# DISSENT AS A FORMAL FEATURE OF RULE BY LAW
## A textual legal ethnography of adjudication in authoritarian contexts


## Abstract

*Judicial adjudication is a process through which, in systems claiming to abide by the rule of law, the polyphony of the many parties in a trial and their voices is submitted to a polishing mechanism through which the normative monologue of the verdict is produced. In that sense, dissent is part of the due process of law, even though it is to be eventually replaced by the singular outcome of the verdict. This paper aims to explore what happens between the parties' initial polyphonic dialogue and the judge's final verdict, which largely erases the practical conditions of its crafting, to see how dissenting voices are formally and substantially accounted for. Drawing on the distinction between the rule of law and the rule by law, it will show that legal formalism can be used to present the appearance of legal conformity, while, in some regimes, achieving the objectives of an authoritarian conception of law, justice and politics. Inspired by realistic jurisprudence and legal ethnomethodology, this study will be conducted from within judicial documentary practices. It contributes to the field of law in authoritarian contexts by showing, in opposition to the main literature trends, how, practically dissenting and marginalized voices are silenced, repressed or even included in the objectifying and justifying narratives of authoritarian regimes.*


Judicial adjudication is a process through which, in systems claiming to abide by the rule of law, the polyphony of the many parties' voices in a trial is submitted to a polishing mechanism leading to the normative monologue of the verdict. In that sense, dissent, which is structurally embedded in the concept of justice, is eventually replaced by a univocal (or majority-based) verdict. In other words, the reduction of dissenting voices, notably of the defending parties, is a constituting feature of the due process of law and not a specificity of adjudication in authoritarian contexts. The question we want to address is thus the following: where and how a feature that is common to any legalistic system becomes a tool in the hands of regimes having an instrumental conception of law and justice; where and how the rule of law transforms into rule by law.

While the passage to law structurally entails the reduction of any trial's polyphony – to various degrees stretching from mainly civil-law systems with singular verdicts to mainly common-law systems admitting the possibility of dissenting opinions – it is actually legal formalism, which we define as the litteralist, over-entreched (Schauer, 1991), understanding of procedural and substantive rules, that proves the most efficacious resource for an authoritarian practice of law and justice. By 'literalist', we do not mean one knowledge of rules that would

be ‘truer’ or ‘closer’ to the original ruler’s intentions, but one understanding of rules claiming to stick to, and only to, the latter’s external forms, while often resorting to various interpretive means to achieve such understanding.

We mean by “authoritarian regime” a regime antithetic to democracy, in the sense that, firstly, the state's power is not open to contestation and, secondly and consequentially, it draws on repression to assert its authority. An authoritarian regime is thus understood as a political configuration in which rulers tend to ascertain their power by drawing on the state's coercitive apparatus against either contestation, directly, or any disruption of the social order, indirectly. However, this definition does not suffice for our present purposes. In this paper, we also contend that “adjudication in an authoritarian context” does not mean any kind of adjudication in political regimes externally characterized as authoritarian, but adjudication observably constrained by the authoritarian nature of the regime in which it operates. We argue that most trials taking place in countries whose regimes can be described as such are not primarily determined by authoritarianism. In other words, there can be non-authoritarian, everyday justice in authoritarian regimes.[1] However, there is a minority of trials, in such countries, that exhibit features testifying to their being adjudicated in a politically authoritarian context. It means that authoritarianism is an endogenous property of such trials; it is part of their “relevant context” (Dupret and Ferrié, 2008). It is the purpose of this paper to document these features, to explain how they are exhibited, and to account for their endogenous working.

Concentrating on judicial documents, rulings in particular, we proceed through a textual and praxiological ethnography. This perspective is necessarily partial, but we contend it is at the same time perspicuous. Rulings do speak if one can read them. To our knowledge, existing literature on “the politics of courts in authoritarian regimes” (Ginsburg and Moustafa, 2008) is not very concerned by rulings, for possibly three main reasons. The first one pertains to research ethics and concerns about the practical reach of legal positivism in authoritarian regimes. Describing the law would turn researchers into accomplices of authoritarian rulers by nurturing the illusion that they operate following objective constraints and not their mere will and interests (Lochak, 1989). The second one is related to a methodological bias, as this literature is based on the assumption that justice in such regimes is wholly subservient to politics and judicially disguises politically motivated rulings not worth of being analyzed for their internal properties. The third reason is related to disciplinary purposes: this literature regards adjudication as a

[1] As there can be authoritarian drifts in law-making and adjudication in democratic contexts.

resource for addressing political dynamics, which means that, by the same token, it does not investigate adjudication in and for itself. We want to re-specify this "missing-what" (Garfinkel, 1967) by directly addressing these disguising practices, by exploring the characteristics of ordinary justice on which it leans, by accounting for the ordinary justice features it seeks to reproduce and exhibit, by describing the place where it takes place for all authoritarian purposes. Thus, we hope to unveil the operations of authoritarian regimes, not to legitimize them.

We observe that many authoritarian regimes have an important use of law and justice. This raises intriguing questions as to why they do so. Some hypotheses can be made: authoritarian regimes do not (succeed or want to) completely control the society they rule, leaving intact the necessity to legally resolve conflicts in matters that are not concerned with politics (Fraenkel, 1941); there are advantages for the ruling elite in institutionalization, stability, and legal security; by delegating cases to non-overtly political institutions, cases become depoliticized and do not expose political authorities to contestation, something that can often prove advantageous; staging the respect for law, justice and order can profit the regime at both internal and international levels; finally, delegating to courts brings also benefits in terms of social control, legitimation, administrative control, elite cohesion, economic commitments (Ginsburg and Moustafa, 2008). However, this paper does not explore these reasons so much as it explores the ways they translate into "legal ethnomethods" (Dupret et al. 2015) and especially judicial writing. In that respect, legal praxeology, because of its concern for ordinary law at work, for the practical accomplishment of legal work, for the ways of doing in the perspective of "members", offers a particularly heuristic vantage point on the fabric of justice in authoritarian context.

The article proceeds in three steps. First, we outline our praxeological framework, after having suggested how it can fill a gap in the literature on law in authoritarian context. Second, we illustrate the general value of our approach by exposing some aspects of the working of ordinary justice operating independent of its embedment in a democratic or authoritarian regime. Third, we apply it directly to a set of three cases in Egypt and Turkey reflecting the authoritarian nature of these regimes. We concentrate on the issues of facts, rules and evidence to show how the due process of law can be an efficacious tool in the hands of judges adjudicating in cases reflecting the authoritarian nature of the political regime. In other words, as we insist in conclusion, the means used in authoritarian adjudication are the same as those

used in non-authoritarian adjudication, except that they turn the constraints of the rule of law into the resources of the rule by law.

## 1. Contribution to literature and analytical framework

The literature on law in authoritarian context tends to be silent regarding how law is mobilized in the practical operation and instanciations of authoritarian rule. We present here three jurisprudential approaches focusing on legal actors, which have the potential to fill that gap. We will draw mainly on the praxeological approach and apply it to a carefully chosen set of decisions.

### *1.1 Structural approaches to law in authoritarian context*

Most of the literature interested in law and authoritarian power does not seem to take law completely seriously, whether positively or conceptually. It can be classified into two approaches, sometimes overlapping, one being liberal/dogmatic and the other instrumental. The first considers law primarily in the light of what it should be or what it could be, while the second primarily grasps law from the viewpoint of the interest of actors or, more structurally, of the power balance within a given polity. Liberal/dogmatic approaches critically evaluate law in relation to democratic standards composed of authors' values (Fombad, 2011), comparison with other positive laws (Faundez, 2006), or normative theories about law and democracy (Biagi, 2016). This literature can also aim at giving legal formulas or normative recommendations for democratization, especially when studying processes of political changes in authoritarian countries (Miller and Aucouin, 2010; Partlett, 2012; Philippe, 2015). Instrumental approaches are descriptive insofar as the content of positive law is at the core of the analysis, showing the aim and interests of the political authorities which have produced the legal texts and which the texts are supposed to serve (Brown, 2003; Ginsburg and Simpser, 2013; Frankenberg and Alvar Garcia 2019, Dixon and Landau 2021). Uses of law by other actors, such as constitutional courts or oppositions, are also covered, there too, mainly from a political perspective. Indeed, courts decisions are read as a sign of their relation to authoritarian political institutions and reveal how the latter outsource political functions to the former (Hirschl, 2004; Moustafa, 2007) or how the former are gaining autonomy from the latter (Bernard-Maugiron, 2004). As for uses of law by oppositions, they are viewed as counter-hegemonic practices, whereby law is used to reverse the tools of authoritarian elites against them (Parslow, 2018) or seek an alliance with autonomous courts (El-Ghobashy, 2008). Some works are also located at the exaxct intersection of instrumental and liberal approaches (e.g.

