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Law and Homosexuality: Survey and Analysis of Legislation Across the Arab World

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Studying homosexuality across the legal codes of various Arab countries is no easy undertaking.

Information about laws pertaining to homosexuality is readily available; information about actual court cases and verdicts, however, is rather scarce. As of now, court proceedings and the work of security agencies are accessible only through media outlets.

Previous studies on homosexuality and legislation are few and far between; moreover, what exists can largely be found only in universities' unpublished academic records.

References were largely obtained from the rare few written legal sources on homosexuality available. Due to the shortage of such sources, however, it was necessary to look at non-academic sources, mostly consisting of articles and other essays published in traditional media sources (e.g. newspapers, magasines, etc.) or on the internet; this was especially necessary in order to obtain information regarding court cases and rulings.

In spite of these methodological impediments, the importance of addressing homosexuality from a legal perspective, especially with regard to Arab countries, cannot be understated.

Looking at the legislation in the various Arab countries we had the opportunity to study (Mauritania, Algeria, Tunisia, Libya, Egypt, Palestine, Lebanon, Syria, Jordan, Iraq, Saudi Arabia, Qatar, United Arab Emirates, Bahrain, Kuwait, Yemen, Somalia and Sudan), we find that the majority either explicitly criminalisse homosexuality in their penal codes or have interpreted other, vaguely defined criminal acts so as to have homosexual interactions fall within their scope.

The study of homosexuality in legislation of Arab states, and examining whether this legislation is applied fairly and judicially, requires scrutinising available sentences and proceedings that reflect a discrepancy in the attitudes of Arab legislation towards homosexual acts (Part I).

In spite of these discrepancies there remains a dominant tone of deterrence, which leads to negative consequences for this criminalissation on individuals and society (Part II).

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Part I: The Discrepancy of Arab Legislation in "Criminalising" Homosexual Acts

Most of the Arab legislation that has been studied does not tackle homosexuality explicitly, but rather only acknowledges acts that fall within the scope of homosexual behaviour.

When such acts are unacknowledged, the legislation does not address any sexual acts at all (I). As one would expect, whether or not such acts are acknowledged affects how homosexual acts are penalised (II).

Different Concepts for Homosexual Acts in Arab legislation

The phrases "Gay" or "Homosexual" are never used in Arab legislation due to the novelty and objectivity of these terms that incline towards a more scientific approach. This absence, however, does not mean that words with similar connotations are likewise unused in these legislative texts.

Arab legislation only tackles homosexual acts from the perspective of punishment (penal or criminal), so its language is devoid of any connotation that could be seen to weaken the deterring tone of the legal language.

Therefore, we notice that such legislation in the Arab world uses phrases loaded with moralissing connotations, which indicate deviation or corruption, so that the penalty fits the crime.

As previously indicated, we can divide legislation in Arab states into two groups:

A. Those which explicitly or implicitly criminalise homosexual acts.

B. Those which adapt their material to cover homosexual acts.

Arab legislation that refers to homosexual acts

Arab legislation, while criminalissing homosexual acts, does not refer to them in the same way (1). Other legislation only deals with homosexual acts so as to include them implicitly among general expressions (2).

Examples of Explicit References to Homosexual Acts in Legislation

Only six out of the 18 pieces of legislation studied explicitly tackled homosexual acts in their penal codes (in some codes these fell under the heading "criminal laws," while in others they fell under "penalties"). For example, Article 230 of the *Tunisian penal code* states, "Sodomy or Lesbianism, if not taking the form expressly noted, is punishable by up to three years in prison."

Here, homosexuality, whether between males (sodomy) or females (lesbianism), is treated more explicitly and comprehensively. However, the Tunisian code along with the Algerian and Somali, are unique in this regard.

Yet despite their seemingly straightforward acknowledgement of homosexuality, the wording of these texts raises some fundamental problems as to what counts as sodomy or lesbianism. For example, they leave vague exactly what actions, behaviours, movements, etc. fall within the sphere of homosexual acts. As such, these materials can be interpreted variously—one is free to interpret a homosexual act as only "homosexual sex" or as any act involving members of the same gender with a sexual aim or dimension (kissing, oral sex, foreplay, etc.).

