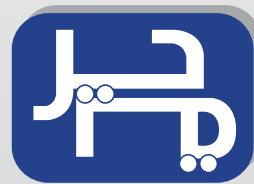


## A Reading of the Legislative Framework Governing the Work of Human Rights Defenders

“TUNISIA”

المؤسسة العربية  
للحريات والمساواة  
arab foundation for  
freedoms and equality



A study issued by the Arab Foundation for Freedoms and Equality

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## GENERAL INTRODUCTION

### I. The methodology of the study:

This legal study was conducted upon the request of the Arab Foundation of Freedom and Equality on the legal framework governing the activity of human rights defenders in the Arab World and exactly so in Lebanon, Tunisia, and Morocco.

This aforementioned study is divided in two:

- **The pure theoretical part**, where we will deal with the most important laws supporting or hindering the movement and the work of human rights defenders. The Constitution and the International Conventions ratified by the countries aforementioned are our main focus as well as various laws related to public and private freedoms. These private freedoms are considered to be the pillar of the movement of the human rights defenders and their struggle in this area.

- **The practical part**, where we will address a specific case in each country that emphasizes the exploitations suffered by activists due to their work as rights and humanitarian defenders based upon their background especially where these exploitations and harassments are a result of a sexual and/or a gender discrimination expressed by authorities whether security or judiciary.

Before digging into the existing legal system in each of the countries listed above, it is first required to define the human rights defenders in order to determine the most important rights and freedoms to be underlined later in the study. We will also briefly review the evolution of this group of people in the international community for its importance in providing a legal framework to strengthen and fortify the mobility of this category in our societies.

## **II. Identifying and defining the category of human rights defenders:**

The United Nations High Commissioner for Human Rights defines the human rights defenders as “those who work individually or in association with others to promote or protect human rights (...) through their work (...) to describe the work they do and some of the contexts in which they operate in.”

In the same context, Amnesty International defines the human rights defenders as “persons, or groups of people, or organizations working to promote and protect human rights through peaceful and non-violent means.”

They:

- *“Expose violations.*
- *Subject violations to public scrutiny.*
- *Incite sanctions for officials held accountable.*
- *Entrust individuals and groups to claim their basic rights as human beings.”*

Based upon these definitions, anyone, no matter of his/her nationality, social status, works and educational background, and/or his/her sexual identity, can be a human rights defender. Defenders can work individually or in groups on a professional or personal level. On one hand, some practice defending human rights in their continuous work. On the other hand, others become defenders due to their individual work a/o through a personal stand they took for the sake of human rights.

Their work can be focused on a certain category of rights such as civil rights, economic and social rights, a/o on cultural rights. However, others turn to defend those whom are exposed to discrimination or marginalization; e.g. homosexuals, bisexuals, and transsexuals; a class we will further highlight in the present study.

Due to what was mentioned above, it is permitted to say that the category of human rights defenders is flexible and dynamic and can be simply defined through the works of individuals regardless of positions and qualifications. In light of this fact, the work of these individuals is quite distinguished from other professions organized and sponsored by specific and clear laws. An attorney or a journalist for example, adopting a certain case of social nature affecting the public interest, due to his/her job descriptions, may benefit from some guarantees enshrined by the legislature under the ordinances which promote and shield his/her activity.

However, and as aforesaid, anyone can become a defender of human rights when he or she adopts a case or takes a stand or enrolls in a movement aiming for human rights. A large number of activists do not necessarily belong to a profession, or a professional association subjected to laws so what about their legal status? Are they not worthy of requiring, just like other professions, some of the guarantees and immunities to ensure and promote their movement?

## **III. The importance of the Universal Declaration explicit for human rights defenders’ rights and duties:**

Human right defenders are prone to violations and retaliations due to their work. These issues are the main reason to dictate an explicit text for this category of individuals; everywhere they were exercising their activities, far from borders and the geographical scales. On March 8, 1999, the United Nations’ General Assembly issued the resolution number 53/144 entitled “the declaration correlated with the right and the responsibility of individuals, groups, and structures of society to promote and protect human rights and fundamental freedoms globally recognized” in order to confirm and enshrine certain rights and freedoms such as, the freedom of expression and dissemination of ideas, the right to a peaceful rally and the dissemination and the exchange of information alongside the criticism of the work and the performance of governmental bodies; not to mention the fundamental right of each individual to practice an activity aiming for promoting and protecting human rights in general.

Although these rights and freedoms abovementioned were originally enshrined in the Universal Declaration of Human Rights, in the International Covenant on civil and political rights, and in most constitutions for all individuals and citizens, they have extents and effects directly linked to the nature of the work and the activity of human rights defenders where they turn, as a result to acts of “retaliation” exercised by governments and their organs from defending other individuals’ rights into having their own rights violated which impedes and sometimes even cripples their work.

For this reason, the Universal Declaration explicit for human rights defenders was put to devote a responsibility to protect human rights where it considered that “anyone can, as a result of their profession, impact the human dignity, human rights, and fundamental freedoms of others shall respect those rights and freedoms and comply to national and international standards relevant to the behavior or the protocol of the profession.”

Moreover, the declaration abovementioned set the responsibility on the government in taking “legislative and administrative steps necessary for ensuring the effective enjoyment of the rights and freedoms referred to in the declaration” right after emphasizing on the two duties of protecting and promoting human rights which are, in the first place, the government’s responsibility. Thus, the duty of protecting individuals working to provide what most organizations and government institutions had failed to provide or had caused from raging violations of fundamental rights becomes twice over and requires the provision of appropriate framework and climates for the conduct of their activity.

#### **IV. Defenders of homosexuals and bisexuals rights:**

During the last two decades, active movements were supporting sexual rights and fighting the violations against homosexuals, bisexuals, and transsexuals. In fact, this movement has taken an explicit bias in our societies especially with the existence of laws, still present in our days, completely chastising individuals for their sexual choices. Due to the conservative stand taken nowadays by the legislator in most Arab countries, practices, stands, discriminatory, and bigoted judgments are still overpowering in our societies towards this category of individuals for religious, cultural, or traditional considerations contributing in marginalizing these individuals and exposing them to countless violations.

According to Amnesty International, which for decades had monitored violations of human rights, individuals or groups defending the rights of homosexuals, bisexuals, and transsexuals are often exposed to danger and denouncement in their own communities. Defenders of homosexual, bisexual, and transsexual rights have also faced the entire list of violations including:

- Denial of legal registration.
- Prison on charges of committing crimes “against nature.”
- Killing sprees.
- Threats.
- Attacks.
- Ostracized by others in their local communities.

Defenders had drawn the public attention to the many ways forbidding individuals with different sexual tendencies or gender-related identities from the supposed norm of living their lives and practicing their rights and freedoms perceived by others as postulations.

#### **V. The problematics and the axes addressed by this study according to the constitutions and the positive laws in each country:**

The study will address the legal status of human rights defenders in different countries through two angles:

The first is based on analyzing the positive laws that preserve or undermine the set of rights as seen by the Universal Declaration explicit for the rights and duties of Human Rights Defenders which are summed up as follows:

- To seek the protection and realization of human rights;
- To meet or assemble peacefully including to form and to join associations and non-governmental organizations; To unhindered access to and communication with non-governmental and intergovernmental organizations;
- To seek, obtain, receive and hold information relating to human rights and fundamental freedoms including the access to information related to the realization of these rights and freedoms, and to the legislative, the judicial or the local administrative systems;
- Freedom of expression including to spread opinions and information related to human rights and fundamental freedoms and transfer them to others; the right to study, discuss, form, and adopt opinions to ensure all human rights and fundamental freedoms in the field of law and in application;
- To develop and discuss new human rights ideas and principles and to advocate their acceptance;
- To participate on the basis of equality and without discrimination in the management of public affairs;
- To submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may impede the realization of human rights and fundamental freedoms;
- To benefit from an effective remedy;
- To the lawful exercise of the occupation or profession of human rights defender;
- To participate in peaceful activities seeking anti-human rights and fundamental freedoms’ violations;
- To protect and preserve personal freedoms;
- To solicit, receive and utilize resources for the purpose of protecting human rights;

As for the second, it leads the study towards a specific category of legal texts influencing the sexual freedom, the obstacles, and the challenges faced by the defenders of homosexuals, bisexuals, and transsexuals in every country. Here, we will highlight and underline the applicable penal laws along with some practices that are carried out by security forces interfering in the work and movement of defenders whether by restricting them to practice their freedoms or by being subjected to blackmail and intimidation due to their sexual identities that they strive to defend.

