Commission established a mechanism through which foreigners and Tunisians could register their property with the state and establish title. Property disputes would no longer be adjudicated in *Shari'a* courts. Instead, they would be judged by a newly established mixed real estate court *(tribunal mixte immobilier)*, headed by a French judge staffed with French and Tunisian magistrates.[76] This evolution, coupled with other measures similarly established with the objective of "strengthening foreigners' claims to land," would quickly bear fruit, leading to the transfer of hundreds of thousands of acres of land to French *colons* (French colonists) over a period of a several decades.[77]

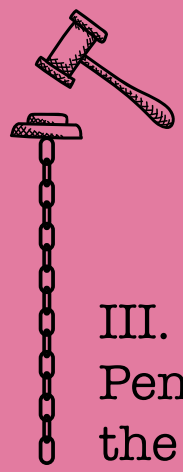
The establishment of property registration and the extension of French jurisdiction over most property disputes arguably marked the first important rupture with the prior legal status quo, by which France had avoided direct interference in the "indigenous" judicial system. In the ensuing decades, the colonial administration progressively sought to re-shape Tunisian law, molding a once fluid administration of justice into categories, forms, and institutions which closely corresponded to the French legal system. Cognizant of the symbolic importance of codification in the "normalization of the colonial order" and taking advantage of the Tunisian state bureaucracy, colonial authorities would transform Tunisian law—including *Shari'a* jurisprudence—into a set of fixed legal codes.[78]

In September 1896, a little over a decade after the creation of the mixed real estate court, Resident-General René Millet established a commission tasked with codifying Tunisian "civil, commercial, and penal" legislation based on the French model.[79] The impetus for the Commission, doubly entitled the "Commission of the Codification of Tunisian Laws" and the "Commission of the Codification of Muslim Laws," grew out of the demands of a number of different groups, many with sharply opposing interests.[80] First, as discussed above, the French colonial administration was aware of the overarching need to reform the Tunisian judicial system from the onset of the protectorate, both in order to ensure French control over Tunisian affairs and to prevent the continued influence of European colonial rivals through the system of Capitulations. 1896 additionally marked the point at which Tunisian *Ouzara* courts were placed under the Directorate of Judicial Services, overseen by a French judge.[81] Secondly, the rapidly increasing population of *colons* exercised a growing influence on the protectorate authorities, particularly through the Consultative Conference, a body which brought together the representatives of the French community in Tunisia for the purposes of advising the Resident-General.[82] Committed to the continuation of French dominance and resolutely opposed to anything which might empower Tunisians, the *colons* put pressure on the administration to extend the jurisdiction of French courts throughout the protectorate. In a 1905 statement, for instance, the Consultative Conference demanded "that the Muslim courts are eliminated and the Muslims are judged by French Courts according to their laws and customs."[83] Thirdly, beginning in the early 20th century, members of Tunisia's then-substantial Jewish community publicly called for an overhaul of the Tunisian legal system, a call which included demands for the French naturalization of Jewish Tunisians (as in neighboring Algeria) and for Tunisian Jews to be judged by French courts. Demands for Jewish naturalization and judgement in French courts, proposed by prominent Tunisian Jew Mardochée Smaja during two gatherings of Colonial Congres *(congrès colonial)* in Marseille (1906) and Paris (1908), were ultimately rejected both by members of the Tunisian Muslim community and by the French government. However, the Congress did recognize the need for judicial reform, issuing a statement that reads in relevant part: "The demand to reform the Tunisian justice system and to improve its functioning has been clearly formulated and is considered urgent."[84] Lastly, an increasingly vocal group of Tunisian reformers, collectively known as the *Le Mouvement des Jeunes Tunisiens* (the Movement of Young Tunisians), called for a broad range of policy changes in the protectorate and the Tunisian state in the early 20th century. Heavily influenced by the Young Turks' efforts to modernize the Ottoman Empire, the Young Tunisians established a newspaper, *Le Tunisien*, in 1907, providing them with a platform to advocate their reformist

programme. Led by Ali Bach Hamba, Abdeljeli Zaouch, and others, the Young Tunisians recognized the substantial flaws of the Tunisian justice system, and called for a major judicial overhaul.

Over the ensuing decades, the original Commission, as well as several later commissions tasked with the codification of specific areas of Tunisia law, would eventually produce a series of modern codes for Tunisian secular courts, strictly limiting the jurisdiction of *Shari'a* courts to cases involving questions of Islamic personal status and inheritance.[85] The Tunisian Civil and Commercial Code was published in 1899, followed by the Code of Contracts in 1906, and the Code of Civil Procedure in 1910.[86] Given the magnitude of the codification, the protectorate authorities created a new position, the Secretary-General of Justice *(Secrétariat général du gouvernement pour la justice)*, charged with "presiding over various commissions established for the preparation of Tunisian codes as well as directing the preparation…[as well as] promulgating the laws, decrees and regulations concerning civil law, commercial law, and penal law."[87]

Veteran French colonial administrator Bernard Roy became the first to fill the role in 1910. Under his leadership, the Tunisian penal code was promulgated in 1913.[88]



III. The Promulgation of the Penal Code and the Inclusion of the Sodomy Law

Much remains unknown regarding the drafting, as well as the drafters, of the 1913 Tunisian Penal Code. Significant ambiguity remains, for instance, around the precise composition and the assorted roles of a "sub-commission" *(sous-commission)*, chaired by French colonial official Henri Guyot, theoretically responsible for drafting the initial version of the penal code. Additionally, if discussions took place regarding the development of the penal code, there do not appear to be corresponding written records. Thus, the following account of the drafting of the penal code, and the inclusion of the sodomy law, has been pieced together through archival research and continued reference to secondary sources.

In 1909, a beylical decree established a commission charged specifically with preparing a preliminary draft *(Avant-Projet)* of the penal code.[89] Unlike the exclusively French commission tasked with drafting the Code of Civil Procedure several years prior, the penal commission was "mixed," including both French and Tunisian members.[90] Though membership appears to have evolved somewhat over the course of several years, the make-up of the commission in 1912—during the final stages of the code's drafting—consisted of six French and two Tunisian members. The French members included Bernard Roy, Secretary-General of Justice, Henri Guyot, Director of Judicial Services of the Tunisian Government, Paul Dumas, President of the Civil Court of Tunis, as well as several other high-level protectorate administrators and lawyers. The Tunisian membership consisted of Mahmoud Ben Mahmoud, a Hanafi Judge, and Mohamed Kassar, a Maliki Judge *(See Exhibit 9)*.

Archival research indicates that the first draft of the penal code was drafted and completed in 1911. As indicated by the 1909 beylical decree discussed in the preceding paragraph, the front page of the document includes the title: "Preliminary Draft of the Tunisian Penal Code" *(See Exhibit 1)*.[91] The front page further specifies that the document was submitted by a sub-commission on which Henri Guyot (a member of the Commission) served as the *rapporteur* (chair). Further, a note on the bottom of the page contains important information regarding the relationship between the sub-commission and the full commission, made up of the six French and two Tunisian representatives discussed above. The first sentence of the note—"We have exclusively made an effort to submit to the Commission propositions which can serve as the basis for the discussion"—indicates that a sub-commission, chaired by Henri Guyot, was tasked with writing an initial draft, to be subsequently submitted to the full commission for edits and revisions *(See Exhibit 1)*.

The text of the Preliminary Draft, particularly when compared with subsequent drafts, lends credence to this understanding of events. The margins of the Preliminary Draft are filled with handwritten comments, proposals, and addendums, several of which are attributed to individual members of the Commission, particularly Dumas and Roy *(See Exhibit 2)*. Some articles are scrupulously edited, with certain lines crossed out and other sentences added, while others are simply marked "rejected," "approved," "reserved" or "deleted" in the margins, either with or without any ensuing explanation *(See Exhibit 3)*. While it is not clear who else served on this sub-commission aside from Henri Guyot, or how much time was spent editing the Preliminary Draft, the large number of modifications as well as the various handwriting styles and number of comments attributed to particular members of the Commission give the impression that several Commission members spent a substantial amount of time editing and reformulating the Preliminary Draft.[92] The 434 articles in the Preliminary Draft, for example, would eventually be reduced to 321 articles in the final version.

The first appearance of the Tunisian sodomy law appears as a handwritten note on the margins of the "Offenses against Decency" *(Attentats aux moeurs)* section of the Preliminary Draft *(See Exhibit 4)*. Similar to the 1861 Tunisian Penal Code promulgated prior to the French Protectorate, none of the 431 *printed* articles contain a single mention of the words "sodomy" or "homosexuality." However, a handwritten note in the margins contains "Article 274," which reads as follows: "Whoever is convicted of sodomy is punishable by three years in prison, without prejudice to longer penalties incurred based on the cases and distinctions outlined in the preceding articles."[93] The "preceding articles" almost certainly refer to the articles in the "Offenses against Decency" section, which expressly criminalize "public indecency", "public indecency against a child", "rape", and other sexual crimes *(See Exhibit 6)*. Given that one can be guilty of "sodomy"—there is no mention of what "sodomy" consists of or of its potential relationship to homosexuality—in addition to the crimes described above, the punishment in the original formulation of the sodomy law makes clear that anyone guilty of a more severe crime, under a different "offense against decency", will not see their sentence reduced under "sodomy."

Unlike several other marginalia, Article 274 is not attributed to a particular member of the Commission—there is neither signature, nor explanation. But while it is not clear who actually wrote the text of the sodomy law, Henri Guyot appears to be the most likely candidate. As the *rapporteur* in charge of the sub-commission, his central role in the writing of the Preliminary Draft, as well as in the subsequent incorporation of the Commission's comments into later drafts, is beyond dispute. Further, on December 4, 1911, he signed and dated the Preliminary Draft *(See Exhibit 5)*. Nonetheless, even if Guyot added the sodomy law by hand, it is unclear whether he did so on his own volition, or whether he simply followed the instructions of Bernard Roy, Paul Dumas, or one of the other Commission members. As stated above, there are no meeting notes or summaries which describe the editing process—the sequence described here has been deduced primarily from the drafts of the codes themselves.

Equally importantly, the fact that the original formulation of the sodomy law appears in the margins of the Preliminary Draft makes the source of the article difficult to decipher. The note on the bottom of the front page of the Preliminary Draft, which provides a short explanation of the Penal Code's juridical sources, reads in relevant part: "[T]hese propositions are based, in part, on Islamic law and the jurisprudence of the indigenous tribunals, and in part on European laws (notably the French Penal Code) whose principles can be reconciled with Islamic law and Tunisian customs."[94] The note additionally mentions that the Preliminary Draft borrowed significantly from the Ottoman (1859), Egyptian (1904) and Thai (1905) penal codes *(See Exhibit 1)*.[95] In accordance with this introductory note, many of the articles printed in the code contain footnotes referencing their specific legal sources. References are made to several Tunisian and Islamic sources, including the 1861 Tunisian Penal Code *(Qânun Al-Jinayat Wal-Ahkam Al-Ôrfya)*, as well as to a number of European (e.g. French, Russian, Belgian, and Hungarian), Middle Eastern (e.g. Ottoman, Egyptian), and Asian (e.g. Thai, Japanese) legal sources. For example, Article 268, which criminalizes "public indecency," contains references to the French, Hungarian, Ottoman, Egyptian, and Tunisian penal

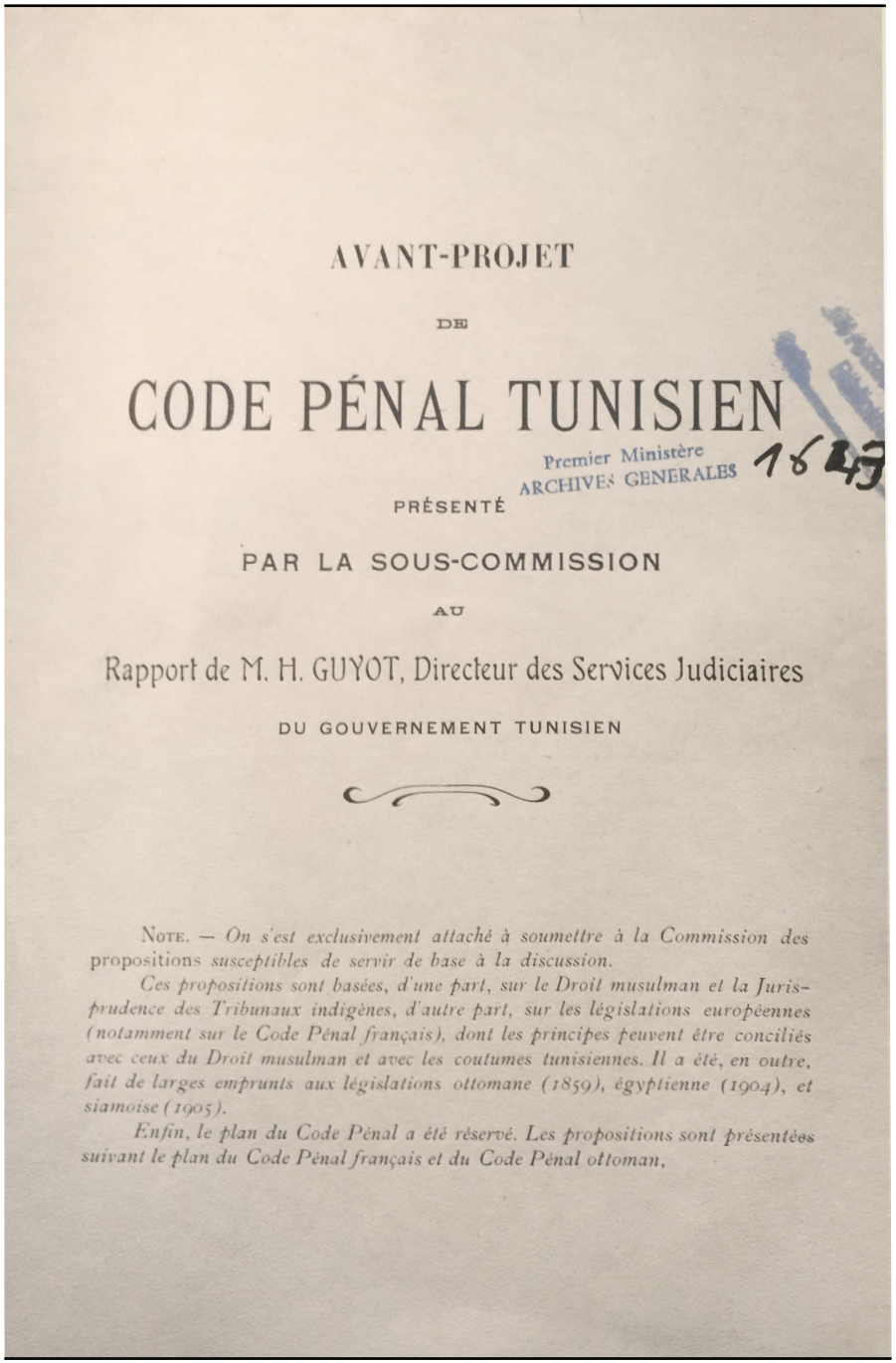
codes *(See Exhibit 6)*. But given that the Tunisian sodomy law first appears as a handwritten note, it contains no reference to any juridical sources.

The subsequent draft of the code, printed in 1912, contains the identical formulation of the sodomy law in the handwritten note *(See Exhibit 7)*. The only difference is that in the 1912 version, the sodomy law is typed rather than handwritten, and has shifted from Article 274 to Article 212. The change in the Article's placement is simply a function of the fact that the entire "Offenses against Morality" *(Attentats aux moeurs)* section appears earlier in the newer draft, a result of the fact that the 1912 version is significantly shorter than the 1911 Preliminary Draft. Unfortunately for the purposes of identifying the sources of the sodomy law, the 1912 draft does not contain footnotes explaining the legal influences behind each article.

In the final draft of the Tunisian penal code published the following year, the sodomy law shifts from Article 212 to Article 230—a function of the fact that the "Offenses against Morality" section appears later in the draft —with slightly modified language. The full French text of the Article reads as follows: "Sodomy, if it does not fall into any of the cases specified in the previous articles, is punishable by three years in prison."[96] As stated above, the article's phrasing ("if it does not fall into any of the cases specified in the previous articles") stems from its placement within the "Outrages against Morality" section. Unlike Article 226 (which criminalizes "gross indecency" committed in a public place), Article 230 only applies to crimes committed in private between two consenting adults.[97] Due to the lack of notes from the members of the Commission, it is unclear how, and through what process, edits were made to the 1912 draft. Regardless, the final version of the sodomy law is almost functionally identical to its predecessors in the 1911 and 1912 drafts. Those convicted of "sodomy" may be punished by up to three years in prison, provided that the alleged act does not fall within any of the other morality crimes described earlier in the section. However, it is noteworthy that the authoritative Arabic translation of the text, published soon after the publication of the French version, replaces "sodomy" with *"Liwat"* (masculine homosexuality) and *"El Mousahaka"* (female homosexuality).[98]

In 1914, a commentary on the newly promulgated Tunisian penal code, written by Henri Guyot and translated by Mohamed Tahar Bouderbala, was published in Arabic—there does not appear to be a French version. In the preface, well-known Tunisian Sheikh Mohamed Tahar Ben Achour refers to the fact that he received two books from Guyot, each discussing different parts of the penal code. However, only the first book remains available in the Tunisian National Archives and National Library. That book, which explains the origins and legal sources of the articles in the first book of the penal code *(Dispositions générales)* in detail, does not cover the later sections of the code, including the "Outrages against Morality" section in which Article 230 appears. Thus, despite the fact that the sources of the majority of articles in the penal code appear either in Guyot's 1914 commentary or in the footnotes of the 1911 Preliminary Draft, there is no indication of the origins of Article 230. Whether or not a copy still remains of the second book of Guyot's commentary, or whether said book ever existed, is unknown.

1



AVANT-PROJET

DE

CODE PÉNAL TUNISIEN

PRÉSENTÉ

PAR LA SOUS-COMMISSION

AU

Rapport de M. H. GUYOT, Directeur des Services Judiciaires

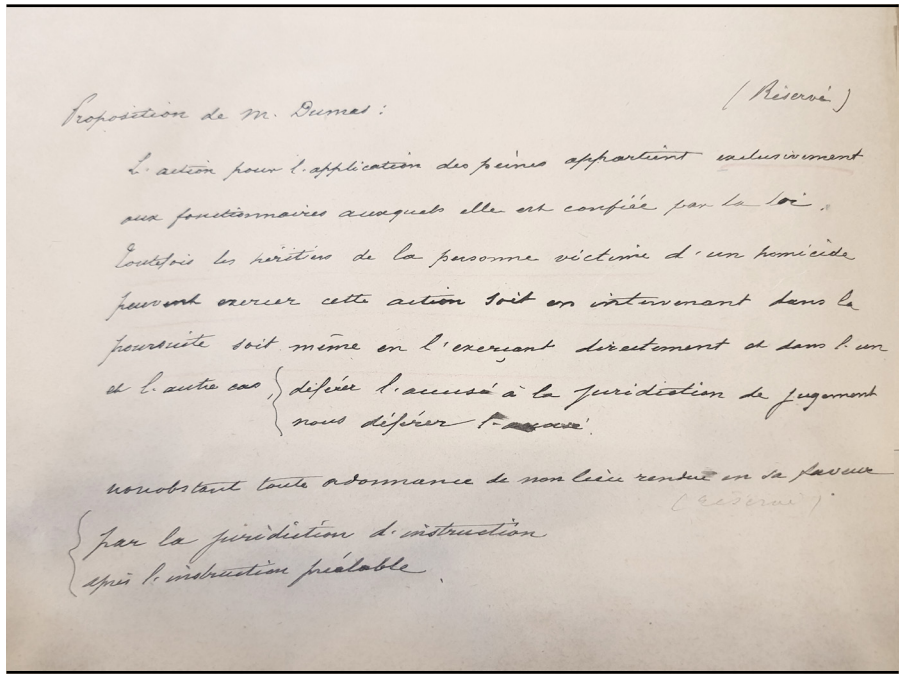
DU GOUVERNEMENT TUNISIEN

NOTE. — *On s'est exclusivement attaché à soumettre à la Commission des propositions susceptibles de servir de base à la discussion.*

Ces propositions sont basées, d'une part, sur le Droit musulman et la Jurisprudence des Tribunaux indigènes, d'autre part, sur les législations européennes (notamment sur le Code Pénal français), dont les principes peuvent être conciliés avec ceux du Droit musulman et avec les coutumes tunisiennes. Il a été, en outre, fait de larges emprunts aux législations ottomane (1859), égyptienne (1904), et siamoise (1905).

Enfin, le plan du Code Pénal a été réservé. Les propositions sont présentées suivant le plan du Code Pénal français et du Code Pénal ottoman.

2



Proposition de M. Dumas : (Réservé)

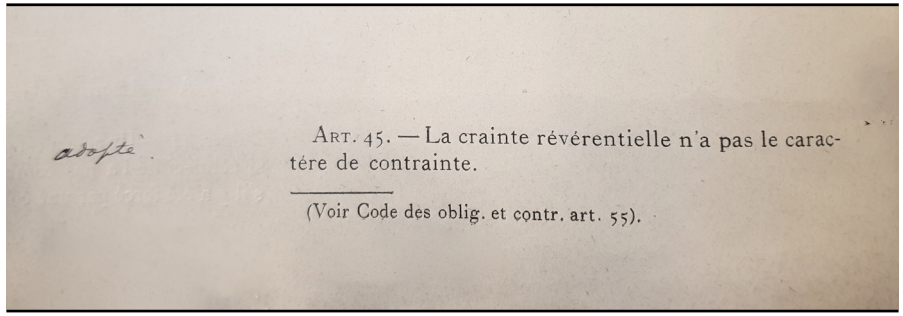
L'action pour l'application des peines appartient exclusivement aux fonctionnaires auxquels elle est confiée par la loi.

Toutefois les héritiers de la personne victime d'un homicide pourront exercer cette action soit en intervenant dans la poursuite soit même en l'exerçant directement et dans l'un et l'autre cas, { déférer l'accusé à la juridiction de jugement / nous déférer l'affaire.

nonobstant toute ordonnance de non lieu rendue en sa faveur (réservé).

{ par la juridiction d'instruction / après l'instruction préalable.

3



adopté.

ART. 45. — La crainte révérentielle n'a pas le caractère de contrainte.

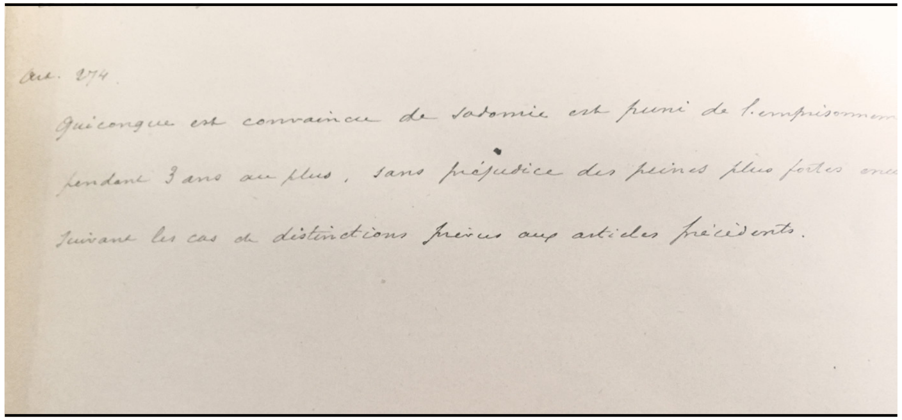
(Voir Code des oblig. et contr. art. 55).

