

Homosexual Relations in the Penal Codes: General Study Regarding the Laws in the Arab Countries with a Report on Lebanon and Tunisia

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The law and homosexuality

A survey and an analytical study of the legislation of most Arab countries

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It is not easy to conduct a study regarding homosexuality in the legislations of Arab countries. This is due to many obstacles such a job is faced with:

Methodology wise the legal studies require of course knowledge of the legislations but also to look at its various implementations whether judiciary in the framework of the sentences issued by the different tribunals and before that from the various security bodies in charge of preserving the public order.

But when it comes to a study regarding homosexuality the information about legislation is available but there is a big lack in the cases and the published sentences. Moreover it is difficult to get records and actions from security forces that we cannot have access to except through what is mentioned in the media.

As for the availability of legal studies related to homosexuality it is difficult and if they are available then it would be academic university studies that are unpublished¹.

There is no data and accurate scientific studies that have the required scientific dimension available regarding homosexuality in general and homosexuality in the law.

Regarding the sources of the study, we have used the available written sources specific to homosexuality in the law (and they are rare) but we also reviewed the general sources especially those dedicated to sexual criminality or moral crimes that usually include a small part about homosexuality. But in order to compensate for that lack we should look into other sources that are non academic. These are basically represented by articles and works that have been published either in conventional

¹ Review the list of references attached to this study.

media (newspapers, magazines...) or through the internet particularly in relation with cases, sentences and judiciary consequences of homosexual acts. These are information published on various internet sites either legal ones (related to or defending human rights) or homosexual websites (Arab or foreign) but it is worth mentioning that we dealt with these sources and the information they provided with a lot of reserve due to the difficulty in confirming its authenticity and the reaction of the governments to it either by denying them or questioning their credibility.

These methodological difficulties cannot hide from us the importance of the homosexuality question in relation with the law has in the legislations of the Arab countries.

The law as a set of general, objective and compulsory rules reflects ideological, religious, cultural and social data and embodies its vision of how the social situations and relations should be like. This law is also ruled by a number of developed factors such as the scientific progress and the cultural interchange.

The legal rule itself has its own philosophy: to say that the law protects the society and the individuals regarding their rights and relations makes the legal rule hold an objective that it tries to achieve through the most appropriate way as the society sees it in a certain era: the legal rule could be based on the preventive dimension, or deterrent or motivational or other means. These different means could all come together to reach the stability of the society and the protection of the individuals within it.

The law stands in general between what is public and shared and what is private and personal. This relation between the public and the private (that has evolved even in the Arab legislation) is seriously on the table in relation with the sexual relations in general, and with regards to the homosexuality particularly due to the issues caused by the sexual relations in the Arab legislations mainly linked to what is allowed and what is forbidden.

Going back to the Arab legislations that we had the possibility of working on (the following legislations: Mauritania, Algeria, Tunisia, Libya, Egypt, Palestine, Lebanon, Syria, Jordan, Iraq, Kingdom of Saudi Arabia, Qatar, United Arab Emirates, Bahrain, Kuwait, Yemen, Somalia and Sudan) we notice that most of them either forbids openly homosexuality in the penal code or uses indirect rules to include homosexual sexual acts.

This way of dealing with the issue has some problems since when we go back to these legislations we notice that the gaps and differences that characterize them whether on the level of the concept of the homosexual act in the Arab legislations or the differences in acknowledging the homosexual act in these legislations and the reasons for its criminalization which lead to a difference in the sanctions set. Nevertheless, this should not make us miss the risks of this criminalization on the individual and the human rights matrix as a whole.

To study homosexuality in the legislations of the Arab countries and their implementation judicially and legally requires an in depth study of the texts, sentences and records that are available and that reflect the difference and the discrepancy in the position of the Arab legislations regarding the homosexual act (part one). But these differences do not take away from the Arab legislations their dominantly deterrent aspect which leads to negative impacts of the criminalization on those individuals and the society (part two).

Part one

The discrepancies in the Arab legislations in the criminalization of the homosexual act

All of the Arab legislations that were studied do not clearly mention homosexuality as most of them acknowledges some acts that are part of the homosexual activities or behaviors, whilst some do not mention at all any homosexual act but nevertheless they use the national legal texts to include such activities. This poses a problem first regarding the discrepancy in the concept of the homosexual act in the Arab legislations (I). This discrepancy affects the way the sanctions are set when criminalizing the homosexual acts (II).

I. the differences in the concept of the homosexual act in the Arab legislations:

Words such as “homosexual” or “of a homosexual identity” are not used in the Arab legislations. This is due to the fact that these are recent terms that have an objective touch (scientific). The Arab legislations do not use either a number of other terms and concepts as we don’t find equivalents to words such as “gay” or “heterosexuality” or “sexual orientation”². But the absence of these terms from the lexicon of the Arab legislations (and other fields) does not mean the absence of words with homosexual implications that are in accordance with the terms used socially and culturally to indicate it³. The Arab legislations only deal with the homosexual acts from the perspective of sanctions (on a penal and criminal level) and thus the use of such terms with moral significance (such as homosexuality or homosexual) would make it lose this forbidding or deterrent dimension. This is why we note that the Arab legislations in this area use terms that have a moral cognitive load (that indicate deviance or corruption) so that the sanction matches the act.

Looking at the Arab legislations we notice that they don’t all mention the homosexual act or behavior directly and in clear terms since some of them do not mention the homosexual act at all not directly and not implicitly. This does not mean though the absence of sanction or legal consequences to homosexual acts and behaviors. Thus we can split the Arab legislations in the way they deal with homosexual acts into two groups: legislations that criminalize openly or implicitly the homosexual acts (a) and legislations that twist their articles to be applicable to homosexual acts (b).

a- Arab legislations that mention the homosexual act:

The Arab legislations - even if they criminalize homosexual acts – do not mention them in the same way or do not use the same terms as some legislations openly mention homosexual acts and sets sanctions (1) whilst others do not mention these acts but in implicit ways that

² This terminology is absent from the Arab legislations and even other fields, as they are not widely used but it has started to appear in the media and some classifications, books and studies.

³ Many terms are used in the Arab countries to indicate the identity of the people that have a tendency towards certain forms of homosexual activity: such as effeminate, fag... refer to Brian Whitaker The Forbidden Love, translation by F. Ibrahim, Al Saki editions, Beirut, Lebanon, 2007, page 254.

include them in general terms that have been understood by the doctrine and the security management as inclusive of the homosexual acts (2).

1- Direct mention to homosexual acts in some legislations:

Through reviewing the Arab legislations that have been studied we note that six out of the eighteen have a direct mention of homosexual acts in their penal code (also referred to as criminal law in some countries and sanctions code in some other). For instance article 230 of the Tunisian penal journal mentions the following: “if homosexual or lesbian acts are not integrated in any way in the form mentioned in the previous chapters they cause their perpetrator a prison sanction for three years”. (The previous forms are in article 227: rape of a female with the use of force, 227 repeat rape of a female without the use of violence, 228 sexual assault against a person male or female without the use of violence – 228 repeat: sexual assault on a child under the age of eighteen, article 229: increased sanctions regarding the previous article if the perpetrator is an ascendant of the victim or if he has authority upon them or if he was from the victim’s teachers or help or physicians or surgeons or dentists”⁴.

This study of article 230 in the Tunisian penal journal is almost clearer and more knowledgeable of homosexual acts whether between males or females. This legislation distinguishes itself from other legislations from the Arab countries due to this comprehensiveness along with Algeria and Somalia. Article 409 of the Somali penal journal of the year 1973 and article 388 of the Algerian penal journal of the year 1966 also criminalize homosexual and lesbian acts; meaning the sexual act with a person of the same sex (we should mention that the situation in Somalia with war and the absence of a state and its dismantlement into little states and the absence of a unified law makes it that the implementation of laws is upon the wishes and desires of the rulers which has led to the mention in the media that the laws are implemented in some areas and in others the Shariaa is in vigor⁵.

These three examples of Tunisia, Algeria and Somalia seem to be the clearest regarding the definition of the homosexual sexual act since it includes acts between both men and women. But the wording of these texts that are absolute pause some essential problems that are related to the concept of being gay or lesbian, i.e. the acts and behaviors and moves or other actions that are included in the homosexual act. Are we going to read these articles in a narrow way whereas the only homosexual act is “homosexual intercourse” or are we going to expand it include any act with a sexual dimension or objective (kissing, oral sex, flirt...) these problems make the role of the security and the judiciary later on crucial (but dangerous as well) to define the homosexual acts that will lead to serious consequences on the freedom and life of an individual. This is what we see in the rest of the Arab legislations that have mentioned some of the homosexual acts directly particularly male homosexuality.

Going back to article 201 of the national Algerian journal published in 1971 and article 193 of the Kuwaiti penal code as well as the Emirati penal journals (whether the federal penal code of the year 1987 or the penal journals of Dubai, Abu Dhabi, Sharjah and Ras el Khaima) we notice that they criminalize the male homosexuality (without mentioning lesbians) without defining what is meant with the act whether it is intercourse (sexual act) or other homosexual acts that have a sexual nature or a sexual objective. This absolute nature opens the way to many interpretations that might endanger the rights, social situation and carrier of an individual.

In application of these articles we notice (through what we managed to get in terms of cases and sentences from the courts of these three countries) that these articles are widely read whether by the security forces or some of the judges as well as the care of the other part to properly implement the rules of the penal laws that state that there is no crime without a clear text that describes clearly the criminal act and that consider that there is no sanction without a clear text that defines the sanction accurately. In this framework we can mention two cases that have taken place in the United Arab Emirates and two perfectly matching incidents in Kuwait but that have taken a totally different judiciary course.

In November 2005 the police arrested in the Emirate of Dubai 26 men in a motel whilst 12 out of them were wearing women clothes. At the time of the raid and arrest none of them was found performing any sexual act. (Which has been recognized by the police itself)⁶.

This arrest has lead them to face the court that has charged them with “sexual deviance” since some of them were wearing women clothes and sentenced them on 10 March 2008 to 5 years in prison. The criminal act in this case was not mentioned in any legal text that prohibits men from wearing female clothes. The same incident took place in Kuwait where the media called it “the gay wedding”⁷, when the Kuwaiti police has arrested a 21 year old men “imitating women” the investigation was based on him practicing homosexuality to which he admitted. The arrest was simply because the man was wearing female clothing but the investigation turned to the charge of homosexuality according to article 193 of the Kuwaiti penal code. Two persons were also arrested the young men admitted that he was used to having sex with them and they were all referred to the court charged with performing homosexual acts according to article 193⁸. The sentence in this case was on April 2009 stating that the three accused were innocent due to the absence of the conditions of article 193. The judge had read this article in a narrow exclusive way that made it only applicable to “intercourse” as in obvious and concrete sexual act not a presumed act or actions that could lead to sexual intercourse “imitating women” or actions and behaviors that could be an invite to others to have sex as other chapters apply to these cases and not article 193⁹.

So we are facing two identical cases regarding the material pillars (wearing female clothes and admission to homosexuality) and the legal pillar; since the Kuwaiti and Emirati laws both criminalize homosexual acts. Still the attitude of the judge was totally different. This difference in the way the legal text is read and interpreted and adapted to the incident is not only noted in different countries but it sometimes happens in the same courts in the same country. In the Emirates and in the case of the homosexual wedding that we have mentioned and in an exactly similar case that took place the same year 2005 in the Emirate of Sharjah and in a motel as well the court sentenced 12 men to a few symbolic lashes and they were released¹⁰.

These different interpretations of the same act are a danger to the rights and guarantees of social and professional life of people which becomes a greater danger when the laws do not clearly mention the homosexual act but includes it in other expressions that are more comprehensive and vague and more dangerous to the rights.

4 Penal journal published on 09-07-1913.

5 Refer to:
Death Haugs Over Somali Queers, Behind the mask, May 3, 2004, by BTM Correspondent, Faro, in Somalia,
Death Sentence for Somali Lesbians, BBC, February, 22, 2001, Judge orders executions for lesbian Duo, the
Washington Blade February23, 2001, by Will O'Bryan.

6 Reference: UAE : Sentences 26 gays to 5 years in Prison, November 23; 2008

7 Or the wedding of homosexuality, profusely mentioned in the papers whether in the Arab Orient: Egypt, Gulf countries, or in the Arab Maghreb as well as we shall see later.

8 Knowing that the young men admitted to having sex with the other arrested men six months ago.

9 Refer to Al Ray newspaper edition 10877 dated 12-04-2009, article “the judiciary declared 3 innocent from homosexuality charges.

10 UAE: Sentences 26 gays to 5 years in prison.

2- Implicit mention to homosexual acts in some legislations:

Some Arab legislations tend to use general terms to describe the homosexual act including four Arab legislations (out of the 18 included in the study) that use the expression actions or acts “counter nature” or “contrary to nature”. (The penal codes in Lebanon, Syria, Bahrain, Extreme Maghreb). For example article 534 of the Lebanese penal code that stipulates that “any sexual intercourse contrary to nature leads to a sentence of prison up to one year”. The same article is included in the Syrian penal code. As for the Bahraini penal code it mentions “contrary to nature assaults” while article 489 of the Moroccan penal journal¹¹ mentions the sanction of acts that are contrary to nature with a person of the same sex.

This expression was interpreted by many of those who studied law and security forces and prosecution and judiciary as referring to homosexual acts¹². Here we face the problem of defining what is meant by acts that are contrary to nature as they should be limited into one clear list to allow the judiciary to apply the due sanction. Thus we need to define the natural acts or actions to compare them to what is not natural and that requires accountability and sanctioning.

Then the issue would be how to define what is natural, is it by going back to the rules of the science of nature and biology or physics and chemistry or what is natural according to what is recognized socially, culturally, morally and ethically... which is not an easy task really and not proven scientifically¹³.

These essential obstacles did not prevent the implementation of the legal articles that criminalize the act that is against nature whether in Lebanon or Morocco or Bahrain. In the cases and sentences that we studied we notice a major and extremely dangerous mix up regarding the acts that are against nature:

In the extreme Maghreb, in what is known as the case of the big castle, or the homosexual wedding the appearance of a person on the tape in a private party wearing a bridal gown walking in front of a group of attendees in one of the houses has been considered as an act that is against nature and was used as a proof of practicing homosexual acts. The six persons were sentenced according to the stipulations of article 489 of the Moroccan penal journal. There received prison sentences that varied between 4 and 10 months. As for the appeal court it (Tangier appeal) in its sentence from 18-01-2008 confirmed the basis of the sentence and adapted the incident to article 489 and considered it an act contrary to nature and diminished the prison sentences of 5 of the convicted men to 2 months and maintained the 10 months sentence for the person that organized the event¹⁴.

In Lebanon and in some cases¹⁵ we notice as well that there is a broad understanding of article 534 of the penal code with all the related dangers on rights and liberties and right to privacy. Given the fact that simply accompanying persons into the car parking lot is

considered by the security forces as an act contrary to nature according to article 534 since some persons admitted to agreeing to party and do homosexual acts¹⁶. The exchange of names and numbers over the internet in preparation for an actual meeting is also considered under article 534¹⁷.

As we see in the case of the admission of a person arrested in a murder case to having homosexual relations as an act contrary to nature where the person has been followed for it even after he was proven innocent in the murder case that he was arrested for as he was not released but transferred for investigation, medical testing and trial according to article 534 of the penal code and he was sentenced and since he is Syrian residing in Lebanon he was sent immediately to Syria¹⁸.

Article 534 has been applied as well on two ladies that lived together that had admitted while being interrogated in a robbery case that they were homosexual in the absence of any proof of their relation regarding the security or the prosecution¹⁹.

We find these laws adaptation as well in some cases from Bahrain within the Philippine homosexual workers' community; whereas about 2000 workers have been fired with the charge of committing un-natural acts as well as closing 500 of their shops equipped for grooming, hairdressing and massage²⁰.

This broad definition of the expression “act against nature” gravely endangers the rights and liberties as well as the principles and rules of the penal law. Since, what makes this law unique, and given its impact on rights is its scrutiny in capturing crimes or felonies or violations with clear terms to stop any exploitation of the text or abuse in its use, this is a phenomenon that marks what is generally known as moral crimes, as there is no detailed list of all the acts that could be included in the set sanction²¹. This danger is even greater when the legal text does not criminalize neither clearly nor implicitly the homosexual act, even does not mention it at all, still other texts are bent to be applicable to it and to sanction according to it every person that commits a homosexual act consensually and secretly.

b- Arab legislations that do not mention the homosexual act but criminalize it:

Many Arab legislations do not really mention the homosexual act neither clearly nor implicitly but this does not mean that they do not criminalize these acts or sanction their acts. The absence of laws against homosexuality in these countries does not necessarily mean that there are no pursuits and consequences and sanctions but we even notice the opposite in some cases. Some countries such as Tunisia and Algeria where homosexuality is clearly criminalized in the penal journals but pursuing and sanctioning homosexuals are not to be compared with the consequences in Egypt despite the absence of a clear text against homosexuality. This is due to the fact that these countries (Egypt, Jordan, Sudan, Palestine, Iraq, Kingdom of Saudi Arabia, Yemen and Mauritania), even if the legal texts do not include a clear condemnation of

11 Published on 26 November 1962.

12 Refer for instance to MaryRose Zalzal, Abuse of the law and its use, the book of homophobia: positions and testimonies, Helem, Beirut, Lebanon, May 2006, page 26.

13 In this framework, refer to Nizar Saghiyeh Preliminary Notes on a Suggested Amendment to the Penal Code Regarding the Human Dignity, published by Dar Sader, Beirut, Lebanon, 2003, page 22. Also refer to General Kazour, Sexual Homosexuality and the concept of “contrary to nature”, same source page 84 and following, as well as , homosexuality between the stipulations of nature and the nature of stipulations, the book of homophobia – previously mentioned – page 32 and following.

14 Refer to AL Watan Arab newspaper on 29-02-2008, human rights groups issue a petition asking for the cancellation of the Moroccan law criminalizing homosexuality, report by Nawfal Al Charkawi for Magharibiya from Rabat, also refer to: Moroccan Court upholds jail terms for six homosexuals 24-11-2008.

15 That were provided to us by Mr Nizar Saghiyeh the lawyer and legal researcher, we would like to seize the occasion to extend our gratitude.

16 Refer to, homophobia the previous reference, page 164 where I mentioned the three young men by the ends of 2003 that have been caught by police using three Saudi young men.

17 Refer to the case of the internet provider Destination in the year 2000 that have been ruled in the courts of first instance and appeal, refer to Brian Whiteckar, Prohibited Love, that was previously mentioned page 167 and following, also refer to the press release by Human Rights Watch on 23-09-2000 and the Daily Star article: Appeals court overturns conviction of defendants in gay Lebanon case. Jun 19, 2001.

