



**Criminalizing Sexuality:
Zina Laws as Violence Against Women
in Muslim Contexts**

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Summary

Islamic legal tradition treats any sexual contact outside a legal marriage as a crime. The main category of such crimes is *zina*, defined as any act of illicit sexual intercourse between a man and woman. In the late twentieth century, the resurgence of Islam as a political and spiritual force led to the revival of *zina* laws and the creation of new offences that criminalize consensual sexual activity and authorize violence against women. Activists have campaigned against these new laws on human rights grounds. In this discussion paper, I show how *zina* laws and the criminalization of consensual sexual activity can also be challenged from within Islamic legal tradition. Far from mutually opposed, approaches from Islamic studies, feminism and human rights perspectives can be mutually reinforcing, particularly in mounting an effective campaign against revived *zina* laws. By exploring the intersections between religion, culture and law that legitimate violence in the regulation of sexuality, the paper aims to contribute to the development of a contextual and integrated approach to the abolition of *zina* laws.. In so doing, I hope to broaden the scope of the debate over concepts and strategies of the SKSW Campaign.

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1 Introduction

Islamic legal tradition treats any sexual contact outside a legal marriage as a crime. The main category of such crimes is *zina*, defined as any act of illicit sexual intercourse between a man and woman.¹ The punishment for *zina* is the same for men and women: one hundred lashes for the unmarried, and death by stoning for the married – though instances of these punishments are rarely documented in history.

In the early twentieth century, with the emergence of modern legal systems in the Muslim world began, the provisions of classical Islamic law were increasingly confined to personal status issues.² *Zina* penal laws, which were rarely applied in practice, became also legally obsolete in almost all Muslim countries and communities. In the late twentieth century the resurgence of Islam as a political and spiritual force reversed the process. In several states and communities, once-obsolete penal laws were selectively revived, codified and grafted onto the criminal justice system, and, in varying forms and degrees, applied through the machinery of a modern state. Most controversial have been the revival of *zina* laws and the creation of new offences that criminalize consensual sexual activity and authorize violence against women. Activists have campaigned against these new laws on human rights grounds. In this discussion paper, I show how *zina* laws and the criminalization of consensual sexual activity can also be challenged from within Islamic legal tradition.

This paper is part of a cross-country study of adultery laws commissioned by Women Living Under Muslim Laws (WLUML)³ in connection with the Women’s Reclaiming and Redefining Cultures Programme (WRRC) Global Campaign to Stop Killing and Stoning Women (SKSW).⁴ The campaign is a response to ‘women’s experiences of the injustice and violence brought by the ‘Islamization’ of criminal

¹Apart from *zina*, other categories of sexual relations criminalized in classical legal tradition are *liwat*, homosexual relations between men, and *musahaqa*, homosexual relations between women, neither of which are a major focus of this paper.

²For instance, many Arab states adopted the penalty for adultery and so-called crimes of passion from European penal codes (Abu-Odeh, 1996; Welchman and Hossain, 2005). The same happened in Iran.

³www.wluml.org.

⁴www.stop-killing.org.

justice in some countries. It emerged through women's and human rights activism in countries as diverse as Nigeria, Iran, and Pakistan, and has spread elsewhere. The issues addressed by the SKSW Campaign resonate in many other Muslim contexts where traditional and patriarchal interpretations of Islam's sacred texts are invoked to limit women's rights and freedoms.

In this paper, I offer a feminist and rights-based critique of *zina* laws that engages with Islamic legal tradition from within. In so doing, I hope to broaden the scope of the debate over concepts and strategies of the SKSW Campaign. I argue for the need to address what I consider to be two blind spots in approaches to the issue. First, scholars who work within an Islamic framework are often gender blind, being largely unaware of the importance of gender as a category of thought and analysis. They are often opposed to both feminism, which they understand to argue for women's dominance of men, and human rights, which they see as alien to Islamic tradition. Secondly, many women's rights activists and campaigners are not well-versed in religious categories of thought and religious-based arguments and find it futile and counter-productive to work within a religious framework. I believe these blind spots need to be cleared up. Far from mutually opposed, approaches from Islamic studies, feminism and human rights perspectives can be mutually reinforcing, particularly in mounting an effective campaign against revived *zina* laws. By exploring the intersections between religion, culture and law that legitimate violence in the regulation of sexuality, the paper aims to contribute to the development of a contextual and integrated approach to the abolition of *zina* laws.

Zina laws are part of Islamic legal tradition, and must be situated within that tradition's classifications of human behaviour and especially sexual relations and gender roles, and the penalties that it prescribes for different categories of offences. Drawing on anthropological insights and feminist scholarship in Islam, I show how *zina* laws are also embedded in wider institutional structures of inequality that take their legitimacy from patriarchal interpretations of Islam's sacred texts. They are elements in a complex system of norms and laws regulating sexuality, and they are closely linked with two other sets of laws: those concerning marriage (*nikah*) and women's covering (hijab). This link is at the root of violence against women.

After outlining my approach and clarifying some of the concepts used, I trace

the historical context of shifts in the politics of religion, law and gender that led to the recent revival of *zina* laws and punishments, and the clash between two systems of values and two conceptions of gender rights: those of international human rights law and Islamic legal tradition. Then I examine *zina* laws in the context of classical Islamic legal tradition, exploring the links with laws of marriage and dress code that regulate women's sexuality, and the theological assumptions and juristic theories that inform them. Finally, I show how *zina* laws and punishments can be challenged on legal and religious grounds and how essential elements of Islamic legal tradition are in harmony with human rights law. I conclude with suggestions or guidelines for developing a framework that can bring Islamic and human rights principles together. Such a framework can empower activists, at both theoretical and practical levels, to engage in an internal discourse within communities to bring about sustained legal and cultural reforms.

2 Approach and Basic Concepts

First, it is important to recognize that both 'human rights' and 'Islamic law' are "essentially contested topics" (Gallie, 1956, pg.167-172). That is, they mean different things to different people and in different contexts. However, advocates of both claim universality; that is, they claim that their objective is to ensure justice and proper rights for all humanity. ⁵

I use the notion of 'human rights' in a relatively limited sense, as a framework that began in 1948 with the Universal Declaration of Human Rights, and has been developed by the United Nations in subsequent documents and instruments. As human rights approaches are relatively well known, I devote more attention here to Islam, where I am concerned with legal traditions and discourses. It is important to recall that what we call Islamic law or Shari'a law in pre-modern times was what legal scholars today call 'jurists' law', a matter of differing opinions and rulings (*ahkam*), developed independently of the state by particular jurists working within

⁵For insightful discussions on the tension between universalism and relativism in human rights, see: An-Na'im (1990, 1995b); Dembour (2001); Merry (2003); Sen (1998). For debates on the compatibility between Islam and human rights law, see: Baderin (2001, 2007); Bielefeldt (1995, 2000); Hunter and Malik (2005); Jahanpour (2007); Sajoo (1999); Strawson (1997).

certain schools.⁶ These ‘laws’ were applied by judges who, though they were appointed by the state, were accountable to the community and its mores, and were responsive to current social practices. Hence I prefer to talk of ‘Islamic legal tradition’ rather than ‘Islamic law’.

Second, I approach this tradition from a critical feminist perspective and from within the tradition, by invoking one of its main distinctions; that is, the distinction between Shari’a and *fiqh*. This distinction underlies the emergence of the various schools in the tradition, and the multiplicity of positions and opinions within them.