Ellmann, 1995, who assesses wether the use of law by anti-apartheid activists has either legitimized or undermined the South-African regime).

In spite of their value, these accounts seem to neglect the hypothesis that something in the law and legal systems, in themselves, might help to understand authoritarian rule. The overlook of this possibility is perhaps tied to a combination of an exclusive conceptualization of law through its alleged normative effects on actors, and the conceptual antagonism between the rule of law and authoritarianism. In other words, because law is deemed not to constrain authoritarian elites, law appears as an irrelevant conceptual framework to grasp the operation of authoritarian rule. Instrumental literature has admittedly put forth the notion of the "rule by law" (Ginsburg and Mustafa, 2008), positing a chain link between authoritarian elites interests, legal texts (law, decrees, court decisions), and implementation. However, few has been written on how these connections are made empirically and the practices of legal production, interpretation, adjudication, and implementation in authoritarian contexts (Dupret and Ferrié, 2013). Such perspectives could however help us to understand why law appears as a technology favored by authoritarian elites and rulers, and give a thicker consistence to the rule by law's notion. Fernanda Pirie's (2013) works on legalism thus show that law, by being composed of general rules, categories, and forms of reasoning provides both flexible tools to frame and take action over empirical reality and also an objective source of authority on which to ground these decisions. Robert M. Cover (1983) puts forth the "jurispathic" nature of state adjudication. Courts do not so much create law by interpretation as they exclude all alternative meanings with the support of coercive state capacities.

### *1.2 Toward a praxelogical inquiry into decision-making*

It remains to see whether some jurisprudential traditions can provide us with useful tools to address authoritarian adjudication in action and context. We suggest that at least three approaches to law can prove heuristic, although in a qualified way, in the understanding of how law can turn into an efficient instrument in the hands of authoritarian rulers. The first approach can be found in Mikhaïl Xifaras's (2017) theory of "legal characters and roles". Xifaras contends that actors engage with law and produce legal relevance, not in an abstract general manner, but through the mediation of their, mostly but not only, professional roles, in addition to personal esthetic considerations regarding their role's function and nature. One can agree with the fact that the formal roles of actors in a trial certainly affect the modality and orientation of their legal practices: judges' activities are, in theory, intended for decision, prosecutors for

accusation, lawyers for defense, witnesses for observation... Emphasis on role can also take into account the different stages and temporalities of the trial and their impact on engagement with law, as, for example, the judge deciding over temporary detention will probably apprehend legal certainty differently than the judge making the final ruling. Roles also highlight the status of trial participants and their distinct resources and constraints, which underlines, for instance, that lawyers are in theory not responsible towards the same institutions than judges, presumably their political and judicial hierarchy for the former and their clients and the bar for the latter. Xifaras's theory also convincingly shows that legal actors are in reality addressing a multiplicity of audiences which are not necessarily located in the legal field. In the case of a trial, audiences can encompass the relevant institutional hierarchy but also others such as, for instance, the media or the public opinion interested in the case. This opening of the range of audiences shows the broader "dialogical network" (Leudar and Nekvapil, 2021) in which the trial is set, and thus enriches the knowledge of the context driving participants activities.

Whatever its insights, the theory of legal characters is weakened by its ironical stance vis-à-vis legal actors who are not considered for what they practically achieve, but mainly for, in a typically Goffmanian dramaturgic way, the personages they are deemed to stage in the theater of justice. In other words, it does not take into consideration that members in a judicial process are not staging the law but performing the law, within the constraining framework of legal provisions and institutions, for all legal practical purposes, with direct and palatable consequences on the lives of people and things, in a process that does not stop when the spectacle of justice ends. If we were to speak of roles in a trial, this should be understood as instructed by legal and structural, rather than dramaturgic, rules. The status of the different parties to the trial – e.g., judges, prosecutors, attorneys, witnesses – is strongly framed by the legal system itself, which defines what ought to be their activities, what are their prerogatives, and what is their constraining position within the institutional structure. In other words, formal roles in a trial can be understood as the result of a combination of contextual and legal constraints.

It is obviously in this respect that the theory of legal constraints (Troper, Champeil-Desplats and Grzegorczyk, 2006) can provide a useful framework to understand the activities of judicial personnel, in general as well as in authoritarian contexts. It was conceived as a development of Michel Troper's (2001) theory of interpretation, according to which actors are free in their interpretation of the meaning of legal texts. The theory of legal constraints is designed to account for why, despite this freedom, legal actors' decisions tend to be predictable, as they

make in practice a very limited use of their interpretative power. These constraints are explained by their position within the legal system and the assumption that actors care about their interests in relation to the former, whether it means to preserve their position or their decision. Constraints can be classified into two interrelated types: institutional and argumentative. Institutional constraints relate to the possibility of sanctions by actors endowed with a stronger position within the legal system, be it an overruling/repeal of the decision or an attack on the institutional positions of the actors themselves, tied, for instance in the case of judicial personnel, to their careers' trajectory. Argumentative constraints can be conceived in most cases as the logical consequences of institutional constraints and reflect in the reasoning and legal arguments made by actors to convincingly interpret legal rules and categories for the purpose of grounding their decisions. Even if, sometimes, the distinction between legal and political constraints appears hard to draw and although the theory of legal constraints leaves out societal factors informing legal actors' activities, it can help to understand how, in an authoritarian environment, judicial personnel concretely articulate objective pressure from political authorities and their practice of legal decision-making. It highlights the "awkwardness" of their situation, inasmuch as they face strong institutional constraints from political authorities alongside a presumably low statutory independence, while still having to produce procedural correctness, legal relevance, and logical argumentation. In other words, they might have the choice of the means but not of the finality of their decision, which must correspond to the political authorities' expectations. This double bind can explain the differences one observes in the relationship between their use of the law and commonsense understanding of rules and categories, as well as between their work in non-politically sensitive cases and what they achieve when constrained by the authoritarian nature of the political regime.

The praxeological approach to law takes into consideration the many insights of the legal roles and legal constraints theories in a way that escapes ironical and theoretical pitfalls. By way of ethnographies, eventually textual (Bens et al., 2021), it describes the practical grammar of law through the examination of actual methods deployed and exhibited contextually and in practice in order for "members" to do "being legal" (Garfinkel, 1967; Sacks, 1985; Travers and Manzo, 1997). We use the expression "legal ethnomethods" (Dupret et al., 2015) to refer to these ordinary though partly specialized means through which people make sense of their situations in a way that is amenable to the terms and purposes of law. Such study of legal action in context through its practical grammar means to address specific and intertwined forms of life and language games (Wittgenstein, 1963; Coulter, 1991: 27). It requires to "problematize" legal

epistemology by describing language variations and ambiguities testifying to the impact of authoritarianism in the practice of the law (Wittgenstein, 1963: par. 496; Lynch, 1993). A trial, for instance, is sequenced in stages which are formal but nevertheless respond to a series of observable accomplishments produced by the participants. Such is the case with production of a procedurally correct decision, which does not correspond to a set of abstract rules drawn from an external and overhanging legal system, but to routine and bureaucratic constraints exerted on legal members' (Atkinson and Drew, 1979; Matoesian, 2001; Scheffer, 2010). The participants in judicial trials also orient to what we might call legal relevance, which corresponds to the process of legal characterization, that is, the matching of "facts" with the "rules" (Sudnow, 1965; Dupret 2011). This orientation to both procedural correctness and legal relevance is best captured by the notion of "instructed action" (Livingston, 1995), actions relating to explicit or implicit instructions. Rules are both their formulation and implementation, and their meaning appears through their practice, that is, the activity of applying and interpreting, or even bypassing or violating, them. It should be noted that, while being instructed by procedural provisions, statute law, and judicial precedents, judicial actions are also instructing: they can subsequently constitute a reflexive precedent, in the line of Garfinkel's (1967) concept of documentary method of interpretation.