This elasticity gives the countries' security and judicial forces power to declare an act homosexual, which, in turn, could have serious consequences on one's life and freedom. This can be seen in the other Arabic legislation that explicitly mentions gay sodomy.

Article 201 from the *Qatari Penal code* issued in 1971 and article 194 of the *Kuwaiti Penal Code* and *Emerati Penal codes* (whether it's the *Federal Penal Code of 1987* or the *penal codes of Dubai, Abu Dhabi, Sharjah, and Ras al-Khaimah*), all incriminate male homosexual acts (no mention of lesbianism) without explaining what is meant by "act" —whether it means "intercourse" or other acts of homosexual nature. This ambiguity allows for many interpretations and thus poses a serious risk to an individual's rights as well as social and professional status.

In November 2005 police in Dubai arrested 26 men at an inn because 12 of them were wearing women's clothing; no one was found performing any sexual acts at the time of the raid (by the police's own admittance).

On these grounds alone, the men were accused and eventually found guilty of "homosexuality" and in February 2005 were sentenced to five years in prison. The men were incriminated despite the absence of any legal provision banning men from wearing women's clothes.

A similar incident occurred in Kuwait in what the press dubbed a "gay wedding," where the Kuwaiti police arrested a 21 year old young man "dressed as a woman." He was interrogated on charges of practicing homosexuality, to which he admitted. The arrest was initially made solely because the young man was dressed as a woman but the investigation focused on sodomy, as defined by an interpretation of Article 193 in the Kuwaiti Penal Code, and two further people were arrested after the young man admitted to having had sex with them. Everyone was charged with sodomy based on the interpretation of Article 193. In April 2009 the defendants were declared innocent, as the conditions of Article 193 were not fulfilled.

Here we find two cases identical in terms of both material circumstances (men wearing women's clothes and admitting to sodomy) and legal terms—both Kuwait and Emirati laws consider sodomy a criminal act. However, the judges ruled differently.

Different readings and interpretations of legal texts and their applications to various incidents is observed not only across countries, but sometimes even before the same judiciary. In the UAE in the homosexual wedding case mentioned earlier, and in a similar case in Sharjah from 2005 (also at an inn), the court sentenced 12 men to a few symbolic lashes and then they were released.

Arab legislation that refers to homosexual acts only implicitly

Some Arab legislation tends to rely on the use of generic terms to describe homosexual acts. For example, legislation in four Arab countries (Lebanon, Syria, Bahrain, and Morocco) uses the term "acts against nature" or "contrary to nature." For example, Article 534 of the ***Lebanese Penal Code*** declares that "all sexual intercourse against nature, is punishable by imprisonment up to one year."

This statement has been interpreted by many law students, law enforcement officers, prosecutors, and judiciary officials as referring to homosexual acts.

But again, this only raises the question of what acts are against nature. A clear definition must be presented so the judiciary can apply the appropriate punishment. Accordingly, natural sexual acts must be defined as well so as to draw a contrast with what is against nature and thus requiring punishment. Neither of these are straightforward definitions and what counts as natural is not "scientifically proven."

These problems, however, have not stopped articles incriminating acts against nature from being enforced in Lebanon, Morocco, or Bahrain. Here, we noticed considerable and risky confusion.

In Morocco, during what is known as the "Grand Palace" case or the "homosexual wedding," a person caught on videotape at a private party wearing a bridal dress was charged with committing an act against nature; the video was used as evidence of homosexual activity.

In Lebanon, we see an expansion in the understanding of the aforementioned Article 534, which represents a grave danger to individuals' rights and freedoms. Merely going with others to the parking lot to spend an evening together is characterissed by security forces as an act against nature based on the interpretation of Article 534, simply because some individuals admitted to agreeing to spend an evening together and committing homosexual acts. Also, the exchange of names and phone numbers online to facilitate an actual get-together for such purposes is characterissed as illegal under Article 534.

