

**GENDER, SEXUALITY AND THE CRIMINAL LAWS IN THE  
MIDDLE EAST AND NORTH AFRICA: A COMPARATIVE STUDY**

**Dr. SHERIFA ZUHUR**

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## About Women for Women's Human Rights (WWHR) - New Ways

Women for Women's Human Rights (WWHR) – NEW WAYS is an independent women's NGO based in Istanbul, Turkey. Founded in 1993, WWHR- NEW WAYS' mission is to promote women's human rights in Turkey and around the globe. Through a decade of activism, advocacy and lobbying, WWHR – NEW WAYS has contributed significantly to various legal reforms in Turkey, networking to enhance social change in Muslim societies, and promotion of women's human rights at the UN level.

WWHR – NEW WAYS operates with a strategic multi-pronged approach, combining and employing a variety of methods in a complimentary manner to promote human rights. WWHR- New Ways' current areas of work include advocacy and lobbying on national and international levels; an international program to promote sexual and bodily rights as human rights in Muslim societies; developing and implementing women's human rights trainings in Turkey and abroad; the production and dissemination of a wide array of awareness-raising and resource materials and publications.



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## INTRODUCTION

Much of the discussion regarding legal transformation of women's status in the Middle East and North Africa (MENA) and the Muslim world has concerned family law, commonly referred to in the region as personal status law. To be sure, many further reforms in that area are necessary. However, the reforms in family law by themselves will not suffice to achieve the legal transformation of women's status. In order to overcome human rights violations and discrimination against women, it is also evident that other areas of law, particularly penal or criminal codes, require re-evaluation and reform, as they continue to legitimize violations of women's human rights in both the private and public spheres.

Criminal codes in MENA and the Muslim world consistently remind us that the primary social identification of women is as reproductive and sexual beings who are constrained by men, the family, and the state. The development of the legal codes reveals that tribal clans held authority over women, and particularly, women's bodies. This control shifted to the *ummah* (the community of Muslims) and its governing officials with the advent of Islamic law. Nevertheless, in many instances families and tribal clans continued to serve in place of Islamic officials to constrain women's behavior. Tribal autonomy from the state and decentralization of authority were factors in the incomplete "Islamization" of control over female bodies and sexuality. In recent history, whether in the West or the South, the process of legal modernization has gradually transferred authority over women (and their bodies) from their extended families to their husbands and in certain rare instances, directly to women as individuals.

Certain omissions from the modern legal codes, like criminal penalties against marital rape or FGM (female genital mutilation) and the legal loopholes providing exemptions or reduced sentences for crimes of honor, exhibit the same underlying principle - that families, clans and tribes hold power over women, as well as the notion that men's lives, testimony, and value outweigh those of women. These kinship groups retained this power even with the advent of *shari'ah* (Islamic law) and the eventual development of modern civilly administered legal codes. Families also wield their authority over men, frequently causing psychological damage to them as well, but there is a key

difference in that men are considered to be responsible for women's sexual behavior. Moreover, men are not under the same degree of pressure to maintain virginity, since its loss in their case would not serve as evidence of *zina* (adultery/fornication). And, as a gendered variation in what Michel Foucault described as the "modes of subjection to the moral and legal order,"<sup>1</sup> we see that men historically have had easier access to a greater number of sexual partners than did women since they have had recourse to polygamy, concubinage, and various forms of temporary marriage.

In some countries, civil authorities have administered penal codes while the 'ulama (religious scholars) presided over matters of personal status law. In some other countries (like Saudi Arabia, or in more recently neo-Islamized countries such as Iran) the 'ulama have remained the source of legal interpretation of penal codes. International criticism has focused on states that imposed, or re-imposed supposedly<sup>2</sup> traditional Islamic punishments, known as the *hadd*, the primary category of capital crimes under *shari'ah*. And so in recent years there have been executions of adulterers and homosexuals, and amputations for theft generating criticism from women's movements and such bodies as the United Nations and the World Organization against Torture (OMCT). If we look systematically at these issues, we see that all of the modern states, not only those which employ the *hadd* penalties, exhibit statutory discrimination - discrimination on the basis of sex - in their legal codes. The wording of these codes also provides loopholes that allow for violence against women. At the same time, omissions from law allow communities to privatize control over women's, girls', and homosexuals' bodies and enforce community definitions of proper sexual behavior. Still other laws are discriminatory in that they punish women disproportionately as compared to men, or fail to punish men or to hold perpetrators accountable for violence against women.

Some penalties are currently being challenged, with reference to an international standard of human rights. Indeed, the 2003 Nobel Committee

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<sup>1</sup> "Modes d'assujettissement" in the original work. In the ancient Greek society that Foucault reflects upon, there was a fundamental asymmetry in that the fidelity "recommended to the husband is ... something quite different than the sexual exclusivity that marriage imposes on the wife," for though she also upheld her domestic duties, he promised to support her in her old age. Michel Foucault, *The Use of Pleasure: The History of Sexuality*, Vol. 2 (New York: Vintage, 1985) 164-165. My point is that the mores of the ancient world there is no great distinction between the gendered asymmetry of Western (Greek and Roman) societies and those that became Muslim.

<sup>2</sup> Various scholars have pointed out that the *hadd* punishments are not specified in the Qur'an, but are instead mentioned in *hadith*, and only over time came to be regarded as an inviolable marker of Islamic law.

voiced their intent to send a message to the Muslim world, and more specifically to Iran, regarding the need for such challenges with their conferral of the Nobel Prize on reformer, activist and former judge, Shirin Ebadi of Iran.

Scholars disagree about whether Islam was meant to rescue women from their chattel-like status, and is actually anti-patriarchal<sup>3</sup> or whether the nascent *ummah* reinforced patriarchal privileges in order to maintain political growth and control. The status of women in the pre-Islamic era (*jahiliyya*) is similarly contested. It seems that while some tribes were not strictly patrilineal, or patrilocal, others were,<sup>4</sup> and that the Islamic expansion also encountered and assimilated neighboring gender practices (for instance, the veiling of the Sassanians and Byzantines, and Roman legal restrictions of women).<sup>5</sup> The combined force of honor codes, the bride price, and the systems of retribution under *'urf* (tribal or customary law) and such “borrowed” traditions all buttressed a system in which women were legal, economic, and political dependents. They held value because of their reproductive ability, and as lineage could be most effectively determined by marrying a virgin, men policed their women, thus obtaining higher payments for a virgin bride.

We are told that people behaved immorally in the *jahiliyya*, and modern authorities imply that this meant widespread abuses of women including rape and incest, and their participation in adultery and fornication. So the stringent punishments for adultery and fornication were assigned to the state once Islamic law had defined *zina* as a violation against Allah; rather than a moral deviation, or a social crime. Such penalties had the effect of ensuring women’s faithfulness to their husbands, and that lineage claims were clear.

Islamic society opposed other cruel practices such as the exposure of female infants. Islam made women a party to their marriages; they could give consent to their marriage, and were not to be married off in arrangements against their will. In theory, the control of women should have shifted from the girl/woman’s immediate male relatives to the state, or at least their legal recourse could be found there. The state would ideally have served as the ultimate guardian of women’s rights. Why it did not do so, is beyond the bounds of this particular

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<sup>3</sup> Asma Barlas, “Muslim Women and Sexual Oppression: Reading Liberation from the Quran,” *Macalester International, International Feminisms: Divergent Perspectives*, Vol. 10, no. 27 (Spring 2001) 117-146.

<sup>4</sup> Sherifa Zuhur, *Revealing Reveiling: Islamist Gender Ideology in Contemporary Egypt*. (Albany: SUNY, 1992).

<sup>5</sup> Leila Ahmed, *Women and Gender in Islam* (New Haven: Yale, 1991); and see Zuhur, *Revealing Reveiling*, Chapter 3.

study, although a number of Muslim writers have addressed the question.<sup>6</sup> Today, our modern aim is to ensure women's rights as individuals, as for instance, in the ability to contract and register one's own marriage, or file for divorce, or to seek justice in cases of rape or sexual abuse for oneself or one's daughter.

Both tribal law and Islamic law undoubtedly differ from early modern or contemporary Western codes in their theories of criminal behavior and punishment. In these earlier systems, imprisonment for crimes was considered unfair and cruel because all individuals, male and female, were in a sense, owned by their respective clans. Men's labor or services were required for the support of their family, as was women's work, or "reproductive labor." Hence, the retaliatory punishments that also functioned to settle inter-clan disputes were preferable to lengthy incarceration, and so certain Islamic legal scholars maintain that these are less cruel than the Western system of prisons, workhouses and enforced labor. Reformation was not the main goal of criminal penalties in tribal law or in *shari'ah*; rather, the strict public punishments were to serve as deterrents, and discourage other criminals.<sup>7</sup>

In addition, law was not classified, as is modern Western law, into categories like commercial, civil, or criminal law. However, a categorization of crimes did exist. These were organized according to their severity, with those committed against God and mentioned in the Qur'an (including apostasy) at the forefront (the *hadd*), followed by the *qisas* crimes, which may involve retaliation and lastly *ta'zir* crimes, wherein a punishment was not predefined, but rather formulated by a judge.

Colonial powers like Britain and France had several effects upon legal developments in the Middle East, North Africa, and the Muslim world. First, they actually encouraged the spread and regulation of *shari'ah* courts in some areas, for instance, East Africa, Aden (Yemen) and India, where tribal law had prevented anarchy in many areas.<sup>8</sup> Colonial regimes also influenced the

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<sup>6</sup> Their responses to this question vary; on the one hand, Fatima Mernissi attributes the problem to misogynistic attitudes of the male Muslim elite. Mernissi, *The Veil and the Male Elite* [translated from *L'harem politique*] (Mass.: Addison-Wesley, 1991), whereas Khaled Abou Fadl points to the persistence of misogynistic attitudes and authoritarianism on the part of the *ʿulama*, without particularly exploring the emergence of these attitudes as an aspect of class or social group identification. Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld Publications, 2001).

<sup>7</sup> Fateh M. Sandeela, "Ethics of Punishments: Islamic and Western Dispensations." In Tahir Mahmood, et al., *Criminal Law in Islam and the Muslim World: A Comparative Perspective* (Delhi: Institute of Objective Studies, 1996) 105-111.

<sup>8</sup> J.N.D. Anderson, *Islamic Law in Africa* (London: Her Majesty's Stationery Office, 1954) 11-12.

codification and legal modernization process already underway. In leaving matters of personal status up to religious authorities and allowing tribes or communities to settle criminal matters prior to appearance before a magistrate, colonial authorities were merely following the established trends of local rulers. Despite this, penal codes were altered and often reflect the dual influence of Ottoman legal codes, and in the British sphere of colonial influence, pre-modern British or continental legal principles, while the Napoleonic code affected those in the French sphere. With reference to women, the latter primarily accords privileges to a woman's husband, with his rights and responsibilities spelled out and prioritized. The Ottoman codes typically refer to a man's wives as well, but in addition also refer to all of his female ascendants, or those female relatives for whose sexual behavior he was deemed responsible (sisters, mother, daughters, not only his wife).

This study concerns sexual "rights" or matters of sex, sexuality, and bodily integrity because it is concerned with issues such as rape, adultery, honor killings, battery and wife-beating, murder, abortion, infanticide (where abortion is unavailable), sex trafficking, sex work, sexual abuse, incest, homosexuality, and transsexuality. All of the above have traditionally been addressed and regulated by penal codes. Other forms of violence against women, like domestic violence, FGM and marital rape were not criminalized in the past. In some cases, additions to the civil code, or areas controlled by the ministries of health (hospitals, public or private clinics) were used to address such issues. In other cases, such violations of women's bodily integrity are, or hopefully will be, included in penal codes.

Other problems like political rape or sexual battery of prisoners require attention beyond the reform of the penal codes. These and other problems would be positively impacted by reforms in police training and practice, along with the hiring of female officers and sensitization training for male and female officers.

Also, there are new additions to the body of laws affecting women. We see new rules governing new reproductive technologies (NRTs) such as in vitro fertilization as in articles 403 A and B in the Libyan Penal Code which punish both men and women for resorting to these medical techniques.<sup>9</sup> There is no single *shari'ah* based attitude to such contemporary issues. Further on in this study, I compare a more nuanced Hanbali approach to NRTs, which allows for

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<sup>9</sup> Anne Mayer, "Libyan Legislation in Defense of Arabo-Islamic Sexual Mores," *American Journal of Comparative Law*, Vol. 28 (1980) 287-313. And reprinted in Tahir Mahmood, et al., *Criminal Law in Islam and the Muslim World*.

procedures so long as lineage is protected<sup>10</sup>, to that of Hanafi religious jurists who had denied their permissibility. In both Muslim and non-Muslim countries, such as Israel, laws governing NRTs are changing.

I will now outline key beliefs and principles that defined the course of legal approaches to these issues. When understood in the context of gender codes in the region, the argued social control over women and girls is quite apparent. Moreover, it is possible to see an outline for future legal reform in many of the topics dealt with below. Such reforms would not “Westernize” law, but humanize it to enhance the equitable treatment of women and girls.

## ***ARDH/ SHARAF (HONOR)***

Ancient and modern Arabs, as well as many other Muslim and Mediterranean peoples, adopted ideas of honor that reinforce the ties of an individual to her/his clan or extended family. One type of honor, *sharaf* applies to men (though in theory, it applies to both men and women), and can be attained through family reputation, hospitality, generosity, chivalry, and to some degree, socioeconomic status or political power. There is another variant of honor, (*ardh*, in Arabic, *irz* in Turkish) which pertains to women, and more specifically to women’s sexuality and the sexual use of their bodies. The honor of the clan was besmirched if unmarried women lost their virginity or married women were unfaithful, thus while this form of *sharaf* was strictly attached to women, it actually reflected upon the clan as a whole.

Women’s honor corresponded to men’s lineage rights, because the ultimate violation of *ardh* took place if a woman -unmarried or married- gave birth to an illegitimate child. Women have often practiced infanticide in such cases, since a single mother could not demand support for her offspring. Under Islamic law this held true as well, since adoption was not formally permitted. In addition, she would be considered to have committed *zina* and had to be punished.

In the seventh century, some tribes apparently practiced polyandry and matrilineal customs, rather than polygamy and strict patrilineality, but with the expansion of Islam, any vestiges of the former trend were eliminated, while polygamy, now limited to four wives, remained. A woman whose husband took another wife did not lose her honor, but any dalliance on her part had to be

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<sup>10</sup> Sherifa Zuhur, “Of Milk Mothers and Sacred Bonds: Islam and New Reproductive Technologies,” *Creighton Law Review*, Vol. 25, No. 5 (December 1992): 1725-1736.

hidden and carried the burden of loss of honor to herself and her family group. Islamic jurists have supported men's rights to polygamy, arguing that it is illicit only when men fail to economically provide in an equal manner for their spouses, but men are not actually bound to any code of behavior by the Quranic phrase "and ye shall treat them equally."

Anthropologists have described the codes of honor as a dynamic pole of honor/shame. The conceptualization of masculinity and femininity holds closely to these ideals. Yet, throughout the region, and throughout history there have been instances of tolerance and intolerance, rigidity in terms of gender definitions, and simultaneously, instances we might call today "gender-bending" or role reversals, or accepted intrusions into male or female dominated areas of social action. It is, however, popularly believed that the rigid ideals are the "norm" and that they have been challenged through globalization and exposure to Western norms, thus "corrupting" society.

## THE LEGACY OF RETRIBUTION AND BLOOD MONEY

The valuation of women as lesser human beings inextricably tied to their reproductive functions was brought into Islamic law through *urf* (tribal or customary law). Paradoxically, the reproductive functions of women are highly valued, so there are antagonistic trends even within that same tradition. Early Muslims, like certain contemporary Bedouin tribes, simultaneously valued and constrained female sexuality and reproduction. In the majority of the region, the general rule was that a life could be paid for in kind, either with another life or by payment of blood money. Revenge killings were not subject to punishment. The Prophet Muhammad (s.a.w.s.) observed the ongoing system of *dhiyah* (blood payments) that could be accepted in place of retaliatory killings, or woundings, and so as Islamic law was systematized, the treatment of such crimes became a part of *shari'ah*. Some jurists and scholars have implied or inferred that the Prophet would like to have changed these tribal mores, but since juridical practice was based upon his example, it is not clear whether such speculations are helpful or not.

In tribal tradition, when a murder was committed, a woman from the assailant's tribe could be abducted by the victim's tribe until she bore a son to the victim's tribe. Payment alone could not reimburse the loss of a life; rather the "in-kind" principle was maintained. In countries which have Islamized their legal codes such as Pakistan, some efforts have been made to regulate this tradition, which

may be noted in the Hudud Ordinances.<sup>11</sup> An earlier example is found in Section 7 of the Tribal Courts Law of 1936 (Palestine).<sup>12</sup> Similarly, the earlier tribal practices like the test of burning of the tongue have been discouraged. However, the practice of the tribal councils in some areas continued to involve *talion* (retaliation), exchanges of women (though other tribes have forbidden this), and, as will be seen below, even retaliatory sexual punishments are included, which are surely offenses from a *shari'ah* point of view.