### *1.3 The textual ethnography of a set of cases from the Global South*

Some ethnographers might be puzzled by the proposition of conducting an ethnography of texts: texts would be important data in any field but could not be an object of ethnographic study in their own right. Our contention is precisely that there is no foundational opposition between ethnography and texts. As nicely shown in Livingston's *An Anthropology of Reading* (1995), texts exhibit the purposes of their writing, the meanings they seek to convey, and the methods which should be used to read them. It is the purpose of textual ethnography to describe how it practically works. It implies an immersion into the cultural "socio-logic" (Jayyusi, 1988) in which texts are embedded, and into the endogenous competences that are needed to competently navigate them. Just as other products of society and culture, texts are nested in social and cultural processes on which textual ethnography focuses. This attention paid to texts is all the more relevant when it comes to law, given the central role texts play in law's life (Dupret et al., 2019), from doctrinal texts and legal decisions to case files and court transcripts. The ethnographic reading of legal texts implies understanding them as practical accomplishments, against the background of what is taken as legally normal in a particular environment, in a manner that simultaneously sheds light on past matters and sets the ground

for subsequent interpretations. Factual accounts must be understood within the frame of relevance of the law and of its legal categories: through the process of legal characterization, which links facts to rules, legal categories are not given but (re)interpreted (Colemans and Dupret, 2022). When "playing" the specific legal game in which they participate, the parties to a dispute, collaboratively though asymmetrically, specify the limits of acceptable and unacceptable arguments, select and interpret the sources of their arguments, and set the basis of their future uses. In sum, legal orders work according to their own logics and legal practitioners act, in various degrees, as proponents of these logics. Practitioners of the law not only try to solve a certain dispute at hand, they are also continuously engaged with the reproduction and occasionally even the development of "the law". Practicing the law means always both practicing concrete matters at hand and practicing the "law in the books" according to which the matters at hand are to be solved (Bens et al., forthcoming).

Our analysis of decisions is not to make a point about the permanent and intangible structures and dynamics of law in authoritarian or/and non-authoritarian contexts. Instead, in line with the ethnographic approach of law and texts outlined above, it is to show how, in given cases, judges have concretely engaged in legal work, positioned vis-à-vis the exterior environment, and drawn on legal formalism to ascertain their authority. We show that legal ethnomethods can be valid to analyze judges' activities in decision-making and help understanding the direct empirical relation between law and authoritarian rule. The five cases we examine are all related to Global South countries, i.e., Egypt, Mali, and Turkey. They reflect the diffusion of law's participation in institutional politics, in line with the globalization of the nation-state model and its formal rationality (Dupret, 2021). In that sense, there should be neither geographical exceptionnalism regarding the study of the rule of law or rule by law nor any Western constraining jurisprudential paradigm. The cases studied in Section 2 tend to show the ordinary working of the law, independent of the possibly authoritarian nature of the political regime, whereas the cases analyzed in Section 3 exhibit the external pressures constraining judicial authorities in authoritarian regimes, which translate in the texts of their decisions.

## 2. The working of ordinary justice

Drawing on cases in which the nature of the regime is irrelevant, we use the praxeological approach to highlight structural aspects of the working of ordinary justice which seem at play anywhere. We address, first, the passage to law, by which we mean the work inherent in any legal process to transform the social into the legal through two main devices: the production of

procedural correctness and the search for legal relevance. Second, we show how, to abide by the due process of law, judges and the legal order they activate organize the dialogicity of the trial, while simultaneously truncating it, that is, selecting the arguments that fit the expected outcome, in order to issue a monophonic ruling.

*2.1 The passage to law*

In the life of law, rules play a fundamental role (Dupret et al., 2020). One way to describe how members deal with legal rules consists of presenting in parallel the rules and their implementation, as in the following case of rape in Egypt. We call it the "phenomenon of the rule", which is made of two segments of a pair. On the one hand we have the many provisions/instructions of the relevant code:

**Criminal Code (CC):**
Art.40 – Is considered an accomplice in the crime:
- This who instigated the committing of an action constitutive of the crime if this action happened as a result of this instigation;
- This who agreed with someone else to commit the crime, and it happened as a result of this agreement;
- This who gave to the actor or the actors a weapon or instruments or anything else that was used in committing the crime while knowing it or who helped in any other way in actions that made possible, easier or achievable its committing.

Art.48 – There is criminal agreement when two or more persons agree upon committing a crime or a misdemeanor or doing what makes possible or easier its committing. […]
This who participated in a criminal agreement, with the goal of committing the crimes or its committing being a means to achieve the goal intended, shall be punished for his simple participation to prison. […]
This who instigated the criminal agreement in this way or by organizing its making shall be punished by temporary hard labor […] or prison […]
Art.267 – This who had sexual intercourse with a female without her consent shall be punished by permanent or temporary hard labor
Art.280 – This who arrested anyone or imprisoned him or detained him without any order of an authority competent in this and outside the circumstances that are specified by the law […] shall be punished by imprisonment or a fine that cannot exceed 100 pounds.
Art.290 – This who abducted a female by ruse or duress, himself or by means of someone else shall be punished by permanent hard labor. This who committed this crime shall be condemned to the death penalty if this crime is cumulated with the crime of sexual intercourse with the abducted woman without her consent.

We can put these provisions synoptically with the prosecutor's following of the instructions of the code. Here, we see that using the rules must be read, in every singular case, as a two-segment pair indissociably binding the rules and the application of the rules.

| **(using the rules)** | |
|---|---|
| **[instructions]** | **<following of the instructions>** |

| | | |
|---|---|---|
| | 1.Q: | When did it happen |
| | 2.A: | On Thursday the 17th of January 1985 at 3:30 |
| | 3. | in Ma`âdî |
| CC 40, 48 | 4.Q: | What are your ties with the other accused |
| | 5.A: | Ashraf and Mitwallî are my buddies |
| CC 40, 48 | 6.Q: | What are your ties with the rest of the accused |
| | 7.A: | I don't know them |
| CC 40, 48 | 8.Q: | How did you meet them a little before the |
| | 9. | events |
| | 10.R: | I and Mitwallî and Ashraf after we left the |
| | 11. | movies we took the cab of the driver Ashraf's |
| | 12. | buddy and we met Salâh while driving and he |
| | 13. | went up with us |
| CC 40, 48, 290 | 14.Q: | What conversation had you got during that time |
| | 15.A: | When Salâh went up he said there was a girl |
| | 16. | with me now and a cop took her from me and he |
| | 17. | gave her five pounds we sat to discuss together |
| | 18. | and Salâh said I I'll take a woman for you |
| CC 40, 48, 267, 280, 290 | 19.Q: | Did you agree to take any woman on the |
| | 20. | street |
| | 21.A: | We agreed to abduct a woman and that |
| | 22. | Salâh took her for us |

Based on lines 19-22 of this excerpt, we can draw a number of remarks. First, we can describe how the public prosecutor relates to the Criminal Code provisions defining the concepts of accomplice, criminal agreement, and the punishment of abduction. Second, we can observe the public prosecutor's steady accomplishment of his work, in an often-redundant way, through which he fixes the legally relevant components of the narrative (e.g., participation, intention, lack of consent). Third, we can see how the public prosecutor exhibits the investigation's procedural correctness (through e.g., establishing the offender's and the victim's identities). Fourth, we can notice how the alleged offender acknowledges participation while foregrounding his accomplice's personal agency. Henceforth, fifth, we can remark the way in which the alleged offender orients to the provisions of the code and exhibits his understanding of their meaning and implications as manifested by the public prosecutor's questions.

In a regressive way, we can also present ordinary judicial decision-making by starting with the reading of a legal provision and ending up with the meaning law professionals ascribe it. It reveals how legal decision-making produces, in a very routinized way, both a procedurally correct and legally relevant outcome. Most often, attorneys, magistrates, and prosecutors legally formalize the categories used by victims, offenders, and witnesses when describing the facts. Conversely, non-professional parties to a trial generally seek to avoid blame-implicative inferences originating in the facts' legal characterization (Komter, 1998).

