

# Snatching Legal Victory: LGBTQ Rights Activism and Contestation in the Arab World

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## Abstract

This article examines the relationship between emergent LGBTQ movements and the state in the Arab world over the past two decades. Focusing on the efforts of various LGBTQ social movements to confront the criminalization of homosexuality in the Arab region, the article puzzles over a cascade of legal victories for LGBTQ rights advocates in Lebanon in recent years in spite of a hostile justice sector mired with corruption. It interrogates a set of prevalent assumptions about the effect of regime type (democracy v. authoritarianism) on gay rights activism and litigation. This article explains how some LGBTQ Arab movements have successfully relied on strategic litigation to confront criminalization laws while others have had less success in pursuing overtly confrontational approaches. The paired comparison between Tunisia and Lebanon shifts our focus back to the agency of judges and social movement leaders in shaping legal outcomes for LGBTQ citizens.

## Keywords

legal mobilization — legal opportunity structure — strategic litigation — gay rights — democracy and minority rights — sodomy laws — Tunisia — Lebanon

## 1 Introduction

*'We worked on creating a new kind of jurisprudence within the judiciary. We wanted to re-imagine the role of the Lebanese judge as a custodian of democracy that also saw within his or her duties to protect minorities not just safeguard the status quo.'*

LEBANESE LGBT activist<sup>1</sup>

*'In certain places, pushing for decriminalization is not a very good idea at this point in time, Lebanon included.'*

LEBANESE LGBT activist<sup>2</sup>

Can LGBTQ social movements advance legal protections for LGBTQ persons in non-democratic settings? Research from the Arab world shows that mobilizing the law is a promising option for LGBTQ rights in the region, especially since the advances we have seen so far have taken place in some of the most unlikely settings. The prevalence of authoritarian systems in the region may lead observers to dismiss the prospects of gay rights activists obtaining favourable court rulings. But what is remarkable about the case of gay rights activism in this region is that, despite the many obstacles, legal victories have already been achieved, and they happened not in the region's newly born democratic republic, but in Lebanon — a state tightly controlled by competing socially conservative factions and one that has been on a spiralling trajectory toward autocracy in recent years.

In January of 2020, news broke in the *Lebanese Daily Star* that, for the second time, a military prosecutor refused to file charges of 'homosexual conduct' against a soldier who was found contacting four other soldiers on the gay dating app Grindr, which is banned in the country. Prosecutor Peter Germanos refused to file homosexuality charges against the men under Article 534 of the Penal Code, which carries a 1-year prison sentence, despite being instructed to do so by then Defence Minister Elias Abou Saab. Article 534 falls under the 'Offenses Against Public Decency and Morality' section of the Lebanese Penal Code of 1943, which is a vestige of the French Protectorate era, prohibiting 'sexual intercourse against nature'. In this instance, Judge Germanos argued that he would prosecute non-consensual sexual relations of any kind, but, since

1 T. Zeidan, *Tarek of HELEM! The Queer Arab*, Podcast audio (1 June 2019), available online at <https://thequeerarabs.com/podcast/episode-69-in-english-tarek-of-Helem/> (accessed 13 April 2020).

2 *Ibid.*

consent was not an issue, he went against the instructions of Abou Saab and closed the case. He further noted that the incident sheds light on the need to reform the outdated penal code which fails to specify the meaning behind 'sexual activity against nature'.

This high-profile case comes after a string of decisions by Lebanese civil and military courts to dismiss homosexuality charges in 2009, 2014, 2016, 2017, 2018 and 2020, in lower courts and in appeals courts alike. This cascade of legal victories demonstrates how prosecutions under Article 534 are becoming increasingly difficult, and how acquittals in 'anti-sodomy' cases have become more common in recent years.

Whereas significant legal advances for LGBTQ rights are noticeable in Lebanon, Tunisia's crackdown on LGBTQ rights has intensified in recent years.<sup>3</sup> Despite the fact that the country saw a surge in the number of newly established civil society organizations following the Arab Spring, many of which openly advocate for sexual and bodily rights, state repression of LGBTQ persons continued. And in some ways, it has intensified. According to human rights organizations and watchdog groups, police and security personnel have been targeting LGBTQ activists, detaining them without cause, searching their homes and offices, confiscating their documents, torturing and assaulting them physically.<sup>4</sup> The violence against queer Tunisians extends well beyond the realm of rights activists and organizers, as the police ramp up arrests against ordinary Tunisians on suspicion of homosexuality, employ surveillance technology to entrap queer citizens and subject them to intrusive and torturous anal examinations. In early 2022, *Damj*, one of Tunisia's leading LGBTQ advocacy organizations, estimated that 2,899 persons had been imprisoned under the pretence of Article 230 of the Penal Code, which criminalizes homosexual relations. According to earlier estimates from 2020, the group had recorded 1458 convictions since the revolution began, with sentences ranging from 1 month to 3 years in prison under Article 230 (see Figure 1).<sup>5</sup> *Damj*, which devotes much of its resources to providing legal aid to LGBTQ Tunisians, reported in 2020 that it assisted LGBTQ individuals at police stations in

3 *Tunisia: LGBT Activist's Assault seen as a Pattern by Police*, available online at <https://www.independent.co.uk/news/tunisia-tunis-police-lgbtq-rights-france-b1973436.html> (accessed 20 February 2022).

4 M. Hall, 'The Crackdown Against Tunisia's LGBTQI+ Community', *The Tahrir Institute for Middle East Policy* (7 May 2021), available at <https://timep.org/explainers/the-crackdown-against-tunisias-lgbtqi-community/> (accessed 9 October 2021).

5 Human Rights Watch, *Tunisia: Police Arrest, Use Violence Against LGBTI Activists*, available online at <https://www.hrw.org/news/2021/02/23/tunisia-police-arrest-use-violence-against-lgbti-activists> (accessed 20 March 2020).

116 cases and responded to 185 requests for legal consultations. According to these reports, 'these figures are five times higher than those they recorded in 2019', a trend indicative of the worsening status of gay rights despite the country's strides toward liberalization and the inclusion of individual rights protections in its new constitution.

How do we explain the rise in court rulings dismissing homosexuality charges in civil and military courts in Lebanon, despite regime pressure and public statements condemning homosexuality from high-ranking ministers and security establishment figures? And how do we explain why, despite the rise of well-resourced LGBTQ rights organizations waging systematic and continuous campaigns for change, LGBTQ rights protections lag behind in the region's nascent democracy? These legal developments call into question widely held scholarly narratives that depict a world in which LGBTQ rights advancement thrives and deepens in democracies but is 'virtually non-existent in non-democracies'.<sup>6</sup> Furthermore, the rapid shifts we are seeing on LGBTQ matters in Lebanon's court system counter conventional understandings of authoritarian governance structures and regime hegemony over the corpus of the authoritarian state and legal outcomes.

This article proceeds as follows. Section 2 overviews the core arguments in this paper — first, that there is a direct link between legal outcomes and the tactical choices activists make in their fight against state repression; and, second, that activists' interactions with the state and their perceptions of their ability to manoeuvre within its judicial structure influences their tactical approach. Section 3 explains how legal mobilization is actualized, even in unfriendly terrains, and lays out alternative channels that LGBTQ movements pursue when successful litigation seems illusive. Section 4 focuses on the Middle East and North Africa (MENA) region, examining the simultaneous increase of state repression against LGBTQ people and the formation of collective movement for LGBTQ rights. Section 5 draws on a paired comparison between two prominent LGBTQ movements in the Arab region to illustrate how intra-movement dynamics and the movements' perceptions of their legal opportunities explain their approach to confronting anti-LGBTQ laws. Finally, Section 6 offers a re-assessment of whether democracy matters for advancing legal equality for queer people. It poses the question, what is it about *some* democracies, and a smaller but still notable number of autocracies, that leaves them open for such legal mobilization?

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6 O.G. Encarnación, 'Gay Rights: Why Democracy Matters', *Journal of Democracy* 25(3) (2014): 90–104, at 91.

## 2 The Argument

Focusing on LGBTQ rights legal mobilization<sup>7</sup> in the MENA, I aim in this article to bring into question the link between democracy and gay rights in order to shift our focus away from regime dichotomies which hold limited explanatory purchase. Instead, I highlight a more useful analytical practice that examines the nexus between social movements and legal systems. This practice requires a close study of the legal opportunity structures (LOS) in the cases we study and the tactical choices LGBTQ activists make in contesting criminalization and state repression (Fig. 2).<sup>8</sup>

There is a widely held belief that electoral democracy and LGBTQ rights advancement go hand in hand. Scholarly work on this topic suggests several pathways: democracy entails the rule of law, judicial independence, and the freedom to organize and lobby legislators who could translate societal pressure into policy. The experience of gay rights movement in the United States and Europe is illustrative of these mechanisms, as interest groups and strategic litigation over the past several decades produced remarkable successes.

The opposite is not true. The absence of democracy does not preclude LGBTQ rights advancements. It can certainly impose higher costs for collective action and make legislative breakthroughs more difficult. Furthermore, democracies have historically repressed queer communities in a way that mirrors how autocracies treat sexual minorities. One only needs to consider how the United States federal government treated those suspected of homosexuality during the Cold War or how police forces systematically targeted LGBTQ people during the Stonewall era.<sup>9</sup>

In this article, I argue that, in the face of laws that directly or indirectly treat same-sex relations and non-normative gender expressions as criminal

7 Legal mobilization is defined as 'the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights'; see C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, IL: University of Chicago Press, 1998).

8 According to Vanhala, the legal opportunity structure 'represents the degree of openness or accessibility of a legal system to the social and political goals and tactics of individuals and/or collective actors'. L. Vanhala, 'Legal opportunity structures and the paradox of legal mobilization by the environmental movement in the UK', *Law & Society Review* 46(3) (2012): 523–556, at 527.

9 E. Cervini, *The Deviant's War: The homosexual vs. the United States of America* (New York, NY: Farrar, Straus & Giroux, 2020); S. Anabtawi, 'Imagined Treason and Post-Lavender Scare Politics: How LGBTQ Communities Respond to Fifth Column Accusations', in H. Mylonas and S. Radnitz (eds), *Enemies Within: The Global Politics of Fifth Columns* (New York, NY: Oxford University Press, 2022), chapter 9.

offenses, nascent LGBTQ movements have three possible options. First, they can choose to challenge existing penal codes and seek to repeal anti-sodomy laws by lobbying the state and policymakers domestically or leveraging international pressure to extract policy concessions.<sup>10</sup> Second, they can pursue 'insider tactics' and challenge the enforcement and application of these laws in domestic courts (strategic litigation) rather than seeking wholesale legislative change. Alternatively, they may lack a legal strategy, thereby eschewing challenging the law altogether in favour of focusing inward and devoting their energy to the construction of a sociopolitical identities within the community, capacity-building, raising awareness, and mobilizing allies.

