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Playing by the rules: The search for legal grounds in homosexuality cases - Indonesia, Lebanon, Egypt, Senegal

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This chapter describes the search for legal grounds in cases of homosexuality in a comparative perspective (Senegal, Egypt, Lebanon, and Indonesia). The authors wonder how judges play by the rules when the law is silent. It appears that, on the one hand, even in cases in which the legal basis is thin or absent, judges are looking for rules on which to ground their decisions. In that sense, judges are positivist legal practitioners who need legal rules to perform their professional duties. However, on the other hand, moral considerations seem to influence deeply the same judges' legal cognition. The chapter examines how this unfolds in the concrete settings of four countries—Indonesia, Lebanon, Egypt, and Senegal—in cases related to male homosexuality. These countries offer in many respects an excellent basis for the comparative inquiry into the morality of legal cognition—Muslim-majority societies, public condemnations of homosexuality, civil-law inspired legal systems, sensitiveness to international discourse on the state of law and human rights. In each of them, it analyzes cases that attracted much public and media attention. It observes in these cases how judges proceeded in situations in which there was no or only elusive rules to ground their rulings. Despite important differences, the cases exhibit striking similarities in the ways in which judges bypass gaps and silences in legislation via the selection of alternate rules that prove efficient in sanctioning morally associated aspects of the accused persons' allegedly deviant behavior.

PLAYING BY THE RULES
The Search for Legal Grounds in Homosexuality Cases
– Indonesia, Lebanon, Egypt, Senegal –

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The positivist dogma contends that judges must base their judgements on rules that are clear and general, and whose application is predictable. In this sense, rules have a determinate meaning and judges apply them in a mechanical way. Against this dogma, the realist critique argues that legal rules and principles are indeterminate, malleable, filled with implicit assumptions, and open to interpretation. Between these two extremes, contemporary legal doctrine recognizes the fact that there is always a degree of indeterminacy in the interpretation and application of rules, but that this does not preclude the fact that, in most cases and especially those deemed "easy", there is little disagreement as to applicable rules, that people routinely understand rules, and that they more or less blindly follow them. In difficult cases whose legal basis is less explicit and necessitates a more stringent effort of interpretation, it is nevertheless true that judges' discretion is much wider and permeated by factors external to legal rules *per se*, like moral and political principles, standards of justice, and professional practices. In other words, law, which is logically distinct from morality, proves thoroughly moral in the operation of its cognition.

We want to use a praxeological approach to these theoretical questions. Specifically, we want to describe how judges play by, and with, legal rules. It appears that, on the one hand, even in cases in which the legal basis is thin or absent, judges seek rules on which to base their decisions. In that sense, judges are positivist legal practitioners who need legal rules to perform their professional duties. On the other hand, however, moral considerations seem to deeply influence the same judges' legal cognition. We aim to show how this unfolds in the concrete settings of four countries—Indonesia, Lebanon, Egypt, and Senegal—in cases relating to male homosexuality. In many respects, these four countries offer an excellent basis for the comparative inquiry into the morality of legal cognition.

Criminal Law and the Repression of Homosexuality

Indonesia, Lebanon, Egypt, and Senegal have different, although comparable, historical, political, legal, and anthropological legacies. However, their legal systems belong to the civil law family. In this section, we briefly present their respective criminal systems and the legal grounds that are used to repress homosexuality.

Indonesian criminal law inherited many of its features from Dutch law, which itself was inspired by the French. In the Netherlands, the French Penal Code of 1811 remained in force until 1886, with only minor modifications, and as such became the law of the Dutch East Indies (Kelk, 2001: 5). Although the Netherlands adopted a new Penal Code in 1886, the colonial government only promulgated a copy, with some modifications, in 1915, which became applicable in 1918 (Jonkers, 1946: 2). After independence in 1945, the colonial Penal Code remained in force (Art 2 of the Transition Regulation of the 1945 Constitution; Presidential Regulation No. 2 of 10 October 1945). It became the Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana*, KUHP) under Art. 4 of Law No.1/1946. Despite several codification projects, this code still applies today (Utriza, 2013: 328-332).

Indonesian criminal law, belonging to the civil law family, follows the latter's main principles, including that of legality. Art. 1, section 1 of *KUHP* states that: "An act cannot be repressed by criminal law unless it was previously prohibited and clearly established by law." Indonesian doctrine defines a crime as "an act violating a norm or a regulation promulgated by the state and condemned by sanctions decided by a judge in order to protect public order" (Lamintang, 2014). Accordingly, the act must: (1) be human; (2) conform to what is described in legal provisions; (3) be the act of a responsible person; (4) be contrary to the law; and (5) be punished by a sanction established by the law (Tresna, 1959).

Indonesian penal law penalizes homosexual acts only when committed by an adult on a juvenile[1]. Art. 292 of *KUHP* provides: "The adult who commits debauchery with a minor of the same sex, whose age is known or could be reasonably presumed, shall be sentenced to imprisonment for a maximum of five years." This is the translation of Art. 248 *b* of the 1886 Dutch Penal Code as amended in 1911.[2] The Dutch expressions for debauchery (*ontucht*) and same sex (*hetzelfde gestlacht*) were translated into Indonesian by *perbuatan cabul* and *sesama jenis* respectively. Indonesian commentator Soesilo (2013) explains that 'debauchery' means "all acts that violate decency or morality or abusive acts, in the sphere of sexual desires, such as kissing, touching and groping the genitals, touching the breasts, masturbation, and intercourse." In 2017 the Constitutional Court ruled out an attempt to criminalize same-sex relationships.[3] In other words, Indonesian law does not criminalize homosexuality among adults.[4] As we shall see when presenting the Atlantis Gym and Sauna case, Indonesian judges do nevertheless have a circuitous means of prosecuting same-sex relationships, including Art. 36 of Law No.44/2008 against pornography, which states: "Anyone who exposes themselves

[1] See for example case no. 522/Pid.B/2012/PN.SBG from North Sumatra, in 2012, where a 50-year-old man had homosexual intercourse with a minor and was sentenced to two years in prison. Indonesian law defines any person under the age of 18 as a juvenile. According to the Child Protection Act of 2002, as amended in 2014, anyone who commits or incites someone to commit child molestation and/or child abuse will be sentenced to 5 to 15 years of imprisonment and fined up to 5 bn Indonesian Rupiah (€4m).

[2] By the Law Gazette (*Staatsblad*) no.130, on 20 Mai 1911.

[3] *Mahkamah Konstitusi*, case no. 46/PUU-XIV/2016.

[4] However, the western province of Aceh, which was allowed to have its own criminal law under the peace agreement, criminalizes homosexuality (*liwât*): in the *Qanun Jinayat* no. 6 of 2014 (which came into force in 2015).

or other people in a show or in public in a way that exhibits nudity, sexual exploitation, sexual intercourse or anything containing pornographic acts as defined in Art. 10[5] will be punished by imprisonment for a maximum of ten years and/or a maximum fine of five billion rupiahs."

In *Lebanon*, the 1858 Ottoman Criminal Code was applied until 1943 in what today constitutes the Lebanese territory[6]. Closely based on the 1810 Napoleonic code, this Code made it superfluous for France, the Mandatory power (1920-1943), to impose new criminal legislation. However, a commission was created in 1939 in order to "replace a structure made for other times […] by a legislative monument capable of controlling boundless criminal activity"[7]. It attempted to integrate French case law, but also European (Greek, Italian, etc.) doctrinal and intellectual developments. It consecrated principles such as the fact that that both crimes and punishments must be defined by the law (Art. 1), a principle already mentioned in the 1926 constitution (Art. 8), and that of the strict interpretation of criminal law. The new code was promulgated by legislative decree number 340/NI, on 1 March 1943, as part a general legislative program that also produced the Obligations and Contracts Code (1934), the Civil Procedure Code (1934, replaced in 1983), and the Commercial Code (1943, amended in 2019). The Criminal Procedure Code was not adopted until 1948, five years after Lebanon's independence, and was replaced in 2001.