In the twentieth century, people in various areas of the Middle East (Jordan, Negev/Sinai, the Western Desert, Syria, Iraq, etc.) could seek justice through the tribe/clan or the courts, and generally preferred the former. As we see in most of the region, in many tribes, a woman's life was worth half of the blood money of a man's. However, there were differing opinions: one tribal leader claimed that the payment should be equal, while another said women were worth four times the blood money of men, since it was estimated that four potential births of sons were lost upon a woman's death.<sup>13</sup>

Through the Islamic conquest, such tribal practices appear outside of the Arab world. A *jirga*, or tribal council in the Thatta district of Pakistan settled a feud in June of 2001, which had arisen from a murder by giving two young girls, ages 11 and 6, in marriage to the 46 year old father and the 8 year old brother of the victim as a compensation package. Although Islamic law supposedly requires the consent of a girl to marriage, these girls were not consulted as per their right. Both girls were too young to marry according to Pakistani civil law, and although the deal was reported in an English language newspaper, the government took no action against the *jirga*. Thus we must understand that modern states allow for tribal violations of modern law and thereby validate a conglomerate of legal ideas.<sup>14</sup>

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<sup>11</sup> Article 16. Compounding of *qisas* in *qatl-l-'amd*. (5) *Badal-i-sulh* may be paid on demand or on a deferred date as may be agreed upon by an offender or the convict and the *wali*. Provided that the offer by the accused of the hand of a girl in marriage to the deceased's *wali* shall not be a valid condition of agreement for the compoundability of the offence. Appendix, "Text of Pakistan's Hudud Ordinances." Tahir Mahmood, "Reform of the Indian Penal Code in Pakistan to Enforce Islamic Criminal Law," In Mahmood et. al., *Criminal Law in Islam and the Muslim World*, 471.

<sup>12</sup> "Tribal courts are forbidden to approve the handing over of girls by way of "diya." But one of Hardy's respondents said that some tribes continued to do it, though the practice had nearly died out. M.J.L. Hardy, *Blood Feuds and the Payment of Blood Money in the Middle East* (Leiden: E.J. Brill, 1963) 86.

<sup>13</sup> Shaykh Adub ibn Zabn of the Bani Sakhr (southern Jordan) claimed the *dhiyah* was equal for a man and a woman. Shaykh Humayd al-Sufi of the Tarrabin tribe of Rafah said the blood payment for a woman is four times that of a man in interviews with M.J.L. Hardy. The price was paid to her family, not to her husband. Hardy, 84, 94; also see Joseph Ginat, *Blood Revenge: Family Honor, Mediation, and Outcasting* (Brighton, England: Sussex Academic Press, 1997).

<sup>14</sup> Amnesty International Press Release, "Pakistan: Tribal Justice System Must Be Abolished or Amended," (19 August, 2002). This is also true in the area of personal status law. For instance,



Under *shari'ah*, murder, voluntary and involuntary manslaughter, and intentional or unintentional injury or maiming are treated as the secondary category of crimes or *qisas*. The sanctions available for such crimes are *talion* or *dhiyya*, now termed compensation, rather than “blood money.” The permissibility of incorporating *urf* into *shari'ah* is traced to the Prophet’s own practice, and the earlier intent of healing potential blood feuds with prompt action. It also encourages the idea that individual Muslims are “the repository at once of private rights and public power” serving as the “soldier of Allah” and the “censor of public morality.”<sup>15</sup> Under Islamic law, *talion* may only be requested by the victim or his/her family, and they must uphold the principle of equivalent harm, that is to say that the harm inflicted cannot be greater than the damage caused by the act committed, and this must be executed with the least pain possible. Female victims were only entitled to *dhiyya* at half the price of a man. The rationale was that since men’s inheritance was twice that of women’s, a woman’s worth was half that of a man.<sup>16</sup> Slaves and non-Muslim victims’ families also received a reduced *dhiyya*.<sup>17</sup>

Hence, it is not solely cultural attitudes toward a woman’s worth that depreciate her value, but also the religio-cultural logic that men provide for women, and the presence of that logic in the religious texts. Nonetheless, women’s reproductive value was also recognized (in the exchange policy I mention earlier, where a victim’s family could claim *dhiyya* in addition to a girl of the tribe to bear a replacement for the murdered man), and this has had other consequences in group vs. group encounters.

## MURDER IN MODERN PENAL CODES

Traditionally, murder was compensated for by the tribe or clan of an individual. Under modern legal systems, prison terms substitute for the previous acts of vengeance or payments. As Islamization, or as earlier termed, neo-Islamization,

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the reason that Iraqi officials lowered the age of marriage to 15 was due to their assumption that the tribes would marry girls off by that age, so the law should comply with popular practice. Fatima Agha Al-Hayani, “Legal Modernism in Iraq: A Study of the Amendments to Family Law.” (Ph.D. diss., University of Michigan, 1993.)

<sup>15</sup> I strongly disagree with the author of this treatise, but such views are upheld frequently. Sandeela, 116.

<sup>16</sup> M. Cherif Bassiouni, “Qesas Crimes,” In M. C. Bassiouni, *The Islamic Criminal Justice System* (London, New York: Oceana Publications, 1982) 203-209; Safia M. Safwaat, “Crimes under the Various Shari’ah Schools,” In Tahir Mahmood et al., *Criminal Law in Islam and the Muslim World*.

<sup>17</sup> This principle also held in Muslim Africa. Anderson, 196-197, 360-1.

has swept the MENA region, Iran, the Sudan, Pakistan, Afghanistan, Libya, and an area of Nigeria and Malaysia have reinstated the older system of penalties. The stricter application of Islamic penalties appealed to disenfranchised youthful male segments of the population in some of these states, though each country's case is quite unique. The Taliban enacted their understanding of *qisas* in consulting with the families of victims, and then scheduling *talion* in public execution sites that could accommodate large crowds (for instance a football field rebuilt since the civil war by a United Nations aid agency).<sup>18</sup>

Like the Taliban in Afghanistan, the Iranian government now also enforces *qisas* rule. In the Iranian Penal Code we read:

*Article 300. The blood money for the first- or second-degree murder of a Muslim woman is half that of a murdered Muslim man.*

This derives directly from *urf*. Such laws do not exhibit any kind of reformulation, or attention to the principles of equality that we may note in other areas of Islamic law.<sup>19</sup>

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In other MENA and Muslim countries, murderers may face capital punishment, or more likely, incarceration. In modernized legal theory, a murderer should receive the same sentence for murdering a woman as a man, though in crimes of honor or passion, sentencing varies, as we will see below.

Under modern legal codes, crimes that a person commits in the “heat of passion” or under emotional duress often receive a reduced sentence. So women who kill their illegitimate children can be charged with murder, but in the Sudan in the 1970s, prior to the current Islamic regime, civil judges usually reduced life sentences for murder to two years.<sup>20</sup> This particular claim is also allowed to those who commit honor killings or murder their spouses under certain circumstances, as described below.

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<sup>18</sup> Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (New Haven: Yale Nota Bene, 2001) 2-4.

<sup>19</sup> Perhaps the Iranian Penal Code will be challenged in the future. As the protests in Iran since June of 2003 reveal, some Iranian citizens are directly challenging the totalitarian nature of their government's interpretation of Islam. There is, for instance, discussion of the penalty for improper veiling being reduced from seventy-five to forty-five lashes. Of course the arrests and censorship of reformers, or others questioning aspects of Islam or Islamic law are generating even more internal tensions.

<sup>20</sup> Carolyn Fluehr-Lobban, *Islamic Law and Society in the Sudan* (London: Franc Cass, 1987) 186.

## ADULTERY

Although modern legal codes have supposedly overcome the *shari'ah* criminalization of adultery, we see in fact that in the treatment of crimes of honor, adulterous or unchaste women may pay with their lives.

Under *shari'ah*, as in *'urf*, adultery and fornication are strictly prohibited. Sex is only licensed within a licit marriage. According to *shari'ah*, men should also be punished for sexual activity outside of legal relationships, but they are permitted to contract multiple marriages, have sexual relations with their slaves or concubines, and Shi`i men could contract temporary marriages as well.

The crime of adultery or fornication is one of the seven serious crimes in *shari'ah*, and the punishments of whipping for unmarried persons, and stoning for married persons fall into the classification of torture by our modern definitions. In countries which have re-adopted the *hadd* punishments -Libya, the Sudan, Iran, Afghanistan under the Taliban, and the northwest province of Nigeria- such punishments have severely compromised women's rights. Conservatives respond that Islam's deep concern for society and the family is what is at stake here, and that the Western system completely fails to penalize immorality, drunkenness, and atheism, or even treats them as "social graces (drinking)."<sup>21</sup> In the Iranian Penal Code, there are several points of particular interest. First, adultery is a more severe crime than murder, or manslaughter. And the discriminatory evidentiary rules hold, even though they have been modernized. In older sources on *shari'ah*, women were not allowed to testify in *hadd* cases at all. In Iranian post-revolutionary law, women's testimony submitted without that of two men will not only be rejected as proof, but may also serve to invalidate the adultery case (yet, they can testify):

*Article 74. Adultery, whether punishable by flogging or stoning, may be proven by the testimony of four just men or that of three just men and two just women.*

*Article 75. If adultery is punishable only by flogging it can be proven by the testimony of two just men and four just women.*

*Article 76. The testimony of women alone or in conjunction with the testimony of only one just man shall not prove adultery but it shall constitute false accusation which is a punishable act.*

The punishment for an adulterer, male or female, is severe, and as in classical versions of *shari'ah*, if the person who is being stoned manages to escape, then

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<sup>21</sup> Sandeela, 106-107.

he or she should be allowed to go free. However, in such cases, the crowd has often intervened.

*Article 100. The flogging of an adulterer shall be carried out while he is standing upright and his body bared except for his genitals. The lashes shall strike all parts of his body – except his face, head and genitals – with full force. The adulteress shall be flogged while she is seated and her clothing tightly bound to her body.*

*Article 102. The stoning of an adulterer or adulteress shall be carried out while each is placed in a hole and covered with soil, he up to his waist and she up to a line above her breasts.*

There are a few contradictions that one may notice in these provisions, for if the adulterer is buried in a hole, then his body is not bare as specified in article 100.

International opinion considers such punishments violations of basic human rights under their contemporary definition, and employs adjectives like “barbaric” when describing them. Muslims have great difficulty responding since they claim that these punishments are part of the sacred law, as were various rules pertaining to slaves. The most logical response: that one may employ *ijtihad* (making legal decisions through independent interpretations of the sources of Islamic law) to reform conditions no longer appropriate to the era, is contested by those who view the *shari’ah* as an immutable body of law. One common argument claims that since these punishments are not specifically included in the Qur’an, though the Prophet is known to have condemned individuals to lashings, they could be modified. Yet the Islamic Republic of Iran has not done so.

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Those who defend Islamic legal theory and argue that adultery is difficult to prove, as four witnesses are required, do a disservice to our understanding here. First of all, when such witnesses are lacking, the system of oath-swearing in *shari’ah* allows these cases to proceed. Secondly, as mentioned in some schools of law, for instance the Maliki, pregnancy is taken as proof of *zina*. This was seen in the Nigerian cases of the teenager Bariya Ibrahim Magazu, publicly whipped for *zina* after being raped or sexually used by several men, and in the case of Amina Lawal, when a similar sentence was handed down and revoked. As an observation on the penalties for *zina* in Nigeria, in the past, whipping rather than lapidation (stoning) was common. And because men who made this accusation could be charged with bearing false witness, most used the charge of “seduction”, which carried a lesser penalty, usually a fine. But where ‘*urf*’ was employed instead of *shari’ah*, the seduction of a virgin was considered more serious, and the fine went to her father rather than her husband.<sup>22</sup>

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<sup>22</sup> Anderson, 196.

In the Bariya Ibrahim Magazu case in Nigeria, a young girl was accused of *zina*. A defense constructed within the rationale of Islamic law could have been argued from three propositions:

1. Bariya claimed that she was compelled to have sex with these three men as payment for her father's debt. Thus her *zina* crime was coerced. And *zina* is defined as willful, not coerced sex. The Maliki jurisprudence, *madhhab*, allows for circumstantial evidence in *hadd* cases. It was inappropriate to allow one kind of circumstantial evidence (her pregnancy) but not another, her testimony or others' regarding evidence of physical resistance, or her assertions soon after the crime.

2. The Maliki school is the minority opinion, while the "majority" (other schools) does not allow pregnancy to serve as proof of *zina* without witness testimony. So, the Nigerian court should defer to majority opinion. However, this particular argument flies in the face of local tradition.

3. *Shubha* (doubt) should have been registered given the circumstances.<sup>23</sup>

In this particular case, the sentence was carried out extra-judicially and without proper notice to her attorneys. The girl was left to crawl back to her village after her whipping. It was reported that the Governor of Zamfara was infuriated by the many letters received from Western sources regarding this case. It should also be noted that the *zina* laws are far more difficult for uneducated and poor women to counter.

The witness system can be misinterpreted as well, as has occurred in rape cases in Pakistan where women were told they must provide four witnesses to their rape (and that otherwise they might be charged and punished for *qadhif*, false witness). Adultery is differentiated from rape because it is assumed to be consensual. When rapists claim that their victims consented to sex, then the penalties for adultery may be invoked against the victim.

Adultery is sometimes treated as a crime only for women, and not for men, and in some countries, it is no longer a crime. For instance, in Tunisia, only women could be punished for adultery prior to 1968, but now the law has been equalized.<sup>24</sup> Outside the region, and now in Turkey, adultery is no longer a

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<sup>23</sup> Asifa Quraishi, Esq., "Islamic Legal Analysis of Zina Punishment of Bariya Ibrahim Magazu, Zamfara, Nigeria," (January 20, 2001), Muslim Women's League [http://www.mwusa.org/publications/analysis/islamic\\_legal\\_analysis\\_of\\_zina.htm](http://www.mwusa.org/publications/analysis/islamic_legal_analysis_of_zina.htm) (last visited 05/15/03).

<sup>24</sup> Alia Cherif Chamari, *La Femme et La Loi en Tunisie* (Casablanca: Éditions Le Fennec, 1991) 47, 120-121.

punishable crime, though it may serve as grounds for divorce. There was a transition in the law from the *shari'ah* treatment of adultery to laws that mirrored those in Europe in which adultery carried no penalty, or a limited prison sentence, to a situation like that of some American states in which adultery is decriminalized, but provides grounds for divorce. In some cases, the sentences for adultery discriminate against women, because they are more severe than the penalties for men convicted of adultery. Article 274 of the Egyptian Penal Code specifies a sentence of not more than two years for a married woman who commits adultery, yet a man's sentence for adultery should not exceed six months.<sup>25</sup> According to Article 277 of the Egyptian Penal Code, a man's adulterous act is considered as such only if it takes place in the marital home, and he could face a sentence of six months in prison, while a woman would receive a sentence of two-year imprisonment. The Egyptian legal and human rights community took action on this issue, so that while social attitudes towards men's adultery as compared to women's are still distinct, the law reflects a more equal penalty.

The next stage in the legal transition process may be seen in Turkey where crimes of adultery by women (Article 440) and adultery by men (Article 441) were annulled from the penal code. However, proof of adultery can still serve as grounds for divorce.<sup>26</sup>

Besides the severity of punishment for the actual crime of adultery, the use of such accusations to intimidate victims of sexual crimes reinforces women's lack of access to adequate legal status and protection. In addition to the unfortunate connection of adultery with rape, penalties for crimes of passion resulting from adultery provide legal loopholes for those who commit honor killings, taken up in the following section.

## HONOR CRIMES

Many people are not aware that killings in the name of "honor" are but the tip of the iceberg – that "honor crimes" consist of a wide range of violations of women's human rights, including sexual rights, but also, their rights to mobility, education, work, and travel. Honor killings refer to the murder of a woman by her

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<sup>25</sup> Mona Zulficar, *Women in Development: A Legal Study*, (Cairo/New York: Unicef, 1995) Appendix 15, 151.

<sup>26</sup> Women for Women's Human Rights – New Ways, *The New Legal Status of Women in Turkey* (Istanbul: WWHR-New Ways, 2002) 31.

male family members for a perceived violation of the social norms of sexuality, even if this is only a matter of rumor, gossip, or being seen with a particular man. Sometimes female family members may collude with or participate in the murder. Honor crimes may also encompass crimes of passion, wherein a husband kills his wife whom he or other family members suspect of adultery. These killings sometimes result from a thwarted cousin-marriage, when a customary pay-off has not been made, or an unresolved kidnapping/elopement (common in Lebanon, Syria, Jordan, Iraq, and northern Israel).

Honor killings affect women in the Muslim world and beyond wherever there are significant communities of Muslims or Arabs. The practice emerged in the pre-Islamic period, but spread with the Islamic faith, which encouraged the tribal manner of settling disputes. As with revenge/blood payment, it is a woman's *wali* (legal guardian), or next of male kin in a particular order of consanguinity, who is responsible for guarding and punishing women's sexual lapses.

It is quite difficult to estimate the overall or annual toll of honor killings. An Egyptian report based on 1995 statistics counted 52 honor killings (out of 819 murders). In Yemen, more than 400 women were reported killed for honor in 1997.<sup>27</sup> 461 honor killings were reported in Pakistan in 2002. In Jordan, Rana Hussein reported that one third of the nation's homicides are honor killings, frequently committed by minors since they may be released at age 18 without a criminal record. The average sentence served in Jordan is seven and a half months for an honor killing.<sup>28</sup> There and elsewhere, for instance in Turkey, premeditated selection of a murderer by family assemblies takes place.<sup>29</sup> Individuals may act without family input as well, in response to comments by peers, or in fear of such comments.

Neither *shari'ah*, nor modern laws have appropriately penalized the practice due to the strong influence of the clan system and popular beliefs about women's sexuality. In addition, modern penal codes have the effect of blurring the distinctions between crimes of honor and crimes of passion, thereby reinforcing the notion that men have a "right" to punish women for improper sexual behavior. For example, sexual jealousy is a primary motive for homicides. Carolyn Fluehr-Lobban points out that the largest proportion of the 400 murder cases she studied

<sup>27</sup> Douglas Jehl, "Arab Honor's Price: A Woman's Blood," (June 20, 1999), Polyzine, <http://polyzine.com/arabwomen.html> (last visited 3/01/03).