In the following Egyptian example of a divorce ruling based on the harm inflicted by the husband on his wife, we show how law professionals pay attention to procedural correctness and legal relevance in the accomplishment of their work.

Article 6 of Law No. 25 of 1929 states:

> If the wife alleges that the husband mistreated her in such a way as to make it impossible between people of their social standing to continue the marriage relationship, she may request that the judge separate them, whereupon the judge shall grant her an irrevocable divorce if the harm is established and conciliation seems impossible between them.

A woman's petition in divorce for harm, which is constrained by the stipulations of this statutory provision, initiates a sequential process, reflected in the ruling structure (Dupret, 2011), which, through a series of successive steps, reaches the stage of the judge's decision. Among the judge's major and routine tasks, there is the public manifestation of the correct accomplishment of his job. Producing a procedurally impeccable ruling is of paramount importance, and this is demonstrated in the judge's rehearsal of the necessary steps he must (supposedly if not actually) perform. It is obvious that, at this procedural level, the judge exclusively refers to the procedural technicalities of Egyptian law.

Besides the constraining effects of procedural rules, parties in a trial address substantive issues and seek to give a factual substance to legal definitions. This means, in our case of divorce, to specify what counts as "harm" and what is the cause of such harm. With regard to harm itself, it is up to the judge to make the facts fit into the definition of Article 6. In this case, the Court of Cassation's stipulations constrain the judge's work:

> Considering that, as it comes out from the text of Article 6 of Decree-Law No. 25 of 1929 concerning certain provisions on repudiation, the Egyptian legislature requires, so as to allow the judge to rule for judicial divorce on the ground of harm, that the harm or the prejudice comes from the husband, to the exception of the wife, and that life together has become impossible. The harm here is the wrong done by the husband to his wife by the means of speech or action or both, in a manner that is not acceptable to people of same status, and it constitutes something shameful and wrongful that cannot be endured (Cassation, Personal Status, Appeal No. 50, 52$^{d}$ Judicial Year, session of 28 June 1983; its standard is here a non-material standard of a person, which varies according to environment, culture, and the wife's status in the society: Cassation, Personal Status, Appeal No. 5, 46$^{th}$ Judicial Year, session of 9 November 1977, p. 1644). The harm also has to be a specific harm resulting from their dispute, necessary, not susceptible of extinction; the wife cannot continue marital life; it must be in the capacity of her husband to stop it and to relieve her from it if he wishes, but he continues to inflict it, or he has resumed it (Cassation, Personal Status, Appeal No. 5, 47$^{th}$ Judicial Year, session of 14 March 1979, p. 798; Cassation, Personal Status, Appeal No. 51, 50$^{th}$ Judicial Year, session of 26 January 1982)

Obviously, the Court of Cassation's definition does not clear the uncertainty which judges face while characterizing a factual situation. However, the judges' work is not utterly problematic or arbitrary: the categories they use are taken as largely objective, even if it is the

outcome of their own characterization (Searle, 1995). We can observe how much the legal process of characterization is supported by the sociological process of normalization, by which we mean the process through which judges routinely associate the characteristics of the case at hand with the features of a common, normal, usual case of this type (Sudnow, 1965). These "normal" categories have a commonsense dimension beyond their legal definition, to which judges, prosecutors, attorneys, victims, offenders, witnesses, etc. explicitly or implicitly refer.

The judge's substantiations of the legal category of harm varies according to what he considers as "normal harm", that is, the behavior he typically characterizes as harm in the accomplishment of his routine activities. It includes his knowledge of the typical manners in which a wife suffers prejudice, the social characteristics of male offenders and female victims, the features of the settings in which such an event eventually happen, etc. His conception of harm functions reflexively: he refers to a conception which he thinks he shares with other people and these other people orient themselves to the judge's conception, something that in turn serves as the basis for the final ruling. It means that the judges' rulings operate in a justificatory way, relating themselves to a set of procedural and substantive rules while backgrounding the practicalities of their own writing.

In our case, two evidentiary techniques establish the kind of harm that occurred: forensic evidence and testimonies. We now describe the interactional details through which the court attended the testimonies of the witnesses designated by the petitioner and the defendant:

1- The court called the petitioner's first witness and he said:
2- My name is … **[**oath]
3- Question: What's your relationship to the two parties
4- Answer: My workplace is close to the post office in which the petitioner works
5- Q: What are you testifying to
6- A: The petitioner is the defendant's wife by virtue of a legal marriage contract there were disputes between them and I saw the petitioner's husband whom I know although I don't know the place of his residence he was addressing to her words in front of the post office in which she works calling her I heard him addressing her as you bitch you filthy and other words of this kind for nearly two years and one month ago he called the police against her because there was between them something I don't know
7- Q: For how long have you known the petitioner's husband
8- A: For nearly two years
9- Q: Does he live in your neighborhood
10- A: I don't know
11- Q: For how long has the defendant addressed bad words to the petitioner
12- A: For nearly two years
13- Q: What are the words he's addressed to her
14- A: He told her you bitch you filthy and words of this kind and this was in front of the post office
15- Q: Did any harm affect the petitioner because of this
16- A: Yes she broke down while working at the post office
17- Q: Anything else to say
18- A: No

Both the judge and the first petitioner's witness seek to produce a legally relevant and credible information. The judge tests the information provided by the witnesses through questions directed at their own credibility: the witness's "relationship to the two parties" (turn 3); the witness' first account of his testimony (turn 5) and its assessment through its piecemeal confirmation (turns 7-14). The judge also seeks to extract elements of information relating to the demeanor's temporal dimension (turn 11), content (turns 13 and 16), and prejudicial nature (turn 15), as well as the person responsible (turn 11). Together, these elements constitute the building blocks of the legal category of harm; they are in congruence with the elements of the notion of harm as defined by the Court of Cassation.

Eventually, the judge issues his conclusions, based on such testimonies, in a language that ensures the facts' passage to law:

> Considering that, with regard to the second ground of the petition, namely the assault against her by the means of blows and insults, her two witnesses testified to the fact that they heard him insulting and slandering her in the street; moreover, one of them saw him hitting her more than one time and testified that the words with which he slandered her cannot be accepted. Life together became impossible and she suffered from harm because of this. Pursuant to the above, the testimony of her witnesses is congruent with the petition and is acceptable.

*2.2 From polyphonic to monophonic: Truncating the dialogicity of the trial*

In this second part of this paper, we want to show how, to abide by the constraints of the rule of law, judges and the legal order they activate organize the dialogical form of the trial, while simultaneously truncating it in order to issue a single-voiced, monophonic ruling. In this section we use a material coming from a context that, judicially speaking, is totally different: the trial of Ahmad al-Faqi al-Mahdi, a Malian Islamist who appeared before the International Criminal Court (ICC) in The Hague on the charge of having directed, and participated in, the destruction of Islamic shrines during the 2012 jihadist occupation of Timbuktu. While in Section 2 we used an Egyptian material in order to show how adjudication can proceed ordinarily within authoritarian regimes, we resort in this section to data exposing how the judicial process is structurally anti-pluralistic, in democratic institutions as well.

As is the case for most mediatized affairs, what became known retrospectively as 'the al-Mahdi affair' was simultaneously taking place in a broad dialogical network and in a specific dialogical site (D'hondt et al., 2021). Just like any other judicial institution, the ICC constitutes a unique dialogical site that associates multiple parties and personnel. The site connects them through successive procedural steps that are sequentially organized. This dialogical site, in turn, initiates, extends, or becomes part of a broader network. Such network extends beyond the boundaries of the judiciary and also includes non-judicial actors, e.g., institutional (the media,

political organizations, etc.). In the al-Mahdi trial, networking extends from network to site: the specific facts which al-Mahdi was charged with – the destruction of ancient Sufi religious shrines – were themselves part of a network and may be considered a move within an intensely mediatized "dialogue" between, on the one hand, the Jihadist militia and, on the other, the Malian government and representatives of various international organs and bodies.