As a final point, it is worth mentioning two general observations about the content of the reports according to each country:

- The adopted approach in the Lebanese report was different from the one adopted in Tunisia and in Morocco due to considerations related to the difference in context of each country. Tunisia is considered to be the country in which the Arabic Spring first took place in 2011 where the civil society had accompanied all developments, reforms, and debates marking the post-revolution. However, the Moroccan context, and despite the reforms conducted by the kingdom after the Tunisian revolution, is quite different from the Tunisian context in terms of the weak participation of the Moroccan society along with the subsequent questioning about the importance and effectiveness of the reforms made as we shall further explain in the study. In both cases, we thought it worthwhile to address both contexts before and after the legislative reforms that have taken place especially upon the constitutional level. In parallel, it is noted that the Lebanese context remained isolated, if that can be said, from the storm of reforms affecting some Arab countries. Therefore, we focused in the Lebanese context on what the civil society and the human rights defenders had gotten used to from abuses and practices and how they confronted them during their movements;

- To avoid repetition, we will refer to the international law on active human rights defenders and in particular we will refer to the Universal Declaration of Human Rights and to the International Covenants explicit to the rights and duties of human rights defenders – in Lebanon's report- noting that the same frame is applied to the Tunisian and the Moroccan context especially after the constitutional amendments that have recently taken place with a degree of inequality.

- **Context**

- o The legal, political, and social climate after the revolution.
- o The current general legal framework governing human rights in Tunisia.
- o The evaluation of the general legal framework guaranteeing rights and freedoms: Tunisia's new Constitution (2014) between accomplishments and criticism.
- o The structures and the official bodies concerned with human rights in Tunisia.

- **The reality of the rights and the freedoms of individuals in local laws and their influence on the humanitarian and legal movement.**

- o The right to life.
- o Personal freedom.
- o The right to physical integrity.
- o Freedom of private life.
- o Punitive and discriminatory restrictions affecting sexual freedoms and the inviolability of the home.
- o Legal framework governing the protection of personal data.

- **The reality of general rights and freedoms and their impact on the legal and humanitarian movement.**

- o Freedom of expression.
- o Freedom of press.
- o Freedom of audiovisual communication.
- o The legal restrictions on the freedom of expression.
- o Freedom of assembly and participating in peaceful gatherings.
- o The right to access information.

- **Case study.**

## **I. The context**

The Tunisian society had witnessed throughout the past three years a raucous phase charged with a series of various events and reforms accompanied by radical changes on the legislative and on the institutional levels due to the prominent and firm legal and humanitarian movement- the basis of what was later called the Arab Spring. This movement is still managing, monitoring, demanding, and detecting the progresses and events: on the political and economic level, or in the field of supporting human rights.

This phase began in late 2010. Precisely on December 7, 2010: the day of the uprising, and on January 14, 2011: the departure date of former president Ben Ali and declaring state of emergency. As for the cherry on top, January 2014: the day of adopting a new constitution, supposedly, ending this transitional phase paving a civilian state guaranteeing rights and freedoms according to the aspirations of Tunisians. This phase included some prominent situations in which crucial changes took place on the level of handling the legislative and the executive powers, most notably the election of National Constituent Assembly (October 2011), which was assigned to draft a new constitution and to form three assemblies in the context of the reform process, and to appoint sequential governments.

There is no doubt that the Tunisian society with all of its components, characteristics, and movements was the first factor behind the protests, demands, and reforms lately witnessed by Tunisia. For this reason, it was necessary to focus on the legal and social movement in the Tunisian context, the subject of our study, from a pre and post- revolution point of view particularly, given the nature of the abuses and violations and flagrant infringements incurred by a huge number of individuals and groups active in the field of human rights defender, as we will further prove below.

### **1. The legal, political, and social climate after the revolution:**

On January 27, 2014, and during an extraordinary session of the National Constituent Assembly of Tunisia, the president, the chairman of the National Constituent Assembly, and the prime minister had signed the Tunisian constitution right after it was voted and approved upon by the majority of the members of the Council. Despite some of the criticisms, further mentioned in details, voiced by activists in the field of human rights, this date constitute a prominent phase in the path of the Tunisian revolution which began in late 2010 aiming for a civilian state guaranteeing rights and freedoms.

In return to the pre-stage of adopting a new constitution, a number of legislative and legal achievements are to be noted. These achievements sought to ease the restrictions on practicing human rights and to reinforce some general freedoms especially freedom of expression, freedom of press, and freedom of organizing associations and political parties. Some laws had also been amended especially those related to torture in order to be more consistent with the definition of international law. Moreover, radical achievements were noted on the level of international law and human rights' law initiated by the interim government during 2011 and 2012. It was represented by the withdrawal of all reservations which Tunisia had had declared on the International Convention against the Discrimination of Women, on the consecration of the principle of equality between men and women during the electoral process, and by ratifying international treaties important to human rights including the "Optional Protocol annexed to the Covenant on civil and political rights," the "Optional Protocol annexed to the International Convention against torture," the "International Convention for protecting all individuals from enforced disappearance," and the "Rome Statute of the International Criminal Court."

Nevertheless, this stage was not free from repressive practices and extreme violations committed by the government and the security and judicial authorities against individuals from the beginning of the uprising in late 2010. In addition, the escalation of the religious discourse completely denying the individual's privacy on one hand, and on the other hand, disbelieving the international conventions. This is what negatively impacted the reality of individual and public freedoms. The practices against individuals had worsened especially against women, artists, creators, journalists, individuals adopting free perspectives, and human rights activists in general.

In front of these developments, and in preparation of a fresh phase established by the new constitution, we will set the legal framework supporting human rights according to what is read in the new constitution from one hand, and on the other hand, for the role and the powers of institutions, and for the official assemblies concerned in this range.

### **2. The current legal framework governing Human Rights in Tunisia:**

In this section, we will review the legal framework guaranteeing rights and freedoms designated by the new constitution (A). We will also point out some of the structures and the official human rights bodies (B).

### **A. The evaluation of the general legal framework guaranteeing rights and freedoms:**

Tunisia's new Constitution (2014) between accomplishments and criticism.

As we had aforementioned, the new constitution was approved upon in early 2014 due to the impact of the debates which some were characterized by its roughness between the various political forces represented in the Constituent Assembly especially in terms of demanding the ruling Islamic renaissance movement to adopt Islam the source of legislation, which later was disapproved by voting.

The new constitution includes a preamble, 149 chapters divided into 10 parts. We will point out the most important provisions while highlighting the content of the first two chapters entitled the General Principles, and the Rights and Freedoms for its direct link with our present study.

The preamble dedicated the concept of Human Values and the Universal Principles of Human Rights, an up-close part of the Tunisian people and equal to its attachment with the Teachings of Islam and Its Characterized Purposes with Openness and Moderation. It was necessary that the state would respect freedoms and human rights along with the independence of the law lords and the equality in rights and duties among all citizens with no exception and to ensure justice between parties (...) creating a democratic, republican, and participatory system. Concepts and values inspired from the essence of the revolution and was absent from the constitution of 1959. An observation is made about the phrase: sacred human rights. This phrase can be understood as if it consecrates some sort of relativity and hierarchy in the human rights approach. In its nature, human rights are not prone to divisions; it is connected and interdependent with one another. The relativity of humanitarian values with the Islamic teachings is also noted along with the consequent probability of cornering some public and individual freedoms under the pretext of conflicting with the essence and basis of the Islamic Religion; a sense of fear expressed by local associations active in the field of human rights and the protection of freedoms while commenting on the context of the constitutional draft before recently ratifying it.