<sup>28</sup> Kerry Kennedy Cuomo, "Honor Killings," *Speak Truth To Power: Voices from Beyond the Dark*, (October 8, 2000) Public Broadcasting Service (PBS), <http://www.pbs.org/speaktruthtopower/rana.html>

<sup>29</sup> Women for Women's Human Rights - New Ways, *The New Legal Status of Women in Turkey*, 56.

from the Sudan were motivated by sexual jealousy.<sup>30</sup> It is important to describe honor killings as a form of violence against women that encompasses killings by jealous husbands as well as the murder of other female family members suspected of sexual impropriety.

There are some differences however, when we look at those women who kill their husbands. Penal codes reveal that the standards of proof required are different for men versus women, and as was pointed out in the section on adultery above, the punishments for female spousal murderers are greater than those for men in most Middle Eastern countries. Legal codes frequently contain a reference to the inflamed emotions of the husband, or father, brother or male relative that can excuse him from the murder of a woman. But most do not provide the same loophole for women. It is worth repeating the above-mentioned fact that “honor killings” need not rest on an established act of adultery, but can and do result merely from gossip or suspicion. The specter of honor killings is therefore a powerful deterrent to women, causing them to defer to family wishes and accept the glorification of virginity and chastity, or to engage in sexual behavior in secret and at great risk.

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It should be remembered that until recently, the Western legal system treated married women like minors and unmarried women were by default treated like married women. Due to this general principle of diminished legal capacity and because of the relative novelty of women’s physical and economic rights, campaigns against domestic violence including crimes of passion are a relatively novel global phenomenon. Thus campaigns against honor killings in the MENA and the Islamic world are ambitious and have encountered numerous obstacles even with government sponsorship.

While preparing this study, I read countless horrifying descriptions of honor killings, though only a few can be mentioned here. Among them was the case of Yurdagul Ayas, who, eight months pregnant with twins, was discovered with a knife in her vagina, dead from 30 knife wounds. Other stories illustrate the fact that families discuss and plan the murders of girls, that is, they are premeditated. Some girls who had been sheltered in prison, or in a safe refuge like Aysel Dikmen, were returned to their families who had sworn that they would not harm them, but then murdered them anyway.<sup>31</sup> Statements by

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<sup>30</sup> Fluehr-Lobban, 142.

<sup>31</sup> World Organisation against Torture (OMCT), *Rights of the Child in Turkey: Report Concerning the Application of the Convention on the Rights of the Child by Turkey*, (Report submitted to the Committee on the Rights of the Child 27th Session, Geneva, May 2001) 52.  
[http://www.omct.org/pdf/CC/TurkeyCC\(o6.o1\).PDF](http://www.omct.org/pdf/CC/TurkeyCC(o6.o1).PDF)



judges show their belief that women's "inappropriate" behavior caused their deaths. Indeed, as evidenced by popular reaction to the Jordanian campaign for legal reform of the penal code's references to honor killings, the prevalent belief was that honor killings are a beneficial tradition.

Penal codes contain wording that allows the crime to go unclassified as murder, or provide commutations or reductions of sentences. According to Article 630 of the Iranian Penal Code, if a man witnesses his wife committing fornication (*zina*) with a stranger and knows that she is a willing participant he may kill both parties. However if she has been coerced, he may kill the man.

Lama Abu Odeh examined the wording of articles in the Jordanian, Syrian, Lebanese and Egyptian penal codes that defend the perpetrators of honor killings. The commutation or reduction of sentences derives from the pre-1975 French code, which upholds the idea of a crime of passion.<sup>32</sup> When a husband commits such a crime, it is as if he is in a state of diminished capacity in the current American legal usage. Of course, these laws also reflect the pre-existing Ottoman code, which had been influenced by *'urf* and *shari'ah*. Families would rather punish the illicit acts of their daughters themselves. For conservative Muslims and in Islamist states, this responsibility arguably belongs to the state, not to families.

We also see that statutory discrimination exists within the codes in that male and female perpetrators of crimes of passion or honor are differently considered and sentenced. Men, not women, may be excused in the Moroccan Penal Code:

*Article 418. Murder, injury and beating are excusable if they are committed by a husband on his wife as well as the accomplice at the moment in which he surprises them in the act of adultery.*

Or see Article 340 of the 1960 Jordanian Penal Code, the subject of the reform campaign mentioned above, which derives from the Ottoman Penal Code of 1858: "He who catches his wife or one of his (female) unlawfully committing adultery with another, and kills, wounds or injures one or both of them, is exempt from penalty." Here, the relationship exists under the Qur'anic definition of *mahram* to *maharim* (a *mahram* is a male relative, such as a brother, father, uncle, or son, who may view a woman without her outer modesty garments, have access to the family quarters or area of a home, and act as guardian/protector of a woman's honor when she travels. The *maharim* are all

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<sup>32</sup> Lama Abu – Odeh, "Crimes of Honor and Construction of Gender in Arab Societies." In Pinar Ilkkaracan, ed., *Women and Sexuality in Muslim Societies* (Istanbul: Women for Women's Human Rights - New Ways, 2000), 363 – 380.

of a man's female relatives, who are so closely related to him that he is forbidden to marry them). The next sentence derives from the French Penal Code of 1810 (as does the Lebanese Penal Code) and reads "He who catches one of his (female) ascendants, descendents or sisters with another in an unlawful bed, and he kills or injures one or both of them benefits from a reduction of penalty."<sup>33</sup>

A similar reduction of sentence applies to those who commit honor crimes in Kuwait; they are not prosecuted for murder, but instead commonly sentenced to three years or less. Tunisia, where some of the most energetic efforts to ameliorate legal abuses against women in the Arab world have taken place, including the outlawing of polygamy, nonetheless contains an article in its penal code which provides a reduced sentence of five years in the case of a "crime of passion."

Abu Odeh considers the movement of the law from "crime of honor" to "crime of passion" to be a positive step in the process of legal modernization. She notes that the exclusion of premeditation from these articles meant that the killing of a woman who is not a virgin on her wedding night should not be excused under such principles.<sup>34</sup> But the fact is that these same codes have not been used in a "progressive" manner. Instead, they have been employed to defend family murders of women prior to marriage, whatever the penal code authors' original intent. It appears as well that Islamization has affected judges in some countries, causing them to be reluctant to sentence the murderers of women in such cases.

In February of 1999, Lebanon was the first Arab country to alter one of the relevant legal articles affecting reduced sentences and to make the punishment equal for women and men. Yet, in Lebanon, honor killings continue, and the reaction of locals is that traditional society cannot be changed, or that change will only come gradually. Furthermore, not all of the relevant articles of the penal code have been amended. For instance, Article 252 provides a commuted sentence for a perpetrator "if he carried out the crime while in extreme anger because of an unjust and dangerous act committed by the victim." A very similar clause also exists in the Jordanian Penal Code.

In Jordan, an active campaign to amend Article 340, along with petitions and publicity and support of the palace, ended with the Lower House of Parliament

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<sup>33</sup> Lama Abu - Odeh, "Feminism, Nationalism, and the Law," (SJD thesis, Harvard Law School, 1993) 52-53.

<sup>34</sup> Abu - Odeh, "Crimes of Honor and Construction of Gender in Arab Societies."

twice defeating the proposed amendment of Article 340 of the penal code, despite its passage by the Upper House in December of 1999. In February of 2002 the government cancelled the exemption from the death penalty that had applied to “honor” murderers. It has been suggested that the identification of the reform effort with the Palace and upper class women, or rather the lack of grassroots activity on behalf of women, may have been detrimental to the campaign. In my opinion, however, this is part of a broader pattern of antagonism between Islamist or conservative (here, tribal) factions and women’s rights or human rights activists, exacerbated in some cases by the ongoing process of democratization.

The defeat of Kuwaiti women’s rights to suffrage, or the slow movement in Morocco surrounding reform of the *mudawana* (personal status code, or family law), the opposition to the Egyptian *khul`* law (family law) of 2000, or even the religious response to the proposed draft of the optional Lebanese personal status law are all a part of this dynamic tension between forces. Should women be left to fall through the cracks? No. But regimes would have to act undemocratically to support them.

Turning to Syria, where the Ba’th Party has sponsored women’s rights but society, particularly the Sunni majority in the cities, tend toward social conservatism, we see that the code is very similar to the French and Ottoman inspired models in Jordan:

The Syrian Penal Code (Article 548) reads:

- 1. He who catches his wife or one of his ascendants, descendants or sister committing adultery (flagrante delicto) or illegitimate sexual acts with another and he killed or injured one or both of them benefits from an exemption of penalty.*
- 2. He who catches his wife or one of his ascendants, descendants or sister in a suspicious state with another (attitude équivoque) and he killed or injured one or both of them benefits from a reduction of penalty.*

The Lebanese code is identical to this Syrian law, and Article 418 of the Moroccan Penal Code offers similar considerations as in (1) above, but only to a wronged man, not to a wife, or woman. Similar discrimination exists in the parallel law in Egypt with further elaborations. Under Article 237 of the Egyptian Penal Code, if a man catches his wife in an adulterous act and kills her, he will be imprisoned for 3 to 7 years, rather than receiving a life sentence, but women cannot qualify for the commuted punishment. As mentioned above, in the Egyptian Penal Code, a man’s act of adultery is adulterous only in the marital home (Article 277), but a wife is adulterous outside, or inside the marital home,

and need not be found *en flagrante delicto* for the husband to benefit from the defense of inflamed emotions. The constitutionality of these laws has been challenged by activists in Egypt.

There, activists hope to see the repeal of Article 17 of the Penal Code which allows for sentence reductions along the same lines as those above. Marlyn Tadros reported that Awad El Morr, the former head of the Supreme Constitutional Court, was strongly opposed to any such action. His objection was: "We have to allow for the individualization of punishment and we have to take into consideration the emotional state of the perpetrator when he committed the crime. This prerogative is given to judges in the West as well."<sup>35</sup>

Saddam Hussein introduced Article 128 of Law 111 of the Iraqi Penal Code in 1990. It reads:

*An appeal for murder is considered commutative if it is cited as a pretext for clearing the family name or as a response to serious and unjustifiable provocation by the victim.*

Some analysts speculated that Hussein sought to invoke tribal support with this law, and the UN Special Rapporteur on Violence against Women reported that more than 4,000 women have been victims of so-called "honor killings" since it went into effect.<sup>36</sup>

Actually this was quite similar to the wording of Article 128 in Iraqi Law No.111 of 1969 the relevant sections of which are as follows:

*Article 128. In accordance to the law, an appeal may be either commutative or exceptive in terms of punishment. An appeal for murder is considered commutative if it is cited as a pretext for clearing the family name or as a response to serious and unjustifiable provocation by the victim.*

*Article 130. If the appeal is commutative and the crime punishable by death, it shall be altered to life imprisonment. Provisional or minimum one-year sentences shall be altered to six months.*

*Article 131. If there is a commutative appeal in an offence, commutative is applied as follows: If there is a minimum period for the penalty, the court is not bound by this limit in deciding the punishment. If the offence is punishable by both imprisonment and a fine, the court shall impose one of the two penalties. If the*

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<sup>35</sup> Marlyn Tadros, "Like a Match Stick," *Al-Ahram Weekly Online*, Issue No. 573 (14 - 20 February 2002) <http://www.ahram.org.eg/weekly/2002/573/li1.htm> (last visited 1/3/04).

<sup>36</sup> UN Commission on Human Rights, "Report of the Special Rapporteur on Violence against Women" (January 2002).

*offence is punishable by imprisonment of a minimum period, the court shall impose a fine instead.*

With the rampant violence against women and girls in post-war Iraq today, new laws must be formulated soon. Given the terrible security situation, the evidence of criminal rings that are abducting women and children are one problem, while another lies with the lack of attention to rape victims who may be subject to honor killings.

Iraq is an interesting case, because scholars had touted the regime's promotion of women's rights, yet others believed that the nationalist-modernization effort to reform laws and liberate women in Iraq was "limited and ambivalent," and that a backlash against women began earlier (in May of 1986) due to the demoralizing effects of the Iran-Iraq War on the army and society as a whole.<sup>37</sup>

In Kurdistan, limited autonomy provided an opportunity for a review of the problem of honor killings. Shelters have been introduced. The Independent Women's Coalition has set up three shelters in Suleimaniya, which serve women who fear their families. The National Assembly of Iraqi Kurdistan revoked Articles 128, 130, and 131 of the Iraqi Penal Law 111 of 1969 (which had applied before the 1990 revision discussed above), and issued Law No. 14 in August 2002. This reads:

*On the basis of paragraph 1 of article 56 and article 53 of statute 1 issued in 1992 and the revisions thereof and in accordance with the National Assembly's recommendation and the approval of the Council of Ministers and in view of our legal right as mandated by paragraph 3 of article 2 of statute No.1 of 1997, the following law has been issued.*

*Law No. 14*

*Article 1: It is no longer possible to refer to articles 128, 130 and 131 of Penal Code No. 111 of 1969 as a pretext for the clearance of one's family honour through act of murder.*

*Article 2: Any provisions contradictory to this law are invalid.*

*Article 3: The Council of Ministers shall be responsible for the execution of the new law.*

*Article 4: The new law will be in effect as from the date of its publication in the Kurdistan Gazette.*

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**37** Achim Rohde, "When the Land is Female, War is Love and the Nation is a Family: Iraqi Gender Policies during the Iran-Iraq War." A paper presented to the Cultural Expression/Nationalism/Gender Symposium, May 21, 2001 and will appear in revised form in Lahoucine Ouzgane, *Islamic Masculinities* (London: Sage, forthcoming).

The fact that the perpetrators may be prosecuted in the Kurdish areas had a positive effect: in the PUK territory, the number of honor killings declined from 75 in 1991 to 15 in 2001, and in the area dominated by the Democratic Party, from 96 in 1991, to 32 in 2001. Nevertheless, women in shelters are much like the women held for their own safety in Jordanian prisons, in that if released, their families would kill them.<sup>38</sup> The current situation in these areas regarding these issues is not assessable at present.

The recommendations of the Platform for the Reform of the Turkish Penal Code from a Gender Perspective for the reform of the Turkish Penal Code spell out the fact that repealing just one article (Article 462) that allows for sentence reduction is insufficient.<sup>39</sup> For the old Turkish Penal Code, just like the others discussed above, also included Article 51, which allowed for sentence reduction if a murder is triggered by “unjust provocation.” Provocation by the victim was similarly alluded to in Article 31 of the draft law, Unjust Provocation, which reads:

*The person who commits the offence under the influence of rage or strong grief caused by unjust provocation shall be imprisoned for a period between fifteen and twenty years instead of heavy imprisonment for life; and twelve and fifteen years instead of life imprisonment. In other instances, the sentence shall be reduced from one fourth to three fourths; however the sentence shall not exceed twelve years.*

The Platform for the Reform of the Turkish Penal Code from a Gender Perspective<sup>40</sup> argues that this provision violates international human rights norms and suggests that it should not be applied in cases involving crimes of honor, given the commitments made to rid laws of discriminatory content or that which erodes women’s rights.<sup>41</sup>

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<sup>38</sup> Joshua Kucera, “Political Changes Reduce Kurdistan Honor Killings,” July 7, 2002 Womens e-News. <http://www.feminist.com/news/news64.html> (last visited 1/03/04).

<sup>39</sup> Women for Women’s Human Rights - New Ways, *Gender Discrimination in the Turkish Penal Code Draft Law: Summary Report* (Istanbul: WWHR – New Ways, 2003).

<sup>40</sup> Editor’s note: *The Platform on the Turkish Penal Code from a Gender Perspective* (a national platform of 26 NGOs, spearheaded and coordinated by WWHR- New Ways) has intensively campaigned for the elimination of all provisions legitimizing discrimination and human rights violations in the domain of sexuality from the penal code, and has succeeded in getting 30 of the 36 proposed amendments of the Platform accepted in the new Turkish Penal Code. The new law was approved in the Turkish Parliament in September 2004. For details on the campaign and the reformed Turkish Penal Code, please visit WWHR – New Ways’ website at [www.wwhr.org](http://www.wwhr.org).

<sup>41</sup> Editor’s note: The Platform succeeded in getting the proposed amendment accepted in the new penal code. The unjust provocation article now states explicitly in its justification that the article is not applicable in cases of honor killings.

While not necessarily falling into the classic definition of this crime, nearly 100 women were murdered during the “first” *intifadhah* in the Occupied Territories and labeled “collaborators” and moral offenders. Palestinian organizations acted here as the morals police for society, in place of women’s family members, and while some women were accused of prostitution, the dangerous connection between the national cause and women’s sexual or moral behavior was re-emphasized.<sup>42</sup> This kind of vigilante approach to women could be seen in Algeria as well, and in state-sanctioned policies in Iran, Afghanistan, and in the Sudan, soon after Islamic governments arose.

Honor killings take place outside the traditional Islamic world as well. Zein Isa, a Palestinian immigrant, was recorded on audio-tape as he stabbed his 16 year old daughter Tina to death in November of 1989 in St. Louis while her Brazilian mother held her down.<sup>43</sup> The FBI was monitoring the family because they suspected a connection with the Abu Nidal group, and so every word and sound is on the transcript, but the agency unfortunately did not or could not intervene. A conviction was obtained.

