

# CRIMINALISING SEXUALITY: ZINA LAWS AS VIOLENCE AGAINST WOMEN IN MUSLIM CONTEXTS\*

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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.<sup>1</sup> The punishment for *zina* is the same for men and women: 100 lashes for the unmarried and death by stoning for the married; however, instances of these punishments are rarely documented in history.

In the early 20<sup>th</sup> century, with the emergence of modern legal systems in the Muslim world, the provisions of classical Islamic law were increasingly confined to personal status issues.<sup>2</sup> *Zina* laws, which were rarely applied in practice, also became legally obsolete in almost all Muslim countries and communities. In the late 20<sup>th</sup> 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 the modern state. Most controversial among these have been the revival of *zina* laws and the creation of new offences that criminalise consensual sexual activity and authorise violence against women. Activists have campaigned against these new laws on human rights grounds; campaigns in countries as diverse as Nigeria, Pakistan and Iran have revealed the injustice and violence brought by the 'Islamisation' of criminal justice systems. The issues addressed in these campaigns 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.

There is extensive literature on these issues from a human rights perspective.<sup>3</sup> This chapter offers a feminist and rights-based critique of *zina* laws that engages

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Islamic legal tradition from within. It aims to broaden the scope of the debate over appropriate concepts and strategies for the campaigns to decriminalise consensual sex. It is intended as a contribution to the emerging feminist scholarship on Islam, by showing how *zina* laws can also be challenged from within. Exploring the intersections between religion, culture and law that legitimate violence in the regulation of sexuality, this chapter aims to contribute to the development of 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 so as to bring about sustainable legal and cultural reform.

*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 on Islam, this chapter shows 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 an element 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, and must be broken from within the tradition.

To do so, this chapter needs to address 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 and often opposed to both feminism, which they understand as arguing for women's dominance over men, and human rights, which they see as alien to Islamic tradition. Secondly, many human rights and women's rights activists and campaigners are not well versed in religious categories of thought and religious-based arguments; they consider it futile and counter-productive to work within a religious framework. These blind spots must be eliminated; approaches from Islamic studies, feminist and human rights perspectives, far from being mutually opposed, can be mutually reinforcing, particularly in mounting an effective campaign against revived *zina* laws.

After outlining the approach and the premises on which the chapter is based, it traces 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 the Islamic legal tradition. The chapter then examines *zina* laws in the context of classical Islamic legal tradition, exploring the links with the laws of marriage and dress code that regulate women's sexuality, and the theological assumptions and juristic theories that inform them. Finally, the chapter shows 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. The conclusion offers 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.

## 1 Approach and Premises

The chapter starts from the premise that ‘human rights’ and ‘Islamic law’ are ‘essentially contested concepts’; that is, they mean different things to different people and in different contexts.<sup>4</sup> However, advocates of both claim universality, that is, they claim that their objective is to ensure justice and proper rights for all humanity.<sup>5</sup> The notion of ‘human rights’ is used 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, more attention is devoted here to Islamic legal traditions and discourses.

Secondly, in this chapter a discomfort with the term ‘Islamic law(s)’ must be noted. ‘Islamic laws’, like other laws, are the product of socio-cultural assumptions and juristic reasoning about the nature of relations between men and women. In other words, they are ‘man-made’ juristic constructs, shaped by the social, cultural and political conditions within which Islam’s sacred texts are understood and turned into law. From the perspective of this chapter, it is more analytically fruitful and productive to speak of ‘Islamic legal tradition.’

This tradition is approached from a critical feminist perspective and from within the tradition, by invoking one of its main distinctions, which underlies the emergence of the various schools in the tradition and the multiplicity of positions and opinions within them; that is, the distinction between *shari’a* and *fiqh*. *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, 1966, p. 100)<sup>6</sup> *Fiqh*, jurisprudence, literally means ‘understanding,’ and denotes the process of human endeavour to discern and extract legal rulings from the sacred texts of Islam – the Qur’an and the Sunnah (the Prophet’s practice, as related in the *hadith*, or traditions).

Thus, the rulings derived from the sacred texts are matters of human interpretation. However, 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 statements are heard that begin 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 the separation of 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.<sup>7</sup>

Thirdly, this chapter rejects statements beginning ‘Islam says...’ or ‘Islam allows...’ or ‘Islam forbids...’ Islam does not speak, rather it is people who claim to speak in the name (with the authority) of Islam, selecting sacred texts (usually

out of context) that appear to justify their claims, and repressing other texts that oppose them. 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 organised 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 organised religion are linked, but they are not the same thing, as implied by conflating them in the labels 'Islamic' or 'religious.'