Exhibit 1
First Page of the 1911 Preliminary Draft

Exhibit 2
Example of a proposition (submitted by Mr. Dumas) to the 1911 Preliminary Draft

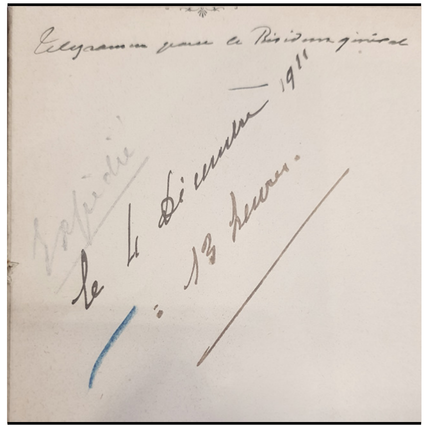
Exhibit 3
Example of a proposition simply marked "adopted" in the 1911 Preliminary Draft

4


Art. 274

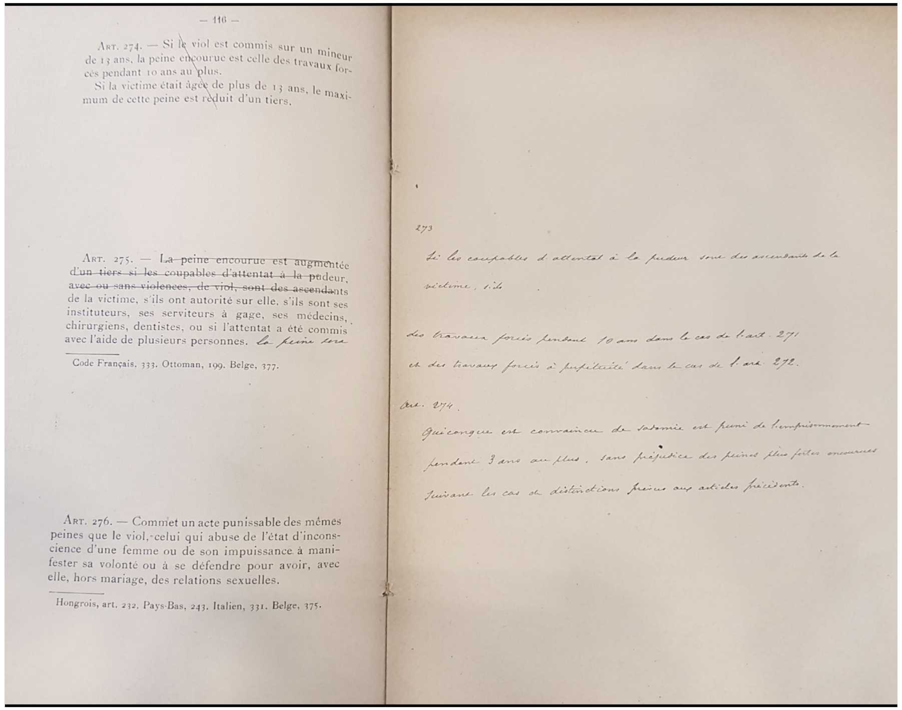
Quiconque est convaincu de sodomie est puni de l'emprisonnement pendant 3 ans au plus, sans préjudice des peines plus fortes encourues suivant les cas de distinctions prévus aux articles précédents.

5


Télégramme pour le Résident général

Expédié le 4 Décembre 1911 à 13 heures.

4 bis


— 116 —

ART. 274. — Si le viol est commis sur un mineur de 13 ans, la peine encourue est celle des travaux forcés pendant 10 ans au plus.

Si la victime était âgée de plus de 13 ans, le maximum de cette peine est réduit d'un tiers.

ART. 275. — ~~La peine encourue est augmentée d'un tiers si les coupables d'attentat à la pudeur, avec ou sans violences, de viol, sont des ascendants~~ de la victime, s'ils ont autorité sur elle, s'ils sont ses instituteurs, ses serviteurs à gage, ses médecins, chirurgiens, dentistes, ou si l'attentat a été commis avec l'aide de plusieurs personnes. la peine sera

Code Français, 333. Ottoman, 199. Belge, 377.

ART. 276. — Commet un acte punissable des mêmes peines que le viol, celui qui abuse de l'état d'inconscience d'une femme ou de son impuissance à manifester sa volonté ou à se défendre pour avoir, avec elle, hors mariage, des relations sexuelles.

Hongrois, art. 232. Pays-Bas, 243. Italien, 331. Belge, 375.

273

Si les coupables d'attentat à la pudeur sont des ascendants de la victime, ...

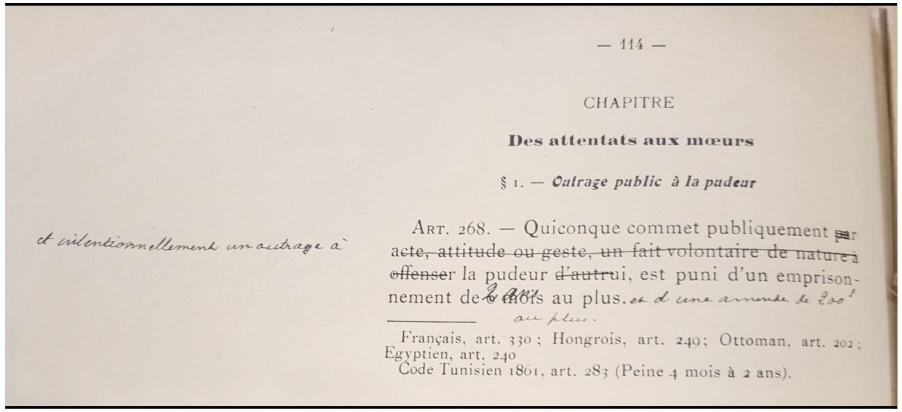
des travaux forcés pendant 10 ans dans le cas de l'art. 271

et des travaux forcés à perpétuité dans le cas de l'art. 272.

Art. 274

Quiconque est convaincu de sodomie est puni de l'emprisonnement pendant 3 ans au plus, sans préjudice des peines plus fortes encourues suivant les cas de distinctions prévus aux articles précédents.

6


— 114 —

CHAPITRE

Des attentats aux mœurs

§ 1. — *Outrage public à la pudeur*

et intentionnellement un outrage à

ART. 268. — Quiconque commet publiquement ~~par~~ a~~cte, attitude ou geste, un fait volontaire de nature à offense~~r la pudeur ~~d'autr~~ui, est puni d'un emprisonnement de ~~6 mois~~ 2 ans au plus. et d'une amende de 200 f au plus.

Français, art. 330 ; Hongrois, art. 249 ; Ottoman, art. 202 ; Egyptien, art. 240

Code Tunisien 1861, art. 283 (Peine 4 mois à 2 ans).

7

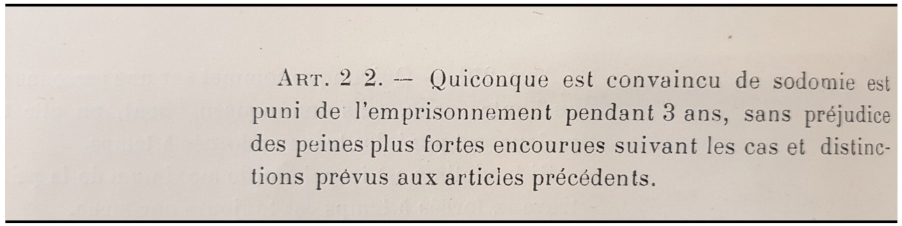

ART. 2 2. — Quiconque est convaincu de sodomie est puni de l'emprisonnement pendant 3 ans, sans préjudice des peines plus fortes encourues suivant les cas et distinctions prévus aux articles précédents.

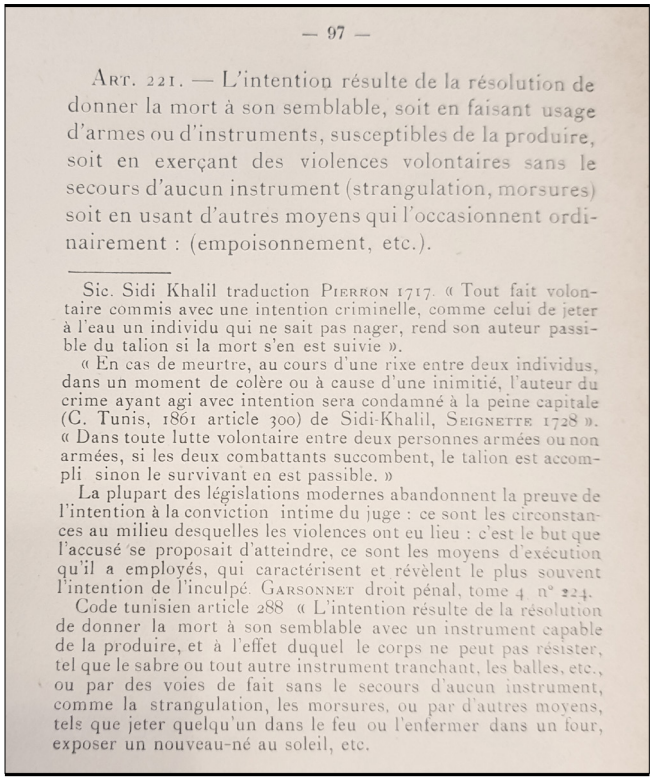
Exhibit 4
The first formulation of the sodomy law, in the margins of the "Outrages against Decency" section of the Preliminary Draft

Exhibit 5
Henri Guyot's Signature on the 1911 Preliminary Draft

Exhibit 6
Article 268 of the 1911 Preliminary Draft

Exhibit 7
Article 212 of the 1912 Draft

8



— 97 —

Art. 221. — L'intention résulte de la résolution de donner la mort à son semblable, soit en faisant usage d'armes ou d'instruments, susceptibles de la produire, soit en exerçant des violences volontaires sans le secours d'aucun instrument (strangulation, morsures) soit en usant d'autres moyens qui l'occasionnent ordinairement : (empoisonnement, etc.).

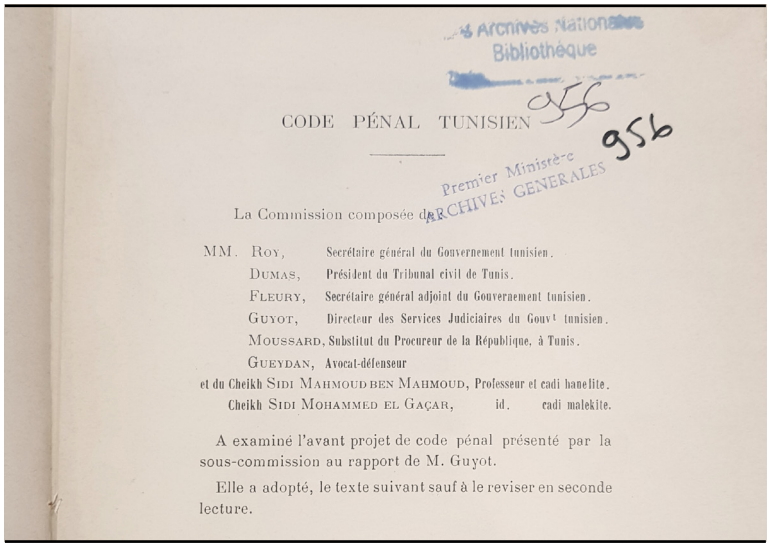
Sic. Sidi Khalil traduction Pierron 1717. « Tout fait volontaire commis avec une intention criminelle, comme celui de jeter à l'eau un individu qui ne sait pas nager, rend son auteur passible du talion si la mort s'en est suivie ».

« En cas de meurtre, au cours d'une rixe entre deux individus, dans un moment de colère ou à cause d'une inimitié, l'auteur du crime ayant agi avec intention sera condamné à la peine capitale (C. Tunis, 1861 article 300) de Sidi-Khalil, Seignette 1728 ». « Dans toute lutte volontaire entre deux personnes armées ou non armées, si les deux combattants succombent, le talion est accompli sinon le survivant en est passible. »

La plupart des législations modernes abandonnent la preuve de l'intention à la conviction intime du juge : ce sont les circonstances au milieu desquelles les violences ont eu lieu : c'est le but que l'accusé se proposait d'atteindre, ce sont les moyens d'exécution qu'il a employés, qui caractérisent et révèlent le plus souvent l'intention de l'inculpé. Garsonnet droit pénal, tome 4 n° 224.

Code tunisien article 288 « L'intention résulte de la résolution de donner la mort à son semblable avec un instrument capable de la produire, et à l'effet duquel le corps ne peut pas résister, tel que le sabre ou tout autre instrument tranchant, les balles, etc., ou par des voies de fait sans le secours d'aucun instrument, comme la strangulation, les morsures, ou par d'autres moyens, tels que jeter quelqu'un dans le feu ou l'enfermer dans un four, exposer un nouveau-né au soleil, etc.

9



CODE PÉNAL TUNISIEN

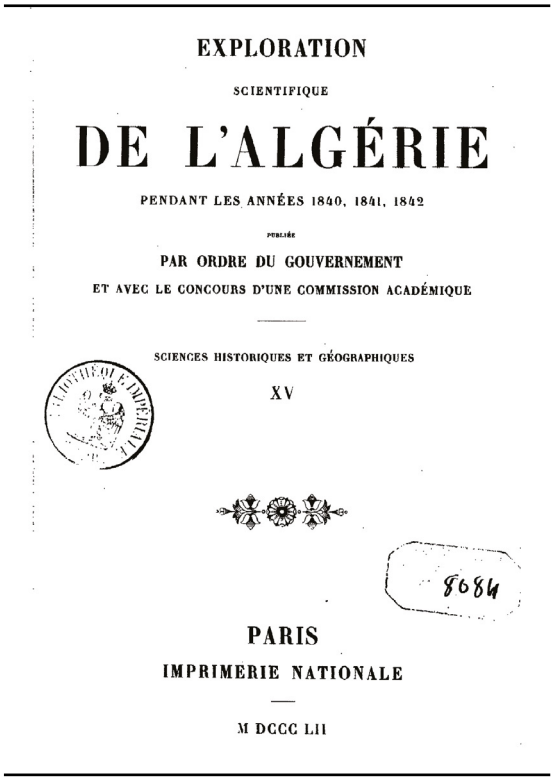
La Commission composée de

MM. Roy, Secrétaire général du Gouvernement tunisien.
Dumas, Président du Tribunal civil de Tunis.
Fleury, Secrétaire général adjoint du Gouvernement tunisien.
Guyot, Directeur des Services Judiciaires du Gouvt tunisien.
Moussard, Substitut du Procureur de la République, à Tunis.
Gueydan, Avocat-défenseur
et du Cheikh Sidi Mahmoud ben Mahmoud, Professeur et cadi hanelite.
Cheikh Sidi Mohammed el Gaçar, id. cadi malekite.

A examiné l'avant projet de code pénal présenté par la sous-commission au rapport de M. Guyot.

Elle a adopté, le texte suivant sauf à le reviser en seconde lecture.

10



EXPLORATION

SCIENTIFIQUE

DE L'ALGÉRIE

PENDANT LES ANNÉES 1840, 1841, 1842

PUBLIÉE

PAR ORDRE DU GOUVERNEMENT

ET AVEC LE CONCOURS D'UNE COMMISSION ACADÉMIQUE

SCIENCES HISTORIQUES ET GÉOGRAPHIQUES

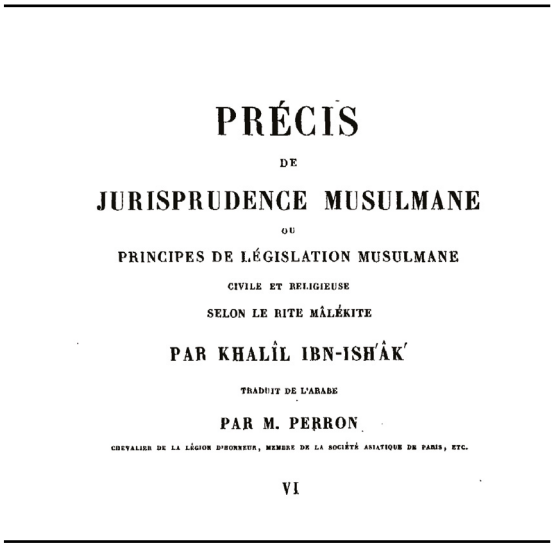
XV

PARIS

IMPRIMERIE NATIONALE

M DCCC LII

11



PRÉCIS

DE

JURISPRUDENCE MUSULMANE

OU

PRINCIPES DE LÉGISLATION MUSULMANE

CIVILE ET RELIGIEUSE

SELON LE RITE MÂLÉKITE

PAR KHALÎL IBN-ISHÂK

TRADUIT DE L'ABABE

PAR M. PERRON

CHEVALIER DE LA LÉGION D'HONNEUR, MEMBRE DE LA SOCIÉTÉ ASIATIQUE DE PARIS, ETC.

VI

Exhibit 8
Citation to "The Handbook of Sidi Khalil" in the 1911 Preliminary Draft

Exhibit 9
Full list of the Commission printed in the 1912 Preliminary Draft

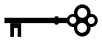
Exhibit 10
Front page of "The Scientific Exploration of Algeria during 1840, 1841, and 1842."

Exhibit 11
Front Page of the French Translation of the Handbook of Sidi Khalil, also titled the "Handbook of Maliki Islamic Jurisprudence"

IV. Why a Sodomy Law? Several Hypotheses

There does not appear to be an essay, book chapter, collection of meeting notes, or even a sentence jotted in the margins of one of the drafts which explains the legal influences of Article 230. And as stated above, neither the previous 1861 Tunisian Penal Code *(Qanun Al Jinayat Wal Ahkam Al Urfya)*, nor the 1810 French Penal Code includes any mention of sodomy or homosexuality. Thus, rather than presenting a single theory as to why the Commission decided to criminalize sodomy, this section focuses on several different elements of the drafting which provide potential, often overlapping, explanations for Article 230. Largely, these elements are drawn from the information provided in the drafts of the Tunisian Penal Code themselves, such as the stated legal influences and the members of the Commission as listed on the front page of the 1911 Preliminary Draft *(See Exhibit 1)*.

This section is divided into three sub-sections, each of which deals with the potential roots of the Tunisian sodomy law: 1) *Shari'a*, Tunisian, and French legal sources; 2) "Arab Sexuality" in the French Colonial Imaginary; and 3) Individual Members of the Commission. If the first sub-section largely examines the legal sources referred to in various drafts of the penal code, the second and third sections focus specifically on the historical, political, and social context in which the penal code appeared. Even if one can demonstrate precedent for the Tunisian sodomy law in Islamic, French or other sources, it is likely that the inclusion of the sodomy law, and its specific wording, stemmed partially from the political context of the protectorate and the individual objectives of the Commission members.



a. Shari'a, Tunisian, and French Legal Sources

On a structural level, the 1913 Tunisian Penal Code largely borrows from the 1810 French Penal Code. In the words of French legal scholar Jean Pradel, the Tunisian code is the "little brother" of the 1810 French Code: "The structure is basically the same [and]…the ideology is the same."[99] But as stated above, the 1911 Preliminary Draft emphasizes the importance of *Shari'a* and Tunisian jurisprudence, both in the introductory note on the front page as well as in the many footnotes which reference Tunisian and Islamic sources. Similar to other Tunisian codes, the 1913 Penal Code must be understood as "the product of a synthesis of diverse systems of law and values," indicative of the "singularity of Tunisian law both in its relationship to classical Islamic law and to French law."[100]

Aware of the political risks of appearing to infringe on particularly sensitive elements of Tunisian national identity, French colonial authorities had long maintained a certain degree of respect for *Shari'a* and pre-colonial Tunisian jurisprudence. It is notable, for example, that while the protectorate would re-shape the structure of Tunisian law and the Tunisian court system, colonial authorities never touched questions of personal status, maintaining a "laissez-faire policy on family law" throughout the protectorate.[101] In spite of a vision of colonialism as a "civilizing mission" *(mission civilisatrice)*, the French recognized the real risks of rebellion and political violence, an attitude at least partially reflected in the decision to maintain a protectorate framework—in which the Bey theoretically remained the autonomous head of state—rather than simply declaring Tunisia a French colony

This pattern largely continued in the drafting of the Tunisian penal code. Beyond the repeated references to Islamic law and "indigenous jurisprudence" discussed above, it is notable that the eight-member Commission included both a Hanafi and a Maliki Tunisian *cadi*. But while the inclusion of the *cadis* speaks to the French desire to maintain the appearance of incorporating Tunisian customs and religious beliefs into Tunisian law, neither *cadi* seems to have contributed meaningfully to the code. In an article on the Tunisian penal code, Tunisian legal scholar Rachida Jelassi explained that it is "nearly certain that [the *cadis*'] presence in the commission was only a question of respecting formalities. It comes out clearly from the observations included in the Preliminary Draft…that Sheikh Mahmoud Ben Mahmoud and

Mohammed Kassar hardly participated in the writing of the code."[102] An examination of the 1911 Preliminary Draft appears to confirm this position. The marginalia, for instance, contain a number of notes attributed to Roy and Dumas, but not a single comment from either Kassar or Ben Mahmoud. Moreover, for Jelassi, the fact that the Commission debated, edited, and drafted the code in French rather than in Arabic, coupled with the fact that "the Rapporteur insisted from the first page that they relied on the [1810] French Code as the primary source," are further evidence of the two *cadis*' extremely limited influence on the code's drafting.[103]

But the potentially negligible contribution of Kassar and Ben Mahmoud—the only Tunisians on the Commission—does not necessarily indicate that *Shari'a* considerations did not play a role in the drafting of the penal code. Colonial authorities had long relied on Arabic-speaking Europeans with extensive knowledge of *Shari'a*, particularly in the codification process. For example, colonial authorities selected Italian lawyer David Santillanna, a fluent Arabic speaker with expertise in Islamic law, to write the Contract Code as well as the initial draft of the Civil and Commercial Code.[104] Santillanna made specific reference to Islamic legal concepts such as *tajdid* (renewal) and *ijtihad* (independent reasoning), and consulted earlier Tunisian legislation, including the 1861 Civil and Penal Code *(Qanun al-jinayat wal ahkam al ôrfiya)*.[105] However, in the specific context of the penal code, none of the French members of the Commission appear to have had any specialization in Islamic law. The question then, is whether the Commission actually made a meaningful effort to ensure that the penal code respected *Shari'a* and Tunisian legal precedent, or whether the introductory note and repeated references to Islamic law merely served as window-dressing in an ultimately French endeavor.

In the footnotes of the 1911 Preliminary Draft, one Islamic source appears repeatedly: the "Handbook of Sidi Khalil" *(Le Précis de Sidi Khalil)*, written by 14th-century Egyptian Islamic legal scholar Khalil Ibn Ishâq and apparently translated into French in 1717 *(See Exhibit 8)*.[106] The translation appears to have been re-published nearly a century later, as part of a longer study, "Scientific Exploration of Algeria during 1840, 1841, and 1842," commissioned "by the [French] government" in the recent aftermath of the colonization of Algeria *(See Exhibit 10 and Exhibit 11)*. A re-publication by the *Société Asiatique*, a prominent French academic organization dedicated to the study of Asia, includes the following introductory note (in French): "[T]his Arabic handbook of jurisprudence applies to Muslims who follow the Maliki School, which is followed in Algeria, Tunis, Tripoli, Morocco, Senegal and in almost all of Africa…as this handbook is that which has the most authority among the indigenous people…the French government created a French translation."[107]

The repeated reference to the Handbook in the 1911 Preliminary Draft, as well as its publication by the French government, indicates a reliance on Ibn Ishâq's book in interpreting Islamic law in North Africa, as well as a belief that Maliki, and not Hanafi, Islam predominated in Tunisia. Furthermore, according to Jelassi, the Handbook of Sidi Khalil constituted the "single source" of the French Commission members' knowledge of Islamic law. European powers, including the French, "attached a significant importance to [the Handbook] and each power translated it into their proper language."[108]

The Handbook of Sidi Khalil provides a possible explanation for the role of Islamic law, or at least French interpretations of Islamic law, in the criminalization of homosexuality in the 1913 Tunisian Penal Code. Chapter 43 of the Handbook, entitled "Illicit Cohabitation, that is to say adultery, fornication and implicitly sodomy," contains detailed paragraphs explaining the illegality and corresponding punishments for several sexual acts. "Sodomy" falls under "illicit cohabitation," which itself is defined as the "intentional act of an adult male, endowed with reason, who introduces… the head of the penis (or a part of the penis of equal length to the head) into the body parts of a person on which he has no legal right as recognized by the doctors of the law."[109] Notably, the French editors specifically added the phrase "in terms of virility" *(au point de vue viril)* before "no legal right," which appears to extend "illicit cohabitation" to any form of intercourse other than vaginal intercourse.[110] The second article in Chapter 43 prescribes the appropriate punishment in no uncertain terms: "Pederasty or sodomy is the equivalent of illicit cohabitation and incurs the legal penalty [of] stoning."[111] Interestingly, the French translation of the Handbook does not appear to differentiate between "sodomy," "pederasty," and "*Liwat*" (male homosexuality), a confusion potentially reflected in the divergence between the French version of the 1913 Tunisian Penal Code, which criminalizes "sodomy," and the Arabic version, which criminalizes "*Liwat*."

It is not improbable that the decision to include a sodomy law in the Tunisian penal code bore some relation to the criminalization of sodomy in the Handbook of Sidi Khalil. As stated above, the Handbook was reprinted by the French government during the colonization of Algeria and referenced in footnotes throughout the 1911 Preliminary Draft—the French interpreted it as an important representation of North African *Shari'a* jurisprudence. But the prescribed punishment—stoning—bears no relation whatsoever to the three-year prison sentence laid out in the 1913 Tunisian Penal Code. Ultimately, if the Handbook informed the Commission of the impermissibility of homosexuality and sodomy in Islam, it did not provide it with the blueprint for an appropriate punishment.