Through inductive qualitative research carried out between 2016 and 2021, I take this analysis a step further to posit that these tactical choices are not merely dictated by structural factors, such as the nature of the regime, or the presence or absence of political and legal opportunities. However, these strategic decisions hinge on activists' *subjective understanding of the legal opportunity structure*. That is, how activists *perceive* their ability to achieve legal change. Do they believe that decriminalization is within reach? Do they think they can achieve organizational unity and coherence as a movement in dealing with the state? Do they believe they can *create* legal opportunities where none exist? These perceptions are not wholly founded on objective material realities, and they can vary from movement to movement and within movement over time, independent of structural changes.

As this article shows, despite facing similar structural constraints and restrictive legal environments, activists' subjective evaluations of the legal system, their relationship to it, and their perceptions of their own ability to make legal change differ dramatically between the LGBTQ rights movements in Lebanon and Tunisia. These *between-movement* differences played a major role in shaping their tactical approaches, and subsequently, legal outcomes.

Furthermore, my empirical analysis shows that LGBTQ activists in non-democratic settings have been able to mobilize critical support structures that make strategic litigation tactics viable and successful; these support structures include cause-lawyers, organized groups, and funding necessary for a sustained legal effort. I ultimately argue that by building these structures from the ground up and employing them in the pursuit of strategic litigation tactics, Lebanese LGBTQ rights activists were able to incrementally *create* new legal opportunities that their counterparts in a more democratic setting such

<sup>10</sup> M. Keck & K. Sikkink, 'Transnational advocacy networks in international and regional politics', *International Social Science Journal* 51(159) (1999): 89–101, at 93.

as Tunisia found themselves unable to achieve despite objective political and legal openings.

Lebanon has experienced numerous political and economic crises in recent years, which have sparked mass protests and unrest. As political elites sought to maintain their grip on power in 2019, citizens' demands for the removal of the country's sectarian and corrupt political upper echelon resulted in increased repression, arrests, broader military involvement, and 'a rise in the number of disappearances of individuals opposing the government'.<sup>11</sup> In 2021, the annual *Democracy Index Report* downgraded Lebanon from its previous classification as a hybrid regime to an authoritarian regime.<sup>12</sup>

In the face of gradual autocratization and powerful sects in control of the executive and legislative branches, queer activists in Lebanon believed that the political system was 'too rigid to break' and that a new strategy was needed to change the status quo. Activists from the organizations *Helem* and *Legal Agenda* articulated a strategic litigation approach, as they believed that working within the judiciary, and starting deliberations with and among judges can be a pathway to escaping the sectarian trap, by taking the conversation about LGBTQ issues away from the realm of religion and morality and bringing it into the realm of legality, justice and rights. Several years later, Lebanese cause-lawyers believe that they were successful in transforming judges' perceptions and creating new jurisprudence within the court system.

To achieve this result, they had to rely on a robust network of rights-lawyers and newly available resources to lobby the courts and reshape the way Article 534 is interpreted and enforced. Because of the widespread corruption and weakness in the Lebanese justice system, courts have historically been hostile to LGBTQ litigants. However, the LGBTQ movement and its legal advocacy supporters were successful in establishing openings where none previously existed.

In Tunisia, LGBTQ movements only gained traction following the Arab Spring. While the country transitioned away from the Ben Ali regime and joined the ranks of full electoral democracies, the number of visible LGBTQ organizations and initiatives rose sharply. But they hardly formed a cohesive movement. Apart from the ideological schisms that splintered the movement, the LGBTQ movement fell short of articulating a coherent and unified

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11 Economist Intelligence Unit, *Democracy Index 2020: In Sickness and in Health?*, available online at <https://www.eiu.com/n/campaigns/democracy-index-2020/> (accessed 20 Dec. 2021).

12 Tunisia was also downgraded from 'flawed democracy' to 'hybrid regime' given recent political turmoil in the country.

approach toward the state and its continued persecution of the community under Article 230. The adoption of a new liberal constitution, as well as the country's eagerness to meet the demands placed on it in international fora, encouraged organizations like *Damj* and *Mawjoudin* to pursue the repeal of Article 230. Rather than spending years trying to persuade an inhospitable judiciary, they hoped that working with the executive and legislative branches would swiftly culminate in the rehauling of the penal code. Thus, they focused their efforts on lobbying allies in the parliament and producing reports that document violations against LGBTQ Tunisians, such as the *Universal Periodic Report for the UN Human Rights Office*.

In general, the Tunisian movement aimed to mobilize a global network of allies to hold newly elected governments accountable and effect policy change. However, these efforts were complicated when a prominent LGBTQ organization in their coalition took the 'leverage politics' model to an extent that did not meet their approval, lobbying the European Union Parliament to impose economic sanctions on Tunisia for violating the rights of its LGBTQ citizens. Groups like *Damj* and *Adli* pursued limited legal tactics domestically as well, while *Mawjoudin*, *Chouf* and others considered the political atmosphere as too unstable, and believed it was premature to focus their energies on domestic courts. Instead, they opted to focus on capacity building and attending to the needs of the LGBTQ community, putting the litigation approach on the back burner.

A full decade later, many of these hopes were dashed. Subsequent elected governments failed to create a constitutional court that could have struck down Article 230. The Individual Freedoms and Equality Committee (COLIBE), a reform commission appointed by President Essebsi, recommended the repeal of Article 230, but these recommendations were never enacted by the legislature. Similarly, a number of MPs working with LGBTQ activists proposed drafting a new law in 2018 decriminalizing homosexuality and banning forced anal exams, but such proposal never saw daylight in the parliament. And while Tunisia agreed to the recommendation of the UN Human Rights Council to prohibit the use of forced anal exams, the police continue to employ this act of torture until today.

Because the leverage politics model has thus far failed to deliver substantial results, organizations like *Mawjoudin* have recently turned to partnerships with *Helem* and other Lebanese and Tunisian-based legal advocacy organizations to develop a litigation strategy. Similarly, *Damj* has accelerated its litigation efforts over the past 2 years, filing an appeal with the Supreme Court in December 2021 to overturn two lower court convictions. With the recent tectonic shifts in Tunisia's political landscape, including the dissolution of the



Parliament and the High Judicial Council, it is too early to predict whether *Damj* and its peers will continue their strategic litigation efforts and whether their endeavours will succeed as they did previously in Lebanon.

### 3 Snatching Victory from the Jaws of Defeat: Challenging Criminalization through Strategic Litigation and Leverage Politics

In the previous section, I argued that democracy alone is not a sufficient explanation for when we observe legal advances pertaining to LGBTQ rights and that in order to understand diverging outcomes, we must consider the agency of collective actors — activists and movements — and how they influence their political and legal environments. The social movements literature on legal mobilization offers a useful theoretical framework to understand how activists mobilize in the face of considerable structural challenges. Drawing on the Legal Opportunity Structure research tradition developed by Epp, Andersen, Wilson, Vanhala, and Arrington among others, I argue that even in authoritarian settings that appear inhospitable to gay rights and litigation strategies, collective actors for gay rights can wield tremendous influence on how laws are enforced and interpreted. Charles Epp contends that judicial approval of individual rights results from ‘deliberate, strategic organizing by rights advocates’ who capitalize on the presence of ‘support structures’ for legal mobilization.<sup>13</sup> Support structures include cause-lawyers, advocacy organizations, and material resources. Epp argues that legal mobilization — defined as ‘the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights’ — requires ‘seasoned, well-resourced organizational litigants (“repeat players”)’ who can bring forward a steady stream of cases on a particular issue.<sup>14</sup>

Lisa Vanhala highlights an important theoretical point about the dynamic nature of legal opportunities and legal mobilization. She argues that research on legal mobilization should challenge ‘static, snapshot applications of the LOS by bringing attention to the dynamic nature of the relationship between the “structure” of legal opportunities and the agency of activists.’<sup>15</sup> Seen as such, agents can mobilize and lobby to ‘render it more open or closed’. The utility of this theoretical framework stems from its acknowledgment of the effect collective actors could have on the justice sector. It does not regard activists or

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13 Epp, *supra* note 7 at 2, 18.

14 Epp, *ibid.*, p. 18.

15 Vanhala, *supra* note 8 at 528.

social movements as reactive players, but rather as proactive in creating new legal opportunities. The recursive nature of the relationship between social movements and the legal system allows activists to learn and adapt over time, and mobilize support from the public, the media, experts, and lawyers to create new legal opportunities. The Lebanon case study highlights, for instance, how *Helem* and other organizations pursued strategic litigation to neutralize Article 534 and render it ineffective.

The bulk of legal mobilization research is based on empirical studies from liberal democracies. But as I noted previously, the absence of democracy does not render these mechanisms implausible when certain features are met. In fact, courts under authoritarianism have also been sites of contestation against anti-LGBTQ laws and state repression. In an authoritarian context, courts might be the sole option to achieve rights and protections for individuals and minorities when overt confrontation through protest or policy-change through democratic legislative channels are not feasible.<sup>16</sup> Considering the law in authoritarian states as a source of contestation is possible for two reasons. First, institutionalized judiciaries often have a cadre of career judges with a sense of mission and who are willing, in the presence of convincing cases that are well-argued by powerful rights lawyers to make the right decision even if prompts backlash from the regime. Second, when gay rights movements challenge state repression through the courts rather than a more confrontational approach, they become likely to extract concessions without appearing to challenge the legitimacy of the state.

Recent scholarship on legal mobilization for gay rights under authoritarianism highlights similar strategic approaches to the ones movements employ in democracies. Extant research in this area posits that nascent LGBT movements in repressive states tend to eschew overt and large-scale confrontation with the state due to their precarious status and desire for survival (*e.g.*, Chua,<sup>17</sup> Spires<sup>18</sup>). Rather than overt and visible forms of challenging the regime and its authority or threatening the existing order, Lynette Chua argues that in autocratic settings, LGBTQ movements engage in 'pragmatic resistance that involves an interplay among legal restrictions and cultural norms'.<sup>19</sup> She underscores the dual function of law in those particular settings. While law oppresses sexual rights and the civil liberties of LGBT people, it is also a 'source of

16 L.J. Chua, 'Pragmatic resistance, law, and social movements in authoritarian states: The case of gay collective action in Singapore', *Law & Society Review* 46(4) (2012): 713–748.