The new code had an important influence on Lebanon's neighbors (in 1949, Syria adopted a criminal code largely based on that of Lebanon). It was modified several times after 1943: in 1958 after the first civil war, and in 1983, as part of a major effort to update Lebanese codes, and then several times in the 1990s and 2000s through a number of legislative amendments. However, these amendments did not affect Article 534, which criminalizes "acts against nature". This last article comes within the general heading regulating offenses linked to public order and good morals (Book II, Heading VII, ch. II, § II). Homosexuality cases fall under the jurisdiction of a single criminal judge (*al-qâdî al-munfarid al-jazâ'î*) like most minor offenses (*mukhâlafa*) and misdemeanors (*junha*) as indicated in the new 2001 Criminal Procedure Code. This judge's decisions can be challenged before the Misdemeanors Court of Appeal (*mahkamat al-isti'nâf al-jazâ'iyya al-nâzira fî qadâyâ al-jinah*). More serious crimes, and linked misdemeanors, fall under the jurisdiction of the Criminal Court (Criminal Circuit of the Court of Appeal, *mahkamat al-jinâyât*). The rulings of both courts can be challenged, under some conditions, before the Criminal Chamber of the Court of Cassation (*mahkamat al-naqd*).

The repression of homosexuality is based on Art. 534 of the Criminal Code, which states that "any carnal conjunction running against the order of nature will be punished by prison up to one year". While the antique, Biblical, and medieval origins of the concept of "nature" used to regulate homosexual practices are well known[8], the legislative inspiration of Art. 534 remains uncertain. It seems related to the Vichy Law No. 744 dated 6 August 1942[9] establishing sexual majority at the age of 21 for homosexual acts (as against 15 for heterosexual acts) and therefore

[5] "One is forbidden from exposing oneself or others to a performance or public appearance that exhibits nudity, sexual exploitation, sexual intercourse or other pornographic acts".
[6] Report by the Chairman of the Commission for the Reform of the Criminal Code (President Fouad Ammoun), March 1939, "Rapport général sur la réforme pénale", in *Code pénal*, 2009, Beirut, Antoine Édition, pp. 16 et s.
[7] *Ibid*., p. 18.
[8] See e.g. Veyne, 1982, *Épitre aux Romains*, I, 26-27, Chiffoleau, 1990.
[9] The crime of sodomy was abrogated with the French Revolution. However, outrages against public decency were aggravated by judges in the case of homosexual acts (Art. 330, al. 2 of Criminal Code) and acts against nature with a juvenile under the age of eighteen (Art. 331, al. 3). One should also note that Art. 175 of the 1871 German Criminal Code punished "acts against nature".

making “acts against nature” illegal under the age of 21[10]. In cases involving transsexuals, Art. 534 is often used together with Art. 523 of the same code criminalizing prostitution.

Despite Lebanon’s ratification of international covenants against discrimination and Art. 2 of the Civil Procedure Code making international agreements superior to national legislation, Art. 534 is often used to repress homosexuality. Lebanese judges justify this situation by the principle of non-direct applicability of international provisions, which is consecrated by Lebanese case-law.

In 2001, a new draft Criminal Code was proposed which included the suppression of Art. 534. It did not succeed, however, and the new draft submitted in 2017 reinstated the former provision. This legislative inertia, combined with hostility to homosexuality among political and religious leaders, convinced LGBT militants to explore alternative ways of changing the legal situation. In 2009, the Helem association for the defense of LGBTIQ rights sponsored a report reviewing dozens of rulings referring to Art. 534.[11] It showed that the latter, far from being marginal, was actually largely implemented by courts, fueling the hypothesis of repression that varied according to the social status of the people involved. In the same year, a ruling by the Batrun Criminal Court – whose single judge, in order not to punish homosexuality, for the first time interpreted the word “nature” of Art. 534 from the point of view of social and human sciences – stressed the potential benefits of taking the judicial path. Activists from the Legal Agenda association later developed a template document presenting arguments to be used by lawyers in order to organize the defense of people prosecuted before the courts based on Art. 534[12]. This was followed by several rulings of the same type, which were however confined to first-instance single-judge courts (in 2014, 2015 and 2017). It was not until 2018 that an appellate court, following an appeal lodged against the 2017 ruling, for the first time took a decision partially based on this template, and avoided condemning homosexuality *per se*.

Today’s *Egyptian* legal system is the outcome of a process that has lasted more than two centuries. During the nineteenth century, Ottoman governors, viceroys, and khedives strove to give the legal and judicial system a “modern” tone largely inspired by Western models (Hill, 1987; Reid, 1981; Ziadeh, 1968; Botiveau, 1989; Brown, 1997; Dupret & Bernard-Maugiron, 2002). From the late 1870s onward, mixed courts (*mahakim mukhtalita*) and indigenous courts (*mahakim ahliyya*) operated, together with religious courts (*mahakim shar‘iyya*), over matters related to personal status. A unified system of national courts was established in 1956; since 1979 it has been crowned by the Supreme Constitutional Court (*al-mahkama al-dusturiyya al-‘ulya*).

The nineteenth century was also a time of intense codification. In Egypt, decrees and laws regulated criminal matters as early as 1829. Although a new penal code was promulgated in 1852 that was largely identical to the Ottoman Penal Code of 1851 (Peters, 1995), French law massively permeated Egyptian law at the time of the promulgation of the Mixed (1876) and Indigenous (1883) Codes, of which Egypt’s first modern penal code was a part. A new Criminal Code was issued in 1937, which applied to all Egyptian residents in 1949, when Mixed Courts were abolished and the judicial system unified. That 1937 code, amended several times, remains in force today. It has been complemented by several laws combating drugs, alcoholic beverages, money laundering and – important in our case – prostitution (law No. /1961). Emergency laws, (nearly) continuously in force since the 1952 Revolution (and even before) outline special

[10] See Saghieh, 2009: 31.
[11] *Ibid.*
[12] The plea template can be accessed online on the Legal Agenda website.

procedures when state security is deemed to be endangered, which actually means any situation involving a breach of public order.

The principles and general organization of Egyptian penal law are similar to other systems in the civil law family. Articles 95 and 225 of the 2014 Constitution affirm the principle of legality and of non-retroactivity of criminal rules and punishments. Three categories of crime are listed: contraventions (petty offenses), misdemeanors (punishable by short imprisonment and/or fines), and felonies (punishable by hard labor or death). The general theory elaborated by Egyptian jurists defines crime (*al-jarima*) as "an illegitimate action produced by a criminal will for which the law stipulates a sanction or precautionary measures." (Husni, 1989: 40)[13]. This definition may be deconstructed as follows: (1) Crime supposes that an action (*fi'l*) be committed either actively (commission) or passively (abstention); (2) This action must be illegitimate (*ghayr mashru'*) with regard to an explicit provision of criminal law and must not be committed under circumstances that can excuse it; (3) This action must originate in a "criminal will" (*al-irada al-jina'iyya*), i.e. a human will that is capable of distinction and free to choose, yet that sought to perform this action and is therefore responsible for it; if this will intended the consequences of this action, jurisprudence speaks of "criminal intent" (*al-qasd al-jina'i*), whereas it speaks of "unintentional fault" (*al-khata' ghayr al-'amdi*) when the will did not intend the consequences of this action; (4) The law must stipulate a sanction (*'uquba*) or precautionary measures (*tadbir ihtirazi*). Three basic elements therefore make up a crime: the legal element (*al-rukn al-shar'i*), the material element (*al-rukn al-maddi*) and the moral element (*al-rukn al-ma'nawi*). The material element is made up of three components: an action, the consequence of this action, and the causal relationship linking the act and its consequence. The moral element corresponds to the will that accompanies the action, in the form of either criminal intent or unintentional fault. It conditions the infliction of a penalty on the commission of an offense by a human being. The legal element refers to the illegitimate status of the action and implies that there must be a text criminalizing this action, providing for the punishment of its perpetrator.