In the wake of the fall of the proposal for adopting Islam as a source of power according to latest discussions, the new constitution gained back the literal text of chapter I of the constitution of 1959 and stressed, in chapter II, upon the significance of the law and the civility of the state, and prohibited both chapters from ever being modified.

Among the general principles mentioned in chapter I, and the pledging of the freedom of thought, conscience, and religious practices that were originally dedicated in the old constitution, the new constitution obliges the government, guarantor of religion, to spread values of moderations, forgiveness, the protection of holy sites, and to prevent attacks and calls of atonement and to stress on hatred, violence, and to address them. This clause was added to the draft constitution during the debates within the Constituent Assembly. It is also noticeable the devotion of a clause dedicated to national security forces to maintain security, general order, the protection of individuals, institutions, and properties, and the enforcement of the law **within the confines of respecting freedoms in the framework of strict neutrality**. There is no doubt that these additions reflect the reality lived by Tunisians during the post-revolution period in terms of extremism in religious discourses and the suppression of freedoms by security authorities.

As for the principle of the sequence of the laws, the international treaties- approved by the parliament- surpass local laws but remains under the constitution. Here, we recall what was mentioned in the report of the Tunisian Association for the defense of individual liberties that have expressed concerns about this clause and noted the following:

“ The citation gave the constitution a solid explicit necessity to match the ratified treaties to write the constitution (...) censorship later on enforced on human rights treaties ratified before the entry into force of the new constitution (...) this fear seems legitimate and justified by us for the following reasons: the absence of an explicit international reference for human rights in the draft of the constitution stresses this fear for the majority of the Constituent Assembly , stamped with a religious reference, has opposed the explicit citation or to mention the Universal Declaration for Human Rights as a part of the constitution.”

Part II addresses the rights and freedoms where chapter 21 paints the general framework to practice them. After it had stressed upon the principle of equality among citizens in rights and duties and in front of the law with no discrimination, it obliged the state to guarantee the individual and public rights and freedoms and to provide the reasons for a decent living. It is noted in this area the exclusion of banning inequality of race, color, gender, language, religion, and/or political or other national or social origin, property, and birth origins from the article.



This allows to retain some practices and to adopt legislative texts discriminating marginalized ethnic, sexual, and gender groups or even foreigners for they are not covered by the protection noted in this chapter where explicit reasons were not defined which prohibit inequality. On the other hand, it is noted a specific section for provisions related to women's rights in order to promote equal opportunities and equality with men and the elimination of violence against them and providing children's rights on many levels as required by the best interests and the rights of people with special needs towards ensuring their integration into society.

The right to life is sacred and strictly untouchable unless in major situations controlled by the law and that is the main result of not abolishing the death penalty. Torture, whether physical or moral, is completely prohibited. The human dignity and the sanctity of the body are both guaranteed while the crime of torture does not fall in line with the amendments of 2013 to strengthen the fight against torture according to what we will further expose.

Along with the freedom of expression abovementioned, and under the title of individual freedoms, the new constitution has guaranteed the private life, the inviolability of the home, and the confidentiality of personal correspondence and communications according to chapter 24, along with the freedom of choosing residence, and the freedom of movement inside and outside the borders of the country. It is noted that the constitutional draft, in its original form, was quite restrictive vis-à-vis these freedoms and rights in certain cases laid down by law and by court order; however, this was not adopted by the final text of the new constitution.

Personal freedom and the principle of sanctions' legitimacy are both guaranteed along with the right to counsel and the need to determine the length of time of the temporary arrest according to explicit texts.

As for public freedoms, which are directly related to political, social, and legal movements, freedom of thought and expression, the media and publishing are guaranteed and it is prohibited to undergo prior censorship. However, it is possible to limit them under a law protecting the rights and reputations of others, as well as, security and health. The note required the issuance of a decree on November 2, 2011 regarding the freedom of audiovisual communication and established an independent body to graduate this end. We will discuss its provisions and clauses in the section on public freedoms.

On the same track, the new constitution has guaranteed the right to access information within the limits of not compromising national security and the guaranteed rights of the constitution. It was in order to devote the legislation of May 2011 and the way to implement it which was declared upon the decision of the Prime Minister in 2012. We will further highlight it in the context of the report.

The new constitution had allocated an area for academic freedoms and the freedom of scientific research. It had urged the State to provide necessary resources to develop researches in both scientific and technological fields. It had also provided culture with a special preference through guaranteeing the freedom of creativity and had supported its originality, diversity, and renewal while praising the values of tolerance and the rejection of violence, along with the openness to various cultures, and inter-dialogues between civilizations.

Moreover, the new constitution has guaranteed the right to peacefully meet and assemble through devoting the freedom to form political parties, unions, and associations on the condition that the law would control the configuration procedures without ever impairing the essence of this freedom and under the condition that the parties, the unions, and the associations would commit to its fundamental statutes, and activities due to the provisions of the constitution, the law, the financial transparency, and the renouncement of violence. At this point too, we note the issuance of two decrees in March 2011. These two decrees discuss the organization of associations and political parties where we will further discuss their clause in the report. On the same hand, the new constitution has noted the right to participate in peaceful activities through devoting the freedom to meet and to peacefully protest; it is known that the original draft of the constitution was restricting the practice of this freedom according to what is controlled by the law from actions which do not affect the essence of this freedom; a matter not adopted after the final discussions.

Unlike the constitution of 1959, which had guaranteed the right to organize with no reference to the right to protest, this right became dedicated explicitly under chapter 36 of the new constitution.

Finally, we refer to the provisions of Chapter 49, which deals with the controls located on the practice of the rights and freedoms guaranteed in the constitution and the role of the judiciary in protecting the latter from any violation. In the initial draft of the constitution, the restrictions under the law aim for not compromising the essence. However, crucial amendments had occurred in the text seeking to limit these restrictions for a necessity required by the civil democratic state and for the reason of protecting the rights of others (...) while respecting proportionality between these controls and their obligations. On the other hand, and on a contradictory path aiming for expansion in imposing these restrictions, it is noticed an increase of the use of the phrase “the requirements of public morals” as well as the requirements of general security, national defense, or public health; a flexible phrase in its structure and can be interpreted in order to impose additional restrictions on the practice of these freedoms.

It is also noted that a new clause was added to the aforementioned chapter prohibiting any amendment undermining the gains of human rights and its guaranteed freedoms in this constitution. We also refer to an important recommendation brought up by human right organizations that promote the role of the judiciary in this area by giving priority for public rights and freedoms and the interpretation of human rights conventions, but unfortunately this has not been introduced in the final version of the text of the new constitution.

In conclusion, there is no doubt that the new constitution has reflected a new and sophisticated speech to the reality of freedoms and rights in Tunisian society, in spite of some of the gaps and criticism to which we had consequently referred to. It is required however, a follow-up for the judiciary work by the civil society and activists in the field of human rights and freedoms to devote this rightful speech which Tunisians had fought for during the past few years.

#### **B. The structures and the official bodies concerned with human rights in Tunisia**

We will be sufficient here to underline the most important bodies related to human rights. Some of these bodies were already present before 2011 and some were renewed under the law after the revolution and were devoted by the new constitution. We will further expand on how they are formed and their functions within the framework of our handling for freedoms and rights.

#### **• The Ministry of Human Rights and Transitional Justice:**

On the governmental level, we note that the Ministry of Human Rights and Transitional Justice was renewed on 24 December 2011 and was later organized under Decrees No. 22/2012 and 23/2012 issued on January 19, 2012.

On the level of “independent” bodies, we refer to two bodies established before the revolution: the High Commission for Human Rights and Fundamental Freedoms (1991), and the National Commission for the Protection of Personal Data (2004). After reviewing their regulatory texts, it is clear that their independence and effectiveness are quite narrow.