17 Chua, *ibid.*

18 A. Spires, 'Contingent symbiosis and civil society in an authoritarian state: Understanding the survival of China's grassroots NGOs', *American Journal of Sociology* 117(1) (2011): 1–45.

19 Chua, *ibid.*

contestation' offering movements the ability to challenge their own repression without resorting to public confrontation with the regime. The strategic dance described here often results in a compromise where criminalization laws may not be formally repealed, the state still concedes by ceasing to enforce them, and this is precisely the direction in which the Lebanese judiciary seems to be headed.

In describing this strategic interplay, Chua states 'in exchange for ensuring their movement's survival and making gains without direct confrontation or threatening existing power arrangements, they accept law's discipline and control, and thus reify the existing order'.<sup>20</sup> When LGBTQ communities use insider tactics to challenge their repression in court, any favourable decisions they get can also be framed as legitimizing the regime by giving it the opportunity to point to those decisions as 'the consequence of having an independent judiciary'.<sup>21</sup>

Emphasizing this strategic dimension of LGBTQ activism in the shadow of the repressive state, scholars run the risk again, of exaggerating the uniformity of the effect that authoritarian rule has on movement strategies. Chua suggests that LGBTQ activists,

[...] focus on immediate gains that change practice and informal policies, but not formal laws and regulations. On the rare occasions when they do seek legal reform, they also perform pragmatic resistance. The goal is to stay alive and advance with skirmishes, rather than court demise with open warfare declared on grander principles [...] These activists understand the state to tolerate some rule bending, even contraventions. As a whole, so long as their tactics do not threaten the appearance of hegemonic control (Scott, 1990, as cited in Chua, 2012), the state tolerates them, and reciprocates by dancing to the socially constructed understandings of pragmatic resistance as well.<sup>22</sup>

Strategic litigation, nonetheless, is only one option that gay rights movements can pursue, often in parallel with other tactics when they manage to cultivate the support structure such litigation requires. But in some instances, whether the state is democratic or not, LGBTQ movements either fail to secure support structures and access to litigation or choose to pursue an alternative strategy altogether. Collective actors who perceive the LOS as inhospitable may invest

<sup>20</sup> Chua, *ibid.*

<sup>21</sup> Chua, *ibid.*, p. 728.

<sup>22</sup> Chua, *ibid.*, pp. 722–723.

in other tactics such as mobilizing support from transnational allies who can pressure the state and influence its policies toward LGBTQ people.

What happens when movements fail to lobby the state or the courts to effect change? The research on transnational contention suggests that when the channels between the movement and the state are severed, activists often resort to external allies who can pressure the state from above to bring about policy change. Whether through naming and shaming at the international stage, or through inviting sanctions from powerful state allies, local activists internationalize their cause to push for change. A movement can do so by utilizing its ability to build coalitions with global actors, allowing it to transform its own grievances to a transnational issue on the agenda of powerful global actors. Global actors, in turn, may choose to pressure state elites and incentivize them to pursue alternative policies. The internationalization of gay rights activism is, thus, the key to understanding recent policy shifts toward LGBT communities in several cases globally. Tarrow introduces the term internationalization to signify 'a dense, triangular structure of relations among states, non-state actors, and international institutions, and the opportunities this produces for actors to engage in collective action at different levels of this system'.<sup>23</sup> I use the term slightly differently to describe the process through which local actors place domestic issues on the agendas of international actors by using successful framing strategies that allow them to build coalitions with international forces. The literature on transnational advocacy networks theorizes this strategy, which is described as the 'boomerang pattern' of influence whereby the target of activism is to change a *state's* behaviour through transnational networks in instances where the link between domestic activists and the state is severed, causing local groups to seek the help of international allies to put outside pressure on the state.<sup>24</sup> Having specified the state as its target, the boomerang mechanism is one case of 'leverage politics' where weaker members of a network call upon more powerful actors to affect a given situation of contention.<sup>25</sup>

Leverage politics, and the boomerang effect, are particularly effective when three ideal conditions are met: (1) when a domestic social movement can establish dense ties with international actors and become well nested within a transnational network of activism; (2) when a social movement is capable of framing its mission in a way that aligns with the discourse of a powerful

23 S. Tarrow, *The New Transnational Activism* (New York, NY: Cornell University Press, 2005), p. 25.

24 Keck & Sikkink, *supra* note 10 at 93.

25 Keck & Sikkink, *ibid.*, p. 95.

transnational activism network; and (3) when the target of the boomerang mechanism (state or individual) is vulnerable to international pressures.<sup>26</sup>

Transnational linkages and first-hand contact through global human rights forums allow the replication of these models of activism. The emergence of the internet and social media have also rendered cross-learning more feasible. For instance, while the success of the Latin American gay rights groups in the early 1990s relied on activists meeting at international conferences for human rights advocacy, MENA activists today can easily share their strategies, news, and tactics with their peers in neighbouring states through modern technology. Discourse and strategy 'diffusion' in the realm of gay rights activism mimics 'diffusion' and contagion patterns in the spread democratization, and economic reform.<sup>27</sup> Though the language of contagion and diffusion connotes an organic or an evolutionary process where successful strategies survive and become dominant and less successful ones disappear, the process of sharing these 'models of activism' is far from accidental. In fact, several international non-state actors have emerged in Western societies since the 1970s to replicate these models and facilitate linkages between domestic gay rights movements and global actors. The most prominent NGO in this realm has been The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) which has actively contributed to the spread of LGBT rights activism globally and to pressuring states to comply with the protection of their LGBTQ citizens. That said, the availability of multiple strategies (domestic litigation v. leverage politics for instance) suggest that local movements have to make strategic choices based on the skills, expertise, resources, networks, and allies available for them.

#### 4 Homosexuality, Criminal Law and the Emergence of LGBTQ Rights Claims in the Arab Region

The 1990s was a critical decade for LGBTQ people worldwide. In the United States, the struggle for gay rights had moved from the margins into the mainstream. Gay rights issues were on party platforms, pride marches had become an annual national tradition, and court cases contesting discrimination against

26 M. Htun & L. Weldon, 'When do governments promote women's rights? A framework for the comparative analysis of sex equality policy', *Perspectives on Politics* 8(1) (2010): 207–216, at 213.

27 Encarnación, *supra* note 6 at 94.

people based on their real or perceived sexual orientation, gender identity and expression (SOGIE) abounded.

It may have seemed at the time that such activism was a luxury that only prosperous democracies enjoyed. But for those paying close attention, there was activism in less predictable settings. By the late 1990s, the proliferation of LGBTQ identities and access to the internet prompted gays and lesbians in different parts of the Arab world to organize virtually and form underground social groups. In Lebanon, web-based gay collectives such as the Gay Lebanon Forum and Club Free<sup>28</sup> gave way to the first LGBTQ organization in 2002 when a small number of gay rights activists realized the need for a political advocacy arm and formed an NGO called *Hurriyat Khassa* (private liberties) to tackle Article 534.<sup>29</sup> Two years later, the organization *Helem* was founded with the aim of challenging anti-LGBTQ laws.<sup>30</sup> In 2002 as well, a queer feminist Palestinian organization named *Aswat* was established,<sup>31</sup> and another LGBTQ organization named *Damj* started in Tunisia.

These LGBTQ advocacy organizations across the Arab region evolved in parallel and began to surface in tandem with — if not partially in response to — the rise of state homophobia. In 2001, the Egyptian State Security Investigations officers (*Mabahith Amn al-Dawlah*) alongside Cairo's Vice Squad raided a floating gay nightclub on a Nile cruise called the Queen Boat and detained several dozen men.<sup>32</sup> Footage of the trials of 52 alleged gay men on charges of debauchery were broadcast to the entire region and the names and workplace addresses of those arrested were printed in national newspapers.<sup>33</sup> The Human Rights Watch (HRW) organization highlighted that as a result of this trial,

[h]omosexuality abruptly became visible in Egyptian society and politics, as a vociferously condemned corruption [...] it loudly admonished public and police that homosexual conduct undermined religion and

28 A.Saleh, 'HELEM', *Journal of Middle East Women's Studies* 11(3) (2015): 368–370.

29 A. Sandels & N. Moawad, 'Lebanon', in C. Stewart (ed.), *The Greenwood Encyclopedia of LGBT Issues Worldwide*, Vol. 1 (Santa Barbara, CA: ABC-CLIO, 2010).

30 Outright & AFE, *Activism and Resilience: LGBTQ Progress in the Arabic-speaking States in the Middle East and North Africa Region, 2018*, available online at <https://outrightinternational.org/resilience> (accessed 5 January 2019).

31 S. Atshan, *Queer Palestine and the Empire of Critique* (Stanford, CA: Stanford University Press, 2020), p. 46.

32 Human Rights Watch, *Scandal and Stigma: The Queen Boat Trials*, 2004, available online at <https://www.hrw.org/reports/2004/egypt0304/3.htm> (accessed 20 April 2020).

33 N. Pratt, 'The Queen Boat case in Egypt: Sexuality, national security and state sovereignty', *Review of International Studies* 33(1) (2007): 129–144, at 132.

national security alike. And it advertised to individual officers that crack-downs could further their careers.<sup>34</sup>

Those effects were not limited to Egypt, as these trials were widely visible across the entire region.

The targeting of the Queen Boat in 2001 was also a catalyst for LGBTQ collective action in the Arab region, perhaps in similar way to the 1969 raid on the Stonewall Inn in the Greenwich Village neighbourhood of Manhattan.<sup>35</sup> Police raids on gay events and gathering places were also becoming more common in other parts of the region sparking conversations among activists, lawyers, civil rights groups, and NGOs on how to respond.

In the absence of LGBTQ rights driven organizations in the early 2000s, international rights NGOs — and some domestic groups — found themselves entering a new sphere of advocacy on behalf of an increasingly visible and at-risk constituency. However, given that homosexuality was being dubbed a foreign imposition, small groups of LGBTQ individuals in various Arab countries began turning their attention to establishing their own advocacy groups, the likes of *Helem* (Lebanon), *Damj* (Tunisia), *Al-Qaws* and *Aswat* (Palestine).