18 Refer to the book, Homophobia, Positions and testimonies, page 166.

19 Daily star, two lesbians arrested for un_natural sex, 23-08-02.

20 Refer to: Manila Standard, 11-07-2002; Bahrain deporting 2000 gays from R.P: The gay times are over.

21 Refer to Abdallah Al Ahmadi: Moral Crimes, Tunisia, Orpis 1998, also Sayed Atiq, The Crime of Sexual Harassment, Arab Renaissance Editions, 2003, Mohammad Zaki Abou Amer, the special department for the penal code, New University Editions, 2005, Sexual Crimes, Nisrine Abdel Hamid Nabih, New University Editions, Alexandria, 2008.

homosexuality but they use their other laws and legislations to criminalize the act and sanction the perpetrator. In this framework, we can put these countries in two groups: the first group bends its circumstantial legal texts to be applicable to homosexual acts (1) while the second group criminalizes homosexual acts and sanctions those who commit them using the Islamic Shariaa (2).

1- Bending the circumstantial laws to criminalize the homosexual act:

Looking at the Egyptian, Jordanian and Palestinian laws (in regards to Palestine and Iraq facing the absence of security and stability and due to division and the multitude of decision sources and militias things are not as clear as required when it comes to rights and liberties in general a for the homosexual acts particularly thus we will limit ourselves to the Egyptian and Jordanian examples and we will mention the Palestinian and Iraqi situations later in other parts of this study).

With the beginning of the third millennium organized campaigns started in Egypt to track and pursue the persons that commit homosexual acts which reflected an organized path or a security policy for the government. These pursuits have reached their peak in the case of “Queen Boat” in the ends of 2001 when 50 persons have been arrested whilst most of them were in a nightclub in the Nile in a boat called “Queen Boat” and although none of them was caught in the act of a homosexual action they were transferred to the courts; the campaigns and the arrests took place either in public places such as restaurants or by framing the homosexuals through the internet or via informants and cooperators with the security for the arrests to take place in private locations such as residences. From the cases where persons have been prosecuted for being homosexuals we can mention the following: misdemeanor court of the Nile 09-04-2008 sentenced 5 Egyptians to 5 years in jails and a fine of 300 pounds with the accusation of “immorality due to exercising homosexuality”²² as well as the sentence in absentia in September 2001 on 7 men for habitual exercise of lechery where they were arrested and detained for six weeks then sentenced in absentia to a year in jail. In August of 2002, 12 men were arrested in a private residence and they were sentenced to 3 years in jail²³.

The Egyptian police also frames homosexuals through the internet and setting fake dates only to find the morality police waiting for them and is since 2001, as around 45 men have been arrested at the Tahrir Square after coming according to fake rendezvous set online²⁴.

But the question remains: in the absence of a clear article in the law that criminalizes homosexuality what legal instrument did the security, prosecution and judiciary in Egypt use as a basis to pursue, arrest, investigate and sentence homosexuals?

Going back to the cases and sentences that we have reached, we notice that with exception of the “queen Boat” case of the years 2001/2002 where the case was based on many references such as immorality, a gang of corruptors, threatening the general security and describing the arrestees as a perverted religious sect attempting to recruit other homosexuals. State security claimed that they found at the residence of the main defendant a pamphlet with the title “God’s agency on earth is our religion that is a religion of homosexual people and our prophet and leader is Abu Nawas. Thus the trial took place at the state security court that had been established according to the emergency law of the year 1981²⁵.

The main legal basis to pursue homosexuals in Egypt is the case of immorality that is based on the Egyptian law known today as law 10/1961 which is originally law 68 of the year 1951 that was adopted to combat prostitution. This law mentioned the two terms “prostitution” and “immorality”. Although it was adopted at first to fight prostitution (with a financial fee) but the term “immorality” that was included open the way to charge with accusations that go beyond prostitution to include “immoral” any action or of “sexual nature” even in the absence of a financial return.

Which could lead (and it has really happened) to criminalizing a behavior or the intention of a sexual act. With the absence of a need to provide with an evidence of the financial return, sex out of wedlock and casual sex have been criminalized. But to pursue and follow and convict based on law 1961 these actions and practices should be habitual (article 9d, from the law 10/1961) and the courts considered that a habit should be measured with the practice more than once and with more than one person in three years.²⁶

The conditions set by the law 10 of the year 1961 related to habits and that have been confirmed by the courts also seem to be difficult if not impossible to gather in many cases when it comes to homosexual acts but that did not stop the prosecution from pursuing homosexuals and even framing them and it did not prevent the courts from convicting persons that were not used to the homosexual act at all. Which is what was demonstrated for instance in the cases where the police (particularly the morality police) is the body framing the homosexuals or those desiring homosexual acts.²⁷

We can see the danger of criminalization according to the accusation of bawdry when the doubt, and not the act, is what paves the way for the detective for the arrest, the medical test and the conviction.

This situation has been experienced by 5 Egyptians that have been charged with bawdry and sentenced on 09-04-2008 to five years in jail and a fine of 300 pounds each. They have been charged with bawdry after a fight that broke at a restaurant in the center of Cairo one of the clients of the restaurant accused the five men of performing homosexual acts. Starting from this allegation the men have been arrested and detained and presented to a legal physician that checked them up and confirmed that they “indeed are homosexuals” and that four of them have AIDS. They have been referred to the court of the Nile that ruled on 09-04-2008 that they should be jailed and fined considering that they “have been used to commit bawdry, and trade with the body and that they are homosexuals”. There are some as well that have been sentenced according to the law number 10 of the year 1961 related to bawdry and prostitution. ²⁸

Bending this law for it to be applicable to homosexual acts is considered as an abuse of the law particularly the penal code, but article 9 of the law of 1961 is not the only article that can be used to frame homosexuals, criminalizing them and sanctioning them. For instance the Egyptian law, still law number 10 of the year 1961 in article 14 sanctions to three years of jail for any person that circulate “an invitation that includes allurement with bawdry or prostitution”. The Egyptian penal code in article 178 forbids the displays that are “against general morality” and the “public outrageous actions” (article 272) of the penal code. These charges or one of them at least have been used to add to the main charge (generally bawdry) to frame men who are looking for other men through the internet. Added to this is the charge of “being in a public street... and incite the passengers to bawdry with indications or words”. (Penal code article 269 repeated that sanctions this behavior with prison for a

22 Review the details through AlArabia net – agencies.

23 Review:

24 Review the previously mentioned report, page 74, Human Rights Watch

25 In that regard refer to:

26 Refer to: Edward Ghali Al Dahabi, the Sexual Crimes, Cairo the National Library edition 1988 page 135, also refer to: Nisrine Abdel Hamid Nabih, the previous reference, page 66 and what follows.

27 The case of Tahrir Square the arrest of 45 men or arrest cases at the private residences in Giza and the arrest of 7 men in September 2001 and 12 in August 2002. Refer to the book The Forbidden Love, page 75.

28 Cairo, Al Arabia net - agencies

period that does not exceed a month). This article is also used to criminalize homosexuals that are caught by the police on the internet. (Such articles are found almost in all the penal codes of the Arab countries, even the ones that clearly criminalize homosexual acts, since these articles can also be enforced on the homosexual person that was not caught in the homosexual act which is a very difficult issue unless it was in a planned frame to set them up. For instance the Lebanese penal code sanctions every act that could be “against public decency” in the article 531 as well as “hurting public morality” in article 532 and “things that disrupt diffidence” article 533. We can also mention article 226 of the Tunisian penal journal that sanctions those who “displays bawdry on purpose” and article 226 repeated that sanctions “those who publicly violates good morality and public decency by signs or words” and article 226 part 3 that criminalizes “sexual harassment”...).

What has been witnessed by Egypt in the beginning of the third millennium and that continues till today regarding bending the legal texts to include homosexual acts which is also happening in Jordan since the fall of 2008.

Despite the fact that the Jordanian law does not include an article that criminalizes clearly and directly homosexual acts, we notice that since October 2008 the security forces in Amman have started “enforcing a campaign that targets homosexuals”²⁹. This after these bodies confirmed that they gather and meet in one of the parks close to a private hospital in Amman. Four of them have been arrested “after framing them in an ambush set especially for this purpose³⁰, they have been arrested and then deposited at the reform and rehabilitation center, the governor of Amman prohibited their “sponsoring until getting guarantees that they will not repeat these abnormal behavior” especially that they were “looking for vicious practices that will lead to the diffusion of the morality decay in the society”.

All these security preventive/deterring measures are inserted in the administrative measures without any legal guarantees. Security sources in Amman confirm that the security campaign will remain in force until all the decay signs have been eliminated³¹.

This legal and security situation is reproduced in Palestine as the Palestinian law does not clarify clearly the sanction for the sexual practices between persons of the same gender but according to one of the reports the sanction for homosexuality varies between 3 to 10 years of prison³².

The authorities also frame the homosexuals by setting them up using helpers or informants that set meetings with the homosexuals then they are arrested³³.

The situation of the Palestinian homosexuals in Gaza and the West Bank is very difficult given that the homosexuals can in the Arab countries, hide in big cities, and get away from their families, but it is not possible for the Palestinian homosexual to do so due to the space limitation and to the travel difficulties and fear of accusation of treason in case they go to Israel that could also not accept him or suspect him³⁴.

2- Using Shariaa rules to criminalize the homosexual acts:

Looking at the legislation of the countries that are interested in this research we notice that four of them implement the Islamic Shariaa laws on the homosexual acts, these countries are the Kingdom of Saudi Arabia, Sudan, Yemen and Mauritania. (We could also mention some of what happens in Iraq in some areas where the role of the state does not exist, we mention the Fatwa of the Ayatollah Ali Sistani where he called for the killing of those who commit “homosexual acts with the hardest death”, security sources have also mentioned in Iraq that the corpses of 25 men and teenagers have been found inside Al Sadr city, everybody was holding a paper that said “gay”³⁵.

These states apply as they see fit from their own perspectives the Shariaa laws on homosexual actions. We already mention that there is no uniform Shariaa position regarding the sanction related to homosexual acts that is referred to as sentence for sodomy and sentence for lesbianism. (We will analyze this in more details later on).

For Sudan, since 1985 the Shariaa rules are implemented in all fields including borders. These principles are implemented without setting a particular confession. In this framework we notice that the sanction for homosexual acts in Sudan is the sanction of adultery. In that sanction there is a difference between the protected and none protected when setting the boundaries. (Here we find a response to a part of the Islamic doctrine that makes homosexuality at the same level as adultery regarding the conditions to set a limit).

As for the situation in the KSA it requires some detailing since it is almost the only Arab country (and the second in Islamic countries in the Middle East – with Iran) where the death penalty is implemented on people who have been charged with and convicted for homosexual acts. We will try through what we have received as sentences to demonstrate what is considered a homosexual act that leads to the implementation of the limit.

In four cases mentioned by the Saudi and international media, the following charges have been adopted to sign a sentence on the defendants (men):

“wearing women clothes”, looking like women and homosexual acts between them” (sentence for the 9 accused men to five years in prison and 2600 lashes divided into 50 sets of 50 lashes each once every two weeks)³⁶.

“Extreme obscenity”, “gay sexual behavior”, “imitating women”. (along with that they have been charged with: sexual abuse of boys, photographing them and blackmailing them which led to the execution of the three men by decapitating them as they were accused of drugging and raping the boys³⁷.

“Committing extreme obscenity”, “ugly homosexual practices”, “the three men getting married to each other and harassment of children”.

These practices were “repeated more than once” the three men have abused persons who asked them to stop their actions. (These charges lead to the execution of the three men in 2002)³⁸.

29 The term is from the AlGhad Jordanian newspaper that mentioned the story in its edition dated 28 October 2008.

30 AlGhad newspaper, same reference.

31 Same reference AlGhad newspaper, edition of 28-10-2008.

32 Refer to: Palestinian gays seek safety in Israel, in Cleveland Jewish news, 15-01-2004. www.clevelandjewish.com

33 Halevi Yossi, Refugee status, the New Republic, 19.08.2002.

34 Refer to The Forbidden Love, page 45 and what follows.

35 New York Times, 16.04.2009/Timothy Williams, Tarek Meher.

36 Refer to: Nine Saudi transvestites jailed, 16.04.2000. Associated Press- Was also mentioned in the book “The Forbidden Love” mentioned earlier, page 159.

37 Refer to: Execution in Saudi Arabia, Planet Out, July 11, 2000, www.sodomylaws.org/world/saudi_arabia/saudinews04.htm Also refer to: “The Forbidden Love”, page 151

38 Refer to: Krisberg Kim, Saudis beheaded for sodomy, the Washington Blade, January 4, 2002 www.sodomylaws.org/world/saudi_arabia/saudinews15.htm “The Forbidden Love”, page 151.

“The rape of a thirteen years old child that was “choked and beaten on the head with a rock and pushed in a rocky hill” (the 21 years old young man was given the death penalty and the teenager (16 year old child) that facilitated the meeting with the victim was sentenced to five years of prison and 400 lashes³⁹.

From these four events we can conclude the following:

The homosexual act that is sanctioned in the KSA could be simple, such as wearing women clothes or acting like them. It can also be a sexual behavior or one that has a sexual dimension: “the homosexual behavior between the defendants”, or “committing extreme obscenity”, “men getting married amongst each other”... these are actions that do not affect the others but are only relevant to the defendants and that they practice in the context of their private not public lives still the law sanctions it with prison, lashes and even execution.

The homosexual act is linked to other actions that make it really seem like a criminal act or justifies the criminalization and the sanction: when it comes along with rape or assault against others, or blackmail or even murder. This has led to hardening the sanction regarding prison, lashes and execution. It has also allowed to present the homosexual person this way: abuses others, harasses children, blackmails and kills only to satisfy a sexual desire.

These four incidents cannot give a full and precise idea of the way the Saudi authorities and law deal with the homosexual acts or behaviors that goes way beyond the aspects shown in the above mentioned cases but they show that the homosexual act as simple as it is can be sanctioned if it was discovered whether in the context of another act (drinking, raping, killing, blackmailing, violent sexual abuse) or when declared.

This does not mean that the authority has sanctioned and sanctions all the homosexual behaviors but it could whenever it wants to especially that it follows the homosexuals and can set them up⁴⁰.

The concept of homosexuality as an act or behavior with a sexual dimension between two consenting adults and without declaring it is misunderstood and some confusion in the Arab legislations and even if they are understood this way then we see it being followed, pursued and punished.

Except for the penal codes in Tunisia, Algeria and Somalia where the sexual acts between two persons of the same gender male or female are sanctioned the rest of the Arab legislations either deal with male homosexuality only (Kuwait, Qatar, United Arab Emirates) and do not give importance to the relations between females or that include the homosexual act within a big group of moral criminal acts and some of them legally: these homosexual acts are set within a package of acts that are counter nature or included in bawdry and obscenity and that is what gives it the deviance character and this is what the law and security and legal authorities want to link to those acts.

This legislative tendency was implemented in reality in relation to pursuing and prosecuting homosexuals. Most of the cases that were presented to the courts where the main accusation is homosexual relations or homosexual behavior or even a person that has homosexual tendencies that he has not experienced yet, they link the homosexual act to other actions and behaviors that make it lose the private character (intimate) to become a public scandalous, trashy, ugly, deviant immoral, dangerous to the society and individuals, because

the homosexual could “rape”, “abuse and harass children, blackmail people, turn the laws of nature around, destabilize the society, “the homosexuals could cause life threatening diseases for the healthy”. (All these expressions have been mentioned in sentences issued by the various Arab courts in relation to cases where homosexual acts were judged, some of them were also mentioned in the reports of research or Arab security declarations...).

This horrible confusion reached its peak when France and Holland presented a draft declaration to the general assembly of the United Nations in December 2008 to prevent the criminalization of homosexuality, the Arab and Islamic group presented a counter declaration, where it mixed between homosexuality and sexual abuse against children and incest...⁴¹.

The disparities between the Arab legislations in defining the homosexual act or behavior should not cover for the fact that the legislations do not deal with this behavior but in a deterrence way, or sanctioning where the sanction varies according to the basis it builds upon and the objective from it (part two).

39 Refer to: Okaz the Saudi newspaper, October 3, 2003 Also refer to: Arab News, Saudi Youth Faces death for rape and murder, October 4, 2003

40 Which is what was mentioned by the Saudi security sources in the case of April 2000 the nine men – where the police followed the nine men after reports came in about their behaviors in a weird way until they were raided and found in women clothes. Review the book “The Forbidden Love”, page 159.

41 Refer to: Le Monde, 19.12.2008

Part two:

The disparities of the sanctions for the homosexual acts in the Arab legislations

The Arab legislations do not all deal with the homosexual acts in the same deterrent way. Despite the fact that it sanctions the homosexual acts they have sentences of various degrees and danger on the rights of the persons and their life. This gap in the sanction is mainly due to the basis on which the legislations were built. Most of them go back to legislations based on what is from the colonial inheritance or at least they were affected by it (mostly the legislations of Morocco, Algeria, Tunisia, Egypt, Lebanon, Syria, Somalia, Kuwait, Bahrain, UAE, Palestine and Qatar). These are sanctions that deprive from freedom through jailing and some financial fines (a).

Another part of these legislations reflects some interpretations of the Islamic Shariaa thus the sanction is physical: lashing or executing. (Sudan, KSA, Yemen, Mauritania) (b).

This disparity in the sanctions set by the Arab legislations, even if they go from two months in prison to death, reflects clearly the deterrent dimension in dealing with the homosexual act which is corroborated when we expose the role of security forces in dealing with the homosexual act and the role of the judiciary as the referee between the public interest and the private rights of individuals.

a- The sanctions influenced by the colonial era:

The influence of the colonial countries in the areas and particularly the French and British influence, have had a great impact in shaping the legal systems in the Arab region, this influence shows in various fields including the penal codes. With the beginning of the colonial era in the region the first penal journals or penal codes emerged and they are still in vigor until now even if there have been some updates that did not affect the essence when it comes to moral crimes and particularly sexual ones with what it includes of criminalization of the homosexual acts. These laws that marked the region are due to the vision that was dominant with the colonial forces at the end of the nineteenth century and the beginning of the twentieth in regards to homosexuality that was not criminalized clearly in the texts in the region but was tolerated on a social level which is a case that still marks a lot of the Arab societies.

This criminalizing trend lead to the emergence of the first clear and fixed sanctions in the legislations of the Arab countries (1) that tried to give some explanations to this criminalization by adopting various reasons and basis (2), reasons that are not adopted anymore these days in the countries that criminalized homosexuality in our region (3).