In a January snowstorm in 1999, a 21 year old part-time university student, Methel Dayem, died of seven gun-shot wounds in downtown Cleveland. Two of her cousins, Musa Saleh, 21 and Yezen Dayem, 20 were arrested and charged.<sup>44</sup> Methel had been married to Saleh in an Islamic ceremony, but the marriage was annulled and Saleh had allegedly protested Methel’s “American” ways. Although one cousin admitted the other had pulled the trigger, and despite the fact that information was made public as part of a reduction “deal” for charges of threatening other witnesses (and an eyewitness saw a van similar to theirs

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<sup>42</sup> The Israeli Information Center for Human Rights in the Occupied Territories, “Morality, Family Honour and Collaboration,” In *Collaborators in the Occupied Territories: Human Rights Abuses and Violations* (Jerusalem: B’Tselem, January 1994) 89-99.

<sup>43</sup> Ellen Harris, *Guarding the Secrets: Palestinian Terrorism and a Father's Murder of His Too-American Daughter* (New York: Charles Scribner's Sons, 1995).

<sup>44</sup> This case received a good deal of coverage in *The Plain Dealer*, *Sun News*, *TriState Digest*, and *Newsnet 5*. *Newsnet 5* ran a series of articles: “21-Year-Old Gets Shot 7 Times. Cleveland Police Have No Suspects And Are Ruling Out Nothing.” January 8, 1999. “Police Charge Cousin in Death of CSU Student.” May 10, 1999. “Cousin Of Murder Suspect: He Didn't Do It.” May 11, 1999. “Another Twist in College Student Murder.” May 15, 1999. “\$6 Million Bail for Suspects Who Killed Cousin.” May 26, 1999. “Cousin Points Finger at Cousin As Murderer.” June 8, 1999. “Alleged 'Honor Killing' Cousins Out Of Jail.” June 9, 1999. “Trial Starts For Men Charged In Dayem Murder.” March 6, 2000. “Jury Selection Postponed In Dayem Trial.” March 6, 2000. “Jury Selection in 'Honor Killing' Trial.” April 24, 2000. “'Honor Killing' Trial Begins.” April 25, 2000. “Judge Traces Dayem's Last Steps.” April 27, 2000. “Opening Arguments Begin In 'Honor Killing' Trial.” April 28, 2000. “Mother, Police Testify in 'Honor Killing' Trial, Judge Throws out Officer's Testimony.” May 1, 2000. “Dayem Family Angry About Judge's Decision: Victim's Father Says Family Is Torn Apart.” May 6, 2000.

speeding away), one of the young men was acquitted. The case against the other was dismissed for lack of evidence. During the trial, the defense attorneys and the local *imam* (who had married the couple) loudly objected to the use of the term “honor killing” and a complaint was lodged with a Washington-based Muslim organization. So it seemed that in an American community, which perceives of itself to be multiculturally sensitive, this young woman’s rights were subordinated to ideas of cultural and religious integrity. Furthermore, the U.S. system of justice with its provision of double jeopardy can be inadequate to deal with such crimes.

That traditional, male, and conservative community leaders can ill-advise authorities has also been seen in England, where attempts to arrange forced marriages have ended in murder.<sup>45</sup> For example, a girl who resists an arranged marriage and runs away is at risk. Or one who is suspected of having, or is known to have had a relationship with someone outside the family, may be forced into an arranged marriage, and then be at risk when the earlier relationship comes to the attention of the new bridegroom. Provision of shelters and the dissemination of information from mainstream society to affected women is not an optimal alternative, because women are forced to choose between their primary identity (members of a particular community) and their newly acquired secondary and tenuous identity (residents or refugees in an alien nation). In Germany, a small number of Palestinian women have sought mediation or safe space outside of their community, but a researcher who has closely studied the community explains that they run the risk of complete ostracism from both their community and their family.<sup>46</sup>

Legal reform of penal codes that refer to crimes of passion are therefore essential yet insufficient. In the MENA region, as outside of it, public education on the issue is complicated by traditional Muslim and Islamist authorities who fail to condemn the practice, or even rationalize it. Internationally, organizations need to clearly condemn honor killings as a violation of basic human rights. The United Nations and its agencies have done so. However, we see that the U.S. Immigration and Naturalization Service (INS) has resisted the granting of asylum on the basis of fear of honor killings. When a Jordanian woman appealed a decision that would return her to her country where her father had asked her brothers to kill her, the INS Board ruled that her fear of death was “speculative”

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45 H. Siddiqui, “The Ties that Bind,” In *Index On Censorship*, No.1. (2000): 50-53.

46 Dina Abdulrahim, “Gender and the Policies of Exile: Palestinians in West Berlin,” In Chibli Mallat and Jane Connors, eds., *Islamic Family Law* (London: Centre of Islamic and Middle East Law, at the School of Oriental and African Studies, 1990) 194-195.



and derived from a “personal family dispute” and not an organized persecution.<sup>47</sup> INS judges also argue against asylum on the basis that other countries make efforts to protect their citizens (as could be claimed in the Jordanian extension of protective custody to women) and that therefore the United States is not compelled to provide refuge.<sup>48</sup>

Honor crimes should not be absolved by the use of culturally nationalist arguments – as commonly heard in the Arab world “society is slow to change,” or “our society will not accept such radical shifts in our tradition.” A variant is the “family values” argument – if a transformation of the concept of “honor” takes place, then the family system is on its way to extinction. *Turath* (cultural heritage) is worth preserving, but not in its entirety. Like slavery, and serfdom, honor crimes belong in the past.

## RAPE

The definition of rape in the United States (close to that of certain European countries) is: “the unlawful carnal knowledge of a woman by a man, forcibly and against her will, or without her consent.” Actual penetration is a requirement for the crime of rape. Certain states have penalties for marital rape, but many do not, as an earlier definition of rape specified forcible sex with a woman “not his wife.”

In Islamic law of the Sunni legal schools (*madhahib*), rape is not a capital crime but falls into the category of *hiraba*, the crime of a single person or group of people causing public disruption, killing, forcibly taking property or money, attacking or raping women (*hatk al ‘arad*), killing cattle, or disrupting agriculture. Ibn Arabi called it “*hiraba* with the private parts,” or theft of the sexual organs, which should be reserved for a woman’s husband. Thus, under applications of Islamic law, rape involved compensation, particularly to a virgin, for the action, and also for the corresponding reduction in her bride price.

The references to such remedies come not from the Qur’an but from the *hadith*, (usually Tirmidhi and Abu Dawud). In rape, there was a precedent for not

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<sup>47</sup> *The Washington Post*, 2 February 2000, cited by Yotam Feldner, “Honor” Murders – Why the Perps Get off Easy,” <http://www.ourjerusalem.com/arabpress,04/16/2001> (last visited 02/07/2003).

<sup>48</sup> An INS judge ruled similarly in a case of Berber Algerians seeking asylum on the basis of direct threats from the Islamists. Unfortunately the current relationship between the United States and the country of origin has a bearing on such decisions, and there are no appeals to INS decisions, thus judicial bias cannot be challenged.

requiring the four witnesses necessary to ascertain the crime of *zina*, but some evidence and oath-swearing would have to take place, or a confession provided four times. Unfortunately, a rapist would claim that the victim had engaged in consensual sex, as is the classic defense in rape cases the world over, i.e. “she wanted it.” She could then be punished for *zina*, that is adultery, or fornication.

‘*Urf* treats rape as both an act of physical damage, and a theft of sexual property which alters a virgin’s financial worth. While each of the Islamic legal schools differ slightly in their approaches to the crime of rape, the Hanafi school spells out the notion of this injury, as being one to the man’s property (*mulk*) – rather than to the woman herself. Under this rationale, rape can be punished under the *qisas* laws as well as under *hiraba*, and so two payments can be levied.

Differentiations in the status of women – married versus single – who engage in adultery or who are raped once again illustrate the patriarchal management of female sexuality that we find not only in Islam, but also in other Abrahamic faiths. The physical distinction – virgin, or not – implies a financial distinction. In Deuteronomy 22:28 we read, “If a man happens to meet a virgin who is not pledged to be married and rapes her and they are discovered, he shall pay the girl’s father fifty shekels of silver. He must marry the girl, for he has violated her. He can never divorce her as long as he lives.” And, in Deuteronomy 22:25: “But if out in the country a man happens to meet a girl pledged to be married and rapes her, only the man who has done this shall die.”

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In theory, Islamic law should also demand the punishment against *zina* for the rapist, as well as the compensation, but even when this *hudud* punishment was enforced, it might well be flogging rather than stoning (lapidation), as specified for ever-married individuals. Jurists who felt there was an element of doubt (*shubha*)<sup>49</sup> might decide against the *hadd* (capital) punishment and simply impose the *mahr* (dower or bride price) and compensation<sup>50</sup> on the rapist.

The rape of a male was not technically considered *zina* by the Hanafis as it was according to the Shafi’ school. Other distinctions pertained to Muslims who raped outside of Islamic territory, or while at war. The Hanbali and Hanafi schools seem to have considered the warrior immune from the *hudud* punishments under conditions of conflict.

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<sup>49</sup> See Tirmidhi in the hadith “*idra’u al hududa bi’ shubha*” (“drop the hadd punishments in cases of doubt”), “*al-hudud tusqat bil shubha*” (“hadd punishments are suspended in doubtful cases”), Ibn Rushd, *Bidayat al-Mujtahid*, Vol. 6, 113.

<sup>50</sup> Judith Tucker discusses particular cases in Ottoman Egypt in which “punishment was routinely muted by the legal fiction of *shubha*.” Judith Tucker, *House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998) 161.

In Saudi Arabia the penalty for rape is death, but a prison term can be imposed in other countries. Modern penal codes again reflect a connection to *shari'ah* and also the differentiation in Western legal models referring to forced vs. consensual rape. The penal codes often divide articles dealing with such crimes into two categories: forced, or coerced sexual intercourse, and those that deal with sexual acts which were supposedly consensual. The Platform for the Reform of the Turkish Penal Code from a Gender Perspective has proposed changing Article 150 entitled “Forced Seizing of *Irz* (Chastity)” in the draft law regulating crimes of rape, to “Rape” in order to appropriately reflect the nature of the crime, and has demanded amendments to Article 151, “Forced Seizing of *Irz* of Consenting Children and Minors” to “Sexual Abuse of Children”<sup>51</sup> since by definition, legal consent cannot be given by children and this article may be used to criminalize consensual sexual relations between young people.<sup>52</sup>

This distinction between the true object of rape, a woman, and her family, clan, or political faction, underlines women’s historic lack of self-ownership. This is reflected in the Turkish Penal Code, in which the subsection dealing with crimes of sexual assault is entitled “Felonies against Public Decency and Family Order,” under the section “Crimes against Society.” Women for Women’s Human Rights (WWHR)-New Ways has pointed out that such wording creates a discourse (common to nearly all of the modern penal codes in the MENA) that is detrimental to individuals’ rights, and perpetuates the notion that society and families “own” women. As we shall see below, Palestinian women have noted a similar type of conceptualization in Jordanian law (which governs the West Bank) and which provides for lesser penalties for crimes against “society” than crimes against individuals. In the Turkish Penal Code Draft Law, such crimes were regulated as “Crimes Against Sexual Integrity and the Tradition of Morality.”

The Platform for the Reform of the Turkish Penal Code has been campaigning for a holistic reform of the penal code from a gender perspective and has succeeded in getting crimes of sexual assault moved to the section entitled “Crimes against the Individual” during the revision of the draft law. The proposed change for sexual assault involves a change in terminology and the conception of sexual

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<sup>51</sup> Women for Women’s Human Rights - New Ways, *Gender Discrimination in the Turkish Penal Code Draft Law: Summary Report*.

<sup>52</sup> Editor’s note: The proposed amendments have been made and references to *Irz* (chastity) have been removed. Sexual abuse of children has also been appropriately defined and regulated in one article. However, an article entitled “Sexual Relations with a Minor” has been added to the new penal code, criminalizing consensual sexual relations of minors aged 15-18 upon complaint.

rights as individual human rights. The proposed change would remove the concept of *Irz* from the section, and retitle this section “Attack on Sexual Integrity” and thus treat the crime as one against an individual.<sup>53</sup> Since the writing of this article, the revised draft law has been voted in the Turkish Parliament in Fall 2004, and passed with major amendments to the crimes of sexual assault for the protection of women’s human rights. This could serve as a model for the reform of other codes in the region.<sup>54</sup>

Some penal codes refer to rape-kidnapping. Historical sources suggest that such crimes were prevalent in the late 19th century, when the modern Egyptian legal code was written. It is rather unclear whether at that time there was a great lack of security, or dire economic circumstances or other conditions that affected slavery and prostitution, thus encouraging such crimes. Kidnapping/elopement, which I have elsewhere described as “marital kidnapping” is prevalent in the rural areas of the Arab East, but often, although not in every case, girls have arranged to be “kidnapped,” so that they may marry the boy of their choice, rather than a cousin, or family selection.<sup>55</sup> In other cases, authorities or mediators are expected to convince the kidnapper-rapist to marry his victim, thereby avoiding shame and perhaps death for the victim, and incarceration, or perhaps death, for the perpetrator as well. The rapist who married his victim avoided death, acts of vengeance by the girl’s family members, and indeed, all prosecution. This again shows the continuity of certain principles derived from tribal law and *shari’ah* in modern legal principles. The courts apparently required women to file rape charges promptly. They were often biased against witnesses presented by women, and even evidence of lost virginity might be insufficient to obtain a conviction.<sup>56</sup>

The marriage escape hatch for rapists lingered on, and even gender-activists argued that women who faced the threat of honor killings in cases of rape could use these laws to avoid being murdered. This same argument was recently put forth by an Iraqi police representative to Human Rights Watch.

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**53** Editor’s note: The proposed amendments have been accepted to regulate sexual crimes under “Crimes against Individuals” and define them as “Attack on Sexual Integrity” as a result of the campaign.

**54** Editor’s note: The new law was approved in the Turkish parliament in September 2004. For details on the campaign and the reformed Turkish Penal Code, please visit WWHR – New Ways’ website at [www.wwhr.org](http://www.wwhr.org).

**55** Sherifa Zuhur, “Islamization on the Margins: Women and the Shi’i Community in Postwar Lebanon,” In S. Zuhur, ed., *Women and Gender in the Middle East and the Islamic World Today* (Berkeley: University of California Press and Center for International and Area Studies, 2003 [digital version] and in process for print publication with University of Florida Press).

**56** Amira Sonbol, “Rape and Law in Modern Egypt,” In Pinar Ilkcaracan, ed., *Women and Sexuality in Muslim Societies* (Istanbul: WWHR-New Ways, 2000) 314-318.

Article 290 of the Egyptian Penal Code specifies life imprisonment for abduction, but a capital sentence if the abduction involves rape. Yet if the abductor marries his victim, according to Article 291, he cannot be punished.<sup>57</sup> However, on 20 April 1999, the People's Assembly passed legislation to repeal Article 291 of the Egyptian Penal Code. Law 214 introduced a death sentence for rapist-kidnappers, and in 1993, it was expanded to include some cases of rape without kidnapping, with arguments referring to the *shari'ah* used to rationalize this reform.

Other penal codes in the MENA and Muslim world excuse the rapist who marries his victim. Article 522 of the Lebanese Penal Code reads:

*Article 522. In the event a legal marriage is concluded between the person who committed any of the crimes mentioned in this chapter [including rape, kidnapping and statutory rape], and the victim, prosecution shall be stopped and in case a decision is rendered, the execution of such decision shall be suspended against the person who was subject to it.*

*Prosecution or the execution of the penalty shall be resumed before the lapse of three years in cases of misdemeanors and five years in cases of felonies, in the event such marriage ends by the divorce of the woman without a legitimate reason or by a divorce which is decided by court in favor of the woman.*

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In the Turkish Penal Code Draft Law, Article 162 stated:

*If the abducted or the detained and the perpetrator or the sentenced get married, the criminal lawsuit or the execution of the sentence shall be postponed by the court.*

This article was removed from the draft law as a result of the lobbying efforts by the Platform for the Reform of the Turkish Penal Code from a Gender Perspective.

Modern laws also cause problems for victims in that they have to establish the use of physical coercion.<sup>58</sup> Rapists can argue that women were seductive, compliant or simply did not resist, so the victim's appearance, dress, location, and conduct are all subject to defense strategies. Penal codes referring to rape thus continue to create obstacles to the prosecution of the crime and conditions that reduce or even eliminate the criminality of rape.

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<sup>57</sup> Zulficar, *Women in Development: A Legal Study*, 149.

<sup>58</sup> Sonbol, 321.

## RAPE AS A POLITICAL CRIME

Rape may also be used in a political sense, to dishonor an opponent, captives, or the women of a different faction in situations of conflict. Islamist leaders like Abu al-'Ala Mawdudi claimed that Muslim soldiers never raped women, and that the *shari'ah* was women's best safeguard.<sup>59</sup> In fact, this same argument is echoed by Muslim conservatives in and outside the region, but it is historically inaccurate. One could present instance after instance, but it is sufficient to mention the mass rapes of Bengali women by the Pakistani army, which occurred in 1971 as part of the efforts to repress the Bengali liberation movement, and rapes in the Lebanese civil war and during the Algerian conflict since 1991.

Afghan women were raped and brutalized during the conflict resulting in numerous honor killings.<sup>60</sup> The Taliban also raped women, despite their claims of upholding Islamic social virtues.<sup>61</sup> Algerian Islamists raped women, and used them as sex slaves,<sup>62</sup> taking particular care in some cases to proclaim these situations temporary marriages, or *mut'a*. Under such fictions, they also raped virgins before killing them. These dishonorable acts and simultaneous claims to be upholding "honor" derive from the historic recourse to temporary marriages by marauding Muslim forces, which were supposedly disapproved after the conquest of Mecca (for Sunnis), and the legal notion that virgins should not be executed (which is why they were whipped, instead being stoned to death in *zina* cases).

