Association Tunisienne de Défense des Libertés Individuelles
www.adlitn.org

# Minoritized and discriminated against:

## *Law as factor of inequality*

**Mohamed Amine JLASSI**
Doctor of Law

Preface: Pr. **Wahid FERCHICHI**

Postface: **Dean Habib KAZDAGHLI**

HEINRICH BÖLL STIFTUNG
AFRIQUE DU NORD TUNIS

Tunis 2018

Association Tunisienne
de Défense des Libertés
Individuelles
www.adlitn.org

# Minoritized and discriminated against:

## *Law as factor of inequality*

By:

**Mohamed Amine JELASSI**
Doctor of Law

Preface: Pr. Wahid FERCHICHI

Postface: Dean Habib KAZDAGHLI

Tunis 2018

HEINRICH BÖLL STIFTUNG
AFRIQUE DU NORD TUNIS

# / TABLE OF CONTENTS /


**INTRODUCTION** **94**

**CONTEXT OF THE STUDY:**

**PROBLEMATIC, QUESTIONINGS AND APPROACH**

**TERMINOLOGY**

**PRINCIPLES TO EXAMINE**

**/ FIRST PART /** **104**

• The rule of law is a factor of inequality due to the legal vacuum

- Legal provisions contribute to the vagueness of certain minorities' "status"
- Defining « the status » of transsexuals based on a conservative frame of reference
- The public expression of gender and sexual identity is complicated
- The application of discriminatory law provisions against the minoritized persons

• Persons threatened on grounds of their convictions

- A threat based on explicit provisions
- A threat based on implicit provisions

• Guarantees for the protection of the "minorities" convictions

**/ SECOND PART /** **124**

• The law criminalizes the acts of « homosexual » persons

- The causes behind the criminalization of homosexuality
- The consequences of the criminalization of homosexuality

*The invisibility chosen by homosexuals*

*The violation of the right to an equal treatment before the justice*

*The stereotyped qualification of "homosexual" persons*

*Sentencing "homosexual persons" based on circumstances*

- The violation of the physical integrity

**/ THIRD PART /** **138**

• Law is the rule "of the majority for the majority"

- The law made Islam a dominant religion

*State "strong" involvement in the dominant religion*

*The interference in the private life of certain individuals*

- Law made Arabic a dominant language

*The predominance of Arabic in all the fields*

*The occultation of the cultural diversity*

**/ CONCLUSION /** **152**

# ( Preface )

## When difference kills …

By Wahid FERCHICHI,
Professor of Public Law
University of Carthage,
Faculty of legal sciences, Tunis

In 2011, in full revolutionary atmosphere marked by ambitions of radical change of the Tunisian socio-political model, I was contacted by Mohamed Amine Jelassi to discuss a possible direction of his doctoral thesis in law and I immediately accepted because the research topic concerned the issue of «minorities in Tunisia».

Following Amine in his fascinating research, I was able to verify a delicate and unfortunate dimension of the legal norm: inequality and injustice by «Law»!

And I discovered with him that «Law», supposed to consecrate an equal treatment for all without any discrimination based on sex, language, belief, ethnic or social origin, color, health status..., nevertheless heightened discrimination and stigmatization, legitimizing violations and overtaking of all kinds...

Indeed, when «Law» translates the political will of the ideology of a given era, it reflects at the same time the dominant values and protects the interests of those in power, as tragically illustrated by the Nazi State or recently by Daech ...

Thus, throughout the history of «Law», we have witnessed the rise then the disappearance of forms of discrimination that it once institutionalized and consecrated...

«Law», which aim is to regulate social relations and phenomena, can thus according to the will of the rulers of the moment favor a group and discriminate others ...

Humanity, through «Law», this dangerous tool, could discriminate, condemn or even decimate people, groups and even whole populations, because of their differences ...

However, the evolution of «Law» and the development of a universal approach to persons' rights, more recently called «human rights», have gradually led to the metamorphosis of a legal system protecting groups to a legal system protecting individuals ...

Thus, going from a «Law of dominant groups» to a «Law of persons», allows to recognize and consecrate the protection of a wide range of differences and respect for the human being in its individuality.

This approach that seems to go beyond the classical conception of minority rights, as conceived and recognized in international law tends to combat the legal norms that legitimize all forms of discrimination of groups and individuals by imposing on them an inferiority status based on differences in opinions, convictions, beliefs, appearance, ethnic or social origin, health status, sexual orientation or individual choice, a «law» that is a source of legitimacy of discrimination, a law that sanctions difference and refuses diversity, a «law» that kills ...

Thus, addressing the issue of the minoritized and discriminated against emphasizes the limits of «Law» and encourages reflection on the question of how it would be possible to adapt a legal system built on discriminatory grounds to the universal principles that make the individual the aim of any protection and promotion? An aim that the Tunisian Constitution of 2014 places at the heart of its device, through the central reference to human dignity ... A Constitution which provisions and principles relating to respect for privacy and individual choices are difficult to implement ...

Thus, we still ask ourselves questions about the future of the protection of the minoritized and discriminated against persons and about the most appropriate legal framework for the respect of the individualities and the sanction of the attacks on the bodily integrity and peoples' dignity... Are we ready today to harmonize our national legislation with the provisions of the Constitution and the international commitments of the country, while taking inspiration from comparative legislations that have progressively recognized the equality of all before a fair law, legislations that have gone from penalization to tolerance and then to equality and which sanctions target nowadays discrimination and stigmatization...

Finally, to generalize and disseminate certain conclusions of the doctoral thesis of Amine1, ADLI encouraged the author to publish this research entitled «Minoritized and discriminated against, Law as factor of inequality» ...

[1] JELASSI (Mohamed Amine), Les minorités en Tunisie, Thèse de Doctorat en Droit, soutenue le 11 novembre 2017, Faculté des sciences juridiques, politiques et sociales de Tunis.

# ( Introdcution )

## 1. The context of the study

Since January 14, 2011, the issue of persons belonging to "minorities" is no longer a taboo and the media spoke openly about it. For instance, the arrest of Jabeur El Mejri in 2012 for "attacking sacred values through actions or words" and "undermining public morals," in addition to 6 young other people accused of "sodomy" in 2015, under article 230 of the Penal Code, made the front-page in social media for several days. To this regard, social society activists denounced certain governmental practices restricting freedoms.

Moreover, during the drafting of the Constitution in the National Constituent Assembly (2011-2014), and with the fears raised about the redefinition of Tunisian identity, some individuals felt threatened socially and legally.

Indeed, the trend in post January 14, 2011-Tunisia was to protect the sacred in its broadest sense and even went further to ask the constituent power to criminalize the attacks on the sacred and blasphemy.

This situation fueled religious extremism marked by the «fatwas of takfir» (accusing someone of apostasy), which emerged massively between 2011 and 2013 and threatened the lives of many individuals.

## 2. Problematic, questionings and approach

Enjoying rights and freedoms relates to citizenship. Nevertheless, the socio-legal reality is different and does not reflect this affirmation.

That is why we looked for answers to the following questions when elaborating this study:

- To be a Tunisian citizen, must one be Arab and Muslim?
- To be entitled to rights guaranteed by the Constitution, must one be Arab and Muslim?
- To have equal protection by law, must one be Arab and Muslim?
- One wonders if the society should be exclusively Arab and Muslim. Can an individual still be a Tunisian citizen without conforming to this definition of identity? Isn't this paving the way to the dictatorship of the majority?
- This study will address the issue of equal protection by law, and help the reader to understand whether national identity goes before the guarantee of individual rights for all.
- Why cannot one be Tunisian and homosexual, Tunisian and Jewish, Tunisian and Christian, Tunisian and Baha'i, Tunisian atheist or agnostic, Tunisian Amazigh?

The followed approach focuses mainly on analyzing the various sources of Tunisian, international and comparative positive law that deal with rights and freedoms. It is noticeable that the Tunisian law on freedoms is rich but in practice this wealth is called into question.

The individual is still determined by the society to which he/she belongs and from which he/she proceeds.

Furthermore, we have witnessed that certain individuals are being struck by the imposed model of the Arab and Muslim society, which represents the dominant cultural identity. The latter encompasses not only religion and language but also traditions, customs and habits.

Several articles of the 2014 Constitution sometimes suggest that it only applies to Tunisian Arab and Muslim society.

The constitutional provisions, yet, influence the behavior of political and non-political actors towards certain individuals, especially when they do not fit the socio-legal norm.

Our goal is to understand how individual rights can be protected by law so that the latter does not become a factor of inequality.

The Universal Declaration of Human Rights of December 10, 1948 provides in its preamble that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

To "be protected by the rule of law" refers to: the obligation to protect. Legal protection also means that public authorities are committed to ensuring respect, protection and promotion of rights and freedoms. To this regard, the State has a duty to punish all the perpetrators, including government officials and private actors.

## 3. The terminology

Discriminated against: A person who is discriminated against, on the basis of color, religion, race, sex, descent, place of birth, residence or any other situation. This discrimination involves treating someone less favorably than treating another.

The international system for the protection of human rights is founded on the principle of non-discrimination. Various international instruments of human rights have as a goal to fight against all forms of discrimination.[1]

[1] The prohibition of discrimination has started with the adoption of international human rights instruments of general scope such as the Universal Declaration of human rights, the United Nations Charter and the twin Covenants of 1966. It was also prohibited by instruments of specific scope such as Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)
Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. For more instruments of human rights, log on to: http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx

But, no common definition of "discrimination" can be found in these instruments. In fact, the UN Human Rights Committee suggested a definition with regard to the international Covenant on civil and political rights of 1966, according to which "discrimination" is: "any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[2]

Therefore, a person is discriminated against based on a behavior (distinction, exclusion, restriction or preference) which result is the violation of the rule of equal protection by law.

**Equality:** Like non-discrimination, equality is a core principle of all human rights and fundamental freedoms. All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.[3]

Article 7 of the Universal Declaration of Human Rights reads: "All are equal before the law and are entitled without any discrimination to equal protection by law." Almost identical language is found in the first sentence of Article 26 of the International Covenant on Civil and Political Rights.

Equality means the absence of discrimination, and upholding the principle of non-discrimination between groups will produce equality.

Equality before the law means "the same application of the law to everybody regardless of the content of the law"[4].

## Minority:

Before defining the word "minority" some remarks should be advanced:

First of all, the term "minority" was created by public international law. For instance, the emergence of nationalism in Europe (1815-1919) led to the international legal protection of national minorities[5]. In fact, "The word 'minority' refers to the international norms of human rights protection[6]".

---

[2] Human Rights Committee Thirty-seventh session. Adopted: 10 November 1989 General Comment No. 18 Non-discrimination HRI/GEN/1/Rev.9 (Vol. I), para. 7.

[3] LOCHAK (D.): « Quelques réflexions sur l'universalité de la règle de Droit dans ses rapports avec l'égalité », Droit et cultures, n°49, 2005, pp. 15-19.

[4] TOBLER (Ch.): Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under European Community law, Intersentianv, Oxford, 2005, p. 17.

[5] E NIJMAN (J):"Minorities and majorities", in PETERS (A) and FASSBENDER (B) (editors): The Oxford handbook of the history of international law, Oxford University Press, Oxford, 2012, p. 100.

[6] ROULAND (N.), PIERRE-CAPS (S.) et POUMAREDE (J.): Droit des minorités et des peuples autochtones, P.U.F., Paris, 1996, p.182.

Secondly, the complexity of this study rests, on the one hand, on the changing character of the minority phenomenon, which explains "the difficulty to identify common elements which are able to grasp the plurality of existing relevant communities living within states and observing that the existence of, and coherence within, a minority group are basically context-dependent (namely, factual) matters[7]".

On the other hand, the concept "minority" covers a whole world of heterogeneous phenomena which justifies the impossible formulation of a general and abstract legal definition of "minority". Thus, as a social phenomenon, it is difficult to be totally determined by the law.

Thirdly, "minorities" *per se* are not considered as subjects of law. The subjects entitled to protection by law are the ones who belong to minorities. An exhaustive list of "minorities" does not exist.

Finally, there is no internationally agreed upon definition as to which groups constitute minorities. Although article 27 of the International Covenant on Civil and Political rights (1966) adopted provisions for the protection of minorities, the United Nations did not insert a definition of the term "minority".

Only special Rapporteurs for the United Nations such as Francesco CAPOTORTI formulated a definition for the term "minority" in 1977.[8]

## What constitutes a "minority"?

Public international law deals with "persons belonging to national or ethnic, religious and linguistic minorities". This category falls under the so-called national, "traditional" or classic minorities by excluding other categories to which we can add these qualifying adjectives: "sexual," "atheist," or "agnostic". This second category is not addressed by public international law and can be referred to as: Non- national or non-classic minorities.

Actually, we have noticed that international law avoids a broad sociological approach towards categorizing minorities, as this can encompass a whole range of social

[7] PENTASSUGLIA (G): Minorities in international law: An introductory study, Council of Europe, Strasbourg, 2002, p. 12.
See also: BOKATOLA (I-O.): «La Déclaration des Nations Unies sur les droits des personnes appartenant à des minorités nationales et ethniques, religieuses et linguistiques », R.G.D.I.P., 1993, p. 745.
SOULIER (G.): « Droits des minorités et pluralisme juridique », Revue de la recherche juridique– Droit prospectif, vol. 18, n° 2, 1993, pp.625-630.
Cités par KOUBI (G.): « « L'entre deux » des droits de l'Homme et des droits des minorités: un concept d'appartenance », R.T.D.H., n°18, avril 1994, p. 179.

[8] CAPOTORTI (F.): «Proposed Definition of « Minorities » within the Context of Article 27, I.C.C.P.R.: Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (1979) », E/CN.4/Sub.2/384/Rev.1 paragraph 568.
Francesco CAPOTORTI is a special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities

groups delineated by a multitude of factors. Thus, "for international law purposes, a more restrictive, non-sociological approach towards identifying the beneficiaries of minority protection is adopted. In practice, international legal treaties have related to minorities in the sense of groups whose distinguishing criteria relate to their religious affiliations, linguistic, ethnic, racial, national and cultural traits[9]".

- **Classic or national minorities:**

  In his book "National minorities : an international problem", Inis L. CLAUDE proposed a subjective definition of "minorities" by considering that "a national minority exists when a group of people within a State exhibits the conviction that it constitutes a nation, or a part of a nation, which is distinct from the national body to which the majority of the population belongs, or when the majority element of the population feels that it possesses a national character that minority groups do not and perhaps cannot share[10]".

  In contrast, Jean LAPONCE employs hybrid objective and subjective criteria to define "minority" as " a group of people who, because of a common racial, linguistic or national heritage which singles them out from the politically dominant cultural group, fear that they may either be prevented from integrating themselves in the national community of their choice or be obliged to do so at the expense of their identity[11]".

  But, these definitions do not take into acount the wide range of disadvantaged individuals or the "other minorities"[12] requiring State protection resting on sociological bases.

- **Non-national or non-classic minorities**

  Persons belonging to this category do not meet the characteristics that distinguish national minorities. But, they are denied some rights and freedoms; they are assigned an inferior social position and excluded from the mainstream of life and culture.[13]

---

[9] THIO (L.-A.): Managing Babel: The international legal protection of minorities in the twentieth century, Brill NV, Leiden, 2005, p. 9.

[10] CLAUDE (I-L.): National minorities: an international problem, Harvard University Press, Cambridge, 1955, p. 2. See also: PREECE (J-J): National minorities and the European Nation-States system, Clarendon Press, Oxford, 1998, pp. 2324-.

[11] LAPONCE (J-A.): The protection of minorities, University of California Press, Berkeley and Los Angeles, 1960, p. 6.The definition is quoted by REHMAN (J.): The weakness in the international protection of minorities rights, Kluwer Law International, The Hague, 2000, pp. 1718-.
Cf. PREECE (J-J.): National minorities and the European nation-states system, Clarendon Press, Oxford, 1998, p. 24.

[12] SAGARIN (E.): The other minorities; non-ethnic collectivities conceptualized as minority groups, Ginn, Toronto, 1971 quoted byTHIO (L.-A.):Managing Babel: The international legal protection of minorities in the twentieth century, Brill NV, Leiden, 2005, p.9.

[13] PENTASSUGLIA (G.): Minorities in international law: An introductory study, Council of Europe, Strasbourg, 2002, p. 58.

In Tunisia, the main elements of the national character are affirmed by the Constitution, namely, the Arabic language and the Islamic religion.[14]

These elements explain the fact that the rule of law confers less rights or that it does not guarantee any right to persons belonging to non-classic minorities. Consequently, this precarious situation leads to an inferior status for these persons and not just a discriminatory one. This inferiority is explained by the fact of being different; persons belonging to these minorities are often set apart because of differences pertaining to sexual identity or orientation, atheistic or agnostic convictions or on any ground other than the race or the ethnicity. This category is also inferior because the "minority" is in a subordinate power relation to the rest of society. That is why we talk about minoritized persons.

• **Minoritized:**

At this stage we referred to the political sociology which uses the criterion of "subordination" to define a minoritized person.

According to sociologists the minority status is not created by the minority but rather by social structures that position certain groups as minorities.

To be minoritized, one does not need to be in the numerical minority or to be just discriminated against but only to be treated as if one's position and perspective were less worthy than the majority.

Sociologist Louis WIRTH defined "minority" as "a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges"[15].

In fact, the persons are minoritized whenever their existence is not legitimized by the society's codes; their situation depends on the balance of power[16]. Since the majority group is the dominant one, it holds privileges.

If individuals act in conformity to the pre-established social standards, they will not be considered as minoritized, even if they share the same characteristics with other individuals who are discriminated against for the same motive.

---

[14] Article 1 of the 2014 Constitution.

[15] WIRTH (L.): «The problem of minority groups», in LINTON (R.) (dir.), the science of Man in the world crisis, Columbia university press, New York, 1945, pp. 347372-. The definition quoted by COONTZ (P.): «The etymology of « minority » and woman in international law», in CHANDRA (S.) (editor), International protection of minorities, Mittal Publications, Delhi, 1986, p.162.

[16] FENET (A.): « La question des minorités dans l'ordre du droit », *in* CHALIAND (G.) (dir.), *Les minorités à l'âge de l'État-nation*, Fayard, Paris, 1985, p. 38.

The example of homosexuals[17] is of a great importance in this case. A homosexual who is attracted to individuals from the same sex is not necessarily minoritized. Their sexual orientation is not a criterion they are minoritized for, because, if they are in conformity with the social norms and are married to someone from the opposite sex, while "secretly" engaging in same sex relationships, they will always be legitimized by society.

