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# Principle of Proportionality and Normative Quality: An Overview of the Moroccan Criminal Law

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## Abstract
It is not uncommon for national legislators to adopt inappropriate laws that are contrary to international norms and standards. As a human work, the law is not free from error and must therefore be subject to continuous evaluation and reform in order to comply with the requirements of human rights as the universal general principles endowed with primacy. This study is limited to an examination of certain targeted laws in Moroccan criminal legislation that may represent serious violations of the legal principle of proportionality and normative quality which puts in failure the values of a tolerant democratic society that promotes human rights.

*Keywords: National criminal law, Principle of proportionality, Human rights, Legislative reforms, Kingdom of Morocco*

## Introduction

Before approaching the particularities of Moroccan criminal law, it is first necessary to pay particular attention to the definition of the principle of proportionality. It should be noted in this sense that this general principle of law is a factor of legitimacy, effectiveness and efficiency not only used in criminal law but also in other legal fields.

We can better understand the definition of this principle by referring to its opposite which is absurdity[1]. A norm, a law or a State measure is therefore absurd when it is disproportionate, whereas the State, and particularly a State claiming to be a democratic State of law, is not supposed to be an absurd entity that fails to respect a general legal principle in its internal law and national practice.

In the criminal field, the principle of proportionality or proportional justice is used to describe the idea that the punishment for a certain offence should be proportional to the seriousness and the gravity of the offence itself[2]. The unproportionality of the sanction is also a legal ground allowing the defendants to bring a case to the appeal chamber of the international criminal court[3].

The concrete application of this principle implies, on one side, that the legislator must attribute the most severe sanctions to the most serious crimes, while it must attribute the least severe sanctions to the least serious offences, and on the other side, the legislator, according to this principle, cannot attribute a sanction to acts that have no serious effect. It follows that the analysis of the conformity of a domestic law with the principle of proportionality consists precisely in evaluating the seriousness of the incriminated acts and the seriousness of the related sanction, in order to deduce

1 African Court on Human and Peoples' Rights, Onyachi and Njoka / Tanzania, 2017, pt 130.
2 African Commission on Human and Peoples' Rights, Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe, 2009, pt 176.
3 Rome Statute of the International Court, 2002, pt 81.2

the proportionality or unproportionality of the law under review. This is also the methodology used in this study to evaluate Moroccan criminal legislation.

It is to be specified that the legal incrimination of a human act having no form of gravity or infringement of the rights of others, constitutes an illegitimate restriction of individual and/or collective freedoms, while any limitation to the enjoyment and exercise of the rights of persons must be not only necessary in a democratic society, but also reasonably proportional to a legitimate objective sought[4]. As a result, the criminalization of a human act that has no legitimate purpose or objective is considered *prima facie*, from the point of view of international human rights law, as an illegal and illegitimate limitation which must be abrogate to allow individuals to free themselves from the absurd interference caused by unproportional laws. The study will subsequently develop three articles of law from the Moroccan Penal Code[5] that may eventually hold flagrant unproportionality which seriously undermines the rights and freedoms of the subjects of Moroccan law.

## 1. Criminalization of the Act of Eating in Public During a Specific Month of the Year

« *Whoever, known for belonging to the Muslim religion, ostensibly breaks the fast in a public place during the time of Ramadan, without a reason admitted by this religion, is punished by imprisonment of one to six months and a fine of 12 to 120 dirhams* » Moroccan Penal Code (Art 222)

It is customary in the Muslim religion that followers fast one month annually (the month of Ramadan) as a religious act like prayer. It is also affirmed by the Moroccan constitution that Islam is the religion of the State[6], which is therefore not secular. The Islamic religion therefore has a major influence on Moroccan society and, in particular, on domestic law which is largely proven by this legal article.



### *1.1 Absurd Incrimination of a Harmless Act*

Nevertheless, it can be considered abnormal to punish someone by law for eating, regardless of the month, week or day. The improportionality of this legal text is even more evident when the punishment is imprisonment, while it is only a matter of eating in public, which is a very human, ordinary and even essential element for survival. It can even be considered extremely absurd and arbitrary to punish someone for eating. The existence of such legal article clearly proves therefore the intolerance and religious extremism of the Moroccan legislator, whose police force operates during a month as a religious militia as found in Islamic terrorist entities.

### *1.2 Lack of Legal Quality*

The lack of legal quality of this law is also evident in the substantive wording used, such as "*Whoever, known for belonging to the Muslim religion*", which creates serious problems of interpretation. Indeed, the question that arises is how to determine if a person is a Muslim and if the State has, at first sight, the right to interfere in this aspect of the private life of the individual and to judge whether he belongs to this or that religion. In order to answer these questions, it is necessary to refer to the jurisprudence on human rights and particularly on freedom of religion and consciousness.