1- The first channeled sanctions in the Arab region:

The impact of the French and British legislations on the laws of the region was uneven in the criminalization of the homosexual act and setting the appropriate sanction for it. This is why we make a distinction between the effect of the French colonialism and the British colonialism:

About the French effect of the laws of the region: we notice that the Napoleon journal that was in force during the French expansions in Northern Africa or in the Cham region, did not criminalize the homosexual act and did not mention it at all, except with the beginning of the movement of changes in the region and the text was adopted to criminalize the homosexual act and sanction it with prison basically and fining as well. Which is astonishing and makes us think of its reason; we can explain it by the fact that the lack of mention in the Napoleon journal of the homosexual act does not mean that it was socially accepted especially in the conservative communities which were the ones that lead the colonialism movements and that was behind the change in most of the colonized countries. This is why we notice for instance that at the arrival of the French to Beirut the closed a house for male sex commerce that existed under the Ottoman rule whilst they left another one open for female sex⁴². These conservative communities imposed their religious views about a certain concept for the family and rejecting homosexuality on the Arab laws of this era. For these communities not to be in contradiction with the laws of the country of origin, it did not criminalize the homosexual act except with prison from two months to three years.

Regarding the sanction we note that these countries have various sanctions for the homosexual act:

On the level of the legal texts we can sort the countries as follows:

As for the maximum sentence we find it listed in the Tunisian penal journal of the year 1913 in article 230. This article was never amended since that date. It states a sentence of “three years” for those who commit a “gay” or “lesbian” act. The article does not give the judge the possibility to lighten the sanction as he only has the choice between a sentence of three years or a release.

This maximal sentence (three years) is common to Tunisia and Morocco but article 489 of the Moroccan penal code sets a minimum sentence of 6 months in prison. So the judge has the choice in sentencing to 6 months up to three years of prison with the possibility to set a fine that varies between 120 and 1000 Dirham.

After this maximum, comes what was mentioned in article 388 of the Algerian penal journal that sets a minimum sentence of two months and a maximum of two years with the possibility of fining the offender with a sum that varies between 500 and 2000 Dinar.

The least of these maximums is in article 534 of the Lebanese penal code which is one year of prison. The article did not set a minimum sentence but it gives the judge the possibility to set his minimum as the article states: “he is sanctioned for it with prison up to one year”. Thus the judge has the liberty to set the minimum sentence he sees fit up to one year.

As for the British effect in the Arab region: it was based on the law that was also implemented in other areas of the Empire throughout the Arab region and particularly: the South of Yemen (Aden), Bahrain, Oman, Qatar, and the area that is now the UAE as well as Sudan. This law that was in accordance with the British laws in vigor in the UK itself was translated in the area through article 377 of the Indian journal that sanctions homosexuality with 22 years of exile or prison for 10 years or a fine. In 1956 article 377 was replaced in the areas under British domination in the Gulf with a new article that sanctions the homosexual act with prison up to ten years with the possibility of physical punishment (lashing).⁴³

42 Refer to: Assad Abou Khalil, A note on the study of homosexuality in the Arab/Islamic civilization, Arab studies journal; 1993/2-1. pp. 32-34

It was mentioned by Abdelrahman Ayas, The Role of the Colonialism in Rejecting Homosexuality in the Arab Region and the Orient: how the spell was reversed on the magician, when it comes to homophobia: positions and testimonies. Helem, page 67

43 Refer to:

This British impact that found its source in the British laws that criminalized the “act of sodomy” and sanctioned it with hanging from 1563 to 1861 when death was removed and replaced with prison and fining and other measures: castration for instance. Until today we find traces of it in the laws of the Arab region particularly the Arab Gulf countries that have almost preserved the sanctions introduced by the British to the region since 1861 and that were confirmed in 1956.

Qatar and Bahrain have kept the spirit of the British legislation with its two components: freedom restriction and physical punishment. Article 201 of the penal code states prison for 5 years and the possibility of lashing. As for Bahrain its penal code of 1956 states prison for 10 years and the possibility of lashes. We find this sanction as well in the law of Sharjah in the UAE. It has been enforced in 2005 on 12 men instead of prison. Qatar and Bahrain repatriates the homosexuals that are not nationals, especially foreign workers, Asians, and this has happened on many occasions⁴⁴. This is a sanction that is one of the remainders of the penal code of the British colonies for 1861 that stated the exile of the homosexual for up to 22 years.

As for Kuwait and the UAE they kept the prison sanction, as the Kuwaiti penal code in article 193 sanctions the homosexual act with seven years while the same act is sanctioned at the emirate of Dubai with up to 10 years (article 177 of the penal journal of the emirate of Dubai) and up to 14 years in the emirate of Abu Dhabi (article 80).

These legal remainders of colonialism that still mark the laws of the East and North of Africa have been imposed by the colonialist powers to respond to its cultures and laws that were in vigor at this period of time have integrated into the region the idea of sanctioning homosexuality and criminalizing it which is a foreign idea for this region and its culture that was not originally a culture of defined legal texts that detail behavior and intrude into the intimacy of the private life, homosexuality even if not encouraged socially or culturally but it was not verbally rejected or it was permitted implicitly (tolerated) it did not get this legislative attention and did not require this sanction and this deterrent vision of the issue that show cultural and social backgrounds different from the cultural and social backgrounds of the Arab region; even outside of it in the region of the Orient as a whole⁴⁵.

Thus we wonder about the reasons of this criminalization and the roughness of the sanction.

2- Reasons for criminalization and hard sanctions:

Going back to the period of criminalizing the homosexual act in the Arab region by the ends of the nineteenth century and beginning of the twentieth and the control of the colonial powers over the region, we study here in all details the reasons that lead to that criminalization and tough sanctions for the homosexual act.

What we note is that in Europe for many centuries there was an unlimited hostility towards the homosexual act and homosexuals (to reach burning, executing, organ amputation, castration, exile and prison...) this is a hostility that many linked to Christian religious ideas (a specific interpretation of this religion) for instance the UK for many centuries launched a war on homosexuality in the name of religion, social system and decency and others it also took measures to remove these acts in a way that go beyond what is happening today in all the Arab countries.

Since Henry the eighth introduced catechism into the English legal system (in 1533) homosexual actions (sodomy) as being disgusting and hateful⁴⁶ the sanction was execution by hanging from 1563 to 1861. The concept of “sodomy” was expanded to include oral sex up until 1818. It was also sanctioned with death by hanging. Homosexuality was still criminalized until 1967. The sanctions were very different ranging from financial fines and prison for a long time, the defendants used to accept harsh measures and life threatening steps to get parole or to be released under surveillance. For instance: mandatory treatment, electric chocks or hormones injections⁴⁷.

The reasons for criminalization were mainly linking the sexual act in general and the homosexual act particularly to moral and social dimensions.

As for the moral dimension that is linked to the Christian moral thinking mainly and that looks at sexual desire as being against the teachings and that looks at the illegal sexual act (between a married couple for procreation) as a sin that requires sanctioning. This is what was interpreted by the church as considering sodomy as “a horrible sin” and that was translated by the political and security authorities as a series of sanctions and deterrence measures.

As for the social dimension that legalized for a long time the oppression of homosexual acts it links the homosexual act to going against the main system that the society is based on and that is family. It looks at the homosexual behavior and the homosexual person as being dangerous for the society and individuals especially youngsters.

These ideas had been summarized by the British minister of interior Maxwell Five who said in 1953: homosexuals in general tend to be exhibitionists they gather supporters around them and pose a danger on others especially youngsters⁴⁸ which is what was confirmed by the British ministry of interior in a comment about the report by the John Wolfenden commission in 1957: “the sodomy (homosexual) communities and the clubs support “lies, brutality and lack of morality”⁴⁹.

These ideas and approaches that lead to condemning hundreds of those who were accused of committing homosexual acts (to death, exile, prison, forced immigration, chemical castration and lashing...) that still have traces in our Arab legislations today and in the positions of some of our judges, prosecutors and governors of our nation⁵⁰.

What happened in the countries that were the source of criminalizing homosexuality and homosexual acts is that they exceeded that with the end of the 1960's which was a result of hard, scientific and targeted work, which is what did not materialize until now in our Arab states.

3- Violations of the legislations that are against the homosexual act:

The countries that used to criminalize the homosexual acts and sanction for them started with the end of World War Two reviewing their legislations this was a very difficult task because of the long inheritance of homophobia, as this culture was rooted and gave the impression that criminalization and punishment for homosexual acts is an obvious thing as this anti-homosexuality culture presented this as a normal biological issue inherent to the nature of the human being not only a cultural issue.

Sofer (Jehoeda), sodomy in the law of Muslim states, in sexuality eroticism among males in Muslim societies, Harrington park press, Binghamton, New York 1992.

Also refer to: The Forbidden Love, previous reference, page 148 and Abdelrahman Ayas, the role of colonialism in the rejection of homosexuality in the arab region and the Orient, page 70.

44 Refer to the above mentioned.

45 In India the UK in 1861 set sanctions that criminalize the homosexuality despite the absence of basis for such laws in the Hindou creed which made Indian homosexuals subject to persecution from their societies and religious institutions. Refer to Abdelrahman Ayas, previous reference, page 70.

46 Refer to The Forbidden Love, page 138.

47 Refer to: Stewart (Graham), The accidental legacy of a humanitarian homophobic, the Times, 2.10.2000

48 Refer to: Stewart (Graham) op.cit

49 Refer to: Stewart (Graham) op.cit

50 What would have Maxwell Five said in 1953 about homosexual is what we heard in the reports of the prosecution in the case of Queen Boat in 2001 and we read it by the end of 2008 in the declarations of the governor of the Jordanian capital Amman, AlGhad newspaper, 24 December 2008.

By the end of the 50's and the early 60's and with the development the international chart of human rights has witnessed along with the development of modern psychology; as the protection and dignity of the human beings became the objective of the law and science and the rest of the components of the social system, there was serious consideration regarding reviewing the penal system to match this development. Thus some countries such as Canada and the UK nominated multi-disciplinary committees in charge of reviewing the existing laws about homosexuality and sex traffic.

In this framework the English experience gets our attention due to the impact it had on the laws in the Arab Orient regarding homophobia as well as homophobia in the laws in the UK that lasted for long centuries; the arguments presented to justify the criminalization of the homosexual act and sanctioning it are the same arguments used today to maintain the criminalization of these acts in our Arab countries.

In 1954 an investigation commission was appointed headed by John Wolfender vice-president of "Riding" university that had as mission to review the law related to homosexuality and the law related to prostitution. The work of the commission lasted for three years, it held interviews with a big number of witnesses including religious leaders, security personnel, judges, psychiatrists, social workers and homosexuals; it presented its report in 1957.

The committee report was constructed as follows:

Homosexuality is immoral and destructive for the individuals.

The extent of "morality" on the private level is not a matter of law.

The role of the law consists in preserving public order and decency, in view of protecting the citizen from what is offensive and injurious and of providing sufficient safeguards against exploitation and corruption of others.

The function of the law is not to intervene in the private life of citizens, or to seek to enforce any particular model of behavior.

Consequently, homosexual behavior between consenting adults, who are at least 21 years old, in private, should no longer be a criminal offence⁵¹.

These findings did not please the ministry of interior when they were published and were not passed in the parliament until 10 years after their submission, i. e., in 1967.

Moreover, these logical outcomes have changed the attitude towards contesting homosexuality in England, the most opposing country to homosexuality along centuries. Thus, the logical outcomes have become an incentive for other countries who pursued the same British process, and the Canadian minister of justice, Mr. Pierre Elliot Trudeau, declared towards the end of the 60's, "the State has no business in the bedrooms of its citizens"⁵².

However, it remains a paradox how the Arab legislations, that continue to criminalize the homosexual acts, as a legal colonial legacy, have not started yet to reconsider the feasibility of those legislations although they were overruled in their countries of origin.

These Arab legislations with colonial roots, were they to revise their laws opposing the homosexual acts, they should go back to most of those studies which took many years to be completed; they must as well elaborate their own studies in view of reconsidering their attitude towards all matters that should be included under the privacy section which ought to be protected by law instead of being attacked by it.

Is it right to adopt these observations - that we could put in the context of the Arab legislations based on the colonial legacy - for the Arab countries with legislations based on the Islamic Shariaa in the way they define the punishment for homosexual acts?

b- The punishments "emanating" from reading the Islamic Shariaa:

The Yemenite, Saudi Arabian, Mauritanian and Sudanese legislations go back to the Islamic Shariaa principles to define the punishment for homosexual acts, by keeping the homosexual within the limits in case the conditions of the act were available. This perception, that belongs to a certain way of reading the principles of the Quran and the Sunna, can be countered through the study of Al Shariaa's provisions concerning the homosexual act (1) or the demonstration of the limits of this act in the Quran and the Sunna and what the doctrines have been carrying on (2).

1- Al Shariaa's ruling about the homosexual act :

What we read in the text of the Quran is the talk about the people of Lot and their deeds. The Quran verses speak about how the people of Lot desired men instead of women, how they committed immorality while they were seeing, and how they obstructed the road and committed evil in their meetings⁵³.

However, the text of the Quran does not show explicitly the limit of he who commits the deeds of the people of Lot. In the same time, it does not tackle directly the act of lesbianism.

The question to ask about the acts of the people of Lot is the following: is their act limited to males only and not females, and this is why the outrage and punishment of Allah were inflicted upon them, or was their act more comprehensive than that and that is what brought Allah's punishment onto them?

The Quran verses and the different interpretations show that the acts of the people of Lot were not limited to approaching men (this is the image that was considered as sufficient when mentioning the people of Lot, and all the Arabic synonyms for homosexual acts between men are derived from it). If the act of approaching men seems clear (we will get back to it later on and see how this approaching that characterized the people of Lot was), it remains that many interpretations were given to clarify the obstruction of roads and the evil that was committed (these are acts that converge with the type of homosexual act that the people of Lot were practicing).

Concerning the obstruction of roads, besides the usual meaning of this expression, Al Tabari⁵⁴ said they would obstruct the road before the strangers passing by there to exercise wicked deeds on them. Al Tabrasi⁵⁵ added that the people of Lot "used to throw stones at passengers

53 And [We had sent] Lot when he said to his people, «Do you commit such immorality as no one has preceded you with from among the worlds? (80) Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people.» (81) (7 - Al 'Aaraf 80-81).
«Do you approach males among the worlds (165) And leave what your Lord has created for you as mates? But you are a people transgressing.» (166) (26 – Ash-Shu'ara' 165-166).
And [mention] Lot, when he said to his people, «Do you commit immorality while you are seeing? (54) Do you indeed approach men with desire instead of women? Rather, you are a people behaving ignorantly.» (55) (27 – An-Naml 54-55).
And [mention] Lot, when he said to his people, «Indeed, you commit such immorality as no one has preceded you with from among the worlds. (28) Indeed, you approach men and obstruct the road and commit in your meetings [every] evil.» And the answer of his people was not but they said, «Bring us the punishment of Allah , if you should be of the truthful.» (29) (29 – Al-'Ankabut 28-29).

54 Abu Ja'far Muhammed Bin Jarir Al Tabari, Jami' al bayan fi Ta'wil al Quran, Dar al Kutub al 'Ilmiyah, Beirut, Lebanon, 1992, p. 10, 135.

55 Abu Al Fadhl Bin Al Hassan Al Tabrasi, Majma' al Bayan fi Tafseer al Quran, Dar Al Ma'rifa, Beirut, Lebanon, 1986, ch. 7-8, p. 440.

51 See John Wolfender's committee report: w www.glbtc.com/social-sciences/wolfender_report.html

52 L'Etat n'a pas d'affaires dans la chambre à coucher des citoyens

with their hands, and whoever hit them would deserve to have them, take their money, have sex with them and fine them three Dirhams; they had a judge who gave those sentences”.

As for committing evil, it also drew the attention of the interpreters due to the generality and wideness of the expression. Al Tabari has tried to gather those interpretations saying that “The Quran interpreters have disagreed about what evil Allah meant that this people were perpetrating; some said they would fart in their gatherings; some said they would throw stones at whomever passed by them; and some others said they would commit immorality during their gatherings”⁵⁶.

To show this immorality, Al Tabrasi mentioned their gatherings “would include many types of evil and ugly things such as cursing, absurdities, slapping, gambling, playing with swords, throwing stones at whomever passed by, etc”⁵⁷.

Al Razi, for his part, interpreted this immorality by saying that the people of Lot “would approach men in their gatherings so they could look at them”⁵⁸.

The Quran describes these acts as evil and immoral and the same goes for their homosexual acts. The people of Lot were not practicing homosexuality with the consent of the other party; we could actually qualify their act nowadays as being a “rape” or “a coercion to commit immorality”. This is what could be concluded throughout the different related verses and interpretations. By reading the verses pertaining to the two angels incident, i.e., the incident that burst Allah’s anger⁵⁹, we realize that what the people of Lot wanted was not to propose a homosexual act to Lot’s guests but to “force those guest into this act”, which means raping them. In his interpretation of those verses, Al Tabari went to the extent of interpreting what Lot had said “Do not disgrace my guests”, “Do not humiliate me through mounting my guests against their will”, “People, do not shame my guests, honor me by not inflicting them what is detested”⁶⁰. Al Tahir Ibn ‘Ashur also shared this same view in At-Tahreer wat-Tanweer, acknowledging that one of the aspects of the immorality committed by the people of Lot is that they forced the passengers into practicing them⁶¹. The acts of the people of Lot have widened to go beyond what appeared to be desiring men⁶².

Those acts made some jurists consider that “the people of Lot were punished for their infidelity”⁶³, which explains Allah’s wrath and the punishment that was inflicted upon all of them including the children.

The people of Lot were not punished for their homosexuality but for coercion, rape, obstructing roads, immoral acts, shameful acts and looting i. e., attacking people’s bodies and properties, regardless of all traditions even when it came to respecting and honoring guests. Thus, it is defective to limit the acts of the people of Lot and the punishment that was inflicted upon them

only to homosexuality. It is rather incorrect and dangerous because it was used (and still is) to punish the homosexual act and bring Allah’s wrath onto it. This is what we concluded through the many readings that approved of limits to punish the acts of the people of Lot via adopting those Quran verses and others in addition to reinforcing them with the Prophetic ahadiths (talks).

2- The limits of Al Share’ to the homosexual act: the difference:

We can see that the Quran verses did not put a clear limit to homosexuality or lesbianism. This lack of a definite and explicit limit to homosexuality or lesbianism in the Quran “has created a disagreement among jurists and interpreters”⁶⁴. In this regard, those positions can be divided as follows:

The punishment for the homosexual act based on the adultery limit: This definition, since there is no explicit limit for homosexuality in the Quran, suggests that homosexuality is equal to adultery by name, the immorality of adultery/the immorality of homosexuality, and resembles it in the meaning, for “it is a meaning that is prohibited by Al Sharia, desired by nature, so it is permitted that the limit be attached to it if it comes with an insertion”⁶⁵.