One further remark is in order here. "Dialogicity" (whether it applies to a site or a network) does not mean that speech turns necessarily converge, orient to the same relevancies, or have a monophonic character. On the contrary, speech turns quite often expose diverging viewpoints, depart from each other, and are polyphonic. Among other things, speech turns address different audiences and, therefore, activate contrasting relevancies (Dupret and Ferrié, 2014). By audience, we mean the publics, both real (e.g., the other participants in a trial hearing) and virtual (e.g., the hypostatic addressee of a discourse, like the 'people' or the 'nation'), to which the speakers address themselves. Relevance refers to the discursive repertoire with which the speakers claim to align themselves and to follow.

At the level of the broad dialogical network, the Malian government, on the day the destructions started (June 30, 2012), issued a statement that excluded the possibility of entering into negotiations with Ansar-Dine (AD), the jihadist organization, instead characterizing them as "terrorists without faith or law" and denouncing the destructions as "a destructive furor akin to war crimes". This use of the legal category of war crime created a new affordance, opening up the possibility of referring the case to the ICC. A few days later, on July 2, 2012 this affordance was further amplified by Prosecutor Fatou Bensouda, who issued a statement warning the rebels that the destruction of buildings dedicated to religion could result in a "war crimes charge." Both statements can be described as dialogical connectors. They are dialogical, because they function within a sequential frame of remote speech turns. They are connectors, because they trigger an intervention of the ICC, which thereafter appears as one of the branches of the bush of the internationally mediatized heritage-destruction-in-Mali network.

The crucial role of the connection established in this way is confirmed in the charging document that the Office of the ICC Prosecutor submitted in December 2015. The following fragment, which comes from the "legal conclusions" section outlining the legal principles that apply to the case, shows how the OTP inscribes the charges in the ICC's constitutive order – the legal framework established by the Rome Statute – by referring to Mali's ratification of the Rome Statute (§235) and to the letter by which the Malian government seized the court (§236):

235. Mali signed the Rome Statute establishing the International Criminal Court on July 17, 1998 [...] The International Criminal Court therefore has jurisdiction for crimes under the Rome Statute committed on the territory of the State of Mali or by Malian nationals from July 1, 2002.
236. On July 13, 2012, Mali referred to the Prosecutor of the International Criminal Court the most serious crimes committed on its territory since January 2012. The referral letter sent by Mali to the Office of the Prosecutor referred in particular to "summary executions [...], the massacres of civilian populations [...], the destruction [...] of mausoleums and mosques."

The dialogical connection established in this way sets the legal process in motion and allows the legal site of the ICC to start operating. As a dialogical site, the ICC articulates a multiplicity of audiences and relevancies, including a set of other networks related to the Court's general purpose – the implementation of international criminal law – and the specific events that justified the seizure of the court. Once the ICC had been seized, it processed the heritage-in-Mali network into a collection of data and evidence that were specifically oriented to its own practical purposes (the trial of a case). This selection operated in three directions: (1) setting the parties to the trial and settling their status; (2) addressing the relevant audiences according to their status in the trial; and (3) threading the legitimate legal relevancies of the case.

Already in the first statement of the ICC Prosecutor, a certain distribution of roles and pre-characterization of "actants" (acting entities, including people, objects and events, cf. Greimas and Courtès, 1979; Latour, 2009) is imposed onto the heritage-in-Mali network: certain objects are identified as "buildings dedicated to religion" and "heritage" (thus paving the way for a legal characterization according to the Rome Statute); certain events are selected as putatively constitutive of "facts" justifying the seizure of the ICC; certain people and groups of people are designated as "evildoers" or "victims", preempting their designation as accused party or third parties. This distributed pre-characterization has a double effect. First, it restrictively selects the legitimate turns (e.g., including the statements of Malian authorities, but excluding the statements of AD justifying the destruction of tombs as opposed to the Sharia). Second, it pre-allocates moral and thus normative value to 'actants' (tombs are sacred, destroying heritage is bad, local people are victims, tombs destructors are criminals). In sum, these connective and triggering statements represent the first steps of what Latour (2009) calls the 'passage to law.'

This passage to law truncates the intrinsic dialogicity of the various 'moves' that together make up the heritage-in-Mali network for the practical purposes of its own legal rephrasing. In this process, the network is transformed into a resourceful fact-finding trove, where the 'facts' for which al-Mahdi is tried miraculously correspond to the legal categories and provisions of the Rome Statute. This is exemplified, for example, by the mirroring structure of the charging document submitted by the OTP, in which the first section reviews 'factual elements' and the

second ‘legal conclusions.’ In this way, the al-Mahdi trial, as a specific type of dialogical site, comes to incorporates elements from the heritage-in-Mali dialogical network, to the extent that the latter contributes to the process of legal characterization.

Once this ‘passage to law’ has been initiated, the ‘actants’ required for the legal process to assume its course have been designated, and the original heritage-in-Mali network has been truncated accordingly, the dialogue in court can go ahead and the dialogical site becomes operative. As already indicated, this involves trial actors taking turns in a restricted-to-the-courtroom dialogical way. Trial parties, however, never exclusively address each other. They simultaneously keep on orienting to out-of-the-courtroom audiences, although in legally re-specified terms, roles, and identities. In the al-Mahdi trial, at least three audiences appear to be particularly targeted: the victims, the international community, and the jihadi nebula (at least the last two of these were already involved in the initial dialogical network). This entangling of internal and external audiences is most outspoken in the “apology” (to the victims, the Malian people, the international community) that al-Mahdi made on the first trial day, immediately after the charges had been read out to him (see also D’hondt, 2019). Such apology illustrates how in the course of legal proceedings, the trial ‘parties’ never exclusively address each other, but also speak to audiences external to the ICC dialogical site and to the actants in the network, such as the ‘Malian nation,’ the ‘international community,’ and other abstract, intangible audiences.

The relationship between the parties and these audiences and actants is achieved by the threading of relevancies, that is, by the identification and delineation of relevant themes, in this case the Rome Statute and the body of international criminal law, the UNESCO and the World Heritage discourse the organization promotes, universal values, etc. Through such threading of relevancies, the parties to the trial, collaboratively though asymmetrically, specify the limits of acceptable and unacceptable arguments, they select and interpret the sources of their arguments, and set the basis of their future uses. This is a site-specific instance of what Garfinkel (1967) called the ‘documentary method of interpretation:’ the parties retrospectively ascribe meaning to the provisions and concepts on which they base their arguments, and in doing so they prospectively establish precedents restricting the scope of these provisions and concepts’ future uses. The following excerpt from the charging document illustrates the first part of this process. Here we can observe how the Prosecution, in a kind of “looping effect” (Hacking, 1995), fleshes out the concept of “building dedicated to religion”:

3.2.1 Concept of “buildings devoted to religion” within the meaning of Article 8 (2) (e) (iv)

265. The attacked “buildings” must be dedicated to “religion”.
266. The term “building” is not defined in the Rome Statute or the Elements of Crimes. The Prosecution submits that it is any building whatever its shape, size and function.
267. The term “religion” is not defined. [...]
268. [...] We must therefore understand the term “religion” in a broad sense.
270. The concept of “manifestation” of religion is equally broad. [...]
271. It follows that protected buildings need not be dedicated to any specific, traditional or universally / internationally recognized form of religion. There is no need to adduce evidence of a minimum number of followers / believers. It does not matter whether a religion is recent or ancient. Religion encompasses beliefs, whether practiced individually or in common. Finally, the merits of a religion are also irrelevant.
272. In conclusion, any building serving a religious purpose or being the subject of any practice through which a religion or belief is manifested is a building devoted to religion. This religious character can be established in many ways regardless of the public or private character of the building. Because the term “buildings dedicated to religion” transcends the traditional and popular notion. It is not just churches, mosques, synagogues or temples. It is any building that serves the spiritual needs and purposes of followers of the religion in question. [...]