For any jurist or official seeking to incorporate *Shari'a* perspectives on homosexuality into a standardized criminal code, part of the challenge stems from the ambiguity surrounding the treatment of homosexuality, and homosexual desire, in Islamic law itself. As Islamic legal scholar Scott Siraj al-Haqq Kugle noted, "The Qur'an does not clearly and unambiguously address homosexuals in the Muslim community, as there is no term in the Qur'an corresponding to 'homosexual' or 'homosexuality.'"[112] Moreover, there is no indication that the Prophet himself ever expressly "punished anyone for either sexual orientation or for homosexual acts."[113] Nonetheless, many classical Muslim jurists interpreted the Koranic verses *(surahs)* recounting the story of the tribe of Lut (*âmal quawm Lut*), referred to in the Old Testament as the people of Sodom and Gomorrah, as condemning homosexuality.[114] According to the story, the Prophet Lut advised the townspeople of Sodom to follow the word of God, but was ignored in response.[115] Later, when Lut was visited by angels disguised as men, the men of Sodom threatened to rape Lut's visitors.[116] In response to their threats, Lut "offered" his daughters in the angels' places.[117] Afterwards, God punished the city of Sodom for rejecting the Prophet Lut and for the city's "transgressions."[118] Among the relevant passages, Surah An-Naml, verses 54-55, for example, reads: "Lut, when he said to his people, 'Do you commit immorality while you are seeing? Do you indeed approach men with desire instead of women? Rather, you are a people behaving ignorantly.'"[119]

In spite of the story's traditional interpretation, scholars have contested the notion that God punished the people of Lut for sodomy. Olfa Youssef, a Tunisian scholar of Islamic law, argues that "the vile acts of the people of Lut were not limited to having sexual relations with men; they concerned other practices which threatened the security, and physical and moral integrity, of others."[120] This alternative interpretation of the tribe of Lut dates back to at least the 11th century, when Andalusian poet, historian, and Islamic scholar Ibn Hazm challenged the idea that the destruction of Sodom could be uniquely explained by the sexuality of its inhabitants.[121] According to Ibn Hazm, the punishment of the people of Lut stemmed from their lack of religious faith, rather than their sexual practices.[122] Similarly, Olfa Youssef has highlighted ambiguity regarding the reasons behind the divine punishment, questioning whether the transgressions of the Tribe of Lut had less to do with sexual relations between men, and more to do with the practice of raping male visitors who passed through the village. For Youssef, the tribe's divine punishment—the total destruction of their community—must be understood in light of the practice of utilizing the threat of violence to force male visitors to engage in non-consensual sexual acts. Furthermore, she asserts, there is no proof that the punishments assigned by God for the peoples at the time of the Prophet should serve as an example for punishments implemented today.[123]

Hadith (records of the actions and sayings of the Prophet Muhammad) that supposedly lend credence to the view that sodomy should be punished by death prove similarly inconclusive. Those justifying harsh punishments often invoke the *hadith* of Ibn Dawud: "If you have someone practicing the act of the People of Lut, kill he who does it and he to whom the act is done."[124] But specialists of Islamic law have asserted that this *hadith* is "weak" and "controversial," and noted that similar language does not appear in the principal canonical *hadith* collections of Sunni Islam, compiled by Sahih Al-Bukhari and Sahih Muslim respectively.[125] Ultimately, the lack of clarity in both the Qur'an and the *hadith* regarding the status, and appropriate punishment, for homosexuality and sodomy has allowed for divergent interpretations in different *madhhabs*.

It is possible that the Commission may have relied on the fact that Tunisian *Shari'a* courts applied both Maliki and Hanafi *fiqh* (Islamic jurisprudence or interpretation of the *Shari'a*)—and the differences in the two *madhhabs*' treatment of homosexuality—in order justify the criminalization of homosexuality while avoiding the death penalty prescribed in Sidi Khalil's (Maliki) Handbook. Though both Maliki and Hanafi *fiqh* generally contemplate homosexuality as reprehensible, the two schools prescribe different forms of punishment. In simplest terms, while Maliki jurisprudence classifies homosexuality as a *hadd* crime—a crime for which the punishment is mandated by the crime itself—Hanafi jurisprudence allows for discretionary punishment *(Taz'ir)*.

A deeper analysis of Hanafi and Maliki *fihq* on the question of homosexuality reveals a number of similarities, as well as key differences. As stated above, both *madhhabs* clearly condemn homosexuality. However, neither consider homosexuality as an act of apostasy *(Kufr)*, but rather treat homosexuality within the same legal framework as other forms of disobedience of the commandments of God *(Fisq)*. As Moroccan historian and anthropologist Mohammed Mezziane explained, "The crime of sodomy does not have a specific legal framework. It is an act which is part of a more general framework: disobedience of one of the prohibitions of God. It is part of other prohibited acts such as theft, consummation of wine, and fornication."[126]

Maliki *fihq* classifies sodomy as well as pederasty in the category of illicit sexual relations, for which there is a pre-determined punishment (*hadd* crimes). As discussed above, the Handbook of Sidi Khalili defines *hadd* penalties as those which are "invariably fixed by the law…no one had the right to add anything to this punishment, or to reduce it."[127] Under Maliki law, both sodomy and pederasty must be punished by stoning. Nonetheless, the process through which sodomy must be proved includes an extremely high evidentiary bar.

Mohammed Mezziane describes the conditions under which Malik Ibn Anas, founder of the Maliki *madhhab*, intended for the punishment for sodomy to be applied: "The procedure involves the accused…confess[ing] his guilt in the presence of a judge, four times and at four different moments…otherwise, it is necessary to gather the testimony of four men—Muslim, adult, free, and upstanding—who witnessed the same thing, at the same place in the same place."[128] Mezziane adds further that the "large majority" of the potential four witnesses were automatically disqualified, including anyone who could benefit from the execution—either through inheritance or through gaining the position of the condemned individual—as well as women, children, and slaves. For Mezziane, achieving the witness requirement would be "very improbable if not impossible, particularly given that it would be difficult for free Muslims to move around in private spaces unannounced."[129]

If Maliki jurisprudence theoretically mandates the death penalty for sodomy—while making its application extremely unlikely—Hanafi *fihq* is far more flexible. According to Mohammed Mezziane, Abu Hanifa, the 8th-century founder of the Hanafi school, stated that "if Allah had wanted to kill the *luti* [he who committed sodomy, *liwat*], he would have specified it."[130] Rather than prescribing a particular punishment (*hadd*) for homosexuality, Abu Hanifa allowed for discretionary punishment (*Taz'ir*). As defined by the Handbook of Sidi Khalil, *Taz'ir* is a punishment that "varies according to the persons…[and] according to their roles and their acts."[131] It is notable that Abu Hanifa did not reject *hadd* punishments for all illicit sexual relationships. Rather, the *hadd* punishments for *zina* were put in place in order to prevent broad social problems, including confusion around paternity or a woman's loss of virginity. Sodomy, as a non-procreative act, did not carry this risk, and logically could not merit the same punishment. Thus, according to certain Hanafi jurists for instance, judges should prescribe prison or whipping for the crime of sodomy.[132]

The members of the Commission knew that Tunisian courts had long applied both Maliki and Hanafi jurisprudence, as explained by the inclusion of both a Hanafi and a Maliki judge in the drafting of the penal code. Some may also have been aware of a common Tunisian expression, "*itaka cal-hanfi*," which roughly translates to "rely on Hanafi law." The expression, still commonly used in Tunisia, refers to "trickery and transgression of religious norms" by which one escapes punishment by relying on, or pretending to rely on, Hanafi law.[133] Thus, even if the Commission largely relied on a Maliki text in their drafting of the penal code, they could have invoked the Hanafi conception of sodomy as a crime meriting discretionary punishment (*Taz'ir*) in order avoid the death penalty while remaining theoretically faithful to Islamic law.

If Sidi Khalil's Handbook, coupled with particular interpretations of Islamic jurisprudence, provides a potential explanation for the inclusion of Article 230, French law appears less helpful. Prior to the French Revolution in 1789, sodomy was theoretically punishable by burning at the stake, though the punishment was rarely imposed—there are only five recorded 18th-century cases, at least some of which dealt with rape and murder as well as sodomy.[134] But in 1791, the new French penal code eliminated the criminalization of "consensual, non-violent sexual acts" altogether, breaking with the traditions of the *Ancien Régime* and enacting a strict distinction between permissible acts in the public and private spheres.[135] The subsequent 1810 French Penal Code did not criminalize "homosexuality" or "sodomy" either.

But the elimination of the sodomy law did not protect presumed homosexuals in France from discrimination in practice. Throughout the 19th century, French police routinely relied on offences like "public indecent exposure" and soliciting for "unnatural purposes" in order to prosecute homosexuals, while judges considered homosexuality as an "aggravating factor" in criminal trials.[136] Furthermore, the 19th century marked an important shift in French perceptions of homosexuality, as "sodomists" became "homosexuals." As Kathe Roth writes, "Far from being a sinner or a criminal, the sodomist was transformed into a particular subjectivity, an individual who was suffering from one or another perversion. That is, he became a sick person who had to be treated and from whom society had to protect itself."[137] Still, French repression of homosexuals—through prosecutions, placement in insane asylums, surveillance, and other mechanisms of social control—does not explain why Commission members saw the need for the explicit criminalization of homosexuality in Tunisia. Given that the 1913 Tunisian Penal Code is a close cousin of the 1810 French Penal Code, and given that French authorities continued to police homosexuality following its *de jure* decriminalization, Article 230 appears unnecessary in efforts to discriminate against or control homosexuals. Furthermore, even if both *Shari'a* and pre-1791 French law provided ample precedent for the illegality of sodomy, there is no obvious reason why the drafters settled on three-year imprisonment as the appropriate sentence. A faithful adherence to Sidi Khalil's Handbook, or to the jurisprudence of the *Ancien Régime*, would have led to an entirely different punishment: death by stoning or burning at the stake.

It is likely impossible to identify the precise reasons for which the drafters settled on a three-year prison sentence, at least in the absence of clearer documentation regarding the Commission's work. But the printed note on the front page of the 1911 Preliminary Draft provides an important clue. As stated above, the note states that, in addition to relying on Islamic jurisprudence,

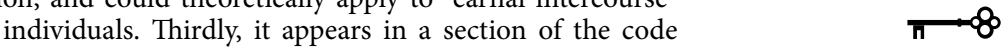
Tunisian customs, and French law, the drafters borrowed from the Ottoman (1859), Egyptian (1904) and Thai (*siamoise*) (1905) penal codes.[138] None of the three codes specifically mention "sodomy" or "homosexuality." In fact, the Ottoman Empire had decriminalized homosexuality during the *Tanzimat* reforms in 1858, having done so at a time in which a number of European states maintained sodomy laws.

But the 1905 Thai Penal Code includes an article which closely aligns with the Tunisian sodomy law. Included in the "Offences Against Public Morals" section of the Thai code, Article 242 reads as follows: "Whoever has *carnal intercourse against the order of nature* with any man, woman or animal shall be punished with imprisonment of three months to three years and fine of fifty to five hundred ticals."[139] The article bears important similarities to Article 230. First, it prescribes a maximum sentence of three years' imprisonment, a punishment which does not appear to have any historical basis in *Shari'a* jurisprudence or in pre-revolutionary French law. Secondly, it contains no gender limitation, and could theoretically apply to "carnal intercourse" between any two individuals. Thirdly, it appears in a section of the code specifically dealing with crimes against morality and public indecency. Thus, the Commission may have simply borrowed the three-year prison sentence from the Thai penal code, substituting "carnal intercourse against the order of nature"—a phrase which also appeared in the 1861 Indian Penal Code promulgated under British rule—with "sodomy."[140]

The fact that a mostly French commission tasked with drafting a penal code in Tunisia could have borrowed a penalty from a penal code in Thailand may be less surprising than it appears. For while the Commission took great pains to identify the diversity of its sources, the majority of the penal codes cited were themselves significantly influenced by, if not largely based on, the 1810 French Penal Code. Though Thailand was not a French colony, the Thai Penal Code presented no exception—around the turn of the 20th century, Thai King Rama V called on French and other European advisors in his efforts to overhaul and modernize the Thai legal system. Notably, King Rama V relied heavily on Georges Padoux, a French diplomat who served as Legislative Council to the Thai government. According to sources from the French Ministry of Foreign Affairs, Padoux played a "predominant role" in the drafting of a number of Thai legal codes, including the civil, commercial, and penal codes.[141]

Prior to his assignment in Thailand, Georges Padoux lived and worked in Tunisia, serving the French colonial authorities from 1896 to 1905. During that period, Padoux served as the Secretary-General Adjoint, and was made a Knight of the Legion of Honor in 1904. Throughout Padoux's tenure in Tunisia, Bernard Roy served as Secretary-General, meaning that from 1896 to 1902, Roy and Padoux would have served together as the Secretary-General and Secretary-General Adjoint. In other words, when the Commission tasked with the drafting the Tunisian penal code cited the 1905 Thai Penal Code as an influence, they may have done so with the knowledge that a former Tunisia-based French colonial officer had played an important role in its drafting.

In promulgating a code which appeared faithful to *Shari'a* jurisprudence, at least as elucidated by Sidi Khalil's handbook, as well as to 19th-century French efforts to exert social and legal control over homosexuals, the Commission may have borrowed—and modified—Article 242 of the Thai penal code, itself written with the assistance of a French diplomat formerly posted in Tunisia.[142] While this hypothesis is far from certain, it does provide a credible potential explanation as to why the Commission sought to criminalize sodomy, and how they settled on a maximum three-year prison sentence as the appropriate punishment.



b. "Arab Sexuality" in the French Colonial Imaginary

Regardless of whether, and to what degree, the drafters of the Tunisian penal code took *Shari'a*, Tunisian jurisprudence, or French law into account in their decision to criminalize homosexuality in Tunisia, it is likely that other factors played a role. The fact that the sodomy law had been taken off the books in France does not mean that French colonial authorities had no intention of criminalizing homosexuality in Tunisia. Indeed, orientalist conceptions of Arab sexuality in general, and homosexuality in particular, figured centrally in French and European perceptions of the Maghreb. Dating back at least as far as the 16th century, a number of Europeans moved to Tunisia for the specific purpose of escaping the repression of the Catholic church and living their sexual identities more freely.[143] For French colonial authorities in Tunisia, it is possible that broader anxieties around "indigenous" sexuality, coupled with a 19th-century emphasis on social control, influenced the Commission's decision to include a sodomy law in the Tunisian penal code.

As detailed in historian Aurelie Perrier's dissertation on sexuality and gender in 19th-century colonial Algeria, French efforts to control and regulate prostitution offers perhaps the clearest example of colonial anxieties around "indigenous" sexuality, and the alleged effects said sexuality could have on French soldiers and *colons* in North Africa. Prior to the establishment of French rule, both Tunisia and Algeria had regulated prostitution primarily

through the *mezwar*, a government agent tasked with registering prostitutes, as well as levying taxes and enforcing certain regulations. For example, the *mezwar* had the responsibility of ensuring respect for particular religious lines: "Jewish women were barred from exercising the profession altogether while Muslim courtesans were prohibited from bedding Christian or Jewish clients, an action that contravened Islamic law and was punishable by death, though it was rarely put into practice."[144] Almost immediately after the invasion of Algeria in 1830, French colonial authorities moved to "strengthen the control of female sexuality on several fronts," establishing a system of "control and supervision over prostitutes and their private space" which marked a major break from the Ottoman period, in which "women had remained relatively free to move around and conduct their trade as they pleased so long as it was out of the public eye."[145]

Beginning in 1830, French colonial authorities in Algeria began issuing a series of decrees which "rigidly constrained the hours of work, the movement and the health of prostitutes as well as the taxation on their work to compensate for some of the costs associated with upholding the system."[146] The colonial system required that "public women" register with police, submit to weekly medical examinations—the French were particularly anxious about the spread of venereal diseases—and pay a fee to cover the costs of police surveillance and medical check-ups.[147] If doctors found that a woman had a venereal infection, they summarily ordered that she remain at the dispensary, at her own expense, until they determined that she had healed. Furthermore, French decrees mandated that sex work could take place only within legally recognized brothels. Women accused of soliciting customers on the street or working clandestinely risked arrest and, in the case of indigenous women caught more than twice, police assignment to live in the "prostitution quarter."[148] Prostitutes faced additional legal prohibitions, including a ban on moving outside after nightfall, and needed to obtain a permit from the local police commissioner to leave the city or town in which they worked.[149]

For Perrier, colonial concerns around prostitution are fundamentally linked to fears around homosexuality—both anxieties constituted essential elements of the French "obsession with sexual chaos."[150] In a world in which "white" French women were largely absent, colonial administrators and military commanders worried continuously about the "specter of homosexuality," particularly in the context of the "homosocial comradeship" of French military campaigns.[151] In the early years of the colonization of Algeria, homosexuality appeared as a dangerous "native vice" which might lead Frenchmen to "go native," to fall prey to the "rampant and aberrant sexuality" that officials believed resulted at least partially from the impact of the "sultry African heat on the sexual drive of both men and women."[152]

Concerns about the possibility of male French citizens and soldiers sleeping together had at least some basis in reality. Though the colonial archives provide little detail on homosexual practices among the French in Algeria, it appears that homosexual sex was widespread, particularly within the French military. Several French battalions gained specific reputations for same-sex relations, and well-known French military figures and colonial administrators openly described discovering their "penchant for men" while serving in Algeria.[153] In the highly racialized colonial perceptions of North Africa, homosexuality constituted a central threat to Frenchmen and French masculinity. Given the small numbers of "white women" in Algeria during the early decades of colonization, French authorities feared that soldiers and *colons* would turn to the twin threats of "indigenous" prostitutes and the "native vice" of homosexuality. For "civilized" Frenchmen, "uncivilized Africa" could result in a dangerous "sinking of moral standards," leading to "decadence," "debauchery," and, given the spread of venereal diseases, even death.[154]

Though the French Protectorate in Tunisia differed significantly from the French colony in Algeria, French colonial authorities in Tunis shared a similar obsession with regulating and controlling indigenous sexuality. In their in-depth study of prostitution in the Tunis Medina (old city), Tunisian historians Mohamed Kerrou and Moncef M'halla note that prior to the French Protectorate, "sexual commerce" *(commerce sexuel)* could be "characterized by its domestic, private, intimate and hidden aspect," and lacked a "public and recognized character."[155] This unofficial, hidden, element of pre-colonial Tunisian prostitution appears in correspondence between French and Tunisian officials. In an 1856 written response to questions from French consul Léon Roches, Tunisian official and historian Ahmad Ibn Abi Diaf asserted that "Muslim women cannot be prostitutes because they aren't recorded (*cataloguées*) in a register…and are hardly distinguishable by particular clothing."[156] Abi Diaf did not deny the existence of "illicit sexual relations."[157] Rather, he stated that Islam recommended "veiling (*voiler, sitr*) all conduct contrary to *Shari'a* norms."[158] According to Aurelie Perrier, Abi Diaf "defines the problem as lying primarily with the visibility of *zina* [unlawful sexual relations], rather than with its existence and eradication."[159]

Ahmad Ibn Abi Diaf's perspective should not be dismissed lightly. A civil servant at the beylical palace for several decades, Abi Diaf, who maintained a close relationship with Ahmed Bey, "play[ed] an important role" in the Tunisian government, serving as one of the drafters of both the *Ahd El Aman* (the Security Covenant) and the 1861 Constitution.[160] A scholar as well as a government official, Abi Diaf chronicled Tunisian history in his book, *l'Ithaf*.

According to historian Leila Temime Blili, the work remains an important source of information, particularly in its discussion of the 19th-century reforms "of which [Abi Diaf] was a fervent partisan."[161] Of specific relevance to Abi Diaf's dialogue with Léon Roches, Blili further notes that Abi Diaf had a deep knowledge of religion, and sought to "gain acceptance for an enlightened interpretation (*interpretation éclairée*) of Islamic law."[162]

Abi Diaf's particular concern with the visibility of illicit sexual relations, in contrast to a 19th-century French emphasis on state control and oversight of sexuality, aligns with traditional elements of Islamic jurisprudence. As discussed above, punishing someone for *zina* and sodomy under Maliki jurisprudence requires satisfying extraordinarily high evidentiary standards, standards which, in Mohamed Mezziane's words, are "nearly impossible" to meet if the act takes place in a *private space*.[163] Given the difficulty of achieving the four-witness requirement, Malik Ibn Anas's prescribed evidentiary bar appears directly aimed at *Sitr*, the veiling of illicit acts from *public view*. If sodomy and *zina* merit death by stoning, such a harsh punishment can only effectively apply if the act takes place in public. Ultimately, whether or not Abi Diaf wrote his letter to Roches with Malik Ibn Anas in mind, his response reflects Maliki principles. While Roches seems primarily concerned with whether specific sexual acts are taking place *at all*, Abi Diaf focuses on their visibility.

In order to better understand Abi Diaf's position, it is important to recognize that the different *madhhabs* generally do not condemn sexual desire in and of itself. Rather, a general tendency exists to recognize the legitimacy of sexual desire, including sexual attraction between members of the same sex. But the range of permissible sexual *acts* remains sharply circumscribed, strictly limited to a rigid, precise and inflexible context: sex must occur between two married individuals of the opposite sex, and must consist of specific acts authorized by Islamic law. Non-normative sexual practices, such as homosexual relations or any oral or anal intercourse, do not constitute permissible expressions of sexual desire.

But justification for the repression of illegitimate sexual relations has more to do with maintenance of public order than with individual morality.[164] Thus, high evidentiary standards requiring multiple witnesses essentially ensure that illicit sex acts take place in private, far from the public view. Provided that such transgressions remain veiled (*sitr*), and do not take place in the public space or in front of others, Abi Diaf expresses confusion as to why his French interlocuter would be concerned with their occurrence.

Abi Diaf's position is grounded in the importance of privacy in Islamic jurisprudence. According to law professor Amr A. Shalakany, "There is a diversity of traditions advising on the respect for privacy, and requiring Muslims to neither spy nor scandalize their fellow Muslims for their wrongdoing and to rebuke the offender only in private if possible."[165] Thus, for example, the Prophet Muhammad is reported to have commanded Muslims not to "dishonor their brothers and sisters who had been secretly involved in disgraceful acts by revealing their secrets" and to "provide a cover (*sitr*)" for another believer's sin.[166] If law enforcement in 19th-century France emphasized surveillance of private spaces and private acts, the same impetus did not exist in the Islamic tradition.

This is not to deny, of course, that prostitution or sexuality were not circumscribed prior to French colonization—as discussed above, colonial authorities built on existing figures such as *mezwars* and *qaids* in their efforts to tighten forms of social control, especially regarding women. Furthermore, 18th-century *Shari'a* courts could still impose "customary punishments," including "the death penalty, stoning, whipping, forced exile and drowning."[167] But, as in Algeria, French colonization of Tunisia led to a dramatic rupture with the pre-colonial regulation of prostitution. If Abi Diaf's primary concern lay in hiding *zina* from the public view, the French had nearly the opposite approach. Colonial authorities in Tunis established a system of "municipal regulations," creating the status of "public woman" and "defining the spaces of prostitution and imposing police and medical surveillance."[168] A municipal decree issued in 1889 established the legal existence of "European, Jewish, and Muslim public women," and mandated that they work exclusively in officially approved brothels, register with the "Office of Morality" (*bureau des moeurs*), and submit to regular medical examinations. The same decree additionally established a "morality police," charged with ensuring that prostitutes obeyed the new set of regulations.[169]

One cannot draw conclusions regarding the treatment of homosexuality or sodomy based solely on the colonial obsession with controlling North African prostitution. But the perceived link between homosexuality and prostitution in the minds of colonial authorities could provide another potential explanation as to why the drafters of the Tunisian penal code included a sodomy law, in spite of the fact that the 1810 French Penal Code did not criminalize homosexuality. To put it simply, French conceptions of sexuality in general, and homosexuality in particular, varied considerably depending on the geographical context—sexuality in metropolitan France differed from sexuality in France's North African colonies and protectorates. Far fewer

French *colons* lived in Tunisia than in Algeria, and France never sought to annex Tunisia. Nonetheless, it is still probable that French authorities in Tunisia shared their Algerian counterparts' concerns regarding the impact of "indigenous" sexuality on *colons*. Indeed, as stated above, French authorities in Tunisia closely followed the example of the colonial administration in Algeria regarding the regulation of prostitution, from enforced medical examinations, to designated brothels, to police surveillance and arrests. Might this same "obsession with sexual chaos" have had an impact on the decision to explicitly criminalize homosexuality, just as authorities explicitly regulated prostitution?[170]

c. Individual Members of the Commission

If the criminalization of homosexuality may have stemmed from efforts to adhere to a particular legal or cultural tradition, Article 230 may have emerged due to the specific beliefs, or prejudices, of the members of the Commission. Rachida Jelassi notes that Bernard Roy and Henri Guyot formed the "cornerstone" of the Commission, an observation which corresponds to their respective positions.[171] Unfortunately, research conducted thus far has not revealed a significant amount of information on Henri Guyot, Director of Judicial Services of the Tunisian Government, who presided over the sub-commission tasked with drafting the penal code. But more has been written about Bernard Roy, who served as Secretary-General of Justice throughout the drafting of the penal code. Roy had served as Secretary-General since 1889, until the establishment of a new position, Secretary-General of Justice, tasked specifically with presiding over the various commissions charged with drafting penal, civil, and commercial codes.[172] If Guyot had the specific responsibility of writing the initial drafts of the penal code, Roy oversaw the broader project of overhauling Tunisian law. It is unsurprising, then, that his name appears first in the list of the Commission members printed in the 1912 draft (*See Exhibit 9*).