Shari’a in Arabic literally means ‘the path or the road leading to the water’, but in Muslim belief it is God’s will as revealed to the Prophet Muhammad. As Fazlur Rahman notes, “in its religious usage, from the earliest period, it has meant ‘the highway of good life’, i.e. religious values, expressed functionally and in concrete terms, to direct man’s life” (Rahman, 1982, pg.100).⁷ *Fiqh*, jurisprudence, literally means ‘understanding’, and denotes the process of human endeavour to discern and extract legal rulings from the sacred texts of Islam, that is, the Qur’an and the Sunna (the Prophet’s practice, as related in the hadith, or traditions).

Some specialists and politicians today – often with ideological intent – mistakenly equate Shari’a with *fiqh*, and present *fiqh* rulings as ‘Shari’a law’, hence as divine and not open to challenge. Too often we hear statements beginning with ‘Islam says...’ or ‘According to Shari’a law...’; too rarely do those who speak in the name of Islam admit that theirs is no more than one opinion or interpretation among many. A distinction between Shari’a and *fiqh* is crucial, from a critical feminist perspective, because it both engages with the past and enables action in the present; it enables us to separate the legal from the sacred, and to reclaim the diversity and pluralism that was part of Islamic legal tradition. It also has epistemological and political ramifications, and allows contestation and change of its rulings from within.⁸

⁶For a general introduction to Islamic legal theory, see Hallaq (1997); Kamali (2006); Weiss (2003).

⁷In Kamali’s words, “Shari’a demarcates the path which the believer has to tread in order to obtain guidance” (Kamali, 2006, pg.37).

⁸For instance, Al-‘Ashmawi, the Egyptian reformist and chief judge of the High Court of Appeals, in a book entitled *Usul al-Shari’a*, The Principles of Shari’a (not *Usul al-Fiqh*), contends that Shari’a is not legal rules but ethical principles and values in the Qur’an, in which justice is primary. For a sample translation of his work, see (Kurzman, 1998, pg.49-56).

Third, the sacred texts, and laws deriving from them, are matters of human interpretation. Moreover, those who talk of Shari'a, or indeed religion and law in relation to Islam, often fail to make another distinction now common when talking of religion in other contexts, namely, between faith (and its values and principles) and organized religion (institutions, laws, and practices). The result is the pervasive polemical and rhetorical trick of either glorifying a faith without acknowledging the abuses and injustices that are committed in its name or condemning it by equating it with those abuses. Of course, faith and organized religion are linked, but they are not the same thing, as implied by conflating them with the labels 'Islamic' or 'religious'.

Fourth, Qur'anic teachings stress the principles of justice (*'adl*), equity (*ih-san*), human dignity (*karamah*), God-consciousness (*taqwa*), love and compassion (*mawaddah wa rahmah*).⁹ To take just the first of these principles, Muslim jurists – and Muslim believers generally – agree that justice is deeply rooted in Islam's teaching and is integral to the basic outlook and philosophy of the Shari'a. However, what justice requires and permits, its scope and manifestation in laws, and its roots in the sacred texts, have been the subject of contention and debate.¹⁰ In brief, there are two schools of theological thought. The prevailing *Ash'ari* school holds that the notion of justice is contingent on the sacred texts and is not subject to extra-religious rationality. The *Mu'tazili* school, on the other hand, argues that the notion of justice is innate and has a rational basis, and exists independently of sacred texts. In this perspective, our notion of justice, like our understanding of the sacred texts, is contingent on the knowledge around us, and is shaped by extra-religious forces.

Fifth, although we may talk about religion, law and culture as distinct arenas of human behaviour, in practice it is hard to separate them. Social reality is far too complex. Religious beliefs and practices are not only shaped by the cultural contexts in which they originate, function and evolve, but they also influence cultural phenomena. Law, too, not only controls behaviour but is shaped by religious as

⁹For a discussion of these concepts, especially on the relationship between equality and justice in the Qur'an, see Kamali (1999). For a feminist perspective, see (Wadud, 2006, 2009).

¹⁰For a discussion on the conceptions of justice in Islamic texts, see Khadduri (1984) and Lampe (1997). For a discussion on the absence of theological debate in the work of contemporary jurists, see Abou El Fadl (2004). See also Kamali (1999) and (Kamali, 2006, pg.194-202).

well as cultural practices; and all these beliefs and practices are in turn subject to relations of power – rulers, governments, structures of inequality. The meanings of laws and religious practices also change with shifts in the power relations in which they are embedded, and through interaction with other cultures and value systems. In other words, we must recognize that laws and religious practices are not fixed, unchanging and uniform, but rather they are the products of particular social and cultural circumstances, and of local and wider power relations.¹¹

Sixth, issues are created through social movements and political debates and struggles. The systematic and institutionalised regulation of female sexuality and behaviour by man-made and man-enforced laws is not confined to Muslim contexts, nor is it recent. It is ancient and found in most human societies, sanctioned by religious texts and cultural tradition, and often enforced by violence. What is new is that the human rights framework and contemporary ideas of gender equality enable us to identify the issue of *zina* laws as a violation of women’s human rights.¹²

3 The Historical Context: Why *Zina* Laws and Why Now?

Current *zina* laws reflect centuries-old, human-made *fiqh* interpretations, which can be criticized from within the framework of Islamic principles, in accordance with the changing realities of time and place and contemporary notions of justice. The revival of *zina* laws, and the emergence of a global campaign against them, must be understood in the context of the recent conflict between two systems of values, the one rooted in pre-modern cultural and religious practices that often sanction discrimination among individuals on the basis of faith, status and gender, and the other shaped by contemporary ideals of human rights, equality and personal freedom.

¹¹See [Merry \(2003\)](#) for an insightful discussion of ways in which culture – and along the way, anthropology as a discipline that studies culture – has been demonized in certain human rights discourses. This has parallels with the demonization of religion by those who do not take into consideration new theoretical developments and the rethinking in recent decades of the concept of culture in anthropology and of religion in religious studies.

¹²For an excellent account of anthropological approaches to violence against women, see [Merry \(2009\)](#).

This conflict of values is not confined to Muslim contexts. Rather it is ubiquitous, and shades into the animated and ongoing debate between universalism and cultural relativism. It acquired a sharper political edge in the Muslim world in the second half of the twentieth century with the emergence of the question of Palestine, and the rise of Islamist movements, which sought a merging of religion and politics.¹³ In the aftermath of the 11 September 2001 attacks, the politics of the so-called war on terror and the invasions of Afghanistan and Iraq – both partially justified as promoting democracy and women’s rights – added a new layer of complexity to the situation. Rightly or wrongly, many Muslims perceived the war to be directed against them. This has not only increased their sense of insecurity and the appeal of traditional values, it has also, in their eyes, eroded the moral high ground of human rights law and delegitimized the voices of dissent and reform from within.

In many ways, 1979 proved to be a turning point in the politics of religion, culture and gender, both globally and locally. It was the year when the United Nations General Assembly adopted the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which gave gender equality a clear international legal mandate. But it was also the year when political Islam had its biggest triumph in the popular revolution that brought clerics into power in Iran, and when the ambit of *fiqh* was extended in Pakistan to criminal law, with the introduction of the *hudud* Ordinances.