Egyptian law does not explicitly criminalize same-sex relationships.[14] However, as we shall see in greater detail in the next section, judges assimilate homosexuality with debauchery (*fujur*) and use Law No.10/1961 on the repression of prostitution (*da'ara*)[15] as the legal element they need to establish the crime. Article 9 of Law 10/1961 stipulates:

> (a) any person who hires or offers in any possible way a place that serves debauchery or prostitution […]; (b) any person who owns or manages a furnished flat or room or other place open to the public that facilitates the practice of debauchery or prostitution […]; (c) any person who usually practices debauchery or prostitution is condemned to imprisonment for a period of no less than three months and no more than three years, and to a fine […], or to one of these two penalties. When the person is arrested in this last situation, he or she may be subjected to a medical examination and, if it appears that he or she suffers from an ordinary venereal disease, to confine him or her in a medical institution until he or she has recovered […].

The 1965 Criminal Code in *Senegal* is "the daughter of French legislation, however adapted to Senegalese reality" (Diouf, 1965). Nevertheless, it refers neither to customary nor to religious rights. With the exception of family law, Senegal's legal arsenal was wholly secularized in the name of the principle of "evolution", which moves "in the direction of giving up customary

[13] We draw most of the information concerning Egyptian criminal jurisprudence from Husni, 1989, which Egyptian jurists unanimously consider the most authoritative reference in the field.
[14] However, on October 25, 2017, several MPs proposed a 5-article draft law criminalizing homosexuality, defined as "sexual intercourse with people of the same sex" (Art. 1) and support for or incitement to it.
[15] In Arabic, the word *da'âra* also refers to the notion of debauchery. However, it seems that this particular law directly targets prostitution, even though the law gives no definition of the terms.

law", the latter being perceived as a "politically dangerous" choice for nation building and development (M'Baye, 1970).

The principles that guided the Preparatory Committee's work included the "protection of the family" on the one hand, and the "protection of childhood and of moral health" on the other (Diouf, 1965). This is why penalties concerning "indecent acts committed by an individual with a juvenile of the same sex" were made more serious. Art. 319-3 stipulates that "… any person who commits an act that is either indecent or unnatural with an individual of the same sex will be punished with imprisonment of from one to five years and a fine from 100,000 to 1,500,000 CFA Francs. If the act was committed with a juvenile under 21, the maximum penalty will always be applied".

However, it should be noted that the repression is not against "homosexuality" but against "an act against nature". This is the legacy of colonization: contrary to British law, the French Criminal Code never explicitly condemned homosexuality, with the important exception of the abovementioned Vichy Law No.744/1942. As in France, however, homosexuality was the object of moral reprobation (Teunis, 2001). It is considered to be a "social scourge" threatening to destabilize families and society, which must be protected by the law. In that sense, penal and family provisions must be understood together: acts against nature are acts against the family, which is conceived of on a heterosexual basis.

In practice, judicial indictments are not limited to acts against nature and include the supposed sexual orientation or identity of an individual. It is up to judges to decide the definition to give to the notion of "acts against nature", notwithstanding the fact that they can use other legal provisions to condemn the accused or make the penalty more severe. On the one hand, they give a wide interpretation to the notion of flagrancy (Art. 45 of the Code of Criminal Procedure), understood by jurisprudence as "the time neighboring the crime", in the absence of evidence of the materiality of the act, so as to encompass acts that are anterior or supposedly planned by individuals designated as homosexuals. On the other hand, the provision regarding conspiracy (Art. 238 of the Code of Criminal Procedure: "any association whatever its duration or the number of its members, or any agreement constituted with the aim of preparing or commiting one or several felonies or crimes against people or property") allows penalties to be made more severe based on Art. 319 for the reason that gatherings of homosexual people would have the objective of preparing acts against nature. To summarize, judges can, by playing on past and future times, condemn individuals in the absence of any evidence of flagrancy, which shows that homosexuality is specifically targeted and not only acts against nature.

Looking for Relevant Rules: Homosexuality at the Bar

We turn now to cases in which accusations of same-sex intercourse were dealt with judicially in our chosen countries. It is important to note that we are interested in the *legal and judicial* mode of reasoning, not in public opinion about homosexuality. As we shall see, the legal and public spheres are not impervious to each other, and commonsense categories often permeate the ways judges address cases related to public order and good morals. It is however essential to the understanding of our analysis to stress that common sense is considered here from the point of view of 'legal cognition' (Dupret et al., 2019) rather than for its own sake. We therefore refrain from making any assumptions, regarding, for example, the prevailing morality or the Muslim-majority structure of society in the four countries.

The *Indonesian* case is known as the "Atlantis Gym and Sauna" affair, after the name of the sport and meeting club in which the accused were arrested. The case can be summarized as

follows. On patrol on 20 April 2017, the North Jakarta police received information from inhabitants of the neighborhood that the Atlantis Gym and Sauna intended to organize gay parties on the following 7, 14, and 21 May. Based on this information, the police sent two officers in civilian dress to investigate. According to the police record, they found gymnastic facilities on the first floor, male striptease shows on the second, where naked men were dancing while staring at, dancing or masturbating with male striptease dancers on the stage, and private cabins on the third. Drawing on these preliminary investigations, the police raided the club on 21 May and arrested 141 men, including men from Malaysia, Singapore, and the United Kingdom. After three days involving long interrogations, the arrested men were nearly all released without charge. However, ten men were kept in custody and charged for breaching the 2008 Pornography Law (see above). These men were submitted to complete interrogation (*penyidikan*), from 22 May to 10 June 2017, and full investigation (*penyelidikan*), from 11 June to 7 August 2017. The police eventually submitted the case to the prosecutor who filed three different petitions to the North Jakarta Criminal Court on 28 July 2017[16]. The accused were four employees of the Atlantis Gym and Sauna, four striptease dancers and two partygoers, the last six having been caught *in flagrante delicto* of 'pornographic activities' during the raid.

The threefold trial started on 14 August 2017. The first trial (of the four employees) was held in thirteen hearings, the second (of the four striptease dancers) in seventeen hearings, and the third (of the two partygoers) in sixteen hearings. Seven common hearings of witnesses were also held. The prosecutors brought eighteen witnesses before the judges, including two police officers, six employees, four striptease dancers, and seven partygoers. They presented more than 100 pieces of evidence in court, including condoms, lubricants, sex toys, CCTV recordings, striptease dancers' tips, mattresses, advertisements for gay shows and mobile phones containing broadcast invitations. During the hearings, the Atlantis employees explained that the Atlantis Jaya Company intended to offer a gym center, a sauna, and a whirlpool as a meeting place for gay people. Moreover, sixteen private cabins were provided for intimate relationships. Women were denied access. The club organized shows staging male striptease dances on a weekly basis. Police officers who conducted the investigation testified to the existence of pornographic and sexual activities in the club. Several witnesses said that they knew the Atlantis Gym and Sauna through the Internet and other social networks.[17] They all knew that the club was restricted to gay people. Visitors said that they came to the club to attend the striptease shows and that they were motivated to find sex partners. They all knew and said that "the club provides pornographic services and programs". Before the court, four striptease dancers said that they performed striptease dances in front of the visitors. With some of them, they would engage in further sexual activities. One of the striptease dancers said: "I know that performing a striptease in front of same sex spectators is forbidden by the law of the country."[18]

The trial lasted for seven months, from the arrest to the court decision. At the last audience on 14 December 2017, the judges declared the accused guilty of breaching the law. They based their ruling on Art. 36 of Law No.44/2008. They also referred to provisions of the Criminal Code referring to assistance and participation in a crime. Namely: Art. 55(2) of *KUHP*, which states: "Are found guilty of a crime: those who give or promise something by abusing their power or dignity, or with violence, threats or offense, or by giving an opportunity, means, or

[16] Case No.852/Pid.Sus/2017/PN.JKT.UTR against the four AGS employees.
Case No.853/Pid.Sus/2017/PN.JKT.UTR against the four AGS striptease dancers.
Case No.854/Pid.Sus/2017/PN.JKT.UTR against the two partygoers.
[17] BBM (Blackberry Messenger), WA (WhatsApp), and Twitter.
[18] The same holds true in Senegal, where investigators look not only for the accused person's confessions but also for their admission that they knew it was forbidden by the law and local mores (between which they wilfully make no distinction).

information by intentionally encouraging others to commit an act;" Art. 56(2) of *KUHP*, which stipulates: "Are convicted of the crime of assistance those who deliberately provide opportunities, means or information allowing a crime to be committed;" and Art. 55(1), which states: "Are sentenced as criminal offenders those who do, induce, or participate in a crime".