However, if a homosexual person rejects the social norms like marriage or to form a family, they are going to be excluded by society based on their declared sexual identity which collides with the legitimate model of the majority. In this case, he/she is considered as minoritized.

A homosexual person, who carries a social stigma, is minoritized and exposed to rejection. That is why he chooses not to come out in the public space, "a hetero-normative space[18]". Thus, "social minorities exist when a stigmatizing feature is considered as a fundamental and determining element of the social identity[19]".

Therefore, to be minoritized means to be perceived by the majority as having a position of lower prestige and social stigma. In this case, it refers to the fact of being subjected to social construction of underrepresentation and subordination.

Thus, an individual who is minoritized adopts a self-image of inferiority, feels incompetent, controlled and develops low self-esteem. Minoritization impacts the identity rather than the specific characteristics of an individual like for the case of a national minority which are religion, ethnicity or language. Minoritization deals for example with individuals who are defined by a sexual orientation other than heterosexual[20].

Minoritization is a process that produces context-specific minority groups. "A group is made a minority by others who reaffirm themselves as the majority in so doing, and in the process reaffirm for themselves the power to exclude. Minority groups come into existence through a process of minoritization at the hand of a self-referential majority, they do not exist in and of themselves as such[21]."

---

[17] The word "homosexual" was coined in 1868 as neutral, legal, scientific and non-medical term by Karoly Maria Benkert, a German-Hungarian, writer, translator, journalist, and polemicist.

[18] BLIDON (M.) : « La casuistique du baiser », *EchoGéo*, n° 5, 2008, dernier accès le 23 Juin 2016. URL : http://echogeo.revues.org/5383

[19] DE BATSELIER (S.) et ROSS (H-L.): *Les minorités homosexuelles: une approche comparative*, Allemagne, Pays-Bays, États-Unis, Duculot, Gembloux, 1973, p. 282.

[20] SAILLANT (F.): « Reconnaissance et réparation », *in* BOGALSKA MARTIN (E.) et *al.* (dir.) *Itinéraires de reconnaissance: Discriminations, revendications, action politique et citoyennetés*, Collectif Archives contemporaines, Paris, 2017, p. 60. See also RATH (J.): "The ideological representation of migrant workers in Europe: A matter of racialization" *in* WRENCH (J.) and SOLOMOS (J.) (editors) *Racism and Migration in Western Europe*, Berg, Oxford, 1993, pp. 215232-.

[21] MARTINOT (S.): *The Rule of Racialization: Class, Identity, Governance*, Temple University Press, Philadelphia, 2003, p. 147.

• L.G.B.T.Q.I[22]:

Inclusive acronym used to refer to the identities of lesbians, gays, bisexuals, and those identifying as transgender or transsexual, as well as those identifying as queer (a broad term for a wide range of non-normative sexual and gender identifications) and intersex - hereafter. Collectively these identities represent a challenge to prevailing binary gender norms and the hegemony of heteronormativity.[23]

We can also call them persons with non-normative[24] sexuality, sexual identities, or gender identifications.[25]

This acronym covers "the different manifestations of sexual orientation and gender identity[26]".

Sexual orientation refers to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".

Gender identity refers to "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".[27]

## 4. Principles to examine

Through these principles, we are going to observe and analyze how the Tunisian positive law deals with these social phenomena while comparing the Tunisian law with international instruments of human rights and other countries laws in this field.

---

[22] Lesbian, Gay, Bisexual, Transsexual, Queer and intersexual.

[23] See the Pre- publication version of chapter of GRAY (J.): "Language and non-normative sexual identities", *in* PREECE (S.): *Routledge handbook of language and identity*, Routledge, London, 2016.

[24] "Non-normative" means not adhering to standard cultural expectations.

[25] « Discrimination fondée sur l'orientation sexuelle et l'identité de genre en Europe », Editions du Conseil de l'Europe, Starsbourg, 2012, p. 21.
See also: HAMROUNI (S.): « L'orientation sexuelle en Droit international », *in* FERCHICHI (W.) (sous la direction de), *Le corps dans toutes ses libertés*, Publications de l'Association Tunisienne de Défense des libertés individuelles, avec le soutien de la Heinrich BollStiftung, Tunis, 2017, pp. 158 - 168.

[26] Etude sur : « Les associations LGBTQI++ en Tunisie : Emergence d'un nouveau militantisme humain », réalisée par Mme Jinane LIMAM et préfacée par M. Wahid FERCHICHI, Association de Défense des Libertés Individuelles avec le soutien de la Fondation Heinrich Boll, Tunis, octobre 2017, p. 12 et s. https://tn.boell.org/sites/default/files/1._etude_associations_lgbtqi_fr.pdf
The terminology often used by the treaty-based organs of the UN and other human rights bodies and associations is sexual minorities to refer to individuals whose romantic and sexual identities, attractions, behaviors, relationships and / or desires are non- heterosexual in nature and are not exclusively oriented toward the other sex. It includes reference to LGBTQI and any other non-heterosexual identities.

[27] The Yogyakarta Principles «preamble» https://yogyakartaprinciples.org/preambule/

The principle of non-discrimination has been inserted for the first time on the Tunisian constitutional history in article 21 of the Constitution adopted in 27 January 2014 stating that:

"All citizens, male and female alike, have equal rights and duties, and are equal before the law without any discrimination.

The State guarantees to citizens individual and collective rights, and provides them with the conditions to lead a dignified life".

This article sets forth five different principles: Equality in rights and duties, equality before the law, the principle of non-discrimination, the recognition of individual and collective rights for everyone, and the dignity of every person.

However, while reading some articles of the Constitution we have noticed that they are not in harmony with article 21. It seems that some citizens are excluded from the protection[28].

Likewise, other law provisions reflect the inequality between citizens and threaten the enjoyment of rights and freedoms by citizens as provided by the Constitution and the human rights international instruments.[29]

Reference to non-discrimination is implicitly made in the Charter of the UN, it is also provided by the international instruments of human rights[30] to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women[31]".

These "fundamental human rights" are based on the universal values enshrined in the Universal Declaration of Human Rights of 10 December 1948 : freedom, dignity and equality[32].

Having analyzed the principle of equality and the principle of non-discrimination, we noticed that the law seems to be a factor of inequality whenever it is formulated

[28] For example, article 74 requires that running for Presidency of the Republic rests on the belonging to the Islamic religion.
**"**Running for the position of President of the Republic shall be a right for every male and female voter who holds Tunisian nationality since birth, whose religion is Islam".

[29] Some provisions are formulated in a vague way and may lead to the State's interference in a person's convictions. An example of these provisions uses the expression "assault against the good morals" in the Penal Code, which has been interpreted by the judge in a law case as an "assault against the sacred values".

[30] "The International Bill of Human Rights" consists of the five core human rights treaties of the United Nations that function to advance the fundamental freedoms and to protect the basic human rights of all persons. 1) Universal Declaration of Human Rights 2) International Covenant on Economic, Social and Cultural Rights 3) International Covenant on Civil and Political Rights 4) Optional Protocol to the International Covenant on Civil and Political Rights 5) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

[31] Preamble of the UN Charter.

[32] Article 1 of the universal declaration of human rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

in a vague way or in the case of legal vacuum (First part). The rule of law may also criminalize certain acts by allowing the State to interfere arbitrarily in the private life of certain individuals (Second part). In addition, the rule of law can be made "by the majority for the majority" to the detriment of other individuals who do not share the same elements of the national identity (Third part).

# ( First part )

## The rule of law is a factor of inequality due to the legal vacuum

> *Legal vacuum is an issue that the legislature has not yet succeeded in defining. It is also a not yet regulated by a written law situation.*[33]

But, the absence of specific provisions does not mean the absence of law. The judge may apply general provisions on a specific case. Nevertheless, there is no guarantee that these provisions as applied by the judge will protect the rights of individuals.

The legal vacuum has made the situation of certain individuals vague (A) whenever the judge applies general provisions on a particular case with reference to his dominant culture. This is the case of persons with non-normative sexuality, sexual identities, or gender identifications like transsexuals, transgenders, and intersexuals who do not enjoy any protection by the law.[34]

Furthermore, even though freedom of conscience and thought is guaranteed, a-religious, agnostics and atheists incur risks of stigma and discrimination or even of being imprisoned because there are no clear legal provisions to protect them. Thus, they are discriminated against based on acts which are not criminalized (B).

## A. LEGAL PROVISIONS CONTRIBUTE TO THE VAGUENESS OF CERTAIN MINORITIES' "STATUS"

There is no legal status for transsexuals. The latter's "status" depends on the judge's frame of reference which determines the provisions to be applied whenever the legislature left a given situation unregulated.

While analyzing the different Court's judgments dealing with the request of changing one's civil status in the birth certificate, we noticed that the frame of reference is conservative and based on an Islamic culture that steers the judge's judgments (1). The ambiguity of some provisions made the manifestation in public of sexual and gender identity more complicated (2).

---

[33] DHOQUOIS (R.): *Le Droit*, Le Cavalier Bleu, Paris, 2002, p. 85.
"In France, the term "legal void" exists in the vocabulary of theorists and sociologists of law. In order to understand its meaning, it is necessary to bring it closer to the notions of deficiency in legal theory as well as to the "non-Droit" (non-law) hypothesis that had been envisioned by Jean Carbonnier. Today, this term is also used regularly in political and journalistic speeches but then it is used in a particular meaning that aims at emphasizing the need to produce a new law".
The idea of *"non-Droit"* embodies that the law is not the only and the best form of regulating certain social conflicts.
HO DINH (A-M.): « Le « vide juridique » et le « besoin de loi ». Pour un recours à l'hypothèse du non-droit », *L'Année sociologique*, vol. 57, n° 2, 2007, pp. 419-453.
*Cf.* CARBONNIER (J.): « Être ou ne pas être : Sur les traces du non-sujet de droit », *Flexible Droit*, L.G.D.J., Paris, 1995, pp. 192 - 206.

[34] REDISSI (H.) et BEN ABID (S.): « L'affaire Samia ou le drame d'être « autre », Commentaire d'une décision de justice, *in* MOULIN (A-M.) (dir.), *Islam et révolutions médicales : Le labyrinthe du corps*, KARTHALA Editions, Paris, 2013. p. 249.

## 1. Defining « the status » of transsexuals based on a conservative frame of reference

First of all, the definition of the term "transsexual" is problematic because of the absence of a legal definition in the Tunisian legal system.

In fact, "transsexualism" can be defined as "a condition in which persons with apparently normal somatic sexual differentiations are convinced that they are actually members of the opposite sex. It is associated with an irresistible urge to be hormonally and surgically adapted to that sex[35]".

Moreover, transsexuals feel they are "a woman trapped in a man's body, and vice versa". As such, "transsexualism" is a complicated and complex situation, which is "a self-made diagnosis with a "self-prescribed" treatment"[36].

Thus, one wonders if the "self-made diagnosis and the "self-prescribed" treatment" means the right of the individual to change his or her sex in the name of freedom of choice.

Transsexualism is not regulated by provisions of law. The Tunisian legislature neither prohibits nor allows the change of sex based on an ambiguous identity. This issue has been raised before Courts when the applicant asked the judge to allow the changing of the "sex" designation in the birth certificate.

Even though no text prohibits the voluntary change of sex, Courts seem to adopt an approach according to which they reject applications of persons to have their gender/sex change formally recognized by a change in the birth certificate because of voluntary on-body interventions. Applicants in this case have undergone sexual reassignment surgeries or hormonal on-body interventions.

By referring to the various Courts' judgments, the prevailing tendency is adopting the binary sexual categorization: male or female. The arguments of the judge in many Courts' judgments aim at protecting society and especially the family which consists, according to his adopted traditional model, of a man and a woman. The judge considers that the transsexual does not fit conveniently into this binary classification and, thus, cannot be categorized as either male or female and cannot be married.

---

[35] SCHILL (W-B.), COMHAIRE (F-H.) and HARGREAVE (T-B.) (Editors): *Andrology for the Clinician*, Springer, Berlin, 2006, p. 19.
See also: ARNOUX (I.): *Les droits de l'être humain sur son corps*, Presses Universitaires de Bordeaux, Bordeaux, 1994, p. 204.

[36] AMBROSIO (G.): *Transvestism, transsexualism in the psychoanalytic dimension*, Karnac Books, London, 2009, p. 82.

The Court rejects the applications of amending the birth certificate since it considers surgically sex changes "artificial" [37] and incite to "artificial feminization"[38]. It ruled that the applicant should consult a specialist in order to regain his psychological balance.

In fact, the Court aims at censoring the voluntary "artificial" change of sex as it is according to the judge contrary to the "civilizational and moral" heritage of the Tunisian nation. This heritage is referred to by the judge in the so-called Sami/ Samia case as an infringement to public order and good morals.[39]

However, the judge makes no distinction between a transsexual and an intersexual.[40] Both undergo surgical body interventions. They seek also to change the designation of "sex" in the birth certificate.

While transsexuals require recognition for a sexed identity different from the anatomical sex which they were assigned at birth, intersexuals are deemed ambiguous in their sex at birth or later.

Transsexuals' sex is not ambiguous; They are born as male or as female but they express the desire to belong to the opposite sex using hormones and/or surgical interventions.

"The intersex child (...) is thrust by his/her parents into the decision to have surgery and the transsexual individual (...) believes that he/she is "trapped" in the wrong body and chooses to have sex reassignment surgery[41]".

---

[37] محكمة الاستئناف بتونس، قرار مدني عدد 10298 بتاريخ 22 ديسمبر1993. رشيدة الجلاصي تعليق حول امكانية تغيير الجنس المنصوص عليه في رسم الحالة المدنية. م. ق. ت.1995. ص. 146» تسرع لإجراء عملية للحصول على تغيير اصطناعي في جنسه.»

[38] «وحيث أن المعيار النفساني الإجتماعي يشجع على التخنث الاصطناعي... اضافة إلى أنه يسمح بالتصرف في الجسم البشري لكونه يمكن الشخص من تغيير جنسه كيف ومتى شاءوهو ما يتنافى والقانون الوضعيوالشريعة الإسلامية.»

Jugement du T.P.I. de Ben Arous, n° 621 du 28 mars 1990, RJL, n° 2, février 1991, p. 127.

[39] «خالف الموروث الحضاري والأخلاقي لهذه الأمة وهو ما يعبر عنه قانونا بالنظام العام والأخلاق الحميدة.»

رشيدة الجلاصي:محكمة الاستئناف بتونس، قرار مدني عدد 10298 بتاريخ 22 ديسمبر 1993 تعليق حول امكانية تغيير الجنس المنصوص عليه في رسم الحالة المدنية، م. ق. ت.، 1995. ص.ص.145 و 170.

[40] Judgment of the appellate Court of Tunis, n°10298 du 22 December 1993.

The Court uses the term sexual ambiguity in the sense of ambiguity based on the sex and not on the identity. Since it affirms that he cannot fit in either sex. That is an intersex person because of his innate sex characteristics which are both female and male at the same time or not quite female or male or neither female or male.

In the case of Sami/Samia the Court should have used the term transsexual and not intersexual.

Sami, the applicant who requested to change his civil status, had undergone surgery in Spain and changed his sex from male to female. Thus, he asked the judge to order the amendment of his birth certificate. His/her request was dismissed. The Court's decision was grounded in the argument that a "transsexual" (although the Court uses the word as synonym with intersexual) change is a "voluntary" and "artificial" operation, and thereby cannot justify civil status change because according to the judge these kind of body surgeries jeopardize the institution of marriage and challenge the unity of the family.

[41] NAGOSHI (J-L.), NAGOSHI (C-T.) and BRZUZY (S.): *Gender and sexual identity: Transcending feminist and queer theory*, New York, 2014, p. 27.

*Thus, when is an individual granted the right to amend the designation "sex" on the birth certificate?*

The judge considers that the voluntary change of sex is "artificial" and deprives the person from amending the designation "sex" on the birth certificate. However, involuntary change, which is the case of the intersexual, permits the amendment of the birth certificate. Actually, this is a case by case decision. Analyzing the Court cases, we were able to sort out the requirements upon which the judge accepts the amendment of the birth certificate.

In fact, the Court accepts surgical or hormonal interventions and orders the amendment of the "sex" designation on the birth certificate whenever:

Change of sex is a psychological necessity for the person and after consulting a psychiatrist.

A sex change made on a personal decision as sole basis is not allowed by the Courts in Tunisia. In most of the Courts' decisions it is held that the change must not be artificial, but must be the unavoidable result of a state of necessity.

First of all, transsexual persons will not be granted the right to change their civil status unless they undergo a psychiatric diagnosis of "gender identity disorder" required by physicians in order to legitimate a request for sex reassignment surgery.[42]

This means that sex reassignment surgeries are only permitted at last resort as the only and unique solution.

Besides, the judges invoke the principle according to which "necessity knows no law" depending on the elements of each case of sex change.

The first element consists in the existence of a danger to the life of the individual. The second element requires that the danger should be imminent and not future. As for the final element, the person wishing to change sex should not have other means to put an end to the danger.

In Sami's case, the judge analyzes the elements of the state of necessity to find out whether the sex change was the ultimate and unique means for Sami to avoid the danger.

When referring to the reports of the medical expertise, the judge was verifying whether the applicant was in a state of necessity when he had a sex change

---

[42] «والحل الأنسب يكون في العلاج النفسي الذي يحقق تصالح الفرد مع ذاته كما خلقها اللّه والرضا بوضعه الجسدي.»
Arrêt cassation civil, n°2828 du 15 décembre 2005 cité par JELASSI (R) : Le corps humain en Droit civil, C.P.U., Tunis, 2013, pp. 361 - 363.
«وكان بامكانه التداوي لدى طبيب نفساني لكسب توازن في شخصيته». محكمة الاستئناف بتونس، قرار مدني عدد 10298 بتاريخ 22 ديسمبر 1993 تعليق حول امكانية تغيير الجنس المنصوص عليه في رسم الحالة المدنية. م. ق. ت.1995، ص. 145.

**Result:** the Court considered that Sami was not in a state of necessity. He suffered from a mental disorder, and then, he should have consulted a specialist and not change his sex.[43]

Likewise, the Court of *cassation* rejected the application of a transsexual requesting to change the designation "sex" on the birth certificate, by considering that the sex of the person cannot be changed with regard to "someone's whims, decisions or (even) psychological disorders[44]".

Analyzing the various Courts' decisions dealing with sexual identity has shown the omnipresence of the traditional frame of reference which refers to a given acceptance of chariaa while carrying out the discretionary power of the judge.

The traditional frame of reference "comprises not only the set of rules and principles of the classic Islamic law, but also the Islamic values that judges do not hesitate to implement in the first place to explain and justify their solutions[45]".