The decades that followed saw the concomitant expansion, globally and locally, of two equally powerful but opposed frames of reference. On the one hand, the human rights framework and instruments such as CEDAW gave women’s rights activists what they needed most: a point of reference, a language and the tools to resist and challenge patriarchy. The 1980s saw the expansion of the international women’s movement and of women’s NGOs all over the world. By the early 1990s, a transnational movement further coalesced around the idea that violence against women was a violation of their human rights, and succeeded in inserting it in the agenda of the international human rights community. In their campaigns, they made visible various forms of gender based discrimination and violation rooted in

¹³For my definition of Islamists as “Muslims committed to public action to implement what they regard as an Islamic agenda,” see [Mir-Hosseini and Tapper \(2009\)](#).

cultural traditions and religious practices, and protection from violence became a core demand of women's human rights activists. In 1994, the UN Commission on Human Rights condemned gender-based violence and appointed a Special Rapporteur on violence against women, its causes and consequences, as requested in the Vienna Declaration at the 1993 UN Conference on Human Rights.¹⁴

In Muslim contexts, on the other hand, Islamist forces – whether in power or in opposition – started to invoke Islam and Shari'a as a legitimizing device. They presented the 'Islamisation' of law and society as the first step to bring about their vision of a moral and just society, as a remedy for the problems of rising criminality, corruption and 'immorality' that they understood be the consequence of the mixing of sexes. This spoke to the masses, and played on the popular belief among Muslims that Islam is the essence of justice, thus no law that is 'Islamic' could be unjust.

Tapping into popular demands for social justice, the Islamist rallying cry of 'return to Shari'a' led to regressive gender policies, with devastating consequences for women: compulsory dress codes, gender segregation, and the revival of outdated patriarchal and tribal models of social relations. The 'Islamisation' of law and society centred on the criminal justice system, an area of public law that had lost ground to codified law, influenced by European models, both under colonial rule and with the modernization of legal systems.¹⁵ At the same time, the Islamists criminalised – and thus politicised – areas of sexual and moral behaviour that previously had not been the concern of the state, and thus facilitated the enforcement of their authoritarian and patriarchal interpretations of the law.

Fiqh-based penal laws had already been revived in codified form Libya in 1972.¹⁶ After 1979, the same happened in Pakistan (Enforcement of *hudud* Ordinances, 1979), Iran (1979), Sudan (Penal Code, 1983, and Criminal Act, 1991), and Yemen (Penal Code, 1994). The same has occurred at a provincial level in Kalantan state in Malaysia (Syariah Criminal Code Act, 1993), several states in

¹⁴For a good account of these developments, see (Merry, 2009, pg.77-84).

¹⁵For a general discussion of the 'Islamization' of criminal law, see Peters (1994).

¹⁶They were grafted onto existing Italian-based criminal law, but they did not have stoning as punishment for zina (Peters, 1994). Meanwhile various Gulf states already had *fiqh*-based Penal Codes: Kuwait (1960, 1970), Oman (1974), Bahrain (1976). Codification came later in United Arab Emirates (1988) and Qatar (2004).

Nigeria (1999-2000), and Aceh Territory in Indonesia (2009). In other cases, such as Afghanistan under the Taliban (mid-1990s to 2001), in Algeria since the rise of the Islamic Salvation Front (FIS), and in Somalia for many years, there are reports of the arbitrary application of Islamic penal laws.¹⁷ Actual instances of stoning as a result of judicial sentences remain rare; currently, they only occur in Iran. But wherever classical penal laws have been revived, and in whatever form, nearly all those sentenced under *zina* laws to lashing, imprisonment or death by stoning have been women. In many instances, women have been brought to court on the basis of false accusations by family members or neighbours, or have been punished by non-state actors and communities.¹⁸

To understand why women have been the main target of the revival of *zina* laws, we need to ask two prime questions: What is the place of *zina*, both as a concept and as a set of legal rulings, in the Islamic legal tradition? How can we argue – within that tradition – for the decriminalization of consensual sexual relations? To explore these questions, we need to examine the links, in *fiqh* (Islamic jurisprudence), between three sets of rulings that regulate sexuality, i.e. those concerning *zina*, marriage and hijab. And what are the juristic constructs and legal theories on which they are based?

4 *Zina* Laws in the Context of the Islamic Legal Tradition

Classical *fiqh* divides crimes into three categories according to punishment: hudud, qisas, *ta'zir*.¹⁹ *Hudud* (singular *hadd*: limit, restriction, prohibition) are crimes with mandatory and fixed punishments derived from textual sources (Qur'an or Sunna). *Hodud* crimes comprise five offences. Two are offences against sexual

¹⁷For instance, 16 October 2009, Somali hardliners Islamic militia whipped women for wearing bras, as they defined it 'provocative'. http://www.alarabiya.net/save_print.php?print=1&cont_id=88238&lang=en. Date of Access: January 2010.

¹⁸There is now a substantial literature on this; for instance, for Pakistan, see Jahangir and Jilani (1988); for Iran, Terman (2007); for Sudan, Sidahmed (2001); for Nigeria, Imam (2005); Peters (2006).

¹⁹For *fiqh*-based accounts, see Safwat (1982); Bassiouni (1997); for an analytical view, see Peters (2005); for reformist and critical accounts, see El-Awa (1993); Kamali (1998, 2000, 2006).

morality: illicit sex (*zina*) and unfounded allegation of *zina* (*qadhaf*). The others are offences against private property and public order: theft (*sariqa*), highway robbery (*qat' al-tariq hiraba*), and drinking wine (*shurb al-khamr*); some schools also include rebellion (*baghi*), and some include apostasy (*ridda*). The jurists defined these offences as violations of God's limits (*hudud al-Allah*), i.e. violation of public interest. Hudud assume the central place in the call for 'return to Shari'a' by Islamists, who consider them crimes against religion, though not every such crime or punishment has a textual basis. They are the main focus of international criticism, since they entail forms of punishment, such as lashing and cutting off limbs, which were common in the past but have been abandoned by modern justice systems that consider them cruel and inhumane – and are defined in international human rights law as torture.

The second category, *qisas* (retribution), covers offences against another person, such as bodily harm and homicide. The penalty is defined and is implemented by the state, but unlike *hudud*, *qisas* offences are a matter for private claims, in the sense that the penalty is applied only if the individual victim – or, in case of homicide, his or her heir – asks for full *qisas*. Alternatively, the victim or heir may forgive the offender, or ask for the lesser penalty of *diyyeh* (compensation, blood money), or waive any claim. In the case of homicide, whether intentional or not, blood money or compensation given for a female victim is half of that of male. By making homicide a private matter, the revival of *qisas* laws allows so-called honour crimes, whereby families can kill female members for presumed 'sexual transgressions' and the killer can escape with at most a few years imprisonment (Welchman, 2007).

The third category, *ta'zir* (discipline), covers all offences not covered by the first two. Punishments for these crimes are not established by textual sources, and are not fixed but left to the discretion of the judge. As a general rule, *ta'zir* penalties are less than *hadd* punishments. Under the category of *ta'zir*, Islamic states have introduced new punishments with no precedence in classical *fiqh*, in order to impose their notions of 'Islamic' morality, and to limit women's freedom, for example by a dress code. As it sanctions and legitimates the state's power to enforce laws, this is also the area of criminal justice most open to abuse by Islamists, that is, "Muslims committed to public action to implement what they

regard as an Islamic agenda” (Mir-Hosseini and Tapper, 2009, pg.81-82).