In comparison, the gap between the bodies formed before the revolution and those renewed after the revolution and are devoted by the new constitution is crystal clear. We refer here in particular to:

#### **• The Supreme Commission for Audiovisual Contact:**

It was established by decree no. 116 dated November 2, 2011. It was reintroduced and dealt with in chapter 127 of the new constitution. It has a supervisory and an advisory function and deals in particular with the amendment and the development of audiovisual and communication sector. It ensures and guarantees the freedom of expression and the freedom of press as well as it guarantees a fair and pluralistic media. The commission is consulted tacitly in draft laws related to its field of expertise. It has a moral personality and a financial and an administrative independence. It is formed by nine independent members of competence and integrity. They exercise their functions for a single period of six years where one-third of its members are renewed every two years.

#### **• The National Commission for the Prevention of Torture and other forms of Cruelty or Inhumane, Harsh, and Degrading Punishments:**

It was established under Law no. 43/2013 on November 21, 2013. It has a moral personality and the financial and administrative independence. Its tasks are the following:

- To get the possible and the necessary administrative facilities.
- To get information on places of detention, its total, its location, and the number of people deprived from their freedoms.
- To get access on information related to the treatment of people who are deprived from their freedoms as well as conditions.
- To get access on all places of detention, their installations, and their facilities.
- To conduct private interviews with people deprived from their freedoms or with any other person capable of giving information without witnesses and so personally or with the help of a sworn interpreter.

This commission stands out from others in its composition. We notice the extent of involvement of the civil society and specialists whereas its total independence from executive authorities.

This commission is formed by sixteen members mentioned as follows:

- Six members representing organizations and civil society associations in defense of Human Rights;
- Two university professors specialized in social works;
- A specialist in child protection;
- Two members representing the legal sector;
- Three members representing doctors, including a psychiatrist;
- Two retired judges;

• **Human Rights Commission:**

It was established under Chapter 128 of the new constitution. It monitors the respect of freedoms and human rights and seeks to strengthen it. It suggests what is important to the development of the human rights system and it is explicitly consulted in matters of draft laws related to its field of competence. The commission has the authority to investigate in matters of human rights violations in order to be settled or forwarded to the concerned authorities. It is formed by independent members with competence and integrity. They exercise their tasks for a single six-year term.

In the same context, the new constitution has established under Chapter 126 the Independent High Commission for Elections which manages and organizes elections and referendums as well as supervising all stages including the safety, integrity, the transparency of the electoral process, and the declaration of the results. It is formed by nine independent members with competence and integrity. They exercise their tasks for a single six-year term and it renews one-third of its members every two years as well as the **Sustainable Development Commission and the rights of future generations** (Chapter 129 of the new Constitution) have the necessary advisory related to economic, social, environmental issues, and development schemes.

According to what was aforementioned, the extent of multiple structures and bodies involved in the field of human rights in Tunisia is quite clear. There is no doubt that the existence of these bodies would strengthen the rights and freedoms in various areas abovementioned.

However, it is recorded in the corresponding overlapping powers and the lack of coordination in terms of tasks, as well as having some authority and becoming under the control of the executive powers. What is worth mentioning here, is the bypass of these restrictions for bodies and commissions established after 2011, as we shall further explain when we address the reality of rights and freedoms.

## **II. The reality of the rights and the freedoms of individuals in local laws and their influence on the humanitarian and legal movement**

In this section, we will discuss the reality of individual rights and freedoms and their influence on the humanitarian and legal movement knowing that the latest violation facing these rights and freedoms and/or its suspension is aiming to control the individual work of human rights defenders and the use of their personal lives as leverage. The security authorities and even the judiciary ones did not however, hesitate to use this method against individuals during the period which had followed the Tunisian revolution. In this case, we will address the legal framework which paints the right to life (1), the personal freedom (2), the right to physical integrity (3), and the freedom of a private life. We will discuss the freedoms of sexuality, the inviolability of the home, and the protection of personal data (4).

### **1. The right to life:**

As aforementioned, the right to life, human dignity, and the sanctity of the body are guaranteed in the new constitution. What is the reality of these rights in the applicable local laws? What are the guarantees and/or the restrictions stated by the legislation of laws?

Despite the devotion of the right to life and considering it as sacred, the new constitution is still allowing the violation of this right in “major cases” stated in the laws. In other terms, the death penalty is still legal in the Tunisian penal laws.

### **2. The personal freedom:**

The personal freedom and the principle of the legitimacy of sanctions are guaranteed in the new constitution. The right to counsel and the need to determine the length of temporary arrest is also explicitly stated. In this context, we refer to the penal provisions governing these rights and freedoms.

Initially, the Penal Code has devoted a section to the assault on personal freedom, meaning the imprisonment of any individual without legitimate reason, where we read the following: "Any person arresting, and detaining an individual and without legal permission, faces ten years of imprisonment and a fine of twenty thousand dinars";

The penalty is stressed upon in the following cases:

"The punishment is for twenty years in jail and a fine of twenty thousand dinars:

- If the arrest, the detention, or the imprisonment is carried out by violence or by threat,
- If this operation was carried out using a weapon or by several people,
- If the victim is a public official or a member of the diplomatic or consular or a member of their family under the condition that the offender had known in advance the identity of the victim,

- If the of one of these actions was carried out under the threat of killing or hurting the hostage and the continuous detention in order to compel a third party whether the State or intergovernmental organization, or a natural person or a legal entity, or a group of persons to do or to abstain from doing any act as a condition explicitly or implicitly for the release of the hostage;
- If the arrest or the detention has exceeded a month, the punishment can be life in prison and if it resulted in a physical attack or resulted in catching a disease or if the intent of this process was to create or facilitate the commission of a felony or a misdemeanor, as well as if it guaranteed a smuggling operation or was meant to ensure the immunity of the aggressors and their accomplices in felony or misdemeanor, to execute a command or a condition, or to undermine the physical safety of the victim or victims for what matters.
- The punishment for these crimes can be the death penalty if accompanied or followed by death."

In this context, it is required to highlight the provisions subsidizing the period of time allowed by law to arrest suspects on the basis of imposed principles of presumption of innocence and personal freedom; we distinguish between the arrest executed by the Judicial Police and the preventive arrest, which by its nature, is an exceptional way to be adopted during the stages of investigation.

In cases requiring further research, the commissioners of the Judicial Police are not allowed to keep the detainee, even in the case of flagrante felony, for more than three days. They must inform and notify the public prosecutor so that he can extend in writing a period of three more days. This process must be justified and portraying all the legal procedures which vindicate it. In addition, the commissioners of the Judicial Police should speak a common language the detainee understands to inform him of the causes, and of the actions taken against him as well as of the duration of his arresting. The commissioners must also inform him of what is guaranteed by law: the possibility of a request submitted to a medical examination during the period of retention and the notification of one asset or branch or brother or wife with suspicion by choosing the action taken against him. The holder or one of the persons mentioned in the preceding paragraph may ask for a medical examination during the holding period or upon termination. What is worth mentioning is that at this point the law did not give the detainee the right to a lawyer.

According to the conservative arrest, which takes place during the judicial investigation stage, the law has authorized the subdued stopping of suspects in precautionary felonies and misdemeanors while stronger evidence requires suspension as a mean of security therefore avoiding them from committing new crimes or ensuring the execution of the sentence or as a way of providing the proper conduct of investigation which does not succeed a period of six months, and under the condition of a strong reason containing facts and legal grounds justifying the detention; if it was required by the interests of the investigation to keep the suspects in, the investigating judge can extend the period of suspension right after taking the opinion of the public prosecutor and under reasoned decision for the offense: once for a period of three months in prison. As for the crime, the duration can be extended twice for a period of four months. In addition, the law has authorized the right to a lawyer during the investigation period. In this case, the hearing of the defendant takes place in presence of the lawyer in question, checking with the procedures of the investigation.