Nevertheless, this frame of reference does not guarantee full protection for persons belonging to minorities because it does not take into consideration their specificities.

In fact, the judge while adopting a traditional approach is forced to legitimize or to delegitimize a fact by meeting the requirements of a community marked by the sacred[46], even at the expense of persons belonging to minorities.

Thus, the judge is elaborating a system strongly linked to the Islamic culture in order to avoid disharmony with society to which he belongs. In fact, in a law case he refused to follow the steps of the European judge by considering that "the judge finds himself compelled by his civilization; he has to apply the instructions of his function in the social group in which he evolves[47]".

In Sami's case the judge stands as a conservative one. By rejecting the request of amending the birth certificate, he considered that Sami has acted against the moral and civilizational heritage of the *Umma*[48]. He emphasizes also that his culture as Arab and Muslim is different from the culture of the European judge. This is in fact a rejection of other cultures by the judge.

---

[43] «فإذا كان ما قام به الشخص لا يعتبر حالة من حالات الضرورة التي تخول له تغيير جنسه... بل تسرع لاجراء عملية للحصول على تغيير اصطناعي في جنسه.»
«محكمة الاستئناف بتونس، قرار مدني عدد 10298 بتاريخ 22 ديسمبر 1993 تعليق حول امكانية تغيير الجنس المنصوص عليه في رسم الحالة المدنية. م. ق. ت.1995. ص. 145.

[44] Arrêt cassation civile, n°2828 du 15 décembre 2005 cité par JELASSI (R.): *Le corps humain en droit civil*, C.P.U., Tunis, 2013, pp. 361 - 363.

[45] BOSTANJI (S.): « Turbulences dans l'application judiciaire du Code tunisien du statut personnel: le conflit de référentiels dans l'œuvre prétorienne », *Revue internationale de Droit comparé*, vol. 61, n°1, 2009, p. 12.

[46] BOSTANJI (S.): *ibid*, pp. 7 - 47.

[47] محكمة الاستئناف بتونس، قرار مدني عدد 10298 بتاريخ 22 ديسمبر1993. رشيدة الجلاصي:تعليق حول امكانية تغيير الجنس المنصوص عليه في رسم الحالة المدنية. م. ق. ت.1995، ص. 152،
«القاضي يجد نفسه مقيدا بحضارته و يجب عليه احترام متطلبات الوظيفة التي يقوم بها في المجموعة الإجتماعية...»

[48] An Arabic word that refers to the community of believers in Islam. Literally translated to "nation".

The first remark is that the judge excluded Sami from the equal protection by the laws because he did not conform to this heritage. In this case, is it compulsory for a Tunisian citizen to be Arab and Muslim? Then, it should be reminded that the judge rendered his judgment in the name of the Tunisian people notwithstanding his confession.

By referring to foreign Courts' decisions, we noticed the difference between the Tunisian judge and the European and Lebanese judges. In fact, the French Court of *cassation* rules that:

"When, after medico-surgical treatment undergone for therapeutic reasons, a person presenting the transsexual syndrome no longer possesses all the characteristics of his original sex and whose physical appearance has become close to that of the other sex, the principle of the respect due to private life justifies the birth certificate henceforth indicating the sex corresponding to his appearance[49]".

A major step forward for transsexuals and intersex persons in Malta has been made in April 2015 by virtue of "gender identity, gender expression, and sex characteristics act" that canceled sex-assignment treatments or surgical interventions on the sex characteristics of a minor. Any such treatment or intervention must be deferred until the person concerned is able to provide informed consent. This law empowers all adults and minors to rectify the gender and name on official documents as necessary based on a simple declaration.[50]

Similar achievements have been witnessed in France when the Tribunal of *Grande Instance* of Tours (Indre-et-Loire) ordered the amendment of birth certificate of an intersex person who was registered as male to insert the designation "neutral sex", in its judgment of 22 August 2015.[51]

It seems that Malta paved the way for foreign Courts to render judgments in favor of transsexual and intersex persons. In fact, in Lebanon, the judge authorized the change of sex in the case of necessity whenever an individual is suffering from a psychiatric and identity disorder.[52]

In its ruling, the Court of Appeals of Beirut weighed the man's health and well-being as factors in allowing the amendment of the birth certificate.

---

[49] AP 111992/12/, Bulletin des arrêts de la Cour de cassation, 011993/02/, n°13, p. 27.

[50] Chapter 540 gender identity, gender expression and sex characteristics act 3(1) a, b, c, d. To provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.14th April, 2015 ACT XI of 2015.
http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1

[51] Judgment of the Tribunal of *Grande Instance* of Tours (Indre-et-Loire) 20 August 2015 (not published).

[52] «و حيث يستفاد مما تقدم أن تحول المستأنفة إلى رجل تبعا للعلاجات الهرمونية و العمليات الجراحية التي خضعت لها يعود سببه إلى حالة مرضية نفسية لازمتها منذ طفولتها و لم يكن هناك من وسيلة لشفائها منها إلا بالعلاج الهرموني و بالجراحة الي أدت إلى تحولها إلى رجل، وحيث أن تحول جنس المستأنفة يكون بالتالي ناتجا عن عمل طبي ضروري لشفائها ولتخليصها من المعاناة التي رافقتها طيلة حياتها...»
Cour d'appel, civil, Beirut, 03/09/2015 arrêt n°2015/1123 publié à l'agenda juridique du 11/01/2016.

It was affirmed that the applicant's right "to receive the necessary treatment for any physical and psychological illness is a fundamental and natural one" and "a medical necessity to relieve him from his suffering that had been present throughout his life"[53].

Speaking of sexual identity in Tunisia may seem new to the justice and to the law. Expressions like "transgender"[54] and "transsexual" may appear strange to the police and judges. This has resulted in apparent "phobia" in the various courts' decisions.

Consequently, the presence of transphobia and heterosexism corresponds to a social and legal reality which impacts the public expression of the sexual identity. This reality is fueled by social, economic, political and religious dynamics which can be in favor or against transsexual persons.

### 2. The public expression of gender and sexual identity is complicated

The public expression of gender and sexual identity deals with the ones we commonly refer to as "LGBTQI individuals" or persons with non-normative sexuality, sexual identities, or gender identifications.

Tackling the issue of sexual identity leads also to talking about "sexual and gender diversity" in comparison to the dominant heterosexual model accepted legally and legitimately in public. In fact, sexual diversity refers to the whole range of sexual interests, desires, and behaviors[55].

*What do these expressions refer to?*

Gender identity refers to "a person's internal sense of being male, female, or something other, or in between[56]".

Gender expression refers to a range of behaviors that express gender identity[57]

---

[53] «و حيث يستفاد مما تقدم أن تحول المستأنفة إلى رجل تبعا للعلاجات الهرمونية و العمليات الجراحية التي خضعت لها يعود سببه إلى حالة مرضية نفسية لازمتها منذ طفولتها و لم يكن هناك من وسيلة لشفائها منها إلا بالعلاج الهرموني و بالجراحة الي أدت إلى تحولها إلى رجل،وحيث أن تحول جنس المستأنفة يكون بالتالي ناتجا عن عمل طبي ضروري لشفائها ولتخليصها من المعاناة التي رافقتها طيلة حياتها...»
Court of appeal, Beirut, 03 September 2015, judgment n°2015/1123 published in the legal agenda of 11 January 2016.

[54] Transgender refers to "individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth".
Transgenderism can be defined as "the breaking of gender roles and gender identity and/or going across the boundaries of gender to another gender".
Transgender individuals typically express gender identities outside traditional heteronormative definition, but having little intention of having sex reassignment surgeries or hormone treatments.
The term includes but is not limited to, transsexuality, heterosexual transvestism, gay drag.

[55] CHAMBERLAND (L.), FRANK (B.) et RISTOCK (J.): « Présentation », *in* CHAMBERLAND (L.) FRANK (B.) RISTOCK (J.) (dir.), *diversité sexuelle et constructions de genre*, Presses de l'Université du Québec, Québec, 2009, p. 3.

[56] POMPEI (V.): *LGBTQ youth: An educator›s guide*, national professional resources Inc./Dude Publishing, New York, 2012, p. 2.

[57] FORD (V-E.): "Coming out as lesbian or gay: A potential precipitant of crisis in adolescence", *in* SULLIVAN (M-K.) (Editor): *Sexual Minorities: Discrimination, Challenges and Development in America*, Routledge, New York, 2013, p. 99. See also pp. 93 - 110.

or "the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics"[58].

Some societies are open to this diversity, while others deny it. Violence and discrimination against transsexual and transgender persons persists in daily life.

Their "status" is precarious, socially and legally, not only because some Courts' decisions rule that they do not have the right to marry but also because they are deprived of the minimum standards of protection. They face persecutions and intimidations by the police and they have no legal protection in their professional life whenever they are fired on the ground of their non-normative gender or identity.

What has worsened their situation is the fact that Courts and the police use the general provisions of laws to arrest and prosecute them under the so-called indecent acts and breaches to good morals.

These laws punish acts which "offend good morals" or "cause public scandal" that can be used to penalize the expression of lesbian, gay or transgender identity, or the exercise of other basic rights by persons with non-normative sexuality, sexual identities, or gender identifications.[59]

Punishments target the non-normative behaviors of these persons (the way they dress or the way they speak) which reveal their sexual identity and expose them to intimidations by the authorities. i.e.: they can be arrested, simply, because of wearing the clothes of the opposite sex.

A transgender boy was arrested in November 2016 in Hammamet. The police claimed that he was wearing a dress and that they were told that he was a woman.

When brought before the Court, he has been sentenced to imprisonment for "indecent acts".[60]

Similarly, transgenders are often humiliated and ridiculed in public places as this has been mentioned in the report on the main violations of individual freedoms in 2017 in Tunisia[61] :

- 19 June 2017, lynching of a transgender in the medina of Kairouan
- 1st July 2017, a transgender was taken to a local police station where he/she was insulted and beaten.

---

[58] POMPEI (V.): *Ibid.,* p. 2.

[59] SEN GUPTA (I.) (Editor): *Human rights of minority and women's: Transgender human rights* (volume 2), Isha books, India, 2005, p. 296.

[60] Tribunal cantonal de Hammamet (regional tribunal of Hammamet), judgment n°55026 of 19 January 2017, not published.

[61] *Cf.* « Etat des libertés individuelles en Tunisie 2017 : Les violations continuent et s'intensifient », p. 4 and p. 12. Available on : http://www.adlitn.org/sites/default/files/fr_redui_1.pdf

To reveal one's gender identity in public seems difficult and even dangerous. Even though, everyone has the right to freely express his identity. Therefore, an individual pushes the boundaries of gender by being a non-conforming person, and be even more proud to assume his/her sexuality or identity. This should also contribute to fight against discriminatory State practices toward the LGBTQI persons.

Expressing one's identity in public is not easily accepted by the Tunisian society or by legal norms, since, neither the society nor the legislature are familiar with the terminology defining persons with non-normative sexuality, sexual identities, or gender identifications.

In its report submitted to the UN Committee on Economic, Social and Cultural Rights in 2016, Amnesty international highlighted the discrimination, harassment and violence based on gender identity and sexual orientation and reinforced by law (especially under article 230 of the penal Code) and practice, that LGBTI persons in Tunisia face daily.

Amnesty notes that LGBTI persons live in constant fear of arrest and prosecution, and are particularly vulnerable to violence on account of their real or perceived sexual orientation or gender identity.

"Amnesty International has also found that the criminalization of same-sex sexual relations fosters violence against LGBTI people in Tunisia, and creates a permissive environment for homophobic and transphobic hate crimes as well as harassment and intimidation by family members and others in the community at every stage of their life (...). Openly gay and lesbian individuals reported facing constant insults and harassment, and said that they received death threats and threats of harm either in person or through social media (...). Law makes LGBTI people especially vulnerable to discrimination and violence by the police, who often exploit their vulnerability to expose and stigmatize them through blackmailing, extorting a bribe or even sexually abusing them."[62]

Following the steps of Amnesty international, local associations sought the expertise of non-governmental organizations in order to publish, in February 2017, a report on the social and legal situation of LGBTQI persons in Tunisia.

In this context, the Tunisian coalition for the rights of LGBTQI persons in Tunisia, consisting of Damj the Tunisian association for justice and equality, Chouf, Kelmty, the initiative Mawjoudin for equality and Shams, with the partnership of EuroMed, submitted this report on the occasion of the national report of Tunisia examined in

[62] Amnesty international report submitted to the UN Committee on Economic, Social and Cultural Rights 59thsession, 19 September – 7 October 2016. Tunisia, pp. 89-.
https://www.amnesty.org/download/Documents/MDE3045752016ENGLISH.PDF

the Universal Periodic Review by the Human Rights Council in May 2017.[63]

The issue of sexual orientation and sexual identity is sensitive since homosexuality and gender identity expressions are punished by law. While other persons are discriminated against based on their convictions although no law punishes minority's convictions.

## B. THE APPLICATION OF DISCRIMINATORY LAW PROVISIONS AGAINST THE MINORITIZED PERSONS

The dignity of the human being is inviolable. No person shall be denied the equal protection of the law. Everyone is equal in dignity and rights.

This equality entails that everyone should be protected by the norms in force, starting with the supreme law of the country which is the Constitution. Yet, it may occur that these norms are not formulated in a clear sense to guarantee protection for all individuals.

In fact, the preamble of the 2014 Constitution contains religious references like the expressions "Islamic *Umma*" and the "teachings of Islam" which may weaken the rights and freedoms of certain persons based on their a-religious or atheistic convictions (1). In order to overcome this threat, guarantees of protection may be found in the national and international instruments in the field of human rights (2).

### 1. Persons threatened on grounds of their convictions

Atheists, agnostics, and a-religious face a double threat under the law. Either the fear to be prosecuted on the basis of implicit provisions whenever they express their convictions (b) or, they suffer from arbitrary State interference which obliges them to express their convictions based on explicit provisions (a).

#### a. A threat based on explicit provisions

The protection of the non-believers is weakened when legislative or constitutional provisions interfere in their convictions as it is the case of administering an oath.

"An oath is to swear by God or by any one of his names and attributes that the so-and-so is true or that he undertakes to do so-and-so. Swearing on anything other than this is not recognized as an oath[64]".

---

[63] National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 1621/ Tunisia, Working Group on the Universal Periodic Review Twenty-seventh session 1 - 12 May 2017.
https://documents-dds-ny.un.org/doc/UNDOC/GEN/G1709/038//PDF/G1703809.pdf?OpenElement

[64] IBN HASAN AL-TUSI (M.):*Concise description of Islamic law and legal opinions*, translated by EZZATI (A.), ICAS Press, London, 2008, p. 380.
See also, BANNEUX (N.): « Brèves observations sur le caractère religieux du serment au XIX$^{e}$ siècle à travers l'affaire « Michel » », *in*, HEIRBAUT (D), ROUSSEAUX (X) et WIJFFELS (A) (dir.): *Histoire du Droit et de la justice: Une nouvelle génération de recherches* , Actes des 19$^{ème}$ journées belgo-néerlandaises d'histoire du Droit et de la justice (10-11-12 décembre 2008, UCL, Louvain-la-Neuve), Presses universitaires de Louvain, Louvain-la-Neuve, 2009, p. 500 et s.
See the case of Maurice Michel who as a dentist refused to administer the religious oath in 16 March 1867.

Given that this is a religious act, has an atheist or an agnostic the right to skip this in the name of the freedom of conscience?

But, rarely are those Constitutions that comprise provisions referring to oaths of religious connotation.[65]

Yet, the 2014 Constitution uses the following expression: "I swear by Almighty God" for the President of the Republic (Article 76), the head of the government and the members of the government (Article 89) and the Assembly of the people's representatives (Article 58) who take oath.

If any of the aforementioned persons is a non-believer and does not wish to take God as a witness, will he be sanctioned?

The oath is also obligatory and considered as the bedrock of the ethics codes of other professions such as: judges, lawyers, notaries and other professionals.[66]

Can these professionals, in the name of freedom of conscience, ask not to take oath or not to take it in a religious form?

No provision answers explicitly to this question, although, freedom of conscience and freedom of thought are guaranteed by the Constitution.

However, in comparative law, article 56(2) of the German basic law provides that the President of the Republic can also take the oath "without religious affirmation"[67].

Likewise, the Greek Constitution states that no one shall be compelled to take oath against his religious convictions (article 13.5).

For instance, the Greek Council of State agreed to release a student from taking an oath as a condition of obtaining a master's degree.[68]

Nevertheless, the European Court of Human Rights found that requiring the applicants to reveal their religious convictions in order to be allowed to make a

---

[65] The Greek Constitution provides that every deputy administers oath according to his religion.
Article 59.2 Constitution of Greece, Resolution of 27 May 2008 of VIII[e]reviewing chamber.
http://www.hellenicparliament.gr/UserFiles/f3c70a2349-7696-db-9148-f24dce6a27c820%180-001/galliko.pdf

[66] For example for lawyers, the expression « I swear by Almighty God» is used by article 6 of the law- decree n° 2011 - 79 of 20 August 2011 on the organization of the profession of attorneys. J.O.R.T. n° 63 of 23 August 2011, p.1595.

[67] Basic Law for the Federal Republic of Germany.
https://www.btg-bestellservice.de/pdf/80201000.pdf

[68] Decision GRE-1998-R-002 a) Greece b) Council of State. Cited by UITZ (R.): *Freedom of religion*, Council of Europe, Strasbourg, 2007, pp. 39 - 40.
The Council agreed that:
"[The student] may instead make a solemn promise referring to his or her honor or conscience, even where such an affirmation is not provided by law as a substitute for the religious oath. However, the person concerned must state the religion that he or she professes, the principles of which prohibit him/her from taking an oath, or state that he or she is a non-believer or atheist. This declaration is not contrary to freedom of religion, as it is necessary in order to release the individual from an obligation that would conflict with his or her religious beliefs"

solemn declaration had interfered with their freedom of religion.[69]

Thus, the solution for an atheist or a non-believer is to make a solemn declaration of honor or conscience but without obliging him/her to reveal his/her convictions.

In fact, in a civil State, it is unimaginable to impose a religion or a religious behavior for the benefit of another (non-religious). This way, the Constitution becomes an instrument expressing a religious policy and even more, promoting for a religious ideology.[70]

The State protects the believers against any attack on their faith; it also protects the non-believers against any attempt of imposing to them to adhere to a religion. Then, the freedoms of conscience, thought and expression are the guarantees for atheists, agnostics and a-religious.