From the beginning of the French Protectorate in Tunisia, Bernard Roy played a central role in the colonial authorities. Having moved to Tunisia two decades before the establishment of the protectorate to work for the French Consulate, Roy commanded significant respect among Tunisians and French alike. Assigned to work in Kef, a northwestern Tunisian city near the Algerian border, from 1862-1889, Roy spoke excellent Arabic and maintained close relationships with local notables and religious leaders. In 1882, when rumors spread that Roy, then serving as a consular agent in Kef, would be dismissed and replaced, Resident-General Cambon himself interceded on Roy's behalf. In his efforts to install a system of *controleurs civils* to ensure colonial control throughout the new protectorate, Cambon recognized Roy as an "excellent agent."[173] Roy served as a *controleur civil* from 1884 until his promotion to Secretary-General in 1889, a role he filled until his death in 1919.

Roy's *parcours* is potentially relevant to the sodomy law for two central reasons. First, as discussed above, he served as Secretary-General during the same period in which Georges Padoux served as Secretary-General Adjoint. Given that Padoux would play a major role in the drafting of the 1905 Thai Penal Code, the connection between Roy and Padoux could partially explain why the sub-commission chose to borrow significantly from the Thai Penal Code. Secondly, Roy had long evinced at least some degree of respect for the preservation of Tunisian customs. Over the course of his long career in Tunisia, Roy was known for his Arabic skills and his close relationships with the Tunisian community in Kef. In one significant example, it appears that Roy's last-minute negotiations with religious and political leaders in 1881 proved essential in the French military's peaceful occupation of Kef.[174] Had negotiations failed, there would likely have been significant armed resistance on the part of certain Tunisians and Algerian refugees to the onset of French rule. Some religious leaders even thought of Roy as a *marabout* (holy man or mystic) for his perceived ability to predict, and ultimately diffuse, violent confrontations between Tunisians and French forces.[175] For Cambon, Roy appeared useful for his ability to "influence the [Tunisian] chiefs and to bring them, gently, to pledge allegiance to [French authorities]." [176] [177]

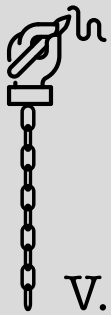
In an 1899 note to another French colonial administrator, Roy made clear his belief that certain Tunisian customs could not be changed. "The indigenous administration," Roy explained, "has a certain number of imperfections that we cannot flatter ourselves in thinking we can make disappear, since they are inherent in the morality and the character of the Arab population."[178] For Rachida Jelassi, Roy's note constitutes a meaningful piece of evidence in understanding the genesis of the Tunisian penal code—modernizing Tunisian law according to the French model without offending the sensitivities of *les indigènes*, thus avoiding any resistance to the application of the new code.[179]

In thinking about French efforts to respect Tunisian customs, or at least maintain the appearance of doing so, it is important to consider Bernard Roy's background. After decades of working in Tunisia, Roy strongly believed that certain elements of Tunisian governance and legal practice could not be modified. Even a cursory examination of the drafts of the penal code is enough to recognize the great pains taken by the Commission to demonstrate

respect for Tunisian customs and *Shari'a*, as evidenced by the many footnotes citing earlier Tunisian court decisions and the Handbook of Sidi Khalil, as well as the introductory note in the 1911 Preliminary Draft. Might the criminalization of homosexuality have been included out of perceived deference to Tunisian custom or Islamic jurisprudence? There is no evidence of Roy having particular feelings about the sodomy law, but it is clear that he recognized the importance of adapting, at least to a certain extent, to the Tunisian context as he understood it.

Paul Dumas similarly showed some concern with demonstrating at least a certain degree of respect for Tunisian culture and tradition. According to Rachida Jelassi, Dumas could be characterized by his deep knowledge of local Tunisian customs, particularly Bedouin customs. During his mandate as President of the Real Estate Court (*tribunal mixte immobilier*), protectorate authorities issued an order on January 14, 1901, declaring that the majority of tribal land constituted state-owned land, which would serve as a reserve for future French *colons*. But Paul Dumas prepared a report in which he asserted that the territory remained the collective property of the tribes. He worried that the appropriation of land would lead to revolts, following what had occurred in Algeria.[180]

While that anecdote alone proves little, it is potentially indicative of Dumas's recognition that reforms which blatantly discriminated against Tunisians in order to benefit French *colons* could lead to violence and instability.[181] It is unclear whether the same sensitivity to Tunisian customs, at least as the French members of the Commission understood them, had any impact on the inclusion of the sodomy law.



V. Conclusion

The lack of information regarding the drafting and editing of the 1913 Penal Code makes it difficult to identify a single reason for the inclusion of the sodomy law. While other articles contain footnotes with precedent drawn from French, *Shari'a*, Ottoman, and other legal traditions, Article 230 initially appeared as a handwritten note in the margins—there is no indication of the judicial influences behind it, or of which Committee member sought its inclusion. Moreover, there do not appear to be any remaining copies of the second book of Henri Guyot's 1914 commentary on the 1913 Penal Code, which would have covered the origins of Article 230. In terms of broader influences, the 1810 French Penal Code, which largely served as the model for the 1913 Penal Code, includes no mention of sodomy or homosexuality. And perhaps most significantly, neither *Shari'a* nor pre-revolutionary French law provide any apparent precedent for three-year imprisonment as an appropriate sentence for sodomy.

But the drafts of the penal code, and the political context in which the Committee operated, provide meaningful clues as to the sodomy law's origins. First, the cover of the 1911 Preliminary Draft notes that the drafters borrowed from the Ottoman (1859), Egyptian (1904) and Thai (*siamoise*) (1905) penal codes, in addition to relying on French and *Shari'a* jurisprudence (*See Exhibit 1*).[182] Though none of the three codes specifically mention "sodomy," the 1905 Thai Penal Code includes Article 242, which reads: "Whoever has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of three months to three years and a fine of fifty to five hundred ticals."[183] Though replacing "sodomy" with "carnal intercourse against the order of nature," the Thai article similarly prescribes a punishment of three

years' imprisonment. Furthermore, Georges Padoux, a French diplomat who served as Legislative Council to Thai King Rama V during the drafting of the code, had previously served the French colonial authorities in Tunisia. From 1896 to 1902, Bernard Roy and Padoux served together as the Secretary-General and Secretary-General Adjoint. Thus, the punishment prescribed by Article 230 may have simply been borrowed from the 1905 Thai Penal Code.

Secondly, the drafters may have included the sodomy law out of a perceived deference to *Shari'a*, as interpreted by the Handbook of Sidi Khalil. European colonial powers had "attached a significant importance to [the Handbook] and each power translated it into their proper language."[184] According to Rachida Jelassi, the Handbook constituted the "single source" of the French Commission members' knowledge of Islamic law.[185] Reprinted by the French government during the colonization of Algeria and consistently referenced in the footnotes of the 1911 Preliminary Draft, the Handbook appeared to colonial authorities as an important representation of North African Islamic jurisprudence.

The Handbook, which describes the principles of Maliki jurisprudence, asserts the illegality of sodomy in no uncertain terms. But the prescribed punishment—stoning—has no resemblance to the maximum three-year prison sentence in Article 230. If the Handbook informed the Commission of the impermissibility of homosexuality and sodomy in North African Islam, it had no clear influence on the selected punishment.

Thirdly, the drafters may have been motivated by broader fears around sexuality in general, and homosexuality in particular, in North Africa. Stereotypes around the corrupting influence of Arab sexuality included fears of homosexuality as a "native vice," a primordial threat to French soldiers and *colons*.[186] At a time in which French officials feared the effects of "African heat on the sexual drive of both men and women," and the "rampant and aberrant sexuality" of North Africans, it is perhaps not surprising that colonial officials sought to criminalize homosexuality in North Africa, even if it had been *de jure* decriminalized in metropolitan France.[187] Under this interpretation, the sodomy law aligns with the French emphasis on the reorganization and regulation of Algerian and Tunisian prostitution. For the French colonial administration in North Africa, strict regulation of "Arab sexuality" constituted an important element of social control.

Lastly, at least several French members of the Commission, including Bernard Roy and Paul Dumas, recognized the importance of respecting certain elements of Tunisian custom and religious practice. It is possible that the drafters, perhaps influenced by Maliki jurisprudence as described in the Handbook of Sidi Khalil, believed that the criminalization of homosexuality aligned with Tunisian conceptions of *Shari'a*. Nonetheless, there is no evidence that either Roy or Dumas gave any particular thought to homosexuality. And given the Commission's broad reliance on the 1810 French Penal Code, and other penal codes influenced by French legal traditions, it seems highly unlikely that deference to Tunisian custom would have constituted a primary motivation behind the inclusion of Article 230.

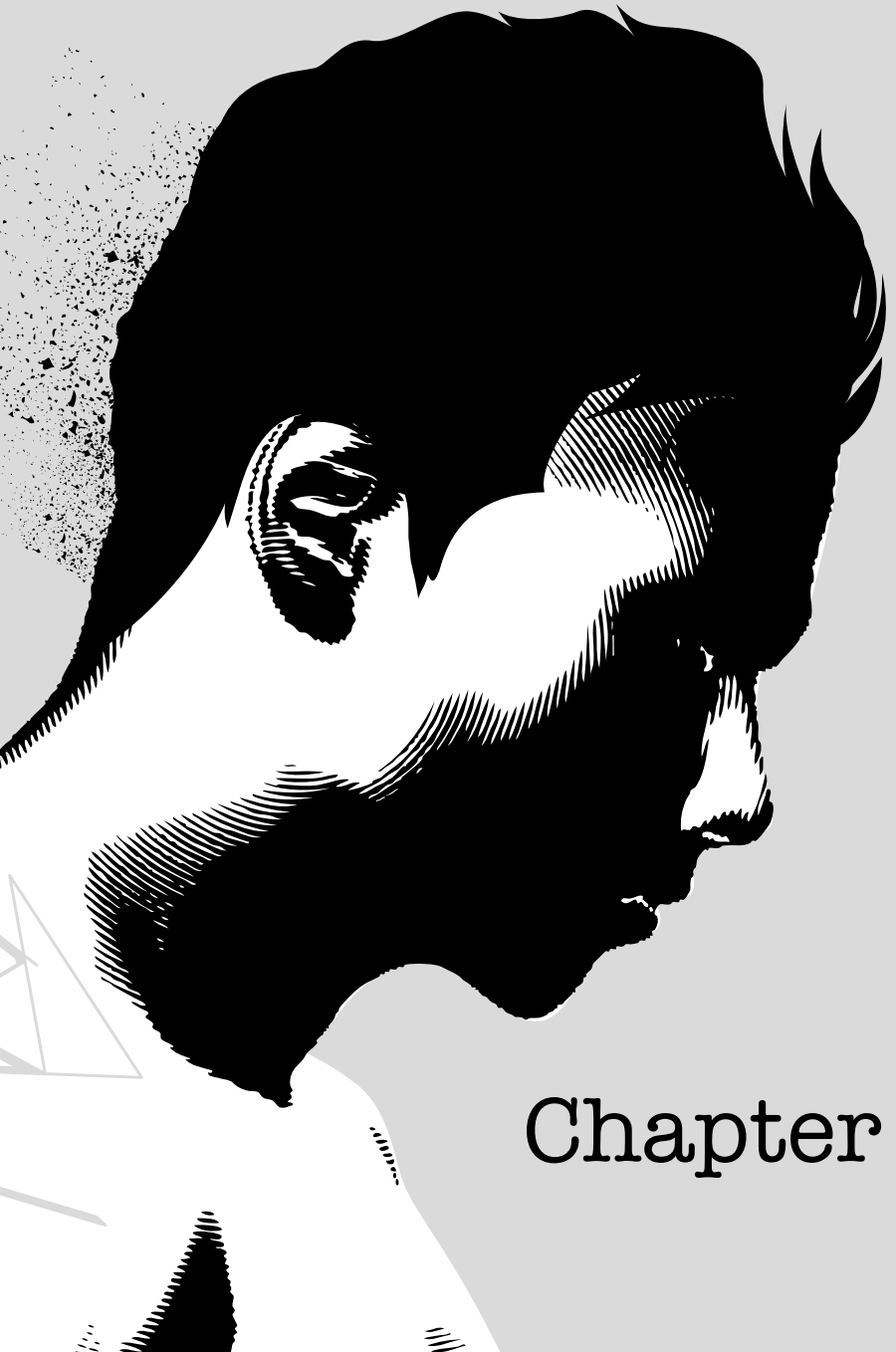
The differences between the theories and potential factors discussed above should not obscure an important historical truth—Article 230 appeared during the French Protectorate, within a penal code drafted almost exclusively by French colonial officials. While the Commission members may have seen themselves as respecting Tunisian custom, or properly interpreting *Shari'a*, the fact remains that a small group of French bureaucrats criminalized sodomy in Tunisia.

This fundamental truth cannot excuse the failure of successive Tunisian governments to eliminate Article 230, a law which continues to destroy the lives of LGBTQ Tunisians over a century after its initial appearance. But at a time in which Tunisian conservatives defend the sodomy law on the grounds of religion or tradition, the colonial origins of Article 230 must not be forgotten.

Chapter 1 Notes

[1] "Kairouan," United Nations Educational, Scientific, and Cultural Organization, http://whc.unesco.org/en/list/499 (accessed November 17, 2018).
[2] "Tunisia Signs New Constitution," The Guardian, January 27, 2014 , https://www.theguardian.com/world/2014/jan/27/tunisia-signs-new-constitution-progressive (accessed November 17, 2018).
[3] Human Rights Watch, "Tunisia: Men Prosecuted for Homosexuality," March 29, 2016, https://www.hrw.org/news/2016/03/29/tunisia-men-prosecuted-homosexuality (accessed November 17, 2018).
[4] Rihab Boukhayatia, "Tunisie: Condamnés et bannis de la ville de Kairouan pour homosexualité, les six jeunes sont en liberté (provisoire)," HuffPost Maghreb, October 2, 2017, https://www.huffpostmaghreb.com/2016/01/07/tunisie-homosexualite-liberte_n_8931370.html/ (accessed November 17, 2018).
[5] Human Rights Watch, "Tunisia: Men Prosecuted for Homosexuality."
[6] Ibid.
[7] Rihab Boukhayatia, "Peine maximale, test anal et bannissement: En Tunisie, la chasse aux homosexuels se durcit," HuffPost Maghreb, December 13, 2015, https://www.huffpostmaghreb.com/2015/12/13/tunisie-homosexualite-prison_n_8792416.html (accessed November 17, 2018). It is worth noting that one of the students received an extra six months' imprisonment for pornography discovered on his computer.
[8] Though the government initially defended the ruling, the defendants' sentences were eventually commuted to one month's imprisonment and a 400 dinar fine on appeal.
[9] Amnesty International, "Marwan freed after being imprisoned in Tunisia—for being gay," January 12, 2018, https://www.amnesty.org.uk/tunisia-gay-rights-marwan-student-freed-imprisoned-lgbti, (accessed November 17, 2018).
[10] "The Nobel Peace Prize for 2015," The Nobel Prize, https://www.nobelprize.org/prizes/peace/2015/press-release/ (accessed November 17, 2018).
[11] Interview with Tarek, University Student and LGBTQ Activist, Tunis, January 4, 2018.
[12] Interview with Aziz, Nurse and LGBTQ Activist, Tunis, January 4, 2018.
[13] Rihab Boukhayatia, "Tunisie: Les réactions se succèdent après la condamnation de six étudiants emprisonnés et bannis de Kairouan pour homosexualité," Huffpost Maghreb, December 15, 2018, http://www.huffpostmaghreb.com/2015/12/14/tunisie-ministere-de-lint_n_8804228.html?utm_hp_ref=societe-tunisie (accessed November 17, 2018).
[14] Agence France Presse, "Tunisia jails six students for homosexuality," The Guardian, December 14, 2015, https://www.theguardian.com/world/2015/dec/14/tunisia-students-homosexuality-prison-human-rights (accessed November 17, 2018).
[15] Interview with Joachim Paul, Former Director of the Heinrich Böll Foundation in Tunis, January 24, 2018.
[16] Tunisian Penal Code, art. 230, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61250/60936/F1198127290/TUN-61250.pdf (accessed December 23, 2018).
[17] Wahid Ferchichi, "L'homosexualite en droit tunisien ou de l'homophobie de la règle juridique," in Être Homosexual au Maghreb, ed. Monia Lachheb (Paris: Karthala, 2016) p. 3.
[18] Ibid.
[19] Ibid., p. 7.
[20] Ibid.
[21] Ibid.
[22] Monia Ben Hamadi, "Tunisie: Rached Ghannouchi se prononce contre la dépénalisation de l'homosexualité et félicite Béji Caïd Essebsi," HuffPost Maghreb, August 10, 2015, http://www.huffpostmaghreb.com/2015/10/08/tunisie-rached-ghannouchi-homosexualite_n_8262766.html (accessed November 17, 2018).
[23] Jean Pradel, "L'apport du droit penal francais au droit penal tunisien," in Centenaire du code pénal : le passé, le présent, et l'avenir (Tunis: Latrach Editions, 2016), p. 5.
[24] Ramy Khouili and Daniel Levine-Spound, "Why does Tunisia still criminalize homosexuality?" Heinrich Böll Stiftung, October 30, 2017, https://tn.boell.org/en/2017/10/30/why-does-tunisia-still-criminalize-homosexuality (accessed November 17, 2018).
[25] Michael Sibalis, "Homophobia, Vichy France, and the 'Crime of Homosexuality': The Origins of the Ordinance of 6 August 1942," GLQ: A Journal of Lesbian and Gay Studies, vol. 8:3 (2002), p. 302.
[26] Patrick Corriveau, Judging Homosexuals: A History of Gay Persecution in Quebec and France (Vancouver: University of British Columbia Press, 2011), p. 54. It is also worth noting that the Vichy regime re-introduced the "crime of homosexuality" in France in 1942 (Sibalis, "Homophobia, Vichy France, and the 'Crime of Homosexuality,'" p. 302).
[27] Mounira Charrad, States and Women's Rights: The Making of Post-Colonial Tunisia, Algeria, and Morocco (Berkeley: University of California Press, 2001), p. 89.
[28] Ibid., p. 95.
[29] Ibid.
[30] Ibid.
[31] Ibid., p. 96-97.
[32] Kenneth Perkins, A History of Modern Tunisia (New York: Cambridge University Press, 2004), p. 14-16
[33] Ibid.
[34] Ibid., p. 18.
[35] Ibid., p. 27.
[36] Ibid.
[37] Nathan J. Brown, Constitutions in a Non-Constitutional World: Arabic Basic Laws and the Prospects for Accountable Government (Albany: State University of New York Press, 2002), p. 17.
[38] Jocelyne Dakhlia, "Homoérotismes et trames historiographiques du monde islamique," Annales. Histoire, Sciences Sociales, vol.62(5) (2007), p. 1097-1120.
[39] Ibid.
[40] Perkins, A History of Modern Tunisia, p. 28.
[41] Brown, Constitutions in a Non-Constitutional World, p. 18.
[42] Sana Ben Achour, "Fait Colonial et Droit Tunisien" (Noir sur Blanc Editions, 2000), p. 25 ("Obéissant à leur objectif unificateur, les codifications professent l'idée qu'elles introduisent l'ordre là où il n'y a que désordre….Les règles sont identiques pour tous, connues par tous, rassemblées en un seul lieu : le code de l'Etat.").
[43] Brown, Constitutions in a Non-Constitutional World, p. 18.
[44] Abdelhamid Larguèche, Les ombres de la ville: pauvres, marginaux et minoritaires à Tunis, XVIIIème et XIXème siècles (Manouba: Centre de publications universitaire, Faculté des lettres de Manouba, 1999).
[45] Email Correspondence with Abdelhamid Larguèche, Ethnologist and Historian at the University of Manouba, June 2, 2018.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Mary Dewhurst Lewis, "Geographies of power: The Tunisian civic order, jurisdictional politics, and imperial rivalry in the Mediterranean, 1881-1935," Journal of Modern History, vol. 80(4) (2008) p. 793.
[51] Ibid., p. 803.
[52] Mohammed Dabbab and Tahar Abid, La Justice en Tunisie: Histoire de l'Organisation Judiciare: de 1856 jusqu'à la veille de l'Indépendance (Tunis: République tunisienne, Ministère de la justice, Centre d'études juridiques et judiciaires, 1998), p. 19.
[53] Ibid., p. 31.
[54] Ibid., p. 32.
[55] Ibid., p. 27.
[56] Ibid., p. 35.
[57] Ibid., p. 42.
[58] Ibid., p. 43.
[59] Charrad, States and Women's Rights, p. 110-112.
[60] Ben Achour, Fait Colonial et Droit Tunisien, p. 20 ("Le contact avec l'administration coloniale ne s'est pas traduit en Tunisie par une destruction totale de la hiérarchie administrative léguée par le pouvoir beylical. Il s'est agi, plutôt d'une appropriation au sens plein du terme des vieilles structures existantes, amarrées par le pouvoir colonial à son projet économique. Le contact avec le droit de la puissance colonisatrice ne s'est pas fait, non plus, de manière brutale…Reçu et diffusé dans une forme locale (les décrets beylicaux), le droit du conquérant, a dû s'adapter à la réalité locale.").
[61] Perkins, A History of Modern Tunisia, p. 28.
[62] Lewis, "Geographies of power," Journal of Modern History, p. 803.
[63] Charrad, States and Women's Rights, p. 116.
[64] Perkins, A History of Modern Tunisia, p. 40.
[65] Ben Achour, Fait Colonial et Droit Tunisien, p. 22.
[66] Perkins, A History of Modern Tunisia, p. 43.
[67] Charrad, States and Women's Rights, p. 117.
[68] Perkins, A History of Modern Tunisia, p. 42.
[69] Ben Achour, Fait Colonial et Droit Tunisien, p. 23.
[70] Charrad, States and Women's Rights, p. 119.
[71] Ben Achour, Fait Colonial et Droit Tunisien, p. 12.
[72] Lewis, "Geographies of power," Journal of Modern History, p. 795.
[73] Ibid., p. 804.
[74] Charrad, States and Women's Rights, p. 132.
[75] Perkins, A History of Modern Tunisia, p. 45.
[76] Ibid., p. 47.
[77] Ibid.
[78] Ben Achour, Fait Colonial et Droit Tunisien, p. 61, 79.
[79] Ibid., p. 82.
[80] Ibid.
[81] Dabbab and Abid, La Justice en Tunisie, p. 20.
[82] Perkins, A History of Modern Tunisia, p. 67.
[83] Paul Sebag, Histoire des juifs de Tunisie : des origines à nos jours, (Paris : Editions L'Harmattan, 1991), p. 156-161.
[84] Ibid.
[85] Sana Ben Achour, Fait Colonial et Droit Tunisien, p. 82.
[86] Dabbab and Abid, La Justice en Tunisie, p. 21.
[87] Ben Achour, Fait Colonial et Droit Tunisien, p. 84 (quoting the "Décret du 28 avril 1910 instituant un Secrétariat Général du Gouvernement Tunisien pour la Justice").