In Pakistan, a different variety of political rape has evolved, one intended to destroy the "honor" of a political foe. Shahla Haeri has written about the well-publicized Rahila Tiwana and Veena Hayat cases.<sup>63</sup> A public lens on these and other cases has at least stimulated discussion of the issue. A special concern is that with the implementation of penalties for *zina* in Pakistan, rape victims can also be charged with adultery. This inhibits women from filing rape charges according to the rationale discussed previously in this article, particularly women of lower incomes.

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<sup>59</sup> Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder: Westview Press, 1998) 119.

<sup>60</sup> Sima Wali, "Muslim Refugee, Returnee and Displaced Women," In Mahnaz Afkhami, ed., *Faith and Freedom: Women's Human Rights in the Muslim World* (London: I.B. Tauris, 1995) 178-179.

<sup>61</sup> Rosemary Skaine, *The Women of Afghanistan under the Taliban* (Jefferson, North Carolina: MacFarland & Co., 2002) 74, 101.

<sup>62</sup> Karima Bennoune, "SOS Algeria: Women's Human Rights under Siege," In M. Afkhami, ed., *Faith and Freedom*, 184-208.

<sup>63</sup> Shahla Haeri, "The Politics of Dishonor: Rape and Power in Pakistan," In M. Afkhami, ed., *Faith and Freedom*, 161-174.

Such rapes have taken place elsewhere. For example, it has been recently reported that Ms. Kadyrbekov Keniegun, the sister of Ishenbai Kadyrbekov (a member of the Kyrgyz Parliament and a leader of an opposition group that is calling for the resignation of President Akayev), was raped by three men on 16 February 2003 at her workplace. Also on the 19th of February 2003, Ms. Ajieva Saikal was raped by four militia officers. Saikal serves as staff to the Coalition for Democracy and Civil Society and opposed a referendum that had taken place earlier that month (Feb. 2) and that was to bolster the government.<sup>64</sup>

Failure to report rape and charge rapists as well as the crime's links to psychological trauma, illegitimate births, honor killings, and ostracism must be confronted and dealt with by the state. And as mentioned above, altering the attitude of the police towards sex crimes against women and training them in the proper treatment of victims, reporting of crimes, including appropriate forensics procedures, and active prosecution is also essential. Many women are afraid to report such crimes and are not always given the necessary information on how to report them, where to go for a physical examination, or that they need to have photographs taken of injuries or bruises.

Similarly, states must do their part to prevent gender-based war crimes that victimize women and cause further damage where the honor/shame system prevails. For instance, there was the situation of Greek women in Cyprus who were discarded by their husbands when raped, while other women affected were prevented from obtaining a divorce despite their husbands' disappearances. Or, consider Muslim Kosovo, where countless men deserted their wives who had been raped by the Serbs during the war. Many women in turn abandoned the babies they bore as a result of the rape, and tried to alter their babies' identities after running away from hospitals.<sup>65</sup>

## MINORS

The rape of minors occurs in the MENA and the Muslim world as commonly as it does in the West. However, the general popular belief, supported by Muslim traditionalists and Islamists, is that incest and sexual abuse of minors is not as prevalent as it is in the West. Statistical evidence is hard to come by since victims fear the terrible consequences of ostracism, or honor killings, and until recently, the media was censored or self-censored coverage of such topics.

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<sup>64</sup> International Secretariat of the Organisation Contre La Torture, Violence against Women/Rape, Case KGZ 250203.VAW.

<sup>65</sup> *Al-Quds*, 17 January 2000.

Middle Eastern penal codes treat the rape of minors, like that of adult women, differently when the victim is considered to have “consented” to the crime. So, for example, Article 414 of the old Turkish Penal Code provided a sentence of five years for statutory rape of a minor, but a ten year sentence if force is involved (Article 415), and attempted rape of a minor alone involved a two to four year sentence. Article 267 of the Egyptian Penal Code specifies a life term for rape by a parent, guardian, or servant.

## INCEST AND SEXUAL ABUSE

Like rape, incest under Islamic law was also considered to be *hiraba*, or technically, theft of the use of the sexual organs, if non-consensual. It was a lesser crime than *zina*, but punishable. Incest also violates the degrees of relationship set out in the Qur’an 4:23<sup>66</sup> and therefore one might expect more severe punishment, yet the punishment was the same as for rape.<sup>67</sup>

Today, penalties for incest range from execution to penalties less serious than those for rape. For instance, Article 82 of the penal code in the Islamic Republic of Iran requires execution for the crimes of incest or unlawful sex with one’s stepmother. In Egypt, Article 267 of the penal code increases the penalties for those committing sexual intercourse with a child, specified as a female, if that person is a relative or “has authority over the child” to that of a life sentence.<sup>68</sup>

In Kelantan, Malaysia, in 2000, a 17-year old girl was charged with incest along with her father. Her case to some degree paralleled those of rape victims in Pakistan who were charged under the *zina* laws. The Sisters of Islam, a Malaysian women’s group, argued that it would have been better if the father was given the heavier penalty for rape rather than the light sentence for incest

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<sup>66</sup> “Forbidden unto you [in marriage] are your mothers, and your daughters, and your sisters, and your father’s sisters, and your mother’s sisters, and your brother’s daughters, and your sister’s daughters, and your foster-mothers, and your foster-sisters, and your mothers-in-law, and your step-daughters who are under your protection (born) of your women unto whom ye have gone in – but if ye have not gone in unto them, then it is no sin for you (to marry their daughters) – and the wives of your son who (spring) from your own loins. And (it is forbidden unto you) that you should have two sisters together, except that what hath already happened (of that nature) in the past. Lo! Allah is ever Forgiving, Merciful.” *The Meaning of the Holy Qur’an*. Trans. by. Muhammad Marmaduke Pickthall. (Beltsville, Maryland: Amana Publications, 1989).

<sup>67</sup> Bukhârî Vol. 8 p.526.

<sup>68</sup> (i) Any person who copulates with a female without her consent is punished by penal servitude for life or for a certain period of time. If the offender is related to the child or responsible for the child’s upbringing or having authority over the child or serving her against salary or one of those previously mentioned, penalty of penal servitude of life is inflicted.



under the Kelantan Criminal Code. This example shows the impact of Islamization on Malaysian society and how it can work to women's disadvantage.

Fay Afaf Kanafani's autobiography shocked many as she revealed that her father had sexually abused her as a child.<sup>69</sup> She regards it as but one of a host of tribulations including an arranged early marriage, flight from Haifa in 1948, struggles over the custody of her children, her education, and the deaths of two husbands. Her current reluctance to publish her book, *Nadia, Captive of Hope*, in Arabic is due to the responses she received to the English publication, but still, her revelation has opened the door for other women who allude to similar experiences.

Some estimate that in the West, nearly 60% of girls and 40% of boys may be affected by sexual abuse and that a high proportion of such abuse involves relatives. Similarly, Palestinian women's centers, problems with data notwithstanding, estimate that 75% of sexual assault cases involve close male relatives, with 4-13 year old girls being most at risk. Incest and rape are considered crimes against public morals and ethics. As such, Articles 285 and 286 of the Jordanian Penal Code (which apply in the West Bank) carry a sentence of only three years, and only a male relative of a woman may file a complaint in the case of incest. Women's organizations cannot file on behalf of women, nor may they do so themselves.<sup>70</sup>

Incest takes place in the private sphere; it can be factually difficult to establish, and since the violator perpetrator is a relative, even more damaging to children's or girls' psyches. Other relatives may be aware of but keep silent about incest. Since the reporting of incest can result in death for the victim (as in 10% of the cases studied in Palestinian shelters), one researcher has concluded that only the most serious cases of sexual abuse are likely to be reported, and that subterfuge or "nullification" through abortion, or hymen repair is a common recourse.<sup>71</sup>

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<sup>69</sup> Fay Afaf Kanafani, *Nadia, Captive of Hope: Memoir of an Arab Woman* (New York and London: M.E. Sharpe, 1999).

<sup>70</sup> Women's Centre for Legal Aid and Counseling, "A Gap Analysis Report on the Status of The Palestinian Women in the Context of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Summary Report," <http://www.wclac.org/cedawengeditedfinal.htm> (last visited 5/7/03).

<sup>71</sup> Nadera Shalhoub-Kevorkian, "The Politics of Disclosing Female Sexual Abuse: A case study of Palestinian Society," *Child Abuse & Neglect*, Vol.23, No.12 (1999)1275-1293.

## SEXUAL ABUSE AND HARASSMENT

In Morocco, in 1993, the shocking case of police commissar, Hajj Muhammad Mustafa Thabit, came to light. After two women pressed charges, he testified to the rape of around 500 women over a period of thirteen years. He had videotaped assaults, and recommended hymen repair to those who needed it, and he was rather swiftly (within two months) executed for these crimes. Thabitgate, as the case was called, opened up a public discussion of sorts, but no systematic investigation into other abuses, despite knowledge of these acts within the security system.<sup>72</sup> What Moroccan women's groups had hoped for was a broader discussion and increased public understanding that violence against women is connected to legal discrimination against women, and the notion that men own and therefore control women.

Morocco is not alone in the abuse of women by public officials, police, or prison officials. Amnesty International has documented numerous complaints in the region regarding sexual crimes against prisoners. In Lebanon, where the poor condition of women's prisons has been recognized by local NGOs and a parliamentary committee, there are horrifying reports involving torture, withholding of legal rights, and gender-based abuse and rape of local and migrant women. While Article 401 of the Lebanese Penal Code prohibits torture, some additional means to levy inquiries, enforcement of punishments for officials involved, and gender-specific training, are also necessary.<sup>73</sup>

Changing ideas about sexual harassment in the workplace are still a relatively novel and polarized debate in the West. Likewise, in the MENA and the Islamic world people understand that women's rights confront those of employers, other superiors and established codes of silence. In November of 2002, a young Tunisian hospital worker attempted to file a sexual harassment complaint, but the hospital disciplinary board was swift to hear complaints against her. Political police surrounded the hospital and threatened the complainant and her attorneys with rape.<sup>74</sup>

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<sup>72</sup> Laurie Brand, *Women, the State, and Political Liberalization: Middle Eastern and North African Experiences* (New York: Columbia University Press, 1998) 78-81.

<sup>73</sup> Amnesty International, "Lebanon: Torture and Ill-Treatment of Women in Pre-Trial Detention: A Culture of Acquiescence," (September 25, 2001) <http://web.amnesty.org/library/index/ENGMD180142001> (last visited 1/20/03).

<sup>74</sup> Organisation Mondiale Contre La Torture (OMCT) Case TUN 141102 VAW. On 12 November 2002, a disciplinary board was convened at a hospital in Tunis to hear a complaint against Ms. H.B., a young hospital worker. In August 2002, Ms. H.B. had lodged a complaint with the Director of the hospital and with the Minister for Public Health alleging that she had been sexually

If nothing else, the Anita Hill trials and subsequent workplace legislation on sexual harassment in the U.S. and Europe encouraged a public discussion in the Middle East, where the “new” rules against sex in the workplace coincide with traditional attitudes holding that women are in danger of male harassment in the public sphere. What is alarming though, is the depth of public feeling against women plaintiffs, and the common distrust and diminishment of their claims.

From preliminary discussions on the issue of sexual harassment in the Egyptian context, I noticed that some laughed at the idea of regulating behavior “in an American style.” Policing the workplace is the way they put it. Yet, many women are well aware of and complain about high levels of harassment on their way to and from work. The problem is rationalized as one of social class, and so inside the university walls, where upper-class enlightenment supposedly reigns, groping, and *quid pro quo* type harassment go unacknowledged. Article 306 of the Egyptian Penal Code calls for one month imprisonment for lewd behavior – verbal or physical – affecting women’s modesty.<sup>75</sup> However, there is apparently no mechanism in place to convince police to enforce it or to not behave in the same manner towards those attempting to file charges. The UAE has instituted a policy whereby men who harass women are fined and their photographs appear in the newspapers. This has apparently been effective in lowering the rate of harassment.

## MARITAL RAPE

According to custom more than law, sex is considered the husband’s right, and various *hadith* are cited in this vein. Although scholars have commented on cases in which wives or their mothers protested “unusual” sexual practices, and Muslim jurists advised husbands to desist, it seems that men have far more frequently exacted their “rights” without any legal protest.

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harassed by her superior. Rather than examining the complaint, Ms. H.B. was in turn accused of having abandoned her workplace without authorization, of non-respect for her superior and of making slanderous accusations against him. The disciplinary hearing on 12 November 2002 was convened for the purposes of examining the case against Ms. H.B. Prior to the disciplinary board hearing, the hospital was reportedly encircled by members of the political police who prevented Ms. H.B.’s lawyer, Ms. Bochra Bel Hadj Hamida and Ms. Azza Ghanmi, a member of the Executive Committee of the Association Tunisienne des Femmes Democraties (ATDF) from entering the building. The police reportedly insulted Ms. Hamida and Ms. Ghanmi and threatened them with rape.

<sup>75</sup> Zulficar, *Women in Development: A Legal Study*, 86.

Marital rape is not criminalized or even recognized in many nations of the MENA and the Islamic world.

India has a large Muslim minority and its penal code is much like that of many Western legal systems with regard to the definition of rape. It states in Section 375. Exception [to the definition of rape in Section 375]: “Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age is not rape.”

Similarly, in Section 375 of the Malaysian code we find a similar exception to the definition of rape: “Sexual intercourse by a man with his own wife by a marriage, which is valid under any written law for the time being in force, or is recognized in the Federation as valid, is not rape.”

The justification of Article 313 of the Turkish Penal Code in effect seems to deny the possibility of marital rape, unless anal intercourse is involved:

*The General Assembly of the Penal Chambers of the Supreme Court of Appeals has held in its judgement of 19.06.1996 that the coercion of a wife to have anal intercourse by force cannot be regarded as an unlawful sexual act, but can be regarded as a violation of Article 478 of the Turkish Penal Code; therefore this Article does not require any further clarification.*

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The Women’s Platform on the Turkish Penal Code demanded the removal of this paragraph and succeeded in getting marital rape criminalized in the revised draft law.<sup>76</sup>

A study by the U.S. National Coalition against Domestic Violence showed that marital rape constitutes about 25% of rape cases and that 30% to 50% of battered women are subject to marital rape at least once. Apparently only very few of these cases (7.5%) are prosecuted. A majority of the states in the U.S. have not criminalized marital rape, or require proof of force.

The links here between marital rape and other forms of violence against women – battering (domestic violence), FGM, honor killings, and other forms of rape – are clear to researchers, but the belief that men have the right to hit or brutalize their wives does remain prevalent. Now, some discussions amongst moderate Islamists have shown that there is a rationale under Islamic law, at least in its liberal mode, to free marriage from violence or coercion, and so limit domestic violence. However, in most cases legislation and public education have not yet challenged the social construction of “husbands’ rights.”

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<sup>76</sup> Editor’s note: In the reformed code, marital rape is explicitly criminalized.

## HOMOSEXUALITY/ TRANSEXUALITY

Under *shari'ah*, the crime of *zina* included homosexual acts, but since these might be more difficult to prove and lineage was not at issue, it seems that homosexuality was often ignored, or tolerated, with periodic crackdowns. Quranic verses condemning sex between men are found in Surah VII:80-1, XXVI:165-166 and IV:16, and imply the natural condition of heterosexuality, but there are no specific punishments mentioned.<sup>77</sup> Various *hadith* refer to the Prophet's abhorrence of homosexual acts. In *adab* literature, Jawami' wrote of the whore of Mecca who researched other women's lesbian preferences. The women she interviewed stated their reasons for their preferences to be mainly "out of fear of pregnancy" and the fact that men feared the responsibilities of children were echoed in other *belles lettres* of that era.<sup>78</sup> Yet, forms of birth control were known and employed, and so the tradition of homosexuality is historically discernable and probably not entirely due to this rationale. Homosexual love may only have been enhanced by the ideals of courtly love (*hubb udhri*), which glorified unrequited and unconsummated (and often unrevealed) love in the medieval period, and most modern casual observers attribute it to the socially imposed separation of the sexes.

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Countries either treat homosexuality as an offence against society and public morality while not explicitly forbidding it for adults, or it is treated as a crime with a fine or prison sentence. In the Islamic Republic of Iran, sodomy has been classified as a *qisas* crime, punishable by death, or if confessed less than four times, by flogging. Lesbianism is punishable by 100 lashes under Article 129 of the Iranian Penal Code (Articles 127-134) unless the lesbian repents, and Article 134 defines a lesbian act as two unrelated women who "stand naked under one cover without necessity."<sup>79</sup>

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**77** "And Lot! (Remember) when he said unto his folk: 'Will ye commit lewdness such as no creature ever did before you?' Lo! Ye come with lust unto men instead of women. Nay, but ye are wanton folk." Surah VII: 80-81 (trans. Pickthall) (Dawood translates: "Truly, you are a degenerate people" and 'Abd al-Khalhaq Himmat Abu Shabanah as "a people given to excess and perversion.")

"Of all creatures in the world, will ye approach males. And leave those whom Allah (God) has created for you to be your mates? Nay, ye are people transgressing all limits?" Surah XXVI: 165-166. *The Meaning of the Holy Qur'an*. Trans. by. Pickthall. (Beltsville, Maryland: Amana Publications, 1989 [1408 h.]).

"If two men among you commit indecency, punish them both. If they repent and mend their ways, let them be. Allah is ever Relenting, Merciful." Surah IV: 16. The Koran. Trans. N. J. Dawood. (London: Penguin Books, 1990, fifth revised edition).