Specifying the meaning of a legal category such as “buildings dedicated to religion” enables two additional operations. First, it allows the Prosecution to characterize the Timbuktu tomb destructions as “attacks against buildings dedicated to religion” (in a kind of double-bind process: facts are processed so as to fit legal categories; legal categories are interpreted in a way that make them relevant regarding to the processed facts):

4. The attack of June / July 2012 in Timbuktu against historical monuments and buildings dedicated to religion
4.1. Function and importance of the mausoleums in Timbuktu [...]
82. The old town of Timbuktu is characterized by its mud architecture and some of these buildings date from the period of the Songhoy Empire. It is listed in the Register of tangible and intangible elements classified as national cultural heritage and is fully protected by Malian legislation. Some of its sites have been inscribed on the World Heritage List since 1988. They were twice inscribed on the List of World Heritage in Danger [...]
4.2. Context of the attack carried out in Timbuktu in June and July 2012 against historical monuments and buildings dedicated to religion [...]
90. Buildings dedicated to religion and historical monuments other than those referred to in these writings were also attacked in Timbuktu in 2012. [...]
92. This first attack prompted the government of Mali and UNESCO to meet on May 24 to ensure better protection of the cultural heritage located in Timbuktu and in northern Mali. As of June 28, 2012, the city of Timbuktu was inscribed by UNESCO on the list of world heritage in danger.
93. A second attack on historic buildings and monuments dedicated to religion took place between approximately June 30, 2012 and approximately July 11, 2012. [...]
94. The unique cultural value of these buildings and their sacred character for the inhabitants of Timbuktu was due in particular to their age, their emblematic character in the history of the city, and their strong links with the history of the Muslim religion in Africa or to the Muslim saints for whom these mausoleums served as tombs. Their religious dimension stemmed either from their very nature or from the religious practice of which they were the object by the Timbuktans. [...]

Second, when the meaning of the legal category “buildings dedicated to religion” proposed by the Prosecution is confirmed in the verdict of the Trial Chamber, this in turn allows for the characterization of other facts in other contexts as “attacks against buildings dedicated to religion.” In other words, it, possibly but not necessarily, sets a precedent. The al-Mahdi case alluded to such other cases working as precedents, as illustrated in the abovementioned §267 of the charging document.

## 3. From the rule of law to the rule by law: legality as authoritarian resource

To abide by the rule of law, trials are usually constituted as dialogical sites organizing polyphony as a structural feature of the due process of justice. However, this is done in a way that steadily truncates this polyphony to produce a monophonic outcome: the ruling. For this specific purpose, the members of a trial pay particular attention to the conformity of their moves, claims, and reasoning to two specific sets of rules: procedural and substantive. In other words, they strive to produce their procedural correctness and legal relevance. Ordinarily, the search for procedural correctness and legal relevance is accomplished in a routine way, in a non-problematic way, in the ordinary practice of law and justice, as part of this "doing being legal" (Garfinkel, 1967; Sacks, 1985) which is the proper of routine lawyering. Yet, this is here, at this very place, that the ordinary practice of justice can open itself to authoritarian practices, where the usual means of performing the law are twisted to support an authoritarian political order. Here, "doing being legal" can transform into "staging being legal". In this case, procedural correctness tends to be constructed *ex post facto*, in the writing of the ruling and not in the performance of the trial. Furthermore, legal relevance tends to be produced in a syllogistic way whose validity is strictly formal, where facts and rules, presented as if they were absolutely objective, are put in correspondence without or with thin substantial links.

We illustrate our point with Egyptian and Turkish cases. The Egyptian case dates back from the former President Mubarak era, when the regime had adopted a very repressive stance towards homosexuals under the pretext it did not match Egyptian social values. The Turkish cases refer more to the direct political dimension of authoritarianism and both lead to the condemnation of individuals having criticized the politics of President Erdogan.

The Egyptian case, known as the "*Queen Boat case*", followed a police raid of a nightclub on a barge moored to a Cairo wharf, in May 2001, during which several people were arrested based on their alleged homosexuality. Fifty-two people were prosecuted, among whom two were also accused of contempt of religion, which explains why the case was transferred to a State Security Court. In November of the same year, the court condemned the principal accused to five years in prison for debauchery and contempt of religion, the second accused to three years in prison for contempt of religion, and nineteen others to one year in prison for debauchery. However, the President of the Republic, refused to ratify the ruling against all those accused of debauchery and the whole case was transferred to an ordinary court, which, in March

2003, condemned the accused to even harsher penalties[2]. Here follows the grounds on which the public prosecution based its initial accusation:

> 1: The first and the second accused … both abused Islamic religion by propagating and encouraging extremist thoughts through speech, writing and other means …
> 2: All the accused practiced debauchery with men in the way indicated in the investigation.
> [The Prosecution] required that they be condemned to [the penalty stipulated in] Article 98/7 of the Penal Code and Articles 9/3 and 15 of Law-Decree 10/1961 on the repression of prostitution.

The two Turkish cases are related to the repression and purges that followed the 2016 alleged coup d'état attempt.[3] The first one is known as "*the Cumhuriyet trial*" and involves several executives and senior journalists of Cumhuriyet, an historical newspaper renowned for its leftist and secular editorial policy. The media was targeted for its critical coverage of AKP politics, especially in relation to the Gülen movement and the armed conflict with the Kurdish PKK. The ten accused were arrested, put in pre-trial detention and nine of them were condemned, by a judgment of 25 April 2018 of the Istanbul Criminal Court to sentences of imprisonment ranging from eight years and one month to two years and six months. The decision was then quashed by the Court of Cassation, to be after for the most part reconfirmed by the Istanbul Criminal Court and by the Constitutional Court, which led to Turkey's condemnation by the European Court of Human Rights on 10 November 2020. The incrimination which grounded the convictions was the one of assistance to illegal organizations, here PKK and the Gülen movement, as mentioned in the Article 220 §§ 7 of the Criminal Code:

> Anyone who assists an [illegal] organization knowingly and intentionally, even if he or she does not belong to the hierarchical structure of the organization, shall be sentenced for membership of that organization.

The second Turkish case is known as the "*Academics for peace trial*", after the name of an informal group of Turkish academics advocating for a peaceful resolution of the conflict between the Turkish government and the Kurdish PKK. The regime attacked members of the group after the publication of a petition entitled "We will not be a party to this crime!" on 10 January 2016, which denounced Turkish military operations and human rights violations in Kurdish provinces. The signatories massively lost their job in Turkish universities along with facing individual trials. The decision studied here was the first verdict of these trials and was issued by the Istanbul Criminal Court on April 4 2018[4]. The accused, Professor Fusün Ütsel, was condemned to 15 months of imprisonment for the crime of "propaganda for a terrorist

[2] The Court of Appeal eventually decided, in June 2003, to reduce the penalties to the time they had already spent in jail.
[3] Extracts of Turkish decisions are drawn from the European Court of Human Rights' decision: *Sabuncu and Others v. Turkey*, 10 November 2020.
[4] The text of the decision was found https://afp.hypotheses.org/.

organization", namely PKK, based on an incrimination mentioned in the Article 7 of the Turkish law on "fight against terrorism":

> A person who makes propaganda for a terrorist organization in a way that legitimizes or promotes the methods of coercion, violence or threat used by the organization or encourages to resort to such methods, shall be punished by imprisonment from one year to five years.

Rulings of this type do equally rely on facts, rules, and evidence. However, they do so in a very specific way. Starting with facts, we can observe how they are extensively based on prosecution accounts, which are themselves based on police records. In the Egyptian Queen Boat case, the facts are presented as follows:

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

Part of the structural organization of such rulings is that they should be based on evidence. Contrary to accusatorial systems, the production of evidence in inquisitorial systems, such as the Egyptian and Turkish ones, is not the object of cross-examination by the parties. In the Egyptian Queen Boat case, evidence was presented by the court as follows:

> On the basis of the Public Prosecution's warrant […], the first accused was arrested in the manner established in the record […] and the following items were seized: (1) 10 books entitled "God's Lieutenancy on Earth"; (2) numerous photographs and negatives showing sexually perverse practices of the accused with many people; (3) numerous Muslim, Christian, and Jewish books; (4) numerous photographs of areas around Cairo, churches, mosques and tourist sites and one Jewish synagogue; (5) commentary papers from Military Unit 1057c; (6) one Star of David; (7) a number of hand-annotated documents; (8) a photograph of the President of the Republic and his wife, (9) photographs of the accused in Jerusalem and the Occupied Territories; (11) numerous photographs of the country's Jewish community and Jewish tombs in Basatin; (12) the Israeli national anthem, a copy of the book […]; (13) two maps […]; (14) two maps of Cairo churches; (15) many maps of Cairo mosques. […]

In the Cumhuriyet case, evidence consists of presenting long enumerations of articles published in the journal, tweets, testimonies by colleagues and allegations, which in themselves, individually or linked, do not show an intentional assistance to PKK nor to the Gülen movement. An example can be found in the bill of indictment concerning eight of the accused, in which most of the facts do not origin from actions of the accused (but from other members of the journal). In addition, one can see that the link connecting these facts with the incrimination is systematically speculative, and often backed with references to rumors or anonymous testimonies:

> (i) The publication of an interview with Fethullah Gülen (the leader of the Gülen movement) on 23 May 2015 under the heading "The son-in-law called my humble home (fakirhane) a mansion (malikhane)" [...]
> (ii)The use by the newspaper Cumhuriyet, on two occasions, of the same heading as the daily newspaper Zaman (regarded as having close ties to the Gülen movement) [...]