While state violence against queer citizens was becoming more prominent in the early 2000s, same-sex relations had already been criminalized in most of the region's penal codes for decades, in large part due to colonial legacies on state and legal development. Those which do not criminalize homosexuality explicitly rely on vaguely worded public morality laws which prohibit debauchery, public indecency, and acts that are 'in violation of Islamic standards' or lead to 'moral corruption and perversion' in order to crack down on sexual minorities.<sup>36</sup>

Although vaguely worded anti-sodomy laws, such as Article 230 in Tunisia and Article 534 in Lebanon, were given sharper teeth in the early 2000s, their enactment goes back decades ago. Scholars who study the history of the criminalization of homosexuality show that the majority of these laws are rooted in secular penal codes that were promulgated by French and British mandatory powers.<sup>37</sup> A recent study of the origin of Article 230 of Tunisia's

34 Human Rights Watch, *supra* note 32.

35 Although it is not LGBTQ-specific, the Egyptian Initiative for Personal Rights was also established in 2002 following the Cairo 52 incident and engaged in legal advocacy on behalf of LGBTQ Egyptians.

36 ILGA, *State Sponsored Homophobia 2019 Report*, available online at <https://ilga.org/ilga-launches-state-sponsored-homophobia-2019> (accessed 20 June 2019).

37 E. Han & J. O'Mahoney, *British Colonialism and the Criminalization of Homosexuality: Queens, Crime and Empire* (Abingdon-on-Thames: Routledge, 2018).

Penal Code, for instance, highlighted that Tunisia's Ottoman Penal Code of 1861 (*Qanūn al-ġinayat wa-l-aḥkām al-ʿurifiyyah*) made no mention of same-sex acts.<sup>38</sup> The study underscored that 'the 1861 Constitution also makes clear that pre-colonial Tunisian authorities did not intend to criminalize sodomy' and that even 'following its repeal in 1864, there is no indication that Tunisian authorities sought to prosecute consensual homosexual relations between adults'.<sup>39</sup> What is Article 230 today — punishing homosexual acts by up to 3 years in prison — first appeared as a handwritten note on the margin of the 1911 Preliminary Draft of the Tunisian Penal Code. This document which was prepared by a French drafting committee mirrored the 1810 French Penal Code. Khouili and Levine-Spound contend that in pre-colonial Tunisia, consensual homosexual acts had been treated as taboo and relegated to the private sphere but not criminalized until the French came into the picture.

The presence of these laws has been a constant for decades but how and when they have been applied, interpreted, and challenged has varied both across Arab countries as well as over time. And while LGBTQ rights observers are acutely aware of the first fact, they often overlook the second one. The uneven enforcement and judges' variant interpretations of legal texts as I will show in the next two sections of this article greatly matter for legal scholars and social scientists and call for a closer study not just of the laws and where they originate, but also of who benefits from enforcing them and who has the autonomy and interest to deny their application. There lies the bulk of judicial politics and the complexity that characterizes the recursive nature of the relationship between LGBTQ activists and the state.

## 5 To Challenge or to Repeal the Law? Divergent Strategies across Lebanon and Tunisia

For the purposes of this article, Tunisia and Lebanon are ideal cases for comparison. Both countries inherited a French civil law system. Both countries have had significant openings for civil society to lobby for gender, minority, and human rights. LGBTQ rights advocacy organizations surfaced in both countries by the early 2000s despite significant obstacles. Over the past decade, LGBTQ groups and their civil society allies in Lebanon and Tunisia have

38 R. Khouili & D. Levine-Spound, *Article 230: A History of the Criminalization of Homosexuality in Tunisia*, 2018, available online at <https://article230.com/en/article-320-eng/> (accessed 5 February 2020).

39 Khouili & Levine-Spound, *ibid.*, p. 13.



campaigned against Article 534 and Article 230 respectively — both remnants of an entrenched institutional legacy of the French colonial era. Similarly, the majority of the population in both countries does not tolerate homosexuality according to cross-national Pew and Arab Barometer polls.

Yet, there are major institutional distinctions. In 2011, Tunisia's brief uprising which ousted Ben Ali put the country on the path to transition toward democracy. Meanwhile Lebanon's political system, plagued with corruption and factionalism, does not meet the threshold of democracy. This variation along the democracy/authoritarianism dimension will prove helpful in understanding the effect of democracy or its absence on LGBTQ collective action and legal strategies.

The two movements also vary in their approach to tackling the criminalization of homosexuality and non-normative gender expressions. In Lebanon, a clear legal strategy evolved over time. The LGBTQ movement began cultivating a support structure to pursue strategic litigation. They relied on external financial support, expanded their outreach to a network of professional lawyers who have a reputation for working on rights issues and winning court cases. Their legal strategy started paying off in 2009 when a judge refused to apply Article 534 setting a precedent that foreshadowed later judgements in higher courts. The LGBTQ movement in Tunisia has not gained similar successes on the judicial front. Instead, its strategies were more fragmented with some groups opting to skirt domestic lobbying in favour of leveraging external pressure on the state from transnational allies, states, and organizations with the aim of repealing Article 230 entirely rather than 'neutralizing' it. That internationalization approach has achieved limited successes. The most notable of which is Tunisia's acceptance of Universal Periodic Review recommendation from the UNHRC to ban forced anal examinations — a commitment that was made in principle but never implemented.

The Tunisian case study shows that electoral democracy and liberal reforms on their own do not prove sufficient to advance legal protections for LGBTQ Tunisians as hundreds of citizens continue to experience arrest and trial on charges of homosexuality. Yet, Lebanese gay rights activists have successfully mobilized and managed to create new legal opportunities despite the increasingly authoritarian nature of their state.

### 5.1 *Lebanon*

The Lebanese LGBTQ rights movement prides itself for being the first to mobilize in the MENA region. This historical development mirrors the emergence of gay rights movements in other parts of the world — a response to state repression and the criminalization of non-conforming sexual practices and gender

identities. In Lebanon, the penal code criminalizes homosexuality for up to 1 year in prison. Since the start of the new millennium, the country has seen multiple attempts at redrafting the Penal Code which dates back to 1942. But all of these proposed attempts were intended to make Article 534 broader and explicit in mentioning *gay* and *lesbian* relations. A 2002 Draft proposed replacing the language of ‘unnatural intercourse’ to ‘unnatural sexual relations’ in order to penalize all gay and lesbian sexual relations. The key question I tackle in this section focuses on how the targets of these increasingly repressive policies responded to state repression.

In 2002, A group called *Hurriyat Khassa* (private liberties) created by attorney Nizar Saghieh was registered to tackle the proposed changes to Article 534 of the Lebanese Penal Code. The result of this first official mobilization of gay activists was an organization by the acronym *Helem* (*Himaya Lubnaniya lil Mithliyin*) which means ‘Lebanese protection for LGBT’. Helem — which started as an *ad hoc* sub-group of *Hurriyat Khassa* — sought to register the organization according to the country’s NGO laws, but the Ministry of Interior denied them a filing number. In 2003, the *Lebanese Daily Star* quoted *Hurriyat Khassa’s* reaction statement to the new Draft Law, which said:

The new Draft Penal Code is considered to be a form of tribal communal law from the Middle Ages, consecrating traditions and closeness, jeopardizing freedoms of belief and choice, and interfering in the private lives of citizens.<sup>40</sup>

The campaign they launched to resist the reformed Penal Code was framed in broader terms that meant to get other civil society groups on board. The campaign against the new law was supported by the Lebanese Association for Human Rights, the Lebanese Democratic Women’s Gathering, *Khatt Mubashir*, and Amnesty International. The group compiled a 272-page book with detailed legal studies written by rights lawyers focusing on each amendment that was under consideration in the Lebanese Parliament’s Administration and Justice Committee. It did not focus solely on the expansion of Article 534. Instead, it framed the entire amended Penal Code as an encroachment on citizens’ privacy, modern values, sexual and individual freedoms, and an assault on women. By highlighting a whole slew of social issues, the campaign eschewed activating negative majoritarian sentiments toward homosexuality, and allowed them to carve out space and be visible within Lebanon’s civil society arena.

<sup>40</sup> B. Chayban, *New Penal Code Slammed as ‘Disaster’ for Freedoms*, available online at <https://dailystar.com.lb/ArticlePrint.aspx?id=45787&mode=print> (accessed 5 April 2019).

This successful campaign set the tone for the movement for many years to come, embedding LGBTQ activism as part and parcel of a broader struggle for progressive values, individual liberty, feminist liberation and anti-imperialism. In fact, since its early years *Helem* vowed to reject any conditional aid that would tie it to political agendas or projects.

*Helem's* fight against state and societal homophobia continued to gain more visibility. In May of 2005, the organization began commemorating the International Day Against Homophobia (IDAHO). The celebration which entails public discussions, art exhibits and film screenings drew attention and rebuke from influential media outlets and the Sunni religious establishment (*Hay'at Ulama' al-Muslimin*). The organization also started running a community center, providing services to Lebanese and refugee LGBTQ people while focusing on legal lobbying, influencing the media, and providing health services including testing and awareness campaigns on HIV/AIDS.

*Helem's* pragmatic strategy was based on a multi-pronged approach. On the one hand, its organizers were deliberate in focusing their lobbying efforts on the media and the law simultaneously. They expanded their circle of allies among famous journalists and began inviting them to host media training sessions for other journalists and media figures, in which the topic of covering LGBTQ rights in the press was prominent. Today, Lebanese LGBTQ activists report that they work with an ever-growing network of 60 journalists who have helped the movement shift media coverage and attitudes on the subject.

The Lebanese LGBTQ movement's legal strategy began to pay off in a famous court case in 2009 where Judge Munir Sleiman disputed that homosexual relations were 'contrary to the order of nature', and went on to offer an elaborate explanation in his ruling of what nature is. He concluded that what is often deemed 'unnatural' is a simple reflection of the social mores of the time and that it is 'impossible' to ascertain which human behaviour is unnatural. The judge's decision and new interpretation of Article 534 was based in a technical and ontological debate on how to interpret what is natural and unnatural rather than grounding his dismissal of homosexuality charges in broader legal frameworks on respecting privacy, human rights, and international treaties and laws. Sleiman concluded that 'consensual same-sex relations were not "unnatural", and therefore should not be subjected to legal penalty'.