### **3. The right to physical integrity:**

Torture, whether physical or moral, is prohibited and is not subject to the statute of limitations; in other words, the right to prosecute the offense does not fall over time, contrary to what was the case previously. This prohibition is enshrined under the constitution and under the legislative texts recently issued and requires further explanation.

Law No. 43/2013 dated October 21, 2013, has introduced an independent public body called the "National Commission for the Prevention of Torture and other cruelties, whether inhuman, harsh, or degrading punishment." It has the moral personality, and the administrative and financial independence. The aforementioned law has included new and developed terminology harmonizing with Tunisia's national obligations through defining the concept of deprivation of liberty as well as the expansion in defining and explaining the places of detention, where we read the following:

"The following terms explain the meaning of the Basic Law:

Deprivation of liberty: Every form of detaining, arresting, imprisoning or depositing a person by a judicial or an administrative order or by another authority with its consent, acquiescence or muteness.

Places of detention: This means all the places that are subject or could be under the jurisdiction of the Tunisian state and its control or held by its consent, which can be found where people are deprived of their liberty under an order issued by a public authority with its consent, acquiescence or muteness.

**In particular, the places of detention are:**

- Civilian prisons,
- Reform centers for delinquent children,
- Shelters for children,
- Retention centers,
- Psychiatric institutions,
- Accommodating refugees and asylum seekers centers,
- Migrant centers,
- Quarantine centers,
- Transit zones at airports and seaports,
- Disciplinary centers,
- The means used for the transport of persons deprived of their liberty.”

What is worth mentioning is the lack of indication for the concept of “discriminating practices.” This case allows the National Commission to detect the possible violations occurring in the future without being restricted to the text.

The aforementioned law has given the National Commission a wide authority especially in terms of carrying out surprise visits for the abovementioned detention places. The law has obliged administrative authorities to cooperate with the National Commission or else it would be subjected to administrative penalties. The law has also set penal sanctions against anyone attacking the members of the National Commission.

In addition, and in order to assure the work of the National Commission and its effectiveness, the members have the complete immunity where it is prohibited with the exception of in flagrante delicto of course, “to track or to stop the president of the National Commission or one of its members of the reason of an expressed opinion or an act related to the practice of the tasks even after the end of their term (...) it is also prohibited to track or stop the president of the National Commission or one of its members for a felony or an offense unless the National Commission has agreed to lift the immunity with the majority of its members. In the same context, the law protects the individuals providing the National Commission with information related to torture practices or leading to their perpetrators while taking into account the legislation on the protection of personal data which we will cover below.

**4. The freedom of private life and the protection of personal data:**

The most serious restrictions of individual freedoms and the sanctity of the individual and his personal life is reflected in the criminal provisions that still criminalize acts related to intimacy of individuals and their sexual freedoms. These provisions have granted broad powers to an officer of justice, public prosecutors, and investigating judges allowing them to violate special places and expose the private life under the pretext of investigating felonies into or “moral crimes” (a). We will also discuss in the second paragraph the legal framework governing the protection of personal data (b).

**a. Criminal and Discriminatory Restrictions on Sexual Freedom and the Inviolability of the Home**

Although the new constitution has enshrined the concept of private life, sexual freedom and the right of the individual to dispose his body remain violated due to legal provisions criminalizing sexual acts between adults with their mutual consent. This case allows the Judicial Police to interfere in the intimate lives of individuals and in the sanctity of their homes under the pretext of “flagrante delicto.”

Under the title of “adultery,” the Penal Code criminalizes sexual encounters between adults of different sexes happening outside the frame of marriage under the condition that one of the individuals is married. The individuals face a fine and a sentence of five years in prison. What is worth mentioning is that the Tunisian law does not discriminate in sentences on the basis of who committed the crime as well as it does not criminalizes sexual encounters between adults outside the frame of marriage unless in the case of a man and a woman under the age of twenty as we will see below.

Under the title of “assault in contravention of humility,” the Penal Code criminalizes sexual encounters between adults of the same sex where we expressly read that perpetrators of *homosexuality and lesbianism face three years in prison.*

On the other hand, we refer to discriminatory penal provisions on the basis of gender or sex, where the offense of rape is only valid if the victim was a woman:

“Death penalty: Any individual engaging in a sexual act with a female by force, violence, or with the use or the threat of a weapon, and any individual engaging in a sexual act with a female under ten years old even if the means aforementioned were not in use;

Life in prison: Any individual engaging in a sexual act with a female without her consent. The consent is completely absent if the victim did not complete her thirteen years of age.”

Generally, a man faces six years in prison if he had been engaged in a non-violent sexual act with a female who did not complete her fifteen years of age. However, if the victim was above fifteen but less than twenty years of age, the man faces 5 years in prison; the perpetrator of one of these crimes is completely exonerated if he marries the victim.

The reality of the matter is that it is hard when it comes to facts and evidence to prove these “crimes” or arrest their perpetrators unless in the cases of flagrante delicto which means providing exposure to private life and the sanctity of the private places. It is a fact that the sanctity of the home is enshrined in the new constitution as well as in the old one, but the lesson remains in the penal provisions legalizing its violation through expanding the authority of the Judicial Police in this area.

We read in the Journal of Criminal Procedures the following:

#### **“Chapter 93**

Inspection is carried out in all places where there may be evidence leading to the truth.

#### **Chapter 94**

The inspection of residential properties is the responsibility of the general investigator only.

He may initiate his inspection in residential properties:

**Art.1:** The Commissioners of the Judicial Police in the form of crimes or misdemeanors and according to the conditions prescribed by the Law.

**Art.2:** The Commissioners of the Judicial Police showed in number 2 to 4 of Chapter 10 and required under the behalf of the general investigator.

**Art.3:** Administration staff and their licensed assistants under a special provision.

#### **Chapter 95**

The inspection of residential properties and what follows is prohibited before 6:00 am and after 8:00 pm unless in the matters of crimes or misdemeanors or in cases where entering without the consent of the owner in order to arrest the suspect or a fleeing prisoner.”

It is crystal clear that the principle is allowing the inspection where restrictions are only limited to available hours. However, the concept of “felony or misdemeanor” is flexible and open to interpretation.

#### **b. The Legal Framework Governing the Protection of Personal Data**

On July 27, 2004, the Fundamental Law No. 63/2004 aiming to the protection of personal data was issued. It established the "National Commission for the Protection of Personal Data," and its important tasks are:

- Licensing and receiving permission to carry out the processing of personal data according to the aforementioned law;
- Receiving complaints under the jurisdiction entrusted under the same law;
- Identifying the necessary guarantees and appropriate protection measures of personal data;
- Accessing the data subject to processing inadvertently and validating the collection of necessary instructions for the exercise of its functions;
- Expressing an opinion on all the relevant provisions of the same law issues;
- Preparing behavioral rules in the field;
- Contributing to research activities, training and studies relevant to the protection of personal data and in general in every other activity related to the field of intervention.

Considering its composition, it is evident that most of its members belong to a government authority and therefore lack the independence and the margin of freedom necessary to pursue such tasks, as well as the lack of involvement of competent individuals and representatives of civil society, unlike the composition of the Commission Against Torture for example. It is noticed that the law No. 63/2004 did not specify the method of selection and nomination of members of the Commission. It was completed later in 2007 as the minister in charge of Human Rights became responsible for choosing the members, something that would restrict the procedures and reduce the margin of autonomy; it was not required for members to be present and on task on a full-time basis with the exception of the president and two judges which had raised debate about its effectiveness.

Apart from the problem of configuration and the extent of authorities, and the margin of powers, the abovementioned law includes important definitions and a number of principles asking for further attention for they had become part of the Tunisian legislation and it can be relied upon. The law defines the processing of personal data as "operations carried out automatically or manually by a natural or by a legal person. It aims for the collection of personal data, recorded or saved or organized, changed or exploited or used or sent or distributed or published or destructed, or to access the data as well as all operations relating to the exploitation of data, indexes, records or cards or interface linking.”