[88] Ben Achour, Fait Colonial et Droit Tunisien, p. 84.
[89] Ibid., p. 86.
[90] Ibid.
[91] Avant-projet du code pénal tunisien. National Archives No 1643. Dated December 4, 1911.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Tunisian Penal Code, art. 230, https://www.constituteproject.org/constitution/Tunisia_2014.pdf (accessed December 26, 2018).
[97] Wahid Ferchichi, "L'homosexualité en droit tunisien ou de l'homophobie de la règle juridique," p. 3.
[98] Ibid.
[99] Pradel, "L'apport du droit pénal francais au droit pénal tunisien," p. 5.
[100] Ben Achour, Fait Colonial et Droit Tunisien, p. 30.
[101] Charrad, States and Women's Rights, p. 115.
[102] Rachida Jelassi, "Genèse du code pénal tunisien," in Centenaire du code pénal : Le passé, le présent, le futur, (Tunis: Latrach Editions, 2016).
[103] Ibid.
[104] Ben Achour, Fait Colonial et Droit Tunisien, p. 107, 113.
[105] Ibid.
[106] The book is sometimes translated as the "Handbook of Maliki Islamic Jurisprudence."
[107] Khalil Ibn-Ishâq, "Précis de Jurisprudence Musulmane selon le Rite Mâlékite," trans. M. Perron, Exploration Scientifique de l'Algerie (XV) (1854).
[108] Rachida Jelassi, "Genèse du code pénal tunisien."
[109] Khalil Ibn-Ishâq, "Précis de Jurisprudence Musulmane selon le Rite Mâlékite."
[110] Ibid.
[111] Ibid.
[112] Scott Siraj al-Haqq Kugle, Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims (New York : Oneworld Publications, 2010), p. 50.
[113] Scott Siraj al-Haqq Kugle, "Sexual diversity in Islam: Is There Room for Gay, Lesbian, Bisexual, and Transgender Muslims?" Muslims for Progressive Values, 2010, http://www.mpvusa.org/sexuality-diversity/ (accessed December 23, 2018).
[114] Al-Haqq Kugle, Homosexuality in Islam, p. 50.
[115] Al-Haqq Kugle "Sexual Diversity in Islam," Muslims for Progressive Values. A detailed summary of this interpretation of the story of Lut is provided in the following memorandum: Katelyn Kang and Canem Ozyildirim, "LGBTQ Rights and Islamic Law," Harvard Law School, International Human Rights Clinic, April 30, 2018.
[116] Al-Haqq Kugle "Sexual Diversity in Islam," Muslims for Progressive Values.
[117] Junaid Jahangir, Islamic Law and Muslim Same-Sex Unions (Lanham, Maryland: Lexington Books 2016), p. 40. These sources, and corresponding analyses, are largely drawn from the following memorandum: Katelyn Kang and Canem Ozyildirim, "LGBTQ Rights and Islamic Law," Harvard Law School, International Human Rights Clinic, April 30, 2018.
[118] Al-Haqq Kugle "Sexual Diversity in Islam," Muslims for Progressive Values.
[119] The Qur'an (27:54-55), https://quran.com/27/54-55 (accessed December 23, 2018).
[120] Olfa Youssef, "Confusion autour de l'homosexualité" in Confusion d'une musulmane (Tunis: 2008) ("Les actions infâmes du peuple de Loth ne consistaient pas uniquement au fait d'entretenir des relations sexuelles avec des hommes, elles concernaient d'autres pratiques qui menaçaient la sécurité et l'intégrité physique et morale des autres.").
[121] Ibn Hazm, Al Muhalla ("The Sweetened" or "The Adorned Treatise") (Cairo: 1934).
[122] Mohammed Mezziane, "Sodomie et masculinité chez les juristes musulmans du IXe au XIe siècle," Arabica, vol. 55(2), p. 276-306.
[123] Olfa Youssef, "Confusion autour de l'homosexualité."
[124] Mezziane, "Sodomie et masculinité chez les juristes musulmans du IXe au XIe siècle," p. 276-306.
[125] Ibid.
[126] Ibid.
[127] Khalil Ibn-Ishâq, "Précis de Jurisprudence Musulmane selon le Rite Mâlékite," Section 48.
[128] Mezziane, "Sodomie et masculinité chez les juristes musulmans du IXe au XIe siècle," p. 276-306.
[129] Ibid.
[130] Ibid.
[131] Khalil Ibn-Ishâq, "Précis de Jurisprudence Musulmane selon le Rite Mâlékite," Section 48.
[132] Mezziane, "Sodomie et masculinité chez les juristes musulmans du IXe au XIe siècle," p. 276-306.
[133] Mohamed Kerrou, "Le mezwâr ou le censeur des mœurs au Maghreb," in Public et privé en Islam (Tunis: Institut de recherche sur le Maghreb contemporain, 2002).
[134] Corriveau, Judging Homosexuals, p. 52.
[135] Ibid.
[136] Ibid., p. 53.
[137] Ibid., p. 58.
[138] Avant-projet du code pénal tunisien. National Archives No 1643. Dated December 4, 1911.
[139] Georges Padoux, Code penal du royaume de Siam (Paris: Imprimerie Nationale, 1908), art. 242, https://babel.hathitrust.org/cgi/pt?id=mdp.35112105335956;view=1up;seq=120 (accessed February 1, 2019) (italics included).
[140] "Supreme Court decriminalises Section 377: All you need to know," The Times of India, September 6, 2018, https://timesofindia.indiatimes.com/india/sc-verdict-on-section-377-all-you-need-to-know/articleshow/65695884.cms (accessed November 18, 2018).
[141] Padoux (Georges), https://www.diplomatie.gouv.fr/IMG/pdf/394paap_cle055259__papiers_georges_padoux.pdf (accessed December 23, 2018).
[142] It is worth noting that the phrase "intercourse contrary to the order of nature" appears in the penal codes of several former French colonies. Article 534 of the Lebanese penal code, for instance, criminalizes "any sexual intercourse contrary to the order of nature" with up to one year in prison. Human Rights Watch, Lebanon: Same-Sex Relations not Illegal, July 19, 2018, https://www.hrw.org/news/2018/07/19/lebanon-same-sex-relations-not-illegal (accessed December 23, 2018).
[143] Paul Sébag, Tunis au XVIIème siècle : Une cité barbaresque au temps de la course (Paris: L'Harmattan, 1989).
[144] Aurelie E. Perrier, "Intimate Matters: Negotiating Sex, Gender, and the Home in Colonial Algeria, 1830-1914" (Ph.D. Diss., Georgetown University, 2014), p.173-174.
[145] Ibid., p. 181.
[146] Ibid., p. 183.
[147] Ibid., p. 188.
[148] Ibid.
[149] Ibid., p. 190.
[150] Ibid., p. 339.
[151] Ibid., p. 89.
[152] Ibid., p. 336-340.
[153] Ibid., p. 335.
[154] Ibid., p. 342.
[155] Mohamed Kerrou and Moncef M'halla, "La Prostitution dans la medina de tunis aux XIXe et XXe siècles," Annuaire de l'Afrique du Nord, vol. 30 (1991), p. 202.
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Perrier, Intimate Matters, p. 225.
[160] Leila Temime Blili, "Ibn Abi Diaf," in L'éveil d'une nation, ed. Ridha Moumni (Tunis: Officina Libraria, 2016), p. 175.
[161] Ibid.
[162] Ibid.
[163] Mezziane, "Sodomie et masculinité chez les juristes musulmans du IXe au XIe siècle," p. 276-306.
[164] Ibid.
[165] Amr A. Shalakany, "Islamic Legal Histories," Berkeley Journal of Middle Eastern & Islamic Law, vol. 1(1) (2008), p. 49-50. Analysis of this source is drawn primarily from the following memorandum: Katelyn Kang and Canem Ozyildirim, "LGBTQ Rights and Islamic Law," Harvard Law School, International Human Rights Clinic, April 30, 2018.
[166] Ahmad Atif Ahmad, "The Right to Privacy," in Islam, Modernity, Violence, and Everyday Life (New York: Palgrave Macmillan, 2009) p. 178.
[167] Kerrou, "La Prostitution dans la medina de tunis," p. 202.
[168] Ibid., p. 203.
[169] Ibid., p. 211.
[170] Perrier, Intimate Matters, p. 339.
[171] Rachida Jelassi, "Genèse du code pénal tunisien."
[172] Ben Achour, Fait Colonial et Droit Tunisien, p. 84.
[173] Élisabeth Mouilleau, Fonctionnaires de la République et artisans de l'empire (Paris : L'Harmattan, 2002) p. 57.
[174] Ibid., p. 58.
[175] Ibid.
[176] Ibid.
[177] For his role in ensuring the capitulation of Kef to French forces in 1881, Roy was named a Knight of the Legion of Honor.
[178] Mohamed Hédi Cherif, Histoire de la Tunisie (Tunis: Céres, 1980), p. 228.
[179] Rachida Jelassi, "Genèse du code pénal tunisien."
[180] Ibid.
[181] Dumas is most well-known for presiding over the trials that took place after the well-known Djellaz affair. In 1911, after the Tunis municipality sought to register Al-Djellaz, the Muslim cemetery, in order to transfer ownership to the French protectorate authorities, large-scale riots broke out, leading to the deaths of 14 Tunisians and the arrest of nearly 800. At the trial conducted in June 1912, several Tunisians, including well-known activists Chedli Guetari and Manoubi Jarjar, were condemned to death. "Âal Jarjar," a Tunisian song that remains popular today, describes the organizers' resistance against French colonial authorities.
[182] Avant-projet du code pénal tunisien. National Archives No 1643. Dated December 4, 1911.
[183] Georges Padoux, Code penal du royaume de Siam, (Paris: Imprimerie Nationale, 1908), art. 242, https://babel.hathitrust.org/cgi/pt?id=mdp.35112105335956;view=1up;seq=120.
[184] Khalil Ibn-Ishâq, "Précis de Jurisprudence Musulmane selon le Rite Mâlékite."
[185] Rachida Jelassi, "Genèse du code pénal tunisien."
[186] Perrier, Intimate Matters, p. 336-340.
[187] Ibid.



Chapter 2:

The Application of Article 230 in Post-Revolution Tunisia

As a 17-year-old high school student in 2012, Amir feared for his life. He had begun dating an older man, Salim, during summer vacation. In September, after Amir explained that he would have less free time during the school year, Salim "became violent—he beat me up a number of times and even raped me once."[188] When Amir tried to end the relationship, Salim began threatening him, hacking into his Facebook, routinely calling his family's home phone, and threatening to publicly reveal Amir's sexuality. Traumatized by the physical and sexual violence, Amir attempted suicide, and spent months secluded from friends and family.

In November 2013, soon after he had begun leaving the house again, Amir ran into Salim while having a drink with a friend in downtown Tunis. When Amir informed his friend that they needed to leave the cafe, Salim followed the pair outside, grabbing Amir and loudly insulting him. Witnessing the violent scene unfolding before him, Amir's friend informed Amir's father over the phone that his son's life was in danger, and that they needed to report what had happened to the police. When his father arrived, Amir explained that Salim had attempted to rob him. The two of them traveled to a police station that evening.

At the station, an officer informed Amir that he "needed to tell him everything."[189] Upon Amir's admission that Salim had previously attacked and raped him, the officer subsequently assured Amir that he would take all necessary measures to help him. But later that evening, a second officer informed Amir that Salim served in the Tunisian military. The officer asserted that Salim could not be a "faggot" because he defended his country, and accused Amir of attempting to "create problems and ruin the man's reputation."[190] He informed Amir that he had only one option—confess to his homosexuality or be forced to undergo an "anal examination."[191] Later that evening, police brought Amir to Hospital Charles Nicole, a well-known Tunis hospital. After forcing him to undress and mount an operating table on his hands and knees, a hospital worker put on rubber gloves and began aggressively inserting his fingers into Amir's rectum, continuously insulting him—"You spread your legs for men all the time so there is no reason to resist now"—and demanding that he "squeeze."[192] Police officers remained in the room throughout the "examination."

Soon after his ordeal at the police station and the hospital, Amir appeared in front a judge. Initially sentenced to one year in prison, Amir appealed. His parents had hired a lawyer, who emphasized that Amir was a minor, and brought in a psychologist's certification attesting to his client's "mental illness."[193] Four years later, an appeals court dismissed the case.

Amir's arrest, anal examination, and prosecution for homosexuality are not unique in contemporary Tunisia. Mounir Baatour, President of Shams, one of Tunisia's four officially recognized LGBTQ rights organizations, and a lawyer who frequently defends LGBTQ Tunisians in court, estimates that there were at least 67 prosecutions under Article 230 in 2017 alone. During an interview, Baatour explained that he currently had seven clients accused of violating Article 230, from all across the country.[194] The fact that none of his current cases had received significant media attention, particularly when compared to the international outrage surrounding the 2015 prosecutions in Kairouan and Sousse, does not indicate a broader reduction in the number of Article 230 prosecutions.

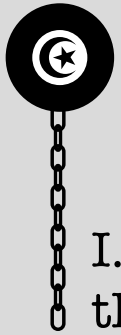
If Article 230 remains a regularly prosecuted offense, larger questions remain as to whether or not arrests and prosecutions for "sodomy" have increased following the 2011 Tunisian Revolution. Nadhem Oueslati, President of NESS, an organization working on health issues in the LGBTQ community, stated that he is "totally convinced that there are more arrests [under Article 230] now than before the Revolution."[195] He noted that a wave of arrests against LGBTQ Tunisians had taken place in 2008, three years before the Revolution, but that these arrests had been made on the basis of Articles 226 and 226bis, other provisions of the penal code frequently weaponized against the LGBTQ community. While many Tunisian activists and civil society members, as well as several European diplomats, echoed that perspective, precise numbers cannot be verified. Amna Guellali, Senior Tunisia and Algeria Researcher at Human Rights Watch, explained that "it is very difficult to say whether there is the same number of prosecutions before and after 2011. The type of reporting that existed before did not allow for documentation of the scope of arrests and prosecutions. Also, associations working on this issue weren't organized, as they have been since the Revolution, and the visibility of the issue was not the same."[196] Fida Hammami, Tunisia Researcher at Amnesty International, had a similar understanding, noting that prior to 2011, "LGBTQ organizations were not visible, so [Article 230] cases were simply understood as common criminal cases. But with newfound freedoms for civil society and LGBTQ groups after 2011, the issue became more visible, and it became easier for victims to seek remedies. That might be why we hear about higher numbers, though it is difficult to say."[197]

If one cannot obtain exact data regarding pre-2011 prosecutions under Article 230, it is certain that the Tunisian sodomy law has taken on increased political importance, and received consistent media attention, over the past few years. According to Amna Guellali, the "uptick in arrests" is likely due to "the increased visibility of the LGBTQ community, which has exposed

them to public condemnation and the police."[198] In the face of a growing and increasingly vocal LGBTQ movement, Guellali sees Article 230 arrests as a "backlash," in which the LGBTQ movement's greater presence in the media and civil society "has also made them more vulnerable to all sorts of reactions," including greater risk of "arrest and prosecution."[199] If Article 230 arrests have become more common, they have also evoked widespread indignation both in Tunisia and abroad, and have drawn attention to the previously taboo subject of homosexuality. Monia Ben Hamadi, Editor in Chief of Inkyfada, an online Tunisian news publication, explained that since the Revolution, homosexuality is "now on the table and up for discussion," a development which is at least partially related to "the media attention around those accused of homosexuality [under Article 230]."[200]

The persistence of Article 230 arrests on the one hand and the growing public presence of the Tunisian LGBTQ movement on the other speak to a kind of paradox of LGBTQ rights in Post-Revolution Tunisia. There are four officially recognized LGBTQ organizations, where none existed before, each of which has demonstrated increased willingness and capacity to challenge discrimination and provide legal and psychological support to LGBTQ Tunisians. At the same time, the rate of Article 230 arrests shows little sign of abating, and there is no indication that the Tunisian parliament plans to abrogate Article 230 anytime soon. In a climate marked by "pervasive discrimination" and threats to the "personal safety" of LGBTQ Tunisians, the government's refusal to decriminalize homosexuality represents a "leading challenge in the LGBTQ quest for equality."[201]

This Chapter explores the application, enforcement, and role of Article 230 in contemporary Tunisia, and seeks to shed light on how arrests and prosecutions under Article 230 take place, and why the law violates both Tunisia's 2014 Constitution and the country's obligations under international law. The chapter is divided into the following sub-sections: 1) Article 230 in the Context of the Tunisian Penal Code; 2) The Enforcement and Application of Article 230; and 3) Article 230, the 2014 Constitution, and Tunisia's International Obligations.



I. Article 230 in the Context of the Tunisian Penal Code

If Article 230 has a specific application—at least according to the text of the law itself—it shares a repressive quality with many other articles in the penal code. According to Kerim Bouzouita, a member of the Individual Freedoms and Equality Committee (COLIBE) established by Tunisian President Essebsi in August 2017, "Article 230 is not unique—we have many laws which directly violate people's individual liberties."[202] For Fida Hammami, Article 230 exemplifies the ways in which "the entire philosophy of the penal code is repressive rather than protective of rights and liberties. It was a penal code that was established under colonization and re-formulated under dictatorship, so it cannot be a legal instrument that protects rights or liberties."[203]

Article 226bis, which criminalizes acts in violation of "publicly decency" and "public morality" (*atteinte aux bonnes moeurs ou à la morale publique*), represents a key example of the ill-defined laws that can be interpreted as judges and police officers see fit—nowhere does the code define "public decency" or "public morality."[204] Thus, during Ramadan in 2017, police arrested four Tunisian men in Bizerte for eating and smoking cigarettes in public.[205] No law mandates that Tunisians fast during Ramadan, or avoid eating, drinking, or smoking in public during Ramadan, and Article 6 of the Constitution expressly "guarantees freedom of conscience and belief" as well as "the free exercise of religious practices."[206] Nonetheless, the men received one-month prison sentences—the court interpreted their public refusal to fast during Ramadan as a "violation of public decency."[207] In defending the sentence, Chokri Lahmar, spokesman for the Public Prosecutor's Office, explained that eating and smoking in public during Ramadan was "provocative," estimating that if the men chose not to fast "they only had to eat behind closed doors and not attempt to sew hatred between people."[208] Lahmar's arbitrary

interpretation of what is, and what isn't, permissible during Ramadan speaks to the troubling latitude with which authorities can interpret and selectively enforce vaguely defined articles of the penal code.

As lawyers, civil society activists, journalists and others have pointed out, Article 230, as well as other *liberticide* laws, clearly contravenes Tunisia's 2014 Constitution, as well as its international legal obligations. In the lead-up to Tunisia's 2017 Universal Periodic Review, a coalition of Tunisian LGBTQ organizations released a tri-lingual report detailing the various ways in which the law is unconstitutional. Noting that authorities rely on a number of other articles in the code in discriminating against the LGBTQ community, including Article 226bis regarding public decency, Article 228 relating to indecent assault, and Article 231 relating to solicitation and prostitution, the report concluded that "a revision of the penal code…is required to align it with the new Tunisian Constitution and [Tunisia's] various international commitments."[209]

But if Article 230 and other provisions in the penal code violate the Constitution, no court exists in which lawyers can challenge them. Tunisia's 2014 Constitution, widely praised as the most progressive in the Arab world, mandates the establishment of a Constitutional Court, tasked with ensuring the constitutionality of current laws. In accordance with the Constitution, the Tunisian Parliament passed a law establishing the court in December 2015. Twelve judges were to be selected, four by the ARP (the Tunisian parliament), four by the President of the Republic, and four by the High Council of the Judiciary (*Conseil supérieur de la magistrature*). But three and a half years later, the court remains hypothetical, as political parties squabble over the selection process.[210] Each of the judges selected by the ARP, for example, must receive 145 votes out of 217 seats, a high number which requires support from multiple political formations. In March 2018, it appeared as if the leaders of the largest political parties had agreed upon four candidates. But over two rounds of voting, only one of the candidates received the necessary number of votes—none of the other three received more than 104.[211] Thus, in spite of the constitutional obligation to establish a Constitutional Court "within a maximum of one year from [the first legislative] elections," lawyers seeking to challenge unconstitutional laws in court have no choice but to wait.[212] In this strange transitional moment, qualified by Monia Ben Hamadi as "half democracy, half dictatorship," Tunisia still operates under myriad laws and regulations which clearly contravene the country's Constitution.[213] The 1913 Penal Code, and a host of unconstitutional laws and regulations dating back to the colonial period, remain in effect.[214]

Though the litigation route is currently unavailable, other means exist for challenging Article 230. As mentioned above, Tunisian president Béji Caid Essebsi announced the establishment of a Commission on Individual Liberties and Equality (COLIBE) in August 2017.[215] Chaired by the progressive MP and prominent Tunisian feminist Bochra Bel Hadj Hamida, COLIBE was tasked both with establishing a code of individual liberties, and with identifying unconstitutional laws and regulations and proposing corresponding reforms. According to Commission member Kerim Bouzouita, Tunisia's progress on public freedoms, such as freedom of expression and association, has yet to translate into a "legal transformation" around individual liberties.[216] Highlighting Article 230 as well as other *liberticide* laws as examples, Bouzouita noted that under current laws, "We are all prisoners *en sursis* (serving suspended sentences)."[217]

COLIBE released its report on June 12, 2018.[218] The report called for a range of legal reforms aimed at harmonizing existing law with the 2014 Constitution, cataloging a number of unconstitutional laws and proposing alternatives.[219] In lieu of side-stepping the delicate issue of LGBTQ rights, the report called for the "the outright repeal of article 230."[220] [221] COLIBE additionally recommended the total abolition of anal examinations.

Since its release, the COLIBE report has been met with both significant support and intense backlash, as political leaders and civil society groups have organized competing demonstrations and public statements.[222] While President Essebsi has submitted legislation mandating equal inheritance rights for men and women—in line with COLIBE's recommendations—he has yet to announce any measures regarding Article 230, or the decriminalization of sodomy. Whether he will take such steps remains to be seen.

II. The Enforcement and Application of Article 230

No one can identify the exact number of prosecutions or arrests executed pursuant to Article 230. While Mounir Baatour has estimated that 67 arrests took place for alleged violations of Article 230 in 2017, that statistic cannot be verified with certainty. Still, numerous lawyers, journalists, and human rights defenders speak of an increase in Article 230 arrests after the 2011 Revolution as well as of a more recent spike in arrests over the past few years. But whether this stems from the dramatically increased publicity of LGBTQ organizations in Tunisia, from a concerted effort on the part of specific actors within the Tunisian justice system, or due to any number of other reasons is unknown. Additionally, while the Arabic version of the law theoretically criminalizes female homosexuality, and while some activists made reference to women serving sentencing for violating Article 230, there is no publicly known Article 230 case concerning female defendants. Unlike other articles involved in the criminalization of LGBTQ Tunisians, Article 230 appears specifically aimed at men who have sex with men.

Because of the ambiguity surrounding the precise number of Article 230 arrests, it is difficult to identify broader trends in the prosecution of sodomy cases. But Tunisians accused of violating Article 230, as well as lawyers who represent clients prosecuted under Article 230, have provided details drawn from particular examples, which help shed light on larger patterns. Their descriptions speak to the myriad ways in which the criminalization of homosexuality in Tunisia manifests in law enforcement and in the court system.

Over the course of two interviews conducted in January and May 2018, Mounir Baatour described the seven Article 230 cases then on his docket. While the facts of the cases are varied, they reveal an overarching pattern—LGBTQ Tunisians who come into contact with the police for any number of reasons may find themselves arrested, verbally or physically harassed by police, forced to undergo an anal examination, and/or prosecuted under Article 230. Baatour described the seven cases as follows:[223]

1 Tarek, a 23-year-old living in Sousse, had been arrested fifteen days prior to our May 2018 interview. His arrest took place following a fight with his ex-boyfriend, who had refused to accept that Tarek wanted to end their relationship. When Tarek's ex-boyfriend physically attacked him in a café, the café owner called the police, who brought both men to the police station. Given that Tarek bore clear marks of physical injury from the altercation, the police asked if he wanted to press charges. In response, his ex-boyfriend confessed the nature of their relationship, explaining that they had slept together and had engaged in anal intercourse. Following the confession, the police classified the affair as one of homosexuality rather than violence. A judge subsequently sentenced both Tarek and his ex-boyfriend to eight months in prison.

2 Foued, a 27-year-old living in Jendouba, discovered that his motorcycle had been confiscated due to alleged lack of insurance. He subsequently went to the police station to show his insurance and reclaim his motorcycle. When Foued arrived, the police began to criticize him for his clothing, his long air, and his apparently effeminate look. After an argument, the police officers illegally seized his cellphone, and found photos of him kissing his boyfriend. Without providing him with access to a lawyer or making him aware of his rights, the police began their interrogation, ultimately convincing Foued to sign a report that included a number of false confessions regarding prostitution. Though they had assured Foued that signing the report would end the matter, he and his boyfriend were subsequently forced to appear at a Jendouba court. Both received three-year sentences, shortened to two-years on appeal.

3 Ayman, a soccer referee, had had long-running disagreements with the neighborhood chief of police, which ultimately resulted in police placing his house under surveillance. Officers subsequently noticed several men who regularly visited his house. One evening upon returning home, Ayman found a police summons. When he went to the police station, officers explained that they were currently investigating burglary in the neighborhood, and that they had noticed two men casing his house. They subsequently brought the two men into the station, and asked whether they knew Ayman. When they responded affirmatively, the police asked whether they had had sexual relations with him. When they again responded affirmatively, the police took Ayman into custody. Though he refused to undergo an anal examination, Ayman received a three-month prison sentence, which he then completed. Before the end of his sentence, both Ayman and the prosecution had appealed, the former demanding the annulation of his sentence and the latter seeking a harsher punishment.