How do we make sense of this sudden change in legal outcomes? Prior to this point, courts treated homosexual relations between men to be a violation of Article 534 which criminalizes 'intercourse that goes against the order of nature'. Now there is a major precedent where a judge says it is not up to the court to determine which human behaviour is unnatural. The ruling follows a series of public awareness and media campaigns by *Helem* and other partner

organizations that targeted the arrest, torture, and prosecution of LGBTQ people. In a personal interview with a prominent LGBTQ activist in Lebanon since the movement's early years, the activist reflected on the evolution of their legal strategy saying:

Lebanese society is ahead of the law. The law might stay the same but the direction is changing toward reinterpretation. Public pressure has helped us secure many victories, especially on the legal front. The judges now know that this is a sensitive issue and that public opinion is not in favour of arrests, violence, anal exams, imprisonment of gay people etc. And that strongly helped our cases. In a recent study of public opinion that we conducted, we asked "what should happen to LGBT people? Should they be sent to prison?" and there the responses were much more positive. Nearly 70% said no. So, I think there is a lot of room to change. And visibility has really helped us a lot now.

The approach to target public opinion in tandem with litigation secured multiple other wins in the court system in 2014, 2016, 2017, 2018, and 2020. In all of these cases, lower courts, a court of appeals, and a military court acquitted defendants charged under Article 534. In January 2014, a similar decision to the Batroun ruling was obtained in a lower court in Jdeide, except this time, the case which involved a transgender defendant went a step further in acknowledging the defendant's gender identity. The judge argued, 'Gender identity is not only defined by legal papers; the evolution of the person and his/her perception of his/her gender should be taken into consideration.'<sup>41</sup> The decision reflected documents submitted by cause lawyers from *Helem* and their partner organization Legal Agenda who have developed 'a model defence'. In 2016, a decision by Judge Hisham Qantar dismissed charges against a 'Syrian national assigned male at birth who was standing by the roadside wearing what was described as "feminine" clothing'.<sup>42</sup> In this case, the judge's position on Article 534 evolved to reference not just the problematic definition of what is natural, but also 'international human rights conventions and the *International Statistical Classification of Diseases and Related Health Problems*, which states that homosexuality is not a disease'.<sup>43</sup>

41 Outright & AFE, *supra* note 30.

42 Outright & AFE, *ibid.*, p. 29.

43 Outright & AFE, *ibid.*, p. 29.

In 2017, a new court ruling against the application of Article 534 took on an entirely new set of legal reasonings based in a rights and liberties discourse. Judge Rabih Maalouf stated that ‘Homosexuals have a right to human and intimate relationships with whoever they want, without any interference or discrimination in terms of their sexual inclinations, as is the case with other people’. This was a long and detailed ruling that cited non-discriminatory clauses in the constitution as well as Lebanon’s membership in the UN and the fact that it is bound by its conventions including the Declaration on Human Rights. It also stressed that homosexuals have ‘natural rights attached to them as humans’, which are covered in Articles 2 and 26 of the ICCPR, ratified by Lebanon in 1972. The judge went on to cite reports from World Health Organization and other mental health professional communities which confirm that homosexuality is not a mental disorder and concluded with an emphasis on the protection of the right to privacy as protected by international treaties in which Lebanon is a member.

The significance of this ruling reflects the evolution of the judiciary’s stance on the issue but also the willingness to be bolder in moving away from dismissing cases for lack of evidence or on technicality, toward offering a well-argued legal defence of gay rights. This is also a reflection of an evolving culture of ‘rights consciousness’ that *Helem*, Legal Agenda, Human Rights Watch (HRW), Arab Foundation for Freedoms and Equality (AFE), and their allies in the media and legal sphere have pushed forward over the past decade.

The El-Metn 2017 Court Decision did not go unnoticed. It gained significant attention from the media and was discussed in the Parliament. Most importantly, it prompted an appeal from the prosecutors. The appeal was heard by the Mount Lebanon Criminal Court of Appeals where the judges upheld the El-Metn acquittal. In this case, lawyers from Legal Agenda argued that identities and orientations cannot be criminalized when the law only criminalizes ‘acts’. Their case demonstrates the pragmatism of the litigants in working with existing institutions and laws to confront state repression. It is also a significant ruling as it is the first victory at an appeals court that is likely to affect how future cases are adjudicated.

The same strategy of mobilizing support from the media, professional expertise, and the public was also effective in putting an end to the medically discredited practice of forced anal exams. A sustained campaign by civil society groups titled ‘Tests of Shame’ helped spread awareness about the extent of the application of these tests, which are considered torture by the HRW and international standards. The campaign, which gained support from allies in the media, included sit-ins outside the Ministry of Justice and the Lebanese Order

of Physicians which pressured both institutions to issue circulars demanding the halt of this police practice which is used to produce ‘evidence’ of homosexual relations in Article 534 proceedings.<sup>44</sup>

The takeaway here is not that positive outcomes appeared in Lebanon because its judiciary is more receptive than that of Tunisia. Instead, cause lawyers tell us that ‘the judiciary is a violent place for people who don’t know the legal lingo’<sup>45</sup> and they consider it the hardest part of their task to render the court room a place where LGBTQ litigants can be seen and heard. Moreover, given that both Tunisia and Lebanon have civil law systems, we should not expect one system to be more prone to judicial activism than the other. In fact, judges in civil law systems arguably have less potential to create new policies or novel jurisprudence than judges do in common law systems. Thus, we can rule this out as the factor driving variation in court outcomes across the two cases.

What explains this variation — and these victories — is that the way several Lebanese judges interpret and apply Article 534 has changed — a noticeable change from how the same justice sector used to deal with LGBTQ-related cases a decade ago. This string of court victories is the product of years of strategic litigation by experienced cause-lawyers. Years of collaboration between activists, cause-lawyers, and community members resulted in a ‘model legal defence’. In preparing this legal document, lawyers and activists worked on preparing thorough and convincing legal, cultural, and science-based rebuttals to as many potential accusations or justifications that judges could make when they try to justify the application of Article 534 in a given case. This document is made available publicly so that any defence lawyer can utilize it in future cases.

These statements from lawyers and legal advocates that are part of *Helem* and Legal Agenda reflect this process:<sup>46</sup>

The way I see my role is bringing the voices of my clients, and particularly marginalized communities into the legal sphere to get them to be seen and to get them to be heard.... But in order for me be able to do that, I should see them first, and I should listen to them first, and use my legal knowledge to translate what they have to say into legal arguments. [...]

44 Outright & AFE, *ibid.*

45 These statements come from lawyers and organizers from *Helem* and Legal Agenda. These comments were given during a live virtual open forum organized by the Human Rights program at Harvard Law on 14 October 2020. Event information available online at <https://hrp.law.harvard.edu/events/movement-lawyering-and-social-change-a-spotlight-on-lgbtq-advocacy-in-lebanon/>.

46 *Ibid.*

by getting the judge to understand what the client is going through half of the battle is won.

What is remarkable about this litigation approach is that it takes into consideration the identity, history, and ideological orientations of the judge adjudicating each case in order to tailor a defence that is customized to the judges' own biases, preconceptions, and lived experiences. For example, the most common justifications that judges make when applying of Article 534 to LGBTQ sexual relations is that a sexual relationship between people of the same sex does not lead to procreation, hence, it is inherently "against the order of nature". In addressing this justification, one of the pioneers behind the defence models illustrates with a useful example:

We do not only make scientific rebuttals to Article 534, instead we make arguments that could make the judges identify with what we are saying. For example, we had a panel of judges that was composed of majority women judges, we made it known to the court that the legislator had not considered selling contraceptives illegal, and therefore, considered a relation between a man and a woman is not contrary to the law even if it does not have the objection of procreation. And thus, we brought up the fact that it is legal in Lebanon for a woman to go into a pharmacy and buy contraceptives and have a sexual relationship without the intention of procreation. Why did we use this analogy? Because we wanted the judges to look at us and look at our clients as they look at themselves.

These court cases further demonstrate the framing mechanisms central to this model. Lawyers who work on these cases have worked to dislodge dodgy political claims that frame LGBTQ people as an insidious threat to morality and local culture. Legal Agenda lawyers offer another useful illustration of these framing processes:

We use the model defence taking into consideration who the judges in front of you are and how they think. When we were in front of the Beirut Court of Appeals, we knew that the judges were from a certain generation and their main concern was whether we are imposing Western values and whether our work is based in the values of our own society. Therefore, it was important to demonstrate to the court that we are not coming from abroad, and we are not here to impose international human rights principles, and so we stressed the fact that we are from Lebanon, and so are our clients, and that the organizations we work with express themselves

in the public spaces, that they are rooted here. To demonstrate this to the court, we benefited from the visible work that *Helem* and our community do, showing that we are Lebanese and that we are one of multiple Lebanese cultures that should be recognized legally.

What is more, these cause lawyers strive to reconstruct how judges see their own role in adjudicating these cases. A Lebanese lawyer goes on to say:

[Our lawyers] don't just argue the specifics of the case, but they, in many cases, implicitly and sometimes subliminally suggest a new role for the judge and understanding the judge's role in protecting individuals, and protecting minorities in particular, and ushering new jurisprudence within the judiciary concerning gender identity and sexual orientation and gender. That is what makes judges really understand and go on and become advocates themselves.

Finally, in focusing on how activists and lawyers reflect on their accomplishments, several themes emerge elucidating both their own evaluations of their roles and of the court system. First, these movements do not pursue litigation merely to win cases. Instead, they view the deliberations taking place within the court room as an opportunity to reframe societal discourse on sexuality and gender expression. They go on to note:

[...] the judiciary is one of the few places in which you can have conversations that were otherwise impossible to have in other parts of the Lebanese government and other parts of the Lebanese public sphere.

Regardless of whether they win or lose a case, the act of strategic litigation has successfully reframed the issue of homosexuality as an issue of right, and personalized these prosecutions in a manner that can elicit empathy from the public rather than keeping it an abstract and polemical debate.

## 5.2 *Tunisia*

On the tenth anniversary of the birth of the Arab Spring in Tunisia, a new wave of civil unrest broke out as a response to a government-imposed lockdown. Anti-government protests spread across the country in subsequent weeks demanding accountability for the security forces and the police and economic dignity. Prominent among those who took to the streets were LGBTQ organizers from multiple LGBT rights organizations such as the advocacy group *Damj* that had become visible in the public sphere throughout the past decade. Two



*Damj* activists were among over a thousand detained in the crackdown on charges related to civil unrest. In late February of 2021, Human Rights Watch documented the arrest of more LGBTQ activists including a prominent gender-queer artist. In a last ditch effort, both *Damj* and HRW sent a joint letter to multiple UN rights experts and EU states demanding accountability for the government's violations of the rights of LGBTQ activists. The organizations called on those parties:

[...] to engage with the Tunisian government to hold their security forces accountable for violations of international law, and ensure that authorities refrain from using “sodomy” laws and vague “morality” claims, to curtail basic freedoms of sexual and gender minorities [...] Tunisia is one of the few remaining countries in the MENA region that provides a space for organizing around SOGI issues, and human rights more generally, and we regret to watch this space shrink. We believe it is necessary for the international community to urge Tunisia to adhere to its international human rights obligations.