In order to establish the crime and to condemn the accused, the court had to examine whether criminally sanctioned crimes had been committed by criminally responsible people who acted intentionally and deliberately. On this basis, the court found the four employees guilty of assisting, procuring, offering, and organizing pornographic services. The manager of the club was sentenced to three years in prison and the three other employees to two and half years, in addition to a one billion rupiah fine (or six months in prison). As for the four striptease dancers and the two partygoers, the court found them guilty of participation in the criminal act of showing their nudity and performing sexual activities in public. It sentenced them to two years in prison and a fine of one billion rupiah (or three months in prison).

In *Lebanon*, in 2015, following a petition from the inhabitants of Bouchrieh, a Christian majority neighborhood in Beirut, and a municipal campaign against places frequented by supposedly homosexual or transsexual people, the police arrested nine people in the street and transferred them to the Prosecution who remanded them in custody and accused them of violating Art. 523 (against prostitution) and Art. 534 (against unnatural relationships) of the Criminal Code. In his decision dated 26 January 2017, the first degree criminal judge of Jeidet el Metn, in Mount Lebanon, condemned only one of the accused for prostitution, while dismissing the argument regarding relationships "against the order of nature" on the basis of Art. 183 of the Criminal Code, which states: "There is no offense when the deed was committed in a non-abusive exercise of one's right". This provision is rarely used by Lebanese jurisdictions, but it is part of the aforementioned plea template on which the Jeidet el Metn judge directly drew.

In his argument, the judge identifies the three conditions upon which Art. 183 can be used, thus making it possible to exclude the criminal characterization of homosexual intercourse under Art. 534:

1. There must be an acknowledged right. In this case, it is the right to have intimate relationships with the individuals of one's choice (providing they are adults and consenting). The judge demonstrates the existence of this right through the Preamble of the Lebanese Constitution, the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, which was ratified by Lebanon in 1972, and the principle of equality. The judge also gives his interpretation of Art. 534, arguing that "depriving homosexual people of their 'natural' right to have intimate relationships among them without any discrimination or the intervention of any other party, leads to impose upon them what is 'against their nature' in order to conform with the 'nature' of the majority", something that constitutes an assault on their fundamental rights. In other words, nature changes according to the party concerned; there are many 'natures' in society and it is the judge's duty to guarantee their peaceful co-existence.

2. It is the exercise of this acknowledged right that is being prosecuted. The judge seeks to demonstrate that (homo)sexual relationships represent one means of expressing the right to intimate relationships with the individuals of one's choice. He refers, for example, to Art. 12 of the ICCPR and its guarantee of the right to a private life.

3. This exercise must be non-abusive. This is the case, since the deed does not concern juveniles or non-consenting individuals.

In conclusion, the Jeidet el Metn judge considers that Art. 183 makes it possible to dismiss accusations based on Art. 534. This decision fueled significant public unrest, for example from the Committee of Muslim Ulamas, which considered that "this ruling violates what is stipulated by all divine rules as well as by logic", pointing out that "Lebanese law forbids interpretation (*ijtihad*) in the presence of a text". The Committee asked the Judicial Inspection Office to investigate the judge who took this decision that "seeks to legalize a perversion condemned by both the Sharia and the law" and to require the Prosecution Office to lodge an appeal, before calling for general mobilization to protect society and its family and religious values "against these phenomena alien to the Lebanese social body."

On 1 February 2017, the Prosecutor's office lodged an appeal against the decision. In its ruling dated 12 July 2018, the Mount Lebanon Appellate Criminal Court began by recalling what constitutes, in its opinion, the two fundamental rules regarding interpretation of legal texts: interpretation must be carried out in accordance with the goal pursued by the legal text; interpretation must be carried out in a manner that conforms to "social evolution". Referring to treatises on criminal jurisprudence, the court stresses the fact that Art. 534 of the Criminal Code is part of the section entitled "Outrages to public decency and good morals", which means that "the legislator's goal was not to punish sexual perversion, but outrage against good morals". This is something that must be evaluated with respect to social evolution, so that "the implementation of the text does not become inexplicable in terms of logic or social justice". Based on this assumption, the court considered that the assault on good morals in Lebanon today is "intercourse that deviates from the traditional conception of natural sexual relationships between a man and a woman, providing this intercourse takes place in the view of other people or in a way that allows them to hear, or in a public space, or with a juvenile who deserves protection". Thus, Art. 534 does not repress the sexual act between people of the same sex, but only its performance in public in a way that undermines good morals.[19] To summarize, the appellate court, while rejecting the first instance judge's argument that relativized the idea of "nature" and coming back to a more classical dichotomy between natural and perverse, confirmed his decision.

In his dissenting opinion, one of the three judges considered that there is no ambiguity in the expression in Art. 534: "carnal conjunctions against the order of nature", since "from the time of the Creation, human nature" supposes the coupling of different sexes. The evolution of ideas within society cannot mean a change in the meaning of 'nature', since nature is independent of practice. This judge considers his position to be mere application of the law: the legislator has "the obligation to accompany and take into account those people who have perverse tendencies with respect to nature, independent of the causes of this perversion which must remain private out of respect for each person's freedom and personal conditions". He adds:

> The evolution of ideas in society does not produce a change in the stable notion of 'nature,' as mentioned in Art. 534, and the notion of 'nature' should not be manipulated in order to adapt it to new ideas and notions, since it is not acceptable to naturalize a situation on the basis that it is spreading, because being progressive and open does not allow the judge to go beyond the text until it is abrogated or amended. […]

[19] Moreover, in this case, the court adds that the act was committed by a man and a transsexual, which transforms it into an act between a man and a woman, "like any sexual relationship characterized as traditional".

Finally, he insists that the law does not punish sexual tendencies *per se*, but only the sexual act that proceeds from them and which has therefore to be established. This is, in his opinion, a strict reading of the law and not a stance against homosexuals:

> The insistence on the current application of the text should not be interpreted as rejection of any particular group, but as application of the law.

The *Egyptian* case is known as the "Queen Boat case". It followed a police raid, in May 2001, of a nightclub on a converted barge moored to a Cairo wharf. Several people were arrested on the basis of alleged homosexual practices. In fact, this raid was only one among many concluding a police campaign in the Egyptian capital's gay milieus, without information being available as to why this particular moment was chosen to engage in active repression of gay practices in Egypt. Among the fifty-two people who were prosecuted, two were also accused of contempt of religion: this was why the case was transferred to a state security court. There follows a summary of the grounds on which the State Security Prosecution based its accusation:

> Considering that the Public Prosecution filed the criminal petition against the abovementioned accused because, from 1996 until 11/5/2001, in the district of the police office of Qasr al-Nil, governorate of Cairo
>
> 1: The first and the second accused:
>
> both abused Islamic religion by propagating (*tarwij*) and encouraging (*tahbidh*) extremist thoughts (*afkar mutatarrifa*) through speech, writing and other means, insofar as they kept interpreting Koranic verses in a wicked (*fasid*) way, they calumniated revealed religions and one of the prophets, they came to [commit] actions contrary to moral behavior (*adab*) while attributing these [actions] to religion, they had imposed a prayer that was contrary to established prayer, they had founded a place for prayer to perform it, they had ranked perverse (*shadhdha*) sexual practices among its rites and the practices [bound] to these ideas and had encouraged them among the other accused and yet other people, and this in order to denigrate revealed religions, to disdain them and to provoke sedition (*fitna*).
>
> 2: All the accused:
>
> practiced debauchery (*fujur*) with men in the way indicated in the investigation.
>
> It [i.e. the Prosecution] required that they be condemned to [the penalty stipulated in] Article 98/7 of the Penal Code and Articles 9/3 and 15 of Law-Decree 10/1961 on the repression of prostitution (*da'ara*).