(iii) The participation of certain journalists working for the newspaper Cumhuriyet in the "Abant meetings"(conferences organized by the Gülen movement), together with testimony to the effect that only individuals approved by Fethullah Gülen were invited to those seminars.
(iv) The publication of the article by the journalist Aydin Engin on 13 July 2016, two days before the attempted coup, entitled: "Peace in the world, but what about at home? [...] According to some informants, the article had announced the date of the planned coup attempt.
(v) The statement made by a Cumhuriyet journalist, H.Ç., in an interview [...] , in which he said that he "would not describe the Gülenist community as a terrorist organisation".
(vi) The publication of the article of 12 July 2016, three days before the attempted coup, written by the applicant Ahmet Kadri Gürsel and entitled "Erdoğan wants to be our father" …
(vii) The fact that the United States correspondent of the website haberdar.com had also been Cumhuriyet's US correspondent for two years, and had allegedly published articles setting out some of the views of the Gülen organization.
(viii) The fact that false and manipulative information posted on the Twitter accounts @fuatavni and @jeansbiri (Twitter feeds of whistleblowers critical of the government to which members of the Gülen organization allegedly contributed) had been reproduced in a special section of the newspaper Cumhuriyet, thus enabling the information to be circulated widely among the public.

The compulsory production of evidence appears sketchy and circular. It is listed without commentary, as if facts were self-speaking and objective. The relationship between the items is not established. The mere fact of them being listed together, what we call "impregnation by contiguity", gives them the force of evidence. In the Queen Boat case, police, prosecution, witnesses, and defendants' voices are mixed to produce a self-evident and blame-implicative master-narrative:

When the accused was confronted [...] with what the investigation and information revealed, he admitted that he had embraced certain religious thoughts [...] , had founded God's Lieutenancy [...] , had used certain religious symbols according to his convictions [...] , had undertaken to publish these ideas of which he was convinced among the people who were bound to him, among whom the second accused [...] , so that the latter undertook to found a cell [...] , had practiced sexual perversion for a long time and during his education at the German School in Duqqi, and had kept on practicing homosexuality with numerous people; had frequented certain hotels, public places and boats that sexually perverse people frequent; had collected numerous photographs of these perverse practices with certain people, had printed and circulated them, had circulated certain messages through the Internet containing his religious thoughts, besides the exchange of sexually perverse messages.

Under the effect of "impregnation by contiguity," several people sit in the dock, and this effect is itself produced in the ruling by the presentation of one single structure of causality: (1) one person is accused and in turn designates some other person or place; (2) said person is arrested or said place is searched; (3) any person found in this place is suspect as such and risks being arrested for the same reasons that justified the first search or arrest. Such mechanism of impregnation by contiguity functions based on background expectations and spontaneous categorizations made by police officers ("considering his physical appearance and clothing, this person presents all the characteristics proper to those whose arrest was ordered; he must consequently be included within the roundup"). The ruling gives retrospective coherence to all this and its consistency is not questioned. It thereby turns impregnation by contiguity into a legitimate basis for presumption of guilt; and it turns the forensic examination, conducted on that basis alone, into a means to confirm the presumption.

Impregnation by contiguity is not necessarily tied to incriminating facts *per se* but can also express in the ways judges arrange and present the background context and its alleged relationship with the case at hand. The justification in the "Academics for peace's" decision thus develops significantly more on the actions of PKK than on the signature of the petition by the accused. The operations of the Kurdish group are described with the view to disqualify it morally, politically, legally, and contiguously, i.e., by tainting and staining everything that can be related to it one way or another, even indirectly and hypothetically:

> It has continuously carried out armed terror activities that have caused the death of thousands of civilians and security officers up until today, that it still engages in the activities and carries out numerous operations of a calamitous nature; it is obvious that on January 11, 2016, the time of the crime, starting in the second half of 2015, it aimed to drag the country into the chaos of violence as it carried out acts of occupation under the name of so-called self-governance by placing barricades and bomb traps on the roads via the terrorists that had infiltrated several town centres in the eastern and south-eastern regions of the country, digging up ditches with barricades reinforced with explosives, by taking locals that were unable to leave the area hostages and by using women, children and the elderly people as shields and finally, in several settlements, it sought to create zones under the control of the terrorist organisation that are independent from state sovereignty.

The juxtaposition of the accusation against Professor Ütsel and the description of PKK's actions thus creates a tie, which, in the light of the strongly negative characterization of PKK, renders her criminalization evident, regardless of any other elements.

All rulings give *ex post facto* coherence to a series of events that share very little (if any) unity. By analyzing the contents of the ruling document, in the Queen Boat case, we can see how, on the one hand, technically speaking, two cases that were different at the beginning – contempt of religion and debauchery – were merged to mutually reinforce each other. On the other hand, it also shows how unity is retrospectively attributed to facts that are bound only by time and space coincidence.

In this formally syllogistic game, judges need a rule to legally characterize facts. Put simply, the alternative is between a readily available rule and a rule that must be made relevant; between the "soft cases" where rules can be followed "blindly" (Wittgenstein, 1963: §199) and the "hard cases" where rules must be discovered beyond prevailing uncertainty; between routine practice and high-profile affairs. Any case requires some reasoning and thus some quantum of interpretation, be it to just establish an equivalence between the paradigm embodied by the rule and the instance represented by the facts. As nicely shown by Lenoble and Ost (1981), neither facts nor rules are ever totally transparent. However, rules are more or less "entrenched" (Schauer, 1991) and the judges' interpretive work varies accordingly. In the context of authoritarian rulings, one can observe the tendency to transform soft cases, which would have

easily led to an acquittal of the accused, into hard cases, which require an important work of interpretation and twisting of the rules to produce relevance despite all appearances.

The paramount importance of rules is illustrated in the Egyptian case in a paradoxical way. Indeed, Egyptian law does not explicitly criminalize same-sex relationships. However, judges assimilate homosexuality with debauchery and use Law No.10/1961 on the repression of prostitution as the legal element they need to establish the crime. Article 9 of Law 10/1961 stipulates:

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

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

> The crime designated in [this text] is only committed when a man or a woman fornicates with people without distinction, habitually. When a woman fornicates and sells her virtue to whomever asks for it without distinction, she commits prostitution […]; debauchery occurs when a man sells his virtue to other men without distinction.

Then the judge cites a 1988 ruling of the Court of Cassation that confirms this conception:

> Case-law customarily used the word *da'ara* to [designate] female prostitution and the word '*fujur*' to [designate] male prostitution.

Legal relevance can also be achieved by creating, as nicely shown by Gregory Matoesian (2001), incongruities or disjunctive pairs. In the "Academics for Peace" trial, it was achieved by the crafting of an opposition between the behavior of the accused as it ought to ideally be, according to the court's standards, and as it happened to be, according to the court's description:

> It is obvious beyond dispute that it does not suit the identity of a so-called intellectual, pacifist, democratic, responsible and unbiased academic such as the accused, who states that s/he signed the declaration to contribute to the establishment of peace as a responsible and intellectual academic, to only address the state as if the perpetrator of the events is the state, to not think about preparing and addressing another declaration of the same nature to the terrorist organization PKK/KCK, to not consider making a similar call, study or declaration concerned with the fact that the so-called self-governance declaration of the PKK/KCK might initiate a development that can end up in the division of the country or may have political consequences leading to a separation. Again, it does not suit the identity of a so-called unbiased, pacifist, intellectual academic such as the accused to be unaware of the fact that with this declaration she has made terrorist propaganda in a way that legitimizes the coercive, violent and threatening methods of the terrorist organization and encourages the application of such methods, to not consider that the mentioned declaration would be used as a propaganda tool for the armed terrorist organization.