Fourthly, although this chapter 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 also shaped by religious as well as cultural practices; 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 in interaction with other cultures and value systems. In other words, it must be recognised 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.<sup>8</sup>

Finally, 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 the identification of the issue of *zina* laws as a violation of women's human rights.<sup>9</sup>

## 2 Why *Zina* Laws and Why Now?

Current *zina* laws reflect centuries-old, human-made interpretations of Islam's sacred texts, which can be criticised from within the framework of Islamic principles, in accordance with the changing realities of time and place and contemporary notions of justice. As in other religious and legal traditions, notions of justice among Muslims have not until recently included gender equality in its current sense. The idea of gender equality became inherent to conceptions of justice only in the 20<sup>th</sup> century, and has only recently presented Islamic legal tradition with a challenge that it has been trying to meet.<sup>10</sup> Thus, 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.

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. But it acquired a sharper political edge in the Muslim world in the second half of the 20<sup>th</sup> century with the emergence of the question of Palestine, and the rise of Islamist movements that sought to merge religion and politics.<sup>11</sup> In the aftermath of the 11 September 2001 ('9/11') 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, but it has also, in their eyes, eroded the moral high ground of human rights law and delegitimised 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 to power in Iran, and when the military government in Pakistan extended the ambit of *fiqh* to criminal law, with the introduction of the Hudood 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 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.<sup>12</sup>

In Muslim contexts, on the other hand, Islamist forces — whether in power or in opposition — started to invoke Islam and *shari'a* as a legitimising 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 to 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 modernisation of legal systems.<sup>13</sup> At the same time, the Islamists criminalised — and thus politicised — areas of sexual and moral behaviour that had previously 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 in Libya in 1972.<sup>14</sup> After 1979, the same happened in Pakistan (Enforcement of Hudood 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 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.<sup>15</sup> 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.<sup>16</sup>

To understand why women have been the main target of the revival of *zina* laws, two prime questions need to be asked: What is the place of *zina*, both as a concept and as a set of legal rulings, in the Islamic legal tradition? How can it be argued – within that tradition – for the decriminalisation of consensual sexual relations? To explore these questions, the links need to be examined, 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?

### 3 *Zina* as defined in Classical *Fiqh* Texts

Classical *fiqh* divides crimes into three categories according to the penalties they incur: *hudud*, *qisas*, and *ta‘zir*.<sup>17</sup> *Hudud* (singular *hadd*: limit, restriction, prohibition) are crimes with mandatory and fixed punishments derived from textual sources (Qur’an or Sunnah). *Hudud* crimes comprise five offences. Two are offences against sexual 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-tariqhiraba*), 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.<sup>18</sup> 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 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 *diya* (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 a 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.

There are differences between legal schools and among the 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 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, 100 lashes. The lashes have a Qur'anic basis, as will be shown; but stoning does not, being based only on the Sunnah.<sup>19</sup>

The juristic consensus ends here. There are significant differences among the legal 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 sacred texts, have practical and important legal consequences. For instance, while jurists in Hanafi, Hanbali and Shi'a schools require the confession to be uttered four separate times, Maliki and Shafi'i jurists consider one confession sufficient to establish the offence. The majority view among Maliki jurists is unique in allowing an unmarried woman's pregnancy to be used as evidence for *zina*, 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, it is important to stress that, for Maliki jurists, the duration of pregnancy can be as long as seven years, which clearly suggests their humanitarian concern to protect women against the charge of *zina*, and children against the stigma of illegitimacy. That is to say, like their counterparts in other schools, Maliki jurists did their best to make conviction for *zina* impossible.<sup>20</sup>

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 (*qadhif*) is itself defined as a *hadd* crime, punishable by 80 lashes (Quran 24. 23).<sup>21</sup> 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 *qadhif*, 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* (Quran 24. 6-7). Further, a confession of *zina* can be retracted at any time; and the doctrine of *shubha* (doubt, ambiguity)<sup>22</sup> 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 – 100 lashes for men and 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” (Quran 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; KRAMERS, 1961, p. 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 (Quran 24. 33); speaks of sex outside marriage as a sin to be punished in the Hereafter (Quran 17. 32; Quran 25. 68-71); and modifies existing practices to promote chastity and a standardised form of marriage. Eight verses (Quran 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 a new form of 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” (Quran 4. 15). The verse does not use the term *zina*; instead, *fahisha* (lewdness) is used, 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, 1997, p. 189),<sup>23</sup> the subject of the next verse, which states: “no punishment is specified for the man, as would be the case when a man was involved in the crime” (Quran 4. 16). It has also been argued that *fahisha* in Quran Surah an-Nisa, (Quran 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. The verse, however, 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 Quran, Surah an-Nur (Quran 24. 2), which reads: “The woman and the man guilty of adultery or fornication (*al-zaniyahwa 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 a modern nation state.<sup>24</sup> 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.