There are differences between schools and among jurists as to the definition, elements, evidentiary requirements, legal defences, exonerating conditions and penalties applicable to each of these three categories of crime, and to each crime within each category. The boundaries between the sacred and the legal are particularly hazy with respect to *hudud* crimes, which are viewed as having a religious dimension because of their textual basis. This is certainly the case with respect to *zina*, which is treated at times as a sin to be punished in the hereafter, rather than as a crime. There is room for repentance and God’s forgiveness. The objective is not punishment but rather self-reformation and the shunning of evil ways (Kamali, 1998, 2000; Rahman, 1965).

Yet there is a certain consensus in *fiqh* on the definition of *zina*, and the rulings are clear. *Zina* is defined as sexual intercourse between a man and women outside a valid marriage (*nikah*), the semblance (*shubha*) of marriage, or lawful ownership of a slave woman (*milk yamin*). *Zina* can be established by confession or by the testimony of four eyewitnesses, who must have witnessed the actual act of penetration, and must concur in their accounts. The punishment is the same for men and women, but offenders are divided into two classes: *muhsin*, defined as free men and women, of full age and understanding, who have been in a position to enjoy lawful wedlock; and non-*muhsin*, who do not fulfil these conditions. The penalty for the first class is death by stoning, and for the second, one hundred lashes. But only the lashes have a Qur’anic basis; as we shall see, the punishment of stoning is based only on the Sunna.²⁰

The juristic consensus ends here. There are significant differences among schools and among jurists within each school as to the conditions required for a valid confession and for testimonial evidence. These differences, based on arguments supported by reference to textual sources, have practical and important legal consequences. For instance, while Hanafi, Hanbali and Shi’a jurists require the confession to be uttered four separate times, Maliki and Shafi’i jurists consider one confession as sufficient to establish the offence. Only Maliki *fiqh* (majority view) allows an unmarried woman’s pregnancy to be used as evidence for *zina*,

²⁰For an outline of *zina* rulings in Sunni schools and differences of opinion among the jurists, see (Ibn Rushd, 1996, pg.521-30).

unless there is evidence of rape or compulsion; in other schools, pregnancy does not automatically constitute proof and *zina* must be established by confession or the testimony of eye-witnesses. Yet again, in Maliki *fiqh*, according to the majority opinion, the duration of pregnancy can be as long as seven years, which clearly suggests the humanitarian concern of Maliki jurists to protect women against the charge of *zina*, and children against the stigma of illegitimacy. That is to say, these jurists, like their counterparts in other schools, did their best to make conviction for *zina* impossible.²¹

A closer examination of classical jurists' rulings on *zina* confirms that they did their utmost to prevent conviction, and provided women with protection against accusations by their husbands and the community. In this, they relied on Qur'anic verses and the Prophet's example in condemning the violation of privacy and honour of individuals, in particular those of women, and leaving the door open for repentance. These verses define requirements for valid evidence of *zina* in such a stringent way that in practice establishment and conviction of an offence are almost impossible. An uncorroborated accusation (*qadhf*) is itself defined as a *hadd* crime, punishable by 80 lashes (Qur'an, Surah an-Nur 24: 23). If the wife is pregnant and her husband suspects her of *zina*, but has no proof, all he can do, in order to avoid the *hadd* offence of *qadhf*, is to deny paternity and divorce her by the procedure of *li'an*, mutual cursing by swearing oaths; if the wife swears an oath of denial, she is exonerated from the charge of *zina* (Surah an-Nur 24: 6-7). Further, a confession of *zina* can be retracted at any time; and the doctrine of *shubha* (doubt, ambiguity)²² prevents conviction for *zina* in cases where one party presumes the sexual intercourse to be licit, for example when a man sleeps with woman he believes to be his wife or a slave, or when a woman has sex with a man she presumes to be her husband.

Scholars suggest that the Qur'anic penalty – one hundred lashes for men and

²¹The belief in the 'sleeping foetus' (*raqqad*) is still widespread in North and West Africa. According to this belief, the embryo for some unknown reason goes to sleep in the mother's womb, and remains there dormant until it is awakened, for example by a magical potion or intervention by a saint. Malik ibn Anas, founder of the Maliki school of jurists, was reputed to have been a sleeping foetus. See Jansen (2000) and (Mir-Hosseini, 1993, pg.143-146).

²²The doctrine of *shubha* is based on a saying of the Prophet: "God's sanction will not be applied in cases where there is room for doubt." *Hadd* is suspended in cases where there is any ambiguity as to facts and proofs; for discussion, see Fierro (2007).

women – was intended to reinforce a single form of marriage and to forbid other forms of union and promiscuity. This is evident in the verse that follows: “Let no man guilty of adultery or fornication marry any but a woman similarly guilty, or an Unbeliever: Nor let any but such a woman or an unbeliever marry such a man. To the Believers such a thing is forbidden” (Surah an-Nur 24: 3). Likewise, the penalty for slaves (both male and female) is half of that of a free person, which means that in no way did the Qur’an envisage death as a penalty for *zina*.

In pre-Islamic Arabia several forms of sexual union existed, including temporary ones; female slaves were prostituted by their masters; women as well as men could have multiple partners; and adultery was not considered a sin, but an injury to the property rights of a fellow tribesman – the male partner paid a fine, while the female was punished by being detained in her house for the rest of her life (Gibb and Kramers, 1961, pg.658). The Qur’an clearly disapproves of the prevalent sexual and moral codes among the Arabs, and introduces measures to reform them; it forbids the prostitution of female slaves (Surah an-Nur 24: 33); speaks of sex outside marriage as a sin to be punished in the Hereafter (Surah al-Isra’ 17: 32; Surah al-Furqan 25: 68-71); and modifies existing practices to promote chastity and a standardized form of marriage. Eight verses (Surah an-Nur 24: 2-9) deal with the law-like issue of illicit sexual relations and form the basis of *fiqh* rulings on *zina*. These verses introduce new sanctions to safeguard marriage, subject men and women to the same punishment for extra-marital relations, and protect women in the face of accusations against their chastity.

Two verses prescribe punishment for illicit sexual relations. The first reads as follows:

If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way (Surah an-Nisa 4: 15).

The verse does not use the term *zina* but *fahisha* (lewdness), which most commentators understood as implying adultery and fornication. However, Yusuf Ali, one of the notable translators of the Qur’an, in a note states that *fahisha* “refers to unnatural crime between women, analogous to unnatural crime between men”

(Yusuf 'Ali, 1999, pg.189),²³ the subject of the next verse (Suran an-Nisa 4: 16), which states: “no punishment is specified for the man, as would be the case when a man was involved in the crime.” It has also been argued that *fahisha* in Suran an-Nur 4: 15 denotes a sexual act in public and prostitution, not private consensual sex, whether it is heterosexual or not. The verse endorses the existing punishment for *fahisha* – of which only women, it appears, could be accused. They should be confined to the home for the rest of their lives, or humiliated by having to appear in public covered in animal dung. But the verse, while not abolishing this penalty, contains it by requiring the evidence of four witnesses, and perhaps more importantly, promises women a way out. In any case, jurists agree that the punishment was superseded by Surah an-Nur 24: 2, which reads: “The woman and the man guilty of adultery or fornication (*al-zaniyah wa al-zani*) – flog each of them with a hundred stripes.”