4 One evening, Samir heard a knock at his door. When he opened it, he encountered a drunk and aggressive man, who then raped him. Samir called the police, who subsequently brought both men to the station. The rapist claimed to know Samir, claiming that they often slept together. He then admitted to the fact that that evening, after Samir had refused his solicitations, he had come to Samir's house and raped him. Though the attacker explicitly admitted to raping Samir, the prosecutor nonetheless decided to charge both men, one for rape and the other for violating Article 230.

5 Due to previous high-profile Article 230 arrests, Muhammad and Fawzi, two men in their 20's living in Tunis, had no financial resources and no ability to seek help from their families. They began working as sex workers, staying at the home of Ali, a third person. One evening, after a dispute between Muhammad, Fawzi and Ali, a neighbor called the police, who brought all three men to the police station. Muhammad and Fawzi admitted to working as prostitutes, explaining that Ali ran an operation in which he brought clients to the house to sleep with Muhammad and Fawzi and pocketed some of the money. Muhammad and Fawzi each received two-year prison sentences for violating Article 230, while Ali received two years in prison for solicitation.

6 Three gay men in their 30's rented an apartment in Hammam-Sousse to throw a party. When they arrived at the apartment, neighbors noticed their effeminate appearances, and called the police. After the police brought all three men to the station, one of the men admitted that he had previously engaged in homosexual relations in the past. When the police ordered an anal examination, two refused while the third accepted. But the police failed to find a doctor willing to administer the test, likely a result of the growing number of Tunisian doctors who systematically refuse to implement anal examinations. In spite of the lack of an anal examination, the prosecutor charged all three men with violating Article 230. As of January 2018, the three awaited trial.

7 Skander slept with a well-known Tunisian filmmaker. Initially, he claimed that after the two slept together, the filmmaker threatened him with a knife when he attempted to leave the house. But Skander later retracted that statement, confessing that he fully consented to engaging in sexual relations with the filmmaker. Police arrested both men in March 2017. As of January 2018, the two remained in pre-trial detention, a violation of Tunisian criminal law, which requires that a judge authorize continued holding in pre-trial detention after six months

The cases summarized above highlight several trends in the enforcement of Article 230. First, and perhaps most importantly, none of the accused were caught engaging in anal intercourse. While police uncovered pictures and videos of male partners, they found no explicit images of "sodomy," at least as defined as anal penetration. Enforcement of Article 230, then, cannot be separated from the fundamental vagueness of the law itself—the definition of sodomy depends on the perspective of individual police officers, prosecutors, and judges. Indeed, according to Hayet Jazzar, a Tunisian lawyer who has represented several individuals accused of violating Article 230, police officers and judges "distort" the Article, "elastically" interpreting it to cover elements beyond the text of the law.[224] "The fact that someone is gay," Jazzar asserted, "is not punishable under Article 230. It is not the orientation that violates the law, but the act itself."[225] There remains some dispute as to whether Article 230 specifically criminalizes anal intercourse, or whether it covers male and female sexuality more broadly. But by arresting individuals based on their effeminate appearance, possession of women's clothing, or admission

of engaging in some sexual acts with members of the same sex, police functionally use Article 230 to punish whoever they want to punish. Given the lack of clarity around what Article 230 prohibits, it essentially serves as a flexible tool for law enforcement to discriminate against men perceived to have a non-normative sexual identity.

Secondly, a number of contemporary Article 230 arrests and prosecutions stem from interactions with police officers, often with no sexual dimension or connection to Article 230. Indeed, when asked to describe the "typical Article 230 case," Baatour offered the example of a Tunisian nurse who was assaulted and raped at 2am. When the man escaped his attackers and fled to the police station, explaining that he had been anally raped, police arrested him for violating Article 230.[226] For gay Tunisians, any police interaction has the potential of morphing into an Article 230 arrest.

Thirdly, interactions with police officers often lead to verbal abuse and even physical violence against LGBTQ Tunisians, leading some to avoid contact with police altogether. For example, Elissa, a trans woman living in Tunis, explained that after two men tried to violently mug her with a knife she went to a local police station to report what had happened. The police officer "began to insult me, called me a whore. He pulled my hair and smashed my head on his desk multiple times. It was so violent that I had skull fractures; I was hospitalized and operated on."[227] She explained further that on a different occasion in 2016, a man had kidnapped her, brought her to his home in Ksar Said, and sexually assaulted her. Nonetheless, she decided not to go to the police, given that she "didn't trust them."[228]

Lastly, Article 230 enforcement is entirely arbitrary and unpredictable. A suspicious neighbor, an apparently effeminate outfit or hairstyle, a loud argument that attracts attention, a particularly homophobic police officer, or even a personal vendetta can result in a three-year prison sentence for "sodomy." Because Article 230 cases do not concern cases of *flagrante delicto*, in which individuals are caught engaging in anal intercourse, the Article serves as an arbitrary mechanism through which police, or civilians, can endanger or imprison gay Tunisians.

Given that the definitions of the offense in both the Arabic and French versions of Article 230 remain ambiguous, and given the law's clear unconstitutionality (discussed in detail in the following section), lawyers representing clients accused of violating Article 230 utilize a number of tactics to defend their clients. When asked about his general strategy in Article 230 cases, Baatour explained that his arguments depend on the circumstances of the case, as well as on the particular judge: "Sometimes, I claim there is a lack of proof, sometimes I argue that Article 230 is unconstitutional and that the Constitution is more powerful than the law. I do not have a typical strategy; my goal is to avoid prison for my client in whatever way I can."[229] Punishments, he noted further, often center on the politics of the judge or other external elements which do not implicate the text of the law itself: "It is really about the judges. There are conservative judges, and less conservative judges. With Islamist judges, we get higher sentences. With less retrograde judges, we get shorter sentences, sometimes around three months. This also depends on the media attention the affair gets—[with more attention] the sentences are lighter."[230]

Shortly after the conclusion of the initial trial of the Kairouan Six, in which the lower court judge sentenced the six students to five-year banishments from Kairouan in addition to prison sentences, Hayet Jazzar traveled to Sousse to argue their appeal. Working pro bono—"I did this out of principle" —Jazzar estimated that she argued for an hour and a half, with little interruption from the three-judge panel. Jazzar invoked a broad range of arguments, ranging from the textual to the historical. She asserted that homosexuality "has always existed in Arab-Muslim culture," referencing well-known Muslim poets' invocation of homosexual love.[231] She made arguments based on the text of Article 230, stressing that "the text doesn't punish homosexuality, but rather the homosexual act," and emphasizing that the defendants were not caught engaging in anal intercourse.[232] Further, the fact that police found dresses in the apartment did not entail a violation of Article 230: "They are free to do what they want in a private apartment."[233] Perhaps most notably, Jazzar made the case that judges have the power to refuse to apply an unconstitutional law. Ultimately, the defendants' sentences were commuted to two months' imprisonment.

Though Jazzar noted that the judges posed few questions during oral argument, one judge asked whether it was the court's role to decide questions regarding the application of Article 230. Specifically, the judge inquired as to whether "her conflict was with the legislature."[234] That question speaks to the difficulties facing lawyers in Article 230 cases. As discussed above, the Constitutional Court tasked with hearing challenges to the constitutionality of specific laws has yet to be implemented. And, at least currently, the ARP has not demonstrated willingness to unilaterally eliminate Article 230 from the penal code, in spite of recent efforts made by progressive parliamentarians. Thus, lawyers must employ a range of arguments, from lack of sufficient

proof, to interpreting the law as punishing specific sexual acts rather than sexual orientation, to a judge's power to ignore laws incongruent with the Constitution. Until the creation of the Constitutional Court, lawyers must contend with Article 230's continued application in whatever ways they can.

In spite of the particularities of Article 230 cases, one should not analyze the Tunisian sodomy law in isolation. Rather, Article 230 arrests and prosecutions demonstrate larger deficiencies of the Tunisian criminal justice system, in which police routinely ignore constitutional protections around arrest, detention, and access to legal counsel, and judges and prosecutors apply a range of unconstitutional laws and regulations. As Amna Guellali noted, persecution of the LGBTQ community constitutes one element of a "broader spectrum of abuses" in a context marked by "lack of respect for the rule of law in police custody, and interference in the private lives of citizens."[235] The application of Article 230 must be understood within the reigning climate of impunity for abusive police practices and lack of respect for the rights of detainees.

As evidenced by the cases described above, Article 230 arrests often entail verbal harassment, physical violence, humiliating interrogations and extracted confessions with no lawyer present, and other forms of police abuse committed during pre-charge detention (*garde à vue*). The frequency of abuse that occurs immediately after arrest in Article 230 cases is unsurprising in the Tunisian context. According to Antonio Manganella, Tunisia Country Director of Avocats sans Frontières (Lawyers without Borders), "The highest rate of human rights violations [in the penal process] takes place during the pre-charge detention (*garde à vue*) period."[236]

In 2016, the ARP passed Law No. 5, reforming the Tunisian Code of Criminal Procedure (CCP) with major implications for individuals in pre-trial detention. Law No. 5 "establishes the general principle that all suspects in police custody have the right to consult a lawyer before police questioning, and to legal assistance during each interrogation session. Having a lawyer present during questioning ensures the integrity of criminal proceedings and supports a suspect's right to an effective defense."[237] Whereas detainees previously had "no right to see a lawyer until their first appearance before an investigative judge," the new law meaningful expanded detainees' access to justice, providing that a "detainee or a family member [has] the right to request the assistance of a lawyer during pre-charge detention."[238] As Manganella noted, Tunisian law now mandates that detainees have access to a lawyer during "*all* phases of the penal procedure."[239] This reform appears particularly important given long-standing patterns in pre-charge detention, including suspects routinely signing "police statement[s] that could be used against them during trial" without a lawyer, or offering coerced confessions after torture.[240]

But while Law No. 5 provides important protections against pre-charge abuses in theory, questions remain as to the law's effect in practice. In a 2018 report on Law No. 5's implementation, Human Rights Watch reported a number of cases in which detainees "alleged that the police either did not inform them of their right to a lawyer or denied them access to one, despite their explicit request to consult a lawyer."[241] Detainees spoke of interrogations undertaken with no access to counsel and coerced confessions extracted through physical and verbal abuse.[242] Stated simply, many of the abuses reported in the context of Article 230 pre-charge detention are endemic to the Tunisian criminal justice system writ large.

If the application of the Tunisian sodomy law must be interpreted in the context of the Tunisian criminal justice system, Article 230 should not be conflated with other provisions of the Tunisian penal code. As noted above, Article 230 cases do not concern police officers catching individuals in *flagrante delicto*. Instead, officers and prosecutors seek to "prove" violations of Article 230 by conducting bogus anal examinations, combing through suspects' phones, computers, or apartments for "evidence," or extracting forced confessions through physical abuse or interrogations with no lawyer present, all in violation of the Tunisian Constitution and the country's international obligations. While Article 230 is not the only provision in need of reform or abrogation, its acutely harmful effects should not be understated.

III. Article 230, the 2014 Constitution, and Tunisia's International Obligations

This sub-section does not provide an exhaustive analysis of Article 230's incompatibility with domestic and international law. Instead, it describes the fundamental ways in which the Tunisian sodomy law violates both the Tunisian Constitution and the country's international legal obligations, as well as offering an overview of the core protections for LGBTQ rights under international law. This sub-section specifically focuses on equality under the law, the legal prohibition against torture, the right to privacy, and vagueness.

a. The Development of Protections for LGBTQ Persons under International Law

Largely beginning in the 1990s, UN human rights mechanisms have focused increasing attention on human rights violations committed on the basis of sexual orientation and gender identity, and affirmed protections for LGBTQ persons under international law. As Navi Pillay, former United Nations High Commissioner for Human Rights, explained, the rights of LGBTQ persons rest "on two fundamental principles that underpin international human rights law: equality and non-discrimination."[243] In 2011, the Human Rights Council adopted Resolution 17/19, "the first United Nations resolution on human rights, sexual orientation and gender identity."[244] In Resolution 17/19, the Human Rights Council expressed "grave concern at acts of violence and discrimination" due to sexual orientation and gender identity and affirmed that the Universal Declaration of Human Rights[245] guarantees "that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind."[246]

In 2014, following the release of a report by the High Commissioner detailing "evidence of a pattern of systematic violence and discrimination directed at people in all regions because of their sexual orientation and gender identity," the Human Rights Council issued Resolution 27/32.[247] Notably, Resolution 27/32 underscores the universality of human rights, stating that cultural and religious particularities cannot not justify states' failure to uphold human rights protections: "It is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[248] The Human Rights Council adopted its most recent resolution on the subject in 2016, establishing an "Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity."[249]

In 2012, the UN Office of the High Commissioner for Human Rights released a report detailing the international human rights law principles regarding sexual orientation and gender identity.[250] The report specifically identifies five "core" human rights obligations of states regarding LGBTQ persons, derived largely from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[251] Among these core protections,

international law requires that states decriminalize homosexuality, prohibit discrimination on the basis of sexual orientation and gender identity, prevent torture and degrading treatment of LGBTQ individuals, and protect LGBTQ persons from homophobic and transphobic violence.[252] As discussed below, Tunisia's continued application of Article 230 violates each of these obligations.

b. Equality under the Law

Article 21 of the Tunisian Constitution guarantees that all citizens "are equal in rights and duties" and "equal before the law without discrimination."[253] Yet the authoritative, Arabic-language text of Article 230 appears to punish individuals based exclusively on their sexual orientation. Both male and female homosexuality, *Liwat* and *El Mousahaka*, constitute criminal offenses punishable by up to three years in prison. Far from being "equal in rights and duties," LGBTQ Tunisians theoretically violate the penal code by virtue of their sexual preferences alone—a textual reading of the Arabic version of Article 230 does not exclude imprisonment on the basis of sexual preference. The French version of Article 230, however, refers exclusively to "sodomy" (*sodomie*) and thus appears to criminalize anal intercourse, including in the context of a married heterosexual couple. As Kerim Bouzouita pointed out, "Men have been found guilty and sent to prison for 'sodomizing' their wives."[254] But while differences and ambiguities in the Arabic and French versions of Article 230 could allow for prosecutions of lesbians as well as heterosexual women and men, all Article 230 cases discovered in researching this report concern men accused of engaging in anal intercourse with other men.

The principle expressed in Article 21 of the Tunisian Constitution is embodied in Article 7 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights,[255] guaranteeing "equality before the law" and ensuring that "all persons…are entitled without any discrimination to the equal protection of the law."[256] Taken together, the above articles can be interpreted as standing for the "principle of equality between citizens."[257] Sexual orientation is not explicitly mentioned as one of the example criteria on which a state cannot discriminate—the International Covenant on Civil and Political Rights lists "race, color, sex, language" and several other identity criteria.[258] However, the Human Rights Committee, the UN treaty body tasked with monitoring the implementation of and interpreting the Covenant, has stated that "the reference to 'sex'…is to be taken as including sexual orientation."[259]

Other international human rights bodies have similarly understood non-discrimination as including sexual orientation. The African Commission on Human and People's Rights, for example, interpreted Article 2 of the African Charter on Human and People's Rights— "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind"—as protecting against discrimination based on sexual orientation.[260] In 2015, the Commission issued a resolution specifically condemning "the increasing incidence of violence and other human rights violations…on the basis of…imputed or real sexual orientation or gender identity."[261]

It is important to note that international human rights treaties often allow states to place certain limitations on some of the rights they enunciate. The International Covenant on Civil and Political Rights, for example, allows signatories to impose restrictions on specific rights, provided that restrictions serve to protect "national security, public order (*ordre public*), public health or morals or the rights and freedoms of others," and are not inconsistent with other rights in the Covenant.[262] Of particular relevance to Article 230, the Human Rights Committee has soundly rejected public health arguments for the criminalization of homosexuality. In *Toonen v. Australia*, the Committee asserted that the "criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV," underscoring that criminalization could actually be counterproductive, driving individuals at risk of infection "'underground.'"[263] As discussed below, the Human Rights Committee has also rejected arguments justifying sodomy laws on the basis of public morals.

c. Prohibition Against Torture

Article 23 of the Tunisian Constitution guarantees that "the state protects human dignity and physical integrity, and prohibits mental and physical torture."[264] This prohibition is in line with Tunisia's international obligations, as expressed in Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. Article 7 prohibits "torture" and "cruel, inhuman or degrading treatment or punishment," and guarantees that "no one shall be subjected without his free consent to medical or scientific experimentation."[265] Unlike other rights contained in the Covenant, the prohibition on torture is non-derogable—

even in times of "public emergency which threatens the life of the nation" states may not utilize torture.[266]

Anal examinations, employed by Tunisian police in order to "prove" violations of Article 230, have consistently been condemned as torture on the international level. In his 2016 report at the 31st session of the Human Rights Council, for example, the Special Rapporteur on torture noted that "in States where homosexuality is criminalized, men suspected of same-sex conduct are subject to non-consensual anal examinations intended to obtain physical evidence of homosexuality, *a practice that is medically worthless and amounts to torture or ill-treatment*."[267] In the past few years, international human rights bodies have specifically condemned Tunisia's use of anal examinations. In its 2016 report on Tunisia, the Committee against Torture (CAT) asserted 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."[268] [269] Though acknowledging that examinations are theoretically voluntary, the Committee explained that it had received "information that several persons have accepted them, under threat from the police, who contend among other things that a refusal would be interpreted as incriminating."[270] In its recommendations, the Committee called both for the repeal of Article 230 and for the prohibition of "intrusive medical examinations that have no medical justification and cannot be performed with the free and informed consent of the persons subjected to them."[271]

The Committee against Torture's report appeared less than one month after Tunisia's 2017 Universal Periodic Review, in which a number of states called for ending the practice of anal examinations altogether. While the Tunisian government accepted the recommendation, the government understood it as requiring the prohibition of "forced" anal examinations, thus allowing for a loophole for "voluntary" examinations.[272] But given the context in which these examinations are undertaken, it is unlikely that meaningful "consent" is possible. Dr. Ines Derbel, a Tunisian psychiatrist and sexologist with significant experience working with LGBTQ patients in Tunis, explained that anal examinations are applied "in a destabilizing context" in which "[one's] points of reference are entirely shaken up."[273] Often in the presence of police officers after having undergone substantial abuse, those suspected of sodomy usually "do not know they have the right to refuse this test, or if they do know, they know that if they refuse, it is proof of guilt."[274] Dr. Derbel explained further that anal examinations are often coupled with insults and psychological abuse, highlighting instances in which medical examiners "do not use vaseline, as if it was a way of punishing someone for their sexual orientation, or sexual practices."[275] Dr. Derbel affirmed that these examinations constitute a "form of torture" that violates one's "physical, moral, and psychological integrity," emphasizing that individuals may experience anal examinations as rape.[276]

d. The Right to Privacy

Police, prosecutors, and judges consistently rely on information garnered from an individual's personal messages, photos or belongings in the context of Article 230 prosecutions. As sodomy prosecutions do not involve individuals caught engaging in anal intercourse, courts seek to demonstrate violations of Article 230 through circumstantial "evidence," which allegedly proves a suspect's homosexuality. The process of gathering this "evidence" often leads to violations of an individual's right to privacy, as guaranteed by Article 24 of the Constitution: "The state protects the right to privacy and the inviolability of the home, and the confidentiality of correspondence, communications, and personal information."[277]

The highly-publicized case of the "Kairouan Six" exemplifies the privacy violations that occur within the context of Article 230 investigations. Police arrived at a college dormitory looking for a missing high school student—a security guard had previously alerted the police regarding the boy's presence in the company of several students at Kairouan University.[278] Kerim, one of the university students, explained that the police were initially friendly as they searched the apartment and began confiscating a number of items. He mentioned that an officer "asked me for the password to my computer and began to search it—he didn't explain anything to us."[279] Though they had no warrant, the police ultimately confiscated a laptop, dresses, and high heels and brought the six students to the police station.[280] At trial, the judge specifically made reference to pornographic videos on the laptop, accusing the students of spreading their "depravity" in Kairouan.[281] Given that the police did not actually witness any sexual activity—and none of the students appeared in the videos—the trial and conviction largely centered around evidence gained through confiscated personal affairs. These invasions of privacy remain essential in "proving" a suspect's homosexuality, and their corresponding likelihood of committing "sodomy."

The right to privacy is also guaranteed by Article 17 of the International Covenant on Civil and Political Rights, which reads in relevant part: "No one shall be subjected to arbitrary or unlawful interference with his privacy,

family, home or correspondence."[282] In *Toonen v. Australia*, the Human Rights Committee considered whether provisions of the Tasmanian Criminal Code prohibiting consensual sex between adult men in private infringed on the complainant's right to privacy under Article 17. After rejecting the public health justification discussed above, the Committee refused to accept that moral issues were "exclusively a matter of domestic concern."[283] Finding that the provisions in question did not constitute a "reasonable" limitation on the complainant's right to privacy, the Committee held that the Tasmanian sodomy law violated his rights under Article 17.[284]

The decision in *Toonen* reflects the Human Rights Committee's analysis in General Comment No. 16, underscoring that actions authorized under domestic law may still violate the Covenant's privacy protections: "'Arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with…the Covenant…and should be reasonable in the particular circumstances."[285] Even if conducting a home search to investigate sodomy was legal under Tunisian law, such an infringement of privacy likely fails the *Toonen* "'reasonableness' test," and thus violates the Covenant.[286] Given the Committee's rejection of public health and morals as a justification for the criminalization of homosexuality, it is unclear whether the Tunisian government could invoke any grounds under the Covenant to defend Article 230 searches. If the criminalization of consensual sex between adults in private is itself unreasonable, the provision cannot justify infringements of other rights protected by the Covenant.

It is additionally notable that the Human Rights Committee places strict limitations on searches of an individual's person, as well as searches of their possessions or their home. The Committee has explained that "effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched." [287] Humiliating anal examinations undertaken to demonstrate homosexuality cannot be said to comport with any conception of "dignity." The Committee has further noted that "searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment."[288] As it is unclear why possession of dresses or pornography would have any bearing on an individual's engagement in sodomy, such objects should not qualify as "necessary evidence." Lastly, the Committee has stated that "public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant."[289] The details of consensual sex between adults within the privacy of their own home cannot reasonably be interpreted as "essential" knowledge for society as a whole.

Similar to many international human rights instruments, the Tunisian Constitution allows for certain restrictions or limitations on the rights contained therein. However, Article 49 mandates that "limitations…can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought."[290] Given that Article 230 transgresses certain constitutional rights, such as the right to privacy, the question is whether it comports with the requirements imposed by Article 49. On this subject, Shams has argued that because Article 230 criminalizes consensual activity "in the private sphere which harms no one and does not infringe on public order, public morals, or public health," it fails the Article 49 requirements.[291] [292] In other words, while the Tunisian government can undoubtedly place restrictions on *public* actions, Article 230 only applies in the case of consensual sexual activity between adults in private. Reading such activity as a threat to *public* order, morals, or health would provide the government with enormous leeway in interfering in individuals' private lives.

e. Vagueness

Beyond the clear constitutional and international law concerns discussed above, Article 230 suffers from a fundamental vagueness problem. As stated, the French text and the Arabic text differ markedly. While the former specifically prohibits "sodomy" (*sodomie*), the latter refers to male and female homosexuality (*Liwat* and *El Mousahaka*). Secondly, neither version provides a definition of the above terms. Whether or not Article 230 is intended to criminalize all anal penetration with no regard to the gender of the parties, or whether it criminalizes homosexuality as an orientation in both women and men, falls within the discretion of police, prosecutors, and judges.

International and domestic courts have long recognized the inherent dangers of criminal laws which fail to define the offense in question. The U.S. Supreme Court, for example, has created a "void-for-vagueness" doctrine, mandating "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[293] Similarly, the South African Constitutional Court has stated that "it is incumbent upon the legislature to devise precise guidelines if it wishes to regulate sexually explicit material."[294] Allowing for the prohibition of "obscene," "indecent," or "immoral" acts, without clearly defining what falls within said adjectives,

provides the executive with an inordinate amount of power to define, rather than implement, the law.

Clearly, neither South African nor U.S. jurisprudence is binding on Tunisian courts. But as discussed above, Tunisia remains bound by the provisions of the International Covenant on Civil and Political Rights. The Human Rights Committee has interpreted the prohibition on "arbitrary detention" as mandating that "any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application."[295] Given that Article 230 varies meaningfully between its French and Arabic translations, and given that the penal code never defines *sodomie*, *liwat*, or *el mousahaka*, Article 230 runs afoul of the Covenant's precision requirements. Any arrest under Article 230 is definitionally arbitrary, as one cannot determine what the law prohibits.