To substantiate the accusation, the Prosecution produced evidence, which is presented by the court as follows:

> Regarding what the court deduced from the examination of the documents and the investigations […] as well as from the evidence submitted and what was related during the trial, [the first accused] adopted deviant (*munharifa*) ideas inciting others to hold revealed religions in contempt (*izdira'*) and to call to abject (*radhila*) practices and sexual acts contrary to revealed laws. […] He undertook to propagate these ideas among his acquaintances and those who are bound to him and to call them to adopt [those ideas]; he is affected by sexual perversion (*musab bi'l-shudhudh al-jinsi*) and practices it with people who are bound to him by considering [these practices] one of their rituals; he and his companions set about organizing decadent parties (*hafalat majina*) every Thursday in their homes or on boats, among them the tourist boat "Queen Nariman" […] which many of his sexually perverse acquaintances attended […] He photographed these sexual encounters, then developed and printed the pictures […]
>
> He set about diffusing pictures of these meetings as well as his confused (*mushawwasha*) ideas through the Internet […] A warrant was sought to arrest these accused and the other regulars of the tourist boat "Queen Nariman."
>
> On the basis of the Public Prosecution's warrant […], the first accused was arrested in the manner established in the record […] and the following items were seized: (1) 10 books entitled "God's Lieutenancy on Earth"; (2) numerous photographs and negatives showing sexually perverse practices of the accused with many people; (3) numerous Muslim, Christian, and Jewish books; (4) numerous photographs of areas around Cairo, churches, mosques and tourist sites and one Jewish synagogue; (5) commentary papers from Military Unit 1057c; (6) one Star of David; (7) a number of hand-annotated documents; (8) a photograph of the President of the Republic and his wife, (9) photographs of the accused in Jerusalem and the Occupied Territories; (11) numerous photographs of the country's Jewish community and Jewish tombs in Basatin; (12) the Israeli national anthem, a copy of the book […]; (13) two maps […]; (14) two maps of Cairo churches; (15) many maps of Cairo mosques. […]

In November 2001, the court issued a ruling condemning the first two accused to a punishment of five and three years in prison respectively, twenty other accused to penalties of two years in prison, and the last accused to a penalty of one year in prison. Nineteen accused were freed for lack of evidence. The principal accused was condemned for debauchery and contempt of religion, while the second accused was condemned for contempt of religion only. All the other accused were condemned for debauchery.

The characterization of debauchery, which is covered by Law No.10/1961, actually targets passive homosexual relationships – the only ones to which the forensic physician could testify, according to the judge.[20] The following shows how the judge made this criminalization of homosexuality explicit:

> The crime designated in [this text] is only committed when a man or a woman fornicates (*mubasharat al-fahsha'*) with people without distinction, habitually. When a woman fornicates and sells her virtue to whomever asks for it without distinction, she commits prostitution (*da'ara*) […]; *fujur* occurs when a man sells his virtue to other men without distinction.

Then the judge cites a 1988 ruling of the Court of Cassation that confirms this conception: "jurisprudence customarily used the word *da'ara* to [designate] female prostitution (*bagha' al-untha*) and the word '*fujur*' to [designate] male prostitution (*bagha' al-rajul*)."

In May 2002, the Military Governor, that is, the President of the Republic, refused to ratify the ruling against all those accused of debauchery and the whole case was transferred to an ordinary court. The latter, in a ruling dated March 2003, condemned the accused to even harsher penalties. However, the appeal court, in its June 2003 ruling, reduced the penalties of the accused to the time they had already spent in prison, making their release possible.

The Sicap Mbao case broke out in *Senegal* in December 2008. Following an anonymous tip-off, nine men were arrested at the home of the first defendant, a LGBT militant and the secretary general of Aides Sénégal. This arrest came shortly after the 15th International Conference on AIDS and STI in Africa (ICASA) in Dakar, during which the issue of the care of homosexuals was discussed. This conference re-ignited the homophobic climate that had prevailed since the "gay marriage" affair[21].

The police record makes no mention of any flagrant offense. The record concentrates on objects and documents that were seized during the search, that is, "dildos, lubricants, condoms, pornographic tapes and information for homosexuals". Based on this, the accused were arrested for "acts against nature and harm to good morals".

During their stay in jail, while awaiting their trial, the accused acknowledged their homosexuality but denied the accusations made against them. They stated that they were gathered for a dinner-debate about the use of condoms and the scourge of AIDS. During this period of two times 48 hours, the nine men received no assistance from an attorney. Later, when freed, some of them told the media that they had been mistreated in order to extort confessions.

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[20] As far as lesbianism is concerned, one can mention, the so-called "piano piano case" in Senegal, from the name of the bar where the defendants, five women accused of having kissed each other, were arrested on the night of 11-12 November 2013. Judged one week later for "acts against nature" and "public offense against decency", they were eventually given the benefit of the doubt and released. To our knowledge, no case of lesbianism has ever been filed in Indonesia, Lebanon or Egypt.

[21] In February 2008, a celebrity magazine published a series of photos, asserting they were taken during a gay marriage ceremony. Most of the men in the photos were arrested but were quickly released due to lack of proof regarding "acts against nature". This decision generated an unprecedented wave of homophobia in the country.

The case was judged by the court in charge of flagrant offenses, on the 6th of January 2009. Claiming that it constituted an "act against nature" and a "conspiracy", the Prosecution required that the accused be condemned to five years in prison. According to the prosecutor, the fact that this house was frequented on a regular basis by the accused, who acknowledged their homosexuality and their participation in condom distribution, constituted "constant facts" justifying their condemnation.

On the other side, the defense attorneys stressed the absence of material evidence and asked for the release of their clients, adding that the law does not repress the offense of homosexuality but only that of acts against nature. According to them, the objects that were seized do not constitute evidence but only clues. Moreover, the attorneys considered that an occasional or one-off gathering cannot serve to establish a conspiracy. They summed up by asking the judge not to yield to street pressure and to simply apply the law.[22]

However, the judge condemned the accused to a severe punishment exceeding the Prosecution's demands: eight years in prison (five for acts against nature and three for conspiracy) and a 500,000 CFA Francs fine. In his ruling, the judge defined an act against nature as "any act aiming at satisfaction of a sexual kind, whatever its form, outside the scope of normal sexual relationships". He considered that this act was established since the accused had acknowledged that "they have practiced same-sex sexual intercourse with men for at least three years". Regarding the alleged conspiracy, the judge claimed that it was motivated by the fact that, beside its aiming at establishing a care and solidarity network among gays, its goal was to prepare acts against nature, thereby establishing the existence of an "intended offense".

The severity of the condemnations contributed to the huge national and international media coverage of the case. The defense attorneys lodged an appeal on 12 January. Their team was reinforced with attorneys from RADDHO and ONDH, two Senegalese Human Rights NGOs. A defense committee was also created, bringing together local (RADDHO, ONDH, Enda Santé) and international (UN AIDS, FNUAP, FIDH, Solidarité Internationale LGBT) organizations. Their plea was based on the right to intimacy and a private life, an argument that avoided the debate on homosexuality, which is considered to be problematic even within human rights associations.

The case took a political twist after many French leaders made statements asking for the liberation of the nine accused. Bertrand Delanoë (Mayor of Paris), Roselyne Bachelot (Health Minister) and President Sarkozy expressed their concerns and invited the Senegalese authorities to review their decision. In Senegal, Islamic NGO Jamra stigmatized the inadmissible intrusion of French authorities and the President of the Bar Association criticized the pressure exerted by France on a pending case.

The appeal was heard in this highly politically charged atmosphere on 20 April 2009. The very short delay (only three months, while generally there is a lapse of at least six months) reinforced the idea that foreign pressure was influencing the functioning of Senegalese justice. According to the defense attorneys, it could be explained by the fact that the accused had been denied provisional release and by the danger they incurred in prison, where they were threatened and assaulted.