It seems clear that not only the Qur'anic verses but also the jurists, with their intricate rules for proof of *zina*, aimed to reform existing practices in the direction of justice, as understood at the time. But both the spirit of the verses and the rules of the jurists lose their force for justice when classical *fiqh* rulings are codified and grafted onto a unified legal system, and implemented by the coercive machinery of

²³For a groundbreaking study, see Kugle (2003, 2010).

a modern nation state.²⁴ Hence it is not enough to take the classical *zina* rulings at face value, as some do. Defenders of current *zina* laws often hide behind the reassurance that they are impossible to enforce in practice; they ignore how they are actually used, and that it is women and the poor who are most often the victims.

5 Marriage (*Nikah*) and Covering (Hijab)

What defines *zina* is the absence of a legal marriage (*nikah*), thus *zina* rulings intersect with and in practice are maintained by other rulings that the classical jurists devised for the regulation of sexuality, namely marriage and women's covering. These patriarchal rulings sustained the power and sanction of *zina* provisions, and continue to do so today, even if they have been eliminated from modern legal codes. In all Muslim countries – apart from Turkey – the source of family law is classical *fiqh*, which grants men the right to polygamy and unilateral divorce. Thus a closer examination of marriage and hijab as defined in classical *fiqh* texts is in order.

Classical jurists defined marriage (*'aqd al-nikah*, 'contract of coitus') as a contract with fixed terms and uniform legal effects. It renders sexual relations between a man and a woman licit; any sexual relation outside this contract is by definition *zina*. The contract is patterned after the contract of sale, and has three essential elements: the offer (*ijab*) by the woman or her guardian (*wali*), the acceptance (*qabul*) by the man, and the payment of dower (*mahr*), a sum of money or any valuable that the husband pays or undertakes to pay to the bride before or after consummation.²⁵

The contract automatically places a wife under her husband's *qiwama*, a mix-

²⁴For instance, the Islamic Republic of Iran uses the notion of *elm-e qazi* ('judge's intuition'), which refers to personal information that is not presented or examined by the court. In practice, this allows the judge to decide if an offence has been committed; often women are tricked into confession. See Terman (2007).

²⁵This discussion is concerned with marriage as defined by classical jurists, not marriage in practice; for more detailed treatment of the subject, see Ali (2008); Mir-Hosseini (2003, 2009). *Mahr* is sometimes translated as 'dowry', but this means property or cash which a wife brings her husband on marriage, as occurs in India and used to occur in Europe; the Muslim *mahr*, by contrast, resembles 'dower', property that a husband gives his wife.

ture of dominion and protection. It also defines a default set of fixed rights and obligations for each party, some supported by legal force, others with moral sanction. Those with legal force revolve around the twin themes of sexual access and compensation, embodied in the two concepts *tamkin* (obedience; also *ta'a*) and *nafaqa* (maintenance). *Tamkin*, defined as sexual submission, is a man's right and thus a woman's duty; whereas *nafaqa*, defined as shelter, food and clothing, is a woman's right and thus a man's duty. In some schools, a woman becomes entitled to *nafaqa* only after consummation of the marriage, in others this comes with the contract itself; but in all schools she loses her claim if she is in a state of *nushuz* (disobedience), which the classical jurists defined only in sexual terms. In other words, all schools share the same logic that links a woman's right to maintenance and protection to her obedience and sexual submission to her husband. Among the default rights of the husband is his power to control his wife's movements and her 'excess piety'. She needs his permission to leave the house, to take up employment, or to engage in fasting or forms of worship other than what is obligatory (for example the fast of Ramadan). Such acts may infringe on the husband's right of 'unhampered sexual access'. There is no matrimonial regime; the husband is the sole owner of the matrimonial resources, and the wife remains the possessor of her dower and whatever she brings to or earns during the marriage.

In discussing the legal structure and effects of the marriage contract, classical jurists had no qualms in using the analogy of sale. They allude to parallels between the status of wives and female slaves, to whose sexual services husbands/owners were entitled, and who were deprived of freedom of movement. This is not to suggest that classical jurists conceptualized marriage as either a sale or as slavery.²⁶ Certainly there were significant differences and disagreements about this among the schools, and debates within each, with legal and practical implications.²⁷ They were keen to distinguish between the right of access to the woman's sexual and reproductive faculties (which her husband acquires) and the right over her person (which he does not). Rather, what I want to stress is that the notion and legal logic of 'ownership' and sale underlie their conception of marriage and define the

²⁶For similarities in the juristic conceptions of slavery and marriage, see Marmon (1999).

²⁷For these disagreements see Ali (2003, 2008) and Maghiniyyah (1997); for their impact on rulings related to *mahr* and the ways in which classical jurists discussed them, see (Ibn Rushd, 1996, pg.31-33).

parameters of laws and practices, where a woman's sexuality, if not her person, becomes a commodity and an object of exchange.

The logic of women's sexuality as property, and its sale on marriage, which informs the classical *fiqh* texts, is at the root of the unequal construction of marriage and divorce, and sanctions the control of a woman's movement. It is also this logic that justifies polygamy and defines the rules for the termination of the marriage. A man can enter up to four marriages at a time,²⁸ and can terminate each contract at will. Legally speaking, *talaq*, repudiation of the wife, is a unilateral act (*iqa'*), which acquires legal effect by the declaration of the husband. A woman cannot be released without her husband's consent, although she can secure her release through offering him inducements, by means of *khul'*, which is often referred to as 'divorce by mutual consent'. As defined by classical jurists, *khul'* is a separation claimed by the wife as a result of her extreme 'reluctance' (*karahiya*) towards her husband. The essential element is the payment of compensation (*iwad*) to the husband in return for her release. This can be the return of the dower, or any other form of compensation. Unlike *talaq*, *khul'* is not a unilateral but a bilateral act, as it cannot take legal effect without the consent of the husband. If she fails to secure his consent, then her only recourse is the intervention of the court and the judge's power either to compel the husband to pronounce *talaq* or to pronounce it on his behalf if the wife establishes one of the recognized grounds – which again vary from school to school.²⁹

Another set of rulings that are invoked today to sanction control over women and to limit their freedom of movement are those on hijab.³⁰ They are used to prescribe and justify the punishment of women for non-observance of the dress code, using *ta'zir*, the discretionary power of the judge or Islamic state. But this has no basis in Islamic legal tradition. Unlike rulings on marriage and *zina*, classical *fiqh* texts contain little on the dress code for women. The prominence of

²⁸In Shi'a law a man may contract as many temporary marriages (*mut'a*) as he desires or can afford. For this form of marriage, see Haeri (1989).

²⁹Classical Maliki law grants women the widest grounds (absence of the husband, his mistreatment, failure to provide, and failure to fulfil marital duties), which have been used as the basis for expanding women's grounds for divorce in the process of codification, see Mir-Hosseini (1993, 2003).

³⁰Many terms commonly used today in different countries for 'the veil', such as hijab, purdah, chador, burqa, are not found in classical *fiqh* texts.

hijab in Islamic discourses is a recent phenomenon, dating to the Muslim encounter with colonial powers in the nineteenth century, when there emerged a new genre of Islamic literature in which the veil acquires a civilisational dimension and becomes both a marker of Muslim identity and an element of faith.