This position was supported by jurists such as Fakhr Al Din Al Razi and Abu Abdullah Al Qurtubi, as well as the Hanbalite and Shafiite jurists.

Al Razi says that desire is a mark of ugliness and the desire of the other is important for the continuity of human beings and their lineage through reproduction. Consequently, adultery leads only to reproduction and the lineage is lost, that is why it is an immorality that deserves to be limited. As for homosexuality, it is an even uglier immorality for it does not result in any children, however he says it is equal to adultery in regard to the limit⁶⁶.

The same goes for Abdullah Al Qurtubi who also considers homosexuality equal to adultery, for it is a link between two people that is not based on a contract or a marriage⁶⁷.

This approach between adultery and homosexuality can be recently found in the Sudanese penal code; its article 316 stipulates that there is punishment of adultery whenever there is ejaculation in the vagina or the anus, by executing the married and giving 100 lashes to the non married”⁶⁸.

However, comparing homosexuality to adultery creates the problem of the limit itself; what is the punishment and how should it be applied?

It is established that the Quran does not include any limit for the adulterer and the adulteress other than the 100 lashes, explicitly in the Nour Surat. It is also established that the Quran does not include any explicit limit for homosexuality or lesbianism. In order to determine the punishment for the homosexual act, the interpreters have examined the verses related to the people of Lot and used adultery as a basis for defining the punishment.

Concerning the people of Lot punishment, that was adopted by many interpreters to control the punishment for the homosexual act (even though it is a punishment for a whole people for a wide array of acts one of which could be the homosexual act), it is not as clear as necessary; there are many interpretations of these verses, which shows they are not agreed upon. In

56 Al Tabari, Jami’ al bayan, Id. ch. 10, p. 135-136.

57 Al Tabrasi, Majma’ al Bayan, Id. p.441.

58 Fakhr Al Din Al Razi, Mafatih al Ghayb, Dar al Fikr, Beirut, Lebanon, 1985, v. 13, ch. 25, p. 59.

59 And when Our messengers, [the angels], came to Lot, he was anguished for them and felt for them great discomfort and said, «This is a trying day.» (77) And his people came hastening to him, and before [this] they had been doing evil deeds. He said, «O my people, these are my daughters; they are purer for you. So fear Allah and do not disgrace me concerning my guests. Is there not among you a man of reason?» (78) (11 – Hud 77-78). His Almighty says in Al-Hijr Surat: And the people of the city came rejoicing. (67) [Lot] said, «Indeed, these are my guests, so do not shame me. (68) And fear Allah and do not disgrace me.» (69) (15 – Al-Hijr 67-69). The same in Adh-Dhariyat 51: 24-37 and Al-Qamar 54:37.

60 Al Tabari, Jami’ al bayan, Id. p.526.

61 At-Tahreer wat-Tanweer, The Tunisian Publishing House, Tunisia, 1984, ch. 20, p. 240.

62 Ulfa Yusuf, Hira Muslima, Fi al Mirath waz Zawaj wal Jinsiyah al Mithliyah, Dar Sahar Lil Nashr, Tunisia, 2008, p. 192.

63 Abu Bakr Ibn Al Arabi, Ahkam al Quran, Al Babi al Halabi Printing House, 1968, ch. 2, p. 777.

64 Ulfa Yusuf, Hira Muslima, Id. p. 205.

65 Abu Bakr Ibn Al Arabi, Id. ch. 2, p. 776.

66 Al Razi, Mafatih al Ghayb, Id. ch. 25, p. 59.

67 Abu Abdullah Al Qurtubi, Al Jami’ li Ahkam al Quran, Dar al Kutub al Misriyya, (no date).

68 Article 316 of the Sudanese Penal Code of 1983.

Al-A’raf Surat, “and we rained upon them rain. Then see how was the end of the criminals” (7 Al-A’raf Surat, 84). For its part, Al-’Ankabut Surat says, “Indeed we will bring down on the people of this city punishment from the sky because they have been defiantly disobedient” (29 Al-’Ankabut Surat, 34). Did the people of Lot die from the rain or from the punishment? The interpreters have explained differently the punishment; some said it was stones, some others said it was fire, and others considered it as an eclipse⁶⁹. Which punishment is more likely: stones, fire, eclipse or rain?

Commonly, it is resorted to stone throwing, based on stoning the married adulterer⁷⁰; this stoning was established by all the interpreters without a text of the Quran – the text only stipulates the 100 lashes for the adulterer. This is a spiny issue that makes us wonder if the Quran was copied by the Sunna or by the unanimity of the Sahaba⁷¹.

In front of this problematic, a group of interpreters and jurists went to look into the Sunna Muhammadiyah (Peace be upon Muhammed), to find ahadiths of the homosexual or lesbian act in order to help in determining a sentence solely for them; this is what led to endorsing a punishment for the homosexual act independent from the adultery punishment.

The punishment for the homosexual act, as attributed to the Prophet, Peace be upon Him: Killing: The ahadiths that address homosexuality are doubted or general and ambiguous, which makes it difficult and illogical to implement them. One of them is that the Prophet’s hadith was as follows: “ If you find someone doing what the people of Lot have done, kill the one that is doing it and also kill the one that it is being done to”. There has been here a contradiction (inka’r) based on ‘Akrama based on Ibn ‘Abbas, and it was said it had been a subject of disagreement; it was also rejected by Al Jassas, based on the fact that one of the transcribers, ‘Omar Bin ‘Omar, was unreliable. Moreover, the Prophet’s hadith: “I am afraid the most that you do what the people of Lot have done”, and the fact that he cursed who has done it three times, is found by Al Tarmathi as “strange”. The following hadith “When a man mounts another man, the throne of the Merciful shakes” was described as having “a loose and inserted” basis. As for Bin ‘Abbas’ hadith, “If the homosexual dies without having repented, he is turned into a pig in his grave”, it was described as evil, and one of its sources, Ismail Bin Umm Dirham, was unreliable. Ibn Al Joozi classified this hadith as “inserted”. About the following hadith “If you find someone doing the acts of the people of Lot, stone them up and down”, it was also rejected by Al Jassas based on the fact that one of the transcribers, ‘Assem Bin ‘Amr, was unreliable. Concerning the hadith of “Lesbianism among women is adultery”, it is said that its foundation is loose⁷².

These weak ahadiths, with doubtful bases, and even the inserted ahadiths, are still until this moment references that are used each time we are confronting a homosexual act committed by a Muslim or on the land of Islam. Whereas if they had been righteously founded and adopted, an interpreter such as Al Razi would have used them to justify the limit of homosexuality; furthermore, Al Qurtubi and other Imams would not have had to compare it to adultery and taken all this trouble to justify it with logical arguments, not originating from the texts or from the Sunna.

These impediments, i.e., the absence of a decisive and categorical Quran text, the doubt in the transcribed ahadiths about homosexuality and lesbianism, as well as the difficulty of comparing homosexuality to adultery, have led a group of jurists, headed by Imam Abu Hanifa, to a different direction where homosexuality is not considered as a crime of limit.

The homosexual act is not a crime of limit: Because of this absence in the Quran and the lack of correct and reliable ahadiths, a number of jurists and interpreters consider that homosexuality is “an intercourse in a vagina without any permission (ihla’l), marriage, necessity of dowry, or proven lineage, and it has no limit attached to it” ⁷³. That is why Imam Abu Hanifa made discipline as the only limit for homosexuality. ⁷⁴

Some interpreters say that the Quran employs the “immorality” expression in some places to indicate lesbianism or homosexuality, one of which His Almighty’s saying, “Those who commit unlawful sexual intercourse of your women - bring against them four [witnesses] from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them [another] way (4 – Al Nisa’ 15). Abu Muslim Al Asfahani explained this verse saying that the limit for lesbians is confinement until death. ⁷⁵.

In this same orientation, these interpreters see that the limit of the homosexual is dishonor through scolding or rebuking, as His Almighty says, “And the two who commit it among you, dishonor them both. But if they repent and correct themselves, leave them alone. Indeed, Allah is ever Accepting of repentance and Merciful” (4 – Al Nisa’ 16).

Adopting extreme, sometimes unfair, legal positions against a social category - about which there is no decisive and explicit Quran text, or well founded and reliable Prophetic ahadiths, and about which doctrines and interpreters have disagreed in judgment - is enough to push this category away from its religion, i. e., its cultural, social and moral environment. This severity will not facilitate this category reconciling with its culture; so it finds itself before two options: either accept the provisions of this severe reading of the Sharia principles and reject themselves, or preserve themselves and reject the Sharia as a whole. The promotion of this severe reading will lead the homosexual to living in constant fear and anxiety towards the divine and social anger. Furthermore, on the social level, recalling the people of Lot and tying them to the homosexual act only expose the homosexuals to the irritation of the society and the family, and they are compared to the people of Lot, the people of all corruptions and sins.

The diverse and different interpretations only confirm that also the Sharia could make an enlightened, non severe and fair reading. The Sharia should not always show the dark half of its face that only pertains to criminalizing acts and establishing limits for lashing and stoning. In fact, a number of jurists and interpreters of Islam have founded their reading on the text and spirituality of the Sharia based on justice and equity, and this a thousand years ago or more and their doctrines still exist.

69 Fakhr Al Din Al Razi, Mafatih al Ghayb, Dar al Fikr, Beirut, Lebanon, 1985, v. 13, ch. 25, p. 63-64.

70 This was endorsed by Al Razi, Id. v. 7, ch. 14, p. 179.

71 This question was asked by Dr. Ulfa Yusuf, Hira Muslima, Id. p. 212.

72 See in this context Dr. Ulfa Yusuf, Hira Muslima, Id. p. 214, Muhammed Jalal Kushk, Khawater Muslim fi al Mas’ala al Jinsiyah, Al Turath al Islami Library, Cairo, 1992, p. 191-192, and Kugle, Scott Siraj al Haqq, Sexuality, diversity, and ethics in the agenda of progressive Muslims, ed. Omid Safi, one world, Oxford, 2003, p. 220.

73 See Abu Bakr Ibn Al Arabi, Ahkam al Quran, Id. ch. 2, p. 777.

74 Ahkam al Quran, Id. ch. 1, p. 776.

75 Fakhr Al Din Al Razi, Mafatih al Ghayb, Dar al Fikr, Beirut, Lebanon, 1985, v. 5, ch. 9, p. 239.

Conclusion

Law and homosexuality: any ways for reconciliation?

The Arab legislations and the security forces exactions in our countries are, in their majority, characterized by an oppressive and reprimanding nature based on punishment, which starts with months of imprisonment in some countries and ends with execution in others. This comparison founded on tracking and punishing, that proved its inefficiency – which led to overriding it in many modern judicial systems -, negatively impacts the social and legal situation of persons (1), which necessitates overruling it through a more comprehensive system based on the human rights (2).

1- The dangers of criminalizing and punishing the homosexual act:

The experiences and studies all over the world showed that the penal approach (based on deterrence, physical punishment and freedom deprivation) constitutes a lot of dangers for the individuals, their rights, and society as a whole.

Concerning the individual, the existence of a penal sanction and the possibility of being followed for a private act that only concerns their body constitute a factor of anxiety and fright, for they represent a moral and criminalizing burden and the fear of punishment; all of that could hinder the individual from advancing psychologically and socially.

As for the society, the existence of a punishment for a private act could grow a duplicitous environment that places homosexuals in a dual situation towards themselves and their privacy, and towards society. Moreover, this punishment deepens the exclusion, the isolation and the marginalization of a social category as well as deprives society from it and from its role in boosting this society on many levels; especially after watching, in the countries where homosexuality is not criminalized (and even in our countries), the role played by this category on the different levels: intellect, politics, science, literature, art, and economy, in view of improving and serving their society.

On the security level, these legislations that criminalize the homosexual act represent security threats; for the formulation of these texts in that broad and wide manner without any precision could lead to many transgressions and to the arbitrary use of those laws. Thus, random arrests could be conducted and the detainees exposed to medical tests, with what it includes of violation of their bodies and humiliation.

These procedures, even if they resulted in releasing the person whether before or after trial, would not eliminate the psychological damage inflicted on this person or the social impacts. Hence, the mere arrest and detention, based on the charge of “exercising a homosexual act”, could affect that person’s situation on the social and family levels, even inside the detention and imprisonment locations; because homosexuals are badly treated by the rest of the prisoners.

Furthermore, although the punishments are often trivial (a few months in prison), it remains that the impact they leave on the person’s life and their relationships is more dangerous and severe than the sentence itself ⁷⁶.

This punishment and this criminalization have direct and dangerous repercussions on the public rights and the private liberties.

In this framework, a question about the role of the law should be asked: is the law put to watch, punish, criminalize and catch the wrong doers or those who intend to make something wrong and have not done it yet? Is it the objective of the law to criminalize and punish? Or does it have more useful objectives for the society and the individual? Such as protecting the individual from the society’s intrusion in their privacy and intimacy, as well as protecting the society from some individuals’ transgressions that could damage others in their bodies and monies?

Working on homosexuality puts the law before important challenges essentially represented in determining its role, its separation between the public and the private, and its endeavor to promote human beings and their acceptance of themselves in order to be useful to themselves and to society.

These approaches that search for the purpose of the legal rule find their applications and their manifestation in the universal rights system or what is known as the Human Rights. Those rights should enable the reconciliation between the homosexual act and the law.

2- The possibility of reconciliation: the Human Rights approach:

The homosexuality issue in our Arab legislations is not isolated from the other issues related to rights and liberties in the Arab countries. The legislations that criminalize homosexuality are nothing but a sample of our legislations founded on limiting liberties and fearing them.

This fear is essentially manifested in the dominating nature of our legislations: rebuking, deterring and cutting on liberties with expanded control, which reflects on many areas: politics, intellect, religion, sex and others. These laws are shaped with the idea of marginalizing the individuals and their role, and do not accept the thought of sharing and dialogue. Thus, working to protect the private life of individuals, in all its dimensions, would positively influence the individual’s choices and their exercise of their private life, without being monitored and without fearing the law, the security forces, the judiciary, punishment, society’s opinion, etc. The right to privacy, as one of the Human Rights, would eliminate from our legislations this confusion between the individuals’ relationships with themselves and their rights as individuals, on one hand, and their relationship with society and their rights as elements of this society on the other hand. The purpose of the law is, in essence, to create a social environment that enables everyone to live in it and advance without prejudice or abuse of the individual’s right to privacy. This approach, emanating from the Human Rights System, has some of its applications in the Arab legislations: the right to dignity, the inviolability of the residence, the confidentiality of correspondence, etc. However, our legislations lack the clear and explicit acknowledgment of the right to protecting the private life or what is known as the right to privacy.

This process of privacy protection would make every individual, whatever their private matters are, feel they have the right to an area that regards them only. That would also alleviate the severity of the reprimanding and punishing nature of our legislations and would give them a more humane aspect.

⁷⁶ One of those who were punished for a homosexual act in Lebanon, by imprisonment for a few months, mentioned that this punishment, especially the accusation, the arrest and the medical test, has negatively affected his life: he lost his job, his family denied him, his friends left him and the others give him a demeaning and inferior look; he is now homeless after he had been a mathematics teacher. See Homophobia: Positions and Opinions, “Helem”, 2006, p. 168.

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Homosexuals in the Penal Code

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Beirut, October 2009

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Acknowledgements

I would like to thank all the judges who showed cooperation and understanding in approaching this very delicate subject and accepted, in all transparency and open-heartedness, criticism of their decisions. I would also like to thank the heads of court districts, court writers, and lawyers who helped in collecting the aforementioned decisions.

Special thanks goes to my colleague Nayla Gaegae for monitoring and analysis of the court decisions subject of this study and contributed to and scrutinized many of its sections.

Dedication

This research is dedicated to all who have contributed, through their work, to the promotion of social acceptance of homosexuals, without prejudgment.

Introduction

The primary aim of this research is to study the manner of legal prosecution of consensual homosexual relations between adults. While the spread of homosexual scenes in many areas of Lebanon, including nightclubs and gathering places, suggest broad tolerance, Article 534, aiming to punish sexual intercourse contrary to nature, remains a living text according to court records, affecting, selectively and from time to time, a specific number of people as if we are suddenly in another country. The presence of this feeling is increased by the fact that these cases remain, to a large extent, hidden and away from public discourse, and do not face any criticism, opposition, or commentary. Calls to remove Article 534 from the books remains largely a matter of principle calling for the recognition of homosexuals and personal freedoms, without being supported by a factual study of the actual consequences caused by the implementation of this article.

Thus, the issue seems to point towards social schizophrenia:

On one hand, there is a world where homosexuals can live freely and plan their lives accordingly in a manner that was even unthinkable a few years ago, in an ever expanding scene, calling for the annulment of Article 534, or at least its inapplicability against them following the development of the term “nature” scientifically and socially, based on a deep feeling of the authenticity of their orientation and needs. Moreover, this issue led to the creation of an organization for LGBTs (Helem), to calls for the punishment of homophobia, to the organization of petitions that expressed social solidarity with homosexuals in many circles, and publishing books where many intellectuals expressed solidarity with what came to be known as the gay cause⁷⁸ or that tell the stories of lesbians⁷⁹.

On the other hand, there are individuals who are persecuted in secret, away from the media, based on Article 534 without any debate on the matter of nature and what is natural or unnatural. They face anal and penile examinations to prove sodomy and receive sentences whereby they are jailed for months. All this happens in a technical manner, whereby the rhetoric of the legitimacy of homosexual orientation is rarely reflected in courts. On the contrary, and this is the most important issue, without the persecutions, both in procedures and provisions and marred by violations and risks, becoming compelling reasons to call for the annulment of Article 534 of the Penal Code, in addition and in support of the principled position.

Therefore, the main aim of this research, conducted in cooperation with Helem Association, is to put an end to this schizophrenia through highlighting prosecutions and analysis of the procedures and related provisions in preparation for a better assessment of Article 534 and its consequences. On the other hand, it aims to lay the foundations for a discussion inside the courts in this regard, in order to turn the discussion of individual case before the judiciary into issues with a social dimension that concern a large segment of the population, and, consequently, get the deserved attention through study, reasoning, lessons learned, and scrutiny. I hope that this research stays alive and is tuned continuously in light of future prosecutions and legal judgments that are available for study. To this end, we will divide this report into three segments: the first seeks to analyze legal texts used to

78 *Homophobia*, Helem/CDTheque, Beirut, 2005

79 *Bareed Mista3jil*, Meem, Beirut, 2009

support the persecution of homosexuals in a simplified manner that allows the reader to understand all the dimensions of the court decisions; the second is to analyze how these texts are applied in reality through court decisions and legal files available for scrutiny; before we reach the last section that aims to find conclusions concerning the current reality and the most practical steps to overcome it.