### *1.3 Religious Affiliation is a Matter of the Inner Self*

4 African Court on Human and Peoples' Rights, Tanganyika Law Society, the Legal and Human Rights Centre et Reverend Christopher R. Mtikila / Tanzania, 2013, pt 106.1.
5 Moroccan dahir, Doc.1-59-413, 1962.
6 Moroccan Constitution, 2011, pt 3.

Generally speaking, the question of religious affiliation is a matter of the inner self and only the religious manifestation can be subject to restrictions[7] insofar as any person may adopt the religion he or she deems appropriate without compromising social imperatives. It follows that a State respecting the religious freedom of its subjects will never pronounce on whether or not a person belongs to a given religion, since this subtle question is a matter of the inner self. This law thus seriously undermines the freedom of religion as defined and protected by international norms and standards when it allows the State to pronounce on religious affiliation. Moreover, it should be remembered that only the manifestation of religion can be subject to a legal restriction, while eating in public does not represent a manifestation of any religion that can be legally limited since it is not a worship or prayer.

If a State governed by the rule of law, in accordance with the requirements of human rights and democracy, cannot interfere in the religious affiliation of an individual or a group of individuals, then how can it be the guarantor of the respect of some religious obligations like "fasting", while it does not have to interfere previously in this field that belongs strictly to the inner self.

### *1.4 Hidden Political Factors and Lack of Societal Tolerance*

It follows from this analysis that the previous Moroccan law is undoubtedly unproportional and therefore characterized by an unparalleled absurdity since it criminalizes the act of eating in public. This law cannot besides be justified by public morals since the fact of eating is not a flagrant violation of morality. This situation of the Moroccan penal legislation can be due to the religious intolerance and the will of the Moroccan State to subordinate the majority of its subjects, to muslim laws that serve obvious political interests. In this context, it can be concluded that the essence of Moroccan society as formulated by its legislator is not in conformity with the values of pluralism, tolerance and openness that characterize a democratic society[8]. It is thus a question of working on the sensitization of the governors and the governed on these noble values.

## 2. Criminalization of Sexual Relations Between Consenting Adults Outside of Marriage and of Same-sex Relations

« *Are punished by imprisonment from one month to one year, all persons of different sex who, not being united by the bonds of marriage, have sexual relations between them* » Moroccan Penal Code (Art 490)

« *Anyone who commits an indecent or unnatural act with an individual of his or her own sex is punished by imprisonment of six months to three years and a fine of 200 to 1,000 dirhams, unless the act constitutes a more serious offense* » Moroccan Penal Code (Art 489)

In the process of integration into human rights protection systems, States are obliged to harmonize their domestic legislation with treaty standards. This involves the amendment, abrogation and adoption of laws[9] that guide the actions of the executive power and authorities. This obligation to harmonize becomes pressing at the highest level when the State is subject to a control by an individual complaint mechanism that involves regional courts and advisory organs (universal committees and regional commissions).

However, Morocco is not fully integrated into these international systems of protection, particularly in the field of civil and political rights, including the right to a private life and privacy which encompasses the freedom of consensual relationships outside marriage. In fact the notion of

7 European Court of Human Rights, KOKKINAKIS / Greece, 1993, pt 31.
8 Ibid., Handyside c/ Royaume-Uni, 1976, pt 49.
9 International Covenant on Civil and Political Rights, 1966, pt 2.

"private life" include the social identity and the right to form and develop relationships with others, and elements such as gender identity, name, sexual orientation and sex life are also included in the personal sphere[10]. However, legal and legitimate limitations may restrict sexual freedom, for example in the case of adultery where the rights of others are violated. Nevertheless, the Moroccan legislator was not satisfied with the incrimination of adultery only, but incriminates any relationship outside of marriage and despite its ratification of the aforementioned international pact that protect life privacy.

Regarding the credible and effective strengthening process of human rights protection, Morocco has established only three universal mechanisms of individual complaints that exclude the one related to the protection of civil and political rights[11] which is the most important in addition to the one concerning the prohibition of torture and other inhuman or degrading treatment. Moreover, Morocco is among the few countries in Africa that are not monitored by any regional human rights protection system, which favors the maintenance of these non-compliant laws often perceived as liberticidal and from an ancient world.