### b. A threat based on implicit provisions

Even though the 2014 Constitution provides that Tunisia is a civil State based on the respect of citizenship, religion and State are inextricably linked. The religious aspects in the Constitution either in the preamble or in certain provisions are numerous and this resulted in a contradiction with regard to the civil character of the State.[71]

In this sense, citizenship is hidden by the Constitution, an a-religious or an atheist or a person belonging to another religion can be deprived of his rights.

Besides, the religious aspects are in conflict with what is provided by the Constitution that the State guarantees: "the respect of human rights and equality between all the citizens".

In fact, some people believe in God, other in many, and other are atheists or agnostics. The state has the duty to respect and protect all of them. Particularly, non-believers require special attention.

What about if an individual criticizes what is viewed as sacred ? Are "the teachings of Islam characterized by openness and tolerance" or "the human values and the

---

69 Dimitras and Others v. Greece, 3 June 2010.
Freedom of conscience and religions "was an essential part of any believer's identity, as well as being a precious asset for atheists, agnostics, skeptics and the unconcerned. It had already held that freedom to manifest one's religious beliefs included an individual's right not to reveal his faith or his religious beliefs and not to be obliged to act or refrain from acting in such a way that it was possible to conclude that he did or did not have such beliefs – and all the more so when aptitude to exercise certain functions was at stake".
DOURNEAU-JOSETTE (P): Quel filtrage des requêtes par la Cour européenne des droits de l'Homme ?, Conseil de l'Europe, Strasbourg, 2011, p. 189.

70 AMOR (A): « Constitution et religion dans les Etats musulmans », *in Constitutions et religions, Tunis*, 1994, pp.32- 34. *Cf.* GEORGES (N): « Minorités et liberté religieuse dans les Constitutions des États de l'Orient arabe », *Égypte/Monde arabe*, Troisième série, n°10, 2013, URL : http://ema.revues.org/3206

71 وحيد الفرشيشي: «دسترة الحريات الفردية قراءة حقوقية للدستورالتونسي الصادرفي 27 جانفي 2014» في وحيد الفرشيشي (تحت إشراف)، الحريات الفردية تقاطع المقاربات،الجمعية التونسية للدفاع عن الحريات الفردية، تونس 2014، ص. 56 .

universal and superior principles of human rights"[72] that will prevail in the judge's decision ?

The preamble though referring to human rights is incomplete and contradictory. The Constitution should be addressed to all citizens notwithstanding their beliefs, religions, and thoughts. It should also target the believers and non-believers.

This reading of the Constitution is subjective, because the reference to the notion of « *Umma* », made the Tunisian nation limited to one religion. The « Umma » is a part of an entity which is broad, vague and difficult to define.

Consequently, an agnostic or an atheist is faced with an obstacle which is the fact of criticizing the dominant religion and its elements considered as sacred.

Knowing that article 6 of the 2014 Constitution protects « the sacred »; can a Tunisian atheist express his convictions without being accused of having committed "defamation" of the Islamic religion ?

In fact, article 6 states that the State undertakes to protect the religion but without clarifying which one. This leads to think that the religion in question is the majority religion and the protected sacred is necessarily religious.

Yet, the « sacred » is a vague expression which is not necessarily related to religion. The non-religious sacred exists too and it differs from a society to another, from a country to another and even from a city to another.

Consequently, the State protection of the religion and the prohibition of attacking the sacred weaken the freedom of conscience whenever an atheist or an agnostic expresses his opinions. For these individuals freedom of expression and freedom of thought are sacred, like for a drawer who represents the prophet of any of the monotheistic religions in a caricature while exercising his freedom of expression and art.

The censorship of opinions considered by some people (in Tunisia by public institutions) as offensive to the religion and to the good morals contributes to restricting freedoms of expression, thought, conscience, and religion.

The unclear provision of protecting the "sacred" would pave the way for adopting laws against blasphemy, apostasy and defamation of religions.[73]

---

[72] Preamble of the Constitution of 27 January 2014.

[73] While drafting the current Constitution, a local debate was conducted on freedom of expression and religion because of the exhibition "the spring of Arts" held in June 2012 in the Abdelia Palace of La Marsa. The exhibition was accused of displaying artworks "offensive" to Islam. As a result, a draft law amending and completing specific provisions of the penal Code on the criminalization of offences against sacred values was introduced to the Constituent Assembly in 1st August 2012.

The core of the draft law consisted of the proposal of a new Article 165b of the penal Code that reads as follows: "Anyone whosoever offends the sacred values shall be punished by two years' imprisonment and a two-thousand dinar

The 2014 Constitution guarantees freedom of thought and conscience. This refers to the right to change religion or not to believe in a religion.

Practicing one's freedom of conscience and expressing his a-religious convictions may be sometimes considered harmful to the public order and good morals (article 121 ter penal Code), or violate public decency (article 226 bis penal Code).

In a law case in 2012, a Tunisian citizen has published on a social network his opinion concerning Islam by denying the existence of God, of the Islamic religion and of the prophet of Islam. When arrested by the police, charges were filed on grounds of violating the good morals[74].

Then, it seems that the predominant tendency is to protect freedom of religion, yet, to protect only those who believe in the majority's religion of the society. In this case, not only freedoms of conscience and thought are violated but also the principle of non-discrimination is ignored.

Implementing the freedom of changing one's religion or not to believe in a religion is recognized by the judge. However, this is complicated for an atheist, like in this case, where he is denied the right to express his convictions under the threat of imprisonment. The judge has in fact, limited the exercise of this freedom in the name of protecting the "sacred", considering that criticizing Islam offends the "sacred" of Tunisians[75].

Thus, freedom of conscience encompasses the right to change one's religion or belief or not to believe at all[76]. If the right to not believe has been effectively protected, lawsuits filed against Nessma TV for the well-known case of Persepolis and the case of Jabeur El Mejri for publishing caricatures of the prophet of Islam would have had no meaning.[77]

---

fine (…)".

See the report and the commentary of the Association Article 19: "Tunisia: draft law amending and completing specific provisions of the penal Code on the criminalization of offences against sacred values", legal analysis, August 2012. https://www.article19.org/data/files/medialibrary/341116--08-12/LA-tunisia.pdf

74 The Tribunal of first instance of Mahdia, judgment n°1395 of 28 March 2012, not published.

75 Court of appeal, Monastir, decision n°1056 of 18 June 2012, not published.

76 Resolution 1613/ adopted by the Human Rights Council: "Freedom of religion or belief", 24 March 2011. A/HRC/RES/1613/.

See also, Resolution 1618/ adopted by the United Nations Human Rights Council: "Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief", 24 March 2011.

*Cf.* TEMPERMAN (J.): *Religious hatred and international law: The prohibition of incitement to violence or discrimination*, Cambridge University Press, Cambridge, 2015, p. 7 and following.

77 In May 3, 2012, the Tribunal of first instance of Tunis has convicted the head of the private TV station Nessma for "disturbing public order" and "threatening public morals" by airing an animated film "Persepolis" that some religious leaders said insults Islam and the symbols of the sacred.

Similarly, the Religious Affairs Ministry issued a communiqué expressing concern over the fallout from airing a movie that "personifies the holy lofty God" and calling on the media to respect "the beliefs and religious sanctities and the necessity of commitment to the principles of social peace." As reported by Human Rights Watch.

https://www.hrw.org/news/201113/10//tunisia-drop-criminal-investigation-tv-station-airing-persepolis

In the same context, the union of imams filed a petition against the Tunisian ministry of education claiming the removing of two tasks in a school book. Claimants considered that the tasks contained altered verses of the Coran.

The argument of the imams' union according to which, "the distortion of the Coran is a direct violation of the sacred, given that the Coran constitutes the supreme sacred that must be protected and whose verses are inviolable (...) The Ministry of education is a component of the State which should respect the Constitution in the choice of topics of the official curricula"[78], was confirmed by the Tribunal of first instance of Tunis which ruled that the two tasks violated the "sacred" pursuant to article 6 of the 2014 Constitution.

In this case, the freedom of conscience, expression and thought are seized by the proponents of the protection of the "sacred" to the detriment of the atheist or the agnostic who also believe that their convictions and opinions are sacred.

Even when drafting the present Constitution, inserting the freedom of conscience was challenged. This explains why the provisions of article 6 do not guarantee an effective protection for non-believers. Starting with the vagueness of the expression "sacred" based on which atheists can be brought before justice for the simple criticism of the "sacred" of the dominant religion.

In contrast with the Moroccan legislature,[79] the Tunisian law does not explicitly criminalize apostasy or atheism. Two countries address not only the issue of apostasy but punish apostates in their penal Codes, are the Sudan[80] and Mauritania[81].

In practice, the justice and the police refer to Penal Code general provisions as a basis to accuse someone of "apostasy" or of "atheism", although these acts are not criminalized by the criminal law.

Therefore, clinging to conservative provisions, with a religious connotation, weakens the freedom of religion, such as the freedom of conscience.

---

For the case of Jabeur El Mejri, the Tribunal of first instance of Mahdia, judgment n°1395 of 28 March 2012, not published. He was convicted for the same reasons as the private TV Nessma.

78 Tribunal of first instance of Tunis n° 2017 / 76087 of 3 April 2017, summary judgment, not published.

79 Article 220 paragraph 2 of the Moroccan penal Code does not address apostates, but, those who are guilty of trying to subvert the belief of a Muslim, or those who try to convert a Muslim to another religion. The punishment varies between a fine and imprisonment.

80 In the Sudanese penal Code of 1991, article 126. 2, reads: "Whoever is guilty of apostasy is invited to repent over a period to be determined by the tribunal. If he persists in his apostasy and was not recently converted to Islam, he will be put to death."

81 The penal Code of Mauritania of 1984, article 306 reads: "(…) All Muslims guilty of apostasy, either spoken or by overt action will be asked to repent during a period of three days. If he/she does not repent during this period, he/she is condemned to death as an apostate, and his belongings are confiscated by the State Treasury."

## 2. Guarantees for the protection of the "minorities" convictions

International instruments in the field of human rights protect the freedom of religion along with the freedom of thought and of conscience[82]. It protects theistic, non-theistic and atheistic beliefs[83], as well as the right not to profess any religion or belief. It comprises the right to change one's religion and belief, and the right to manifest one's religion or belief.

If we consider that in the case of Jabeur El Mejri, by attacking the prophet and the values of sacred by means of photos and writings, this caused a "division between the Muslims", the Human Rights Committee of the UN does not share the same point of view.

Actually, in its general comment on article 19 of the international covenant on civil and political rights[84], the Committee considered that freedom of expression embraces even expressions that may be regarded as deeply offensive for the believers of a particular religion, unless these expressions refer to "national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"[85].

Consequently, the unity of the nation will not be in danger as long as critics or the expression of atheistic opinions do not target the believers or incite to hatred and violence.

What is freedom of conscience? How can it reduce the resistance of the national particularism in front of the universality of the minoritized' rights?

First of all, the answer can be found in the 2014 Constitution:

Articles 6 (freedom of conscience) and 31 (freedoms of thought and expression) are interrelated and interdependent; they protect all the convictions including those of non-believers.

Freedom of conscience differs from the freedom of religion because it entails the right to choose a religion, the right to choose a philosophy or morals which do not belong to any divine power. It, therefore, allows an individual to act voluntarily without the interference of the State.[86]

---

[82] For example, the UN Declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief of 25 November 1981. Its Article 1 guarantees freedom of religion or belief; in addition, it states that "this right shall include freedom to have a religion or whatever belief of his choice" and determines, in Article 1(2), 2 that "no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice".

[83] UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4.

[84] UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34.

[85] See the Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, 11 January 2013. A/HRC/2217//Add.4

[86] See judgment n°44801 of 12 December 2017, Tribunal of first instance of Kef (not published).
« Freedom of conscience is one of the universal principles of natural law and positive law. It is guaranteed by article

Actually, freedom of conscience like freedom of religion "prohibits laws or policies that have the purpose or effect of favoring or burdening some religious beliefs or practices over others. The state may not require a course of action for the purpose of compelling religious compliance or attempting religious indoctrination. Rather, respect for freedom of religion requires that governments avoid laws or policies that seek to enforce the practices of a particular religion or indoctrinate citizens' religious beliefs[87]".

Moreover, article 6 of the 2014 Constitution provides that the State prohibits "accusations of apostasy". Since the State is committed to prosecute people for accusing individuals of apostasy, we can say that public authorities must protect atheists and a-religious.

Instead of striving to prioritize the Arab and Islamic culture, Tunisian judges should refer to the universal human rights in order to take into consideration the humanity of the litigant and his citizenship and not his convictions or his belonging to a religion.

What is more dangerous for the society, the public order and good morals or inciting to murder on the basis of the publically declared atheism of someone?

Courts shall hold liable those who threaten persons which convictions differ from the dominant one, instead of prosecuting atheists, agnostics and a-religious.

The judge is in fact committed to respect and implement the principle of non-discrimination as enshrined in article 21 of the Constitution. He ensures "the supremacy of the Constitution", "the sovereignty of law", and "the protection of rights and freedoms" according to article 102 of the Constitution.

Thus, article 166 of the penal Code protects the freedom of conscience by stating that:

"Is sentenced to 3 years of imprisonment, whoever deprived of legal authority on a person, compels him by violence or threats to practice or to refrain from practicing a religion".

The criminalization of forcing someone to abandon or to adhere to a religion reinforces the obligation of public authorities to cling to the universal values of human rights in order to respect religious freedoms.

---

6 of the Tunisian Constitution, in continuity with international instruments of human rights which imply that the individual believes according to his personal convictions. The Court refuses to deprive the defendant from the right to the guardianship of her children on the basis of her marriage with a non-Muslim.

Such a restriction would prevent the children from the right to choose their religion, which would oblige them to follow a lifestyle and to adopt a belief system that they could reject once they reach the age of majority. It is a situation that the Court rejects so that the children would neither be indoctrinated nor directed towards another religion".

87 RYDER (B.): "State neutrality and freedom of conscience and religion", *The Supreme Court Law Review*, Osgoode's annual constitutional cases conference, vol. 29, 2005, pp. 171 - 172.

Nevertheless, Arab Constitutions like the Tunisian Constitution, only speak of freedom of religion. But, they do not mention "negative freedom of religion" which refers to a person's right not to be obliged to believe in a certain religion, or a God or Gods, to relinquish a religious belief, or to take part in any religious worship.[88]

*Then, does conscience encompass the one of the believer and the non-believer alike?*

Because, "if constitutional texts do not tackle the issue of atheism, there will be no room left in the institutional practice or in the social space for the atheist and even for the Muslim who converts to another religion. We call the latter apostate"[89].

If we consider that freedom of conscience as guaranteed by the 2014 Constitution comprises the disbelief, a Muslim who converts to another religion or who does not believe in any religion or in God will not be prosecuted.

In fact, The fact that the Tunisian legislature does not criminalize atheism, this reinforces the freedom of conscience.

Consequently, by providing in article 1 of the 2014 Constitution that Islam is the religion of Tunisia, this does not lead to the non- recognition of other religions.

Thus, this constitutional provision should not lead to fuel public distrust towards non-believers or atheists. Whenever, the State protects a religion, this should mean that all the public institutions will be in the service of every citizen by respecting all the convictions on the one hand, and by protecting religious and non-religious practices and believers and non-believers and not the religion *per se* on the other hand.

In the USA, former President Barack Obama signed in 2016 a religious freedom bill.

This bill amended "the Frank R. Wolf International Religious Freedom Act" by virtue of which the rights of non-theists as well as religious minorities will be enshrined.

According to the new law, non-theists, humanists, and atheists targeted because of their beliefs have been recognized as a protected class.

Actually, "the freedom of thought and religion is understood to protect theistic and non-theistic beliefs as well as the right not to profess or practice any religion"[90].

---

[88] Robbers (G.): *Religion and law in Germany*, Kluwer Law International, The Netherlands, 2010, p. 97.
See the Constitution of the Tunisian monarchy adopted on 26 April 1861 which guaranteed this right for non- Muslims in Chapter XII.

[89] ZIRY (J-P.): *Les Etats arabes : Des Constitutions incohérentes, inégalitaires et restrictives*. Des Libertés (Religions et Citoyens), Lulu.com, s.l, 2011, p. 105.

[90] H.R.1150 – "*Frank R. Wolf International Religious Freedom Act*", 16 December 2016, n°114-281. https://www.congress.gov/bill/114th-congress/house-bill/1150
Title VI section 2

This law is a significant step toward full acceptance and inclusion for non-religious individuals, who are still far too often stigmatized and persecuted around the world.[91]

That is why many discriminatory measures should be repealed. In fact, freedom of conscience "bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert" (...), it also guarantees that "the same protection is enjoyed by holders of all beliefs of a non-religious nature[92]".

If the law allows the State to interfere in the convictions of individuals which led to stigmatization and discrimination against these persons, it allows also interference in the private life of others by criminalizing certain acts.

[91] According to Mr. Roy Speckhardt, the executive director of the American Humanist Association which lobbied for the inclusion of atheists in the legislation.
https://www.independent.co.uk/news/world/americas/atheists-legal-protection-us-religious-freedom-bill-signed-barack-obama-a7489641.html

[92] UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, paragraph 5.

# ( Second part )

## The law criminalizes the acts of "homosexual" persons

Law regulates freedoms and legal provisions specify the scope and conditions of exercising these freedoms through which it may be judicially protected.

The judicial protection of these freedoms depends on the penalty imposed. The latter is not disconnected from the social values which violation give rise to punishment. Thus, "law both reflects and formulates social reality. (...) Law is the most definitive exposition of the fundamental norms of a society[93]."

Traditionally, a distinction had been drawn between "natural crimes", *mala in se* crimes, and "crimes created by people" or *mala prohibita* crimes with regard to their aspects.[94]

The former refers to "those acts whose evil or harmful nature was so blatant that the law was really only confirming the negative nature of the act and laying down specific rules as to what was society's official response, for instance, the penalty that would be imposed".[95]

The latter are acts "that were forbidden even though their prohibitive status would not be automatically recognized, with the possibility of differences between different societies and cultures".

They are "specifically prohibited" and not "automatically prohibited" because they are not "inherently harmful". The society may or may not sense the need to deny them legal legitimacy.

As a consequence, criminal law can be understood as the form of State coercion appropriate to the stability of social relations. But, we must mention that the "State coercion" may diminish the exercise of individual freedoms, indeed, "institutionalized practices of coercion like the criminal law are seen to be justified only to the extent that they respect individual freedom, invading the individual sphere only so far as it is strictly necessary[96]".

As a result, authority abuses with regard to limiting individual freedoms must be punished and limitations to rights and freedoms "can only be put in place where necessary in a civil democratic State[97]".