#### 4 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 those concerning 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.<sup>25</sup>

The contract automatically places a wife under her husband's *qiwama*, which is a mixture 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 'unhindered 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 conceptualised marriage as either a sale or as slavery.<sup>26</sup>

Certainly, there were significant differences and disagreements about this among the schools, and debates within each, with legal and practical implications.<sup>27</sup> 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, the intention here is to stress is that the notion and legal logic of 'ownership' and sale underlie their conception of marriage and define the 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 over a woman's movements. It is also this logic that justifies polygamy and defines the rules for the termination of marriage. A man can enter up to four marriages at a time,<sup>28</sup> and can terminate each contract at will. Legally speaking, *talaq*, repudiation of the wife, is a unilateral act (*iqā'*), 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 recognised grounds — which again vary from school to school.<sup>29</sup>

Another set of rulings that are invoked, today, to sanction control over women and to limit their freedom of movement are those on *hijab*.<sup>30</sup> They are used to prescribe and justify the punishment of women for non-observance of the dress code, using *ta'zīr*, 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 women's dress-code. The prominence of *hijab* in Islamic discourses is a recent phenomenon, dating to the Muslim encounter with colonial powers in the 19<sup>th</sup> century, when there emerged a new genre of Islamic literature in which the veil becomes both a marker of Muslim identity and an element of faith.

Classical texts — at least those that set out legal 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.<sup>31</sup>

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. 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 male 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.<sup>32</sup>

## 5 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 a modern state. As shown, these rules are, in theory, gender-neutral. They specify the same punishments 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, it is necessary to 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 the 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. They must not be approached anachronistically. Judgement should be suspended when dealing with past tradition. But this does not mean that this tradition has to be accepted blindly or that it can't be dealt with critically. In this time and context it also needs to be asked: 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 it is accepted – as it is here – 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 the production of religious knowledge. The further one moves from the era of the Prophet, the more it is found 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.<sup>33</sup> 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.<sup>34</sup> 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 *shar'ia* 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 7<sup>th</sup>-century Arab society and culture and the formative years of Islamic law (MIR-HOSSEINI, 2003, 2007, 2009).

In short, classical jurists' conceptions of justice and gender relations were shaped in interaction with the social, economic, and political realities of the 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 they are meant 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 19<sup>th</sup> 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, 1984, p. 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’ah*’, and their attempt to translate *fiqh* rulings into policy, have provoked Muslim women to increased activism, which some refer to as ‘Islamic feminism.’<sup>35</sup> The defence of patriarchal rulings as *shari’ah*, as ‘God’s Law,’ as the authentic ‘Islamic’ way of 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. This opened a space for an internal critique of patriarchal readings of the *shari’ah* 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.<sup>36</sup>

The emerging feminist scholarship on 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’ah* 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; 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 approach that was eclipsed when 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’ah* and *fiqh* constructs must be evaluated in their historical contexts.<sup>37</sup> This new trend of reformist thought helps to assess how these legal constructs have been reproduced, modified and redefined by those countries and communities that have reintroduced *zina* laws by ‘Islamising’ penal laws.

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 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.<sup>38</sup> 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 Arabia, which continued into the Islamic era, though in a modified form.

For example, it can be shown how death by stoning (*rajm*) takes its textual justification not from the Qur'an but from the Sunnah. 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,<sup>39</sup> as well as on human rights grounds. It can be stressed how the legal rulings in the Qur'an and the Sunnah 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.<sup>40</sup>

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, "(w)hile 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." (QURAIISHI, 1997, p. 296).<sup>41</sup>

Defining crimes according to punishment is itself a juristic development. The 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 is it stated specifically what these limits are (KAMALI, 1998, p. 219; 2000, p. 45-65). As Fazlur Rahman notes, in two verses (Quran 2. 229-230) 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, p. 240).

## 6 Summary and Conclusions

What are the implications of the analysis offered here for the Violence is Not Our Culture Campaign? This chapter 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? The chapter located *zina* laws in the context of the intersection between religion, culture and law in the regulation of sexuality in the Islamic legal tradition, and the shifting politics of relations between religion, law and gender in recent times. The premise here 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 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 secularisation of penal laws and criminal justice systems in the first half of the 20<sup>th</sup> century, and their 'Islamisation' 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.