[22] Note that this demand for the application of the law can be made for diametrically opposing purposes: condemning homosexuality, as in the dissenting opinion in the Lebanese case; releasing those accused of homosexuality, as requested by the attorneys for those accused in the Senegalese case.

Procedural questions alone were addressed during the appeal hearing. The defense attorneys challenged the regularity of the police record (the search having been made outside legal hours and without a warrant) and reminded the court that the offenses of which the defendants were accused were not flagrant in the sense of Art. 45 of the Criminal Procedure Code. The judge accepted the defense argument and declared the police record and the subsequent procedure null and void, leading to the liberation of the accused. In his ruling, the judge recalled the fact that respect for procedures has the objective of "the protection of the individual and his domicile". According to a defense attorney, this ruling represented a victory for "the right to defense, the presumption of innocence, and the respect of the legality of penalties" (interview, Dakar, 2018). However, this ruling did not clarify the distinction between "homosexuality" and "acts against nature". Its concise wording and the lack of reaction from the Prosecutors' Office, which did not appeal against the decision at the Court of Cassation, demonstrated the discomfort that the case had created within the Senegalese judiciary. By concentrating on procedural rules, the court avoided discussing the content and did not directly disavow the first-instance judge, which means in fact the moral norms that served to justify the harsh sentences he handed down.

The liberation of the accused ignited the anger of several Islamic associations, which decided to create an "Islamic front for the defense of ethical values", whose objective is to prevent the spread of homosexuality in society and to ensure that culprits are prosecuted and punished for this crime. Ten years later, the situation has not evolved very much: homophobia (fueled by conservative groups and media) is still active and homosexuals are still subject to trial. At the judicial level, however, convictions are generally limited or even overturned at appeal, thus confirming the judicial intermingling of moral and legal repertoires.[23]

Facts, Evidence, Rules, Procedures, and Interpretation: Legal Reasoning in Practice

Going further in the anthropology of judicial reasoning in cases dealing with sexual morality, we now explore the specific ways in which the courts transformed social situations into legalistic rule-based decisions. We address two specific issues: courts' search for procedural rules and legal relevance. It leads us to examine how courts identify and present the facts of the ongoing case, applicable rules, and conclusive evidence; how legal characterization is permeated with moral standards; and how moral issues are formulated in legal technical terms.

Facts

In most cases, the facts of the pending case are extensively based on prosecution accounts, which are themselves based on police records. In the Egyptian Queen Boat case, for instance, the facts are presented as follows:

> The court based its conviction on the facts of the petition and has no doubt with regard to their veracity. Regarding what the court deduced from the examination of the documents and the investigations […] as well as from the evidence submitted and what was related during the trial, [these facts] amount to what was consigned in the record […]. This information reached [the Prosecution] from secret and reliable sources, confirmed by its careful investigations, which suffice [to show that the first accused] adopted deviant (*munharifa*) ideas inciting others to hold revealed religions in contempt (*izdira'*) and to call to abject (*radhila*) practices and sexual acts contrary to revealed laws. […]

In the same way, the Senegalese ruling reads:

[23] Contrary to what happened in Lebanon until recently, where 'liberal' decisions taken by single judges used to be overruled on appeal.

Considering that, following the interrogation record of *flagrante delicto* dated 24 December 2008, the Prosecutor of the Republic called the defendants [names] before this jurisdiction, with the charge of having committed, on 24 December 2008, or in any case in a period which does not make public prescription applicable, acts against nature (*actes contre nature*), and having belonged in the same circumstances of time and place, to an association created with the purpose of committing crimes.

This way of relying on facts as established by the police and the prosecution office testifies to the inquisitorial nature of the judicial systems under study. Facts are not disputed by the parties, as in adversarial systems in which the parties have to present their respective versions to the judge who acts as a neutral arbitrator. In inquisitorial systems, judges have an active role that consists of not only weighing the parties' versions of facts, but also of conducting the debates and orienting them in a discretionary manner. From a practical point of view, there is a tendency for judges to base their version of facts on the narratives provided by the public institutions that have conducted the investigation (and have the considerable evidential force of the state on their side). They do this in a routine way – sometimes because of the heavy case load – by merely duplicating the summaries that have been submitted for their attention. However, they always have the option of dismissing evidence produced by the police and the prosecution, especially in rulings that overrule established precedents, as is the case in Lebanon.

The presentation of facts is even more summary in the Lebanese case:

On 5/8/2015, the president of the municipality of Bouchrieh-El Sedd, Mr. Antoine Gebarah, referred to the Anti-trafficking and Decency Protection Bureau in the Department of general Criminal Investigations, a complaint filed by the residents of the region of Bouchrieh against "all the cafés and bakeries whose clients gather on sidewalks and in public places on the entrance of the town of Bouchrieh (Dawra roundabout), and which became a gathering point for groups from different nationalities including night girls (*fatyat al-layl*, i.e. *prostitutes*) […] and homosexuals (*mithliyyîn*), and involving drinking alcohol and other substances, which caused disturbance to the passers-by and the residents of the place", and asking it to deal with this issue,

And on 7/8/2015 the Appellate Public Prosecution charged the agents of the aforementioned Bureau to go to the place and arrest the girls there in addition to the transsexuals and those who contact clients in order to have sex in exchange for money,

And therefore the defendants were summoned and heard […]

In this case, facts are reduced to a complaint, a police round-up, summarized interviews and confessions that do not concern specific sexual acts but general practices or reasons to be in such suspicious places, as may also be seen in the Egyptian and Senegalese cases. Judges do not seem interested in knowing more about the situation. This can be explained by the nature of the ruling itself, which denies the criminal nature of most of the facts alleged against the defendants, either because of their non-abusive nature (single judge) or because of their non-public character (appellate judge: "it was not proven that the accused committed some sexual act in such a way that they could be seen or heard by others, or in a public space, or with a juvenile; nor was it proven that the accused had the will to go against public morals"). It is interesting to observe that the same facts (public appearance in suspicious places and times) can lead to radically diverging conclusions: they either fully support the accusation (police and prosecution), based on a kind of ordinary knowledge of "normal crimes" (Sudnow, 1965), or they fall completely outside the scope of the law (single and appellate judges), which requires an overt breach of its restrictively defined provisions.

Rules

In this formally syllogistic game, it is not enough to have evidenced facts, judges need a rule legally characterizing them. Put simply, the alternative is between a readily available rule and a rule that must be made relevant; between the "soft cases" of rules that can be followed "blindly" (Wittgenstein, 1953: §199) and the "hard cases" of rules that must be discovered

beyond prevailing uncertainty; between routine practice and high profile affairs; between socially produced "obviousness" and dogmatic principles (the law cannot be silent and the law does not speak for nothing). Actually, any case requires some reasoning and thus some quantum of interpretation, be it to just establish an equivalence between the paradigm embodied by the rule and the instance represented by the facts. As nicely shown by Lenoble and Ost (1981), neither facts nor rules are ever totally transparent. However, rules are more or less "entrenched" (Schauer, 1991) and the judges' work varies accordingly. In Indonesia, there is no legal provision criminalizing homosexuality. The judges therefore found it impossible to condemn the people who had been arrested by the police, unless they could be found guilty under the pornography law:

> Considering, that the defendants have been faced with trial […], then based on the facts revealed, the judges chose to demonstrate the second accusation, that is, the violation of Art. 36 of UURI No. 44 of 2008 regarding pornography [viz. "Any person who exposes themselves or exposes other people in a show or in front of a public in a way that exposes nudity, sexual exploitation, sexual intercourse or anything that contains pornographic acts as defined in Art. 10 is punished by imprisonment for a maximum of ten years and/or a maximum fine of five billion rupiahs"] […], which consists of three elements, namely:
>
> First element: "any person" is substantiated as follows:
>
> What is meant by "any person" or "anyone" here is what is referred to as the subject of law, namely, a human or a corporation, who has legal rights and obligations, which is submitted for trial and can account for all his/her actions legally; […]
>
> Second element: "exposes themselves or exposes other people in a show or in front of a public in a way that exposes nudity, sexual exploitation, sexual intercourse";
>
> The police established that the visitors were nude, […] the dancers came and […] took off their clothes […], [and] the dancers masturbated two partygoers [in public] […]

In Senegal, there is a provision criminalizing sexual relationships against nature, and the judge takes it as a perspicuous rule without any further consideration:

> Considering that, according to the interrogation record of flagrante delicto dated 24 December 2008, the Prosecutor of the Republic summoned [names of the accused] before this court based on the accusation of having performed, in Dakar, on 24 December 2008, for a period that excludes any prescription of public action, acts against nature, and to have belonged in the same circumstances of time and place, to an association created with the purpose of committing crimes;
>
> These facts are provided for and punished by Art. 319 §3 and 238 sq. of the Criminal Code.