At the start of the revolution a decade earlier, Tunisia's LGBTQ activists had been hopeful the political shift was an opportunity to advance their rights and rid the country's Penal Code of rudimentary articles that criminalize them. After the revolution, civil society saw a massive expansion with thousands of new organizations established by 2013. The opening up of the public space came along concrete legal change and the amendment of the 1959 Law of Associations, giving activists and LGBTQ persons in the country the opportunity to organize legally and more visibly.<sup>47</sup> But that space remains very precarious, with repeated attempts by the state to shut down LGBTQ organizations, harass their staff, surveil and imprison their activists. Ten years on, the record has been bleak. While the Tunisian movement strategy of leveraging external support allowed the survival of LGBTQ organizations, it only succeeded in dismissing sodomy charges in rare high-profile cases, while the number of convictions continues to rise rapidly.

Over the past decade, the LGBTQ movement in Tunisia experienced expansion and fragmentation, which made it difficult to coordinate a sustained legal strategy. One prominent LGBTQ organization, *Shams*, was pursuing overt confrontational tactics and ideologies that became a major source of concern for the broader movement, leading to the expulsion of *Shams* from the country's

47 E. Fortier, *Contested Politics in Tunisia: Civil Society in a Post-Authoritarian State* (Cambridge: Cambridge University Press, 2019).

coalition of LGBTQ organizations and their allies by early 2018. Since then, the country's organizations have pursued a reactive strategy toward the law, providing legal aid to victims who face prosecution and arrest, but without mounting a strategic and systematic legal campaign akin to the one observed in Lebanon.

One prominent leader within the movement notes:

Because the political climate was unpredictable at the time, we chose not to focus on advocacy. Instead, we wanted to concentrate on community building instead. In addition to that, the number of those within the community who are truly interested in legal activism [against Article 230] was small. Instead, we focused on preparing shadow reports for the UPR and recording rights abuses against the community for other international reports. [...] The government at the time was going around saying we have a perfect human rights record and we are committed to *blab la bla*. [...] We had to counter these falsehoods and speak out against the violations we face, such as arrests and anal exams. [...] In 2017 and 2018, we worked on another report to document the violence that queer people experience. And we tried to share it with members of the parliament directly to lobby them to act. We weren't able to get too far, but we gained the COLIBE report and its recommendations.<sup>48</sup>

Their efforts in the legal arena have, thus, focused on providing information, documenting abuses, and calling on transnational bodies to pressure the Tunisian state to suspend its assault on LGBTQ rights. While *Shams* continued to evolve in its strategic approach in a confrontational direction 'waging war' on the state through all possible international channels, other organizations like *Mawjoudin* have prioritized looking inward by focusing on identity formation projects, capacity building, and spreading public awareness about LGBTQ rights from an intersectional perspective that is grounded in a local context.

Even though Article 230 remains intact, there have been rare instances in which leveraging external pressure may have succeeded. In December 2015, a court in the city of Kairouan sentenced six students to 3 years in prison, and 3 subsequent years of 'banishment' from their city on allegations of sodomy after subjecting them to harsh physical beatings and forced anal forced exams used to obtain evidence of same-sex sexual relations. Tunisian NGOs, mentioned in the *United States State Department Annual Human Rights Report*, reported 56 cases of arrests under the Sodomy Law in 2015 alone. Following

<sup>48</sup> Personal interview, January 2020.

a powerful international campaign and foreign pressure that lasted 4 months, the men were finally released. This instance remains one of the few in which the leverage politics model has yielded a positive result *vis-à-vis* Article 230.

Nevertheless, the leverage politics model has not been entirely futile. So far, the movement has succeeded in very limited ways. By 2017, the country's human rights reputation had sustained serious damage internationally for subjecting LGBTQ persons to anal examinations while in police custody. A report published by the UNHRC described the practice as 'medically worthless' and one that 'amounts to torture'. In September of that year, the country accepted the recommendations of the UNHRC following its third *Universal Periodic Review* of Tunisia's human rights record, and vowed to ban the forced use of anal exams, stating that victims can now deny going through the exam if requested by a judge, without their denial being used against them in court. In practice, this concession was merely symbolic. Tunisia's police forces continue to subject detainees to forced anal exams, and judges continue to consider their refusal to undergo this practice as proof of guilt.

In a similar symbolic move, Tunisia was the only Arab country in 2019 to vote in favour of renewing the mandate of the UN independent expert on SOGI.

These moves gained the state significant publicity, but they have not helped advance the rights of LGBTQ persons domestically. The persecution of LGBTQ citizens under Article 230 of the Penal Code continues unabated, despite rare instances of movement success in resisting this rudimentary article. In a recent 2020 case, a Tunisian appeals court upheld the conviction of two gay men, based on confessions obtained while they were in police custody, and human rights observers confirm that it remains common for Tunisian courts to rely on anal examinations to manufacture evidence of sodomy. This case is part of an ongoing and intensified crackdown by the state on LGBTQ rights and organizations. In early 2021, police unions were inciting violence against LGBTQ persons through social media, and arresting activists from *Damj* and interrogating them about their organization's activity. A *Damj* official reported, 'Police are using homophobic chants in protests against us, calling us "faggots" and "sodomites" who deserve to be killed. They are trying to use our identities to discredit the [general] protest movement, but we are the movement, and our demands are intersectional'.<sup>49</sup> This escalation indicates that despite international pressure, the Tunisian State is likely to continue to target sexual minorities, instrumentalize their visible presence for populist ends, and intensify the use of Article 230.

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49 Human Rights Watch, *supra* note 5.

## 6 Democracy and Sexual Minority Rights: Revisiting Questionable Preconditions

What effect does democracy (or its absence) have on the legal status of LGBTQ people both in the Arab region but also more broadly? Is democracy necessary for safeguarding LGBTQ minority rights? These questions are in part motivated by an empirical puzzle apparent in the diverging trajectory of the legal status of homosexuality between Tunisia and Lebanon. And they are equally the result of increasingly common yet questionable assumptions about the vitality of democracy for sexual minority rights activism in research on LGBTQ studies.

From a normative vantage point, scholars commonly — and often correctly so — associate liberal democracy with values such as the respect for human rights, the rule of law, freedom of expression, pluralism, and constitutional safeguards for minority rights. But from an analytical perspective, political scientists take on a much more minimalist understanding of democracy as a political system in which people choose their rulers through free and fair elections and where incumbents have a significant chance of losing elections. But none of the above-mentioned values which go hand-in-hand with gay rights are embedded into electoral democracies by design. A snapshot of the world today reveals that the countries where gay rights protections formally exist are by and large democratic, and the majority of countries where homosexuality is a punishable crime are authoritarian. This leads to the common misconception that there are institutional or cultural features of democratic polities that make them *ipso facto* amenable for the attainment of sexual minority rights.

Despite the fact that political scientists have written volumes on the typologies of democracies and non-democracies, some of the literature that touches on democracy and gay rights slips into a reductive and crude understanding of regimes as a dichotomy of democracy and authoritarianism. My argument in this project rests on the important caveat that a tremendous variation in institutional features is found *outside* of liberal democracy. These differentiations in institutional arrangements matter so much for explaining legal outcomes that a crude dichotomous view of regimes does not allow for. When we unpack the residual category of non-democracies, we find that *some* authoritarian regimes have institutional features that allow for some degree of autonomy in the judicial branch and receptiveness to civil society pressures that allow activists an opportunity to make change.

Some of the outcomes I analyze here — favourable court verdicts for the LGBT movement in Lebanon but not in Tunisia — do not square with the literature on LGBTQ rights that rests on a binary understanding of democracy. Without paying attention to institutional features, one would falsely predict

that LGBT rights activists in Lebanon (a non-democracy) would be far less likely than the ones in Tunisia (a country that has already democratized and held multiple rounds of free and fair elections) to make inroads in their fight against the criminalization of homosexuality. The reality on the ground shows the opposite: arrests and convictions of gay citizens under Tunisia's Article 230 continue to be the status quo. In Lebanon, as stated earlier, LGBTQ rights lawyers secured favourable verdicts, and although these cases are not binding precedent, LGBTQ activists report that prosecutors no longer bother to bring sodomy charges before judges.<sup>50</sup>

A cursory look at Lebanon reveals that its court system is not independent, its political system is fragmented and plagued with corruption, and its judges are highly vulnerable to pressure from political elites who are staunchly opposed to LGBTQ inclusion. By contrast, Tunisia, has undergone a transition away from authoritarian rule following the Arab Spring, and it introduced a new constitution and one of the most liberal ones in the region. It ranks far higher than Lebanon on various measures of the rule of law<sup>51</sup> and civil and criminal justice. Reforms and the increased openness that accompany democratization would lead us to expect the country to be a likely case for advancing civil and individual liberties on the legal front.

How does this square with conventional wisdom on the relationship between LGBT rights and democracy? Is democracy in its minimalist definition necessary or sufficient for the attainment of legal protections for LGBTQ citizens? And does its absence foreclose the opportunity for the type of legal victories that LGBTQ social movements achieved in democratic contexts such as Western Europe and the United States since the 1960s?

I argue that being an electoral democracy does not guarantee LGBTQ activists success in confronting criminalization, and that a careful examination of state institutions (parliament and judiciary) is necessary to understand *when* legal inroads are possible. Moreover, authoritarian regimes have distinctly different institutional features. In some, but not all, state institutions — defective as they might be — are prone to change and to societal influence. Their judiciaries in particular vary (across country and over time) in how receptive they are to litigation and their judges' ability and willingness to rule independently of the interest of the executive. The latter two vary from an authoritarian setting to another. As a result, there is significant overlap among some

50 Personal interview with Georges Azzi.

51 The World Justice Project publishes an annual report focusing on the status of the rule of law around the world with country rankings. According to their data, Tunisia ranks significantly higher than Lebanon when it comes to the quality of civil and criminal justice.

democracies and a small but sizable number of autocracies in their institutional features that renders a crude regime distinction futile for understanding the outcomes of rights-based activism.