Before getting into these sections, it is necessary to make some preliminary remarks on the framework and methodology.

First, the research encompasses a number of legal decisions that we were able to observe and collect in the courts of Beirut, Baabda, and Tripoli, starting in 2003 (around 40 decisions). More specifically, it includes decisions taken by individual judges in these courts, in addition to the work of public prosecutors, investigating judges, and courts of appeals of misdemeanors. Although we were thankfully met with the cooperation and guidance of several judges, the process of monitoring and collection was faced with some difficulties, which makes us very careful not to claim comprehensiveness. The most significant difficulties include the sensitivity of the issue as expressed by a number of court clerks, the difficulty of scrutinizing the court records due to the lack of digitization, and the problem of funding files in an archiving system in dire need of reform in order to preserve the history of the judiciary. Furthermore, with the exception of some specific cases, we had to make do with a copy of the final ruling without access to the remainder of the file, which makes us extremely cautious in its evaluation.

Second, this research is about homosexual relations between adults. This means that it does not include the work of juvenile courts that definitely require a separate study, based on more complex assumptions, whether related to the persecution or the protection files of the juveniles. On the other hand, this did not mean the exclusion of decisions that included a minor, since these decisions often contained important and significant information about homosexual relations in general. The reader will find a number of observations on this matter.

Third, and on a very personal note, large parts of this research were written in Berlin, close to the memorial for homosexuals who had lost their lives or were persecuted during the Nazi era, giving it an additional dimension. This does not mean the comparison of the Lebanese situation with the Nazi period, since they are incomparable, but to draw attention to the danger of being driven by preconceived prejudices in this issue that might turn into real persecution in particular social circumstances. In fact, mentioning Berlin in this introduction and the current social conditions is more than justified in light of actions aiming to abolish Article 534: Berlin, in the late nineteenth and early twentieth century, saw the beginnings of psychological research that aimed to consider homosexuality as a natural inclination and therefore to exclude its branding as an act against nature. The city also saw the first petitions aiming to call for the abolition of Section 175 (similar to Article 534) used to prosecute homosexual relations, which was signed by many prominent persons, in the face of injustice, selectivity, and extortion. It also saw the most prominent protests against the trial of Oscar Wilde. All these actions were buried under Nazism and the growing intolerance before being recovered as illuminating moments of German history, with the abolition of the aforementioned section in 1969.

Section One: Legal Provisions Used as a Basis for Prosecution of Consensual Homosexual Relations Between Adults

The text applied in this matter is Article 534 of the Penal Code that stipulates that:

“Any sexual intercourse contrary to the order of nature is punished by imprisonment for up to one year.” (“**Toute conjonction charnelle contre l’ordre de la nature** sera punie de l’emprisonnement jusqu’a une année”).)

This text appears in the second section “On Violating Public Manners and Morality” of Chapter 2 “On Incitement to Debauchery and Opposing Public Manners and Morality” from Title VII “On Crimes Against Morality and Public Manners” of the Penal Code. To start with, we aim to study this article from various sides, especially its source and position in the penal code as part of a number of crimes related to sex and public morality.

Part One: An Attempt to Understand the Article Based on its Source:

It can be said that the concept of “contrary to nature” mentioned in the article is based on prevalent Western concepts at the time of writing the penal code in 1943, especially relating to homosexual relations. This is confirmed by the prevalent rhetoric in France at that time, specifically in 1942, when the Vichy regime introduced a new law punishing sexual acts contrary to nature (“acte contre nature”)⁸⁰ between 2 persons, where one of them at least is less than 21 years of age.

The Vichy legislation differentiated therein between heterosexual and homosexual relations, whereby it specified the age of consent for the first to be 15 years, while raising the age to 21 for the second. It is worth noting that it allowed persons above this age freedom of sexual intercourse whether “natural” or “contrary to nature”. Looking into this article in relation with the then prevailing circumstances means two things. The first is the stated claim that the legislation justified penalizing acts contrary to nature not to protect society from imminent danger but to protect those under 21 from exploitation by those who are older, more specifically from relations that would promote socially unacceptable sexual orientations and that might at least impede their emotional development. The second meaning, unstated, is the public censure of homosexuality in general, included in and under the guise of protecting children or young men from exploitation by adults. Therefore, it appears that the conjunction of “contrary to nature” with homosexual relations becomes necessary not only to explain discrimination in this field, but also to reinforce moral censure of homosexuality.

This explanation of the concept of “contrary to nature” is substantiated by French legislation aiming to reclassify the article following the end of the Vichy regime in 1945 leading to its repeal in 1982. We can see this clearly in the adamant position of the French government to repeal the law in 1982,

80 «La loi du 6 août 1942 (JO 27 août) crée une nouvelle infraction en réprimant les actes impudiques ou contre nature avec un mineur de son sexe âgé de moins de 21 ans», Rép. Pén. Dalloz, octobre 2002, parag. 8, *Incrimination de l’homosexualité*.

despite the intransigence of the Senate, due to the government’s commitment to end discrimination against homosexuals.⁸¹ This is also the case in all works of jurisprudence⁸² and interpretation⁸³.

In reality, designating homosexual relations as contrary to nature is an old description that can be found in classical writings⁸⁴ and in a number of European laws⁸⁵ at the time, especially article 175 from the German code that criminalizes acts contrary to nature, even between adults, which opened the door wide for persecution of homosexuals during the Nazi era as mentioned earlier.

This description has two unambiguous meanings:

On one hand it is a universal biological semi-ontological description based on linking sexual pleasure with procreation, which cannot happen between two males or two females. It is supported by the assumption that non-human life forms do not have sexual intercourse with members of the same sex⁸⁶, providing conclusive evidence that homosexual relations are contrary to nature. This description faced mounting criticism with the development of psychology, leading to its removal from the list of mental illnesses by the World Health Organization. This is in addition to scientific progress that showed that many species of animals have different types of homosexual relations.

On the other hand, it is a “social” designation based on the general refusal of such relations that remain a taboo⁸⁷. It differs from the first explanation since it allows development in light of the progress in the surrounding social environment.

From another side, in light of legislation of that time, it is difficult to provide “nature” with a biological definition that can alter between people, whereby intercourse between persons with natural orientations is deemed natural and that between persons with an orientation contrary to nature will be deemed unnatural. This explanation would contradict the general consensus, then, to put specific types of relations under this article, based on the biological sex of the partners, without reference, explicitly or implicitly, to sexual orientation.

81 V. l’intervention de Robert Batinder (garde des sceaux français) à l’Assemblée générale le 20 décembre 1981 sur la dépénalisation de l’homosexualité, disponible sur l’adresse suivante : <http://culture-et-debats.over-blog.com/article-511880.html>, Dernièrement consulté le 27-10-2009; Et J.O. déb. Ass. nat. 1982, p.5369, col 2.

82 Ph. JESTAZ, Actes homosexuels accomplis sur la personne d’un mineur: suppression des sanctions pénales, RTD civ. 1982, 795s. et M.L. RAASAT, Droit pénal spécial, Infractions des et contre les particuliers, 2^e édition 1999, Dalloz, n°444, p. 423 et 424.

83 V. *Incrimination de l’homosexualité*, Rép. Pén. Dalloz, octobre 2002 et *Attentats aux bonnes mœurs*, Rép. Pén. Dalloz, 1953

84 R.GARRAUD, *Traité théorique et pratique du droit pénal*, Tome cinquième, Librairie du Recueil Sirey, troisième édition, 1953, p. 440 (note de bas de page n°15): «Le droit romain n’avait prévu pour punir les *[actes anti physiologiques, les inversions de l’instinct sexuel]* que les rapports homme à homme (...) le droit impérial prescrit la peine de mort (...) L’immoralité contre nature ne paraît pas avoir été inconnue des Germains, la Caroline prononce la mort par le feu (...) Le droit commun germanique étend l’incrimination des actes contre nature punissables à la *sodomia contra ordinem naturae*, c’est-à-dire à toutes relations sexuelles contre nature entre hommes et femmes, à l’onanisme, à la souillure des cadavres etc.».

85 *Idem*, pp. 439-440, parag. n°2069: «Les législateurs anciens étaient unanimes dans leur appréciation. Pour eux, il ne s’agissait pas seulement dans ces actes *[actes anti physiologiques, inversions de l’instinct sexuel]* d’aberrations pathologiques ou de vices, relevant de la conscience, mais bien de crimes monstrueux, relevant de la loi. On frappait uniformément ces actes du dernier supplice(...) Au siècle dernier *[en France]*, on brûlait les sodomistes en place de grève, on pendait les coupables en Amérique et en Angleterre (...) La loi anglaise punit encore du hard labour ceux qui se rendent coupables de sodomie ou de bestialité (...) le code pénal hongrois considère comme crime le coït contre nature c’est-à-dire avec des animaux et avec des personnes du même sexe (...) les codes pénaux allemand et hongrois punissent de la prison et de la perte des droit honorifiques le délit contre nature accompli entre hommes et avec des animaux...» .

86 Cf. *Regard sur l’amour entre hommes*, chap. V intitulé *Le triomphe de la médecine sur l’amour*, disponible sur l’adresse suivante: <http://www.lambda-education.ch/content/menus/histoire/planhistoire.html> Dernièrement consulté le 27-10-2009.

87 Cf. D. FERNANDEZ, *Le Rapt de Ganymède*, Edition Grasset & Fasquelle, 1989.

While the Lebanese Law adopted this description from the French legal system under the Mandate without expanding on the meaning of nature, thus leaving the confusion, it differs from the French text from two angles. The first is that it is applied generally, even on relations between adults (closer to the German code mentioned above), in a manner that reflects the supremacy of traditional values over considerations of liberty, which seemed to have lesser value in the prevailing Lebanese social order at that time. The second is that it requires sexual intercourse (in French *conjonction*, derived from the verb *conjoindre*, which has the meaning of joining and coordinated movement and refers to the requirement of anal penetration), which is a restriction justified by expanding the article to include relations between adults.

Whatever the approved meaning, the inclusion of this term in the Penal Code is distinctive. Unlike the majority of penal texts that stipulate the punishment of specific action such as theft, murder, fraud, bounced checks, forgery, non-consensual sex, etc., this text does not refer to the action being punished, such as intercourse between two men or two persons of the same sex, but the reason behind it, which is contradicting nature. Therefore, if this legislation reflects the position that intercourse between two men is contrary to nature, then we could say that punishing this act is justified legally by being contrary to nature, but, therefore, completely loses its legitimacy if it is proven that the act is not contrary to nature or is no longer considered to be.

Two: “534” and Sex Crimes: an attempt to understand the article based on the provisions of the Penal Code

Here, we attempt to understand Article 534 from another angle, its position *vis-a-vis* other provisions in the Lebanese Penal Code. We can quickly say that this law, highly affected by the values set in France at that time, first and foremost, seems eager to protect legitimate family and lineage. It generally leans towards the predominance of public morality over individual freedoms. This will be studied below through shedding light on the position of each of the principle used to steer legislation, especially those that influence the explanation of this article.

1- Marriage:

Here, the legislator is closer to Latin conceptions, whereby, in the event of a sexual liaison outside of marriage between an adult man and adult woman, adultery is established only if one of them is linked to a marriage contract to a third person. This concept of adultery is different from the traditional conception (enshrined in Islamic jurisprudence), where any relation by two adults outside of marriage is considered adulterous, whether both are married, or one of them, or none. It should be noted that the maximum punishment for those who are married is graver than that for those who are not. What is being protected in the first place is the marriage bond, which remains predominant over considerations of personal liberty, while heterosexual relations between two unmarried adults remain free. The law goes further in giving prominence to the bond of marriage over individual freedoms by punishing non-consensual sex only if it happens outside the bond of marriage, where a marriage contract will lead to all charges to be dropped.

The law also provides for rape charges to be dropped (522) in the case of consequent marriage between rapist and rape victim. This points to a position that allows the bond of marriage to hide all flaws.

Consequently, this shows that the right of the family over the individual is based on the Penal Code, at least in relation to adults, and not by birth but by marriage, whose existence justifies the repression of the individual’s freedom to have intimate relationships. This leads to the next principle, protection of lineages.

2- Protection of Lineage:

The second principle used by the legislator to describe sexual acts is a continuation of the first, excessive punishment of acts that might mix lineages or hide them, such as rape or a married woman’s adultery. Using this principle reflects the social role of protecting lineages.

One of the most prominent examples is that rape through the contact of the penis with the vagina is considered more serious than rape through the anus or between two men. We see this clearly in a recent decision by the Court of Cassation⁸⁸ in a case of a man raping a woman through the anus. The question asked by the court was, is this considered non-consensual intercourse based on Article 503 or is it considered fornication and a violation of decency based on Article 507 that has a lesser sentence and, especially, the possibility of leniency?

Based on this question, the answer of the Court of Cassation was notable. It subjected the act to Article 507, since the Lebanese Penal Code “used the term ‘intercourse’ in Article 503, a translation of the original French term ‘acte sexuel’, and was still upholding the prevalent opinion at the time of its inclusion in French law and jurisprudence, as consecrated in Article 332 of the Penal Code, and which limits rape to the violent forcing of the natural physiological relationship between a man and a woman, based on philosophical reflections that do not give the woman any role except through the tripartite relationship based on marriage, establishment of the family, and procreation, **in order to avoid the inclusion of illegitimate births in families**. The elements of sex through coercion and violence, rape, are only complete in the case of an illegitimate contact of a man and a woman’s sexual organs (“conjonction des sexes”), the penis and the vagina, as a result of actions that fall under that criminal code. All acts, of any kind, contrary to nature are considered acts of fornication”.

Therefore, forced sexual acts are not complete if a man forcibly penetrated a woman through her anus or another man. It is considered fornication and thus has a lesser sentence than rape, since it does not put lineages in danger.

In the same direction, we can note that the Penal Code differentiates between the adultery of a married man and that of a married woman in a way that indicates a background of protecting lineages, since it is only the adultery of a married woman that puts lineages in danger. The difference in the elements of crime based on the sex of the adulterer proves that law gives prominence to the fidelity of a woman towards her husband more than the fidelity of a man towards his wife. While adultery has its elements complete in any sexual relationship by a married woman with a man other than her husband, it is not considered in the case of a married man, except if he publicly declares that he has a lover or if the act is performed in the marital house. The adultery of a married man has a maximum sentence of one-year imprisonment, half that against a married woman, 2 years of imprisonment.

3- Degree of the Sexual Act:

Here, we find another principle, distinguishing between sexual acts based on their severity. As we saw earlier, sexual acts that include the physiological relationship based on the contact of the sexual organs of a woman and a man, the procedure that would lead to procreation, is considered the most serious. In this case, non-consensual sex has the highest penalty. It also impacts sexual acts with minors under 18, even if consensual. On the other hand, forcing the other to perform indecent acts such as anal sex, undressing and masturbating on the victim or in the area of the anus without penetration, or fellatio and other similar acts, are considered less dangerous, have lesser sentences, and do not impact consensual relations with a minor over 15. The same applies to immodest acts (such as playing with or kissing sexual organs, etc.), which are considered less dangerous, receive lower sentences, and are not punished unless performed on a male younger than 15 or, non-consensually, on a female younger than 18. This leads us to the fourth principle: age.

4- Age

This principle is based on two ideas. The first is that sexual acts are dangerous or more dangerous when performed with a person who has not reached a certain age, the age of consent, which might change based on the gravity of the sexual act or its affect on the person’s psychological and emotional development. The second is that consent is not considered when the person in question is

under age. Based on this principle, the law distinguished between concerned persons, even between minors, based on their age, whether in considering the elements of the crime or punishment. This led to classifying them according to certain age groups, prevalent in determining minors, 15-18 years, 12-15 years, and under 12. This is in addition to the category of adults between 18 and 21 who sometimes receive special protection, especially from incitement to debauchery.

The lawmaker of 1943 was more inclined to consider the age of consent to be 15, punishing acts performed with or on those under that age, whether consensual or non-consensual and whether they included penetration or not, while allowing all sexual acts for those above that age. On the other hand, the lawmaker of 1983, amended article 505 (in the section on rape and until that time specific to sex without violence or force against a minor under 15) to sex with a minor between 15 and 18, with a sentence from two months to two years. This amendment is ill conceived for several reasons: it is in a section on rape, therefore in a section on forced sexual acts or in conditions where the consent of one of the parties is not considered, under 15 years old. This also contradicts the proscribed sentence that does not exceed two years of imprisonment, while sex with a minor under 15 is punished by a sentence of three to 15 years, with a minimum of five years in case the minor was below 12 years old.

The second reason is that the lawmaker raised the age of sexual consent only in the case of “penetration”, while other sexual immodest and indecent acts are not punished if the minor of this category consented.

Based on this, it is important to raise some questions about the possibility of applying this amendment on homosexual relations, especially in the case of anal intercourse. Does the judge use the definition of sexual act considered by the Court of Cassation above, the contact of the male and female sexual organs, or should the judge expand the application of the amendment of Article 505 to cover homosexual relations? Until today, the judiciary has adopted the second solution without reasonable explanation.

5- Consent:

Of course, consent is proscribed in the Penal Code; forcing a person into a certain sexual act is considered, in many cases, an act to be punished. But there are several issues with this:

- Lack of consent to a certain sexual act is not always a reason for punishment. We see this in the case of marital rape and also in less serious sexual acts of immodesty committed non-consensually where punishment only exists if the victim was a woman under 18 years old.

- Consent is not always a hinder to punishment. This is apparent especially in punishing sexual intercourse contrary to nature or sex with a minor, whether the other person is an adult or another minor, which also shows a clear intent to censure this category from early sexual relations. If we know that this category is allowed to have an early marriage with the consent of the parents, it will seem that the punishment is intended to control and frame this segment more than it aims to protect children from harm or exploitation.

- There is an assumption of lack of consent if one of the parties is young, has mental or physical weakness, or if one of the parties is in a position of authority, such as parents. The Penal Code also expands the concept of deception and temptation and opens the door to punishing a man who has consensual sex with a woman leading her to lose her virginity based on a written promise of marriage he made.

Therefore, it seems clear that the Penal Code gives precedence to a number of traditional values over respecting privacy and personal freedoms, mainly those of patriarchy, marriage, virginity, and public morality.

⁸⁸ Decision #128/97 on 4/6/1996 of the Court of Cassation, Chamber 7, President Ahmad Mouallem and assistants Mortada and Nammour, published in Al-Adl magazine, 1996, pp. 127-128-129.

6- Gender:

Here, discrimination against women and homosexuals is clear.