In sum, criminal law aims at punishing prohibited behaviors by the law. The criminalization of an act is determined according to the society's needs on the basis that criminal sanctions prevent harm or the risk of harm in a society.

---

93 SHELEFF (L.): *Social cohesion and legal coercion: A critique of Weber, Durkheim, and Marx*, Rodopi, Atlanta, 1997, p. 319.

94 L. BERG (B.): *Policing in Modern Society,* Gulf Professional Publishing, Boston, 1999, pp. 11 - 12.

95 SHELEFF (L.): *Ibid.,* pp. 177 - 187.

96 CARVALHO (H.): *The preventive turn in criminal law*, Oxford University Press, Oxford, 2017, p. 41.

97 Article 49 of the 2014 Constitution.

But, it occurs that criminalizing specific individual behaviors contradicts with the requirements of "a civil and democratic State". We are faced in this case with the "tyranny" of a dominant social norm as enhanced in the penal provisions reflecting the social context (A). This "tyranny" has consequences on the rights and freedoms of certain individuals (B).

## A. THE CAUSES OF THE CRIMINALIZATION OF HOMOSEXUALITY

Legal provisions are established in order to "punish, tolerate, or, very rarely to protect the sexual and emotional attraction of individuals toward the persons of the same sex[98]".

In Tunisia, masculine homosexuality is sanctioned by the society and by the law: "homosexuality was considered socially and morally as an evil, worse than the prostitution, sodomy used to represent in the traditional penal system as a serious crime against the morality and sanctioned by severe punishments[99]".

Sexual practices between consenting adults of the same sex (sodomy as the word used by the legislature), conducted in private, are "punished by imprisonment of 3 years" under article 230 of the Penal Code. The latter which criminalizes "sodomy" is referred to as a "homophobic" law provision.[100] However, this article does not clarify the meaning of "sodomy".

The French and Arabic versions of article 230 use the words "sodomy"/ "*liouat*" which refer to a religious repertoire. One refers to the destroyed city Sodom and the other refers to the people of Lot.

Besides, "sodomy" is seen as immoral and non-procreative or unnatural sex[101]. It is also classified in the category of immoral crimes because it is deemed as criminally harmful to the society.

Furthermore, the criminalization of "sodomy" is based upon "ratio socialis"[102]. This norm aims at "fighting against sexual deviances", to "prevent sodomy" and to

---

98 BORRILLO (D.) : *Homosexualités et Droit,* les voies du Droit, P.U.F. Paris, 1998, p. 1.

99 LARGUECHE (A.): Les ombres de la ville *: pauvres, marginaux et minoritaires à Tunis (XVIIIème et XIXème siècles)*, Centre de publication universitaire, Tunis, 2002, pp. 309-310.

100 FERCHICHI (W.): « L'homosexualité en Droit tunisien ou de l'homophobie de la règle juridique », *in*, LACH'HEB (M.) et FASSIN (E.) (dir.), *Être Homosexuel au Maghreb*, IRMC- Karthala, Paris, 2016, p. 171 et s.

101 M. CUSACK (C.): *Animals, deviance, and sex*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2015, p. 4.
LABIDI THAMRI (M.) considère les comportements homosexuels comme des actes déviants et contre nature, dans son mémoire de fin d'études intitulé « Le crime moral dans la législation tunisienne », École Supérieure de la Magistrature, Tunis, 1995. (En langue arabe). Cité par FERCHICHI (W.): « L'homosexualité en droit tunisien ou de l'homophobie de la règle juridique », *in*, LACH'HEB (M.) et FASSIN (E.) (dir.), *Être Homosexuel au Maghreb*, IRMC- Karthala, Paris, 2016, p. 171.
عبد الله الأحمدي: قانون جنائي خاص، الجرائم الأخلاقية، الخدمات العامة للنشر مطبعة الوفاء ، تونس، 1998، ص. 135.

102 FERCHICHI (W): *Ibid.*, p. 171.

"combat this moral deviance[103]".

Social stigmatization of homosexuality has led to the fact that homosexual persons live in fear of being identified, "homosexual desires internalized deep levels of shame and fear. In their families, schools, and religious organizations, gay individuals were taught that being homosexual was wrong and abnormal[104]". As a matter of fact they have chosen to stay "in the closet" especially in patriarchal societies.

In fact, according to this vision, "sodomy" endangers the social unity and the family because it does not guarantee the continuity of the race. Thus, non-reproduction in itself disqualifies a male from his status of a masculine adult.

The Tunisian society as most of the societies promotes the traditional model of the family consisting in a heterosexual couple and the biological or adopted children. Then, homosexuality is seen to be threatening the institution of the family because it contradicts with the dominant norms which are also subject to social and historical changes.

Therefore, one of the consequences of criminalizing "sodomy" is that homosexuals[105] have chosen to remain invisible in the society on the one hand. They have also chosen not to reveal their sexual identity or orientation for several reasons: social, religious, legal and even very often professional.

## B. THE CONSEQUENCES OF THE CRIMINALIZATION OF HOMOSEXUALITY

The criminalization of homosexuality led to the fact that homosexual persons chose to remain invisible (1). But, once they reveal their identity they are brought to Court and very often deprived of the right to an equal treatment before the justice (2). They may also be condemned and imprisoned on the basis of evidence violating their physical integrity (3).

---

[103] BOU AZIZ (M) : « L'article 230 du Code Pénal », *R.J.L.*, 1973, p. 20, 23 et 27. Cité par FERCHICHI (W): *Ibid.*, p. 171.

[104] HALL (E.) and *al.* (editors): *Sex and society* (volume 2), Marshall Cavendish Reference, New York, 2010, p. 377.

[105] The word "homosexuals" differs from the expression "men having sex with men (MSM)". The latter refers to sexual behaviors and not to a sexual identity.
Minoritized persons in this case are: gays, lesbians and bisexuals who identify themselves as such and fear stigmatization, discrimination and prosecutions for homosexuality.
MSM do not identify themselves as homosexuals, but they still claim their heterosexuality in order to preserve their masculine "identity".
HEBERT (M.) et al. (dir.): Le développement sexuel et psychosocial de l›enfant et de l›adolescent, De Boeck Superieur, Paris, 2017, p. 208.
*Cf.* AGGLETON (P.): *Men who sell sex: International perspectives on male prostitution and HIV/AIDS*, Temple University Press, Philadelphia, 1999, p. 41 and p. 195.

### 1. The invisibility chosen by homosexuals

Homosexuals face oppression, harassment, society's stigmatization and a wide array of discriminatory laws and practices. Most importantly, attitudes of family and society are a bigger problem than fear of being persecuted. That is why most of homosexuals live their sexual life in the dark.

"The anxiety and fear that the family might somehow discover their true identity remains one of their most menacing concerns. Therefore their homosexual life is kept tightly private"[106].

In fact, "what is also striking while observing the Tunisian social codes is the silence made about homosexuality. As if it did not exist[107]". Thus, silence "is a symbol of indifference, and indifference a special kind of disdain"[108].

This indifference towards homosexuality has strengthened the invisibility of homosexuals who "since nobody recognized homosexuality as even existing, they can get away with things we cannot get away with here. But if you start talking about homosexuality, they get very uncomfortable[109]".

Once visible, homosexuals are recognizable through a set of distinctive features that distinguish them from their fellow citizens. They can be then subjected to discriminatory practices that can vary between the criminalization of their acts and the violation of their physical integrity[110].

### 2. The violation of the right to an equal treatment before the justice

"The judiciary is an independent authority that ensures the prevalence of justice, the supremacy of the Constitution, the sovereignty of law, and the protection of rights and freedoms[111]". Yet, criminalizing the acts of homosexuals has had an impact on the right of certain individuals to a fair trial. In fact, the qualification provided by the judge with regard to persons suspected of having committed the act of sodomy under article 230 of the penal Code is stereotyped (a) and led the judge to base his sentence on circumstances (b).

---

106 KHALAF (S.) and H. GAGNON (J.) (Editors): *Sexuality in the Arab World*, Saqi, San Francisco, 2014, p. 250.

107 MARTIN (F.) : « Ecran pour tous ? Personnages gays dans trois films phares tunisiens », *Africultures*, n°96, décembre 2013, L'Harmattan, Paris, p. 109.

108 DRESCHER (J.) and LINGIARDI (V.) (Editors): *The mental health professions and homosexuality: International perspectives,* CRC Press, New York, 2003, p. 109.

109 ROSCOE (W.) and MURRAY (S.) (Editors): *Islamic Homosexualities: Culture, History, and Literature*, New York University Press, New York, 1997, p. 17.

110 WIRTH (L.): "The problem of minority groups", *in* LINTON (R.) (dir.) *The science of Man in the world crisis*, Columbia University Press, New York, 1945, p. 347. See also, ZAHED (L-M.): *L.G.B.T. musulman.es, du placard aux Lumières !,* Editions CALEM, Marseille, 2016, p. 82.

111 Article 102 of the 2014 Constitution.

### a. The stereotyped qualification of "homosexual" persons

The acts of homosexual persons are criminalized by article 230 of the penal Code which uses the word sodomy or *liouat*. This word refers to masculine homosexuality, the Arabic version of the article[112] uses also the word *El Mousahaka* that refers to feminine homosexuality.

"Before the idea of different sexual orientations gained widespread acceptance, sodomy was usually considered only as a deviant sexual act, rather than as part of a homosexual identity. The word sodomy originates from the ecclesiastical Latin term pecatum Sodomiticum, meaning "sin of Sodom""[113].

Many have made a close association between sodomy and masculine homosexuality, while "Some experts believe that the term sodomy has been inappropriately linked to homosexuality, when it should have been associated with non-consensual sexual intercourse[114]".

In Europe, the term sodomy was codified into secular criminal law in the 16th century[115]. It included acts such as anal sex, as well as referencing sexual acts between both men and women and same sex partners. In the US it became a serious felony in the 19th century, then an act equated with homosexuality in the 20th century.[116]

Applying criminal law to homosexuality presents a risk. General and unclear law provisions lead to unlawful arrests and public authorities abuses. These provisions expose the arrested to humiliating medical practices.[117]

The term "sodomy" is vague and can be interpreted in many ways. When arresting people for being suspected of having committed "sodomy", the text leaves

---

[112] The exact translation of the Arabic version of article 230 of the penal Code reads:
"*E'liouat* (masculine homosexuality) or *El Mousahaka* (feminine homosexuality), if they are not committed in the previous cases, are punished by three years of imprisonment".
See FERCHICHI (W.) : « L'homosexualité en Droit tunisien ou de l'homophobie de la règle juridique », dans le cadre d'un Ouvrage collectif : « Être Homosexuel au Maghreb », dir. Monia Lach`heb and Eric Fassin, IRMC- Karthala, Paris, 2016, p. 171 and following.

[113] HALL (E.) and *al.* (editors): *Sex and society* (volume 3), Marshall Cavendish Reference, New York, 2010, p. 824.

[114] HALL (E.) and *al.* (editors): *Ibid.* p. 824.

[115] See BETTERIDGE (T.): *Sodomy in early modern Europe*, Manchester University Press, Manchester, 2002.

[116] R. MILLER (W.) (Editor): *The social history of crime and punishment in America*: *A-De*, SAGE, Los Angeles, 2012, p. 1695.

[117] FERCHICHI (W.): "Law and homosexuality: Survey and analysis of legislation across the Arab world", working paper prepared for the Middle East and North Africa, consultation of the Global Commission on HIV and the Law, 27 - 29 July 2011.
http://bibliobase.sermais.pt:8008/BiblioNET/upload/PDF/0576.pdf
http://www.hivlawcommission.org/index.php/working-papers/law-and-homosexuality-survey-and-analysis-of-legislation-across-the-arab-world/download
Quoted by PATTERSON (D.), EL FEKI (S.) and MOALLA (K.): "Rights-based approaches to HIV in the Middle East and North Africa region" *in* FREEMAN (M.), HAWKES (S.) and BENNETT (B.) (Editors), *Law and Global Health: Current Legal Issues*, Oxford University Press, Oxford, 2014, p. 169.

"vague exactly what actions, behaviors, movements, etc. fall within the sphere of homosexual acts. As such, these materials can be interpreted variously, one is free to interpret a homosexual act as only "homosexual sex" or as any act involving members of the same gender with a sexual aim or dimension (kissing, oral sex, foreplay, etc.)"[118].

But, one should remind that sodomy deals with both homosexual and heterosexual orientations. It is neither an exclusively homosexual practice nor a "mandatory" condition in a homosexual relationship.

The idea that associates sodomy, only, to homosexuality is often linked to the non -reproductive character of the anal sex. Thus, enforcing article 230 by the Courts aims at sanctioning masculine homosexuality.

Traditionally, in American criminal law, by referring to different States' statutes[119], sodomy was defined not necessarily by reference only to same sex relationships, but whenever "a person who carnally knows in any manner any animal or bird, or carnally knows any male or female person by the anus, or with the mouth, or voluntarily submits to such carnal a dead body, is guilty of sodomy".[120]

The term "sodomy" was then replaced by "deviate sexual intercourse" which "is not criminal if both participants consent and each is of sufficient age and mental capacity to give consent and they conduct their relations in private and create no public nuisance" according to "Model Penal Code Annotated".[121] However, when this act is practiced in public this will be considered as obscene: "Open and gross lewdness and lascivious behavior"[122].

Considering the ambiguity of the provisions criminalizing "sodomy", the judge enforces article 230 in a stereotypical way by digging in his conservative culture.

The stereotypical qualification of the judge is visible in the expressions used in his decisions towards certain behaviors of certain groups.[123]

---

[118] FERCHICHI (W.): *Ibid.*, p. 5.

[119] States which adopted sodomy laws to specifically target homosexual couples are: Kansas, Oklahoma, Montana and Texas.

[120] KLOTTER (J-C): *Criminal law*, Anderson Publishing Company, Cincinnati (Ohio, USA), 2001, p. 145.

[121] "Deviate sexual intercourse is not criminal if both participants consent and each is of sufficient age and mental capacity to give consent and they conduct their relations in private and create no public nuisance".
KLOTTER (J-C): *Idem*, p. 147. See,"Model Penal Code Annotated" 213.2,1985.

[122] Commonwealth vs. Robert Wardell 128 Mass. 52 (1880). "*Open and gross lewdness and lascivious behavior*" is supported by proof that a man intentionally and indecently exposed his person, without necessity or reasonable excuse therefor, in the house of another, to a girl eleven years old. http://masscases.com/cases/sjc/128/128mass52.html

[123] See EDGARD (A-Z.) : « Pourquoi le juge intègre-t-il des stéréotypes culturels dans son discours ? » *Signes, Discours et Sociétés* [en ligne], n°4. Visions du monde et spécificité des discours, 29 décembre 2009. http://www.revue-signes.info/document.php?id=1280. ISSN 13088378-.
BOURHIS (R-L.) et LEYENS (J-Ph.): *Stéréotypes, discrimination et relations intergroupes*, Editions Mardaga, Sprimont, 1998.

It is obvious that the Tunisian judge enforces the rule according to the nature of the society. The latter is a conservative one which clings to the teachings of Islam and does not accept the "deviant" behaviors.

Masculine and feminine homosexuality are criminalized by article 230 of the Penal Code, but it is essentially the masculine homosexuality that has been subject of judicial repression. The elements of the act of sodomy are assessed on a case by case basis.

Citing the different Court decisions in which boys suspected of having committed the act of sodomy under article 230 of the penal Code, we noticed that their designation is stereotyped.

In a judgment dated 10 December 2015[124], young boys were convicted of imprisonment for masculine homosexuality under article 230. In this case, the term *mithly* (homosexual) was used, but without any importance since the words "homosexual" and "sodomite" were associated and used as synonyms.

The expressions used in the judge's decision are also stereotyped and derive from a conservative and religious repertoire according to which a homosexual is necessarily "effeminate"[125]. To support his qualification of the boys convicted, the judge mentioned that "dresses were found among the forfeited objects" which according to him were to be used "to commit the perverted acts for which the accused were gathered".

First of all, this stereotyped reasoning is incomplete because the judge charges the passive sodomy and not the active one based on the medical test he ordered to collect evidence on practicing anal sex between the accused boys and more precisely to prove that they have been practicing "passive sodomy".[126]

Secondly, the judge uses the term *liwat* or *choudhoudh* (sodomy or sexual deprivation).[127] Therefore, he confirms on the one hand that these acts are considered as one of the prohibited sins by the religion « *foujour* » or « debauchery». On the other hand, he considers these acts as "unnatural practices".

This can be explained by the fact that in the Arab culture and literature dealing with the passive sodomy, the homosexual who is convicted is the passive one because of his position of inferiority as assimilated to a woman.

---

[124] Tribunal of first instance of Kairouan, judgment n°6782, 10 December 2015. Not published.

[125] «اعترف أنه مثلي ولوطي وأنه يحس أن الهرمونات الأنثوية بجسده تغلب عليه». «كذلك تم العثور على فساتين نساء تنبئ عن الأفعال الشاذة التي تجمع لأجلها المتهمون ».

[126] « وحيث تعززت اعترافات المتهمين بما حققه الطبيب الشرعي من أن جميعهم يحمل بدبره علامات تعوّد قديم على اللواط السلبي و ظهور آثار داخل الشرج تدل على إيلاج عضو كالذكر في الأيام الأخيرة».

[127] «اعتادو ممارسة الاتصال الجنسي غير الطبيعي.... شذوا عن الممارسات الجنسية الاعتيادية... و بتحقق أفعال الفجور المتمثلة في تعاطي اللواط...»

According to the conservative tendency, the active one (*loti*) is more masculine (*fuhuliyyah*) than the passive one (*ma'bun*, *mukhannath*) who is seen as effeminate and humiliated.[128]

The passive role unlike the active and dominant is socially condemned and rejected. The act of passive sodomy is viewed as a deviance from the dominant orders.[129]

By analyzing these expressions of the judgment we can deduce that the judge interpretation of article 230 is the following:

"The suspected of sodomy under article 230 of the penal Code is convicted when the anal test proves he was sodomized". The judge enforces this article only for passive homosexuality.

He reads the rule in accordance with his social education and because he was born in an Arab and Muslim society.[130]

Thus, the judge is moving away from the principles of neutrality, impartiality and equality before the justice, because he is implementing pre-established concepts prescribed by the dominant culture on the basis of certain circumstances in order to punish persons suspected of having committed the act of sodomy.

### b. Sentencing "homosexual persons" on the basis of circumstances

In many Court decisions in which persons accused of having committed the act of sodomy, the judge decides on the basis of evidence that justifies his stereotyped reasoning.