Among the principles enshrined in legislation, the processing of personal data is prohibited in the purposes for which it was collected unless the person concerned has agreed on it, or if the achievement of the vital interest of the person is on the line or if they are used for scientific purposes. The processing of personal data is also banned if or when it is related to offenses or by previewing it or by following it in the penal code or through penalties or precautionary measures or judicial precedents as well as personal data that relates directly or indirectly to ethnic or genetic origins or religious beliefs or political ideas or philosophical or trade unions or health; we note the lack of referencing this clause as a sign for data related to sexual freedoms.

The law also requires every person who, by himself or through others, addresses the data processing to take all necessary measures to maintain the safety precautions to prevent third parties from modifying or damaging it or perceiving it without the owner's permission. Among these precautions we highlight:

- Do not put used equipment and fittings in the processing of personal data in the circumstances or places able to be accessed by unauthorized persons;
- Inability to read, copy, modify or transfer bonds by an unauthorized person;
- Inability to involve any data in the information system without authorization and the lack of access to the data recorded, erased or stroke-through;
- Inability to use the processing of information by unauthorized persons;
- The possibility of subsequent verification of the identity of the persons who carried out the information and data leaking, the timing, and the identity of the person.

The final section of the legislation dictates the nature of the violations and the abuses committed in this area and the their penalties, among which the transfer of personal data to the outside, and to provide non-personal with data produced during the legal pursuits and investigations or related to ethnic or genetic origins or religious beliefs or political ideas, philosophical or trade unions or health, the use of data to achieve a private benefit or to others, or to damage the owner, or carry on to provide personal data using a trick or violence, threats in a detrimental manner to its owner or to his private life.

### **III. The reality of general rights and freedoms and their impact on the legal and humanitarian movement**

In this section, we address the rights and freedoms directly linked to the legal and humanitarian movement and the activity of human rights defender where we will expose the legal framework of freedom of expression (1), freedom of assembly and the participation in peaceful activities (2), and the right to access information (3).

#### **1. Freedom of expression:**

The new constitution has enshrined the freedom of expression and freedom of press and has explicitly dictated, unlike the old one, the prohibition of any form of censorship when it comes to exercising these freedoms. In return, the new constitution allowed some of it under the legislation in order to protect the rights, the reputation, the security, and the health of others. The reality of the matter is that the Tunisian legislator had set the legal framework before the approval and the issuance of the new constitution during a few months after the Tunisian revolution back in 2011.

We will address in this section the legal framework governing the freedom of press on one hand (a), and the freedoms related to audiovisual contacting on the other hand (b). In the last paragraph, we will address the most important clauses and provisions limiting and restricting these freedoms (c).

#### **a. Freedom of press:**

On November 2, 2011, Decree number 115 on freedom of press was issued. It is related to printing and publishing according to the proposal of the Higher Authority for Realizing the Objectives of the Revolution, Political Reform, and Democratic Transition.

The first chapter of the Decree of freedom of expression ensures that “under the terms of the International Covenant on Civil and Political Rights and the International Conventions ratified by the Republic of Tunisia (...) and includes free circulation, publishing and receiving news, views, and ideas of any kind.”

The same chapter refers explicitly and exclusively to the cases upon which the restriction of this freedom is based under legislative texts, and it is manifested according to the following conditions:

- The purpose is to achieve a legitimate interest by respecting the rights and the dignity of others or to maintain the public order or the protection of national security;
- To be necessary and proportionate with what actions are worth taking in a democratic society and without representing a threat to the essence of the right and freedom of expression and press.

As well as the clauses aiming for organizing the written press, whether in terms of the nature of compositions and provisions for individuals and institutions working in journalism, the aforementioned law enshrines a number of guaranteeing principles. We hereby mention the following:

- Ensuring the right of citizens in a pluralistic and transparent media by prohibiting the imposition of any restrictions hinder the freedom of circulation of information or preventing equal opportunities among the various media organizations in accessing information;
- Ensuring the right of every journalist, like every citizen, to access information and news, data and statistics, obtained from various sources and according to the terms and conditions of the existing legislation which we will cover below;
- The protection of journalist sources and ensuring confidentiality in the preparation of information material. It is prohibited to attack the confidentiality of their sources unless it is justified by the state security or the national defense, under the supervision of the judiciary;
- Devoting a certain kind of professional immunity for the journalist where it is prohibited that the opinion issued by the journalist or the information published are a reason of prejudice to his dignity or to attack his physical or moral sanctity. It is also prohibited to question any journalist on the opinion, ideas or information published in accordance with the norms and ethics of the profession and to question him because of his work unless of a proven breach of the provisions of the decree; as well as requiring penalties against anyone who insults the press or exceeds it by saying or pointing or threatening.

**b. Freedom of audiovisual communication:**

On the same date, the Decree No. 116/2011 regarding the freedom of audiovisual communication and the creation of an independent body charged with ensuring a high commission to safeguard the freedom of audiovisual communication and the plurality in accordance with the requirements set forth in the issued decree.

Chapter 2 of the Decree ensures freedom of audiovisual communication, in accordance with the treaties and international conventions ratified by the Republic of Tunisia, and in the same context, guarantees the right of every citizen to access information in visual and audio communication.

**In addition to the clauses aiming for organizing this sector, the aforementioned law enshrines a number of guaranteeing principles for the freedom of audiovisual communication. We hereby mention the following:**

- Respecting international treaties and conventions on Human Rights and public freedoms;
- Freedom of expression;
- Equality;
- Diversity in the expression of ideas and opinions;
- Objectivity and transparency;

**The decree is subject to the exercise of these principles for controls related to the respect of the rights or reputations of others, including in particular:**

- The respect for human dignity and private life,
- The respect for freedom of belief,
- The protection of children,
- The protection of national security and public order,
- The protection of public health,
- Encouraging culture and media production and national communication.

Moreover, the decree has established an independent High Commission of Audiovisual Communication holding the legal status and financial independence. It exercises its functions independently without interference from any party willing to influence the members or the activities.

**It is characterized by involving professionals and owners of jurisdiction combination, in addition to representatives of governmental bodies through constitutional institutions (3 members), the commission holds:**

- Two judges of the second order at least and an advisor of Administrative Justice suggested by professional commissions most of which are representing the judges. One will be positioned as VP of the Independent High Commission of Audiovisual Communication;
- Two members to be appointed by a proposal from the most representative professional bodies for journalists;
- A member appointed by a proposal from the most representative of the audiovisual and non-journalistic professional bodies;
- A member appointed by a proposal from the most representative bodies of the media and communication facilities.



The inclusions of certain conditions in terms of membership are noticed. This will ensure the independence of the members and their professionalism and effectiveness where “it is not possible to set people who have endured governmental or parliamentary responsibilities or political or worked wage laborers during the two years preceding their appointment and it is not possible set, directly or indirectly, contributions or financial interests in the media and communication facilities unless they abandon interests or contributions. the members of the Commission proceed with their duties on a full time basis.”

The combination of membership functions and any partisan responsibility or electoral task or a public function or a professional activity limiting the independence is prohibited. Members of the Commission are prohibited to get paid, directly or indirectly, except for relapsing dues in return services provided before assuming their duties and their commitment to holding professional secret for a period subsequent to the assumption of their duties.

**The work of the Commission governs the following principles:**

- The support of democracy, Human Rights, and the law,
- The support of freedom of expression and its protection,
- The support of audio-visual communication whether national, public, private, and associative, its quality and diversity,
- The support of the rights of the public in the media and knowledge through ensuring pluralism and diversity in programs related to general affairs,
- Avoiding concentration in ownership of the means of audiovisual communication and establishing fair competition in the sector,
- The establishment of an audio, visual, pluralistic, diverse, and balanced scene enshrining freedom and justice and the rejection of discrimination on ethnic origin, sex, and religion-based values,
- Ensuring accurate and balanced media programming,
- Encouraging high-quality educational programming,
- The support of the distribution of communications and audio-visual services on a wide geographical area,
- Supporting and developing programs and broadcasting reflecting the national culture,
- Supporting the control on the use of modern technologies,
- Strengthening the financial capacity and competitiveness of enterprises for audiovisual communication in the Republic of Tunisia,
- Supporting the formation of efficient and high human resources.