The confession of a detainee in a murder case to homosexual relations with the victim led to his investigation, since he had admitted to performing an act against nature. Even after proven innocent of the murder charge, he was arrested and not released; instead, he was deferred to further investigation, medical testing, and trial according to Article 534 of the *Lebanese penal code* and sentenced accordingly.

Such broad characterissation of a term like "act against nature" constitutes not only a risk to individuals' rights and freedoms, but also a risk to the principles and rules of criminal law. What distinguishes this law - since it risks rights - is clearly auditing it to control crimes, misdemeanors, or violations to limit any exploitation of the text or abuse enforcement.

Arab legislation that does not mention homosexual acts, but criminalisses them

Legislation in some Arab countries neither explicitly nor implicitly mentions acts of homosexuality; however, this has not stopped them from criminalissing and punishing individuals for performing homosexual acts. That is, the absence of laws criminalissing homosexuality in these countries does not entail the absence of prosecutions and penalissation for those deemed to be taking part in homosexual acts.

While the legislation in Egypt, Jordan, Sudan, Palestine, Iraq, Saudi Arabia, Yemen, and Mauritania makes no explicit mention of homosexuality, they frequently utilisse other laws to criminalisse the act and punish the perpetrator.

Adaptation of laws to criminalise the homosexual act:

At the turn of the century, campaigns in Egypt were organised to track down and prosecute those performing homosexual acts. These systematic attempts to root out homosexuality reflect the government's security policy and have been best exemplified by the "Queen Boat" incident at the end of 2001 where 50 people were arrested, most of whom from the night club on the Nile ferry "Queen Boat." Although no one was caught performing a homosexual act, they were prosecuted.

Other notable Egyptian cases illustrating the prosecution of homosexuality include the following:

- the Qasr an-Nile Misdemeanor Court's sentencing of five Egyptians to five years in jail and a fine of EGP300 (USD$50) for "lewdness due to practicing homosexuality" on 9 April 2009;
- the September 2001 in absentia sentencing of seven men to a year in jail after already having detaining them for six weeks for "regularly practicing debauchery"; and
- the sentencing of 12 men to three years in jail after their arrest at a private residence in August 2002.

But the question remains unanswered: with the absence of a law explicitly criminalissing homosexuality, on what legal grounds did security forces, prosecutors, and the judiciary in Egypt arrest, investigate, and sentence homosexuals?

Excepting the "Queen Boat" case, which was based on many charges including lewdness, illegal gang activity, compromising public safety, and calling the detainees a cult, the legal basis for prosecution in the above mentioned cases consists in declaring the homosexual acts "debauchery." These acts then fall under the scope of an Egyptian law that is known today as *Law 1961/10* (law number 68 for the year 1951), which was established to fight prostitution but contains the phrase "prostitution or debauchery." Although it was initially established to fight prostitution involving the exchange of money, adding the term "debauchery" to it gives room to prosecute people for committing acts other than prostitution—any "immoral" act of "sexual nature."

This has and will continue to lead to the de facto criminalissation of homosexual acts or the intent to perform them. Without a need to demonstrate that an exchange of funds took place, casual sex has become criminalissed as well. According to Article 9D of *Law 1961/10*, however, in order to prosecute, track, and indict, such acts, the practices need to be habitual. An act is considered habitual if it is performed more than once with more than one person in three years.

The fulfillment of such terms for habitual acts, which have been reiterated by courts, seem difficult, if not outright impossible, for the prosecution to demonstrate with regard to homosexual acts, but this has not stopped homosexuals from being prosecuted and arrested and courts have not been prevented from indicting persons who did not perform homosexual acts habitually.

The risk of incrimination based on the charge of debauchery seems high when suspicion, not the act itself, is what opens the door to investigation, arrest, medical tests, and indictment.

Five Egyptians suffered through this when they were convicted of debauchery after a brawl that took place at a restaurant in central Cairo where one of the restaurant's patrons accused the five men of practicing homosexuality. Based on the claim, they were arrested and brought before a medical examiner who determined that they were "indeed homosexuals" and that four of them were HIV-positive. They were referred to Qasr an-Nile Court, which on April 9, 2008 sentenced each of them to five years in prison and a 300 pound fine on the grounds that they "habitually practiced debauchery, prostitution, and that they're homosexuals"—for transgressing *Law 1961/10*.