The figure of "the intellectual, pacifist, democratic, responsible and unbiased academic" was thus used to incriminate her not for what she had done but rather for what she had not done: publishing a petition critical of PKK. It was also used to postulate her propagandist intention in the absence of any material elements, as an academic ought to know that a declaration criticizing the regime will be automatically used as propaganda by armed groups opposed to the regime.

Interestingly, judges produce legal relevance in some cases by drawing on the vagueness of incriminating rules, despite the principle according to which criminal rules must be interpreted restrictively. The broadness of incriminating rules and the judges' extensive interpretation account for that, in spite of the absence of any single convincing evidence, the case still holds. The overinclusiveness of rules and the vagueness of evidence mutually reinforce each other and circularly achieve the production of guilt. In the Cumhuriyet case, the judge deciding over the extension of the pre-trial detention interpreted "assistance to illegal organizations" not so as to specify the meaning of the provision but, on the contrary, to draw on its vagueness and generality:

> The offence of which they were accused in the indictment, namely assisting an armed organisation, could take a variety of forms and […] the evidence in the case file should be assessed as a whole.

Circularity is also one of the literary techniques to which courts resort to ground the legal characterization of facts. In the Queen Boat case, for instance, *flagrante delicto* and confessions were used to redundantly confirm what was known in advance: a roundup was organized because of the indication of some crime committed on the spot; people were suspected of having committed some crime because they were arrested on this very spot. In this type of logic, culpability is not deduced from collected evidence; on the contrary, evidentiality is induced from pre-established culpability. This is what we already called a "documentary method of interpretation" (Garfinkel, 1967) in which *a priori* social categorization forms the basis of *ex post facto* legal characterization, which reflexively inform the conception one may have of the former.

Intertextuality is another literary technique vastly used to evidence elusive facts. Through the reference to various texts and authors, the ruling incorporates an authority without having to go into factual details. In other words, it draws on the force of other texts while sparing the effort to substantiate the claims. For instance, in the Academics for Peace case, the judges grounded the characterization of PKK as a terrorist organization on other indeterminate court decisions:

It is proven by court decisions that the aim of the terrorist organisation PKK/KCK is to carry out activities to detach a part of the territory of the country from state sovereignty, to distort and disturb the constitutional order and the unitary structure of the Republic of Turkey, and that, in order to achieve this goal, it has caused the death of thousands of civilians and security officers, that it keeps carrying out these activities, and is therefore categorised as a terrorist organisation that commits numerous terrorist actions of a calamitous nature.

Forensic expertise can also play this evidentiary role. The authority of science – whatever that may mean – is mobilized intertextually to support, e.g., testimonial evidence. This was the case in the Queen Boat trial, where medical examination was performed to allegedly establish the performance of passive sexual acts:

Drawing on what precedes in our examination of the Prosecution's report and the former forensic report and from our re-examination of the accused Sharif Hasan Mursi Farahat, we state:
- that the aforementioned is an adult male of approximately 32 years, of ordinary build and muscular strength, and in ordinary health, devoid of the suspected wounds.
Following our local examination of his anal area, [it is clear that] he does not present the forensic marks of repeated homosexual penetration of the rear.
- that it is known that touching and external sexual contact do not leave marks that can be testified to upon examination.
- that it is also known that adult homosexual penetration, whether exceptionally or repeatedly, with the use of lubricants and appropriate positioning of the active (*al-fa'il*) and passive (*al-maf'ul bihi*) parties, leaves no marks that can be testified to on examination.

Through these many devices, judges construct piecemeal a verdict performing its objective conformity to procedural and substantive rules. The sentence is presented as the result of a rational, mathematical operation drawing on a decomposition of the accused's incriminated behavior and a computation of his or her penalty. In the Academics for Peace case, for instance, it takes the form of a listing of elements, adding and substracting years of imprisonment, the latter seeming designed to disguise the harshness of the sentence in the light of the accused behavior:

As the accused has been proven guilty as charged with the crime of MAKING PROPAGANDA FOR THE TERRORIST ORGANISATION PKK/KCK, Article 7/2 of the Law numbered 3713 shall be applied; in accordance with the first clause of this Article, the way of the crime was committed, the properties of the action, the weight and the intensity of the intention have been taken into consideration, the discretionary power has been employed and given the minimum level stated in the law, the accused shall be PUNISHED WITH 1 YEAR OF IMPRISONMENT.
As it has been proven that the crime has been committed by means of media and press, in accordance with clause 2 of Article 7/2 of the Law numbered 3713, the penalty shall be increased by 1/2 and therefore, the accused shall be PUNISHED WITH 1 YEAR AND 6 MONTHS OF IMPRISONMENT.
Considering the behaviours of the accused after the time of the crime and during the process of judgment, in accordance with Article 62 of the Turkish Penal Code, her/his penalty shall be reduced by 1/6 by discretion and therefore, the accused shall be PUNISHED WITH 1 YEAR AND 3 MONTHS OF IMPRISONMENT.

## 4. Conclusion

Albeit in a very formal way, "authoritarian" judges present themselves as constrained by the necessity to base their judgements on rules. Seemingly, abiding by the rule of law constrains their discretionary power, while, actually, it provides them with the opportunity for one-sided flexible reasoning. With rules, judges produce and reproduce narratives as to how to understand

and apply the law. This is the ordinary working of law, which they however twist in a particular way by overstretching certain aspects of the rule of law, e.g.: an over-emphasis on rule formalism, that is, a reading of legal rules according to their letter rather than to their meaning; an excessive stress on procedural correctness, e.g, the retrospective presentation of the ruling as if it had perfectly followed the steps of judicial procedure; the production of argumentative shortcuts; the artificial production of evidentiary coherence, among which what we call "impregnation by contiguity", that is, the ascription of a probing status by the mere fact of standing next to other alleged evidences.

Authoritarian adjudication puts forward legal master-narratives that correspond to what David Sudnow (1965) calls "normal crimes", that is, the routine understanding of legal situations and of their treatment. The Egyptian case is paradigmatic in that judges, despite the absence of any convincing evidence and of a directly applicable rule, accounted for the facts in a very oriented way and selected the legislation that seemed to adequately fit the moral though not formal condemnation of homosexuality. The two Turkish cases are also very much telling, insofar as, despite the existence of applicable rules, they construct the objectivity of the rulings based on the elusiveness of evidence.

In sum, the interest of looking at adjudication in cases reflecting the authoritarian nature of a given regime is to see how easily the constraints of the rule of law in its thick, substantive meaning, can be turned into resources of the rule by law, in its thin, formal version (Tamanaha, 2004: 91). The latter conception considers law as an authoritative instrument for governmental action, whose relation to the people must be either demagogic (producing and reproducing the people's supposed values) or repressive (sanctioning behaviors contrary or assimilated to infractions to rules legislated in a law-and-order goal). This authoritarian conception of the law is best achieved at two levels: first, in the production of a legislation that does not need to be distorted in order to be enforced; second, in a style of adjudication that allows a formal, mechanical, and literalist implementation of repressive rules. This is the outcome of a real craft, within the canons of legal textual production, which is designed to produce a convincing enough interreferential document in which narratives on legal norms and facts are reinforcing each other, so as to objectively ground the sentence of the accused. However, it does not always work this smooth way, as the building of a legalist repressive apparatus looks like, most often, a bricolage, rather than a systematically elaborated Kelsenian pyramid. In such frequent cases, judges rather proceed with the means at hand, playing on legal formalism and the flexibility of their discretionary power. Dissent, and especially accused parties' dissenting narratives, appear

at the same time negated and incorporated. They are negated consequentially, as they bear almost no effect on the justification and outcome of the ruling. They are incorporated symbolically through judges' emphasis on procedural correctness. This paradox seems designed to strengthen authoritarian power. On the one hand, it neutralizes dissonant discourses. On the other, by drawing on the idea of fair trial, it grounds the implementation of authoritarian will on an appearance of objectivity and impartiality. Courts are mobilized to legitimize and serve as a rule-based adjudicating institutions, although they issue decisions substantively unjust and driven by political authorities' diktats.

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