In the case of Kairouan of 10 December 2015, one of the accused was convicted of 6 months imprisonment for indecent behavior pursuant to article 226 of the penal Code. The accusation was based on video sequences showing men having sex with men which the police found on his laptop.[131]

---

[128] See Shihab-al-Din Al-Tifashi, décédé en 1253, who wrote about sexual relationships in the Arab-Muslim society with stories on masculine and feminine homosexuality. AL- TIFASHI (S-E-A): *Nozhat al- albab fima la youjad fi kitab (The Delight of Hearts: Or What You Will Not Find in Any Book)*, Riad el-rayyes books Ltd. United Kingdom, 1992, p. 163 et s.

ABU-SAHLIEH (S-A): *Religion et Droit dans les pays arabes*, Presses Universitaires de Bordeaux, Bordeaux, 2008, p. 204.

[129] RÖMER (T) et BONJOUR (L) : *L'homosexualité dans le Proche-Orient ancien et la Bible*, Labor et Fides, Genève, 2005, p. 43.

[130] Quoiqu'un auteur considère, que l'interprétation sur laquelle se base la condamnation de la sodomie en Islam est fausse, parce que l'acte du peuple de Lot n'était pas consenti et s'accompagnait d'autres actes qui menaçaient l'intégrité physique des autres et qui pouvait aller jusqu'au viol des hommes par des hommes.

YOUSSEF (O): *Confusions d›une musulmane, la succession, le mariage et l'homosexualité* (en arabe), publications de dar sahar, Tunis 2013, p. 185 et p. 188.

« فاحشة قوم لوط لم تكن مجرد اتيان الرجال بل تجسمت في القيام بأفعال أخرى تهدد أمن الآخرين و سلامتهم في أجسادهم و أنفسهم».

« فاحشة قوم لوط قد تتجاوز الضرب و الحذف بالحجر و الشتم إلى مواقعة الرجال عنوة أي إلى اغتصابهم».

La version traduite en anglais, YOUSSEF (O): *The Perplexity of a Muslim Woman: Over Inheritance, Marriage, and Homosexuality*, translated by Lamia BEN YOUSSEF, Lexington books, Lanham, Maryland, 2017.

في نفس السياق: الطاهر بن عاشور: التحرير و التنوير، تونس، الدار التونسية للنشر، 1984، ج.20 ص. 240.

[131] «و حيث تم حجز جهاز حاسوب خزّن به مقطع فيديو يظهر ذكورا يمارسون اللواط.

و حيث أن المتهم قد خزّن بحاسوبه المحمول صورا لذكران يطؤون بعضهم من أدبارهم بشكل يسهل نشرها وترويجها ...»

Tribunal of first instance of Kairouan, judgment n°6782, 10 December 2015. Not published.

Similarly, in a case decided by the Tribunal of first instance of Sfax, on 9 March 2016, one of the accused admitted he was to receive 60 dinars for having sex with the other accused. Among the evidence, the police found two non-used condoms and a lubricant gel.[132]

Knowing that these two items are legally commercialized in drug stores all across the country, unless, the pharmacist would verify whether the customer is homosexual or not.

Nevertheless, national tribunals have been admitting evidence that violate the right to the respect of private life and the violation of the prohibition of torture and inhuman and degrading practices.

In a judgment issued by the Tribunal of first instance of Sousse, on 22 September 2015, a 22-year-old student was sentenced to one year in prison for engaging in "homosexual relations" after forcing him to undergo an anal examination to establish "proof" of anal sex.[133]

Furthermore, the judge continues to ignore the arbitrary arrests against "homosexual" persons. As Amnesty International reported, "Gay men in Tunisia are often arrested without any evidence that they engaged in same-sex relations, and hardly ever when caught in the act. Instead, most arrests are carried out based on gender stereotypes, such as appearance and behavior, with gay men who are considered effeminate and transgender women targeted most"[134].

The normalization of the interference in private life "encouraged" by the judge, has made that article 230 of the penal Code turned into a repressive means for the police, who even in the absence of any sexual relations between same sex persons, may look for other evidence confiscating the mobile phone or the laptop of the suspected.

"Those interviewed by Amnesty International said that it is often enough for two men to be sitting in a car or walking in the street in an area known to be frequented by gay men to be questioned, harassed and detained by the police. In many cases, gay men who conform to established norms of masculinity are released, while

---

[132] Tribunal of first instance of Sfax, judgment n° 1757 of 09 March 2016. Not published.
«وحيث تقرر ادانتهما بالمحجوز ... وحيث أن إنكار المتهمين جلسة مردود عليهما» .

[133] See the report of Amnesty released in 2015: "Assaulted and accused: Sexual and gender-based violence in Tunisia", especially the part on "violence against LGBTI people", p. 34 and following.
https://www.amnestyusa.org/files/tunisia-assaulted-and-accused-report.pdf
See for the case of the 22-year-old student: "Amnesty International, urgent action, student jailed for homosexual acts" (Index: MDE 305 ,(2015/2586/ October 2015, available at: https://www.amnesty.org/en/documents/mde302015/2586//en/

[134] "Assaulted and accused: Sexual and gender-based violence in Tunisia", especially the part on "violence against LGBTI people", Amnesty International, 2015, p. 36.
https://www.amnestyusa.org/files/tunisia-assaulted-and-accused-report.pdf

those considered effeminate are detained[135]".

Likewise, in the case of the Tribunal of first instance of Sfax[136] and the case of the Tribunal of first instance of Tunis of 19 June 2013[137], intimate conversations were read by the police and quoted in the judgment.

Thus, the risk of criminalization of the "sodomy" act which is not clearly defined by the legislature, has brought about that certain elements while being legal (the use of condoms), have become as means of condemnation. Likewise, authorities use illegally obtained evidence (anal test) which violates the physical integrity.

### 3. The violation of the physical integrity

The UN High Commissioner for Human Rights has been reminding that lesbian, gay, bisexual, transgender and intersex people across the world often face grave human rights violations, including torture, sexual violence, arbitrary detention, and even killing, all because of who they are[138].

Actually, when the United Nations Committee against torture (the Committee) examined the third periodic report of Tunisia in 2016 in which it considered illegal the use of forced anal examinations or "Forensic examinations" as an attempt to find "proof" against people accused of homosexual conduct[139] because it violates the principle of prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

The Committee expressed its concerns "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". The Committee also noted that although the suspected have the right to refuse to submit to such examinations, it is concerned about "information that several persons have accepted them, under threat from the police, who contend (...) that a refusal would be interpreted as incriminating"[140].

In the same context, the Special Rapporteur on torture and other cruel, inhuman

---

[135] Amnesty International, 2015, *Ibid.*, p. 36.
https://www.amnestyusa.org/files/tunisia-assaulted-and-accused-report.pdf

[136] «وحيث أجرى الباحث معاينة لإرساليات قصيرة على هاتف وليد مع نجم ...(المتهم الثاني)».
Tribunal of first instance of Sfax, judgment n°1757 of 09 March 2016. Not published.

[137] Tribunal of first instance of Tunis n°12799 of 19 June 2013. Not published.
The Tribunal admitted evidence based on electronic messages sent on *facebook*.

[138] "Experts unite to end human rights violations based on sexual orientation and gender identity", 7 April 2016.
http://www.ohchr.org/EN/NewsEvents/Pages/UnitedtoendviolenceLGBTI.aspx

[139] The Committee against Torture considered the third periodic report of Tunisia (CAT/C/TUN/3) and its additional updated report (CAT/C/TUN/3/Add.1) at its 1398th and 1401st meetings (CAT/C/SR.1398 and 1401), held on 19 and 21 April 2016. At its 1420th and 1421st meetings, held on 6 May 2016, the Committee adopted concluding observations.

[140] Committee against Torture, Concluding observations on the third periodic report of Tunisia, 2016, paragraph 41, p. 10.

or degrading treatment or punishment of the UN Human Rights Council drew attention to practices of torture and ill-treatment of lesbian, gay, bisexual and transgender persons in detention: "Lesbian, gay, bisexual and transgender persons who are deprived of their liberty are at particular risk of torture and ill-treatment, both within the criminal justice system and in other contexts such as immigration detention, medical establishments and drug rehabilitation centers. Criminal justice systems tend to overlook and neglect their specific needs at all levels[141]".

Therefore, the question deals in this case with the legitimacy and legality of the means used to obtain (intimate) information. Are the judiciary police vested with powers to carry out with an expert the forensic anal examinations "to prove" that the suspect has had sexual relations with same sex persons? (The legitimacy of the proof). Is this means of evidence legal?

"The evidence presented must be credible and reliable. A prosecution cannot be based on mere possibilities, suspicion, or speculation (...) it must comply with strict rules of admissibility in order to bar the use of improper, misleading, or prejudicial material[142]".

The legality of the evidence is questioned in the case of two arrested men suspected of having committed acts of sodomy under article 230 of the penal Code, whenever they are forced to undergo medical examinations "to prove" anal sex intercourse.

This situation is in contradiction with the principle of physical integrity or the inviolability of the human body guaranteed by article 23 of the 2014 Constitution providing that: "the State protects the dignity of the human being and his physical integrity, it prohibits moral and physical torture. The crime of torture is imprescriptible".

This medical examination is inconsistent with article 23 of the 2014 Constitution, for its uncertainty, insufficiency and immorality as a means of evidence. Thus, it is equated with practices of torture pursuant to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984. This is a clear violation of the human dignity and the inviolability of the human body as guaranteed by the Constitution.

The Working Group on Arbitrary Detention considered that "obtaining evidence from medical examinations and tests (...) forcibly undertaken, are in and of themselves intrusive in nature and violative of bodily rights of the individual under human rights law (...)". It added that, "forced anal examinations contravene the

[141] UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 5 January 2016, A/HRC/3157/, p. 10, paragraph 34.

[142] P. SIGNORELLI (W.): *Criminal Law, procedure, and evidence*, CRC Press, New York, 2016, p. 329.

prohibition of torture and other cruel, inhuman and degrading treatment (...)."[143]

Even in the case of passive sodomy, forensic experts consider that anal examinations conducted on males to "prove" that they are "homosexuals" is not necessarily determinant of a "homosexual activity".[144]

In fact, there are no scientific studies that provide any basis for the validity of forcibly conducted anal examinations in the detection of consensual anal intercourse because decreased anal sphincter pressure may be caused by a wide range of conditions, including: hemorrhoids and chronic constipation.[145]

The evidence is not conclusive, this examination is incomplete and do not apprehend all the elements of the act of sodomy under article 230. In the case of the masculine homosexuality, there are two persons, one plays the role of the active and the other plays the role of the passive.[146] But, the evidence here is targeting to condemn only the passive person.

As for the judge, he is not legally bound by the expert report, the latter serves just as information for the judge. The judge decides the value of the evidence based on the report, but he has to recognize the strength of the evidence in order to use it or not.[147]

Consequently, the common use of forensic examination as a means of evidence in the case of "homosexuality" by the judge would expand illegally the mission of the expert to undermine the field of law.[148]

### Do forced anal examinations help the police and justice enforce the law and public order?

Actually, some of the practices which violate physical integrity are provided by the law in order to preserve public order and security.[149]

---

[143] UN Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention, 4 February 2009, A/HRC/1021//Add.1, Opinion No. 252009/ (Egypt), paragraphs 23 and 28, p.16.

[144] وحيد الفرشيشي: «السياسة، المثلية وفحوص العار في تونس»، المفكرة القانونية، جوان 2013
«حتى بتوفر العديد من الأدلة والآثار التي يمكن أن تؤكد أن الشخص يمارس اللواط السلبي، إلا أن ذلك لا يعني القطع بأنه فعلا يمارس ذلك إذ يمكن لأشخاص لم يمارسوا أبدا هذا الفعل ومع ذلك تكون لهم نفس أعراض ممارسي الأفعال السلبية سواء لأسباب بيولوجية أو لأسباب تعود لاصابات أو أمراض».
http://www.legal-agenda.com/article.php?id=402&lang=ar Dernier accès 05/05/16 .

[145] See "Statement on anal examinations in cases of alleged homosexuality" by the Independent Forensic Expert Group. http://physiciansforhumanrights.org/library/other/statement-on-anal-examinations-in-cases-of-alleged-homosexuality.html

[146] Court of Cassation, Criminal chamber, decision n°7335 of 15 May 1982, Journal of the Court of cassation, 1982, pp. 199 - 200, (in Arabic).
« جريمة الفصل 230 إن ثبتت تستلزم وجود طرفين كل منهما مسؤول عما اقترفه ايجابيا أو سلبيا»

[147] Article 157 Code of criminal proceedings.

[148] ERWIN (D.) and SCHREIBER (H-L.): *Medical responsibility in Western Europe: research study of the European science foundation*, Springer Science and Business Media, New York, 2012, p.192.

[149] ARNOUX (I.): *Les droits de l'être humain sur son corps*, Presses Universitaires de Bordeaux, Pessac, 2003, p. 347 et s.

Anal exams do not serve security or public order. They amount to torture and to humiliating the human being.

If law is a factor of inequality, because it criminalizes certain acts by interfering in the privacy of individuals. It happens that inequality is embodied in the law whenever law provisions contribute to the marginalization of a minority's culture for the benefit of a majority culture.

# ( Third part )

## Law is the rule "of the majority for the majority"

If we admit that law is the rule of the majority, this "(...) reflects the preference of the majority group vis-à-vis its language, values, religious holidays, and political institutions (...) minorities must either play by the rules of the majority culture or get out entirely"[150]. The majority decides and the minority obeys. In this case, there is domination, it means that majority has the decision-making power and the adoption of laws power. The dominant lays down rules or as Professor MEZGHANI noted: "the law is made by the majority for the majority"[151].

The State imposes the dominant culture through its different institutions, including the government. Particularly, the adoption of explicit law provisions establishes a legal framework that provides safeguards for the majority and that the latter use to coerce the minority.

But, in a democracy [152], the people's will is the basis of the government's authority.

In reality, the exact scope of the term "democracy" supposes the power of the people in whole[153] and not just the majority of the people, otherwise, democracy will be defined as the power of the majority for the people[154].

Thus, when the law promotes the dominant culture, the latter rejects every difference. This results in excluding and stigmatizing every person belonging to a minority. In this case, we talk about a dominated culture; a minority culture threatens the dominant one because of considering it hostile: this culture is viewed as going to undo or modify which has already been established.[155]

Furthermore, the dominant culture is the culture of the group who holds the power.

In fact, "the word 'minority' is misleading. Numbers, (...), must be interpreted in relation to power and access to decision-making centers and the media. Any group who does not have such power or access to media and decision-making centers is relegated, in fact, to a minority position, no matter how large their number is. Real power is exercised by a numerical minority, the latter determines the rules of the game[156]".

---

[150] ORGAD (L.): *The cultural defense of nations: A liberal theory of majority rights*, Oxford University Press, Oxford, 2015, p. 20.

[151] MEZGHANI (A.): *Lieux et non-lieu de l'identité*, sud éditions, Tunis, 1998, p. 65.

[152] KELSEN (H.): *La démocratie, sa nature, sa valeur*, traduit de l'allemand par Charles Eisenmann, Paris Librairie générale du recueil, Sirey, 1932, p. 7.

[153] The law emanates from the people as provided by articles 2 and 3 of the 2014 Constitution.

[154] EMIPHE (M.) et CISHUGI (J-B.): *L'idée d'un gouvernement mondial: pour la paix et la fraternité universelles*, Editions Publibook, Saint- Denis, 2016, p. 157 et s.

[155] PESTIEAU (J.): *Les citoyens au bazar : mondialisation, nations et minorités*, Presses Université Laval, Québec, 1999, p. 73.

[156] VARGAFTIG (M.): "Summary of debates", *in* VARGAFTIG (M.) (general rapporteur), *Cultural Rights, the Media and Minorities*, Report of the Seminar held in Strasbourg, 27 - 29 September 1995, Council of Europe, Strasbourg, 1997, p. 15.

In order for the minority not to be forced to accept the majority rules, "when the citizens of a society disagree about the rightness or wrongness of a given type of action, and a considerable number think it is right, then it is wrong (or inappropriate) for that society to have a law prohibiting that action, even if the majority of the citizens think that the action is wrong[157]". Therefore, determining the extent of rightness or wrongness of an action should not be left to a majority, because it may lead to infringe upon the rights of minorities who do not fit into the majority "rules of the game".

Analyzing the different legal provisions led to sort out the criteria based on which these rules are made, including: the religion (A) and the language (B) that is the dominant Arab and Muslim culture.

## A. THE LAW MADE ISLAM A DOMINANT RELIGION

The State addresses all the aspects of the dominant religion and remains "neutral" towards the other religions practiced in the national territory (1). The prevalence of Islam had as a consequence the State interference in the private life of certain individuals (2).

### 1. The State "strong" involvement in the dominant religion

In countries with a dominant religion, where membership of that religion has historically been tied to national identity, it might be possible to give "privileged" status to one religion in a way that reflects a broad social consensus. In Tunisia, for example Islam has long been associated with national identity.

Islam is the religion of Tunisia[158]: This constitutional provision refers to the State's regulation of the Islam religion.[159]

The State's involvement can be measured according to different criteria. For example, by finding out whether the State's funding is provided for all religions or only one, and by checking if all religions are taught in public schools or is only one?

---

[157] James M. Humber (Editor): *Biomedical Ethics and the Law*, Springer Science and Business Media, New York, 2013, pp. 47 - 48.

[158] "A religion is dominant when it is the religion of the majority of a given country. In such cases, the dominant religion continues to impart historical and cultural references considered "natural" and "legitimate". Religious symbols and rituals become embedded in the public culture of the country.

A religion is exclusive when it is the only religion recognized by the State."

"A religion becomes hegemonic, however, when the State grants a certain religious group exclusive legal, economic, or political rights denied to other religions. In other words, religious hegemony refers to legal and political privileges granted to a specific group, which in most but not all cases is the dominant religion."

CESARI (J.): *The awakening of Muslim democracy*: *Religion, modernity, and the State*, Cambridge University Press, New York, 2014, pp. 9 - 11.

[159] AMOR (A.): « Constitution et religion dans les Etats musulmans » *in Cours de l'Académie internationale de Droit constitutionnel* 10 ème session ,Tunis, 1994, Presse de l'Université des Sciences Sociales de Toulouse, p. 44.

This entails legal protection of the other religions while various legal provisions are established regulating the dominant ones.

The inscription of the religion in the Constitution does not mean it is the exclusive religion, since the other religions are recognized and legally protected by the State.

The State finances places of worship (mosques) and clerics (*imams*), public schools teach religious doctrines and some legal provisions include *charia'a* (religious "law") or are inspired by.

