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Tunisia: Two-year sentence for homosexuality

Arbitrary detention and reported attempt to require discredited anal exam.

HRW (06.07.2020) - <https://bit.ly/3eyEOeG> - A Tunisian court sentenced two men accused of sodomy to two years in prison on June 6, 2020, Human Rights Watch said today. The decision violates their rights to privacy and nondiscrimination under international law and Tunisia's 2014 constitution. The police also attempted to subject the defendants to an anal exam, apparently to use as evidence in the case.

Police arrested the two men, both 26, on suspicion of same-sex conduct on June 3 in Le Kef, a city 175 kilometers southwest of Tunis, after one of them filed an unrelated complaint against the other. The prosecutor of the Kef First Instance Tribunal charged the men with sodomy under article 230 of the penal code, which punishes consensual same-sex conduct with up to three years in prison. Hassina Darraji, the lawyer who took on the men's defense for the upcoming appeal, told Human Rights Watch the defendants told her they had refused the police's demands that they undergo an anal exam.

"Tunisia's record of actively prosecuting people for consensual same-sex conduct is deeply worrying and a blatant invasion of their private life," said Rasha Younes, lesbian, gay, bisexual, and transgender (LGBT) rights researcher at Human Rights Watch. "While states and international bodies have commended Tunisia for its progress on human rights, the criminalization and prosecution of homosexual conduct signals otherwise."

Damj Association, a Tunis-based LGBT rights organization, told Human Rights Watch that one of the men had filed a complaint against the other regarding an outstanding loan. The police then attempted to persuade them to "confess that they are gay" by bullying, insulting, and threatening to imprison them, Darraji said.

Damj and Darraji said that after they were sentenced, the authorities transferred the men, whose names are being withheld for their privacy, to a prison in Ben Arous, near Tunis, when a prisoner in el-Kef prison contracted Covid-19. The men are now being quarantined in the Ben Arous prison. The two-year sentence, Damj said, is longer than most handed down for sodomy in recent years. The appeals hearing is scheduled for July 8.

During Tunisia's 2017 Universal Periodic Review (UPR) hearing at the UN Human Rights Council, in response to the recommendation from several countries, Tunisia formally accepted the recommendation to end forced anal exams as a method of "proving" homosexuality. However, Tunisia's delegation stated: "Medical examinations will be conducted based on the consent of the person and in the presence of a medical expert."

This approach fails to recognize that consent is seriously compromised because trial courts can infer guilt from a refusal to undergo the exam, Human Rights Watch said. Furthermore, the tests are of no scientific or evidentiary value in proving homosexuality. Indeed, such examinations, when forcible, are intrusive, invasive, and amount to cruel, inhuman, and

degrading treatment that violates international law. State-sponsored forcible anal exams violate medical ethics and have been recognized as torture by the UN Committee Against Torture.

Tunisian authorities should immediately quash the two men's conviction and release them, Human Rights Watch said. Tunisia's parliament should repeal penal code article 230, and the Justice Ministry should direct public prosecutors to abandon prosecutions under article 230 and issue a directive ordering prosecutors to stop sending detainees for anal examinations as part of police investigative procedures to determine suspects' sexual behavior. Tunisia's health minister should also direct all forensic doctors under the ministry's authority to cease all anal examinations for these purposes and to respect people's right to physical dignity and integrity.

Prosecutions for consensual sex in private between adults violate the rights to privacy and nondiscrimination guaranteed by the International Covenant on Civil and Political Rights, to which Tunisia is a party. The UN Human Rights Committee, which monitors compliance with the covenant, has made clear on several occasions that sexual orientation is a status protected against discrimination under these provisions. The UN Working Group on Arbitrary Detention has found that arrests for same-sex conduct between consenting adults are, by definition, arbitrary.

This conviction appears to contradict the right to privacy and nondiscrimination reflected in Tunisia's 2014 constitution. Article 24 obligates the government to protect the rights to privacy and the inviolability of the home. Article 21 provides that "All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination."

In 2018, the Commission on Individual Freedoms and Equality, appointed by President Beji Caid Essebsi, proposed, among other actions, to decriminalize homosexuality and to end anal testing in criminal investigations into homosexuality. On October 11, 2018, 13 members of the Tunisian Parliament introduced draft legislation for a code on individual freedoms. It incorporated several proposals from the presidential commission including abolition of article 230.