Concerning women, we find discrimination aiming to restrict their freedoms, such as in the case of adultery and losing virginity. The Penal Code also considers sexual assaults against women to be more serious than sexual assaults against men, such as in Article 519 of the Penal Code, where an assault on the decency of a minor between 15 and 18 years-old is only a crime if the minor is a female. This is an issue that deserves criticism since it discriminated between children.

Concerning homosexuals, Article 534 is, of course, the main example. On the other hand, we do not find texts that discriminate between active and passive partners or that punish transsexuals for having a sex change.

7- Overtness:

This we can see in Articles 532 and 532 concerning situations of disruption of public morality. The concept differs based on region and time – and is supposed to take place in a public space or that open to the public. Often, moral positions on homosexual relations have led to the persecution of many forms of its expression, which will be elaborated in the chapter on the work of the judiciary.

8- Organized Prostitution:

In the context of prostitution, the lawmaker has opted to organize the issue through the licensing of brothels or meeting places where women work under health and behavioral scrutiny. All prostitution outside these places is punishable by law. This system, precluding any possibility of authorizing male or homosexual prostitution spaces, saw a quiet transformation in the period following the civil war, with the demise of licensed houses and the proliferation of “artist prostitution” and bargirls who are under the supervision of security agencies (Directorate General of Public Security and the Internal Security Forces).

Those were some of the main ideas that informed lawmakers in the Penal Code and gave sexual crimes their current shape. Based on that, we can draw the following table about sexual acts conducted in a space that is not public or open for the public:

	Acts Against Nature (Homosexual) between Adults	Acts Against Nature where at least one of the Parties is a Minor between 15-18	Acts Against Nature where at least one of the Parties is a minor under 15
Consent	534, only if there anal intercourse. If no anal intercourse, then no crime.	In case of anal intercourse, then 534 for both. The question is whether 505 applies to the other party or if it is specific to heterosexual relations. If no anal intercourse, then no crime, even if the act is indecent or immodest.	If anal intercourse happens, then 509 for the other party only. If indecency and no intercourse, then 509 for the other party only. If immodesty, then 519 for the other party only.
No Consent	If non-consensual intercourse or indecency, then 507 is applied. If non-consensual immodesty or solicitation for indecent acts, then no crime.		If non-consensual intercourse or indecency, then 509 is applied. If non-consensual immodesty or solicitation for indecent acts, then 519.

This table allows us to identify sexual acts between two persons of the same sex not punishable by law: sexual relations between adults that do not include anal intercourse (and maybe between any two persons over 15, according to the definition of sexual acts by the Court of Cassation). This shows how Article 534 is applied by the judiciary, especially in relation to homosexuals.

Section Two: Homosexuals and the Judiciary: Analyzing Court Decisions

This section will study the application of Article 534 by the courts from several angles: the first on extent of application of the article, the second on initiating prosecution, the third on evidence used, and the fourth on custody and sentencing.

Part One: Extent of Application of Article 534 of the Penal Code:

I – Is the article applied on identity, orientation, or specific acts?

The first question in identifying the extent of application of 534 by the courts is whether it is applied on orientation or on sexual acts, notwithstanding evidence of certain acts. Is the article applied, for example, on a person who declares his homosexuality or his engagement in homosexual acts without evidence of a specific relation?

In this case, the courts tend to answer in the negative. The Penal Code punishes acts and not tendencies, intentions, or vague unspecified actions. While a number of decisions by the criminal court judge in Tripoli mentioned “homosexuals” and “homosexual relations”, most of the reviewed decisions had did not comment on homosexual identity⁸⁹ and seems to prefer the use of terms such as “engaging in sodomy”, “liking sodomy”, “known to engage in sodomy”, “with a bad reputation”, and similar terms that disapprove of sodomy without going into the intentions of the person. There seems to be a taboo on the issue; therefore, it is not surprising that most decisions are technical in nature to a large extent.

It is important to highlight a number of cases where prosecution was based on homosexual orientation rather than specific acts. The most prominent is the reporting of one woman of her adult son based on his acting like a woman, which led her to suspect his homosexuality⁹⁰. What is interesting in this case is that the public prosecution, based on the complaint, interrogated the boy and forced him through a medical examination before indicting him even though the medical examiner determined that “no symptoms exist that prove the suspect’s practice of such acts”. What is notable is that the evidence produced by the Public Prosecution, like the evidence produced by the mother’s complaint, is not particular acts but the behavior of the boy and his looking like a woman. The judge ruled that he is innocent due to doubts in favor of the accused and based on the fact that the complaint did not provide any evidence that would remove this doubt. The decision seems to be sorry that the mother, after dropping the complaint, could not provide further evidence. In fact, this case reveals several very serious occurrences. The first is giving the mother the authority to submit such a claim. The second is opening Pandora’s box based on behavior, lifestyle, etc., and therefore opening the door to all types of abuse.

89 Another decision used “sexual deviant” to describe a dead person in a case that led to the indictment of his boy-friend and partner off 23 years (Decision on 28/4/2005 of the Beirut criminal court, case 541/2004 - Unpublished)

90 Decision 746/2009 on 8/4/2009, Baabda Unique Judge, Unpublished

Another case related to the ruling against a young man based on engaging in sodomy in a certain area in Tripoli. The ruling was based on the customary practice of an act without indication of the identity of the persons involved and even without linking between the ruling and a particular act⁹¹. In fact, this seems to be a case of prosecution based on sexual identity rather than a particular act, since it is unlikely that someone will be sentenced for being a thief, due to his customary practice of theft, while the victim of the theft and stolen objects remain unknown. This conclusion is reinforced by the fact that the decision seemed to identify the sexual identity and orientation of the accused. The decision spoke about sexual relations being related to the psychological and biological inclinations of a person and that the Penal Code, nonetheless, still considers the relationship between two homosexuals (the term used by the judge) to be unnatural and therefore punishable, unlike relations between two persons who are not homosexual (the term is also used by the judge), which the law considers to be natural. In spite of the understanding shown by the judge, in recognizing homosexual orientation and in sentencing, the decision opens the door to indictment without need to prove specific acts. This seems to be an expansion of the application of the concerned article based on sexual orientation and would lead to the punishment of one of the parties, becoming more selective. We will return to this issue later.

The same inclination to disregard the act can also be seen in a decision by the unique criminal court judge in Beirut⁹², where a young man was sentenced based on his confession of practicing sodomy with a Gulf national, while completely ignoring the identity of the latter, knowing that the prosecution was based on an “intelligence memo” accusing him of drug-related charges.

II – What are Acts Contrary to Nature?

Here we see that the general inclination to explain the term “contrary to nature” - a phrase that is clearly problematic, ambiguous, and open to interpretation – is based on the assumption that it encompasses homosexual relations and also anal intercourse between a man and a woman⁹³. This is done without elaborating the description of “nature”, the lawmaker’s intentions, or its agreement with current social conditions. While this partially reflects a general reservation by judges towards expanding the explanation of the law, it also reflects the type of defense that the accused are benefitting from and maybe also their social class, notwithstanding the general rhetoric mentioned in the introduction. The most prominent problem in assuming acts based on this phrase without analysis is keeping alive the ambiguity of the lawmaker’s understanding of nature, especially whether it was a universal concept applicable at all times and for all creatures, or is it a biological concept that can differ between persons, or just a cultural and social concept that can change based on changing social circumstances? This is a fundamental issue to start discussing the extent of its application.

While a few judges felt the need to explain the term “nature”, their suggested explanation seems to oscillate between various meanings and definitions. In some rulings, the concept of nature was universal: “sex between homosexuals is against the laws of nature that make couples between male and female”⁹⁴ and that “the act of homosexual intercourse is contrary to universal nature by creation, development, flourishing, and the reproduction of its members”, or that that the act of intercourse between homosexuals cannot happen except in a way contrary to nature due to their common nature and sexual formation⁹⁵. On the other hand, in two decisions that were studied, the judge seemed to doubt the universal definition. The first decision said that sexual relations are in the sphere of private life and are related to psychological and biological states that control each individual. Nevertheless, the accused was found guilty of homosexual relations since the law still considers

sex between homosexuals to be unnatural⁹⁶. In the decision, the judge seems to be convinced that people are different, psychologically and biologically, therefore there exists a “natural” orientation to engage in sexual relations; but he only spoke about this conviction and probably used it when deciding on the sentence. Nevertheless, he bowed to the convictions of the lawmaker that puts all homosexual relations in one basket and does not leave a space for consideration. The decision of the judge reflected a certain balance between his intention to develop the law (by explaining it in a manner that better conforms with modern medical discoveries and the current values of society) and the need for reservation (by explaining it in a manner that reflects the intentions and concepts of the lawmaker at the time of writing the law). This position could be the basis for a legal challenge to stop applying 534 on persons who are scientifically proven to be homosexual. The judge also took similar path in another decision where he literally said that one party was exploiting the other “who is weak as a male and different in sexual nature from his male appearance”, subsequently finding both guilty of intercourse contrary to nature⁹⁷. This is another proof that there exists a different understanding of nature than perceived by the lawmaker, even though judges are still committed to the lawmaker’s understanding.

On the other hand, we could not find any decision that explains the concept of nature from a social perspective. One judge, in a personal interview, admitted to having acquitted a person, a few years ago who had a steady homosexual relation with a European man in a European country, based on the fact that the relationship is not considered contrary to nature in that environment. I mention this with reservations since the file of the case could not be found.

III – What sexual acts are considered “intercourse” contrary to nature?

The question we ask here is: what is meant by intercourse? Does it necessarily assume a relationship between two persons of the same sex or is it also applied to “abnormal” heterosexual acts, such as anal sex? Does it encompass all sexual relations between homosexuals or just the act of “sodomy” or anal penetration, especially in light of the French version that speaks about “*conjonction charnelle*” (carnal intercourse) in a manner that supposes liaison or some type of physical penetration, thus covering the elements of 534 in this case only, while only being considered indecent or immodest in case of other types of sexual acts? While it is possible to use this standard on relationships between males, how does it apply on relationships between females?

Here, we also find an ambiguity in the decisions that rarely delve into analyzing the situation or establishing general related rules.

In the case of heterosexual relations, we find many decisions, including from the Court of Cassation, that support the application of 534 on anal sex, considered to be contrary to nature. The ambiguity of such decisions is not a result of subjecting this act to the mentioned article, but subjecting men only, as if the woman concerned has nothing to do with the situation. This marginalizes the idea of reciprocity in the act, which linguistically requires the usage of the correct tense (to act: *fa’ala*, reciprocal act: *tafa’ala*), a point we will return to below.

Concerning relations between males, the general trend is to consider sodomy (anal penetration) as a precondition to apply the article. This is through expert reports aiming to prove anal penetration. It is also especially true of decisions that steer away from 534 if anal penetration is not evident, notwithstanding evidence of other sexual acts. We can read this clearly in a decision by the unique judge in Tripoli stipulating the non-application of the article, even though there was evidence of oral sex between persons of the same sex, “since there is no evidence of intercourse between the accused”⁹⁸. We read this in many other decisions that covered such indecent or immodest acts

91 Decision 693 on 30/3/2005 from the Unique Criminal Judge in Tripoli, Unpublished

92 Decision on 24/1/2007 of the unique criminal judge in Beirut (case 921/2006), Unpublished

93 Such as Decision 127/97 on 29/1/2004 from the Court of Cassation, Chamber 7, published in Cassander 2004-1, pp. 113-114

94 Decision 905 on 4/4/2007, unique criminal judge in Tripoli, Unpublished

95 Decision 477 on 2/3/2009, unique criminal judge in Tripoli, Unpublished

96 Decision 693/2005 mentioned above

97 Decision 2541 on 4/7/2007, unique criminal judge in Tripoli, Unpublished

98 Decision 3037 on 19/11/2007, unique criminal judge in Tripoli, Unpublished

without applying article 534 of the Penal Code⁹⁹. While this is the general trend, one of the decisions found went in the opposite direction, in a case where a minor between 15 and 18 performed fellatio on an adult¹⁰⁰ without intercourse. It seems that this expanding of application of 534, going against the general trend, reflects the judge’s belief that there is a need to find support for punishment in that particular case.

Finally, any expansion in the definition of intercourse requires an expansion of the terms used in Article 503 and 505 concerning rape, which will lead to expansion of prosecution and harsher sentencing regarding all these acts.

In the case of women, some decisions applied the article without analysis or comment. This leaves us with many unanswered questions¹⁰¹.

IV – Does the application of Article 534 assume mutual consent and common responsibility?

Linguistically, the issue seems obvious. The article punishes acts against the law conducted by two or more persons, and not a violation perpetrated by one person against the other. We see this in the tense used for “intercourse” (*mujama’a*) meaning that each party performed intercourse on the other. If consent is absent, there is a need to look at other supporting articles such as those on relating to rape (503-505), forcing to perform indecent acts (507-510), or immodesty (519-520), with what they entail in difference in the elements of prosecution and punishment.

In spite of the clarity of this rule, the judiciary also seems to waver on the issue. This is apparent in two matters:

First, it seldom applied Articles 534 and 505 (intercourse with a minor) although the latter is in the section on rape¹⁰² and is based, at least in the paragraph on intercourse with a minor under 15, on the assumption that this category’s consent is not taken into consideration. Thus, it seems that the mentioned article does not assume consent on the act, going against French jurisprudence that refused to connect the prosecution of consensual relations contrary to nature with a minor with the prosecution of intercourse with a minor under 15, the category whose consent is not recognized¹⁰³. Even more peculiar, in some decisions, the adult was convicted based on 534 and 505 and the minor based on 534, making them both outlaws and victims of the same act. What makes the matter more prone to criticism is that, according to the Court of Cassation, “intercourse” applies only on sexual acts between a man and a woman as previously mentioned.

Second, it sometimes differentiated between degrees of consent in order to identify the responsibility of each of the parties. Consequently, some decisions moved to exonerate or reduce the sentence on the party that showed a lower level of initiative or control over the relationship, even if there was no assault.

One of the main decisions in this regard is that of an investigating judge, based on the prosecutor general’s prosecution of three persons (two adults and a minor between 15 and 18). In this case, the investigating judge decided to charge one of the adults and dropped the charges against the other two for lack of evidence. The person who was charged had sodomized the two other persons and

there was no evidence that either of them performed sodomy on him or on each other¹⁰⁴. The unique criminal judge confirmed the decision to charge in two consequent rulings¹⁰⁵. In fact, the arguments that led to the charging of one of the adults only seemed to be rhetorical rather than legal, even lacking any legal effect: the person initiating and having more control of the relationship seems to be the culprit since he has a bad reputation and knowingly lures boys and minors to sex and sodomy, based on hearsay mentioned by the minor, without further evidence. The other party (the other adult and the minor) seems to be powerless, even if there is evidence of consent and desire to pursue the relationship. The judge expanded on a justification for the minor remaining in the relationship for three years, namely that the adult had misled him and threatened him to tell his parents if he mentioned the issue to anyone. On the other hand, there was no justification for reducing the responsibility of the other adult except that he was the passive partner and did not perform the act! The sentencing judge agreed and went in the same direction.

Another case worth mentioning is one where the judge sentenced the adult only based on a complaint by a minor (15-18 years old) who confessed that he accepted a request by the former and had sex contrary to nature with him, without mentioning force or violence. The sentence also included a fine of seven million Lebanese Liras as compensation for moral damage. The judge justified this by saying the “intercourse happened through moral authority and psychological pressure due to age difference and the confusion and fear [of the minor], in addition to being appeased by a small sum of money”¹⁰⁶.

We found a similar inclination regarding anal intercourse between a man and woman. Contrary to the Court of Appeals that saw that the act of the accused is a felony (fornication) against the woman due to the evidence of coercion, the Court of Cassation¹⁰⁷ saw that the act happened without coercion, therefore it cannot be considered a felony but a misdemeanor based on Article 534 of the Penal Code, and ended up convicting the man only.

In fact, the two cases are only similar in form. Analysis of the text, in the first case, led to exonerating one of the parties. In the second case, it led to reducing the responsibility of the perpetrator from fornication, a felony, to contradicting nature, a misdemeanor. This inclination can be criticized in both cases: either there was coercion, therefore only the perpetrator should be put on trial, or there is no coercion, therefore both parties should be tried. But to say that one is guilty and the other helpless, even if he had consented to the issue (and probably enjoyed it all these years), based on the excuse that he was passive and not active, reflects a certain belief that refuses to accept the existence of agency, pleasure, usefulness, interest, or mutual need for both parties to decide on a role. Based on this belief, the relationship is not a mutual rebellion against public morality, but an assault by one (the corruptor) who needs to be sentenced against the other (the innocent).

V – What is the punishment for attempt?

Of course, the law does not prosecute attempted intercourse contrary to nature, since the crime mentioned in 534 is a misdemeanor. The Penal Code specifically says that attempted misdemeanors are not punishable unless specified in the text of the code.

In spite of this, some decisions were close to punishing attempts, under the guise of violation of public morality when they happen in a public space under the guise of incitement to debauchery, in case of offering money.

99 Decision on 24/11/2006, unique criminal judge in Beirut, and a decision on 18/5/2009 by the unique criminal judge in Beirut (case 1071/2008), Unpublished

100 Decision 477/2009 mentioned above

101 Decision 182/2007 on 11/4/2007, unique criminal judge in Baabda, Unpublished

102 Decision 2012 on 12/10/2005, unique criminal judge in Baabda, Unpublished; decision 2384 on 15/10/2008, unique criminal judge in Tripoli, Unpublished; and decision 477/2009 mentioned above.

103 V. *Incrimination de l’homosexualité*, Rép. Pén. Dalloz, octobre 2002, parag. 8 et *Attentats aux bonnes mœurs*, Rép. Pén. Dalloz, 1953, parag. 3-8

104 Decision 148 on 8/5/2000, investigating judge in Mount Lebanon.

105 Decision 2012/2005 on 12/10/2005; and decision 2384/2008 on 15/10/2008, unique criminal judge in Baabda, both Unpublished

106 Decision 2502 on 31/5/2006, unique criminal judge in Tripoli, Unpublished

107 Decision 17/2004 on 29/1/2004, Court of Cassation, Chamber 7, published in Casander 2004-1, pp. 113-114

We see this in the decision of the unique criminal judge in Beirut, on 24/11/2006, which led to convicting two persons under Article 531 of the Penal Code (violating public morality). They were sentenced to two months imprisonment after being caught kissing. The sentence (seemingly harsh to an extent) was justified not just by the kissing but because they were “preparing to engage in sodomy, evident with what was found with one of them”. This phrase suggests that the harsh sentencing was their readiness to have sex together.