D. Conclusion

In spite of the important gains of the Tunisian Revolution, arrests and prosecutions for violations of the sodomy law continue unabated. Obtaining precise statistics regarding Article 230 cases remains a challenge. But Tunisian lawyers, journalists, and LGBTQ activists consistently refer to an uptick in Article 230 arrests after 2011, a trend that coincides with the rapid development of the Tunisian LGBTQ movement. Given the law's ambiguous wording, and the contradictions between the French and Arabic versions, police, prosecutors and judges have broad flexibility in determining who gets arrested and imprisoned for alleged violations of Article 230. The Tunisian sodomy law, it appears, functionally means whatever law enforcement says it means.

None of the Article 230 cases examined in researching this report concerned individuals caught in *flagrante delicto*. Generally, men—there do not appear to be publicly known Article 230 prosecutions of women—came into contact with the police for a wide number of reasons. In certain instances, they intended to report another crime, seek protection from an individual threatening to harm them, or file a complaint. In other cases, neighbors called the police, who subsequently made assumptions about the individual's homosexuality, often based on an allegedly effeminate appearance or the photos found on their cell phone. After their arrest, individuals suspected of violating Article 230 reported physical and verbal abuse in the police station, frequently followed by traumatic anal examinations, the results of which were subsequently used in court as "proof" of sodomy.

Lawyers representing clients accused of violating Article 230 find themselves in a difficult position. Despite the sodomy law's clear illegality—under the Tunisian Constitution and international law—the ARP has yet to establish the legally-mandated Constitutional Court tasked with determining the constitutionality of laws and regulations. Thus, in spite of the positive international attention the country received for its 2014 Constitution, Tunisia continues to apply a range of unconstitutional laws.

Due to the impossibility of mounting a constitutional challenge to Article 230, lawyers must argue sodomy cases based on the details of the case in question. For example, lawyers may argue for a narrow reading of Article 230, asserting that regardless of the defendant's homosexuality, his conduct did not constitute sodomy. Given that police rarely if ever observe men engaging in anal intercourse, lawyers may argue that no proof exists that the defendant committed sodomy. In other instances, lawyers may assert that the court should simply refuse to apply unconstitutional provisions of the penal code, given that both the Constitution and international treaties ratified by Tunisia clearly trump statutes.

If a lawsuit challenging Article 230's legality must wait until the formation of the Constitutional Court, the sodomy law's unconstitutionality and incongruence with Tunisia's international obligations is beyond dispute. Criminalizing individuals exclusively based on their sexual orientation violates the principle of equality under the law, while the process of investigating and proving Article 230 offenses often involves torture—in the form of anal examinations—and infringements on individuals' right to privacy. Moreover, the text of Article 230 is impermissibly vague, providing police and judges with the power to define the law, rather than enforce it. Ultimately, the Tunisian Constitution, and international human rights treaties to which Tunisia is a party, clearly affirm the principles of equal protection under the law and the right to privacy and unequivocally prohibit torture. Article 230, and other remnants of Tunisia's authoritarian past, have no place in the country's democratic future.

Chaptre 2 Notes

[188] Interview with Amir, Tunis, January 11, 2018. Due to security concerns, "Amir" is a pseudonym.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Interview with Mounir Battour, President of Shams, Tunis, January 8, 2018.
[195] Interview with Nadhem Oueslati, President of NESS, Tunis, January 4, 2018.
[196] Interview with Amna Guellali, Senior Tunisia and Algeria Researcher at Human Rights Watch, Tunis, January 11, 2018.
[197] Interview with Fida Hammami, Amnesty International Tunisia Researcher, Tunis, January 16, 2018.
[198] Interview with Amna Guellali, Senior Tunisia and Algeria Researcher at Human Rights Watch, Tunis, January 11, 2018.
[199] Ibid.
[200] Interview with Monia Ben Hamadi, Editor-in-Chief of Inkyfada, Tunis, January 11, 2018.
[201] Farah Samti, "More Freedom, More Problems," Foreign Policy, May 1, 2015, http://foreignpolicy.com/2015/05/01/more-freedom-more-problems/ (accessed November 17, 2018).
[202] Interview with Kerim Bouzouita, Member of the Individual Freedoms and Equality Committee (COLIBE), Tunis, January 4, 2018.
[203] Interview with Fida Hammami, Amnesty International Tunisia Researcher, Tunis, January 16, 2018.
[204] Tunisian Penal Code, art. 226bis.
[205] "Tunisie: Prison car il fume pendant le ramadan," Le Figaro, December 6, 2017, http://www.lefigaro.fr/flash-actu/2017/06/12/97001-20170612FILWWW00368-tunisie-prison-car-il-fume-durant-le-ramadan.php (accessed November 17, 2018).
[206] Tunisian Constitution, art. 6, https://www.constituteproject.org/constitution/Tunisia_2014.pdf (accessed December 26, 2018).
[207] Ibid.
[208] "Tunisie : quatre hommes condamnés à un mois de prison après avoir mangé et fumé dans un jardin public pendant le Ramadan," Jeune Afrique, June 1, 2017, http://www.jeuneafrique.com/444230/societe/tunisie-quatre-hommes-condamnes-a-mois-de-prison-apres-mange-fume-jardin-public-pendant-ramadan/ (accessed November 17, 2018).
[209] Tunisian Coalition for the Rights of LGBTQI People, "Stakeholders Report: Universal Periodic Review of Tunisia, May 2017," https://www.fichier-pdf.fr/2017/02/22/rapport-upr-lgbt/rapport-upr-lgbt.pdf (accessed December 26, 2018).
[210] Rihab Boukhayatia, "Tunisie: À quand une mise en place de la Cour constitutionnelle? Les expériences italienne et allemande comme exemple," HuffPost Maghreb, April 4, 2017, https://www.huffpostmaghreb.com/2017/04/21/tunisie-cour-constitution_n_16145500.html (accessed November 17, 2018).
[211] Syrine Attia, "Tunisie: Pourquoi l'élection des membres de la Cour constitutionnelle patine," Jeune Afrique, March 16, 2018, https://www.jeuneafrique.com/542923/politique/tunisie-pourquoi-lelection-des-membres-de-la-cour-constitutionnelle-patine/ (accessed November 17, 2018).
[212] Tunisian Constitution, art. 148(5).
[213] Interview with Monia Ben Hamadi, Editor-in-Chief of Inkyfada, Tunis, January 11, 2018.
[214] Though it has undergone some revision since its initial promulgation, the 1913 code remains in effect.
[215] "Béji Caid Essebsi annonce la création de la commission des libertés individuelles et de l'égalité présidée par la députée Bochra Belhaj Hmida," HuffPost Maghreb, August 13, 2017, https://www.huffpostmaghreb.com/2017/08/13/beji-caid-essebsi-commiss_n_17744400.html (accessed November 17, 2018).
[216] Interview with Kerim Bouzouita, Member of the Individual Freedoms and Equality Committee (COLIBE), Tunis, January 4, 2018.
[217] Ibid. In the interview, conducted nearly six months before the publication of COLIBE's report, Bouzouita mentioned that the scope of COLIBE's work might be limited due to long-awaited reforms of the penal code. Though there is a technical committee under the Ministry of Justice dedicated to reforming the penal code, there is little indication that it will release recommendations any time soon
[218] Tim Fitzsimmons, "Tunisian Presidential Committee Recommends Decriminalizing Homosexuality," NBC News, June 15, 2018, https://www.nbcnews.com/feature/nbc-out/tunisian-presidential-committee-recommends-decriminalizing-homosexuality-n883726/ (accessed November 17, 2018).
[219] COLIBE Report, June 12, 2018, https://colibe.org/wp-content/uploads/2018/06/Rapport-COLIBE.pdf (accessed December 27, 2018).
[220] Tim Fitzsimmons, "Tunisian Presidential Committee Recommends Decriminalizing Homosexuality," NBC News.
[221] Though the report contained a second option—a fine of 500

dinars (around $180)— COLIBE chairwoman Bochra Bel Hadj Hamida made clear that the commission's top recommendation was the outright repeal of Article 230.
[222] "Tunisia's President Vows to Give Women Equal Inheritance Rights," Al Jazeera, August 13, 2018, https://www.aljazeera.com/news/2018/08/tunisia-president-vows-give-women-equal-inheritance-rights-180813172138132.html (accessed December 27, 2018).
[223] The descriptions of the seven cases below are all drawn from two interviews with Mounir Baatour, conducted in January and May 2018, respectively. All clients' names have been changed. These descriptions reflect the status of these cases at the time of the interviews.
[224] Interview with Hayet Jazzar, Lawyer and member of the Tunisian Association of Democratic Women, Tunis, May 16, 2018.
[225] Ibid.
[226] Interview with Mounir Baatour, President of Shams, Tunis, May 14, 2018.
[227] Interview with Elissa, Tunis, January 9, 2018.
[228] Ibid.
[229] Interview with Mounir Baatour, President of Shams, Tunis, May 14, 2018.
[230] Ibid.
[231] Interview with Hayet Jazzar, Lawyer and member of the Tunisian Association of Democratic Women, Tunis, May 16, 2018.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Interview with Amna Guellali, Senior Tunisia and Algeria Researcher at Human Rights Watch, Tunis, January 11, 2018.
[236] Interview with Antonio Manganella, Tunisia Country Director at Avocats sans Frontières (Lawyers without Borders), Tunis, January 15, 2018.
[237] Human Rights Watch, "Tunisia: Lax Enforcement of Right to a Lawyer," June 1, 2018, https://www.hrw.org/news/2018/06/01/tunisia-lax-enforcement-right-lawyer (accessed December 26, 2018).
[238] Human Rights Watch, "You Say You Want a Lawyer: Tunisia's New Law on Detention, on Paper and in Practice," June 1, 2018, https://www.hrw.org/report/2018/06/01/you-say-you-want-lawyer/tunisias-new-law-detention-paper-and-practice (accessed December 26, 2018), p. 12.
[239] Interview with Antonio Manganella, Tunisia Country Director at Lawyers without Borders (ASF), Tunis, January 15, 2018.
[240] Human Rights Watch, "You Say You Want a Lawyer?" p. 12.
[241] Ibid., p. 2.
[242] Ibid.
[243] Navi Pillay, forward to "Born Free and Equal," UN Human Rights Office of the High Commissioner, HR/PUB/12/06 (2012), https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf (accessed December 27, 2018) p. 6.
[244] UN Human Rights Office of the High Commissioner, "Born Free and Equal," HR/PUB/12/06 (2012), p. 9.
[245] Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948). The Universal Declaration of Human Rights constitutes the primary UN document laying out human rights norms and standards. It is highly authoritative and arguably constitutes customary international law. The Universal Declaration of Human Rights is part of the International Bill of Human Rights.
[246] Human Rights Council, "Human Rights, Sexual Orientation, and Gender Identity," Resolution 17/19, A/HRC/RES/17/19.
[247] UN Human Rights Office of the High Commissioner, "Born Free and Equal," p. 9.
[248] Human Rights Council, "Human Rights, Sexual Orientation, and Gender Identity," Resolution 27/32, A/HRC/RES/27/32.
[249] Human Rights Council, "Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, Resolution 32/2, A/HRC/RES/32/2.
[250] UN Human Rights Office of the High Commissioner, "Born Free and Equal."
[251] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Tunisia on April 30, 1968. The International Covenant on Civil and Political Rights is a key international human rights treaty that lays out a range of protections for civil and political rights—Tunisia ratified the Covenant without reservations in 1969.
[252] UN Human Rights Office of the High Commissioner, "Born Free and Equal," p. 5.
[253] Tunisian Constitution, art. 21. Further details can be found in: Tunisian Coalition for the Rights of LGBTQI People, "Stakeholders Report: Universal Periodic Review of Tunisia, May 2017," https://www.fichier-pdf.fr/2017/02/22/rapport-upr-lgbt/rapport-upr-lgbt.pdf (accessed December 26, 2018).
[254] Interview with Kerim Bouzouita, Member of the Individual Freedoms and Equality Committee (COLIBE), Tunis, January 4, 2018.
[255] Article 20 of the Tunisian Constitution states that "International agreements approved and ratified by the Assembly of the Representatives of the People have a status superior to that of laws and inferior to that of the Constitution." Thus, under Tunisian constitutional standards, Article 230—a provision of the penal code with no constitutional basis—has a lesser status than international agreements ratified by parliament. International legal requirements prohibiting the criminalization of homosexuality should trump Article 230.
[256] UDHR, art. 7; ICCPR, art. 26.
[257] Shams, "Bill Presented by Shams to the Tunisian Parliament Aiming to Eliminate Article 230 from the Penal Code."
[258] ICCPR, art. 2(1).
[259] Human Rights Committee, View: Toonen v. Australia, Communication No. 488/1992, CCPR/C/50/D/488/1992, March 31, 1994, para. 8.7.
[260] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986, ratified by Tunisia on March 16, 2018, art. 2.
[261] African Commission on Human and People's Rights, "Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity," Resolution 275, May 12, 2014.
[262] ICCPR, art. 11.
[263] Human Rights Committee, Toonen v. Australia, para. 8.5.
[264] Tunisian Constitution, art. 23.
[265] ICCPR, art. 7.
[266] Ibid., art. 4.
[267] UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez, January 5, 2016, A/HRC/31/57, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement (accessed December 27, 2018) (italics added).
[268] The Committee against Torture is a UN treaty body tasked with monitoring compliance with and interpreting the Convention against Torture. The United Nations Convention against Torture is an international human rights treaty that prohibits torture, as well as inhuman or degrading treatment or punishment. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by Tunisia on September 23, 1988. Tunisia ratified the Convention against Torture with no reservations.
[269] UN Committee against Torture, "Concluding Observations on the Third Periodic Report of Tunisia," CAT/C/TUN/CO/3, June 10, 2016, para. 41.
[270] Ibid.
[271] Ibid., para. 42.
[272] Amnesty International, "Amnesty International Urges Tunisia to End Impunity for Security Forces," September 21, 2017, https://www.amnesty.org/download/Documents/MDE3071432017ENGLISH.pdf (accessed December 27, 2018).
[273] Interview with Dr. Ines Derbel, Psychiatrist and Sexologist, Tunis, January 10, 2018.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Tunisian Constitution, art. 24.
[278] Human Rights Watch, "Tunisia : Men Prosecuted for Homosexuality," March 29, 2016, https://www.hrw.org/news/2016/03/29/tunisia-men-prosecuted-homosexuality (accessed December 26, 2018).
[279] Interview with Brahim and Skander, Tunis, January 10, 2018.
[280] Human Rights Watch, "Tunisia : Men Prosecuted for Homosexuality."
[281] Ibid.
[282] ICCPR, art. 17.
[283] Human Rights Committee, Toonen v. Australia, para. 8.6.
[284] Ibid.
[285] Human Rights Committee, General Comment No. 16, Right to Privacy, HRI/GEN/1/Rev.9 (Vol. I) (1988) para. 4.
[286] Human Rights Committee, Toonen v. Australia, para. 8.6.
[287] Human Rights Committee, General Comment No. 16, para. 8.
[288] Ibid.
[289] Ibid.
[290] Tunisian Constitution, art. 49.
[291] Shams, "Bill Presented by Shams to the Tunisian Parliament Aiming to Eliminate Article 230 from the Penal Code."
[292] It is further worth noting that Article 230 also fails the derogation threshold under ICCPR, art. 4: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation."
[293] Grayned v. City of Rockford, U.S. Supreme Court, 408 U.S. 104, Judgement, January 19, 1972, p. 108-9.
[294] Case & Anor, v. Minister of Safety and Security & Ors, Constitutional Court of South Africa, 1996 (5) BCLR 609, para. 63.
[295] Human Rights Committee, General Comment No. 35, Liberty and Security of Person, CCPR/C/GC/35 (2014), para. 22.

The Tunisian LGBTQ Movement

An Emerging Political Force

On the evening of January 15, 2018, an estimated two hundred people gathered in downtown Tunis to celebrate a historic occasion—the first queer film festival in North Africa. Created by Mawjoudin ("We Exist"), one of four legally recognized LGBTQ organizations in Tunisia, the four-day festival screened twelve films produced in the Middle East and North Africa.[296] In a celebratory atmosphere, LGBTQ Tunisians and allies gathered at several different locations in Tunis—undisclosed on publicity materials for security reasons—to watch films centered around questions of "non-normative gender and sexuality."[297] Ahmad, a Tunisian high school student who attended the festival on January 16, excitedly explained that he had skipped class to be there—"A queer film festival in Tunisia? It's incredible!"[298]

If the Mawjoudin queer film festival speaks to the increasing boldness and assertiveness of Tunisian LGBTQ activists, such an event was hardly imaginable a few years ago. Senda Ben Jebara, a Mawjoudin board member and one of the festival organizers, explained that, "Before this year, it was not possible to think about a queer film festival, for security reasons."[299] Noting Tunisian LGBTQ activists' recent achievement at Tunisia's May 2017 Universal Periodic Review, at which the Tunisian government recognized the unconstitutionality of discrimination on the basis of sexual orientation for the first time, Ben Jebara noted that 2018 marked "the perfect moment" for a queer film festival.[300] [301] Islem Mejri, a former Advocacy and Communications Officer at Mawjoudin, emphasized the symbolic power of the event: "Having a queer film festival is important. I am so proud to not only have a queer film festival in North Africa, but also to see LGBTQI people gathering together, claiming their own spaces, and defying power dynamics in the most sublime way—through art and movies."[302]

While Mawjoudin's explicitly queer film festival marks an important first in Tunisia, it constitutes part of a larger trend. Since the 2011 Revolution, a growing number of Tunisian LGBTQ organizers and activists have created organizations, hosted artistic and cultural festivals, addressed the Tunisian public on television and radio, formed alliances with Tunisian civil society groups and international human rights organizations, submitted reports to UN institutions, and provided legal, psychological and other services to LGBTQ Tunisians. If the apparent increase of Article 230 arrests in the past few years marks one, albeit crucial, element of Tunisia's recent history, the rise of a diverse, courageous, and increasingly visible LGBTQ movement represents a notable post-Revolution achievement. And when it comes to the sodomy law, the position of Tunisian LGBTQ advocates is clear: Tunisia "must immediately repeal Article 230."[303]

It is beyond the scope of this paper to provide a complete history of the Tunisian LGBTQ movement. But a number of interviews with Tunisian activists, allies, journalists, members of Tunisian civil society, and foreign diplomats shed light on the movement's development, and myriad efforts to advocate for LGBTQ rights, change cultural attitudes, and reform cruel and unconstitutional legislation. And if LGBTQ activists have not yet succeeded in repealing Article 230, or other elements of Tunisian law weaponized against the LGBTQ community, the LGBTQ movement's growing influence offers some reasons for optimism.

No recognized LGBTQ organization existed in Tunisia prior to the 2011 Revolution. But when asked to describe the beginnings of the Tunisian LGBTQ movement, several Tunisian LGBTQ activists discussed the early 2000s, and the rise of the internet and social media. Online forums and dating sites provided an opportunity for LGBTQ Tunisians from across the country to get to know one another, an important step given the absence of safe physical spaces for LGBTQ Tunisians to assemble. As Youssef, a Tunisian LGBTQ activist currently living in Europe explained, the internet created "a mini LGBTQ society, where we used fake names and fake profiles on Facebook."[304] But while social media and dating sites began to increase in popularity, LGBTQ Tunisians confronted an acute problem. "Beginning in 2002, people began to create fake profiles on dating sites," explained Badr Baabou, President of Damj, one of Tunisia's officially recognized LGBTQ associations, "and some people began to blackmail LGBTQ people for money. We believed that some of them were police officers. Those who refused to pay, or who didn't have the money, were publicly outed."[305] As a result, a number of LGBTQ Tunisians found themselves rejected by their families and forced out of their homes, leading many to flee their hometowns for Tunis. According to Baabou, "The majority of them were between the ages of 18 and 20 years old, sleeping on the street on Avenue Habib Bourguiba, the center of downtown Tunis. A group of friends and I brought some of them to sleep at our apartment, and eventually understood that we needed to do something to deal with the situation."[306] He explained that their apartment, nicknamed "Apartment 19," became widely known among the Tunisian LGBTQ community as a "central gathering place and space of intracommunal solidarity," in which large numbers of LGBTQ Tunisians supported one another, including through the provision of food, clothes, and other necessities for those forced out of their homes.[307] For Baabou, "This was the beginning of a community spirit, as people began to feel that they belonged to a group, and sought to participate and support one another."[308]

It is critical to note the rise of social media, and the emergence of spaces like Apartment 19, in understanding LGBTQ activism in Tunisia prior to 2011. But years before the government allowed for the establishment of official LGBTQ organizations, the Tunisian Association for the Fight Against AIDS and Sexually Transmitted Diseases (ATL) provided opportunities for individuals seeking to work on issues facing the LGBTQ community. Issam Gritli, a Program Officer at ATL, explained that since 2005, ATL has "worked on a program regarding men who have sex with men. We offer a number of services, including STI testing/screening, social support, condoms, lubricant, and information. For those facing discrimination or legal prosecution, we offer legal support."[309] Prior to 2011, ATL framed their work around "sexual health" rather than sexual orientation: "[B]efore, we didn't speak about homosexuality, though now we speak about it freely."[310] ATL, Gritli emphasized, served as a "pioneer organization," training many activists currently working in Tunisia's LGBTQ associations, "some of [whom] were initially beneficiaries of ATL's services."[311] Bochra Triki, Co-President of Chouf, one of the four officially recognized LGBTQ organizations in Tunisia, similarly noted that before 2011, "Those who wanted to do activism around LGBTQ issues needed to do so through ATL."[312]

But if ATL allowed for individuals to work on issues of sexual health facing the LGBTQ community, no space existed for LGBTQ rights activism. As Nadhem Oueslati explained, "Before the Revolution, it was impossible to speak about questions of rights, not simply in the [LGBTQ] community. Everyone who wanted to speak of their rights would be humiliated."[313] In 2019, the question of LGBTQ rights has largely been taken up by other LGBTQ organizations, such as Damj, Chouf, Mawjoudin, and Shams. But for Oueslati, it is important to remember that before 2011, ATL served "as the locomotive" for the LGBTQ movement.[314]

As stated above, it is difficult to know the extent to which Article 230 was enforced prior to the Revolution, or to find precise statistics regarding the number of prosecutions targeting LGBTQ Tunisians and activists. But in 2008, it is clear that LGBTQ Tunisians suffered a wave of arrests, as police appeared to intentionally target areas known as LGBTQ gathering places. According to Badr Baabou, "A number of arrests took place on Avenue Habib Bourguiba, or after police raids on particular hammams (bathhouses), cafés, and bars with large numbers of LGBTQ people."[315] Working with a small group of activists who would later form the nucleus of Damj, Baabou sought to track the various arrests and corresponding court cases, and to raise money to provide detainees with legal representation. Describing his efforts, Baabou noted that "it was very difficult to find lawyers who were willing to help at this time; we found one to two lawyers maximum. But members of the LGBTQ community had no idea that there was a group of activists providing support. Lawyers were spending their time in the courts looking for cases related to sexual orientation and offering their services."[316] Two years later, in 2010, Damj applied to the government for official recognition—their application was categorically rejected. But following the 2011 Revolution and the toppling of the Ben Ali regime, Damj took advantage of the post-revolutionary context and re-applied for official recognition, this time with the assistance of a lawyer and a notary. While Damj's application did not refer to LGBTQ rights explicitly, instead describing the organization's objective as defending minorities and vulnerable groups, its success marked the first time that a Tunisian LGBTQ association received official recognition from the state.