This is one aspect of the State's involvement in the dominant religion. Is it an implementation and a confirmation of the expression used by article 6 of the Constitution "the State protects the religion"? In fact, the word "religion" is used in singular, is it "religion" as provided by article 1 of the Constitution? Though, in the same article, it is mentioned that the State protects the "religious practices".

It is obvious that the law governs the relations between citizens, it is the positive law and not religious "law" (divine law, *charia'a*). But, the State controls the activities of the dominant/hegemonic religion[160]. It grants financial resources which are denied to the other religions.

It does not interfere in administering the other religions which are self-managing according to the law that regulates each practiced religion in Tunisia.

The "strong" involvement of the State has brought about discrimination. Therefore, minority religions do not receive government funds or resources for maintenance of property or organizations.

Furthermore, States with Muslim majority will become a civil State whenever they will stop mixing the political authority with religion.[161]

Moreover, the state has a positive obligation in order to implement the rights. This obligation refers to material and proceedings obligations.[162]

To enforce these obligations, the duty was entrusted to administrative structures of the different ministries. These structures will be dealing more or less with the affairs of minorities.

However, we have noticed that these administrative bodies are limited and they do not primarily address minorities' issues. For instance, the Ministry of religious affairs gives considerable attention to all the aspects of the dominant religion. Thus,

---

[160] MEHREZ (M.): « Laïcité et Etat Civil, quel rapport ? » , *Portimão* , n° 5 ,2014 ,pp. 169 - 178.

[161] *Ibid*, p.177.

[162] DUMONT (H.) et HACHEZ (I.): « Les obligations positives déduites du Droit international des droits de l›Homme, dans quelles limites? *in* CARTUYVELS (Y.) (dir.) *Les droits de l›Homme, bouclier ou épée du droit pénal ?* Facultés Universitaires Saint- Louis, Bruxelles,2007 , p.53.

CHOLEWINSKI (R.): "State duty towards ethnic minorities: positive or negative ,"?*H.R.Q.*, 1988 , pp. 344 - 371.

it has a controlling power of religious bodies.

Consequently, this means that the dominant religion is under the control and patronage of the civil power; religious authorities are subordinate to the State, and religion is subject to the controlling power of the State.[163]

Since the independence, public authorities have been engaged in expressing the State's policy in the field of religion[164]. This can be described as the "nationalization of religion" which is "an attempt by the State to use religion in order to promote State interests while still maintaining control over it. The State ensures its supremacy over religion by, on the one hand, allowing it to play a central role in the public life of the nation, while, on the other hand, controlling and using it to advance both the religious and the wider goals of the State[165]". These goals should be as part of the civil and democratic State which respects pluralism and human rights.

"Islam as a religion of the State encompasses first and foremost the relation of the State with the practice of the worship, namely, the training and designation of imams, the funding and maintenance of the mosques, and the prior authorization of sermons[166]".

This indicates that the State has control over the religion and not the religion having control over the State.

In spite of the dominant character of Islam in the 2014 Constitution and in other law provisions, no legislation or constitutional provision outlaw the existence of a religion in Tunisia. Likewise, no legal provision lists the recognized religions.

The religion in Tunisia is characterized by the predominance of Sunni Maliki and Acha'ari Islam, and the official recognition of minorities' religions[167] with their own institutions: the Jewish faith and Catholicism.

The nationalization of religion has led to give the dominant religion a privileged status compared with minorities' religion which is not being treated on equal footing.[168]

---

[163] BEN ACHOUR (S.): « Les convictions religieuses face au Droit positif », *in Convictions philosophiques et religieuses et droits positifs*, textes présentés au Colloque international de Moncton 2427- août 2008, Bruylant, Bruxelles, 2010, pp.141 - 143.

[164] CHERIF (M-H.): « Hommes de religion et pouvoir dans la Tunisie de l›époque moderne », *Annales Économies, Sociétés, Civilisations*, 35e année, n°31980 ,4-, pp. 580 - 597.

BRAS (J-Ph.): « L'islam administré: illustrations tunisiennes » *in* KERROU (M.) (dir.) *Public et privé en Islam, espaces, autorités et liberté*, Maisonneuve et Larose, IRMC, Paris, 2002, p.229.

[165] STOPLER (G.): "Religion–State relations and their effects on human rights: Nationalization, authorization, and privatization", *Oxford journal of law and religion*, Volume 6, Issue 3, October 2017, pp. 474–497.

[166] HACHED (F) : « La laïcité : un principe à l›ordre du jour de la IIe République tunisienne ? », *Confluences Méditerranée*, n°77, 22011/, pp. 29 - 36.

[167] See BEN ACHOUR (S.) : « Les convictions religieuses face au Droit positif tunisien », *in* FOBLETS (M-C.) : *Convictions philosophiques et religieuses et Droits positifs: textes présentés au Colloque International de Moncton* (24 - 27 août 2008), Bruylant, Bruxelles, 2010, p.139.

[168] In 2013 we witnessed the creation of the bureau of relations with organizations and associations and coordination with

In fact, if the State's role with regard to the dominant religion is regarded as an "involvement", its role towards minorities' religious affairs seems to be in a form of "cooperation". The State's intervention in minorities' religious affairs is very weak compared to the dominant religion. Religious minorities administer their religious matters through independent institutions.[169]

As for the Jewish cult, it is regulated by the law n°58-78 of July 11, 1958, related to the administration of the Jewish cult which governs the daily life activities of the Tunisian Jewish cult.[170]

While the State controls, administers and constructs mosques [171], the management and upkeep of synagogues is left to the Jewish religious associations[172]. Mosques are part of the public State domain; the State pays the bills and bears all kind of expenses[173].

In order for the Jewish religious associations to ensure the strictly religious matters, such as the upkeep of synagogues and ritual slaughtering services, giving welfare aid of religious character and organizing religious teaching, Their resources are constituted eventually (and not mainly) by subventions from regional public bodies[174]. In contrast, for the equipping and the maintenance of mosques a large budget is allocated to the Ministry of religious affairs[175].

As for the Catholic cult, the Catholic Church is regulated by the *modus vivendi*[176], a

bodies that supervise religious minorities' affairs within the Ministry of religious affairs.

Article 5 Decree n° 20134522- of 12 November 2013, related to the organization of the Ministry of religious affairs, official gazette of 19 November 2013 n° 92, (in French), p. 3216.

[169] الناصر المكني: الإسلام و الدستور : دراسة قانونية وفقهية مقارنة لعلاقة الدين بالدولة في مختلف الأنظمة الدستورية، مجمع الأطرش للكتاب المختص، تونس، 2014، ص. 171-172.

[170] See The American Jewish Committee Paris, France, memorandum July 18, 1958. http://www.ajcarchives.org/AJC_DATA/Files/5A49.PDF

[171] Law n° 948- of 17 January 1994, on transferring the powers related to mosques to the ministry of religious affairs. The official gazette n° 6 of 21 January 1994 (in French), p.101.

[172] But, according to LASSERRE the Jewish cemetery and the great synagogue were renovated at the expenses of the Presidency of the Republic in 1996 and 2007.

LASSERRE (E.): *Le Territoire pensé: Géographie des représentations territoriales*, presses universitaires du Québec, Québec, 2003, p.127.

See also, DI FOLCO (P.): *Le goût de Tunis*, éditions Mercure de France, Paris, 2007, p. 69.

BISMUTH-JARRASSE (C.) et JARRASSE (D.): *Synagogues de Tunisie: monuments d›une histoire et d›une identité*, Esthétiques du divers, Paris, 2010.

[173] Article 9, law n°88-34 of 3 May 1988 related to mosques, official gazette, n°31 of 6 May 1988 (in French), p. 705.

*Cf.* Article 1er of decree n° 2012 - 1711 du 4 September 2012, determining the nature of expenses for functioning and equipment of regional character, J.O.R.T. n°73 of 14 September 2012, (in French), p. 2133.

[174] Article 13 (5) of law n°58 - 78 of July 11, 1958, related to the administration of the Jewish cult.

[175] In 2016, the budget for the maintenance of mosques was estimated to 12 077 000 dinars. Budget of the State, 2016, chapter 8, Ministry of religious affairs, p. 21.

[176] A Convention that was concluded between the Tunisian Republic and the Holy See on 27 June 1964. Article 1 of the Convention states that the Tunisian Republic shall protect the free practice of Catholicism in Tunisia. Under this Convention, the Catholic Church also agreed to permanently close down churches and hand them over to Tunisian authorities free of charge (such as the Church of Saint Louis in Carthage). The official gazette n°36 of 24-28-31 July 1964, (in French), p. 902.

Convention that aims to guarantee to Catholics the practice of their faith according to the freedom of religion as guaranteed by the Constitution.[177] By virtue of this agreement, Tunisia undertakes to protect the free observance of the Catholic cult in Tunisia and the Church undertakes not to participate in a political activity.

Despite the non-intervention of the State in minorities' religious affairs, it does often assist the other religions especially in social matters.[178]

The Ministry of religious affairs notes for example that it approved the renewal of residence for priests and monks from different nationalities, besides to the grant of residence to most of them.

But, since Tunisia is a country where the majority of individuals are Muslim, the Ministry of religious affairs seems suspicious concerning the activities organized by religious minorities.

Thus, the Ministry supervises the apostolate activity of priests especially by verifying the content of brochures or flyers handed out in train stations or in mail boxes. Information are collected and sent by the regional preachers.

Similarly, the Ministry has mentioned in its report of activities for the year 2012 that it undertakes the follow-up of litigations related to land-rights according to information sent by the Jewish religious associations.

Furthermore, the report adds that the synagogue of Ghriba is in an urgent need of financial support since it did not realize revenues due to the tourism crisis.

Moreover, the Minister of religious affairs has participated in the pilgrimage of Ghriba in order to reflect an image of a Ministry that engages in treating equally all the cults practiced in Tunisia.

Assisting persons belonging to religious minorities in administering their affairs did not prevent the State from interfering in the private life of certain individuals (on the basis of their beliefs).

### 2. The interference in the private life of certain individuals

The manifestation and declaration of belonging to a group are the exclusive and inalienable right of the human beings. For instance, no one can be forced to declare that he/she belongs to a religious group.

But, in Tunisia, legal provisions are in conflict with this principle. These provisions

[177] See LIMAM (J): "Religious freedom in Tunisia: The scope of ambivalence", *in* FERRARI (A) and TORONTO (J): *Religions and constitutional transitions in the Muslim Mediterranean: The pluralistic moment*, Routledge, London and New York, 2017, p. 81.

[178] Activities report of the Ministry of religious affairs, 2012 (in Arabic) pp. 19 - 20.
http://www.affaires-religieuses.tn/uploads/media/rapport_2012.pdf

force the individual to declare his religious affiliation and even to convert to Islam as a pre-condition to practice other rights. This is considered to be an interference with the convictions.

In fact, pursuant to the Circular n°39 of 14 May 1988 of the Prime Minister to the civil registrars, related to certificates of non-Muslim spouse conversion to Islam desiring to marry a Tunisian Muslim woman. A non-Muslim man who wishes to marry with a Tunisian Muslim woman has to bring a certificate of conversion to Islam.

Actually, this pre-condition violates, on the one hand, the principle of equality for persons belonging to religious and a-religious minorities. Then, how will a Jewish, a Christian, or an agnostic Tunisian practice his/her rights like any other Tunisian citizen including the freedom of choosing their spouse?

Equality in rights and duties between citizens is enshrined in the preamble of the 2014 Constitution. Should one be Muslim to be described as a Tunisian citizen? Or should they convert to the dominant religion of the society in order to be able to marry a Tunisian Muslim woman?

On the other hand, the Constitution protects the inviolability of private life and personal data in article 24. Similarly, the law related to the protection of personal data promulgated on 27 July 2004 provides in article 14: "It is prohibited the processing of personal data, which directly or indirectly deal with (...) religious convictions".

*What if this Tunisian woman who wishes to marry has changed her religion? Will she be deprived of her right to marry and declared as apostate?*

Plus, how will the Mufti of the Republic verify if the individual became Muslim? It is irrelevant and senseless to verify the belonging to the Islamic religion based on an administrative document.

The civil registrar verifies the conversion to Islam via this "imposed" formality on non-Muslims. A piece of paper cannot necessarily reflect the religious affiliation, an individual can at any time change his religion, reconvert to the initial religion or just become atheist.

In fact, the freedom of marriage is like the freedom of belief, it is a personal affair. Indeed, choosing a spouse is part of the individual's privacy, it is like a "black box" which individuals do not wish to expose to anyone. The State interference in this case amounts to pulling by force this "black box" and opening it. Yet, since the faith is something spiritual, neither the Mufti nor the civil registrar could be convinced of the affiliation of someone to the Islamic religion.

Another circular violates also the principle of the protection of private life: the 1973 circular [179] (abrogated in 2017 by virtue of a circular of the Minister of justice)[180] used to impose the so-called "religious endogamy"[181] "in order to preserve the Islamic authenticity of the Tunisian family and to take away all foreign elements which are in contradiction with its traditions and its religion[182]".

The "religious endogamy" is accompanied by a monolingualism which contributes to the marginalization of minorities' culture.

## B. LAW MADE ARABIC A DOMINANT LANGUAGE

Arabic is a dominant language which prestige is different from the dominated languages one (1). This resulted in the marginalization of the latter and on the occultation of the cultural diversity (2).

### 1. The predominance of Arabic in all the fields

The dominant language is the official language as it is recognized by the Constitution and other legal statutes. Its official status confers to it the prestige of being the mainstream language that predominates in public life.

However, a minority's language "can be distinguished from a majority language by its lesser numerical or political importance in the country (UNESCO, 2003). The power differential between those groups with more influence though perhaps smaller numbers, and those who are more numerous but less influential, is reflected in the term 'minoritized' [183]"

Furthermore, many dominated languages do not even enjoy the status of a national language, i.e.: Amazigh in Tunisia is not only a forgotten language but also a marginalized one. This led to the invisibility of the Amazigh-speaking Tunisians.

---

[179] Circular of the Minister of justice of 5 November 1973 prevents the civil registrars from celebrating a marriage between a Tunisian Muslim woman and a non-Muslim man. The circular also orders the judges to annul the marriage if the condition of converting to Islam has not been fulfilled.

*R.J.L.* n°9, 1973, p. 83.

[180] The abrogation was introduced by the Minister of Justice on 8 September 2017, to implement the 2014 Constitution's articles 21 (equality) and 46 (women's rights). It also implements the conformity of the Tunisian legislation with the international instruments of human rights ratified by Tunisia, such as the Convention on the elimination of all forms of discrimination against women (CEDAW). It is also in conformity with the law adopted on 11 August 2017 related to the elimination of violence with regard to women.

*Cf.* « Etat des libertés individuelles en Tunisie 2017 : Les violations continuent et s'intensifient », p. 17. http://www.adlitn.org/sites/default/files/fr_redui_1.pdf

[181] A marriage between members of the same religion.

[182] « محافظة منه على الأصالة الإسلامية للعائلة التونسية. و بعدا لها عن جميع الجوازم الغريبة التي ترفضها هذه الخلية بحكم شرعها و تقاليدها. و لا تنسجم معها بأي حال من الأحوال.»

[183] SPOLSKY (B.) and M. HULT (F.) (Editors): *The handbook of educational linguistics*, John Wiley & Sons, Oxford, 2010, p. 266.

See also KASBARIAN (J-M.): « Langue minorée et langue minoritaire », *in* MOREAU (M-L) (dir.) *Sociolinguistique: les concepts de base*, Editions Mardaga, Sprimont, 1997, p.185 et s.

The latter seem even to be invisible in statistics. In fact, Tunisia does not provide in its reports addressed to the UN's bodies, estimations on its demographic composition. Hence the UN's Committee on the elimination of racial discrimination has noted "the absence of statistical data on the ethnic composition of Tunisian society" and the lack of "information on the Berber (or Amazigh) population"[184].

Nevertheless, in the neighboring countries of the Maghreb, like Algeria, Tamazight has been recognized as official language since the Constitutional amendment of 2016.[185]

Likewise, in Morocco, Amazigh language has been also introduced along with Arabic as official language under the new Constitution of 2011.[186]

Yet, in Tunisia, law provisions confirm the superior and prestigious status of Arabic as a language used in all fields.[187]

Besides, other law provisions provided by presidential and ministerial decrees require the use of the Arabic language in examinations and in the administrative records.[188]

In the field of nationality, acquiring the Tunisian nationality by means of naturalization requires knowledge of the Arabic language. The latter is also the language of the judiciary. Before courts the classic Arabic is the only authorized language.

However, we have to mention that the choice of the language is linked to the freedom of expression. In fact, the predominance of one language contradicts with the freedom of choice. In this case, unilingualism consists in favoring one language on political, social, economic, legal, and cultural context.

---

[184] The Committee considered the thirteenth to seventeenth periodic reports of Tunisia, submitted as one document (CERD/C/431/Add.4), at its 1560th and 1561st meetings (CERD/C/SR.1560 and 1561), held on 6 and 7 March 2003. At its 1575th meeting, (CERD/C/SR.1575) held on 18 March 2003, it adopted the following concluding observations **(CERD A/582003) 18/):**

252. "The Committee notes that the State party did not provide information on the Berber (or Amazigh) population and on measures taken for the protection and promotion of their culture and language. In view of the absence of any reference to this group in the report, the Committee requests concrete information on their situation and recommends that increased attention be given to the situation of Berbers as a specific component of the Tunisian population".

253 "The Committee takes note of the view of the State party as to the homogeneity of its population. However, since the report itself refers to the liberties and rights of those who are not Arabs or Muslims, and in the light of the absence of statistical data on the ethnic composition of Tunisian society, the Committee recommends that the State party provide an estimate of the demographic composition of the population in subsequent reports".

[185] Article 4 of the Algerian Constitution. Law n° 16 - 01 of 6 March 2016 on the constitutional amendment.

[186] Article 5 of the Moroccan Constitution. Dahir n°191-11- of 29 July 2011 related to the promulgation of the Constitution.

[187] Municipality of Tunis decision of 6 August 1957, the Code of penal procedures (1968), law of 29 July 1991 related to the educational system (1991), law of 5 July 1993 related to the publishing of laws in the official gazette, Arabic is the only language used during debates in the Parliament, drafting and promulgation of laws. The law of 2008 related to the higher education.

[188] Decree n° 94 - 1692 of 8 August 1994 related to administrative records.

Ministerial Decree of foreign affairs of 10 September 2001, on the modalities of organizing the internal examination for the promotion to the rank of financial inspector of the foreign affairs.

The regime of the official unilingualism is predominant in Tunisia. Arabic language is the only official language in the Constitution.