As part of the Universal Periodic Review, the International Human Rights Council has urged Morocco to decriminalize consensual sexual relations outside of marriage and between same-sex[12]. UN jurisprudence has also stated that sexual relations outside of marriage, and even those that involve same-sex, are not of a nature to undermine the morality of a given society and that therefore a law that interferes in these private acts is considered as arbitrary[13]. Nevertheless, the universal protection limits marital rights by condemning polygamy generally for all States[14], which is specifically enjoyed exclusively by men according to moroccan law[15] and which represents, among other things, an inequality between the two genders that leads to a discrimination. As for the non-conforming laws quoted, this polygamous rule is the result of the residue of the islamic history of the country and which appears inappropriate in this era of human rights and freedoms ruling.

### *2.1 Discrimination Observed Against LGBTI Community*

The purpose of the principle of non-discrimination is to ensure equal treatment for persons irrespective of nationality, sex, race or ethnic origin, political opinion, religion or beliefs, disability, age or sexual orientation[16].

In the criminal field, discrimination can be found in different sanctions which differ from one category to another but punish the same offence. Thus, in the context of discrimination on the grounds of sexual orientation, it is noted that the Moroccan repressive article has increased the amount of the fine and the length of imprisonment for homosexual acts that do not necessarily constitute sexual relations, but rather minor actions qualified as indecent or unnatural, which again creates a confusion of interpretation. Sexual relations between same-sex will therefore be those acts that are qualified as more serious offenses and therefore deserve a much higher penalty from the perspective of the Moroccan legislator and which has not been specified, leaving it to the sovereign appreciation of the judge, although this term of "sovereign" is itself legally limited by being subordinated to the substance of the law that the Moroccan court applies without being able to refer to the conventional and constitutional standards whose appreciation are of the competence of the constitutional Court of the State.

10 European Court of Human Rights, OBST / Germany, 2010, pt 39.
11 United Nations Human Rights Treaty Body Database, Ratification Status, Treaty bodies Treaties (ohchr.org), (accessed Mai 11, 2021)
12 Human Rights Council, Report of the Working Group on the Universal Periodic Review, 2017, pt 144.32.
13 Committee on Human Rights, Communication No 488/1992, pt 6.8.
14 Human Rights Committee, Vol 1, 2001, pt 75.9.
15 Moroccan Family Code, 2016, pt 42.
16 African Commission on Human and Peoples' Rights, Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe, 2009, pt 155.

Unfortunately while in Morocco these simple acts between two people of the same-sex are restrictively qualified as unnatural can trigger criminal proceedings that take them to prison, in the States of the Council of Europe, homosexual marriage and cohabitation are protected by the right to private and family life[17] and are therefore legitimate to the point that the spouses have the possibility to adopt a child[18].

It is clear once again that this law manifests a clear intolerance of the Moroccan legislator's mind which may not reflect the real opinion of the people in its majority, especially in this contemporary era and in a State characterized by a youthful demography. Nevertheless, Morocco remains a State strongly attached to its cultural roots, except that human society is not stagnant, but evolves at the rhythm of globalization, which leads us to say that it is up to the moroccan people, and especially youth, to decide on the nature of societal values to be adopted, notably through deliberative democracy processes.

### 3. Holding Public Officials Not Accountable for Civil and Political Rights Violations

« *Any magistrate, any public official, any agent or servant of the authority or of the public force who orders or performs any arbitrary act, infringing either on individual freedom or on the civic rights of one or more citizens, is punished by degradation of citizenship. If he justifies having acted by order of his hierarchical superiors in a field of their competence, for which he owed them obedience, he benefits from an absolute excuse. In this case, the penalty is applied only to the superiors who gave the order* » Moroccan Penal Code (Art 225)

This law does not manifest a disproportionality of a sanction or a relation to a legitimate objective pursued, but rather it highlights substantial deficiencies that guarantee the absolute excuse of the perpetrators of serious human rights violations, which contribute to the continuity of the practices related to them. In fact, a public official, often a law enforcement officer, who is aware that he is protected by the law even if he commits serious crimes against humanity, can only be an agent of impunity and not of order, unless his inner morality prevents him from committing such acts. In addition, the superiors who are supposed to be responsible are often untouchable because of their high rank.

This insufficiency of the normative quality of this Moroccan law can be categorized among the reluctance noted by the International Committee against Torture concerning the prosecution of the perpetrators of these acts and the carrying out of serious investigations[19].

The Committee against Torture also urged Morocco to amend its legislation so that it explicitly states that an order from a superior officer or public authority cannot be invoked as a justification of torture[20], notably by amending the above-mentioned legal article.

As long as this modification has not been made, a climate of impunity will reign to promote violations of the most basic rights which is the respect of the physical and psychological integrity of a human being.