While Egypt's adaptation of legal texts to include homosexual acts dates back to the beginning of the millennium, Jordan began doing similar things in Autumn 2008.

Despite the absence of any articles in Jordanian law that explicitly outlaw homosexual acts, in October 2008 security forces in Amman "launched a campaign that targets 'homosexuals,'" after security forces verified that they were gathering and meeting up at a park near a private hospital in Amman. Four of them were arrested "after being ambushed," and were detained in a correctional rehabilitation facility. The Governor of Amman banned "releasing them on bail until guarantees are provided that they would not return to such deviant behaviour," especially since "they're seeking to practice vice, which spreads moral decadence in society."

Resorting to Sharia Law to criminalisse homosexual acts

Four of the countries studied—Saudi Arabia, Sudan, Yemen, and Mauritania—apply Sharia'a Law (Islamic Law) to homosexual acts.

The situation in Saudi Arabia deserves special attention, as it is probably the only Arab country (and one of two Islamic countries along with Iran) that applies capital punishment to those found guilty of performing homosexual acts.

In the following four cases covered by Saudi and international media, certain charges were used to punish the men accused:

- "Wearing women's clothes," and "imitating women's likeness and committing homosexual acts." The nine men were sentenced to five years in prison and 2600 lashes divided across 50 sessions of 52 lashes every two weeks.
- "Extreme obscenity, homosexual acts, and imitating women." Three men were additionally charged with sexual assault on boys as well as photographing and blackmailing them. The men were executed by decapitation as they were also charged with drugging and raping the boys.
- "Practising extreme obscenity, vile homosexual acts, three men marrying each other and molesting kids."
- "Raping a thirteen year old," then "strangling him and hitting him on the head with a rock and pushing him off a cliff." The 21 year old perpetrator was sentenced to death and the 16 year old teenager that helped him meet the victim was sentenced to five years in prison and 400 lashes.

From these four instances we can deduce the following:

- Punishable acts of homosexuality in Saudi Arabia can be as simple as wearing women's clothes or imitating their likeness. It can be also a sexual act or acts of a sexual nature: "homosexual behaviour among the defendants," "extreme obscenity," or "men marrying each other ...." Those actions do not affect others and only concern the defendants and those who practice them within their private lives and not in public. Still, they are punishable by imprisonment, flogging, and even execution.
- Homosexuality is linked to other acts that make it seem like a crime and justify criminalissing it. It's often linked to rape, assault, blackmail, and even murder. This has led to increasing the punishment from imprisonment and flogging to death. It also created a perception of homosexuals, regardless of their age or actions as people who assault others, molest children, blackmail, and murder only to satisfy sexual urges.
- The concept of homosexuality in the sense of sexual acts or behaviour between two consenting adults in private is often misunderstood and confused in Arabic legislation. Even if that was the concept, prosecution and punishment still happen.
- This terrible confusion peaked when France and Holland introduced a draft of an announcement to the UN on December 2008 to ban the criminalissation of homosexuality, and in return the Arab and Islamic group introduced a counter draft that mixed homosexuality with paedophilia and incest.
- The variation within Arab legislation when it comes to defining homosexual acts or behaviour should not stop us from seeing that such treatment only handles it in a repressive, and punitive manner, where the punishment depends on one's reason for performing the action or actions as discussed below in Part II.

Part II: Variation in the punishment in Arab legislations

Arab legislation does not use the same means of deterring one from performing homosexual acts. Although they always punish such acts, the punishments themselves vary.

This disparity in punishment is a relic of the way the legislation was first codified. Most legislation is based on foundations heavily influenced by the legacy of colonialism; this is specifically the case in Morocco, Algeria, Tunisia, Egypt, Lebanon, Syria, Somalia, Kuwait, Bahrain, UAE, Palestine, and Qatar. Such punishments result in the deprivation of liberty and fines.

Other parts of the legislation reflect certain readings of Islamic Sharia'a so the punishment is physical: flogging, or death (such is the case in Sudan, Saudi Arabia, Yemen, and Mauritania).