### 6.1 *Absence of Democracy is Not a Dead End (i.e., Democracy is not a Necessary Condition)*

The spurious relationship between gay rights and democracy lurks in the background in much of the scholarship that examines the status of gay rights cross-nationally. A common misconception about gay rights activism in the Arab world, for example, stems from a questionable assumption that progress for gay rights is virtually non-existent outside of liberal democracies and that due to widespread authoritarianism in the region, it is a 'least-likely' case for legal and policy change.<sup>52</sup> Some studies treat democracy as a sufficient condition for queer collective action to emerge and implicitly treat it as a necessary one. It is neither of those.

Despite being insufficient, arguments based on regime-type are common in this area of research. Quantitative attempts at assessing 'respect for gay rights' globally such as the *Gay Friendliness Index* argue that 'the nature of the political regime is a better predictor of gay rights' than cultural accounts or religious variations.<sup>53</sup> Omar Encarnación notes that gay rights have 'progressed most in the very parts of the world where the third wave has been most successful, and that gay rights have struggled the hardest in the very places where the third wave itself has faced difficulty in advancing, or has not advanced at all'.<sup>54</sup> He goes on to argue:

Among the many factors that make democracy an apparent *prerequisite* [emphasis added] for gay rights are the opportunities that it provides for advocacy — including access to the courts, the party system, and the legislature — as well as a social environment that permits gay people to live their lives openly and honestly, a critical but often overlooked factor in advancing societal acceptance of homosexuality. Not surprisingly, the most favourable environment for gay rights is found in places where political freedoms, civil society, and the rule of law have taken root, especially in recent decades, as in Spain, South Africa, and Latin America. By contrast, gay rights are languishing where authoritarianism is on the rise

52 J. Pierceson, *Sexual Minorities and Politics* (Lanham, MD: Rowman & Littlefield, 2016).

53 Encarnación, *supra* note 6 at 97.

54 Encarnación, *ibid.*, p. 98.

and civil society is under attack, as in Russia, most of Africa, and virtually the entire Middle East.<sup>55</sup>

Encarnación's account details some of the mechanisms through which direct democracy leaves the door open for activists to attain legal protections for LGBTQ people. But then it falls into the trap of making a generalization about gay rights under autocracy that is deductively invalid. Even if we accept the *correlation* between democracy and sexual minority rights, we cannot lapse into deducing that in the absence of direct democracy, gay rights are bound to languish.

This common logical fallacy — denying the antecedent — leads us to ignore and erase two formative decades in the LGBTQ movement history in the Arab region. The empirical reality of queer collective action in the Arab world, both visible and underground, shows a very similar historical trajectory to the one witnessed in the United States after WWII where gay men and women began to forge a political community and a shared cause toward queer liberation and ending legal discrimination.<sup>56</sup> LGBTQ movements in non-democratic places like Singapore, Myanmar, and Lebanon have taken root and mobilized allies and resources to challenge the extent of their legal rights through the court system. Despite all the structural challenges that accompany autocratic institutions, the ingenuity of social movements and their cause-lawyers have created legal opportunities where none existed before.

Authoritarianism admittedly poses significant hurdles to civil society and queer organizing. Under autocracy, police forces crackdown on those seen breaking the law and destroying social harmony. The Queen Boat incident of 2001 or Egypt's arrest of nearly 70 people after a concert-goer raised the rainbow flag in Cairo at a Mashrou' Laila concert are among the well-known examples. But as Human Rights Watch, International Gay and Lesbian Association (ILGA), Amnesty, and other international observers report, the arrest, torture, and harassment of people based on their real or perceived SOGIE have become routine in many parts of the Arab world, including Morocco, Tunisia, and Lebanon among others.

But repression often generates a response. Queer history compels us to pay attention to the role that state repression has played in creating bonds of solidarity among queer people. The Stonewall riots in the United States, now commemorated with annual pride parades were the result of repeated raids on

55 Encarnación, *ibid.*, p. 92.

56 J. D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970* (Chicago, IL: University of Chicago Press, 1998).

an underground gay bar in Manhattan and the harassment of the men and women who used to frequent it. These 'bonds of oppression' allowed men and women, whose vast social, political and demographic differences would have otherwise left them stranger to one another, to envision a sense of kinship and common culture. Queer historian John D'Emilio suggests that the repression gays and lesbians faced in the 1950s was the primary explanation for how a queer community in the United States emerged:

The shifts that occurred in gay life during the 1940s were not paralleled by a growing social tolerance of homosexuality. The matrix of religious beliefs, laws, medical theories, and popular attitudes that devalued and punished lesbians and homosexuals remained intact [...] The widespread labelling of lesbians and homosexuals as moral perverts and national security risks gave local police forces across the country a free rein in harassment. Throughout the 1950s gays suffered from unpredictable, brutal crackdowns. Men faced arrest primarily in bars and cruising areas such as parks, public restrooms, beaches, and transportation depots, while women generally encountered the police in and around lesbian bars [...] Systematized oppression during the 1950s exerted contradictory influences on gays. In repeatedly condemning the phenomenon, antigay polemicists broke the silence that surrounded the topic of homosexuality. Thus the resources available to lesbians and homosexuals for attaching a meaning to otherwise dimly understood feelings expanded noticeably. The attacks on gay men and women hastened the articulation of a homosexual identity and spread the knowledge that they existed in large numbers. Ironically, the effort to root out the homosexuals in American society made it easier for them to find one another.<sup>57</sup>

This process of group identity construction through repression is not exclusive to a geographic context, a political regime, or a time period. When members of a particular group experience repression, the resulting grievances become a common cause around which they rally and develop 'rights consciousness'.<sup>58</sup> As I noted earlier, episodes of crackdown and repression in the early 2000s were fundamental for understanding why so many queer political organizations were launched in 2002 in the Arab world. Two decades later, the mission statements of many of these LGBTQ organizations remain focused on repealing

57 D'Emilio, *ibid.*

58 Epp, *supra* note 7; H.J. McCammon & A.R. McGrath, 'Litigating change? Social movements and the court system', *Sociology Compass* 9(2) (2015): 128–139.



repressive laws and putting an end to police violence and harassment of queer people who now view themselves as a distinct cultural minority united by the common experience of institutionalized repression. Thus, we can see how repression, violence, and the scapegoating of minorities, all common features across autocracies, may actually have the opposite effect on LGBTQ mobilization than what the state intends from its systematic crackdowns.

## 6.2 *Electoral Democracy Alone is Not Sufficient for Attaining LGBTQ Rights*

Democracy and the rule of law are not interchangeable. By providing freedom of expression and broad participation, democracies open debate on rights, policies, and various issues that affect the way citizens are ruled. However, democracy alone cannot guarantee the protection of gay rights, nor any other form of human rights, as democratic governments also selectively choose which human rights principles to apply. In many instances, democratically elected governments engage in the suppression of women and minority groups in ways similar to those practiced by their authoritarian counterparts.<sup>59</sup> Democratic institutions and popular sovereignty can give power to forces that seek to block progressive efforts and oppress minorities.<sup>60</sup> Democratic legislatures have always passed laws that harm minorities and that has been a constant critique of representative democracy. Additionally, the literature on gay rights promotion in democratic contexts shows many examples of how political and legal advances in gay rights could trigger a sweeping backlash in public attitudes and opinion which could result in legislation limiting minority rights.<sup>61</sup> It is therefore, obvious that democracy matters for minority rights and LGBTQ rights more specifically, but only when certain features are present. And we have established that these features may also be present in a smaller but notable number of non-democracies, leaving the door open for LGBTQ movements to engage in litigation.

Thus, the democracy/authoritarianism dichotomy is less useful when the suppression of LGBTQ people occurs across both regime types. The tension inherent within democracy between ensuring majority rule and protecting minority rights has long been the concern of political thinkers and statesmen

59 B.P. Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (Westport, CT: Praeger, 1995), p. 33.

60 J. Lukacs, *Democracy and Populism: Fear and Hatred* (New Haven, CT: Yale University Press, 2005).

61 B.G. Bishin, T.J. Hayes, M.B. Incantalupo & C.A. Smith, 'Opinion backlash and public attitudes: Are political advances in gay rights counterproductive?', *American Journal of Political Science* 60(3) (2015): 625–648.

from to Alexis de Tocqueville to James Madison. This is why liberal democracies have enshrined constitutional safeguards for the rights of minorities. But even in the presence of such institutional features, liberal democracies like the United States continued to implement discriminatory policies through legislation and executive orders. The adoption of Jim Crow segregation laws and Eisenhower's multiple decades executive order banning gays from holding positions in the federal government are just two contemporary examples of *institutionalized* discrimination against racial and sexual minorities in the US.

Although constitutional protections for minorities do exist, most liberal constitutions do not explicitly prohibit discriminatory policies based on gender identity or sexual orientation, leaving the door wide open for judges — including constitutional court judges — to legitimate or invalidate such policies and leave LGBTQ people in a precarious position. Consider the recent history of LGBT rights in the United States, one of the longest and oldest surviving democracies today and home to one of the oldest organized LGBTQ social movements. Despite its democratic nature, the US long criminalized homosexual relations and conduct, and deployed police forces as well as the FBI to target and entrap gays and lesbians. During the height of the Cold War, Eisenhower issued an executive order banning gays and lesbians from serving in the federal government. The loyalty of LGBT people was questioned and they were labelled a national security threat. And while a homophile movement began to take shape as early as the 1940s, the first state to repeal its sodomy law did so in 1960.<sup>62</sup> Ellen Andersen notes that in 1969, all states except Illinois had anti-sodomy laws that criminalized private same-sex sexual relations. The number of states that retained such laws at the start of the new millennium stood at 13, until the Supreme Court ruled in *Lawrence v. Texas* (2003) that the gay male couple in this case were entitled 'to respect in their private lives', effectively ending anti-sodomy statutes in all remaining states. This decision came less than two decades after *Bowers v. Hardwick* (1986) where the court had upheld Georgia's anti-sodomy law. As Anderson demonstrates in her seminal book *Out of the Closets and into the Courts*, it was not democracy per se that made the repeal of anti-sodomy laws possible — in fact, the judicial branch had upheld these laws for so long — but rather the ability of LGBT

62 According to Melinda Kane, 'the phrase "sodomy law" refers to a category of laws that criminalize consensual, sexual acts between adults'. Kane acknowledges that the language of these laws varies and that they are mostly interpreted as 'bans against homosexuality'. M. Kane, 'Decriminalizing Homosexuality: Gaining Rights Through Sodomy Law Reform', in D. Paternotte & M. Tremblay (eds), *The Ashgate Research Companion to Lesbian and Gay Activism* (Abingdon: Routledge, 2016), p. 276.

legal rights groups to mobilize resources and exploit openings within the legal opportunity structure.<sup>63</sup>

Despite the stark difference in regime type and state strength, the story of the first two decades of the US gay rights movement post-Stonewall looks similar to that of the LGBTQ movement in Lebanon since the creation of the first LGBT organization *Helem* in 2004. The queer community in both of these countries — one a democracy and the other is not — faced anti-sodomy laws that threatened their safety and reinforced hostile attitudes toward them. And in both of these cases, collective actors in the realm of gay rights confronted the absence of a political opportunity. Securing protections nationwide through legislative channels — be it Congress or the Lebanese Parliament — was simply not an option. In the US, negative attitudes among the general public limited the legislative option, while in Lebanon, that path remains blocked because the Parliament is dominated by sectarian factions that are hostile to LGBTQ people. State repression and harassment of the LGBT rights organizations was also rampant in both of these cases. One needs to look no further than the Mattachine Society, an early LGBT rights advocacy organization that became the subject of an FBI internal security investigation between 1953 and 1958 for alleged ties with communists. *Helem* had multiple of their early events cancelled by the security apparatus, citing alleged safety concerns of the attendees. And last, in 2012, Lebanese security forces raided a Syrian gay night club in Beirut, closed it down for ‘public immorality’, and arrested 25 gay men. The security forces also stripped down a transgender detainee and published her photographs on national television to prove that ‘her gender was misleading’. Then, gay rights activists the world over recalled images from the Stonewall Inn police raids in Greenwich Village.