Classical texts – at least those that set out rulings – address the issue of dress for both men and women under ‘covering’ (*satr*). These rulings are found in the Book of Prayer, among the rules for covering the body during prayers, and in the Book of Marriage, among the rules that govern a man’s ‘gaze’ at a woman prior to marriage.³¹

The rules are minimal, but clear-cut: during prayer, both men and women must cover their ‘*awra*, their pudenda; for men, this is the area between knees and navel, but for women it means all the body apart from hands, feet and face. A man may not look at the uncovered body of an unrelated woman, but a woman may look at an unrelated man. The ban can be relaxed when a man wants to contract a marriage; then, in order to inspect a prospective bride, he may be allowed the same privileges as one of her close relatives.

There are also related rules in classical *fiqh* for segregation (banning any kind of interaction between unrelated men and women) and seclusion (restricting women’s access to public space). They are based on two juristic constructs: the first defines all of a woman’s body as ‘*awra*, pudenda, a zone of shame, which must be covered both during prayers (before God) and in public (before men); the second defines women’s presence in public as a source of *fitna*, chaos, a threat to the social order.³²

6 A Critique from Within

In their rulings on *zina*, classical jurists sought to safeguard sexual order, personal honour, and blood relations, and to ensure legitimate paternity. But these rulings were designed and perceived to protect the sanctity of marriage and to be a deterrent, not to be codified and enforced by the machinery of modern state. As we shall see, these rules are, in theory, gender neutral. They specify the same punish-

³¹For the evolution of hijab in Islamic legal tradition, see [Mir-Hosseini \(2007, 2011\)](#).

³²For a critical discussion of these two assumptions, see ([Abou El Fadl, 2001](#), pg.239-247). In some extremists circles today, even a woman’s voice is defined as ‘*awra*’.

ments for men and women, and contain measures to protect women against false accusations, with such strict requirements of evidence that it is almost impossible to prove a case.

The power and sanction of *zina* rulings, it must be stressed, lie not in their implementation, but in how they define the limits of permissible sexual conduct. Their power is exerted and sustained through the other rulings just outlined, those regulating marriage and women's covering. To understand how all these rulings work, we must examine how classical jurists thought of gender and female sexuality, and identify the underlying legal theories and juristic assumptions. As is evident from the rulings on marriage and hijab discussed above, *zina* laws rest on two juristic constructs: woman's sexuality as property acquired by her husband through the marriage contract, and woman's body as a shameful object (*'awra*) that must be covered at all times. Such constructs in turn hinge on a patriarchal reading of Islam's sacred texts and an underlying theory of sexuality that sanctions control over female behaviour. All *fiqh* schools share this patriarchal ethos and conception of sexuality and gender; if they differ, it is in the manner and degree to which they translate them into legal rulings.

Islamists and traditional Muslim scholars claim that the classical *fiqh* rulings are immutable and divinely ordained. It is not my intention here to enter a discussion on the theological validity of such a claim, or whether such a patriarchal reading of the Qur'an is justified. The legal logic of classical *fiqh* rulings must, of course, be understood in their own context. We must not approach them anachronistically. We should suspend judgement when dealing with past tradition. But this does not mean that we have to accept this tradition blindly or that we cannot deal with it critically. In our time and in our context we also need to ask: How far does such a conception of sexuality and gender rights reflect the principle of justice that is inherent in the very notion of Shari'a as a path to follow? Why and how did classical jurists define these rulings so that women are under men's authority, and women's sexuality is men's property? What are the ethical and rational foundations for such notions of gender rights and sexuality? These questions become even more crucial if we accept – as I do – that the classical jurists sincerely believed both that their findings were derived from the sacred sources of Islam and that they reflected the justice that is an indisputable part of the Shari'a,

as they understood it.

There are two sets of related answers. The first set is ideological and political, and has to do with the strong patriarchal ethos that informed the classical jurists' readings of the sacred texts and their exclusion of women from production of religious knowledge. The further we move from the era of the Prophet, the more we find that women are marginalised and lose their political clout: their voice in the production of religious knowledge is silenced; their presence in public space is curtailed; their critical faculties are so far denigrated as to make their concerns irrelevant to law-making processes.³³ Women had been among the main transmitters of the hadith traditions, but by the time the *fiqh* schools were consolidated, over a century after the Prophet's death, they had reduced women to sexual beings and placed them under men's authority.³⁴ This was justified by a certain reading of Islam's sacred texts, and achieved through a set of legal constructs: *zina* as a *hadd* crime, with mandatory and fixed punishments; marriage as a contract by which a man acquires control over a woman's sexuality; and women's bodies as '*awra*, shameful.

The second set of answers is more theoretical, and concerns the ways in which patriarchal social norms, existing marriage practices and gender ideologies were sanctified, and then turned into fixed entities in *fiqh*. In brief, the genesis of gender inequality in Islamic legal tradition lies in an inner contradiction between the ideals of the Shari'a and the patriarchal structures in which these ideals unfolded and were translated into legal norms. Islam's call for freedom, justice and equality was submerged in the patriarchal norms and practices of seventh century Arab society and culture and the formative years of Islamic law (Mir-Hosseini, 2003, 2011).

In short, classical jurists' conceptions of justice and gender relations were shaped in interaction with the social and economic and political realities of the

³³There is an extensive debate in the literature on this, which I will not enter. Some argue that the advent of Islam weakened the patriarchal structures of Arabian society, others that it reinforced them. The latter also maintain that, before the advent of Islam, society was undergoing a transition from matrilineal to patrilineal descent, that Islam facilitated this by giving patriarchy the seal of approval, and that the Qur'anic injunctions on marriage, divorce, inheritance, and whatever relates to women both reflect and affirm such a transition. For concise accounts of the debate, see Smith (1985); Spellber (1991).

³⁴As Abou-Bakr shows, women remained active in transmitting religious knowledge, but their activities were limited to the informal arena of homes and mosques and their status as jurists was not officially recognised (Abou-Bakr, 2003).

world in which they lived. In this world, patriarchy and slavery were part of the fabric of society; they were seen as the natural order of things, the way to regulate social relations. In their understanding of the sacred texts, these jurists were guided by their outlook, and in discerning the terms of the Shari'a, they were constrained by a set of gender assumptions and legal theories that reflected the social and political realities of their age. The concepts of gender equality and human rights – as we mean them today – had no place and little relevance to their conceptions of justice.

It is crucial to remember that even if ideas of gender equality belong to the modern world, and were naturally absent in pre-modern legal theories and systems, nevertheless, until the nineteenth century, Islamic legal tradition granted women better rights than did its Western counterparts. For instance, Muslim women have always been able to retain their legal and economic autonomy in marriage, while in England it was not until 1882, with the passage of the Married Women's Property Act, that women acquired the right to retain ownership of property after marriage.

For Muslims, however, the encounter with modernity coincided with their painful and humiliating encounter with Western colonial powers, in which both women and family law became symbols of cultural authenticity and carriers of religious tradition, the battleground between the forces of traditionalism and modernity in the Muslim world – a situation that has continued ever since. As Leila Ahmed observes, this has confronted many Muslim women with a painful choice, between betrayal and betrayal. They have to choose between their Muslim identity – their faith – and their new gender consciousness (Ahmed, 1991, pg.122).