Notwithstanding Damj's successful application, LGBTQ organizations and activists still operated in an exceedingly difficult climate. Joachim Paul, then Director of the Heinrich Böll Foundation's Tunis office, described the challenge of working on LGBTQ issues in the first few years after the Revolution: "We had a few meetings with Damj in 2012 and 2013, but everything was informal and semi-clandestine—it was important that no one knew where we were meeting, and that we shouldn't park the car in front of the meeting place. We didn't spend any money, or provide funding."[317] During that period, Paul recalled, many expressed concern that working on LGBTQ issues "could spark a counter-wave."[318] Even progressive politicians, he noted, warned Heinrich Böll against working on LGBTQ rights or partnering with LGBTQ activists, arguing that doing so could give Islamist politicians "a pretext to go against us, under the slogan that the 'West is trying to impose a Western agenda on a Muslim North African Society.'"[319]

But in the years that followed, three other Tunisian organizations dedicated to LGBTQ rights successfully applied for official recognition. Chouf, a feminist, LBT (Lesbian, Bisexual, Trans) organization, received governmental approval in 2013. According to Bochra Triki, Chouf focuses its efforts on issues facing all individuals who identify as women, specifically those with a non-normative sexuality. Describing Chouf's origins, Triki noted that LGBTQ organizations often prioritize issues facing gay men, rather than the challenges faced by lesbians, transgender persons, and others: "You can be a cisgender gay man and still enforce the patriarchy against women…we decided we needed to be autonomous, independent, to have an organization working on problems facing us, which are often different than those faced by gay men."[320] In terms of tactics, she noted that Chouf often focuses its efforts on artistic and cultural events, including Chouftouhouna, an annual feminist arts festival

that takes place in downtown Tunis, and a campaign of film screenings in dorms, shelters, prisons and other locations across Tunisia.[321]

Mawjoudin, the association that organized the queer film festival discussed above, received official authorization in 2015. According to Islem Mejri, the organization sought to create a "new identity in the Tunisian LGBTQ scene," focusing on "the cultural approach, the social approach, and the legal approach."[322] Around the time of Mawjoudin's founding, Mejri emphasized that the organization aimed to "do community-building events. We wanted to bring the queer community together, make people know each other, feel that they are not alone."[323]

Senda Ben Jebara explained that the group's "main focus is on community-building within the LGBTQ community. We believe that it is our role in this society to bring people together, to help them strengthen themselves."[324] However, she stressed that, particularly in recent years, Mawjoudin has expanded its efforts, spearheading national advocacy campaigns and providing counseling to LGBTQ Tunisians. In reference to a specific project called LILO ("looking in, looking out"), she stressed the importance of Mawjoudin's efforts to "help us accept ourselves as LGBTQ people in a very hostile environment, and to learn to count on people from our community." [325]

Shams, the most recent Tunisian LGBTQ organization to receive official recognition, began operating in 2015. Unlike Damj, Chouf, and Mawjoudin, Shams officially presented itself as an LGBTQ association in its application to the government, garnering widespread media attention and backlash. Since its controversial inception, Shams has maintained consistent media exposure, both in Tunisia and internationally. Shams's President Mounir Baatour explained that "Shams's strategy, from the beginning, was exposure. Our Facebook page has tens of thousands of followers and the media covers our publications. Many criticize Shams for adopting a 'shock' strategy, but we believe that this is what works. We have succeeded in raising the subject of homosexuality in Tunisian society—it has become a subject of debate."[326] This strategy has long been reflected in Shams's actions, from the creation of Tunisia's first LGBTQ radio station, to public appearances on popular Tunisian television programs, to media advocacy around Article 230 arrests.[327] Youssef, a former Shams activist, noted that in 2015, he "wanted to see revolutionary change, not just networking, or intellectual discussion."[328] Shams's outspoken strategy has earned the organization international attention as well as substantial criticism, both in the eyes of the broader Tunisian public and within the Tunisian LGBTQ community.

In describing the development of the Tunisian LGBTQ movement, Tunisian LGBTQ activists, NGO workers, journalists and foreign embassy officials highlighted the two high-profile Article 230 cases discussed in Chapter I: Marwan and the Kairouan Six. Police in both cases arrested Tunisian men in their early 20's, violently abusing them in the police station before subjecting them to anal examinations. Prosecutors subsequently marshalled evidence from the anal examinations in ensuing trials, during which Marwan received a one-year sentence and the six college students from Kairouan received three-year sentences coupled with five-year banishments from the city. The announcements of both verdicts generated enormous outcry in Tunisian civil society as well as media attention across the globe, as Tunisian LGBTQ activists and allies mobilized on behalf of the defendants.

The two cases, and the effective responses of Tunisian LGBTQ organizations and Tunisian civil society more broadly, represent critical moments in the development of the Tunisian LGBTQ movement. Several LGBTQ organizations launched media campaigns, demanding that the state "free Marwan" and abolish the anal examinations. According to Amna Guellali, "There were very clear and strong reactions after these cases, as well as common press releases issued by the different associations. I think it really represented a turning point. It sparked outraged."[329] Joachim Paul similarly characterized the Marwan and Kairouan Six trials as a "turning point," emphasizing the unprecedented media coverage around both cases:

It was absolutely in the media. I remember listening to the different radio stations, including local radio stations such as Mosaique and Shams—it was on the air all the time. In [Marwan's] case, there was a criminal investigation against him, but he had nothing to do with the crime. It was something totally wrong, and many people could, somehow, identify with him. Young people, very often, see the police as their enemy, as the "tyrant," their enemy in the street. So, all of this mobilized some sort of sympathy, and people could identify with the young people being mistreated by the police—this was a motivating factor.[330]

Journalists confirmed the significant media attention generated by the two cases, noting that both prosecutions brought Article 230, anal examinations, and legal discrimination against the LGBTQ community to the forefront of public attention. Rihab Boukhayatia, a journalist who covered both trials for the Huffington Post, explained that, "We had begun writing about Shams, and then there was the case of Marwan and the six young people from Kairouan. The question of Article 230 began to be something that was discussed more and more."[331] Monia Ben Hamadi similarly noted that "the Marwan Affair was extremely covered in media,"[332] as did a foreign diplomat stationed in

Tunis with years of experience working with Tunisian LGBTQ associations: "Article 230 was quite a public issue after 2015, after the Marwan case and the Kairouan Six case. They were quite covered by NGOs and media outlets. Diplomats became very aware of the issue."[333]

In addition to the dramatic shortening of both sentences on appeal, the mobilization around the Marwan and Kairouan Six cases arguably led to several other important symbolic victories. After receiving several complaints regarding homophobic comments on television, the Tunisian Independent High Authority for Audiovisual Communication (HAICA) issued an official warning against a TV station for homophobic comments on October 26, 2015.[334] The warning likely constituted the first official reaction of a public, constitutionally-mandated institution regarding violence against the LGBTQ community. In explaining the response, HAICA President Hichem Snoussi was firm: "This amounts to professional misconduct. We dealt with the case based on a sliding scale. In the event of a repeat offense, the punishment will be higher."[335] [336]

Perhaps more significantly, the Tunisian National Council of the Order of Doctors (CNOM) took a clear position against anal examinations. On September 28, 2015, CNOM issued a public statement expressing that it was "profoundly concerned by the conviction of a Tunisian citizen for homosexuality based on medical expertise."[337] CNOM clarified its position further on April 3, 2017: "The order of doctors, as the guarantor of respect for medical ethics, firmly condemns any medical examination which is non-justified and/or violates dignity and the physical or mental integrity of the person examined."[338] According to Mounir Battour, there exists a growing number of doctors who "systematically refuse" to administer the anal examination. [339]

Perhaps the most notable government reaction came from then-Minister of Justice Mohamed Salah Ben Aïssa. Several days after Marwan's initial sentencing, Ben Aïssa called for the abrogation of Article 230, asserting that "after the adoption of the new Constitution, it is no longer acceptable to violate individual liberties, private life, or personal choices, including sexual choices."[340] Though President Essebsi quickly distanced himself from the Minister of Justice, noting that Ben Aïssa spoke "only for himself" and denying the possibility that Tunisia would decriminalize homosexuality, an admission from a high-ranking government official regarding the unconstitutionality of Article 230 marked an important first.[341]

In the years following the mass mobilizations around Marwan and the Kairouan Six, Tunisian LGBTQ groups have increased their efforts, hosting larger cultural events, undertaking lobbying and advocacy efforts, and building closer alliances with Tunisian civil society more broadly. Chouf, for example, began organizing an annual feminist art festival, Chouftouhouna, in 2015. Since its inception, Chouftouhouna has grown steadily—in 2017, the third edition brought together over one hundred artists and activists from fifty countries, and involved film screenings, artistic performances, and political panels and presentations.[342] Dora Mongalgi, a member of Chouf involved in planning Chouftouhouna, emphasized that while Chouftouhouna "is an artistic festival…there is a purpose; it is not merely an abstract festival."[343] Chouftouhouna, she noted, is a form of "artivism," part of Chouf's broader effort to create much-needed "community spaces" and support women in achieving "economic independence."[344] Furthermore, as an artistic festival, Chouftouhouna aims to bring in those who might not normally attend a distinctly LGBTQ or feminist event. As Bochra Triki explained, "Artistic and cultural events speak to a much wider audience. When we host an arts festival, free and open to the public, we will see people who aren't normally interested in the LGBTQ or feminist cause who will attend, maybe because there is an artist they want to see. When they arrive, they will see films and panels which deal with the issues. This forces them to reflect."[345]

Several LGBTQ organizations have worked on the critical issue of awareness-raising within the Tunisian LGBTQ community. Damj, for example, developed and distributed a detailed "Security Guide" for LGBTQ Tunisians.[346] The booklet, which provides LGBTQ Tunisians with detailed guidance around their legal rights and protections, digital security, and sexual and mental health, is freely available for download. Given that Tunisia's LGBTQ organizations are all located in Tunis, the online pamphlet allows for Damj to reach a larger Tunisian public. For Tunisians with little access to the organized LGBTQ community in the capital, the "Security Guide" provides a clear overview for self-protection, whether from abusive anal examinations, social media hacking, or the prevention of sexually-transmitted infections (STIs).

As Tunisia's LGBTQ organizations have adopted progressively bolder tactics, they have faced a corresponding increase in media scrutiny and varying levels of public backlash. Shams, indisputably the most controversial of Tunisia's LGBTQ organizations, has earned the ire of prominent governments officials and media outlets, surviving multiple legal efforts to shut it down. On January 4, 2016, the organization faced a temporary suspension following a government lawsuit. But on February 23, a Tunis district judge ruled in Shams's favor, ordering the immediate cancellation of the organization's suspension, and putting an end to a lengthy legal battle. Nonetheless, Shams contended with another legal challenge on December 15, 2017, following the launch of Shams Radio, an LGBTQ radio station run out of a studio in downtown Tunis.[347]

The National Council of Imams filed a lawsuit demanding the immediate suspension of the radio station, citing an imminent threat to Tunisia's "values and religious and social identity" and asserting that official recognition of the radio station was akin to "defending sexual delinquency." [348] But again Shams prevailed, as the district court refused to suspend the radio station.[349] While Shams's media notoriety has resulted in death threats, street harassment, and the physical abuse of its members, the organization has consistently proven successful in court.[350]

Discussions with Tunisian LGBTQ activists revealed broad disagreements around the utility of brash, in-your-face, tactics and events aimed at shocking the Tunisian public, such as marching in downtown Tunis carrying rainbow pride flags.[351] Nonetheless, it is clear that LGBTQ activism has changed the conversation in Tunisia. Describing the increased media coverage around LGBTQ issues, Monia Ben Hamadi noted that homosexuality is now "on the table and up for discussion."[352] If issues of sexuality were once taboo under the Ben Ali regime, they are now openly discussed on Tunisian media. Even if much of the coverage contains a "violent discourse against LGBTQ people," Ben Hamadi continued, homosexuality is still "something that we can debate today."[353] Rihab Boukhayatia had a similar impression: "In 2011, LGBTQ issues were not discussed in the written press. Since 2015, this has changed dramatically in terms of the media landscape."[354]

In May 2017, Tunisian LGBTQ activists won an important symbolic victory at Tunisia's Universal Periodic Review (UPR). In the lead-up to the UPR, a coalition of LGBTQ activists presented a comprehensive human rights report on LGBTQ rights in Tunisia to the UN Human Rights Council, meticulously detailing the ways in which Article 230 contravenes Tunisia's Constitution and international legal commitments.[355] In parallel, activists launched a multi-faceted advocacy effort in Tunis and Geneva, seeking to engage with all relevant national and international stakeholders on the importance of repealing Article 230 and banning anal testing.

Their efforts bore fruit. During Tunisia's UPR hearing, 18 different countries challenged Tunisia on human rights violations committed against LGBTQ Tunisians, discrimination based on sexual orientation and gender identity, and anal testing. Though the Tunisian delegation did not accept recommendations regarding Article 230, it did recognize the broader anti-discrimination principles in question:

Concerning discrimination on the basis of sexual orientation, under the Constitution all forms of discrimination, hatred, and incitation to hatred are unconstitutional. Any person of any sexual orientation has full rights…Any act of aggression committed against any person on the basis of his sexual orientation is criminal and can be prosecuted.[356]

As noted above, the delegation's response marked the first time that a Tunisian government representative officially recognized discrimination on the basis of sexual orientation.

Though the UPR, large-scale cultural events, and increased media coverage represent important successes in a difficult climate, broader questions exist as to the Tunisian LGBTQ movement's accessibility and outreach. Wafa Belhadj Amor, Senior Coordinator of the Democracy and Transition program at the Heinrich Böll Foundation's Tunis office, stated that "from what I see, the people we interact with are mostly educated, from Tunis and Sousse... in cities like Kelibia and Djerba, we had events that almost no one attended. When you live in smaller places, everyone knows each other and people do not want to attend."[357] Several LGBTQ Tunisians who are not involved in the LGBTQ movement largely confirmed Belhadj Amor's impressions. Brahim and Skander, two men in their early 20's working as sex-workers in Tunis, explained that "if you are from the country, from outside of Tunis, or if you are not highly educated or particularly if you are a sex worker, it is impossible to join one of these organizations.[358] Elissa, a trans woman who has suffered multiple episodes of police violence, explained that "the [LGBTQ] organizations are doing important work but for me, coming from a difficult background…I don't know if it's sufficient. There are people sleeping on the street, who have no idea that these organizations exist."[359] Elissa explained further that her ability to interact with the organizations often depends on the activist in question:

The members of certain organizations are closer to us, we speak the same language. I feel comfortable with them. With others, I feel distant from them, they put too much distance between us. These are students or government workers, I don't feel represented in these groups. They still look at us as vulnerable people, as beneficiaries. They haven't tried enough to integrate us. There is also a lot of discrimination in the LGBTQ community. [360]

A number of individuals involved in the LGBTQ organizations have recognized the problem and undertaken efforts to make the LGBTQ movement more inclusive. Khooka McQueer, an independent LGBTQ activist, has specifically worked on intracommunal violence. "When we began working on this," she explained, "we were subjected to homophobic and transphobic slurs, even in the LGBTQ community. It was alarming. We realized that we needed

to explain that we cannot fight against oppression when we, ourselves, are oppressors."[361]

When questioned on the subject, Tunisian LGBTQ activists agreed that the LGBTQ movement has not done enough regarding accessibility and outreach. But the fact that more work remains to be done should not take away from the LGBTQ movement's accomplishments. In the space of eight years, LGBTQ activists have created a vocal, vibrant, and increasingly organized LGBTQ movement where none existed before. And as the 2017 UPR made clear, Tunisian LGBTQ activists show no sign of relenting in their efforts to defend the rights of the Tunisian LGBTQ community.

The Release of the COLIBE Report—Could Decriminalization Happen Now?

On June 12, 2018, the Tunisian Commission on Individual Liberties and Equality (COLIBE), established by President Essebsi in August 2017, published its long-awaited report regarding the constitutionality of current laws and regulations. Rather than avoiding the controversial issue of LGBTQ rights, COLIBE directly called for the abrogation of Article 230. Though the report contained a second option—a fine of 500 dinars (around $180) in lieu of imprisonment—Chairwoman Bochra Bel Hadj Hamida made clear that COLIBE's top recommendation was "the outright repeal of Article 230."[362] In justifying its recommendation, COLIBE asserted that "the state and society have nothing to do with adults' sexual lives…sexual orientations and individual choices are essential to private life… [Article 230]...violates… private life, and…has brought criticism to the Republic of Tunisia from international human rights bodies."[363] COLIBE additionally recommended the total abolition of anal examinations.

In the weeks following its release, the COLIBE report generated significant support, as well as intense backlash, manifested in competing demonstrations and public statements from political leaders and civil society groups.[364] While President Essebsi has submitted legislation to parliament mandating equal inheritance rights for men and women—in line with COLIBE's recommendations—he has yet to announce any measures regarding Article 230, or the decriminalization of sodomy. Moreover, Essebsi has never recanted his publicly stated position provided in a 2015 interview, following the Minister of Justice's call for the repeal of Article 230. Modifications to the Tunisian sodomy law, Essebsi stated unambiguously, "'have not taken place and will not take place.'"[365]

Few would argue that 2019 will mark the year that Tunisia finally decriminalizes homosexuality, ridding itself of a brutal colonial legacy that continues to destroy the lives of LGBTQ Tunisians over a century after its initial appearance in 1913. But from the initial protests that set off the Arab Spring in 2011, to the promulgation of the most progressive constitution in the MENA region, to the birth of a dynamic and increasingly effective LGBTQ movement, Tunisia has consistently defied the world's expectations. In 2011, Tunisians overthrew a dictatorship, beginning a complex and challenging transition towards democracy. If Tunisia is to live up to the bold promises of the 2011 Revolution, then Article 230 must go.

Chapter 3 Notes

[296] Colin Stewart, "Tunisia Gets its First Queer Film Festival," Erasing 76 Crimes, January 23, 2018, https://76crimes.com/2018/01/23/tunisia-gets-its-first-queer-film-festival/ (accessed January 9, 2018).
[297] "Mawjoudin Queer Film Festival," http://queerfilmfestival.mawjoudin.org/en/about-us/ (accessed January 9, 2018).
[298] Interview with Ahmad, High School Student, Tunis, January 16, 2018.
[299] Interview with Senda Ben Jabara, Mawjoudin Board Member, Tunis, January 16, 2018.
[300] Ibid.
[301] Ramy Khouili and Daniel Levine-Spound, "Why Does Tunisia Still Criminalize Homosexuality?" Heinrich Böll Stiftung, October 30, 2017, https://tn.boell.org/en/2017/10/30/why-does-tunisia-still-criminalize-homosexuality (accessed January 9, 2018).
[302] Interview with Islem Mejri, Former Advocacy and Communications Officer at Mawjoudin, Tunis, January 16, 2018.
[303] Tunisian Coalition for the Rights of LGBTQI People, "Stakeholders Report: Universal Periodic Review of Tunisia, May 2017."
[304] Interview with Youssef, Tunisian LGBTQ Activist, January 8, 2018.
[305] Interview with Badr Baabou, Chairman of Damj, Tunis, January 5, 2018.
[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] Interview with Issam Gritli, Program Officer at ATL, Tunis, January 10, 2018.
[310] Ibid.
[311] Ibid.
[312] Interview with Bochra Triki, Co-President of Chouf, Tunis, January 8, 2018.
[313] Interview with Nadhem Oueslati, President of NESS, Tunis, January 10, 2018.
[314] Ibid.
[315] Interview with Badr Baabou, Chairman of Damj, Tunis, January 5, 2018.
[316] Ibid.
[317] Interview with Joachim Paul, Former Director of the Heinrich Böll Foundation's Tunis Office, January 24, 2018.
[318] Ibid.
[319] Ibid.
[320] Interview with Bochra Triki, Co-President of Chouf, Tunis, January 8, 2018.
[321] Ibid.
[322] Interview with Islem Mejri, Former Advocacy and Communications Officer at Mawjoudin, Tunis, January 16, 2018.
[323] Ibid.
[324] Interview with Senda Ben Jabara, Mawjoudin Board Member, Tunis, January 16, 2018.
[325] Ibid.
[326] Interview with Mounir Baatour, President of Shams, Tunis, May 14, 2018.
[327] Haba Kanso, "Tunisia's First LGBTQ Radio Station Keeps Playing Despite Threats," Reuters, December 27, 2017, https://www.reuters.com/article/us-tunisa-gay-radio/tunisias-first-lgbtq-radio-station-keeps-playing-despite-threats-idUSKBN1EL1HB (accessed January 9, 2018).
[328] Interview with Youssef, Tunisian LGBTQ Activist, January 8, 2018.
[329] Interview with Amna Guellali, Senior Tunisia and Algeria Researcher at Human Rights Watch, Tunis, January 11, 2018.
[330] Interview with Joachim Paul, Former Director of the Heinrich Böll Foundation's Tunis Office, January 24, 2018.
[331] Interview with Rihab Boukhayatia, Huffington Post Journalist, Tunis, January 9, 2018; Rihab Boukhayatia, "Tunisia's War on LGBT People is Heating Up," Huffington Post, December 21, 2015, https://www.huffingtonpost.com/entry/tunisia-lgbt-criminalization-prison_us_56781d35e4b06fa6887ddfd9 (accessed January 9, 2018).
[332] Interview with Monia Ben Hamadi, Editor-in-Chief of Inkyfada, Tunis, January 11, 2018.
[333] Interview with Foreign Diplomat stationed in Tunisia, Tunis, January 4, 2018.
[334] Khouili and Levine-Spound, "Why Does Tunisia Still Criminalize Homosexuality?" Heinrich Böll Stiftung.
[335] Rihab Boukhayatia, "La HAICA adresse un avertissement à la chaîne TV El Hiwar Ettounsi pour son ton sarcastique face à certains sujets," HuffPost Maghreb, October 26, 2015, https://www.huffpostmaghreb.com/2015/10/26/tunisie-haica-el-hiwar-et_n_8370608.html (accessed January 9, 2018).
[336] HAICA Press Release, October 22, 2015, http://haica.tn/2015/10/نـــظـــر-إلى-الممث-الـــفـــت/3 (accessed January 31, 2019).
[337] CNOM Press Release, September 28, 2015.
[338] Ibid.
[339] Interview with Mounir Battour, President of Shams, Tunis, May 14, 2018.
[340] "En Tunisie, le président Essebsi s'oppose à la dépénalisation de la sodomie en Tunisie," France 24, July 10, 2015, https://www.france24.com/fr/20151007-tunisie-essebsi-depenalisation-pratiques-homosexuelles-sodomie-droits-lgbt-lesbien-gay-test (accessed January 9, 2018).
[341] Ibid.
[342] Khadija Arras, "4e Festival international d'art féministe de Tunis : Appel à participation à «Chouftouhouna» jusqu'au 15 mars prochain," Reporters, February 5, 2018, http://reporters.dz/index.php/culture/item/91925-4e-festival-international-d-art-feministe-de-tunis-appel-a-participation-a-chouftouhouna-jusqu-au-15-mars-prochain (accessed January 9, 2018).
[343] Interview with Dora Mongalgi, Chouf Member, Tunis, January 19, 2018.
[344] Ibid.
[345] Interview with Bochra Triki, Co-President of Chouf, Tunis, January 8, 2018.
[346] "Guide de Sécurité," Damj, https://www.damj.co/wp-content/uploads/2014/09/Guide-web-FR.pdf (accessed January 9, 2018).
[347] Ed Ram, "Inside Tunisia's Shams Rad – the Arab World's only 'Gay Radio Station,'" BBC News, January 18, 2018, https://www.bbc.com/news/world-africa-44137901 (accessed January 9, 2018).
[348] Seif Soudani, "Des Imams portent plainte contre l'association gay Shams," Le Courrier de l'Atlas, December 28, 2017, https://www.lecourrierdelatlas.com/tunisie-des-imams-portent-plainte-contre-l-association-gay-shams-10118 (accessed January 9, 2018).
[349] Affaire n° 88184, Tunis District Court (Tribunal de première instance de Tunis), February 14, 2018.
[350] Ed Ram, "Inside Tunisia's Shams Rad – the Arab World's only 'Gay Radio Station,'" BBC News.
[351] Falk Steinborn, "Marching for LGBT Rights in Tunisia," DW, December 5, 2015, https://www.dw.com/en/marching-for-lgbt-rights-in-tunisia/av-18446607 (accessed January 9, 2018).
[352] Interview with Monia Ben Hamadi, Editor-in-Chief of Inkyfada, Tunis, January 11, 2018.
[353] Ibid.
[354] Interview with Rihab Boukhayatia, Huffington Post Journalist, Tunis, January 9, 2018.
[355] In addition to the report submitted by the country under review, the UPR Process allows civil society organizations to submit parallel reports to the UPR Working Group.
[356] "Tunisia Review—27th Session of Universal Periodic Review," UN Web TV, May 2, 2017, http://webtv.un.org/meetings-events/human-rights-council/universal-periodic-review/27th-upr/watch/tunisia-review-27th-session-of-universal-periodic-review/5418393458001 (accessed January 9, 2018).
[357] Interview with Wafa Belhadj Amor, Senior Coordinator of the Democracy and Transition Program at Heinrich Böll Stiftung's Tunis Office, Tunis, January 4, 2018.
[358] Interview with Brahim and Skander, Tunis, January 10, 2018.
[359] Interview with Elissa, Tunis, January 10, 2018.
[360] Ibid.
[361] Interview with Khookha McQueer, independant queer activist, Tunis, January 5, 2018.
[362] Tim Fitzsimmons, "Tunisia Presidential Committee Recommends Decriminalizing Homosexuality," NBC News.
[363] Ibid.
[364] "Tunisia's President Vows to Give Women Equal Inheritance Rights," Al Jazeera, August 13, 2016, https://www.aljazeera.com/news/2018/08/tunisia-president-vows-give-women-equal-inheritance-rights-180813172138132.html (accessed January 9, 2018).
[365] "En Tunisie, le président Essebsi s'oppose à la dépénalisation de la sodomie en Tunisie," France 24.

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