**The commission has supervisory tasks. Among the most important we hereby mention:**

- Organizing and editing the audiovisual communication sector;
- Deciding on demands to grant leaves to exploit the audiovisual communication facilities or radio channels and television associative up to a non-profit purpose;
- Coordinating with the National Agency for frequencies in all that matters to specify these frequencies or assign them;
- Ensuring freedom of expression and pluralism of thought and opinion, especially in the political media.
- Preparing a periodic report of its activity, publishing it to the public, and sending it to the presidency of the legislature and the President of the Republic ..
- Monitoring the respect of legislative texts specified for the production of programs related to electoral campaigns;
- Monitoring the legal and technical standards to measure the number of those who follow the audiovisual communication facilities programs.
- Deciding on disputes relating to the operation of communication channels and their exploitation, and to punish all offenses.

In addition to consultancy tasks where the commission requires a ruling on any draft laws, decrees, orders, and giving its opinion on all matters referred by the President of the legislature. Various procedures are also proposed especially those of legal nature guaranteeing the principles of the Constitution with the relevant legislative and regulatory texts and making recommendations for legislative changes and all ordinal orders, and showing the corresponding view as on naming general managing presidents of audiovisual communication.

**c. Legal constraints on freedom of expression:**

There are two types of legal constraints located on the freedom of expression. The first is devoted in the general provisions such as the Tunisian Penal Code; and the other, is devoted in private texts, particularly the provisions of the Freedom of the Press, which we had dealt with above.

On one hand, some penal provisions criminalizing all aspects affecting public order or good manners or public security and threatening the sacred or the general serenity from the most dangerous legitimate means of violating freedom of expression, where we read the following:

“The distribution of leaflets, brochures, and foreign literature or other sources disturbing the public order or the good morals as well as selling it and presenting it to the public for the purpose of propaganda is forbidden.”

In addition,

“Anyone publically assaulting moral standards by an act of signs or orally or attempts to publically disturb others in an unethical matter faces 6 months in prison and a fine of one thousand dinars.”

The fact that such clauses would open a wide door for interventions of the judicial police and later in front of the judicial system in terms of suspensions, investigations, and the passing of sentences using means of pressure on the creators, artists, and individuals of free opinion according to reports from the organization of Human Rights Defenders during the recent period.

The reality is that according to the penal provisions on which the judicial police and judicial decisions are made to justify practices that detract from the freedom of expression, the local and international community on the field of the protection of human rights and freedoms and defending it have welcomed the issuance of Decrees No. 115 and 116 as private texts and predominantly applied to the general provisions, which are also, as aforementioned, discriminate the constraints on freedom of expression. In addition, until 2013, these two decrees have not been partially activated and the application of their provisions were limited by the authorities; perhaps the next phase will witness a radical change in this area towards the promotion of this freedom and the protection of humanitarian and human rights activists and social mobility of individuals.

Therefore, what do these two decrees include in terms of legal restrictions, on the freedom of expression?

Chapter five of the decree addresses “the crimes committed by the press or by any means of publishing,” where it distinguishes between offenses conducing to the incitement to commit misdemeanors originally stipulated by the Penal Code, and the acts committed against individuals by publishing and criminalized according to the decree, as well as the prohibition of the dissemination of some information in specific cases exclusively punishable.

The decree criminalizes anyone who incites to send “speeches, statements or threats in public places directed either by printed images or engravings or symbols or any usage of written forms, or pictures, offered for sale in public places or public meetings, either by suspensions or by displaying the ads through any means of audiovisual or electronic media” aiming for:

- The incitement to commit murder or assault on the physical sanctity of humans or rape or robbery or war crimes or crimes against humanity or collaborating with the enemy;
- The advocacy of hatred between races or religions or population as incitement to discrimination, hostility or violence, use or dissemination of ideas based on racial discrimination;
- The use of houses of worship for partisan or political propaganda and anyone who deliberately undermine one of the licensed religious rites.

Moreover, the decree criminalizes publishing false news by one of the above means that will impair and disturb the public order; it also defines and criminalizes defamation (praise or slander) and verbal abuse. It is understood that most of the infringements on freedom of expression are based on the two abovementioned articles; it is no secret that the phrase “the public order” is **vague, elastic, and is opened to interpretation**. This definition is also applied for “defamation” as a “claim or a percentage of something incorrect in public which would compromise the honor of a particular person, providing direct and personal harm to the targeted person.”

Accordingly, these articles allow ample room for the violation of restrictions of freedom of expression, as well as the consecration of the Penal Code for a similar clause according to what we have referred to above. In contrast, we **note the failure of the offense of defamation in the case issued in good faith and was identical to the representations to the courts or to the reports submitted to it.**

What is striking in this legislation is **the devotion of “the private life of people,”** and the prohibition of exposing it through defamation in aspects related thereto or required shaming in the context of proving the offense, and it is the same that applies if the matter attributed the crime expired amnesty or statute of limitations or restitution or it is still the subject of a penal trace.

Finally, the decree lists information where its dissemination is forbidden and punishable, and for considerations related directly to **the protection of victims of crimes of aggression against the people** and it is limited by the following:

- Information related to rape or sexual harassment crimes against minors would mention the victim's name or leak any information that may allow their identification;
- Information contained in documents preceding the investigation recited in a public hearing or a portion or all of the trials in lawsuits assault on persons in question without taking the court's permission.

### **1. Freedom of assembly and the participation in peaceful activities:**

As noted above, the new constitution enshrines the freedom of participating in peaceful activities, and explicitly refers to the right of organizing and participating in assemblies. This dedicates the development of a qualitative point of promotion and guarantees public freedoms and highlights the impact of the Tunisian revolution on the process of amending the country's new constitution.

At the level of legislation, and in the same direction taken by the legislature to the point of consecrating and ensuring freedom of expression, two decrees were issued in 2011 regulating the organization of associations and organizing parties; we will review in detail the provisions of the first decree because it is directly linked to the subject of the present study.

Decree No. 88 issued on the 24<sup>th</sup> of September 2011, governing associations and canceling legislative texts that previously took place, which was restricted to freedom of assembly. And it recorded a general observation over the development of new legislation and its compatibility with international human rights law, and so on different levels according to what we shall explain below.

On one hand, the first chapter of the decree ensures the “freedom of association and activity in the framework of strengthening the role of civil society organizations, development, and preservation of independence” operating on the basis of “the principles of law, democracy, pluralism, transparency, equality, and human rights also seizing ratified international agreements by the Republic of Tunisia.”

**To view the topic**, we score that the text is empty of vague phrases and concepts that are open to interpretation, and that our covenant read in the laws on liberties such as “disturbing the public order” or “touch the standard morals” and others; the law defines exclusively and explicitly and clearly prohibits goals limited by the following:

- The call to violence and hatred, intolerance and discrimination on religious grounds or nationality;
- Doing business for the purpose of money distributed to their members for personal benefit or exploitation for the purpose of tax evasion;
- Raising money to support political parties or independent candidates for national or local elections or providing them with financial support knowing that this prohibition **does not fall in contrast with the right of the assembly to express its political views and its stands towards public affairs.**

In contrast with these prohibitions, the legislation guarantees the rights and freedoms and promotes the work of associations and contributes directly to fortify and empower human rights defenders, in line with the private rights and obligations of those of the Universal Declaration and therefore as follows:

- Consecration of the right to information, which includes, according to the abovementioned definition (Art. 6 thereof) the right to know information about all human rights and fundamental freedoms and to request, obtain, receive, and hold, information as to how these rights and freedoms are enforced in the legislative systems or judicial or local administrations;
- The right to assess the role of the state institutions and make proposals to improve its performance, which is equivalent to the right to make criticisms and proposals to government bodies and organizations concerned with public affairs to improve their performance as well as to draw attention to any aspect of their work that may hinder or impede the promotion of human rights and fundamental freedoms refined in Art. 8 of the Declaration;
- The right to establish meetings and assemblies, conferences, workshops, and all other civic activities; in line with the consecration of the new constitution of these activities;
- The right to publish reports and information printed publications and opinion polls, in line with freedom of expression which was addressed above, and includes the right to study, discuss, form and hold opinions on the observance of all human rights and fundamental freedoms in the field of law and its application. (Art. 6 clause B and C of the Declaration.)