**78** B. F. Musallem, *Sex and Society in Islam: Birth Control before the Nineteenth Century* (Cambridge: Cambridge University Press, 1983) 154 note 8 et passim.

**79** Vahme-Sabz, "Violence against Lesbians in Iran." In Pinar Ilkcaracan, ed., *Women and Sexuality in Muslim Societies*, 285-287.

In Israel, homosexuality was decriminalized in 1988. In Turkey, homosexuality is not criminalized, though homosexuals and transsexuals may be charged with “indecent and offenses against public morality” covered by Articles 419, 547, and 576. In Iraq, homosexuality between consenting adults is not penalized, but the 1969 Penal Code assigns a 7 year sentence for sodomy with a minor aged 15 to 18, and 10 years for a minor under 14. In Syria, sodomy with males, or acts with females, or animals may be punished with a one year prison sentence according to Article 520 of the Penal Code of 1949.

Section 489 of the Moroccan Penal Code (of 26 November 1962) punishes same sex “lewd or unnatural acts” with a prison sentence of 6 months to 3 years and an additional fine (120-1000 dirhams). In Algeria, it is the 1984 family code, rather than the penal code, which prescribes a 2 month to 2 year sentence for any homosexual acts under Article 338 (June 19, 1984) and a fine of 500 to 1000 dinars, with additional prison time and fines if one partner is under 18. However, there is also another law (82.04), which refers to an “outrage to public decency” that can result in a lengthier prison sentence of 6 months to 3 years.

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Bahrain’s laws derive from the Indian Penal Code. Former Article 377 punished sodomy with deportation for 20 years, imprisonment for 10 years, or a fine. In 1956, the new penal code called these acts, “unnatural sexual offences” which might involve corporal punishment and imprisonment of no longer than 10 years.

In Egypt, where homosexuality had not previously been the target of any aggressive campaign, 52 men were arrested on May 11, 2001, on the Queen boat moored on the Nile bank of Zamalak. They were held and put on trial on charges of “obscene behavior” with “contempt for religion” by the Emergency State Security Court for Misdemeanors. The charge of obscene behavior within Law No. 10 of 1961 on the Combat of Prostitution allows for a sentence from 3 months to 3 years, while “contempt for religion” falls under Article 98(f) of the Egyptian Penal Code and carries a prison sentence from 6 months to 5 years. Only two of the defendants in this case were charged with the second crime, and a number of the cases were dropped, but 23 were sentenced, and this particular court does not permit appeals. It is quite possible that increased gay internet activities (monitored by state security) and the Islamist impact on public attitudes concerning homosexuality and Western influence led to this incident. Egyptian authorities rebuffed communications from gay rights and human rights organizations on behalf of the plaintiffs.

Saudi Arabia treats homosexuality as “carnal knowledge against nature” and it may be punished as a crime of fornication according the local interpretations of

*shari'ah*. *Shari'ah* is uncodified in the Kingdom, therefore judges may issue their own interpretations or look to the guidelines of the Judicial board which has referred in the past to the works of Hanbali jurist Mar'i ibn Yusuf al-Karmi al-Maqdisi (d. 1033/1624). Al-Maqdisi writes that sodomy must be punished as fornication, with the usual distinction between the *muhsan* (a married individual) and a non-slave bachelor. There are numerous reports of beheadings, including those of 3 Yemeni men who were found guilty of engaging in homosexual acts and molesting young boys and put to death in Jizan in July of 2000 and Saudi men executed in Abha in the same month. There and elsewhere in the Gulf, foreign nationals have been accused of homosexuality as well. Some argue however, that there is a tolerance of homosexuality, but that certain severe or serious cases are pursued.

The Taliban punished homosexuals by toppling a wall onto them to cause death. Yet homosexuality was not unknown or infrequent in the *madrasas* (religious schools) of Pakistan from which the Taliban emerged, or in the Afghani refugee camps.

Lesbians are subject to honor killings and beatings by family members (their own or their lovers') and lack legal protection from such assaults, which may take place overseas as well as in their birthplaces.<sup>80</sup>

The Western media characterizes the region as a wasteland for women and homosexuals. That is not quite accurate; there is something that could be called gay culture in the region. This has traditional and modern aspects. An argot or slang specific to homosexuals can be heard in Egypt, which is derivative of the entertainers, *sim* (argot), and which dates back to the nineteenth century.<sup>81</sup>

The isolation and limitations on individuals in these countries may be more of an issue than the penal codes, yet the codes surely illustrate the conception of gender as dichotomized and reproductively oriented. Lesbianism may be even more threatening than male homosexuality as lesbians challenge male ownership of women's bodies as well as the reproductive bias toward sex. Bisexuality may be more common than homosexuality. Social derision or disparaging of the "female" partner is precisely because he is likened to the lowly social status of a woman. But in terms of the penal codes, there is no essential difference.

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<sup>80</sup> "Jordanian Woman Feared Honor Killing," *Outlines*, (26 January 2000) *Windy City Times*, <http://www.windycitytimes.com/oooutlines/Bash/bashrrra12600.html>

<sup>81</sup> Karin van Nieuwkerk, *A Trade Like Any Other: Female Singers and Dancers in Egypt* (Austin: University of Texas Press, 1995) 96-97; and some of the "mother" slang is found in P. Kahle, "Eine Zunftsprache der Ägyptischen Scattenspieler," *Islamica II* (1926-1927) 313-323.

There are several traditions of transgender and transvestism in the Middle East. The only religious objections beyond those mentioned above are several *hadith* and one attributed to the Prophet: “*Cursed are those men who wear women’s clothing and those women who wear men’s clothing.*” This could be cited to condemn women for wearing trousers rather than a more dramatic form of cross-dressing.

The *xanith* of Oman is a man who would prefer to be a woman. Unni Wikan explains that he is not permitted to dress as a woman, because he is a prostitute. He can socialize or sing with women, whereas men play musical instruments, and he may one day “become a man” and give up his lifestyle for marriage and children.<sup>82</sup> Sigrid Westphal-Hellbusch has written about the *mustergil*, a female-to-male transvestite tradition in Southern Iraq.<sup>83</sup> There are other literary references to “warrior-women” who served in disguise, though in modern times there have also been a few famous Western women who dressed as men, like Gertrude Bell and Isabelle Eberhardt, apparently to gain access to locals. Young girls were also photographed in boy’s dress quite frequently<sup>84</sup> and not necessarily to protect their honor, as was the case in Umm Kulthum’s wearing of male head-garb when she began her career in Cairo in the 1920s. Some portraits of adult women in drag from 1930s Lebanon suggest a subculture that has not been greatly detailed in writing.

Ottoman-era rules like those issued by Muhammad Ali Pasha in Egypt forbade female performers in public spaces and created a tradition of transvestism in entertainment (as well as moving performers away from capital cities). This trend affects Turkish music and television to this day, in which extremely popular and dynamic performers like Zeki Muren or Bulent Ersoy<sup>85</sup> embody an interesting subculture of cross-gender messages. Also, *khawal* performances were seen earlier, in Egypt, in dramatic troupes, where boys played women’s parts – this after all had been a tradition in Europe as well. References to this

**82** Unni Wikan, *Behind the Veil in Arabia: Women in Oman* (Chicago: University of Chicago Press, 1993) 168-186.

**83** Sigrid Westphal-Helbush, “Institutionalized Gender-Crossing in Southern Iraq,” (trans. Bradley Rose) In Stephen O. Murray et al., *Islamic Homosexualities: Culture, History, and Literature* (New York: New York University, 1997) 223.

**84** Sarah Graham-Browne, *Images of Women in Photography of the Middle East* (New York: Columbia University Press, 1988).

**85** John Morgan O’Connell, “In the Time of Alaturka: Engendering the Past in Turkish Vocal Performance.” A paper presented to the Cultural Expression/Nationalism/Gender Symposium, May 21, 2001 and at the Middle East Studies Association, November 25, 2002; Martin Stokes, “The Tearful Public Sphere: Turkey’s Sun of Art, Zeki Muren,” In Tullia Magrini, ed., *Music and Gender: Perspectives from the Mediterranean* (Chicago: University of Chicago Press, 2003) 307-329.



tradition appear in drag comedies and gender parodies in modern Egyptian cinema.<sup>86</sup>

Discussions about homosexuality and sex-changes involve debates tinged with Islamist discourse and dichotomously conceived categories of gender. The new 2002 Turkish Civil Code requires an individual to be 18, unmarried, to establish their “transsexual nature,” chronic infertility, and the necessity of the operation to their mental health on the basis of official medical reports, in order to receive official permission to change their sex.<sup>87</sup> Although the process is regulated, transsexuals are frequently mistreated by the police (as are homosexuals).

Certain Muslim spokespersons equate homosexuality with feminism, and see any vestiges of either as part of a grand conspiracy on the part of the West to attack the family system and strength of the *ummah*.<sup>88</sup> In many instances, the West is gravely criticized for decriminalizing homosexuality and the effects of such social attitudes are probably far more influential in the repression of alternative sexual identities than are the penal codes.

## ILLEGITIMACY

In the clan or tribal system, one purpose of honor killings is to prevent the birth of illegitimate children. A single mother would have had no income without a husband or a system of social welfare. Similarly, there is no place in Islamic law for illegitimate children, and their mothers are guilty of *zina* simply by virtue of their pregnancy. For example, in Morocco, a woman may be imprisoned for six months for bearing a child out of wedlock. Abortion is illegal (see below) and so is child abandonment, but if a woman tries to establish paternity for the child, she is required to bring twelve witnesses.<sup>89</sup> Thus infanticide is one unfortunate option, and another is subterfuge, as when a mother claims her daughter’s child as her own, as dramatized in the short story “Incident in the Ghobashi Household,” by the late Egyptian author, Alifa Rifaat.<sup>90</sup>

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**86** Garay Menicucci, “Unlocking the Arab Celluloid Closet Homosexuality in Egyptian Film,” *MERIP* Vol. 28, No.1 (Spring 1998) <http://www.merip.org/mer/mer206/egyfilm.htm>

**87** Women for Women’s Human Rights – New Ways, *The New Legal Status of Women in Turkey*, 57-59.

**88** For instance, “Feminism and Islam.” Audiotape issued by the Islamic Center of Los Angeles. Circa 1989.

**89** Brand, 58.

**90** Alifa Rifaat, “Incident in the Ghobashi Household,” In Alifa Rifaat, *Distant View of a Minaret*, Trans. Denys Johnson-Davies (Oxford: Heinemann, 1988).

In Jordan, one of the items under revision in the penal code was the prosecution of infanticide as manslaughter, under which a woman could receive a sentence of 5 to 10 years for killing a child born out of wedlock, where the sentence could only be reduced in cases of rape or incest. In the code revision, a reduced sentence would be possible in other cases as well.

Turkey has dropped the term “illegitimate” for children born out of wedlock, but their lineage must be established through court rulings, recognition of paternity, or marriage of the mother. Once paternal descent has been established, then these children inherit from their fathers. More unfortunate are the children of foreign fathers, for instance thousands in Egypt born out of wedlock, or outside of *nikah* marriages. Yet here, it is the laws of citizenship and naturalization (which only grant citizenship through the father) that are even more problematic than the penal codes.

## ABORTION

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In recent years, many Muslim scholars have issued negative views on abortion, one of the many bodily rights now legislated by modern states. Islamic law usually accords the fetus rights equal to the mother's after four months. This point in time (120 days) is the crucial event for jurists, at which point the fetus is “ensouled.” Historically, various attitudes and opinions on abortion coexisted, with Hanafi scholars permitting abortion up to that date, allowing women to do so even without their husband's permission.<sup>91</sup> Most Maliki opinions prohibited abortion, but a smaller number allowed it up to 40 days, while Hanbali and Shafa'i jurists allowed abortion up until differing dates, and Zaydi jurists permitted it “unconditionally” until ensoulment.<sup>92</sup> Muslim women and men resorted to various forms of birth control, including abortion. Musallam points out that some jurists strengthened their arguments supporting withdrawal, for instance, by claiming that it was preferable to abortion, but also that the arguments which supported contraception (and withdrawal) could also strengthen those defending abortion.<sup>93</sup>

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<sup>91</sup> Basim F. Musallam, *Sex and Society in Islam: Birth Control before the Nineteenth Century* (Cambridge University Press, 1983) 57.

<sup>92</sup> *Ibid.*, 57-58.

<sup>93</sup> *Ibid.*, 58. See also Donna Lee Bowen, D., “Abortion, Islam, and the 1994 Cairo Population Conference.” *International Journal of Middle East Studies*. Vol. 29, No. 2 (May 1997)161-184.

With all of this background, it is somewhat confusing to read in the media, or in mosque-produced literature, that abortion is absolutely forbidden in Islam. At international conferences on the issue of population and family planning one may notice that conservative Muslims align with Catholics and other Christian opponents of abortion, as when the Saudi Minister of Education, Muhammad al-Rasheed described it as “premeditated murder.”<sup>94</sup>

Despite the differing views on abortion and the fact that some Muslim jurists have considered it lawful, it is criminalized in the penal laws of most Muslim/MENA countries, with few exceptions. Tunisia, as part of its active family planning campaign, liberalized and then made abortion available in 1973. In Turkey, abortion has been available since 1983, but spousal and parental approval (if the girl child is younger than 18) were required as of 1999. Soviet-influenced countries, in order to enhance production, generally permitted abortion, as in Armenia, Azerbaijan, Georgia, Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan, where it is available without restriction.

Lebanon is considered by many in the Arab world to be “permissive,” but this is a misconceived equation of modernity with the social and legal treatment of women, probably derived from the country’s reputed tradition of free publication, and the mixing of the sexes in some areas of the capital as compared to more sex-segregated Arab societies. In Lebanon, abortion and birth control are anathema to several religious communities. Under Articles 539 to 546 of the March 1, 1943 Penal Code (1983 version) abortion was completely illegal, carrying a sentence of 6 months to 3 years in prison for a self-induced abortion and 1 to 3 years in prison for anyone else performing an abortion, with five years of forced labor if the woman’s consent was not given, and health professionals could be barred from practicing. Presidential Decree No. 13187 (October 20 1969) permitted abortion if a woman’s life is in great danger.<sup>95</sup>

In Jordan, abortion was criminalized under Law No. 16 in 1960. However, as in Lebanon, abortion may be resorted to in order to save the mother’s life or her health under Public Health Law No. 20 of 1971 (section 62 a).

The philosophies inherent in the modern laws do not represent a simple division into two groups, either Western or *shari’ah* inspired. For instance, Mauritania, a

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<sup>94</sup> Education Minister of the Kingdom of Saudi Arabia, Dr. Muhammad Al-Rasheed, (Address to the United Nations Special Session on Children, New York, 10 May 2002).

<sup>95</sup> “Lebanon,” *The Population Policy Data Bank*, Population Division of the Department for Economic and Social Affairs. United Nations, 81-82.

former French colony, has now incorporated many provisions from *shari'ah* into the laws dealing with women. However, the relevant sections of the 1983 Mauritanian Penal Code dealing with abortion actually come from the Napoleonic Code of 1810, which was followed by the 1939 code. In line with the thought of the time, and France's Catholic majority, that code and its Mauritanian adaptation made abortion illegal, penalizing practitioners (1 to 5 years in prison and a fine of 10,000-2,000,000 UM [ouguiyas]), providing a lengthier sentence for habitual or regular abortionists, and 6 months to 2 years, plus a fine of 5,000-6,000 UM for a self-induced abortion.<sup>96</sup>

Abortion laws in Iran reflect a movement toward, and then away from Western models, to an even stricter interpretation of *shari'ah* than previously existed. Under the reign of Shah Muhammad Reza Pahlavi, abortion was illegal prior to 1973, except to save the life of the mother. Article 182 of the penal code called for a sentence of up to 3 years in prison for the use of any medication or substance causing abortion, unless the woman's husband had ordered the operation, in which case he was punished in the woman's place. Under Article 183, medical practitioners could receive 3 to 10 years of forced labor if they performed an abortion. By 1976, physicians could perform abortions if the woman was less than 12 weeks pregnant, permission of parents was provided, and the couple provided social or medical grounds for the procedure under an amendment of the penal code. If the woman was married, or suing for divorce, her husband's consent was necessary.

Following the Islamic Revolution in Iran, the Penal Code of 1991 classified abortion as a *qisas* crime which requires blood money (*dhiyah*) to be paid on behalf of the fetus to the relatives. The amount of *dhiyah* increases according to the development of the fetus: from 20 dinars up to a full *dhiyah* of 1,000 gold dinars or 10,000 dirhams, or specified numbers of animals if the fetus is "ensouled." These developmental stages are firstly based on Quranic passages XXII:4 and XXIII:12-14 which describe the formation of *nutfa*, *'alaqa*, and *mudgha* (semen, a bloody clot, and a lump of flesh), and then, the *hadith*, in which these stages are divided into periods of 40 days.<sup>97</sup> The *dhiyah* can only be paid to a woman who has been forced to abort, or injured so as to abort, and its original purpose was to compensate the patrilineal family, i.e. her husband's family, for the loss of the new family member. However, very recently, on July 20, 2004, the

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<sup>96</sup> "Mauritania," *The Population Policy Data Bank*, Population Division of the Department for Economic and Social Affairs, United Nations, 130-132.

<sup>97</sup> Musallam, 53-54.