The substantial insufficiencies of the Moroccan law cannot be the result of the incompetence of the legislator, but rather of his indefectible will to reduce the legal guarantees at the expense of the subjects of internal law. This abject legal technique aimed at sowing confusion in the legislative field allows the State and its agents to be in a position of strength when they face the judiciary

17 European Court of Human Rights, X / Austria, 2013, pt 95.
18 Ibid., pt 153.
19 Committee against Torture, Report No. 44 (A/50/44), 1995, pt 109.
20 Ibid., Consideration of reports submitted by States parties under article 19 of the Convention (Morocco), 2011, pt 6.

power that only applies a deficient law, which in no way serves the interests of individuals and the ultimate need to protect their rights and freedoms as general universal principles of law.

## 4. The Absence of a Legal Definition of Torture and Inhuman or Degrading Treatment

Although the Moroccan constitution in its article 22 and the Moroccan penal code in its article 225 condemn acts of torture and inhuman and degrading treatment, they do not provide a precise definition of what these acts are.

By noting its reserve to the article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines these inhuman acts, it can be concluded that the Moroccan legislator has voluntarily omitted to define them in domestic law. It seems that the Moroccan legislator does not agree with the universal definition of these inhumane acts and does not propose a more exhaustive definition in this sense. This legal omission which carries with it a severe negligence and a serious disregard for the physical and psychological integrity of the subjects of Moroccan law may be due to a national practice in violation of these universal general principles of law as observed by the relevant committee[21].

Therefore, if an illegal practice of the Moroccan authorities is generalized and systematically applied and which consists in inflicting acts defined by the article 1 of the aforementioned convention, the national decision-maker will be forced to deviate from this universal definition and not to include it in his internal law. Except that in the case of Morocco, its reserve is already contrary to the objective of the convention and tends to take away its very essence[22], which consequently makes the reserve invalid and guarantees to the committee the full application of its jurisprudence in the individual or collective cases that involve Morocco.

It follows from the above analysis that the Moroccan legislator should not only introduce a precise definition of these criminal acts attributed to authorities in the performance of their duties, but should also strive to ban all assimilated practices, whether in prisons or detention centers or police custody.

## 5. Prohibition of Marriages and Succession on the Basis of Religious Affiliation

« *The following are prohibited as temporary impediments: 4) the marriage of a Muslim woman to a non-Muslim man and the marriage of a Muslim man to a non-Muslim woman, except if she belongs to the People of the Book* » Moroccan Family Code (Art 39)

« *There is no inheritance between a Muslim and a non-Muslim, nor in the case where the paternal filiation is legally disavowed* » Moroccan Family Code (Art 332)

In this family context, which does not have a criminal scope, the principle of proportionality no longer refers to the sanction or penalization, but to the necessity of the limitation of a right or freedom to a legitimate objective pursued, which makes possible to evaluate the existence or not of arbitrariness. It is observed in this sense that the Moroccan legislation remains silent as to the legitimate reasons for this limitation of the right to marriage and succession on the basis of religious affiliation, an element that creates a confusion of interpretation that reduces the quality of the law to the point of calling it arbitrary. Moreover, in this discriminatory context, no serious justification can exist to be considered, except that of maintaining cultural homogeneity which is contrary to the spirit of pluralism, tolerance and openness that is supposed to be fully applied in a democratic society.

21 Ibid., pt 10.
22 International Law Commission, Report of the 66 sess, 2011, Doc. 10, pt 2.6.1.26.

Although this laws may be derived from Muslim law, it is nonetheless true that it must obey to the international standards in force today, which do not tolerate discrimination on any basis, including religious affiliation[23]. Furthermore, religious affiliation is an internal self matter as mentioned above and that excludes any interference or consideration by the State of this element. Indeed, the State has a duty of neutrality and impartiality which is incompatible with any appreciation of its part of the legitimacy of religious convictions or the manner in which they are expressed[24].

## Conclusion

States must know how to adapt in time and space and adopt humanistic ambitions that promote individual rights as they are universally defined. It should not be just a written word, but a widespread national practice.

The fundamental opposition of religious precepts that interfere in private life such as those related to obligations and prohibitions that are not find in the common law. must be the statement allowing their eviction as a legal basis. In fact, the principle of the hierarchy of norms does not place religious commandments at the top of the legal order, but rather the principles of natural law which are human rights and freedoms whose protection at the level of positive law is mainly the responsibility of the law guided by the constitution and international conventions.

The constraints for the respect of these general principles are manifested precisely in laws that do not observe the superior norms and whose illegality is often due to the incompetency and/or the corrupted faith of the national legislator.

The deficiency of human rights protection are accentuated in the absence of international protection of civil and political rights through a complaint mechanism and when the constitutionality of the illegitimate law cannot be assessed by ordinary judges, but only by the constitutional organ whose members are appointed in accordance with political factors, which calls into question its independence and quality to serve the popular cause of human rights.

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