Moreover, the law prohibits public authorities to obstruct or disable directly or indirectly the associations' activity as the state is required to take all necessary measures to ensure that everyone has protection by the competent authorities from any actual or legal violence, threats, retaliation, or discrimination or any other arbitrary action as a result of the legitimate exercise of the rights referred to in the decree.

We also recorded a crucial development accomplished by this legislation regarding founding procedures for the assembly. This legislation ensures the subordination of associations to permit regime – in comparison with the license system, which entails prior censorship by authorities -, and it has considered it made up law from the date of deposition of the required documents, and it has considered that the non-return media card by the administration after a period of thirty days as in reach; in other words, the legislature puts an end to procrastination and discretionary management of incorporation through its failure to hand over the mentioned card.

Likewise, the law explicitly grants the right to litigate associations and accords the power to exercise this right within the framework of actions falling within the subject in matter and its objectives; it also allows the litigation for individuals under their written assignment.

Finally, what is worth mentioning is that the decree gave the right to form associations for adult members of 16 years of age and the right of membership for those who have attained the age of 13, in line with the convention on Children Rights and the recommendations of the UNESCO in terms of the involvement of children and young people in public life and public affairs.

## **2. The right to access information:**

We pointed out repeatedly in the context of the study to the devotion of the Tunisian legislation for the right to access information that were at the level of the new constitutional amendment, or at the level of the legislation that deals with the rights and public freedoms. Certainly, the most prominent of safeguards that allow the practice of efficient and effective public freedoms reflected in facilitating the conduct of access to information, particularly in terms of evaluating the work of public institutions, and monitoring and accountability to improve performance. Therefore, in parallel to overcome restrictions on freedoms of expression, assembly and association, a fourth decree issued in 2011 among previous others, number 41 dated 26th of May 2011, the terms of accessing administrative documents in governmental structures.

The decree begins by identifying and defining the concepts introduced by the new legislation such as general structures as “the interest of the central and regional administration of the state and local organizations, institutions, and public establishments” and administrative documents as “the documents wrote by the general structures or obtained in the framework to embrace the general enclosures no matter what the date, the form, and the content of the documents are.”

The legislation distinguishes between two things: the duty of the administration in the dissemination of information on a regular basis and the public right of citizens to access them free of charge.

### **The decree has enlisted types of documents to be published on a regular basis, we refer to the most important:**

- All information about the structural organization, functions, and policies,
- The decisions and policies of interest of the public,
- The procedures followed in the process of decision-making and monitoring phase,
- Services and programs offered to the public and their results,
- Economic and social statistical data, including national accounts and statistical surveys, and its details,
- All information related to public finance, including data related to quantitative economy and those of the public indebtedness, assets and debts of the state, and the expectations; data on the medium-term expenditure and all information related to the assessment of expenses and the disposition of the public finances, as well as detailed data on the budget on the central and local level.

In addition, the deadlines were identified and must be observed in the administration in order to answer requests, to provide information, and the silence is considered as an implicit rejection of the request, and the complainant in this case can appeal before the competent judicial authorities which will urgently make a decision.

### **The law has explicitly provided for cases in which the Department may refrain from responding to the request and to provide information and so when the disclosure of the latter would damage:**

- Relations between the countries or international organizations,
- The development of an effective government policy,
- Public security or national defense,

- Detecting crimes or prevention,
- To stop the defendants and the prosecution,
- The good functioning of the judicial attachment and the respect for the principles of justice, fairness, and the integrity of assigning public procurement procedures,
- Procedures for deliberation and exchange of views and opinions or examination or trial or commercial and financial interests of legitimate public structure in question.

**In contrast, and in order to avoid the possibility of exploiting management of these exceptions as depriving the right of access to information, the text of the decree explicitly introduces the following cases:**

- In case the documents were part of the public domain;
- If the aim of dissemination is to disclose the gross human rights, war crimes or search for them or followed by violations,
- In case it must give priority to the public interest on the interest to be protected to the presence of a serious threat to health or safety or the close environment or by a threat of a criminal act or bribery or misconduct in the public sector.

#### **IV. Case Study**

During the month of May 2013, a universal periodic review of the United Nations had conducted an assessment of the Tunisian record in the field of Human Rights. The government has accepted most of the recommendations of the United Nations, but rejected recommendations that urges decriminalization of defamation and homosexual relations and has revoked laws that discriminate against women and the abolition of the death penalty.

As noted above, in the section that dealt with the private life and sexual freedoms, the Tunisian Penal Code explicitly criminalizes the “act of homosexuality and lesbianism.” This criminalization is not limited to, unfortunately, the text, but remains a legal basis based upon the Tunisian judiciary to punish homosexual relations, as are the facts of the presented case. In this section, we review the facts of a Tunisian lawyer’s case, the president of an opposing political party to the Tunisian government. He was convicted in 2013 by the Tunisian judiciary for committing a “crime of homosexuality and sexual deviation,” what was the verdict against him and the analysis of the legal divisions that, on the basis of which, he had been criminalized by the Court in his case.

##### **1. The facts of the case:**

During the month of February 2013, the competent team for protecting morality had arrested a lawyer, chairman of an opposition political party, under the pretext of “sodomy” with a minor. Elements of the Judicial Police had initiated a raid on a hotel in the capital on suspicion of practicing “homosexuality.”

The accused lawyer was referred to the Court of First Instance in Tunisia, which was still in custody where he had spent three months in prison according to Chapter 230 of the Tunisian penal code, which states the following:

*“Sodomy or lesbianism if not logged in any way or planned in advance in aforementioned chapters, the perpetrator is punished by imprisonment for three years.”*

The facts of the case are ambiguous and require asking many questions which had not been answered in the context of the trial. First of all, how can the commissioners of the judicial police have raided a private room in a hotel under the pretext of suspicion (!!!) of an undergoing sexual relationship criminalized under the Penal Code? What are the signs or evidence relied upon to approach the facts of this case on the basis of a flagrante delicto? What is the legal basis for the judge to move the trial?

## **2. Analyzing the legal divisions which criminalized the act:**

By reviewing Chapter 230 referred to above, we read explicitly that the offense of sodomy or lesbianism is based exclusively in case the exclusion of the other crimes provided by the law were excluded. In this regard, we refer to the text of Art. 228 of the Criminal Tunisian publication, which includes the following:

*“Every outrageous attack without violence on a child under the age of eighteen is liable to imprisonment for five years. The attempt is punishable.”*

Accordingly, it is evident that the judiciary had excluded the application of the said article although it is fixed in the facts of the case that the young man who was accompanying the accused is already a minor. If the intention of the judicial police was in fact to “punish” the lawyer because of his sexual orientation under the protection of morals, how can it make sense that an intimate relationship behind the walls of a hotel room, would cause danger to society and would need intervention of security forces? And if there is indeed a true danger, is it not the task of the district to correct such practices? But more than that, is it not the duty of the judiciary, as a protector of individual freedoms, to punish the defamation of the lawyer who inflicted the damage incurred due to the issue rather than enforcing charges???

Therefore, we can only conclude that the retention of penal punishments of intimate relationships between individuals of the same sex as is the case in the Tunisian Penal Code, it entails the violation of the private lives of individuals and provide a way for security and judicial authorities to punish individuals because of their sexual orientation and the subsequent exploitation of their personal lives and their defamation, and the elimination of social and professional life in a society that is still conservative about sexual freedoms in general.