The same is found in the decision of the unique judge in Beirut on 18/5/2009 to sentence a person because he “harassed another person while touching his penis and offering to engage in sodomy” with one month imprisonment. The decision shows that they were arrested by a patrol that happened to be passing by, not on the basis of violating public morality or seeing someone touch another’s penis, but on the basis that the other person drew a knife and threatened the perpetrator if he does this again. Therefore, the decision seems to punish an attempt rather than a violation of morality.

There is also an inclination to punish attempts under the guise of incitement to debauchery. This was done by the unique judge in Tripoli when sentencing an adult who offered a sum of money to a minor in exchange for sex. The minor took the money and did not come back. The judge considered the actions of the adult to be incitement to debauchery (523)¹⁰⁸. This contradicts French jurisprudence that considers that debauchery only happens if the minor was incited to have sex with a third person.

Part Two: Initiating Prosecution

The way that prosecution is initiated also shows many problems.

I – Personal Claim:

There are a number of complaints that warrant criticism, namely those by guardians of minors over the other person in the intercourse. The problem of such a claim is that it always paints the minor son to be a helpless victim while the law considers him guilty, at least for minors between 15 and 18 years old, as mentioned previously. These claims often reflect a social view that there is always a corruptor working on corrupting others, without reflection on the inclinations or needs of the minor.

In addition, there is the personal claim mentioned earlier, where a woman filed a complaint against her adult son because he looks like a woman, accepted by the prosecutor after subjecting the young man to a medical examination. Accepting the authority of the mother in such a case is more serious than the content of the case in itself. What personal injury could the mother invoke to justify her complaint against the behavior and sexual orientation of her adult son? Would not accepting it as a personal claim open the door to a union between parents and authorities to interfere in the private affairs of their children, and impose on them a certain social behavior, even during adulthood?

The most curious of these complaints are of course those by one party to the intercourse against the other party. There is evidence of this in complaints of some women against men, under the pretext of unnatural sexual intercourse. What encourages this is the inclination of judges to find men as violators and women as violated, even if the intercourse was consensual¹⁰⁹, as mentioned earlier. Of course, such a complaint will open the doors wide for numerous types of extortion or to face charges of theft or any other crime, with a claim of sodomy.

Finally, it is worth mentioning that most of these complaints end in dropping charges or some sort of settlement.

II – Accusation:

The most prominent case involved information provided by an individual against two young men living in the next door apartment, complete with a film of scenes he took of them in secret that show them, according to him, in a suspicious situation. From the minutes of the decision, we find that the direct reason for the complaint was the discomfort of these two young men from their neighbor’s noise. This led him to file a complaint against them to stop them from doing the same thing. Based on this information, the public prosecution arrested and interrogated the young men, and more importantly, subjected them to a medical examination that failed to prove sodomy. Despite the lack of evidence, they were charged with intercourse contrary to nature. While the decision of the unique criminal judge in Baabda was fair, it did not point to the problematic of spying against other people and violating their privacy. They did not receive any compensation for their suffering. This issue shows the extent of abuse of this article. It can lead to turning roles and responsibilities upside down. The annoying neighbor is seen as the victim and the persons suffering from this annoyance the culprits, without any possibility to complain. Such measures could make any two persons from the same sex who share an apartment seem guilty and become targeted by a complaint from anyone.

III – Snitching:

The main situation is when someone who is under prosecution informs on persons he allegedly has homosexual relations with, leading them to be summoned and investigated in order to be charged. It goes without saying that initiating prosecution based on such information, especially with the proliferation of homosexual relations due to increased tolerance, could be one of the most serious violations of private freedoms. It had sometimes led to mass trials, such as in the famous case in Tripoli, where 33 persons were prosecuted over several years between courts and appeals. Other evidence of this issue was found in a large number of decisions and rulings under study, through proceedings based on snitching¹¹⁰. Even more serious, is the public prosecution’s toleration of charging persons based merely on such information. This is clearly evident in a case where the public prosecution charged two persons merely on information by a minor, which he retracted during trial, showing the weakness of the prosecutor’s premises¹¹¹. Similar leniency, this time from the investigating judge in Tripoli, is found in a case where a mentally challenged adult was arrested for harassing a minor. He informed on two persons who allegedly sodomized him, who were subsequently summoned, charged, and sentenced, even though they denied the issue and found it suspicious that they were involved in the case. The most prominent evidence of this leniency is the actual text of the charges, which said that “their denial was not corroborated with enough evidence, especially since [the accuser’s name] had directly given information to the police squad on persons who had intercourse with him and the time and place, including the defendants who he confirmed had intercourse with him”. This gives the impression that information based on a mentally challenged person makes them guilty until proven innocent¹¹².

Some of these decisions and rulings included the reference to certain methods during preliminary investigations, such as asking the accused to write down the names of persons “with whom he engaged in sodomy”¹¹³. Some charges and rulings also mention the names with whom the defendant – under investigation alone – had engaged in sodomy, whether active or passive, in order to prove the alleged crime, without their statements being heard¹¹⁴. Therefore, while the judiciary did not pursue an investigation based on such information, it accused them of such acts in a public decision.

108 Decision 1204 on 2/4/2008, Unpublished
109 Decision 17/2004, Court of Cassation, mentioned above.

110 For example, decision 1177 on 25/11/2000, unique criminal judge in Tripoli, Unpublished, where 3 persons were charged with sodomy based on information provided by a certain individual.
111 Decision 2502 mentioned above.
112 Preliminary decision on 29/11/2001, investigating judge in Tripoli, and decision 3929 on 25/2/2008, unique criminal judge in Tripoli, Unpublished.
113 Preliminary decision 181 on 14/4/2003, investigating judge in Mount Lebanon, Unpublished.
114 Preliminary decision on 30/4/2003, investigating judge in Tripoli; and decision 9435 on 17/3/2004, unique criminal judge in Tripoli, Unpublished.

V – Caught in the act or in a dubious situation:

Most of the cases above were of persons caught in the act or at least in a dubious situation in a public place (Ramlet el Baydaa, Rawche, Dikwaneh, Zahrieh, Mina...) by various security agencies (General Security, Beirut Police, Tripoli Municipal Police, Intelligence, Prison Guards, etc.). Here, prosecution is often based on articles 531 and 532 on violation of public morality; and is sometimes based on 534 when there is suspicion based on the situation or on subsequent confessions.

Notably, most of these cases are against persons who are involved in an act not of expression of feelings or positions in a public space, but who are hiding for the lack of a private space and without intending to provoke. This explains why the only witness to these acts is always the security patrol, while the act remains hidden from the public. In fact, many of these prosecutions – a high percentage of cases studied – shed light on the identity and class of such individuals.

One case that warrants attention is the prosecution of an inmate who allegedly took off his trousers while sleeping next to another inmate. He was arrested by the prison guard and thrown into solitary confinement before being charged. The ruling in this case found him innocent since “he only took off his trousers” and this is not considered a violation of public morals¹¹⁵.

In yet another case, a person was arrested while driving his car alone in a place considered by the judge’s decision to be for cruising, knowing he was arrested by patrols charged with protection from increased thefts in the area. He was charged by the public prosecution when he confessed to going to the area every two weeks to watch people having sex in their cars, masturbate to reach orgasm, and then leave without interfering with anyone or being seen. The unique criminal judge in Amyoun acquitted him on the basis that there is no proof that the defendant masturbated publicly or that anyone had caught him in the said act¹¹⁶. The decision was later upheld after an appeal by the prosecution¹¹⁷.

VI – Information:

Here, one case was found. In a decision by the unique criminal judge in Beirut, we see the following: “The defendant was interrogated at the Central Office for Drug Control after it received information [understood to be from informants] claiming he had seduced young men between 16 and 18 with money and drugs to engage in sodomy with persons from the Gulf countries. During the investigation he confessed to practicing sodomy, that he had met a person from the Gulf through a friend in the summer of 2005, and that the latter engaged in sodomy with him for 30 US Dollars”¹¹⁸.

It is clear that initiating investigation was due to “receiving information” on inciting minors to debauchery through drugs and money. The investigations ended up charging him with one act of sodomy with a Gulf national, always keeping the anonymity of the individuals involved (the Gulf person with whom he had intercourse or the minors he had incited to debauchery). The more serious crimes also remained ambiguous. It seems this is a result of the investigations not finding any link to the information that led to it.

VII – Knowledge of an act by coincidence during the investigation of another case or a claim by one of the parties of the intercourse against the other party for a different offense:

Here, we can identify another example of initiating prosecution based on Article 534 of the Penal Code, as in the process of investigating a felony, such as murder or unexplained death. The most prominent case found was a murder investigation of the victim’s life and work partner (a Syrian

national) for 23 years. This led to the latter’s detention for seven months and one week. Investigations led to his accusation of crimes according to 534 and his later sentencing for such a crime without any type of gesture towards his feelings¹¹⁹.

Also noted is the possibility of discovering an act of sodomy in case of a claim by one of the parties of the intercourse against the other party, such as in a case when a plaintiff in a robbery found himself accused of sodomy. This case is significant since it ended in a sodomy verdict without identifying the other person, who is also accused of theft. Initiating a case based on such an allegation points to one of the biggest flaws in Article 534, where persons affected by this article are in a position of weakness, practically becoming deprived of protection¹²⁰.

VIII – Searching through personal documents and letters in Army barracks:

Another situation can occur where an army conscript can be prosecuted based on the possession of love letters with other men. The person in question was investigated, charged, and sentenced after admitting to having been previously sodomized in one of Saudi Arabia’s prisons¹²¹.

Part Three: Means of Evidence:

The question here is about the main means of evidence used that are highly problematic in their relevance.

I – The medical examination:

This is a common method in cases where the suspects or defendants deny their culpability. It is used in preliminary investigations by law enforcement (morality police) initiated by the public prosecutor. The medical examination is conducted in the police station and has three main aims: examination of the anus and its detailed description, description of the penis and especially erection ability, and testing for sperm remains in or around the anus. In addition to the violation of privacy of the person being examined, forensic doctors are the first to doubt its efficacy, especially if it happens after even a small period of time from the act. One of the most prominent statements concerning this issue is that of forensic doctor Ilias Sayegh in the chapter on sodomy in his 1997 book *Al-Tub Al-Shar’i Al-’amali: Muktatafat Khibra wa Qanun* (Practical Forensic Medicine: Fragments of Experience and Law) which says:

Symptoms and aspects: The sagging of the anus and taking the form of a cone, which go away in a few days. This is in addition to pain in the anus, defecation, bruising, reddening of the anus, and the paralysis of the sphincter for some time. It is known that these injuries and **symptoms go away in three to five days after the act. Forensic medicine texts concur that these descriptions are not exclusive to sodomy because they happen in some cases of illnesses of the anus or sphincter, such as rashes, small worms, and others.** The mentioned aspects of bruises, scratches, and the sagging of the anus in the shape of the cone can be found in people whose behavior and actions cannot be doubted. Conversely, they might not appear on a person addicted to sodomy. There is no clear evidence that indicates definitely or definitively the act of sodomy or its habitual practice, except if all these symptoms appear at the same time or if the examination is performed immediately or a very short period after sodomy, which is very rare. **The only conclusive evidence is the presence of semen on the anus, ass, or thighs when examined, sampled, sent to a lab, and tested for sperm. As for the active partner, the examination of his penis, and its description, it is closer to nonsense, since symptoms can affect those who are morally and ethically worthy and beyond suspicion”.**

115 Decision 1030 on 18/4/2005, unique criminal judge in Tripoli, Unpublished.

116 Decision 392 on 21/6/2005, unique criminal judge in Tripoli, Unpublished.

117 Decision 996 on 22/12/2005, misdemeanor appeals court in Tripoli, Unpublished.

118 Decision on 24/1/2007, unique criminal judge in Beirut (case 961/2006), Unpublished.

119 Decision on 28/4/2005, unique criminal judge in Beirut (case 541/2004), Unpublished.

120 Decision 823 on 26/3/2008, unique criminal judge in Tripoli, Unpublished.

121 Decision 3430 on 31/7/2006, unique criminal judge in Tripoli, Unpublished.

The author considers the examination of the penis to be nonsense and that of the anus useless unless it happens after a short period of time – almost immediately. This is the reality based on the forensic doctor's experience. The presence of semen is the only conclusive evidence of the act, and this does not happen in case of using protection, for example.

Moreover, the forensic doctor added a very important point. The possibility of proving hard sodomy happening once or rarely is higher than the possibility of proving habitual and chronic sodomy: “gentle sodomy does not leave any trace that could help in diagnosis, even if repeated”. We can conclude that medical evidence has less productivity and credibility in cases where the intercourse is consensual and repetitive.

The forensic doctor adds that of all cases presented to him based on the claim of women to have been subject of sodomy, he did not find one single symptom to prove the allegations. He even went further by sending a letter to the investigative judge of Mount Lebanon asking to be relieved from his duties in a case where he was asked to examine a boy for sexual relations or sodomy. He ended his letter with the following revealing statement: “In most cases, I refrain from this assignment, which, stripped of evidence and proof and free from any element of crime and justification, becomes nonsense and fabrication and cannot be accepted by science or art or allowed by logic or conscience”.

The forensic doctor, Hussein Ali Chahrour, went in almost the same direction in his book *Al-Tub Al-Shar'i: Mabadi' wa Haqa'iq* (Forensic Medicine: Principles and Facts, year not available). He also differentiated between forced and consensual sodomy. He saw that practicing this act, with the consent of the “victim” and if it happens slowly and carefully, will not leave any relevant marks, especially if the penis is medium sized and penetration is done carefully and calmly, therefore the anus will expand enough without laceration. He went in the same direction by saying that finding semen inside the anus or around the sphincter is the only sure mark that can be examined, and that all others will cease to exist in less than five days.

In spite of all of this, some forensic doctors asserted the act of sodomy in some cases they examined. Some even claimed that there was habitual sodomy and at the same time that there was no evidence of it happening recently¹²². Such reports, sometimes the only evidence in decisions, are highly problematic. In many cases studied, the public prosecution also used this type of medical examination. Sometimes, this was after a long time from the said acts or even without any relevant act being considered, and with the absence of any serious evidence in the files, such as in the case of the young cross-dresser or the two housemates and their neighbor. While many of the defendants were not found guilty due to doubts brought about by experts who declared the impossibility of proving sodomy, many prosecutors were able to charge persons with sodomy, in spite of the reports showing no evidence.

It should be noted that many forensic doctors' reports are full of preconceived ideas about people's behavior, which we will return to later.

II – Involvement of others in accusation:

This happens when someone admits to a particular crime in partnership with one or more people (which is required in a sexual relation) and this is used as evidence of their involvement. We see this in a remarkable decision in a case of lesbianism where one partner confessed to a relationship and the partner denied it¹²³. The judge saw that “confession did not come from a person who denied the accusation to flee responsibility and throw it on another person. It came from a person who

122 Decision 823/2008 above. The report of the two doctors, Saji Chaarani and Wassef Khalaf, said that the defendant is afflicted with marks that prove he engaged in chronic sodomy in the passive position and that the lesions are more than two weeks old. They did not find any new evidence except these marks that prove recent sodomy. The also said that these facts do not negate recent sodomy especially since the accused is known to practice indecent acts.

123 Decision 182/2007 mentioned above.

confessed about herself and another at the same time, which leaves no space to say that she wanted to save herself and accuse someone else”. The court found them both guilty. In fact, using such evidence will lead to condemning a person who could be innocent and immunize someone who made a false statement or without evidence based on slander or blackmail. It can also encourage law enforcement to continue investigations to obtain the names of person with whom the person had engaged in sodomy, recently or earlier, in order to prosecute them by association.

This problem was scrutinized by the judiciary in drug cases, becoming very careful to exclude evidence based on the involvement of others in accusation unless corroborated by further evidence.

III – Raids on homes or private shops:

In the cases under study, we only found one including a raid. It was on a private home based on a decision of investigation and inquiry about its owner. The raid aimed to find him and not to catch him in the act¹²⁴. Based on this, we can stress that the cases in question – all in recent years – were not part of any raid on public spaces frequented by homosexuals, which demonstrates a direction of leniency and discrimination in this regard.

IV – Witnesses:

Some reports by witnesses who are close to the defendants (neighbors, parents, ...) were the only evidence in many cases that led to their prosecution. These reports do not seem to be enough evidence for a verdict.

In fact, as previously mentioned, the public prosecutor initiated proceedings based on a complaint by the mother of a boy who tries to look like women, without any evidence of wrongdoing. He was subjected to the medical examination¹²⁵ and charged, even though the doctor's report was void of any evidence. The prosecutor also initiated a case based on information from neighbors that included a movie supposedly capturing dubious situations, without evidence of its content¹²⁶. The ease in prosecuting without evidence reflects a preconceived position against the accused. This is highly surprising, knowing there is no comprehensive policy to strongly implement the article.

The prosecutors actions in such situations based on similar information and complaints warrants criticism, since it opens the door to betrayal, slander, extortion, revenge, and invasion of privacy.

V – Personal Documents:

The only case here is that of the conscript mentioned above¹²⁷. This issue poses a major dilemma concerning the legality of violating the privacy of personal letters.

VI – Evidence and Indicators:

Some of the evidence and indicators were mentioned in passing in the decisions. They are the type of evidence that reinforces the judge's conviction that the act to be punished had occurred, such as possession of pornographic films¹²⁸, possession of a condom¹²⁹, one of the accused having

124 Decision 1460/2006 on 14/6/2006, unique criminal judge in Baabda (case 1674/2001).

125 Decision 746/2009, mentioned above.

126 Decision 185/2009 on 13/7/2009, unique criminal judge in Baabda.

127 Decision 3430 mentioned above.

128 Decision 142/2009 on 18/5/2009, unique criminal judge in Baabda, Unpublished.

129 Decision on 24/11/2006, unique criminal judge in Beirut, Unpublished.

his head low in a car¹³⁰, unbuttoning one’s trousers¹³¹, situation of meeting (in a case where two women with a big difference in their age meeting in a cafe)¹³², having a bad reputation¹³³, or merely taking off one’s trousers while sleeping next to a fellow inmate¹³⁴. Resorting to such evidence can also be criticized for opening the door for monitoring and directing people’s behavior. To claim that the meeting situation is an indicator of a lesbian relationship means that there are natural situations to meet and unnatural situations. More seriously of course is to say that there are natural and unnatural social relations. Even more dangerous is the claim that someone has a bad reputation. And while this term is a condemnation of the person and not a particular act, also a stigma that is barely consistent with the Penal Code, it barely has any meaning in a society that claims, whether true to or false, to be conservative and religious.

VII – Security agencies’ reports:

Other means of evidence are reports by various security agencies. A number of these did not state that the persons were caught in the act but that they were in “dubious positions”! When they are used in as evidence by public prosecution, they are often criticized and clearly considered inadmissible in numerous decisions.