In the United States, the Ruiz decision[189] of the Arizona Supreme Court invalidated the official English language provisions of the Arizona Constitution that were enacted by popular referendum in 1988. This lawsuit challenging the constitutionality of the official English language provisions was brought by several bilingual persons, including State employees, elected officials and one public school teacher.

The Arizona Supreme Court concluded that this law violated the first amendment in several ways. First, the official English law restricted Spanish-language speech through its overly broad and extensive prohibition on the use of other languages. Second, the law inhibited the free discussion of governmental affairs both by depriving some Arizona citizens of access to governmental information in the languages best understood by them, and by interfering with the right of citizens to effectively receive redress from their government.

The law interfered with speech and with effective communication between citizens and their government for no compelling reason.

Therefore, the dominant language considered the language of the power and the political expression in public can be a hurdle to the freedom of choice, hence, it violates other freedoms such as freedom of expression and freedom of communication and expressing one's cultural identity.[190]

On the one hand, "restricting the use of certain languages simply cuts off potential audiences or makes it more difficult to reach them, and that harms one of the core interests underlying freedom of expression on any plausible account".

On the other, the freedom of choice of a language is "a means by which a people may express its cultural identity. It is also the means by which the individual may express his or her personal identity and sense of individuality[191]".

In Tunisia, Amazigh language does not seem to gain the same prestige as Arabic, the only official recognized language in all the fields. We do not even talk about a freedom of choice since Amazigh is not recognized nor promoted or valorized by the State.

---

[189] F. PEREA (J.): "The new American Spanish war: How the Courts and the legislatures are aiding the suppression of languages other than English", *in,* DUENAS GONZALEZ (R.) and Melis (I.) (Editors), *Language ideologies: Critical perspectives on the official English movement*, Volume II: *History, theory, and policy*, Routledge, London and New York, 2014, p. 134.

For the case of the Supreme Court of Arizona: State v. Amaya-Ruiz, 166 Ariz. 152 (1990), https://law.justia.com/cases/arizona/supreme-court/1990/cr-860095--ap-pc-2.html

[190] أمين محفوظ: «الدستور بين وحدانية اللغة وحرية اللغة». الأحكام العامة للدستور. خمسينية دستور 1959. هانس سايدل. 2010. ص.ص.32-9.

[191] GREEN (L.): "Freedom of expression and choice of language", *in* WALUCHOW (WJ.) (Editors), *Free expression: Essays in law and philosophy*, Clarendon Press, Oxford, 1994, pp. 135 - 152.

Thus, Tunisia has ratified various instruments on human rights and it undertakes to submit periodic reports to the UN bodies on the implementation of rights concerning a given instrument.

During the interactive dialogue, on the 22 and 23 September 2016, experts raised a series of questions on several cross-cutting issues (such as social and cultural rights) with the Tunisian government. Mr. Mehdi Ben Gharbia, Minister of Relations with Constitutional Bodies, Civil Society and Human Rights declared that:

"Minorities, such as Amazigh, enjoy the same constitutional rights like the rest of the population (...) it is obvious that the identity is Arab and Muslim, but the Constitution protects minorities. The Government does not have a problem with any community whatever it is[192]".

Yet, this affirmation is not convincing because it does not recognize that the Amazigh language, heritage and culture are marginalized.

The focal point in this stage is to remind that the State should take the appropriate measures to guarantee the full realization of the right to culture, these measures "shall include those necessary for the conservation, the development and the diffusion of science and culture[193]".

In fact, not only has the marginalization of the Amazigh language contributed to restricting the freedom of expression due to the domination of the Arabic language, but, it also occulted the cultural diversity.

### 2. The occultation of the cultural diversity

The State contributed to the occultation of the cultural diversity by ignoring or by trivializing the minoritized status of the Amazigh language by affirming that "the Amazigh population of Tunisia consists of no more than 1% of the total of the population, it is integrated in the Tunisian pluralistic unity and they do not suffer from discrimination[194]".

The question is the following: Is this integration a cultural and linguistic assimilation? Or is it an integration of the Amazigh spoken elements in the dominant culture? Knowing that "lexically, the Tunisian dialect absorbed during its long history an important number of Amazigh words[195]".

---

[192] Committee on Social Economic and Cultural Rights, Tunisia 2016, concluding observations, 7 October 2016, E/C.12/TUN/CO/3, paragraph 55.

[193] Article 15 (2) of the International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

[194] Report to the Committee on the elimination of racial discrimination session of (16 February-6 March 2009) and the session of (3 - 28 August 2009), paragraph 11, p. 99.

[195] QUITOUT (M.): *Parlons l'arabe tunisien: Langue et culture*, L'Harmattan, Paris, 2002, p. 8.

In the second case, it is a forced assimilation which occults the minority's specificities. Whereas in the first case, Amazigh speaking individuals integrated in the dominant culture but they preserved their specificities.

Actually, the promotion of the Amazigh culture can be realized by implementing article 42 of the Constitution:

"The right to culture shall be guaranteed.

The right to creativity shall be guaranteed. The State shall encourage cultural creativity and support national culture in its authenticity, diversity and renewal, in so as far as it promotes the values of tolerance, rejection of violence and openness to different cultures and dialogue between civilizations.

The State shall protect cultural heritage and guarantee the right of future generations to it".

Tunisia has not yet taken the appropriate measures to implement the national cultural diversity. Such right is classified in the category of positive rights for which the State undertakes to guarantee full realization.

But, considering the non-respect of Tunisia's international obligations concerning the promotion of cultural diversity, the Committee on social, cultural and economic rights expressed its concerns and recommendations: "the Committee recommends the State party to recognize the language and the culture of the indigenous Amazigh community by assuring its protection and its promotion as asked by the Committee on the elimination of racial discrimination in 2009"[196]. The State party should:

a/ Collect based on the self-identification, statistics broken down by ethnic and cultural belonging;

b/ Take legislative and administrative measures in order to ensure the teaching of the Amazigh language in all school levels and urging to know about the Amazigh culture and history ;

c/ Abrogate the Decree n°85 of 12/12/1962 in order to allow the registration of Amazigh names in the civil status register;

[196] Committee on the elimination of racial discrimination, Seventy-fourth session, 16 February-6 March 2009, consideration of reports submitted by States parties under article 9 of the Convention Concluding observations of the Committee on the Elimination of Racial Discrimination TUNISIA, CERD/C/TUN/CO/19, 23 March 2009, paragraph 11.

"The Committee calls on the State party to take account of the way in which the Amazigh perceive and define themselves. It urges the State party to review the situation of the Amazigh in the light of international agreements on human rights, with a view to guaranteeing the members of that community the enjoyment of the rights they claim, notably the right to their own culture and the use of their mother tongue and the preservation and development of their identity".

d/ Facilitate cultural activities organized by cultural Amazigh associations[197]".

In the same context, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on 20 October 2005 in Paris, urges the States parties to "endeavor to create in their territory an environment which encourages individuals and social groups: (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities[198]".

In the wake of the 14 January 2011, many associations claiming for the promotion and the rehabilitation of the Amazigh language and culture appeared. Among these associations, there were those which formulated claims to the Constituent Assembly while drafting the actual Constitution to recognize the Amazigh language in the Constitution.[199]

Furthermore, talking about the Amazigh culture refers to the national intangible heritage that the State is engaged to protect and to promote.

In order to preserve this national heritage, the Convention for the Safeguarding of Intangible Cultural Heritage provides that "each State Party shall take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory". Among the necessary measures "to adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programs[200]".

[197] The Committee on social, cultural and economic rights, final observations concerning the third periodic report of Tunisia, 7 October 2016, E/C.12/TUN/CO/3, paragraph 55.

[198] Article 7.

[199] For example the Tunisian association of the Amazigh culture.

POUESSEL (S.) : « Les marges renaissantes : Amazigh, Juif, Noir. Ce que la révolution a changé dans ce « petit pays homogène par excellence » qu'est la Tunisie », *l'Année du Maghreb*, VIII 2012, pp.143 - 160.

[200] Articles 11 and 13 the Convention for the Safeguarding of Intangible Cultural Heritage, UNESCO, 2003.

# ( Conclusion )

In the context of the adoption of the 2014 Constitution and the important laws adopted after the 14 January 2011, we addressed the hypothesis of the protection of the rights of minoritized and discriminated against persons through a "search" in the legal provisions hostile to freedoms or through the constitutional provisions that can be read according to two approaches: one conservative and the other universalist.

In fact, an ignorance of the culture of human rights reigns, even in the different court decisions and especially when it is about persons belonging to minorities. The judge prioritizes the Arab-Muslim culture to the detriment of the universal culture of respecting the difference.

As for the constitutional provisions, their weakness resides in the fact that they are not clear. While reading the Constitution, some provisions are contradictory and do not guarantee an effective and clear protection.

Starting with the preamble, with a religious frame of reference, and even tough referring to human rights, the reference lacks a mention to the universality, interdependence, equality and inalienability of human rights. That's to say that recognizing the characteristics of human rights in the Constitution will not leave the floor for its conservative interpretation.

Concerning legal provisions, we have noticed that the legal vacuum resulted in the marginalization of the "status" of certain individuals like transsexuals, transgenders and intersexuals. These individuals do not enjoy a clear legal status; they are often subject to all forms of discrimination and mistreatments by the society and by the authorities.

Furthermore, criminalizing certain individuals' acts has not only violated the respect of the private life but also legitimated intimidations, torture and other inhuman, degrading and humiliating practices by the authorities. That is the case of homosexual persons who are sanctioned under the penal Code.

Therefore, the European Parliament has expressed its concern regarding the slow evolution in the field of human rights, especially, concerning the protection of persons with non-normative identity, sexuality and gender expressions. In that respect, it calls the Tunisian Government for "a reform of the penal Code, and in particular for the repeal of Article 230, which penalizes homosexuality with imprisonment for three years, and is contrary to the constitutional principles of non-discrimination and the protection of privacy[201]".

[201] Resolution of the European Parliament of 14 September 2016 on the EU relations with Tunisia in the current regional context (20152273/(INI)), paragraph 21. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A80++0249-2016-DOC+XML+V0//EN

Apart from the weakness of the legal and constitutional provisions, the latter are vague especially by adding expressions referring to the dominant religion in Tunisia such as "sacred" and "*Umma*", one wonders if certain persons like for instance non-Muslims are protected or not by the Constitution, because referring to the "*Umma*" seems not only to exclude persons on the basis of their convictions or beliefs, but it also leads to the State's interference in the private life of persons like atheists or a-religious. They become vulnerable when they express in public their convictions and may incur prosecutions.

Regarding this matter, in the case of Sinan Isik v. Turkey[202], the European Court of Human Rights ruled on the mentioning of religious affiliation on identity cards. Mr. Isik was a member of the Alevi community, which is seen by some as a part of Islam and by others as a separate religion. His request to change the religion on his identity card from 'Islam' to 'Alevi' was refused by the authorities. Only since 2006 a new legal provision allowed citizens to ask for a change of religion on their identity cards or even to have the entry left blank. The Court reiterated that the freedom of religion (article 9 ECHR[203]) also included a negative aspect, including the right not to manifest one's religion or beliefs.

Law may also be a source of marginalization with regard to other aspects of individuals' life, like for example the minority's language and religion for the benefit of the dominant language and religion. For instance, the Amazigh culture has always been marginalized for the fact that the State has not taken the appropriate measures to promote it.

Moreover, in Tunisia, instead of guaranteeing the sexual freedom of LGBTQI persons, the State takes completely their freedom. That is why, penal laws which are against freedoms sanction every type of behavior because of being against morals, should be repealed. Besides, the State should take away all the prohibitions in the field of health in order to provide transsexuals with their right to health care and sexual health. It is also compulsory to ban body surgeries imposed on the intersexual child for the harmful impacts on his/her psychology.

In this field Malta innovates; on 5 December 2016, the Maltese parliament approved "the Affirmation of Sexual Orientation, Gender Identity, and Gender Expression" Bill, which criminalizes so-called "gay cure" therapy as a "deceptive and harmful" act. The bill defines the practice as any "that aims to change, repress or eliminate a person's sexual orientation, gender identity or gender expression." It also affirms that "no sexual orientation, gender identity or gender expression constitutes a disorder, disease or shortcoming of any sort."

[202] N° 219242, 5 February 2010.

[203] The European Convention of Human Rights of 1950.

The tunisian legislature has to follow the steps of the maltese legislature and criminalizes the violation of sexual identity or orientation and not punishing individuals based on these criteria.

The solution to immunize rights and freedoms of all individuals not with standing their differences is the constitutional "vaccin" by virtue of article 49 of the 2014 Constitution.[204]

Yet, the Constitution is still mute and waiting for the establishment of the constitutional Court to implement it.[205]

As Charles EISENMANN explained, the establishment of a legal framework for the control of constitutionality in a Constitution "made the constitutional provisions legally binding norms". However, in the case of the absence of a constitutional justice, "the Constitution is nothing but a political agenda[206]".

The legislature and the judge should update their frame of reference and get inspired by the universal values of human rights as it is the case for the comparative legal systems.

---

[204] Article 49. «The law shall determine the limitations related to the rights and freedoms that are guaranteed by this Constitution and their exercise, on the condition
that it does not compromise their essence. These limitations can only be put in place where necessary in a civil democratic state, with the aim of protecting the rights of others or based on the requirements of public order, national defense, public health or public morals.
Proportionality between these limitations and their motives must be respected. Judicial authorities shall ensure that rights and freedoms are protected from all violations.»

[205] Law n° 2015-50 of 3 December 2015, related to the constitutional Court, the official gazette, n° 98 of 08 December 2015, (in French), p. 2926.

[206] EISENMANN (Ch.): *La justice constitutionnelle et la haute cour constitutionnelle d'Autriche,* thèse, Paris, L.G.D.G.J, 1928, p. 22, quoted by BALOT (F.) et GEORGES (F.): *L'effet de la décision de justice: contentieux européens, constitutionnel, civil et pénal*, Anthemis, Liège, 2008, p. 151.

# Afterword of the studyentitled « The minoritized »

## To what extent can it be adopted to enforce and develop the law?[1]

By Habib KAZDAGHLI,
Professor of Contemporary History
Former Dean of the Faculty of Letters, Arts and Humanities
University of Manouba

After examining the content of the research conducted by the young colleague Mohamed Amine Jelassi, entitled «The Minoritized», which I had the honor to read before it was published to the readers, I asked myself about the desired interest in the publication of part of an academic work that has been completed for a PhD in Law under the direction of colleague Wahid Ferchichi. In fact, my questioning was associated with the goals and cognitive objectives put forward by the author of this work by tackling a subject that is not unanimous and still causes controversy in society. Indeed, the author of this book describes the legal vacuum that hovers over situations existing in Tunisian society, that are mostly treated by the public only in their problematic aspect, even incendiary, as well as the divergence of points of view in relation to their interpretation and the understanding of what binds them to the founding texts, in particular the Constitution of the Second Republic adopted on January 27, 2014.

We salute the researcher Amine Jelassi for his initiative to launch the debate around such community issues despite the problematic and controversial aspect that dominates their emergence and we note, moreover, that the cognitive approach and the progress in research followed a rational approach based on the observation of the phenomenon studied, its description and the presentation of its legal framework far from victimization and emotional stimulation. We encourage this rational academic approach that refuses to be submitted to taboos that cause certain social phenomena to remain outside the circle of debate and study and which at the same time guarantees the abstraction and distancing of the researcher from topics that constitute the heart of this study. Indeed, the true academic commitment is that which relates to cognitive methods and approaches, it does not constitute a personal victory of the studied community phenomenon. This book is the result of a comprehensive scientific research that was carried out under the scientific supervision of colleague and friend Wahid Ferchichi and whose scientific value was unanimously welcomed by the Scientific Committee of which I had the honor to be part, this research was distinguished by its innovative aspect in the study of Minorities' Law.

We sincerely hope that this cognitive effort will produce a profound and peaceful debate because the book as I understood is an attempt to mature the reflection on subjects that today raise the questions of public opinion. Thanks to the freedom that reigns inour country since 2011, the media have not hesitated to cover these subjects, but in a citizen space where the modern and relevant legal culture is lacking. Thus, the discussions are quickly transformed into verbal altercations and the code of conservative, ready and dominant references is used, which brings us back to the intellectual model in which the individual represents a crushed being

[1] Translate from the Arabic by Ilef Kassab

who lives under the control of the collective being represented by the tribe or group or what was presented under the name of public morality or good mores to which one must submit under coercion and without conviction.

The theoretical conclusions put forward by the researcher have uncovered the cases of legal vacuum that leave room for a possible interpretation, leadingthrough «law», to the minoritization and marginalization of a part of the society. The researcher presented the different gender identities that compose the society, withwhich persons are forced to live in self-repression for fear of isolation. Likewise, freedom of belief is a matter of freedom of conscience and thought; the everyday reality of people who do not identify with the dominant religion is even more complex because law does not provide them with sufficient guarantees for the exercise of their sexual and religious convictions.

The treatment of this subject becomes a community duty in a state of law and constitutional institutions because it concerns citizens who rejoiced and believed like so many others in the new Constitution, but who remained, unlike the others, suspicious to assumetheir identity or beliefs outside the narrow circle that was presumably imposed on them for centuries, based solely on the law. The importance of the research carried out by Amine Jelassi lies in the enumeration of the various gaps in the existing legal texts which must be examined in the light of the liberal spirit of the founding text of the Republic of citizenship advocated by the Constitution of 2014.

We hope that this study will be a tool to deepen the meaning of citizenship by enlightening as many readers as possible on the legal reasoning that frames the subject studied and the disastrous results that come from the situations of minoritization and marginalization that may affect any member of the community due to their assumed identity or its change; questions that are today part of the humanity of contemporary human beings. Conducting research to provide the specificities of the legal situation in our country, but also to inform the reader about comparative experiences in the field of protection of individuals and aspects and samples of respect for their sexual and intellectual identity remains useful.

We are convinced that Tunisia is a pioneering country in terms of initiative - in the name of interest - in regulating the inferior situations of a category of inhabitants who were subjected to injustice and contempt because of their religious or ethnic differences of the rest of the inhabitants, a country of which some bold laws abolished slavery in 1846, the establishment of equality between Muslims and Jews in 1857, and the adoption of a constitution for all the inhabitants in 1861 and we are confident in their ability today, in this promising historical environment in which we have been living since 2011, to put together all efforts to overcome the legal gaps

that have been encountered by the study by Amine Jelassi, whose publication we salute as an intellectual contribution to the achievement of a just society in which all individuals enjoy intellectual and sexual freedom as elements on which modern citizenship is based.