In Lebanon, the provision of the Criminal Code looks identical and led judges to adopt similar positions, as illustrated in the following dissident opinion reflecting the prevailing mood:

> […] We do not see in the expression "carnal conjunction against nature" any ambiguity that requires interpretation, because, in human nature since the creation, sexual intercourse occurs between two different sexes, which constitutes the natural intercourse, and any other sexual intercourse like the one happening between two people having the same biological sex becomes against nature and penalized in application of Art. 534 C.C. […]
>
> And whereas the Lebanese law did not criminalize sexual tendencies, but sexual intercourse in itself, conviction should only occur when there is sufficient proof of the occurrence of sexual intercourse, and not just proof that a person is of homosexual tendencies […]

However, interestingly, the same legalistic attitude recently led some Lebanese judges to reach an opposite conclusion:

> And whereas the criminal legislator emphasized the principle of protecting the individual in the exercise of his rights, making any deprivation of these rights an exception, and translated this into the general rule of Art. 183 of the Criminal Code stating that "an act undertaken in exercise of a right without abuse shall not be regarded as an offence;"

And whereas it appears that this article imposes three conditions on the decriminalization of any act, the first being the existence and acknowledgment of a right, the second being that the committed act should be a legitimate means to exercise that right, and finally that this right should be exercised without abuse;

And whereas it becomes necessary to determine whether the homosexual relation is the exercise of a right without abuse in the sense of Art. 183 of the Criminal Code, which implies establishing the extent to which the three conditions contained in the aforementioned article are fulfilled in the current case.

In the judges' work, finding the relevant rule is paramount. This is illustrated in the Egyptian case in a paradoxical way, in the sense that, without any provision explicitly condemning homosexuality, judges, drawing from the Court of Cassation's case law, extrapolated a rule criminalizing debauchery (*fujur*), to be understood as homosexuality (*liwat*), from Art. 9 of Law 10/1961 on the repression of prostitution (*da'ara*), which stipulates that:

(a) any person who hires or offers in any possible way a place that serves debauchery or prostitution […]; (b) any person who owns or manages a furnished flat or room or other place open to the public that facilitates the practice of debauchery or prostitution […]; (c) any person who usually practices debauchery or prostitution is condemned to imprisonment for a period of no less than three months and no more than three years, and to a fine of no less than five pounds and no more than ten pounds, or to one of these two penalties. When the person is arrested in this last situation, he or she may be subjected to a medical examination and, if it appears that he or she suffers from an ordinary venereal disease, to confine him or her in a medical institution until he or she has recovered […]

Master-narratives, counter-narratives, and procedural strategies

Albeit in a very formal way, judges present, and feel themselves constrained by, the necessity to base their judgements on rules, which both constrain their discretionary power and provide the opportunity for flexible reasoning. With rules, they produce and reproduce narratives as to how to understand and apply the law. This is the ordinary working of law. It puts forward legal master-narratives that correspond to what David Sudnow (1965) calls "normal crimes", that is, the routine understanding of legal situations and of their treatment. The Egyptian case is paradigmatic in that judges, despite the absence of any directly applicable rule, selected legislation that seemed to adequately fit the "moral though not formal condemnation of homosexuality" when it becomes public:

The crime designated in [this text] is only committed when a man or a woman fornicates (*mubasharat al-fahsha'*) with people without distinction, habitually. When a woman fornicates and sells her virtue to whomever asks for it without distinction, she commits prostitution (*da'ara*) […]; *fujur* occurs when a man sells his virtue to other men without distinction.

Indonesian judges could not proceed in the same way, either because of the lack of any alternative legislation or their unwillingness to give the case a maximal extension. Whatever their reasons, they restricted themselves literally to the only legislation they considered to be at their disposal, i.e. the law against pornography. A widely publicized case based, as far as the police were concerned, on alleged male homosexuality was reduced to a circumscribed condemnation of people involved in public sexual indecency (and thus not homosexuality per se).[24] The legislation selected by the judges could only target some of the people facing the moral condemnation of same-sex relationships. This was probably done on purpose: judges wanted to produce a master-narrative relating to commercial (homo)sexual practices – which explains why they found a way to convict the owner and the manager of the Atlantis club for participation – while not further prosecuting individuals for their sexual orientation:

[24] "Public sexual indecency" plays a pivotal role, either, when established, as a basis for conviction (Indonesia) or, when absent, as a reason to preclude it (Lebanon).

Declaring that the defendants [names] have been proven legally and convincingly guilty of committing a criminal act. They intentionally provided opportunities, means or information to commit crimes, namely displaying themselves (dancers and visitors) in performances or publicly portraying nudity, sexual exploitation.

The Senegalese judge transforms a confession regarding sexual orientation into the evidence of the crime of committing acts against nature, although this type of crime can only be established if participants are caught red-handed:[25]

Considering that the accused acknowledged having had sexual relations with individuals of the same sex for less than three years, in accordance to the summons notified to them;

That the crime of act against nature is therefore established in their respect.

In this case, the socially shared master-narrative is made legal, despite the uncertainty of its wording and the inadequacy of its evidence.

However, in general, master-narratives do not operate freely. They are constrained in several ways, e.g. evidential and procedural. In the Egyptian case, the judge decided to convict only those accused whose so-called "passive homosexuality" was established by (most dubious) forensic expertise. In other words, the judge felt his discretion was limited by evidence. We have already shown the extent to which this evidentially based statement reflects a socially shared moral representation (Dupret, 2011), but our point here is to stress the extent to which judges' subjective interpretations are felt from within as objective limitations. This holds true in the case of the Lebanese dissenting judge, who considers that there has been a "human nature since the creation" for which "natural" sexual intercourse occurs between different sexes, while sexual intercourse between people of the same sex is "against nature". Accordingly, this judge considered that the master-narrative is clear and offers no room for interpretation. The same holds true in Senegal, where the inadequacy of the evidence was only highlighted at the appeal level,[26] leading eventually to the case being overturned:

Considering that […] it is imperative that the investigating powers of agents representing public authorities be exercised in a way that conforms to the law in order to serve as evidential facts;

When proceeding in the manner indicated above, investigators blatantly violated the provisions of Art. 51 of the Criminal Procedure Code; […]

It follows that the investigation record, on which the prosecution against the accused and the subsequent procedure are based, must be annulled;

As a consequence, the warrants against the accused are required to be handed in.

If adjudication is about legally characterizing facts so as to attach to them legal consequences and therefore about producing legal master-narratives reflecting prevailing interpretations of rules, there must be some room for challenging these narratives and proposing alternatives. This is known in legal practice as a reversal of precedent, even though the expression concerns the case law of supreme jurisdictions and not the capacity of ordinary jurisdictions to overturn the traditional interpretation of specific provisions. Countering master-narratives is one of the main advocacy techniques used to promote specific causes and trigger changes in the manner some questions are dealt with at the social, political or moral level. Most judicial work is achieved as part of a routine process in which precedents are more or less blindly followed, as conformism spares often overloaded courts time-consuming effort.[27] Cause lawyering seeks to break this

[25] In the case we described, this is what the Lebanese judges refuse to do, although formerly it was normal practice.