Most importantly, in both cases, queer activists resorted to cause-lawyers to chip away (in phases) at their anti-sodomy laws clenching one victory after the other. In the US, the legal efforts were crowned by *Lawrence v. Texas* (2003) and prior judicial victories at the state level.<sup>64</sup> In Lebanon, the movement’s efforts are reflected in major court cases where judges acquitted individuals charged under Article 534 and in securing a court ruling at an appeals court in which the judge affirmed the right of LGBT citizens to have consensual relations without fear of discrimination and argued that Article 534 does not apply to homosexuality.

63 E.A. Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor, MI: University of Michigan Press, 2005).

64 There were also subsequent victories at the Supreme Court, such as *Obergefell v. Hodges* (2015) and *United States v. Windsor* (2013).

These key parallels we observe across the two movements do not rule out the possibility that democracy has a positive effect on the attainment of gay rights. However, they point us to consider the conditions under which democracies and non-democracies present similar legal opportunities for LGBT social movements — instances that obscure the relevance of regime type as a binary predictor. Democracy matters *when* it creates the possibility for collective actors to access courts and lobby policymakers. In the American context, those opportunities hinged on shifting the public mood in a more liberal direction on the issue of gay rights. For instance, the Supreme Court of the United States (SCOTUS) was inhospitable to LGBTQ causes when majoritarian sentiment in the US was not supportive of gay rights. In a 1986 landmark ruling, *Bowers v. Hardwick*, the Court upheld Georgia's anti-sodomy law. By 2003, the balance of the Court shifted alongside public opinion on the question when the court struck down anti-sodomy laws in *Lawrence v. Texas* (2003). It is worth noting that securing anti-discrimination protections through legislation remains a difficult path for the LGBTQ movement despite the major shift in attitudes toward LGBTQ rights in recent years.<sup>65</sup>

Given the significant overlap in the number of democracies and non-democracies that codify discrimination against queer people, the question 'Why do we see legal advances for gay rights in Lebanon and far fewer legal strides in Tunisia?' cannot be answered by looking at regime dichotomies alone. A full account of the diverging status for gay rights in these two cases must take into consideration a variety of institutional features and how movements respond to them. Therefore, in my analysis of the case studies, I paid special attention to the agency of judges, and to how Lebanese activists managed to pry the legal opportunity structure open, whether through building on reports and findings from public health experts and organizations, or through engaging cause-lawyers who have successfully shifted judges' interpretation of the law and norms surrounding its enforcement. Meanwhile, in the face of a closed legal opportunity structure and conservative judges, Tunisia's LGBTQ activists have shifted their focus to mobilizing support from international allies and activist networks internationally to extract concessions from the executive branch and repeal Article 230. Therefore, understanding the nature of the relationship between judges and activists has implications for explaining divergent patterns across LGBTQ Arab movements and what strategies of contention they choose to adopt.

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65 Despite public opinion shifts and the fact that the majority of Americans have favorable attitudes toward LGBTQ rights, Congress has thus far failed to enact the Equality Act which would prohibit discrimination against LGBTQ people across key areas of life.

## 7 Conclusion

In this article, I examined the puzzling cascade of favourable court verdicts for the LGBTQ movement in Lebanon, both in civil and military courts despite the country's worsening democratic performance. I compare the evolving legal status of gay and transgender communities in Lebanon to that of their counterparts in Tunisia to identify the factors that shape legal outcomes when it comes to the enforcement of anti-sodomy laws in the region.

Grounding my findings in the broader literature on strategic litigation and legal mobilization, I advanced two key arguments. First, I argued that the difference in legal outcomes can be explained by the variation in legal mobilization strategies pursued by various movements. Whereas some LGBTQ movements in the region choose to confront the state and challenge its international reputation and expose it to scrutiny, others have resorted to appealing to judges' sense of mission as guardians of the law and the rights of all citizens to create new legal openings. Second, I argued that the difference in strategic approach is driven by activists' perceptions of the legal structure they encounter and their subjective evaluations of their legal climate. Such evaluations reflect whether they believe that the role of legal institutions can be transformed and whether they believe in their ability to create new openings within these institutions.

Throughout the case studies, I traced how Lebanon's LGBTQ rights movement mobilized a 'rights advocacy support structure' to enable judges to challenge repressive laws and chip away at their enforcement. Meanwhile, Tunisia's movement lacked a cohesive and coordinated legal strategy, with two of its prominent organizations focusing on extracting concessions from the state by leveraging international pressure on the executive and the judicial branch. While the Lebanese legal strategic model has produced remarkable success cases, Tunisia's movement has yet to make any significant legal inroads.

I also explored why dichotomous regime distinctions do not give us sufficient analytical leverage when it comes to understanding LGBTQ movements' ability to establish a legal foothold when it comes to resisting the criminalization of same-sex relations. While conventional wisdom would lead one to believe that the nature of the regime (nominally democratic or not) may be a determining factor in how hospitable the judicial system can be when it comes to LGBTQ rights, this article stresses that regime-type and the rule of law are not perfectly correlated, and that to understand how state repression can be challenged under authoritarian states, we must first disabuse ourselves of the assumption that non-democratic states are inherently lawless. Thus, I posited that our study of queer rights activism specifically — and civil rights advocacy more generally — should decentre the nature of the regime and instead zoom

in on the agency, ingenuity and strategic choices that LGBTQ movements pursue even when their manoeuvrability is constrained within authoritarian structures. Thus, I employed a more appropriate set of theories from law and social movements scholarship paying closer attention to the relationship between judicial institutions and rights movements, and how the latter can shape institutional and legal outcomes.

Understanding the judicialization of queer resistance in authoritarian environments gives us an opportunity to explain when and how judiciaries act independently to secure the rights of minorities at a time when the regime is trying to suppress them. Just like we accept that democracy is not a sufficient condition for the rule of law and judicial independence, we should acknowledge that authoritarianism does not *by default* preclude them either. The outcomes of legal mobilization for gay rights in authoritarian state are a clear demonstration of how authoritarian state institutions, including courts, can — and often do — accrue a significant deal of autonomy from the regime allowing their personnel to act on their own interests and develop a sense of mission. As a result, what matters for gay rights movements is not merely the democratic or authoritarian nature of the state, but rather the way movements *interact* with its institutions and influence their outcomes. And finally, the empirical analysis in this article shows us that even when courts are deemed inhospitable, litigation strategies can serve crucial functions for LGBT rights movements.

Figure legends

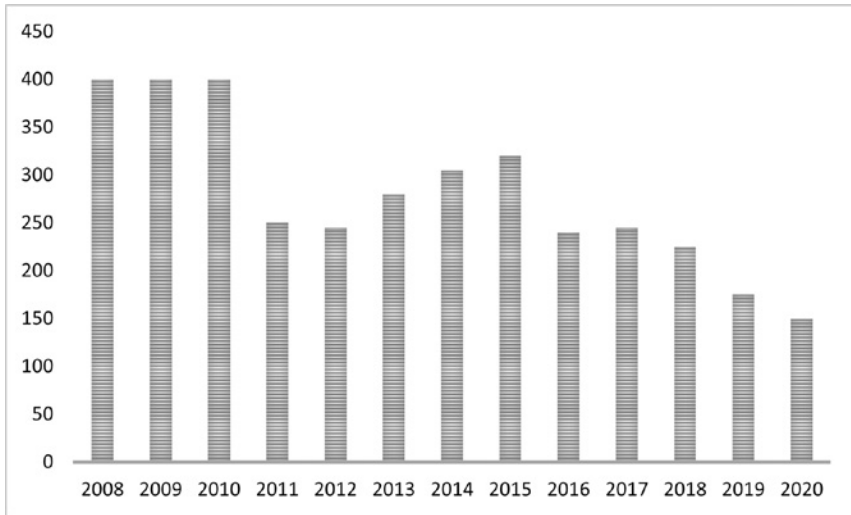


FIGURE 1 The annual number of incarcerations in Tunisia under Article 230  
 SOURCE: DATA GATHERED AND PUBLISHED BY DAMJ IN 2022.

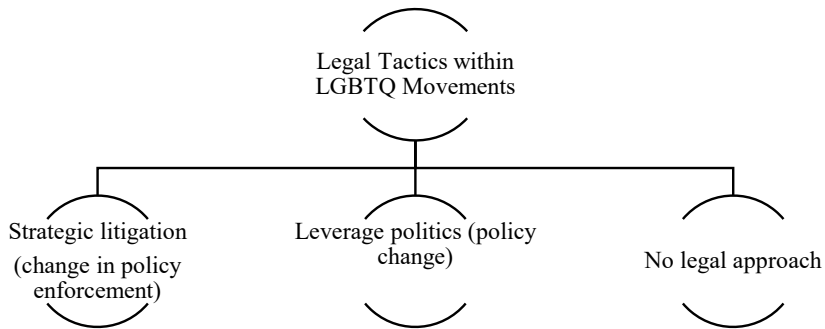


FIGURE 2 Tactical options *vis-à-vis* laws that criminalize homosexuality and non-normative gender expressions