One of the paradoxical and unintended consequences of political Islam has been to help create an arena within which many women can reconcile their faith and identity with their struggle for gender equality and human dignity. This did not happen because the Islamists offered an egalitarian vision of gender relations – they clearly did not. Rather, their very agenda of 'return to Shari'a', and their attempt to translate *fiqh* rulings into policy, have provoked Muslim women to increased activism, which some refer to as 'Islamic feminism'.³⁵ The defence of patriarchal rulings as Shari'a as 'God's Law', as the authentic 'Islamic' way of

³⁵There is a growing literature on the politics and development of 'Islamic feminism'; for references, see Badran (2002, 2006) and Mir-Hosseini (2006).

life, brought the classical *fiqh* books out of the closet, and unintentionally exposed them to critical scrutiny and public debate. A growing number of women came to question whether there was an inherent or logical link between Islamic ideals and patriarchy (Mir-Hosseini, 2006). This opened a space for an internal critique of patriarchal readings of the Shari'a that was unprecedented in Muslim history. By the early 1990s, there emerged a new consciousness, a new way of thinking, a gender discourse that is arguing for equality for women on all fronts within the framework of Islam. This new discourse is nurtured by feminist scholarship in Islam that is showing how gender is constructed in Islamic legal tradition, uncovering a hidden history and rereading textual sources to unveil an egalitarian interpretation of the sacred texts.³⁶

The emerging feminist scholarship in Islam is helping to bridge the wide gap that exists between the conceptions of justice that inform and underpin the dominant interpretations of the Shari'a on the one hand, and human rights legislation on the other. This scholarship is part of a new trend of reformist religious thought that is consolidating notions of Islam and modernity as compatible, not opposed. Following and building on the work of earlier reformers, the new religious thinkers contend that human understanding of Islam's sacred texts is flexible, that the texts can be interpreted as encouraging pluralism, human rights, democracy and gender equality. Revisiting the old theological debates, they aim to revive the rationalist *Mu'tazali* approach that was eclipsed when *Ash'ari* legalism took over as the dominant mode and gave precedence to the form of the law over its substance and spirit. Where earlier reformers sought an Islamic genealogy for modern concepts, the new thinkers place the emphasis on how religious knowledge is produced and how religion is understood; how interpretations of the Shari'a and *fiqh* constructs must be evaluated in their historical contexts.³⁷ This new trend of reformist thought helps us to assess how these legal constructs have been reproduced, modified and redefined by those countries and communities that have reintroduced *zina* law by 'Islamizing' penal laws.

³⁶Feminist studies in Islam are too numerous to list here, but see especially Ahmed (1991); Al-Hibri (1982, 1997); Ali (2003, 2006); Barlas (2002); Hassan (1987, 1996); Mernissi (1991); Mir-Hosseini (2003, 2009); Wadud (1999, 2006).

³⁷For general introductions and some sample texts, see Kurzman (1998, 2002); Abu Zayd (2006).

More importantly, this new religious thinking and its language can open a new and meaningful dialogue between Islamic law and international human rights law. Such a conversation can help to build an overlapping consensus and give the human rights advocates the conceptual tools and the language to engage with Muslim communities. It can enable them to see *zina* laws as neither part of an irredeemably backward and patriarchal religion, nor as divine and immutable, but as an element in the complex web of norms and laws that classical jurists developed for the regulation of sexuality. In other words, this conversation can help human rights advocates to see these laws for what they are: juristic constructions that have their roots in the tribal structures and patriarchal ideology of pre-Islamic Arabic, which continued into the Islamic era, though in a modified form.

For example, we can show how death by stoning (*rajm*) takes its textual justification not from the Qur'an but from the Sunna. Jurists of all schools rely on three hadith to build their legal arguments for stoning. This has been contested both by invoking arguments from classical *fiqh* theory, such as the textual primacy of Qur'an over hadith, and the fact that the authenticity of these hadith has been questioned,³⁸ as well as on human rights grounds. We can stress how the legal rulings in the Qur'an and the Sunna must be understood in their historical and social contexts. For example, some have argued that stoning was a common form of execution at the time of the Prophet, and that it came into Islamic legal tradition as punishment for *zina* from Jewish tradition.³⁹

Moreover, the Qur'an neither mandates stoning as punishment for adultery, nor speaks of any punishment for consensual sexual relations in private. As Asifa Quraishi rightly argues, *zina* as defined by classical jurists must be seen as a crime of public indecency rather than private sexual conduct. In her words, "While the Qur'an condemns extramarital sex as evil, it authorizes the Muslim legal system to prosecute someone for committing this crime only when the act is performed so openly that four people see them without invading their privacy" (Quraishi, 2008, ph.296).⁴⁰

Defining crimes according to punishment is itself a juristic development. The

³⁸For examples, see Burton (1978, 1993); Engineer (2007); Kamali (2000).

³⁹For a discussion of debates in classical sources, see Burton (1978, 1993) and for new arguments based on human rights, see Baghi (2007); Engineer (2007); Quraishi (2008).

⁴⁰Also see Karamah: Muslim Women Lawyers for Human Rights.

expression *hudud Allah*, limits prescribed by God, appears 14 times in the Qur'an. Nowhere is it used in the sense of punishment, fixed or otherwise, nor it is stated specifically what these limits are.⁴¹ As Fazlur Rahman notes, in two verses (Surah al-Baqarah 2: 229-30) the term appears six times in relation to divorce, demanding that men either retain or release their wives *bil-ma'ruf*, i.e in accordance with 'good custom'; each time, the term carries a slightly different meaning, but neither here nor elsewhere is it used in the sense of punishment. In his words:

These facts should compel us to pause and think how little concerned the Qur'an is about the purely legal side and how much more and primarily with setting the moral tone of the Community. The legal side has undoubtedly to be done justice to and an adequate law has to be developed. But it is left to the Community to formulate this law in the light and moral spirit of the Qur'an which itself shows little tendency to lay down hard and fast laws. And doubly mistaken are those who claim to take the law of God into their own hands and seek to implement it literally (Rahman, 1965, pg.240).

7 Summary and Conclusions

What are the implications of the analysis offered in this discussion paper for the Global Campaign to Stop Killing and Stoning Women? The paper has been mindful of two broad questions: What are the main challenges faced by women's rights activists in their campaign to abolish the *zina* laws? Can Islamic and human rights frameworks coexist, or in other words, how can an overlapping consensus be built? I located *zina* laws in the contexts of the intersection between religion, culture and law in the regulation of sexuality in Islamic legal tradition, and the shifting politics of relations between religion, law and gender in recent times. My premise has been that a campaign against *zina* laws must be fully informed about the legal, social and political justifications of these laws and the link between them and other laws and customs that sanction men's control over women's sexuality. *Zina* laws should not be treated in isolation; they are part of complex system for regulating women's

⁴¹See (Kamali, 1998, pg.219) and (Kamali, 2000, pg.45-65).

behaviour, which is informed by a patriarchal reading of Islam's sacred texts and sustained by a set of outdated assumptions and juristic constructs about female sexuality, which are at the root of violence against women.