A) Sanctions affected by the colonial era:

The tendency to criminalisse homosexuality led to (1) establishing clear and fixed punishments for the first time in the legislation of Arab countries, that (2) tried to give some explanations for such criminalisation based on several reasons and (3) those reasons are no longer valid in colonial countries which criminalised homosexuality in the Arab world.

The first instances of punishment in the Arab region

French influence in the region's laws

Countries vary in punishing homosexuality. At the level of legal texts, those countries can be ranked as follows:

The maximum penalty is found in the ***Tunisian legal code of 1913 Article 230***, which has yet to be revised. The article calls for a punishment of "three years" for the perpetrators of "sodomy or lesbianism" and does not allow the judge to mitigate the sentence but only to decide whether or not to impose it. Morocco has the same maximum penalty of three years, but Article 489 of the Moroccan penal code sets a minimum punishment of six months in jail. This allows the judge to determine a punishment ranging from six months to three years in jail with the possibility of fining the perpetrator anywhere between MAD120 to 1000 (USD15-125).

Article 388 of the Algerian penal code sets a lower punishment minimum of two months' imprisonment and two years as the maximum, with the possibility of fining the perpetrator a sum ranging from DSD500 to 2000 (USD7-28).

The lowest maximum punishment is in Article 534 of the Lebanese penal code and is only one year in jail.

British influence in the region's laws

The British influence in the Arab world can be seen in the legislation of Southern Yemen (Eden), Bahrain, Oman, Qatar, the region which now constitutes UAE, and Sudan.

The law, which corresponds to the legislation effective in Britain itself, was translated through Article 377 of the *Indian penal code*, which punishes homosexuality with exile of up to 22 years, imprisonment for ten years, or a fine. In 1956, Article 377 was substituted in the territories under British control in the Gulf with a new article that punishes homosexuality with imprisonment of up to ten years with the possibility of corporal punishment (flogging).

Qatar and Bahrain held on to the spirit of the British legislation in two components: custodial penalty and corporal punishment. Article 201 of the penal code calls for five years imprisonment and the possibility of flogging.

As for Kuwait and UAE, they retained only the custodial penalty. Article 193 of the Kuwaiti penal code punishes homosexuality with seven years in prison while that of Dubai punishes it with up to ten years (Article 177 of Dubai's penal code), and up to 14 years in jail in Abu Dhabi (Article 80).

This sediment of colonial legislation remains prominent in the Middle East and North Africa. It was imposed by colonial powers so as to correspond with their culture and legislation at the time. They introduced the idea of punishing and criminalising homosexuality to the region, which was an alien practice since the culture didn't call for legal texts that define behaviour and intervene in the intimacy of one's private life. Homosexuality, while frowned upon socially or culturally, was tolerated.

Therefore we are left wondering about the causes of criminalisation and the severity of punishment.

Reasons behind criminalising homosexuality and the severity of punishment

The reasons behind criminalisation correspond with linking the sexual act in general and the homosexual act in particular with ethical and social ideas.

Ethically, Christianity views sexual desires as a violation to its teachings, and any illicit sexual act (i.e. one that does not take place between husband and wife for the purpose of producing offspring) as vice worthy of punishment. Accordingly, the Church considers sodomy an "abhorrent and repulsive vice," which ultimately resulted in the political and security authorities' implementing a range of punishments and means of deterrence.

Socially, homosexuality has long been repressed as a violation of the basic structure of society—the family unit. Homosexual behaviour and homosexuals are seen as a danger to society, especially to the youth.

These ideas and approaches led to the indictment of hundreds of those accused of committing homosexual acts, who were then punished by death, banishment, imprisonment, chemical castration, and flogging, etc. and are still visible in contemporary Arab legislation and social attitudes.

But change took place in the colonising countries that were the original source of such criminalisation. By the end of the sixties, they had by and large dropped their attitudes hostile towards homosexuality as a result of serious and meaningful scientific research. This has yet to happen in the Arab world.