[26] Mainly for procedural reasons related to the due process of law, while in Lebanon, the appeal court considered that evidence was inadequate because it did not prove the act and its public character.

[27] This was already hypothesized regarding Senegal (see above). In Indonesia – and despite the Chief Justice Ordinance according to which first instance cases must be dealt with in less than five months – it may be

routine process by proposing ready-made arguments qualifying or reversing the prevailing master-narratives. Such was the case in Lebanon, where associations offered judges a reading of the Criminal Code that subverted the classical interpretation of the expression "carnal relations against nature" (see Section 3). It is a particular manner of functioning, as it does not oppose existing legal provisions, but proposes changes of focus and evolutive interpretations.

The single-judge court of Metn opted for an alternative focus in its dealings with people accused by the Prosecutor's Office of acts against nature. It emphasized that "its first and fundamental role is to protect public freedoms and human rights in a way that preserves human integrity and dignity in society without discrimination or favoritism", a role that is translated into the rule expressed by Art. 183 of the Criminal Code: "An act undertaken in exercise of a right without abuse shall not be regarded as an offence." The judge undertook to explain how having homosexual relations corresponds to "the exercise of a right without abuse in the sense of article 183 of the Criminal Code":

> The right:
>
> […] and whereas it becomes the right of homosexuals to have human and intimate relationships with whoever they want, without any discrimination in relation to their sexual tendencies or any favoritism or intervention from any party, similarly to other people, since this is the simplest of their "natural rights" inherent to them as humans […]
>
> And whereas, on the other hand, the deprivation of homosexuals' "natural" right to have intimate relationships between them without discrimination or intervention from any party, results in forcing them to behave in a way "contrary to their nature" so that it corresponds to the "nature" of the majority […]
>
> The exercise of the right:
>
> […] and whereas the right to physically express human relations, through sexual relations between two consenting adults, is a right inherent to any human, and homosexuals should exercise it similarly to other people without any discrimination or preference, especially those who can only live their sexual lives through their tendencies […]
>
> Without abuse (*tajawuz*):
>
> […] and whereas it is necessary to confirm, within the aforementioned motivations, that the sexual relations that deserve to be protected, whether they are heterosexual or homosexual, are the relations that occur between two consenting adults, without any aggression or exploitation or damage to the other,
>
> Based on all the previous elements, and in application of article 183 of the Criminal Code, the prosecution related to article 534 of the same code should be invalidated.

The appellate Court of Mount-Lebanon opted for an alternative interpretation of Art. 534 of the Criminal Code:

> And whereas it is first necessary to emphasize two fundamental rules of the interpretation of legal texts and the determination of the scope of their application, the first rule stating that the text should be interpreted on the basis of the goal that was sought when it was written, and the second stating that the interpretation of texts should be consistent with social evolution; […]
>
> And whereas, secondly, the text of article 534 C.C. forms part of section 2 of chapter 2 of part 7 of the Criminal Code, whose title is "Infringement of Public Habits and Morals (*al-ta'arrud li'l-adab wa'l-akhlaq al-'amma*)", which means that the legislator's goal in writing this text is not to penalize sexual perversion, but infringement of public habits and morals when perpetrating it;
>
> And whereas, therefore, one should apply the text to situations that constitute an infringement of public habits and morals in the light of social evolution, and the interpretation of the text and the determination of the scope of

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considered that the trial (six months) was rather expeditious, considering the number of defendants. This can be explained by the fact that the judges were under media pressure. It can also explain the fact that the more "objective" Pornographic Act was used, despite what the judges considered to be aggravating circumstances, i.e. the attack on Indonesia's founding principles (*Pancasila*). In Lebanon, the whole procedure lasted about three years, a duration that is not abnormal but certainly not expeditious. Here, the opposite explanation may be suggested: the lack of a national and international political dimension did not incite the judges to speed up the trial.

its application should always be consistent with this evolution, otherwise the application of the text becomes unacceptable from the point of view of correct logic or social justice;

And whereas what constitutes the infringement of public habits and morals in the light of social evolution is the sexual act that is beyond the traditional view of natural sexual relations between a man and a woman, when it happens in a manner that is visible or audible to others or in a public space or when it is perpetrated with a minor who should be protected; […]

And whereas the conditions of article 534 C.C. are not fulfilled, it becomes necessary to confirm the first degree decision in relation to its result.

Besides literal interpretation of the rule on the statute book, an active search for substitute legislation in a case of legal silence, procedural maneuvers aiming to mitigate the strict implementation of the law, and evidential techniques supporting or undermining accusatory characterizations, the Lebanese case proves essential to showing the (possibly successful) capacity to seek, and find, alternative interpretations of legal provisions whose binding character does not look challengeable. The reversal of the master-narrative it offers does not come from a legal "revolution", in the sense of a change of paradigm external to existing law, but from a "transformative" process, that is, a change that is initiated from within the law currently in force. It is a means of by-passing ambient homophobia and asking judges to intervene in matters in which democratically elected representatives will never risk offending public opinion.

How to Do Things with Rules: The Reference to Rules in the Life of the Law

Although empirical descriptions cannot solve conceptual issues, they can show how flesh-and-blood people deal with concepts and pragmatically ascribe an objective meaning to them. To make use of John Searle's epistemic square, lawyers produce interpretations that, while being ontologically subjective (that is, they emanate from subjects), are epistemologically objective (i.e., they are generally considered as impervious to subjective interpretation) (Searle, 1996). Such is often the case with legal interpretation: although it is produced by law professionals, it tends to be considered as objectively based. Our intention is not to confirm or challenge this claim, but to show that interpretation takes shape in the ordinary practice of legal reasoning in a way that is shaped by the epistemically objective character of legal categories.

Following Eric Livingston, we call the process of legal interpretation 'instructed action' (Livingston, 1995). By this, we mean that norms, including legal norms, inextricably combine formulation and actualization. In other words, the (legal) norm acquires its meaning only through the combination of its enunciation with the practices that orient to it, be it to implement, violate or dodge it. Formulation and actualization are internally related to one other – like fire and heat: they are logically inseparable, although one can distinguish them for analytical purposes. In sum, legal action corresponds to activities instructed by legal norms in a way that is never totally predictable though never fully contingent. It should be said, also, that whereas the theory of legal constraints made it possible to relax sociologically the formal understanding of the legal process, the concept of instructed action allows us to logically consolidate the sociological understanding of legal practice. Rules have an open texture (Hart, 1961), but it is more open for some than others. The more legal categories and rules claim to duplicate ordinary moral sense (as is probably the case in criminal law), the more some people can claim access to their essential meaning and literal interpretation. However, the more these morally-supported rules are presented as having an obvious sense, the less entrenched they also prove in their interpretation, as this sense depends on extra-legal criteria, e.g. "common sense", which is by definition evolutionary. It is as if the moral authority ascribed to law – which triggers what we call the privilege of literalism, that is, the possibility of economizing on legal argument on the

grounds that the rule is literally stated – implies its practical malleability, which follows the "spirit of the age" (see Dupret, 2003), and thus its possible re-characterization.

In fields in which the moral basis of law seems to prevail, rule-based decision-making is so important in judges' work that, where no direct criminalization is available, they seek, and find, alternative or partial characterizations. Rules are central to the life of the law. Of course, such centrality does not work in the way legal dogmatism claims. The consistency of rules with facts must be actively produced. However, judges would not dare act without a formal basis for their argument. For them, it is a matter of legal constraint, i.e. how things must be done to be logically, substantially, and institutionally correct. It could be argued, as in caricatured legal realism, that this is purely paying lip-service to formal principles, but this would amount to an "ironic" attitude with respect to judges' work, given that, most often, they take these rules as objective and their argumentation as compelling. On the contrary, the question raised by our theoretically-informed praxeological research is not whether rules do play an effective role in adjudication; they do. What this research has arguably demonstrated is that they play this role in a way that is thoroughly informed and instructed by their interpreters' technical and commonsense knowledge of normative categories.