Iranian Parliament approved a draft bill, permitting abortion up to four months if the mother's life is in danger or if the fetus is malformed. Iran, like other MENA countries, has acknowledged a population growth problem and though abortion is punished as compensation to the head of the family, family planning, including male sterilization, is strongly promoted. Families with more than three children are discouraged through the elimination of various state benefits.<sup>98</sup>

The laws of other MENA/Muslim countries include one or more grounds under which abortion can be permitted.<sup>99</sup> Egypt, Syria, Lebanon, Indonesia, Brunei, Yemen, and Libya criminalize abortion unless it is performed to save the mother's life. In Morocco, Algeria, Pakistan, Malaysia and Saudi Arabia abortion can only be permitted to save the mother's life, or to preserve the woman's physical or mental health. The Sudan, Iraq and Israel also allow abortion in cases of rape and incest and Qatar permits it to save the mother's life, or health, and in cases of rape and fetal impairment.

In recent years, as the majority of the Republican Party in the United States has promoted an anti-abortion, and pro-virginity (rather than sex-education) platform, we have seen ominous alliances between the US administration, the Vatican, and the governments of Iran, the Sudan, and others at large international conferences addressing women's rights to their own bodily integrity. It is certainly not a given that women will win the rights to control their own reproductive life and sexual behavior, nor that the "West" (if that means the United States) will support them in doing so. Rather, women will have to fight for these rights.

## NEW REPRODUCTIVE TECHNOLOGIES

New reproductive technologies (NRTs) are being regulated in a piecemeal, state by state fashion with nods to religio-medical ethics. Sex-selection techniques, in vitro fertilization, and surrogate motherhood already affect women in the MENA and Muslim world, though some travel to the West for procedures and

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<sup>98</sup> "Iran." *The Population Policy Data Bank*, 62-64. To understand the interesting ways in which the state promotes family planning; see Homa Hoodfar, "Devices and Desires: Population Policy and Gender Roles in the Islamic Republic," MERIP (Middle East Research & Information Project) Vol. 24, No. 5 (September-October 1994) 11-17.

<sup>99</sup> See Population Division of the UN Secretariat, *World Abortion Policies* (New York: 1999) and Women for Women's Human Rights – NEW WAYS, *The New Legal Status of Women in Turkey* 2002.

programs. By and large, states are deferring to Muslim religious authorities in drafting regulations on these emerging issues which have not yet been dealt with in the modernist-nationalist penal codes.

Muslim jurists initially opposed all three practices, but for different reasons. Sex-selection techniques, with clinics and physicians promising the births of sons, are extremely popular with Muslim women of several countries, who can avail themselves of such services in Canada, Europe or the U.S. if not in their home countries. But jurists and some scholars argued that there is a Quranic basis for not preferring sons over daughters, and that an imbalance in the population could result.

More traditional jurists opposed medical interventions in general, and with in vitro fertilization, encouraged couples to accept childlessness if that was God's will with reference to the Qur'an 42: 49-50.<sup>100</sup> But more importantly, medical or religious authorities had opinions that in vitro fertilization with the use of donated sperm might be a form of *zina* and had concerns about the potential for incest since the gene pool was unknown.<sup>101</sup>

The attitude toward medical interventions, such as the use of life support and other emergency procedures, has changed and softened over time. In Saudi Arabia, a second decision on in vitro fertilization demonstrated that many jurists approve it so long as it solely involved the parents, with no donated sperm.<sup>102</sup> However, surrogate motherhood received a strongly negative response.

Naturally there is no direct Quranic precedent, but these and other jurists have protested the notion of motherhood for hire, or wombs for rent which could be (and possibly are) dividing the women of the world into two classes, child bearers and wealthy mothers, and separate the functions of motherhood into conception, childbearing and parenting.<sup>103</sup>

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**100** To Allah belongs the dominion of the heavens and the earth. He creates what He wills [and plans]. He bestows [children] male or female according to His Will. Or he bestows both males and females and he leaves barren whom He will. For He is full of Knowledge and Power. (Trans. Abdullah Yusuf Ali.)

**101** Just one example is Hasan Hathout, "Islamic Concepts and Bioethics," ed., *The Center for Ethics, Medicine and Public Issues, Bioethics Yearbook*, Vol. 1 (London: Kluwer, 1991) 103-117.

**102** Members of the Shari'ah Council of the Muslim World Association, "Second Opinion on the Matter of Artificial Insemination and Test-tube Babies" (Mecca: 1989).

**103** Sherifa Zuhur, "Of Milk Mothers and Sacred Bonds," *Creighton Law Review* Vol. 25, No. 5 (December 1992); and Abd al-Hamid Mahmud Tahmaz, *Al-Ansab wa al-Awlad: Dirasah li-mawqif al-shari'ah al-islamiyyah min al-talqih al-sina'i wa ma yusama bi atfal al-anabib* (Beirut and Damascus: 1987).

As there are many similarities between the Islamic legal position and that of *halakha* (religious law and tradition in Judaism), it is worth mentioning that in Israel, after the 1996 Embryo-Carrying Agreements Law issued by the Knesset following the Nahmani vs. Nahmani (1996) case pitted a husband's right to not be a father against his separated wife's right to be a mother, and the Supreme Court ruled in her favor.<sup>104</sup> Questions surrounding surrogate mothers and their rights have emerged. On a state-by-state basis, courts in the West are gradually curtailing these rights, as seen in the Baby M. case, the first well-publicized legal case to involve NRTs. Baby M was conceived through the artificial insemination of Mary Beth Whitehead with William Stern's sperm. Whitehead agreed to bear the child and give up her parental rights to Stern for \$10,000 plus medical expenses. But after giving birth, Whitehead changed her mind, refused the payment, and took her baby Sara. Stern and his wife Elizabeth named the baby Melissa (hence, Baby M). Baby M was taken away from Whitehead and the Sterns went to court to enforce the contract. Public opinion was with them and against Whitehead. The New Jersey Supreme Court then restored Whitehead's parental rights in that it granted visitation, but still granted custody to William Stern.<sup>105</sup>

And in California, in the 1993 Johnson vs. Calvert case, Anna Johnson, a surrogate mother of one race sued for visitation rights regarding the child she bore to a couple of a different race and the courts ruled against her. It has been theorized that this is because surrogates represent the interests of lower socioeconomic classes, and the rights of women vs. those of "legitimate" fathers. Certain views have upheld fathers' rights to procreate, and so a leading Syrian cleric agreed that Muslim men might legally marry surrogates as second wives, thereby sidestepping the difficulties of adoption, and the "rental" of a womb.<sup>106</sup>

Shi'i jurists have broken with the Sunni position against gamete donation by agreeing that couples may use donated eggs. New clinics have opened in Iran and in Lebanon.<sup>107</sup>

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<sup>104</sup> Nina Kohli Laven, "Regulating Conception in the Jewish State: Women's Citizenship and State Responses to the Reproductive Technologies in Israel," In S. Zuhur, ed., *Women and Gender in the Middle East and the Islamic World Today* (Berkeley, California: University of California Press and Center for International and Area Studies, 2003 and now in process for print publication).

<sup>105</sup> Phyllis Chesler, *Sacred Bond: The Legacy of Baby M.*, (New York: Times Books, 1988).

<sup>106</sup> Personal interviews with the Mufti of Damascus, and Imam X. [pseud.] (a respected cleric in contact with the Mufti of Syria) Damascus, September 1993.

<sup>107</sup> Marcia Inhorn, (Paper presented at the Round Table, Family, Gender, and Politics, Middle East Studies Association Annual Meetings, Anchorage, Alaska, November 8, 2003.)

It will be interesting to see how the national bodies that legislate modernized law in the region deal with these various legal questions given the strong cultural bias toward fertility and the blaming of women for infertility.<sup>108</sup>

## SEX WORK / TRAFFICKING IN WOMEN

The laws on sex workers and trafficking in women should be brought into alignment with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child. Once again, countries are separated by their legal approach to the crime. Moreover, activists are quite divided on the issue of sex work. Legalization may benefit women in the trade, but puts minors at risk, as well as perpetuating the notion of sex for money or financial exchange that may harm women as a group.

Three categories of persons are affected – adult nationals, child nationals, and foreign nationals or refugees. The latter category may include non-Muslims, particularly women from the former Soviet Union, Africans – in Egypt, Sudanese, Ethiopians, Eritreans, and Nigerians and in the Gulf, Lebanon, Jordan (and in Israel as well) Filipinas and Sri Lankans. Within this grouping, women may fall victim to sex crimes because they are working under contract, legally or illegally (with regard to immigration and employment restrictions) as servants or nannies. They may be abused by their employers but have no legal recourse. Others, including a large number of Russian/former Russian citizens, end up in sex work, or are even smuggled into countries for that specific purpose.

Poverty and tourism have impacted the sex industry and exploitation of adults and children in Algeria, Morocco, and Egypt. In many areas, older men fill the role of “sugar daddies” who “give girls tuition fees, clothes and presents in exchange for sex.”<sup>109</sup> Legal loopholes and the lingering traditions of early marriage serve to decriminalize such practices; for instance, in Egypt, Arab tourists essentially buy young girls, providing a *mahr*, and then abandon them.

The CRLO (Permanent Committee for Scholarly Research and the Issuing of Fatwa) issued a fatwa that permits a man to marry with the intent to divorce,

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<sup>108</sup> Marcia Inhorn, *Infertility and Patriarchy: The Cultural Politics of Gender and Family Life in Egypt* (Philadelphia: University of Pennsylvania Press, 1996); Marcia Inhorn *Quest for Conception: Gender, Infertility and Egyptian Medical Traditions* (Philadelphia: University of Pennsylvania Press, 1994).

<sup>109</sup> Najat M'jid, “Sexual Exploitation of Children in the MENA Region: An Overview,” (Paper presented at Arab-African Forum against Sexual Exploitation of Children. Rabat: 24-26 October 2001.)



while traveling or studying abroad so long as his intention remains “concealed between him and his Lord” or in other words, is not specified in the marriage contract so that the woman is apprised as in *mut’a*, the Shi’a temporary marriage.<sup>110</sup> Our concern is that this traditional practice, like the “traveling marriage” licenses sex for sale, hoodwinks women, some of whom may then resort to sex work, as is the case in other areas catering to Arab tourists. In Iran, *sigheh* (the equivalent of *mut’a*) has also served as a legitimizing cover for sex-workers, and women’s need for income.<sup>111</sup> And finally, *urfi* marriage, which has existed for some time in Egypt and North Africa, and which has become extraordinarily prevalent in recent years in Egypt due to the rising costs of marriage, may also serve the same purpose. *Urf* refers to custom or tribal practice and law, and here to marriages that are not contracted in accordance with the “normal” type of marriage, *nikah*, under Islamic law. These unions required a contract, but not necessarily the provision of a domicile, household goods, and a public celebration. But couples could use such a marriage simply to legitimize sexual activity, and women did not obtain rights to support, or inheritance equal to *nikah* marriage.

In Iran, Saudi Arabia, Mauritania, Libya and Pakistan the penalties for *zina* are the primary legal vehicle used to control prostitution. So in Libya, Law Number 70 (1973) describes a punishment of 100 lashes for prostitution. Trafficking is also a crime, and also deriving from the *shari’ah* approach is the idea that one who holds public office may be removed if he has committed *zina*. This could apply to sex work (but is also the theory behind the arrests in Malaysia of prominent public figures charged with sodomy). Under family law, not penal codes, a sex worker will lose custody of her children as for example specified in Article 314 of the Mauritanian Criminal Law.<sup>112</sup>

In several other countries, sex work is punishable by a fine or a prison sentence, and in some, sex work is legal so long as no coercion or trafficking is involved. So for example, sex work is illegal in Egypt, but sex workers must be caught “red-handed,” meaning that the trade may be tolerated. Various other regulations, for instance women’s entry into nightclubs, the conduct of club

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<sup>110</sup> Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001) 275.

<sup>111</sup> Shahla Haeri, *Law of Desire: Temporary Marriage in Shi’a Islam* (Syracuse: Syracuse University Press, 1989).

<sup>112</sup> Mohammed Mattar, “Commercial Sexual Exploitation of Women: The Islamic Law Perspective.” (The Protection Project Seminar Series, 21 February 2001.) <http://www.protectionproject.org/vt/mm.htm> (last visited 5/11/03)

employees and walking alone or with an unrelated male companion in the streets are intended to limit sex work, but can effectively limit the movement of all women. A variety of interesting commercial ordinances enacted in the Nasser years in Egypt were intended to prevent or inhibit sex work in the entertainment industry. Among other reasons, sex work flourished in this sector because club-owners required performers to engage in *fath*, drinking or socializing with the customer.<sup>113</sup>

In Algeria, rape laws are intended to protect children with imprisonment of 10 to 20 years, but the legal defense and services provided to children, particularly street children, are inadequate. Anyone profiting from sex work, or serving as an intermediary for someone under the age of 19, is subject to prosecution in Algeria for 5 to 10 years with a fine. There are also prohibitions against advertising for sex tours,<sup>114</sup> which is an issue that has also affected Morocco.

Turkey, Lebanon, Bangladesh, Djibouti, and Indonesia have essentially legalized sex work, but coercion or enforced sex work is not legal, which is in accordance with the trend in Western and former colonies or protectorates, and the UN Convention of 1949. In Lebanon, sex workers may be licensed so long as they are 21 and not virgins. A woman may own a brothel if she is over 25 years old. Monthly medical examinations are conducted by the government, a policy dating back to the Mandate period, intended to accommodate foreign soldiers and prevent the spread of venereal disease and which also applied in Syria.<sup>115</sup> However, sections 526 and 527 of the Lebanese Penal Code prohibit pimping, coercion of sex work, and living on the earnings of a sex worker.<sup>116</sup>

Licensed sex workers in Turkey who work in brothels are covered by the social security system under Annexed Article 13 of the Social Security Law and are also regulated by Articles 128 and 129 of the Public Health Law. Coercion of women into sex work carries a sentence under Articles 435 and 436 of the Turkish Penal

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<sup>113</sup> Sherifa Zuhur, "Sex, Popular Culture and National Image: 'Oriental' Dance in the Infitah Era in Egypt and Echoes in the United States," (Prepared for the World Middle East Congress, University of Mainz, Germany, August 9, 2002.)

<sup>114</sup> Global March Against Child Labour, "Algeria", *Worldwide Report on Worst Forms of Child Labour*, <http://www.globalmarch.org/worstformsreport/world/links/algeri.htm#cs1> (last visited 5/11/03).

<sup>115</sup> Major B.R. Thomas, "Five Years of It," 1989. Unpublished manuscript housed in the Imperial War Museum archives, 114-119. As Battalion Intelligence Officer, Thomas had to supervise testing, cleaning and closing of two of three "houses of joy" near Rayak, one intended for Senegalese (who served in the Free French forces), another for Poles and a third for the French. He reported that the girls were small and "ugly" and mostly from "remote Arab villages."

<sup>116</sup> Mattar.

Code, and a previous reduction in sentencing for rape if the victim was a sex-worker in Article 438 was eliminated in 1990.<sup>117</sup>

There are various reports that young Algerian girls are sent to Italy and other European countries and forced to marry, and also into prostitution. There is also significant migration of women for marriage. Pressures on young Palestinian and Lebanese women to marry relatives from the West are linked to dower payments. While this is not sex work in its crudest form, it nevertheless involves the exchange of women and their sexual functions for money.

Foreign women have been forced or bought into sex work in the region, and there are problems with enforcement and violence in some cases. These may involve Russian-speakers in Turkey and in Israel where there are laws against pimping and regulation of prostitution but no specific laws that deal with trafficking.

Hundreds of sex workers work in the Tel Aviv area, and relatively few traffickers are prosecuted. *Ha'aretz* reported that out of 1,100 cases of trafficking in women, only 136 actually went to trial over a three year period. When the Tropicana, a long-time bordello, closed due to the economic situation which had been worsening since October of 2000, and the absence of its Arab clients (by about 30%), its owner, Iranian-Israeli Jackie Yazdi, defended his trade, saying that he provides employment to needy Russian immigrants,<sup>118</sup> more than a million of whom have emigrated to the country in the last decade. He pointed to an increase in the riskier street prostitution with the closure of the more expensive bordellos. Some of these women travel freely, or are forced to travel to Arab countries as well, as occurs in the Sinai tourist recreation areas. And, in 1997, 675 women from the former Soviet Union were arrested for sex work in the United Arab Emirates.

Similarly, a large number of Bangladeshi women (475) were trafficked to Kuwait and neighboring countries during the Desert Storm campaign. In Iraq, sex work is reportedly a strategy of the desperate. Recently, there have been reports of kidnapped Iraqi women and girls being sold within Iraq, or smuggled to the Gulf. The CEDAW has explicitly stated a concern that trafficking in women should be addressed by the MENA/Muslim countries.<sup>119</sup>

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<sup>117</sup> Women for Women's Human Rights-New Ways, *The New Legal Status of Women in Turkey*, 59-60.

<sup>118</sup> Uriya Shavit, "Full Disclosure," *Ha'aretz*, Saturday, 3 November 2001.

<sup>119</sup> Mattar.

Where children are involved, experts have recommended awareness campaigns. These are problematic when it is argued that local poverty is embarrassing to the national image, but some efforts were made along these lines in Morocco (referring to young domestic servants) and Yemen.<sup>120</sup>

## FEMALE GENITAL MUTILATION (FGM)

FGM or female circumcision is a form of violence against women that has not been truly criminalized. Until now researchers and public audiences have responded somewhat schizophrenically to the custom, which affects at least 130 million women in the Nile Valley, Western and Eastern Africa, across the southern Sahara, and Bedouin women in the Sinai, Negev, Jordan, and Yemen. Although FGM is an issue that does not affect all African women, or all Arab or Muslim women – for example, FGM is unheard of in MENA countries such as Turkey, Lebanon, Algeria – we are still talking about a huge number of affected women and children. Third-Worldism has proposed grassroots efforts to deal with the criminalization of FGM, but without strong state sponsorship, that has not been forthcoming for various reasons. Some countries, instead of outlawing or enforcing laws against FGM and educating the public, have instead medicalized the practice. Effective enforcement and ambitious public education efforts seem beyond the scope of the NGOs, though these groups understand what men and women believe about FGM. In general, national governments have not taken on public education about this issue due to sensitivities of the Islamic religious right.