Moving beyond homophobic legislation

States that criminalised homosexuality began revising their legislation by the end of World War II, which was very difficult given the long history of homophobia—the idea that homosexual acts ought to be criminalised and punished was rooted so deeply that persecution seemed natural and axiomatic. Homophobic culture presented the matter as an issue relating to the biological nature of human beings rather than an issue of culture. In this context we looked at the English experience on the matter, as the Arab east was affected by the anti-homosexuality laws held within English legislation. Homosexuality was antagonised in England for centuries using the same excuses and pretenses to justify criminalising it as those used to criminalise it by Arab countries today.

In 1954, an investigation committee headed by John Wolfender, the Vice President of Redding University, worked on re-evaluating laws pertaining to homosexuality and prostitution. The committee worked for three consecutive years, interviewing many people such as religious leaders, law enforcement officers, judges, psychiatrists, social workers, and homosexuals and submitted its final report in 1957.

The Committee's report was concluded the following:

- Homosexuality was, at the time, considered immoral and destructive to individuals.
- Morality at the personal level is not a matter of law.
- The role of law is to maintain public order and decency in order to protect citisens from what is insulting and harmful, as well as to take necessary preventative measures against the exploitation and corruption of others.
- The law ought not to interfere in citisen's private lives or impose a specific behavioural pattern by force.
- Therefore, there is no need to criminalise homosexual acts taking place between two consenting adults (21 and older) in private.
- Those results did not appeal to the Home Office (Ministry of Interior) when they first came out, and they were not passed by Parliament until 1967 - ten years later.
- It is ironic that those responsible for Arab legislation, which still criminalises homosexual acts as a result of the legacy of colonial policy, have shown no recognition of the benefits obtained by dropping such policy in the original colonising countries.

B) Penalties "derived" from readings of the Islamic Law

Legislation in Yemen, Saudi Arabia, Mauritania and Sudan that determines the punishment for homosexuality, providing all of the conditions relating to the act are met, all goes back to principles in Islamic law.

This approach stems from a specific reading of the Quran and Sunnah, which can be challenged by looking at the rulings of Islamic Law relating to homosexuality, or by looking at the mention of the punishment of homosexuality in the Quran and Sunnah and what the jurisprudential schools of thought understood from it.

The Islamic Ruling and the Homosexual Act

We can see that the Quran speaks about the "people of Lot" and what they did. The verses speak about them having intercourse with men rather than women and thus committing outrageous acts and being disobedient.

The Quran, however, does not specify a clear punishment for the actions of the people of Lot and it does not explicitly discuss lesbianism.

Here, the question arises: were the people of Lot's actions limited to sexual contact among men, which was what brought down the curse and punishment of God upon them, or was their wrongdoing more than that, which is what was really responsible for Divine punishment?

Accordingly, some scholars believe that "the people of Lot were punished for apostasy," which explains the wrath that came upon all of them, including children.

Under this interpretation, the people of Lot were not punished for homosexuality, but rather for rape, coercion, flagrant acts, robbery, attacking people physically, and vandalising their property without respect for tradition, not even honouring guests.

Legal Punishments for homosexuality: the differences

What we can note from the verses of the Quran is that they do not give a clear punishment for homosexuality or lesbianism. This absence of an explicit and definitive punishment in the Quran "is the cause of a disagreement between the jurists and commentators of the Quran" and it is possible to divide the different positions as follows:

The punishment for sodomy is based on the punishment for adultery or unlawful sexual intercourse. This approach, considering the absence of a clear punishment for homosexuality in the Quran, considers homosexuality and adultery to be equal, as they are both sins because they are "forbidden by law but desired, so a punishment can be applied to a homosexual if he committed sodomy".

This position was supported by scholars such as Fakhr al-Din al-Rasi and Abu Abdullah al-Qurtubi as well as jurists of the Hanbali and Shafi'i schools of thought. Furthermore, this equating of adultery and sodomy can currently be found in the Sudanese penal legislation which mentions in article 316 that both adultery and anal intercourse should be punished with 100 lashes for the unmarried.

Due to these issues, we see a split in the Quran commentators and the jurists who look to the traditions of the Prophet Muhammad for narrations that comment on the act of sodomy or lesbianism in order to reach a ruling that makes the punishment of homosexuality separate from the punishment for adultery.