We see this especially in the eloquent and almost mocking phrases used by the unique criminal judge in Tripoli in one of the cases. The public prosecutor had charged two persons who were found in a car, under the pretext that one of them had his head low inside the car when the patrol approached. The judge’s decision was categorical in considering that the “lowering of the head” is not evidence of the act¹³⁵. The same sarcasm is apparent in dropping charges against the inmate who took off his outside trousers “only”, mentioned previously¹³⁶.

Similarly, we see this in the minutes of a decision from the unique criminal judge in Beirut that acquitted two young men arrested by the Information Branch in a dubious position on the beach. The Information Branch’s report had [their trousers] unbuttoned; they stated that they had been urinating right before the patrol had arrived. The acquittal was based on lack of evidence¹³⁷.

We can conclude by saying that the means used for evidence here demonstrates that the application of the article is inherently linked to two issues. The first is violation of privacy in a manner that does higher damage than the issue being protected. This is similar to using forensic doctors to determine the act of sodomy or the use of evidence based on preconceptions of people’s behaviors, in addition to investigation of current and older relationships. The second is the selectivity resulting, not only from double standards, but also directly from the nature of the means, which was demonstrated to be very relative. This leads us to Part Four, on sentencing and custody.

Part Four: Custody:

Here, we need to be alert about two things.

First, the detention of suspects for a relatively long time (between six days and a month, or even months for foreign nationals¹³⁸) is common, contrary to Article 113 of the Penal Procedural Law that

allows temporary detention for a maximum of five days. Some are detained even with weak evidence, such as in the case of the two young men and the neighbor. It is common for the public prosecutor to keep suspects under detention when being sent to the unique criminal judge who often keeps them in custody until reaching the court date. The period can be short or long depending on the judge and the court. Most of these persons also have limited income, making it sometimes impossible to ask for release through a lawyer or post bail. Some persons are detained for months, especially in felony investigations, such as what happened with a person who killed his boyfriend and was under investigation for around 242 days.

Second, the social impact of prosecution and temporary detention often exceeds any criminal penalty against a defendant based on article 534. It increases in severity and injustice the longer the detention period (awaiting the trial), especially if the case lacks any serious evidence and eventually leads to innocence, as in many of the cases mentioned above. The two young men who were subject to a complaint by their neighbor, for example, were detained for six days (detention by law enforcement and public prosecution before being charged: three days, and another three awaiting setting a date for the trial and sentence). They could have remained longer, if not for the presiding judge’s wisdom who set a quick date and gave his decision – innocence - the day the trial ended, which is a positive mark for the judge¹³⁹.

Part Five: Sentences:

The following issues can be noted:

- The majority of decisions by unique judges led to sentences of actual imprisonment of the defendants based on Articles 534 or 531 of the Penal Code. The verdicts were between one and two months for the unique judges in Beirut and Baabda and reached three months with the unique criminal judge in Tripoli. While still below the maximum sentence of one year, they remain high relative to the action.

In some cases, the sentence reached one year without any justification for the severity¹⁴⁰ (to which the judge is not obliged). For example, the young men caught while one was performing oral sex on another were sentenced to one-year imprisonment, and then the sentences were reduced to nine days only for two of them while it remained the same for the third¹⁴¹. It seems the sentence was influenced by the detention period of each defendant, where the third had spent almost a year, and was finally determined by that amount of time.

Some verdicts included varying sentences for the different parties based on the judge’s convictions of the severity of the act, even declaring it sometimes. We see this more specifically in cases where the judge presumed that one party was exploiting the other, such as in a case where three persons were convicted with sodomy. The judge saw that one of the defendants was using his friend as a driver to exploit him into sodomy and the other with money. The exploiter was handed a sentence of six months imprisonment, while the other two received one-month imprisonment only¹⁴². The judge clarified the concept of “exploitation” in another decision reached after less than one month. He considered that exploitation does not necessarily mean that the perpetrator uses his material means and the needs of the others to satisfy his needs. It can also mean the use of masculine power to subjugate the other sexually, in addition to money. In the case mentioned above, and after the court had clarified that “the first defendant was exploiting the second defendant who is weak as a male and different in sexual nature from his apparent masculinity. He was using him sexually and then is drawn to show compassion about his family and financial problems, therefore spending on him and helping him in that matter”, it concluded by convicting them both of sodomy, with a symbolic

130 Decision 4737/2008 on 29/10/2008, unique criminal judge in Tripoli, Unpublished.

131 Decision 185/2009 on 27/7/2005, unique criminal judge in Beirut, Unpublished.

132 Decision 182/2007 on 11/4/2007, unique criminal judge in Baabda, Unpublished.

133 Decision 2012/2005 on 12/10/2005, unique criminal judge in Baabda, Unpublished.

134 Decision 1030/2005 mentioned above.

135 Decision 4737/2008 mentioned above.

136 Decision 1030/2005 mentioned above.

137 Decision 185/2009 mentioned above.

138 Cases where two Syrians were detained for 54 days and an Egyptian for 7 months and a week.

139 Decision 185/2009, mentioned above.

140 Decision 3037/2007, mentioned above.

141 Ibid.

142 Decision 2305 on 13/6/2007, unique criminal judge in Tripoli, Unpublished.

difference where the first received one and a half months and the second one month¹⁴³. In fact, the concept of exploitation in these two cases is worth studying, especially in light of sentences in the Penal Code punishing persons who work in prostitution, and not their customers. It is also useful to approach these sentences and decisions in cases where the individuals involved do not have power over each other. We can point to one case of two persons who confessed to having known each other for years, where the same judge commuted the sentence of imprisonment with a fine of 500,000 Lebanese Pounds¹⁴⁴.

On the other hand, a number of sentences were satisfied with the detention period or set a sentence equal to the necessary period. While this can point to toleration, it sometimes aims to justify the custody period, especially if it is long (such as one month) without publicizing it. The state thus will not seem to have put the defendant in custody for a period longer than the sentence deserved. We can note that one of the decisions lowered the sentence of someone who had intercourse with a minor for a period of three years from three months to a week, with a fine of 300,000 Lebanese Pounds¹⁴⁵.

- We also note that some sentences applied extenuating circumstances to replace the period of imprisonment or its remainder with a fine between 100,000 and 500,000 Lebanese Pounds. This is sometimes an indicator that the fine, not stipulated by Article 534 of the Penal Code, is more relevant than imprisonment in such cases. This is distinctly apparent in the decisions of the Court of Appeals in Tripoli in similar cases, where the indictment is accepted but the period of imprisonment commuted to a fine¹⁴⁶. This position can be explained by increased tolerance or an inclination to end the case without returning the defendant in jail, based on the hope that temporary detention, the length of the prosecution period, and the threat of imprisonment in the primary decisions will be deterrent enough. But the judiciary in such cases has rarely indicated the extenuating circumstances that led to such decisions; sometimes this was justified by the confession of the perpetrator or the passage of time since the act under investigation¹⁴⁷, without reference to psychological considerations of the accused or to the changing circumstances and social values.
- A small number of decisions led to a suspension of the sentences. Notably, one decision (unique criminal judge in Baabda, 8/3/2008) justified the suspension of the sentence against one of the defendants and not the other (who received a sentence of two months imprisonment under 534) by the former's "declaring remorse"¹⁴⁸. In fact, this reasoning reflects a legal approach that considers such relations to be a whim or an easily dispensed of pleasure, marginalizing vital human dimensions.

Finally, it is worth to mention that one sentence subject to research decided on a compensation of seven million Lebanese Pounds for moral injury, in a case of intercourse between an adult and a minor between 15 and 18¹⁴⁹. This was upheld during appeals but reduced to two million Lebanese Pounds¹⁵⁰.

To conclude, here are some observations concerning the application of the article:

- First, there is no penal policy to drop the text or overcome it, evident in the continuation of prosecution based on it.
- Second, there is no penal policy to impose the respect of this text or to confront manifestations of homosexuality, evident in the authorities' disregard of prosecuting persons who frequent bars and other places known to be meeting places for homosexuals, which are becoming very prominent in Lebanon.
- Third, there is an expansion in the application of the article in cases we were able to study, whether in determining the text's relevance, evidence means, formalities in initiating prosecution, or even in custody periods awaiting trial.
- Fourth, in many cases, the deciding judge showed reluctance in accepting the public prosecutor's extension of application of this article. This was reflected in many innocent verdicts. It also showed some tolerance in sentences.

Based on these conclusions, we can present the effects of application of 534 on the Lebanese socio-legal system.

143 Decision

144 Decision 905 on 4/4/2007, unique criminal judge in Tripoli, Unpublished.

145 Decision 2384/2008, mentioned above.

146 Decision 254 on 8/3/2007, Unpublished; also decision 465 on 24/4/2008 leading to a reduced sentence from six months imprisonment to a fine of 300,000 Lebanese Pounds.

147 Decision 2384/2008, above.

148 Decision 544/2006 on 8/3/2006, unique criminal judge in Baabda, Unpublished.

149 Decision 2502 on 31/5/2006, unique criminal judge in Tripoli, Unpublished.

150 Decision 254 on 8/3/2007, misdemeanor court of appeals in Tripoli, mentioned above.

Section Three: The Impact of Applying Article 534 on the Lebanese Socio-Legal System

This section aims to determine the major implications of applying Article 534. This will be followed by some recommendations to improve the judiciary's performance in this matter.

Part One: Major Implications of Applying Article 534:

I – Major Social Implications:

1- Opening the Door to the Invasion of Privacy:

Of course, Article 534 is in itself a violation of privacy as long as it criminalizes certain intimate or sexual relations between adult persons. Some of the court decisions even went in the worrying direction of expanding violation of privacy.

Sometimes, the judiciary seems to be expanding the meaning of “intercourse contrary to nature” to include relations between women and heterosexual anal sex. It was also inclined at times to punish sexual orientation or identity, without evidence of a specific criminal act.

This is also the case in the manner the public prosecutor takes action. One of the verdicts gave the right to parents to have a claim against their adult children, similar to claims of obligation (*al-hisba*). The prosecutor showed considerable leniency in initiating public prosecutions, based on information, snitching, or complaints as shown above, without reference to any serious evidence. This leniency opens the door wide for authorities to invade personal privacy.

It is also noticeable in the means of evidence. We can conclude this from forensic reports that point to the common practice of examining the condition of the anus and erectile ability! We also see this in the use of intercepted private love letters or pictures taken without permission in a private space; also in considering some behaviors to be evidence of wrongdoing, such as looking like a woman, a particular type of meeting to be evidence of homosexual orientation, or even using information from a partner in the relation as evidence of the act.

2- Opening the door to the extortion of homosexuals:

This can be a result of the practice of interrogating persons about their sexual partners or asking them to write down their names on a piece of paper. It can also be a result of public prosecutors or judges increase in invasion of privacy in the forms shown above, especially in initiating a public case based on information or snitching.

3- Reducing Legal Protection of Homosexuals:

This is a result of the criminalization of homosexuals. For example, what might happen in case a homosexual is a victim of theft or physical assault from a partner? What will be the result of his complaint? Wouldn't he be afraid to turn from being a claimant in a theft or something else into a

suspect based on article 534 when going to the police, as evident in one of the cases researched? And, to what extent can a person's dignity and status be protected against slander accusing them of a criminal offense?

4- Selectivity:

Here is the worst offense. As shown throughout this research, selectivity is unmistakable. Whatever the number of cases, it is obvious that they touch a small number of persons who have homosexual relations.

What is most striking is that prosecution of secretive relations is greater than that of public or organized ones. Based on the researched decisions, legal actions against homosexual relations have an impact primarily on sexual behavior or insinuation happening in isolated public spaces, aiming to be hidden in most cases because of lack of a private space. None of the decisions were against persons who publicly declare their homosexual identity – like what happens often in the media or collectively, as in associations or demonstration – or who act out their homosexuality in a public space open to an audience, such as restaurants, nightclubs, or the Internet...

In most cases, this selectivity is clearly due to class and impacts less favored segments. On the other hand, the analysis of the decisions shows that all homosexuals are affected, in one way or another, although rare outside these segments, especially in cases where prosecution is based on snitching and information about other persons.

These facts leads us to a perplexing reality: how can we understand the failure of public prosecutors to act against the most obvious manifestation of homosexuality, especially in light of expanding the terms of prosecution under 534 as previously shown? If they were limited to the most public examples, we could say that this selectivity aims to protect society from manifestation of homosexuality that seems to revolt against traditions or to provoke conservative sensibilities. In that case, it can also be an undisclosed agreement between the state and homosexuals, where prosecution will stop if they keep their orientation private. Failure to prosecute the most obvious manifestations while taking investigative measures to expose a number of people, such as in medical examinations violating privacy based on someone claiming to have had sex with them, leads us to suggest some complementary explanations:

The first is that the decision to prosecute is generally a result of the circumstances of each case. It is connected with the aims of police patrols, the public prosecutor, the concerned parties, and their immediate surroundings, without the public authorities having a clear penal policy in this regard. This suggests a social disparity between need to prosecute homosexual relations relative to the scandal this entails.

The second is that failure to prosecute manifestations of homosexuality aims to avoid litigations that might create wide media attention. Public prosecution seems to be wary of the “spectacle” of its actions more than the “spectacle” of homosexuality. This might explain the suspension of the claim against Helem association presented by a member of the Beirut municipality in 2006.

The third is that keeping the text intact, and therefore the possibility of criminalization, might aim to keep homosexuals in a delicate situation. Their freedom thus becomes a “favor” from the current regime. Going further, we might say that such selectivity is very much connected to the tendency of the regime in power and its understanding of citizenship, rather than protection of traditional social values. It seems it is an excuse to strip a segment of citizens from their given rights more than being a goal in itself.

5- The Clash between Homosexuals and the State:

Consequently, it is natural that homosexuals might feel that there is a clash between them and the State that criminalizes the intimate relations most appropriate to their orientation. The conflict

becomes stronger relative to the homosexual’s conviction of the legitimacy of their relations, and the increased toleration in neighboring countries, such as Cyprus and Turkey. In light of global attitudes towards this issue, homosexuals with the minimum required knowledge would become less willing to suppress their feelings to appease their environment. On the contrary, they will become more prone to express their feelings and needs, whether in their environment, even if leads to marginalization, or in any other environment they are displaced or they emigrate to.

II – Legal Repercussions:

The following are some of the main legal repercussions of the researched cases:

1- Violating the Principle of “No Punishment without Text”:

As previously mentioned, the terms used in Article 534 do not specify a type of intercourse but indicates to intercourse that can be described to be “contrary to nature”. Therefore, the clarity of the penal text is contingent on reaching an agreement on the definition of “nature” and what contradicts it. Disagreement with this issue has widened in the last decades due to changes in the World Health Organization’s judgment of homosexual relations. It is thus important to inquire about the relevance of prosecution on this basis with the principle of “no punishment without text”.

It is not enough to say that the lawmaker was clear in criminalizing homosexuality under the guise of “intercourse contrary to nature” at the time of writing the text. This is for two reasons. The first is that this assumption is not true, especially when it comes to homosexual relations between women or anal heterosexual relations as previously shown. The second is that the terminology allows and warrants a rethinking of the acts that would fall under it, especially based on the change in the understanding of the concept of “nature”. This is in addition to the fact that the text was written during the Mandate.

2- Violating the Principle of Equality Before the Law:

This is apparent in the selectivity that cannot be justified legally, as shown before. It is enough to compare the charging of a person due to an informant and failure to do so for persons who are publicly expressing their orientations and needs.

3- Violating the Principle of Criminality when Necessary:

The criminalization of an act is legitimate only when it is necessary to do so. Actually, this condition becomes more vital when criminalization leads to negative social impacts as illustrated. So where is the need to violate privacy, act selectively, and discriminate against citizens to the extent of marginalization, displacement, and exposing them to extortion and assault without protection?

What dangers does criminalization attempt to tackle productively? Furthermore, what is the effectiveness of such criminalization in a country open to the outside, especially to European countries that consider the legality of such relations as a basic result of democratic principles? More specifically, why is it necessary to prosecute homosexuals based on snitching, in light of a semi-official toleration of the prevailing manifestations of homosexuality?

Based on the information and questions above, which remain more eloquent than any answer, we can move to identifying the major ways to challenge and reduce the effects of this article and its future impact.

Part Two: What Is to Be Done?

He, we will attempt to identify some steps that could lead to increased legal toleration of homosexual relations. The main issue is giving special attention to courts, not only to understand how Article 534 is applied, but also based on an approach that sees the judiciary as a stage to present social issues

and as a relatively efficient and highly important tool of reform regarding sensitive issues. This is the case in all issues where the political class is committed to a formal position or at least silence, in order to appease sectarian leaders or the feelings of certain politically and socially strong segments. There are numerous examples about the role of the judiciary in such situations, lately in the jurisprudence to protect children¹⁵¹ and women’s rights¹⁵². Based on this, as mentioned in the introduction of this research, bridging the gap between the world of legal prosecution and litigation in order to respect homosexuals and enhance their rights is fundamental prerequisite that is becoming more necessary day after day.

The main recommendations here are:

1- Continuing the Documentation and Analysis of Judicial Action:

Here, we can repeat the wish stated above and that is to keep this research alive, whose benefit is self-evident, in addition to allowing the documentation of reality in order to understand it. It is also a call for the judiciary to deal with such issues taking into consideration their important social implications. This continuation will also allow us to measure the progress or development of such cases and the impact of efforts in this regard.

2- Seeking to Enhance the Human Rights Discourse in Courts:

Contrary to what currently exists, there is a need to work on forming a human rights discourse that would shed light on social and legal implications in cases where litigation falls under 534. Some of the more important actions could be:

- a- Spreading legal, medical, and technical knowledge on the issue. We noticed a great lack of jurisprudence on the issue, in spite of the problematic on different levels. It is also useful to follow the progress of laws and legal actions in other countries.
- b- Preparing a model defense argument that reflects the whole of arguments given in such cases. The most important of those would be the legal and social ramifications mentioned above, especially case law from foreign courts that rule out criminalization of such issues. This might have an effect on convincing judges of decriminalization. It might also be useful to publish the said argument and disseminated widely to lawyers and judges.
- c- Holding discussion sessions with all stakeholders in such legal measures, especially lawyers, judges, prosecutors, and law enforcement.

151 Saghieh, Nizar, *Al-Tifl fi hal khatar: al-qada’ yokarris nizaman mulziman lil-tawa’ef* (Children in Danger: the judiciary consecrates a binding system for confessions), Al-Akhbar Beirut daily, 13/8/2009.

152 Saghieh, Nizar, *Al-qadi itha ijtahad* (When the judge is diligent), Al-Akhbar Beirut daily, 20/7/2009.