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In the Sudan, as a result of a British campaign, the 1946 Penal Code prohibited infibulation, but permitted *sunna* circumcision, a less radical form of FGM. Infibulation simply went underground, or efforts to enforce the law were absent or ineffectual. In 1957, this law was re-ratified, and in 1991, the government once again announced its intent to eradicate infibulation (but not *sunna*). There is, however, no mention of FGM in the 1993 Penal Code.

Similarly, Egypt has not criminalized FGM in the sense of including a specific article in the penal code addressing the practice. Instead, the state moved toward medicalization of the practice, meaning that it was to be allowed when performed by licensed health professionals one day a week, if parents could not be persuaded against the practice. The theory was that in an antiseptic

environment with trained personnel using antibiotics, the practice would be safer. The same rationale emerged in Israel, where the Bedouin practiced circumcision (and continue to do so). NGOs and activists split over the issue of medicalization in Egypt. Then, following an embarrassing CNN exposé with live footage of a circumcision, the Minister of Health banned the practice in decree 261 in state facilities and private clinics in 1996. The decree reads:

*It is forbidden to perform excision on females either in hospitals or public or private clinics. The procedure can only be performed in cases of disease and when approved by the head of the obstetrics and gynecology department at the hospital, and upon the suggestion of the treating physician. Performance of this operation will be considered a violation of the laws governing the medical profession. Nor is this operation to be performed by non-physicians.*

His decision was overturned, and then revalidated in the Court of Cassation. Certain Islamist groups were involved in the efforts to overturn this decree. The decree remains in place, but has been ignored, and some deaths have resulted. Enforcement, public education, and the professional education of medical practitioners are all issues here. When the most accurate statistics we possess show that 97% of ever-married Egyptian women are affected by the practice<sup>121</sup> then criminalization of FGM on a broader scale would no doubt result in arrests of mothers, grandmothers, midwives, and physicians, and a more energetic awareness campaigns might subject the government to Islamist criticism. Certainly the wisdom of Solomon is needed to figure out how to better address this phenomenon. For the sake of women's physical and psychological integrity, the inclusion of FGM as a crime in penal codes should be pursued.

With this very goal in mind, a petition entitled the Cairo Declaration was drafted in July of 2003 by activists from twenty-eight Arab and African countries who call for specific legislation to address FGM in each state.<sup>122</sup> It was suggested that such laws should also address gender equality and violence against women and children. At present, though some regulations exist, such as the edict discussed above, a silence remains, and those who practice FGM are unaware of the regulations. Activists therefore call for their governments to disseminate information about FGM into school curricula, medical education, and other programs in the community.

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<sup>121</sup> Fatma K. Zanaty, E.M. Hussein, G.A. Shawky, A.K. Way and S. Kishor, Egypt, *Demographic and Healthy Survey 1995* (Calverton: National Population Council and Macro International, 1996).

<sup>122</sup> Vincent Bartoo, "Activists Call for Specific Laws Against FGM," *The East African Standard*, July 6, 2003.

Some women have sought political asylum outside their home countries on the basis of such violations of their human rights as FGM. Fauziya Kassindja, a Nigerian, won the first case for asylum from FGM in the United States in 1996. Then a Ghanaian woman, Adelaide Abwanka, won a similar asylum claim, only to be later challenged by the INS. Another Nigerian, Eunice Azanor, who was circumcised and argued that both she and her daughter should be granted asylum, was turned down by the Bureau of Immigration Appeals. She pursued her claim under the Torture Convention, and the Ninth Circuit of Appeals ordered her case (*Azanor v. Ashcroft*) to be reopened in March of 2004. Precedents for amnesty will hopefully encourage regional governments to more effectively engage in legal reform and positive public education efforts.

It should be mentioned that some girls have been subjected to FGM within the United States and in other immigrant communities. The U.S. Federal Female Genital Mutilation Act of 1996 is intended to counter such occurrences.

## BATTERING AND DOMESTIC VIOLENCE

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Domestic violence is frequently related to notions of power relations in the family. It is popularly believed that women owe men their obedience (*ta'a*), proper care of the household, and sexual favors on demand. Sometimes, jealousy or frustration with sexual dysfunction can result in battering as well. It is popularly believed that a man's rights include sex upon demand. A wayward woman was classified as being *nashaz* and this is not merely a cultural term, but one with implications in religious law. Rightly, or wrongly, justifications for wife-beating were traced back to *hadith*, which recommended remonstrating, leaving the bed of a wife, and then beating her (lightly). Reformist or liberal Islam rejects this interpretation, but it has seeped into popular belief and undergirds the notion of the male-owned female.

Domestic violence affects women worldwide, and we can say with certainty that 95% of the victims are female, and that it impacts those of all social classes. In the MENA and Muslim world, however, people frequently believe that only the uneducated beat their wives (or circumcise their daughters). Some, even health professionals, believe that battering must be "blamed on mothers" by which they could mean that mothers teach their sons to batter, or that they do so out of the need to break with maternal influence. Certainly it is true that those who were battered as children are more likely to re-enact physical violence as part of a learned psychosocial cycle, unless they experience some form of intervention,

or have managed to internally confront and relinquish their own experiences. But the relationship of violence against women to women's broader lack of political, legal and social power should be understood.

Most countries in the region have laws against battery and assault. New laws or amendments which specifically apply to domestic violence are necessary as well as the repealing of legal loopholes, such as Article 98 of the Jordanian Code, which provides for reduced sentences. Police need training in these issues, particularly to convince women to press charges, as does the public in the sense that people need to understand that intervention can be appropriate. Then there is the additional problem of magistrates' bias toward husbands in sentencing. Article 241 (39) of the Egyptian Penal Code specifies a prison term of no more than two years or a fine of 20 to 300 Egyptian pounds for battery, but a study of 50 cases of 40 male and 10 female batterers conducted in 1994 by attorney Amira Bahie Eldin showed discriminatory sentencing by the judges. Sixty percent of the cases against the husbands simply received a fine (40% were sentenced to prison) but all of the accused women were sentenced to a prison term.<sup>123</sup>

Article 478, paragraph 1 of the Turkish Penal Code calls for a prison sentence of up to 30 months if a "family member is treated in a manner other than that of affection or mercy." A medical report can be used under certain circumstances by the Public Prosecutor who can file charges even if the woman has not.<sup>124</sup>

The ATFD (Association Tunisienne des Femmes Démocrates) and their Center (Centre D'Écoute et D'Orientation des Femmes Victimes de Violence) proposes an active discourse on the sexist nature of violence against women, research on its causes, mobilization of professionals, formulation of laws against sexist violence, psychological treatment for violators, and the creation of shelters. All of these strategies are important, but the relevance of a specific addition to national penal codes that incorporates mention of domestic and sexual violence (including FGM) has yet to take place.<sup>125</sup>

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<sup>123</sup> Zulficar, *Women in Development*, 86-87.

<sup>124</sup> WWHR-New Ways, *The New Legal Status of Women in Turkey*, 49-50.

<sup>125</sup> Association Tunisienne des Femmes Démocrates, *Rapport aux Décideurs: Les violences à l'encontre des femmes* (Tunis: Centre D'Écoute et D'Orientation des Femmes Victimes de Violence & ATFD, 2001).

## CONCLUSION

The women's movements in the MENA and the Islamic world are demanding equality with ever increasing resolve. Despite the theoretical and spiritual equality of women in Islam, Muslim women, children, and slaves were (and are) not equal to men either in *'urf* or *shari'ah*. Upholding inequality yet complementarity of the sexes is highly problematic today, as the definitions of sex roles, at least those of women, have expanded. Social class has also been a very important factor in creating further bases for inequality.

The existence of penal codes that discriminate against women is a violation of global human rights norms and the CEDAW, among other international documents. Cultural relativism has permitted the practice by which countries may sign a convention with reservations based on religion and culture, so there is clearly an externally-driven dynamic to which certain MENA countries are attempting to positively respond. Those penal codes which allow for whipping, lapidation (stoning), and capital punishment also violate the definitions of torture and thus, human rights of women, and also men under international law, and as defined by the United Nations.

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Also, most, but not all of the states in the region declare their citizens to be equal according to their constitutions. Often this equality is granted in general terms, while some countries refer specifically to sex as an illegal basis for discrimination and mention equality of opportunity:

Article 7 of the Constitution of Lebanon:

*"All the Lebanese are equal before the law. They enjoy equal civil and political rights and are equally subjected to public charges and duties, without any distinction whatever."*

Article 8 of the Constitution of Egypt:

*"The State shall guarantee equality of opportunity to all citizens."*

Chapter 2, Article 6 (a) of the Constitution of the Hashemite Kingdom of Jordan:

*"Jordanians shall be equal before the law. There shall be no discrimination between them as regards to their rights and duties on grounds of race, language or religion."*

Article 8 (1) of the Constitution of Malaysia:

*"All persons are equal before the law and entitled to the equal protection of the law."*



Article 5 of the Constitution of Morocco:

*“All Moroccan citizens shall be equal before the law.”*

Articles 25 (3 and 4) of the Constitution of Syria:

*(3) The citizens are equal before the law in their rights and duties.*

*(4) The state insures the principle of equal opportunities for citizens.*

Article 6 of the Constitution of Tunisia:

*“All citizens have the same rights and the same duties. They are equal before the law.”*

Some constitutions more explicitly promise equality without discrimination on the basis of sex. Article 10 of the Constitution of the Republic of Turkey (amended in October 2001):

*All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.*

*No privilege shall be granted to any individual, family, group or class.*

*State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.*

Chapter 3, Article 19 (a) and (b) of the Interim Constitution of Iraq (1990):<sup>126</sup>

*(a) Citizens are equal before the law, without discrimination because of sex, blood, language, social origin, or religion.*

*(b) Equal opportunities are guaranteed to all citizens, according to the law.*

Article 1 (2) Title 1 of the Constitution of Mauritania states that “The Republic guarantees equality before the law to all of its citizens without distinction as to origin, race, sex, or social condition.”

The Constitution of Pakistan contains an article referring to equality like those above, Article 25:

*(1) All citizens are equal before law and are entitled to equal protection of law.*

*(2) There shall be no discrimination on the basis of sex alone.*

*(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.*

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<sup>126</sup> This is the last version of the previous regime’s document. A young American assistant professor of law, Noah Feldman, is advising the Iraqis on the wording of a new Iraqi Constitution. He had performed the same function for the government of Eritrea. Jennifer Lee, “American Will Advise Iraqis on Writing New Constitution,” *New York Times*, May 11, 2003.

Article 21 of the Constitution of the Republic of the Sudan reads:

*All people are equal before the courts of law. Sudanese are equal in rights and duties as regards to functions of public life; and there shall be no discrimination only by reason of race, sex or religious creed. They are equal in eligibility for public posts and offices not being discriminated on the basis of wealth.*

Chapter IV, Article 29 of the Constitution of Algeria of 1976:

*“All citizens are equal before the law. No discrimination shall prevail because of bind, race, sex, opinion or any other personal or social condition or circumstance.”*

Article 15 of the Constitution of India (India has a large Muslim minority) states:

*“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”*

Many of these constitutions refer to Islam as the religion of state. Some include additional articles that refer to the family, or more specifically to women. Some of these references could be used to support affirmative action, whereas others can be employed to uphold limitations on, or discrimination against, women.

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Article 45 of the Constitution of Syria:

*The state guarantees women all opportunities enabling them to fully and effectively participate in the political, social, cultural, and economic life. The state removes the restrictions that prevent women’s development and participation in building the socialist Arab society.*

Articles 11 and 15 of the Constitution of the Republic of the Sudan:

*Article 11: The State shall guarantee the proper coordination between the duties of woman towards the family and her work in the society, considering her equal with man in the fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence.*

*Article 15: The State shall care for the institution of the family, facilitate marriage and adopt policies to purvey progeny, child upbringing, pregnant women and mothers. The State shall emancipate women from injustice in all aspects and pursuits of life and encourage the role thereof in family and public life.*

Article 11 of Iraq’s Interim Constitution of 1990:

*“The family is the nucleus of the Society. The State secures its protection and support, and ensures maternal and child care.”*

The Constitution of Saudi Arabia does not mention equality of all citizens but includes Article 26:

*“The state protects human rights in accordance with the Islamic Shari’ah.”*

Then as in the other examples listed above, we see in Article 1 under the section concerning the Saudi Family:

*“The state will aspire to strengthen family ties, maintain its Arab and Islamic values and care for all its members, and to provide the right conditions for the growth of their resources and capabilities.”*

Israel is rather unique in that it lacks a constitution, but the Basic Law of Human Dignity and Liberty of 1992 should serve in place of an article of this nature. In particular:

*Section 1 Basic Principles*

*Basic human rights in Israel are based on the recognition of the value of the human being, and the sanctity of his life and his freedom, and these will be respected in the spirit of the principles of the Declaration of Independence of the State of Israel.*

*Section 2 Preservation of life, body and dignity*

*There shall be no violation of the life, body or dignity of any person as such.*

*Section 4 Protection of life, body, and dignity*

*All persons are entitled to protection of their life, body, and dignity.<sup>127</sup>*

Thus there is a basic contradiction between the constitutional right to equality for women and the discriminatory nature of existing penal codes. This disjuncture between statutory discrimination in the penal codes and women’s constitutional rights should be a matter of concern. Historically, this has elsewhere been addressed through amendments, or redrafting of legislation that include discriminatory language or fail to provide for equal opportunity.

The links between the regulations governing abortion, rape, adultery, incest, battering, and so on are their common derivation from systems that upheld male authority and group identity. Women’s physical or bodily worth and integrity is at issue in each set of rules. Their sexual and bodily rights are denied through commodification, which is linked to their vulnerability under the honor system. Under personal status law, women are placed under the authority of

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<sup>127</sup> Although it seems to me that these sections (Section 3 Protection of property: There shall be no violation of the property of a person; Section 4 Protection of life, body, and dignity: All persons are entitled to protection of their life, body, and dignity; Section 5 Personal liberty: There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner) are routinely violated in the treatment of Palestinians with or without Israeli citizenship as well as citizens of foreign nations, supposedly to ensure “security” which is referred to within the Law.

males, and so, too, in penal law, their bodies are governed by precepts that prioritize the interests of males, ensure their lineage, and disable the rights of other men, or women themselves. The customs perpetuated through *'urf*, or more properly, *a'raf* (plural, tribal traditions and customary practices), and during the years of Islamic legal regimens, were not thoroughly addressed in the colonial period. Instead, the cultural relativism of the British and French, their own versions of misogynistic Western laws, and their flawed understanding of *'ulama* attitudes led them to characterize Muslim societies as anti-women for political purposes. Of course they expected that such authorities would reject and rebel against policies that altered their own bases of power. The modernization of laws that took place in this era continued in some cases, but reverted in others (Iran, Afghanistan, Sudan), and so various legal traditions co-exist.

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Given the inequities that clearly emerge when we examine the penal codes, why have more aggressive campaigns not emerged to alter them with reference to women's sexual rights as human rights? At the international level, it has been suggested that states should be held legally liable for honor killings in that their failure to act to protect women's interests is a violation of international treaties. However, the goal of differentiation from the orientalism or wholesale disgust for Islam on the part of Western feminists, or from Western interventionism, has caused some Muslim and Middle Eastern scholars, politicians, and development specialists to adopt various anti-feminist positions. I am dubious that we will see this come to pass since control over weapons of mass destruction and oil appears more compelling than redressing violence against women.

Regionally, women's exclusion from legislative and judicial systems, lack of coordination, insecurity vis-à-vis Islamist opposition, and the strength of Islamists in legal and other professional syndicates provide further obstacles to the realization of gender equality. While the authoritarian power of the *'ulama* and an unfortunate and anachronistic approach to the *shari'ah* must be mentioned as a basis for inequality and discrimination,<sup>128</sup> unfortunately, one must also fault the notion of liberals that since the public is uneducated and unenlightened, the laws should cater to its "traditional tendencies." Whether we are making recommendations concerning the penal or family codes, this cultural relativism works to women's detriment. It is high time to relinquish this "staged" approach to equality, given the grave harm and injustice inflicted upon women and girls.

Those who fear Muslim conservative or Islamist reactions, or other forms of academic censure, have made much of an “internal” Islamic debate. They would argue for instance, that we should applaud the Iranian evolution of principle of alimony based on *shari’ah*, and refrain from writing letters to complain about injustice against women, leaving local agencies to do their best. We are told to excuse the obvious devaluation of women’s lives and the implied reduction of their value to sexual services that we see in the penal codes, and wait for indigenous reinterpretation. I fail to see how these muted tactics and apologetics will enable the empowerment of women in a timely and comprehensive manner.

Muslims were able, when required to do so, to outlaw slavery, another product of an earlier age, and another product of reducing human value to a matter of property rights. The laws and precepts were derived directly in that case from the Qur’an. So why is it that conservative traditionalists, and sometimes even secular political actors, loudly exclaim that the “sacred law” cannot be changed? As this survey of the penal codes and related crimes should show, some laws have changed over time, while others are still attuned to the customary practices of another age, but must likewise adapt to the demands of this age and accord women legal autonomy over their own bodies and sexuality.

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