The punishment for homosexuality that is attributed to traditions from the Prophet Muhammad (peace be upon him) is death. However, the narrations that discuss sodomy are either doubtful or questionable and vague to the point that it would be difficult and illogical to apply them. Among these narrations, there is one in which the Prophet said: "If one of you finds someone engaging in the act of the people of Lot (sodomy) then kill both of those involved." However Ikrimah b. Abbas rejected the chain of the narration on the grounds that that one of narrators, Umar b. Umar, is untrustworthy. Likewise the narration of the Prophet, "I fear for you the act of the people of Lot," and he cursed those that engaged in the act 3 times is doubted by Tirmidhi (a scholar of Prophetic tradition) who said that it was "strange." Another tradition, "If a man was to penetrate another man, then the throne of God will shake (out of anger)," is described as fabricated. The tradition of Ibn Abbas, "Indeed if a sodomite dies without repentance then he will turn into a pig in his grave," The narrator of this tradition considered it untrustworthy, and one of his sources Isma`il b. Um Derham cannot be verified. Furthermore, Ibn al-Jawsi included this tradition as part of those considered fabricated. The tradition, "If any of you find one committing the act of the people of Lot then stone both those involved," has been rejected by Al-Jassas based on the fact that one of the narrators, `Asim b. `Umar, is untrustworthy. As for the hadith "lesbianism between women is adultery," the chain of narration is also considered unreliable.

Though these narrations are weak, doubtful, or even fabricated, they are still used today in reference to homosexuality committed by Muslims or in Islamic lands. However, if the narrations were sound and reliable then commentators like al-Rasi would have used them to justify the penalty for sodomy and Imams like al-Qurtubi would not have resorted to deriving the punishment for sodomy from the punishment for adultery by means of logic rather than extracting it directly from the scripture or from Prophetic tradition.

These obstacles, the absence of an explicit and direct Quranic punishment, the doubtful nature of the traditions referring to sodomy and lesbianism, and the difficulty of applying the same punishment for adultery to homosexuality, have all aided in creating a divide in the Islamic jurisprudence. As a result of this divide, Imam Abu Hanifa has gone in his own direction and does not consider homosexuality to be deserving of capital punishment.

According to him, homosexuality is not a capital crime. Faced with the lack of Quranic references, as well as reliable Prophetic traditions, the jurists and commentators resorted to considering sodomy as "intercourse not relating to the necessity of dowry or verifying lineage and so it does not carry the capital punishment." Therefore, Imam Abu Hanifa made the act punishable by lashing only.

Taking the stricter position of the law is unfair to homosexuals when there is no explicit reference from the Quran, or from reliable Prophetic tradition. Moreover, the jurisprudential schools and Quranic commentators have differed in their opinions regarding the punishment, which differs according to cultural, social and moral environments. The stricter position does not aid reconciliation of homosexuality with the wider society. This is because this position leads to two possible outcomes: either the individual accepts this strict reading of Islamic law and renounces himself or herself or remains as he or she is and rejects the law as a whole.

Moreover, promoting this strict reading of the law would make a homosexual Muslim live in a constant state of fear, and in anxiety over concern of the Divine wrath and social prejudice. Also, at the social level, the constant reference to the people of Lot and their relationship with homosexuality makes homosexuals vulnerable to the wrath of the community and family, as they are likened to the people of Lot, people of all corruption and evil.

The multiplicity of interpretations and the differences of opinion can only confirm that the law can also be read in a more enlightened way without any strictness or prejudice. Moreover, this need not just be the case when there is a crime committed deserving of lashing or stoning, but for over one thousand years, commentators of the religion and scholars of Islamic law, interpret according to the text and spirit of the law, based on justice and equality.

Conclusion: Law and homosexuality, is there a way to reconciliation?

The legislative and security practices in Arab countries are usually the most repressive in nature and are based in punishment. In some countries this begins with some months in prison and in others it ends with the death penalty. This comparison based on tracking and punishment, which has proven ineffective, has led many modern legal systems to disregard it. This is because it has a negative impact on society as well as on individual human rights, thus making it imperative to disregard it in order to find a more comprehensive system involving those rights.

