

Call for inputs: Report on colonialism and sexual orientation and gender identity

Addressed to: Independent Expert on sexual orientation and gender identity

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Relevant questions:

2. *What laws, policies, and practices regulated or influenced the shaping of or the socio-normative perception of sexual orientation and gender identity in colonial times? How were they introduced, promoted, administered or enforced? Examples could include prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross-dressing).*

3. *What colonial laws regulating sexual orientation and gender identity are still in place today? How are they enforced? How are they being interpreted by national jurisprudence and customary law? What legal, moral, or socio-cultural explanations have been provided, if any, for their continued existence?*

Comments:

The objective of these comments is to shed light on policies and practices stemming from colonial legacies and discriminating against LGBT persons in Tunisia.

Article 230 of the Tunisian Penal Code criminalizes, to this day, acts of sodomy and homosexuality. The article was drafted in 1913 by French colonial powers. The enforcement of the article often involves a forced, invasive anal examination as ‘evidence’ of a person’s homosexuality. In this regard, not only does Article 230 constitute a violation of human rights but also an infringement of privacy (Flynn-Schneider, 2016).

The problematic practices whereby Article 230 of the Penal Code is enforced are exemplified in the case of ‘Kairouan Six’. In 2015, six men - aged between 18 and 21 - were accused of engaging in acts of sodomy in Kairouan. Following a night of interrogations and a forced anal examination, the ‘Kairouan Six’ were sentenced to three years in prison for violation of Article 230.

While being representative of a wider array of similar cases, the ‘Kairouan Six’ captured significant attention from numerous scholars, journalists and activists on Article 230, particularly on its historical roots. In their report “Article 230: A History of Criminalization of Homosexuality in Tunisia”, Ramy Khouili and Daniel Levine-Spound scrutinize the origins and evolution of Article 230. As they explain, the original French text reads “Sodomy, if it does not fall into any of the cases specified in the previous articles¹, is punishable by three years in prison.” The Arabic counterpart version however replaces “sodomy” with “homosexuality” and thus seems to criminalize the latter rather than the former.

¹ Previous articles mention sexual assaults. In this regard, Article 230 applies to *consensual* sodomy acts.

Khouili and Levine-Spound foreground two key arguments substantiating the colonial origins of Article 230. First, "the absence of explicit references to homosexuality in Tunisian criminal law prior to the French Protectorate", second, the fact that the Tunisian penal code established in 1913 mirrored the 1810 French penal code. Their archival research revealed that the Tunisian sodomy law first appeared as a handwritten note when drafting the preliminary penal code in 1911. However, sodomy laws had been abolished in France almost a century before the colonization of Tunisia, which raises a question that Khouili and Levine-Spound further thoroughly investigate: why did French authorities include sodomy laws when drafting the Tunisian penal code?

One hypothesis brought to light by Khouili and Levine-Spound is the colonizers' perception of Arab/North African sexuality, even more particularly homosexuality. They explain that back in the 16th century, many Europeans moved to Tunisia as an escape from the Catholic Church, to be able to freely live and express their sexual identities. Khouili and Levine-Spound argue that this may have led to "broader anxieties around "indigenous" sexuality", which, along with the colonizers' desire for social control, could explain the inclusion of a sodomy law in the Tunisian penal code in 1913.

The "Arab sexuality" (mis)conception was not unique to Tunisia. Neighboring country Algeria is an interesting case of comparison. Aurelie Perrier's archival research on politics of gender and sexuality in colonized Algeria demonstrates that colonialism was a "fundamentally gendered enterprise" that highly changed the meaning and understanding of sexuality on both the colonizers' and colonized sides. The aforementioned anxieties around "indigenous" sexualities are illustrated here by the French regulation of prostitution. The establishment of a French colony in Algeria in 1830 entailed the enforcement of more severe restrictions on sex workers, such as prior registration with the police or weekly medical check-ups (Aurelie Perrier, 2014). Perrier suggests that the French colonizers' fears around prostitution were deeply tied to fears around homosexuality as both of them embodied the colonizers' "obsession with sexual chaos".

Despite the differences in power structures implemented in each of Algeria and Tunisia, the former being a colony and the latter a Protectorate, Khouili and Levine-Spound suggest that there seemed to be a shared "similar obsession with regulating and controlling indigenous sexuality". This is closely correlated with the French *mission civilisatrice*: since homosexuality was seen as "native vice", singular to 'uncivilized' Africans, French authorities were apprehensive towards the idea that this might exert an influence on 'civilized' French people's moral standards or lead to the spread of diseases.

While the aforescribed hypotheses offer a plausible explanation to the origins and enforcement of Article 230, its continued existence tends to be justified by the country's adherence to Shari'a Law (Islamic Law). Nevertheless, Khouili and Levine-Spound underline the currently relevant importance of understanding its origins; to use Khouili's own words, "you cannot decriminalise it unless you deconstruct why it occurred in the first place."

I am available to provide additional information and material.

Best wishes,

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A revelatory report delves into the historical origins of “Article 230” and the criminalisation of homosexuality in Tunisia. European Endowment for Democracy . (2019, October 2). <https://www.democracyendowment.eu/en/news/1375-a-revelatory-report-delves-into-the-historical-origins-of-article-230-and-the-criminalisation-of-homosexuality-in-tunisia.html>