"Tunisia has an opportunity to uphold individual freedoms and everyone's right to nondiscrimination and bodily integrity by leading the way in decriminalizing same-sex conduct," Younes said. "It should start by immediately releasing these two young men and halting arrests based on sexual orientation under archaic sodomy laws."

LGBTQ association achieves major legal milestone in Tunisia

By Amel al-Hilali

Al-Monitor (10.03.2020) - <https://bit.ly/33mhhcS> - In a first for Tunisia and the Arab world, Shams, an association founded in early 2015 to defend LGBTQ rights, was granted legal protection in a ruling handed down Feb. 21 by Tunisia's Court of Cassation following the state's attempts to shut down the organization.

In December 2015, Kamel Hedhili, head of state litigation, had filed a complaint against the organization, resulting in the Court of First Instance suspending the association's activities for 30 days beginning Jan. 4, 2016. Hedhili's charged that the association had violated the Decree of Associations and had failed to complete the legal registration procedures, ostensibly because its registration was rejected for publication in the Official

Gazette, a decision made by the government and over which Shams had no control. In addition, he asserted that the organization violates the Arab-Islamic norms of Tunisian society because it advocates and defends sodomy, which is a criminal act under Chapter 230 of the Penal Code.

The Decree of Associations (2011) stipulates that associations in their statute, activity, and financing, shall respect the principles of the rule of law, democracy, pluralism, transparency, equality and human rights. It also prohibits them from advocating or involvement in violence, hatred, intolerance and discrimination on religious, sexual or regional grounds. According to Hedhili, Shams violated the decree because its defense of the rights of homosexuals represents sexuality-based discrimination.

On Feb. 23, 2016, the Court of First Instance ruled that Shams “does not violate the law” and allowed it to resume its activities. After additional judicial procedures and postponements, Hedhili challenged that ruling on Feb. 20, 2019, on the grounds that the association's bylaws state that its goal is to defend sexual minorities, which, he said, is inconsistent with “the Islamic values of Tunisian society, which rejects homosexuality and prohibits such inappropriate behavior,” on the basis of Chapter 230 of the penal code.

Three days later, Amna Guellali, Tunisia director at Human Rights Watch, called on the government to stop its legal battle against Shams, especially after the ruling clearing the association of breaking any law and allowing it to continue functioning.

On May 20, 2019, the Court of Appeals rejected the appeal lodged by Hedhili, ruling in favor of Shams resuming its activities, and then last month, the Court of Cassation, the final arbiter in Tunisia's legal system, issued its opinion on Sham's legality.

Speaking to Al-Monitor, Shams executive director Bouhdid Belhedi called the ruling in favor of the association “a victory for the individual rights and freedoms and the civil character of the state established in the country's constitution.”

He lamented the long, drawn out attempt by the government “maliciously” trying to stop Sham's activities, noting that the association's objective is to support sexual minorities “providing financial, emotional and psychological assistance and securing them a safe environment, regardless of their sexual orientation.”

Belhedi stressed that the association will work to abolish Chapter 230 of the Penal Code, which calls for three years in prison for people convicted of sodomy. He also said that Shams, in coordination with human rights organizations, seeks to abolish the practice of authorities ordering “anal examinations” for men arrested on suspicion of having had same-sex sexual relations.

In October 2018, a number of MPs had spoken about coordinating with civil associations in drafting a law decriminalizing homosexuality and prohibiting anal examinations, but no such law has been presented for consideration.

According to Bochra Belhaj Hmida, a former parliamentarian and chairperson of the Individual Freedoms and Equality Committee — created in August 2017 by President Beji Caïd Essebsi to report on proposed legislative reforms on private and public rights and freedoms — the judiciary's decision in favor of Shams is a “legal and judicial revolution” in post-revolution Tunisia.

Hmida told Al-Monitor how proud she was, as a human rights activist, that the judiciary had shown itself to be independent, free of political pressure, in handing an association defending gay rights a victory by legalizing its presence. Hmida stressed that the decision

is a positive first step in that efforts at decriminalizing homosexuality and abolishing anal examinations can now be pursued within the framework of the jurisprudence of that case.

With this legal victory, Shams joins other LGBTQ associations in Muslim-majority countries in the region that have defied prevailing social attitudes in pursuit of human rights. In another example, in Turkey, 17 Mayıs (17 May) was established at the end of February to defend the rights of the country's LGBTQ community. Its name refers to May 17, 1990, when the World Health Organization declassified homosexuality as a mental illness.