The Dangers of the Criminalisation and Punishment of Homosexuality:

Studies and experiments in different parts of the world have shown that the criminalisation approach (based on deterrence and punishment, whether physical or through restrictions to freedom) poses a serious risk to individuals, their rights, and society as a whole.

With regards to the individual, the presence of a penal punishment and the possibility that the act be traceable through his body can create anxiety and fear. This is because it represents the moral weight of being incriminated and the fear of punishment would impede the individual's psychological and social development.

As for the society, the possibility of punishment for this crime fosters an environment of hypocrisy. It makes the homosexual lead a dual life, one in private and the other in public. Also, the punishment is multiplied by exclusion, social isolation and marginalisation and the role of society in pushing for it on several levels. When we look to countries that do not criminalise homosexuality (even in our own Arab countries) we can see the role played by the group on intellectual, political, scientific, moral, technological and economic levels for the development of and in service of their societies.

Regarding security, applying criminal law to homosexuality is a risk. The drafting of the laws and making them inclusive, general and lacking in clarity can lead to numerous irregularities and make it possible to abuse these laws by way of random stops and exposing detainees to medical examinations, which involve violating their bodies and humiliating them.

Though the individual may be proven innocent before or after trial, these procedures will not erase the psychological damage or the impact their mere arrest will have on their social life. Simply being arrested and detained on the accusation that "he engaged in sodomy" would affect the individual's social and family status and even affect treatment within the places of detention and imprisonment as the other prisoners can severely mistreat homosexuals.

In addition to that, although the sentences that are often passed are minor (e.g. a few months in prison), the negative impact from this on the individual's life and relationships is more serious and more severe than the sentence itself.

So, sentencing and criminalisation have a serious direct affect on the public rights and freedoms of the individual.

In this context a question relating to the role of the law arises: is the law in place to monitor, criminalise, and punish those who do wrong, or those who intend to do wrong and have just not done it yet? Is the end goal of the law simply criminalisation and punishment? Or does it have a more beneficial purpose for society and for the individual? For example, is it protecting the individual from societal interference into his intimate and private life, in addition to protecting society from individuals that may cause harm to the person or property of others?

The law raises important challenges, mainly in defining its role and separating public and private lives, and its higher role in helping human beings attain self-acceptance so that they can benefit both themselves and society.

These approaches, that search for an end goal for the rule of law, can be found in the universal human rights system, known as "human rights." These rights would enable us to arrive at a way to reconcile homosexuality with the law.

The Possibility of Reconciliation: The Human Rights Approach

The issue of homosexuality is not an isolated legislative problem in the Arab world, rather it is connected to other human rights issues. The criminalisation of homosexuality is just one representation of our legislation which is based on limiting freedoms, or fear of freedoms.

This fear manifests mainly in the dominant character of our legislation: injunction law, deterrent law, reduced freedoms, and excessive censorship. This is reflected in many areas: political, intellectual, religious, sexual and others. These laws are filled with the idea of individual marginalisation and the marginalisation of his role in society and do not accept any input or dialogue. Thus, the goal is to protect the privacy of individuals in all areas, which will have a positive influence on an individual's choices and his private life without censorship, fear of the law, security, the justice system and society's perceptions. If the right to privacy were considered a human right, this would prevent our legislation from confusing between the individual's relationship with himself or herself, his or her rights as an individual, his or her relationship with society, and his or her rights as a member of that society.

The purpose of the law is essentially to create a social environment that enables everyone to live, develop, and progress without prejudice and abuse, thus relating back to the individual's right to privacy. This approach, derived from the human rights system, can be found applied in the legislations of some Arab countries, such as the right to dignity and inviolability of property and confidentiality, etc. But what is missing from our legislation is the clear and unambiguous right to the protection of the individual's private life or what is known as the 'right to privacy.'

This approach to privacy protection is likely to make everybody, whatever privacy he or she may have, feel that he or she has the right to something that is his or her own. It would also ease the injunction and punitive nature of our legislation and make it more humane.