The reform and secularization of penal laws and criminal justice systems in the first half of the twentieth century, and their 'Islamization' in the second half, has made it clear there can be no sustainable improvements in Muslim women's legal and social position while patriarchal interpretations of Islam's sacred texts remain unchallenged. Twentieth century shifts in the politics of religion, law and gender led to the emergence of two powerful, yet opposing frames of reference: international human rights law and political Islam. The encounter between them has produced a productive dialogue, and opened a new phase in the politics of gender and the battle between forces of traditionalism and modernism in the Muslim world. The crucial element of this phase has been that women themselves – rather than the abstract notion of 'women's rights in Islam' – are now at the heart of the argument.⁴²

International human rights law gives secular activists a conceptual framework and a language in which to criticize these laws as gender-based violence. But such an argument meets powerful opposition in countries and communities where religious discourse is paramount, where religious identity has become politicized, and where the Islamists set the terms of sexual and moral discourses. To be effective in such contexts, human rights norms and values must be articulated in a language that can engage with local cultures and practices and religious tradition (Dembour, 2001). This is a difficult task, a challenge that all human rights advocates must deal with in one way or another. Each context has its own specificities and dynamics, and presents its own challenges. In Muslim contexts, this challenge is given a particular edge by the domination of traditional *fiqh* and the ways in which its rulings have become embedded in customary cultural practices and sexual codes. The very fact that *zina* laws come under *hudud* – seen as 'God's limits' – gives the Islamists and the fundamentalists a real advantage, a ready-made argument for rejecting and denouncing reform as 'contrary to Islam'; hence the power of the Islamist rallying cry of 'return to Shari'a'.

One of the main strategies adopted by human rights advocates is to name and

⁴²For elaboration of this, see Mir-Hosseini (2009, 2011).

shame offending governments into respecting and protecting rights. States that invoke religious misinterpretations to justify discrimination and violence against women have signed up to international human rights conventions, and their lack of accountability in enacting the latter must be exposed. But in the eyes of many Muslims the moral high-ground and justice of international human rights law have been undermined by the politics and rhetoric of the so-called war on terror in the aftermath of the 11 September 2001 attacks, as well as the West's unwavering support of Israel despite the escalating violations against Palestinians and the land.⁴³ Claiming to be advocates of justice, Islamists thrive on being seen to oppose such outside interventions. In these new twenty-first century conditions, activists must also be able to engage in an internal discourse within Muslim communities (An-Na'im, 2005). As Abdullahi An-Na'im points out "although the apparent dichotomy between the so-called religious and secular discourses about the rights of women in Islamic societies is somewhat false or grossly exaggerated, its implications are too serious to be ignored in practice" (An-Na'im, 1995a, pg.51). A campaign that can bring Islamic and human rights perspectives together can be more persuasive and effective.

To summarize my argument:

- Strategies should be diverse and multi-level, and must be able to engage in an internal discourse within communities. Given the intimate links between Islamic legal tradition and culture, it is essential to frame arguments for reform and change concurrently within both Islamic and human rights frameworks.
- In a campaign against *zina* laws or stoning, for strategies of confrontation such as 'naming and shaming' to be more than political rhetoric and to be effective in persuading governments or Islamists to change laws or practices, they must be combined with a process of engagement, dialogue and debate, in which all sides have the opportunity to articulate principles and defend practices. This has worked for example in Morocco with the reform of Family Law following years of women's activism and engagement with

⁴³For an incisive discussion of dilemmas encountered by international NGOs working in Muslim contexts, see Modirzadeh (2006).

clerics (Buskens, 2006; Collectif 95 Maghreb-Egalité, 2005); and in Pakistan, with the amendment of *zina* laws following the intervention of the Ideology Council (Council of Islamic Ideology, 2006; Lau, 2007).

- As a general principle, if we want to persuade some other group to change their practices or laws, it is more effective to argue that they transgress their own principles; that an alternative law or practice might be more in accordance with both their principles and those of others – including international human rights law.
- The principles and ideals of the Qur’an reflect universal norms that have resonance in contemporary human rights standards, and provide the basis for an ethical critique from within an Islamic framework of penal laws based on classical jurisprudence.

Appendices

A Elements of Islamic Legal Tradition

Shari’a (lit. ‘path’)

- The totality of God’s commands contained in the Qur’an and Sunna.
- For Muslims it is the way to conduct this worldly life.
- It governs every aspect of life from matters pertaining to ritual purity to questions related to international affairs.
- Some aspects (*‘ibadat*, devotional acts) are unenforceable by any political authority, and constitute a code of conscience.
- Others (*mu‘amalat*, civil transactions, penal law, etc.) are, in principle, enforceable by the state and they constitute legal norms

Fiqh (lit. ‘understanding’)

- The attempts of qualified Muslim scholars to derive legal rules from the Qur’an and Sunna.

- The human interpretation and understanding of the Shari'a.

Qanun (lit. 'law')

- In cases where the Qur'an and Sunna are silent, Muslim authorities have the right to pass legislation in accordance with Shari'a.
- Based on the doctrine of *al-siyasah al-Shari'a* (Shari'a-oriented policy, or governance according to Shari'a)
- In pre-modern Muslim legal history, one of the most important issues was the relationship between the Shari'a and *Qanun* – the Islamicity of the legislation of the Muslim political authority.

B Legal Schools (*Madhab*)

Many emerged but few survived:

Hanafi school

- Emerged in Baghdad, named after Abu Hanifa (d.767).
- Endorsed reason and logic, made extensive use of analogy and public good.
- Dominant today in Turkey, Iraq, Syria, Lebanon, Jordan, Egypt, Libya, Pakistan, Afghanistan.

Maliki school

- Emerged in Medina, named after Malik ibn Anas (d.795).
- Put emphasis on understanding textual sources.
- Dominant today in North and West Africa.

Shafi'i school

- Emerged in Baghdad, named after Muhammad ibn Idris al-Shafi'i (d.820) who later moved to Cairo.
- Offered a new synthesis of Hanafi and Maliki schools, made extensive use of analogy and public good.
- Dominant today in Indonesia, Malaysia, Singapore, Philippines, Sudan, Lower Egypt, Southern Arabia.

Hanbali school

- Emerged in Baghdad, named after Ahmad ibn Hanbal (d.855), and was made popular by Abd al-Wahhab at the beginning of the eighteenth century.
- Emphasis on textual sources of legal norms.
- Dominant today in Saudi Arabia.

Ja'fari or Ithna 'Ashari school (Shi'a law)

- Named after the 6th Shi'a Imam Ja'far al-Sadiq (d. 748).
- Admits human reason as equally decisive basis in determining the scope of divine purpose for humanity, but qualifies it by being based on revelation.
- Dominant today in Iran and Iraq.

C Classification of legal rulings (ahkam)**Categories of legal rulings:**

'ibadat lit. worship, pertaining to devotional matters

mua'malat lit. contracts, pertaining to civil transactions

huquq al-All lit. rights of God, also relating to collective and public interest

huquq al-'abad lit. rights of man, also relating to individual rights

All acts are either:

halal permitted, or

haram forbidden

Permitted acts are classified further as:

wajib/fard obligatory

mandub/mustahab recommended

mubah neutral

makruh reprehensible

Crimes are divided, according to punishment, into three categories:

hudud (pl of *hadd*, lit. limit) defined as offences as violations of God's limits (*hudud al-Allah*); punishments are mandatory and fixed, derived from textual sources (Qur'an or Sunna), they comprise:

1. *sariqa* (theft)
2. *qat' al-tariq hiraba* (highway robbery)
3. *zina* (illicit sex)
4. *qadhf* (unfounded allegation of *zina*)
5. *shurb al-khamr* (drinking wine)
6. *ridda* (apostasy)

qisas retribution, covers bodily harm and homicide, defined as matters of private claim; punishments are fixed but not mandatory, the offender can waive the claim.

ta'zir discipline, covers all other offences; punishments are at the discretion of the judge.

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