International human rights law gives activists a conceptual framework and language in which to criticise 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 politicised, 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, practices, and religious traditions (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 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; 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 9/11 attacks, as well as the West’s unwavering support for Israel despite its escalating violations against the Palestinians and their land.<sup>42</sup> Claiming to be advocates of justice, Islamists thrive on being seen to oppose such outside interventions. In these new 21<sup>st</sup> 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, 1995b, p. 51). A campaign that can bring Islamic and human rights perspectives together can be more persuasive and effective.

To reiterate the main points of the argument in this paper:

- Strategies should be diverse and multi-levelled, 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 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 clerics (BUSKENS, 2003; COLLECTIF 95 MAGHREB-EGALITÉ, 2005); and in Pakistan, with the amendment of *zina* laws following the intervention of the Council of Islamic Ideology (COUNCIL OF ISLAMIC IDEOLOGY, 2006; LAU, 2007).
- As a general principle, if the aim is 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.

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## NOTES

1. Apart from *zina*, other categories of sexual relations criminalised 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 chapter.
2. For instance, many Arab states adopted the penalty for adultery and so-called 'crimes of passion' from European penal codes (Abu-Odeh, 1996, Welchman, 2007). The same happened in Iran.
3. See the websites of Women Living Under Muslim Laws (<http://www.wluml.org>) and the Violence is Not Our Culture Campaign (<http://www.stop-killing.org>). Last accessed on: Jun. 2011.
4. See Gallie (1956, p. 167-172); an essentially contested concept, in Gallie's terms, has 'disagreement at its core,' Terms and concepts like 'work of art' or 'democracy' or 'religion' inevitably involve endless disputes about their proper use on the part of their users. In other words, contestedness is an essential part of such concepts; there cannot be only one definition on which all agree.
5. For discussions of the tension between universalism and relativism in human rights, see: An-Na'im (1990, 1995a), Dembour (2001), Merry (2003), Sen (1988). 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).
6. In Kamali's words (2006, p. 37), "Shari'a demarcates the path which the believer has to tread in order to obtain guidance."
7. For 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, p. 49-56).
8. See Merry (2003) for an insightful discussion of ways in which culture and, along the way, anthropology as a discipline that studies culture, has been demonised in certain human rights discourses, which do not take into consideration the rethinking of the concept of culture in anthropology in recent decades. This has parallels with the demonisation of religion by those unaware of theoretical developments in religious studies.
9. For excellent accounts of anthropological approaches to violence against women, see Merry (2006, 2009).
10. This challenge has been the subject of many research projects and initiatives; see, for instance, *New Directions in Islamic Thought and Practice*, initiated in 2003 by the Oslo Coalition for Freedom of Religion and Belief ([www.oslocoalition.org/nd.php](http://www.oslocoalition.org/nd.php)), and *Musawah: A Global Movement for Equality and Change in the Muslim Family*, launched in 2009 ([www.musawah.org](http://www.musawah.org)). Last accessed on: Jun. 2011.
11. For a definition of Islamists as 'Muslims committed to public action to implement what they regard as an Islamic agenda,' see Mir-Hosseini and Tapper (2009, p. 81-82).
12. For a good account of these developments, see Merry (2006, p. 77-84).
13. For a general discussion of the 'Islamisation' of criminal law, see Peters (1994).
14. They 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).
15. For instance, 16 October 2009, Somali hardliners Islamic militia whipped women for wearing bras, as they defined it as 'provocative'. Available at: <[http://www.alarabiya.net/save\\_print.php?print=1&cont\\_id=88238&lang=en](http://www.alarabiya.net/save_print.php?print=1&cont_id=88238&lang=en)>. Last accessed on: Jun. 2011.
16. There is now a substantial literature on this; for instance, for Pakistan, see Jahangir and Jillani (1988); for Iran, Terman (2007); for Sudan, Sidahmed (2001); for Nigeria, Imam (2005) and Peters (2006).
17. For *fiqh*-based accounts, see Safwat (1982) and Bassiouni (1997); for an analytical view, see Peters (2005); for reformist and critical accounts, see El-Awa (1993), Kamali (1998, 2000, 2006, p. 184-189).
18. The inclusion of drinking alcohol and apostasy has no textual basis. Hanbali jurists do not define apostasy as a *hadd* crime (PETERS, 2005, p. 64-65); some jurists do not consider drinking alcohol as a *hadd* crime (EL-AWA, 1993, p. 2).
19. For an outline of *zina* rulings in Sunni schools and differences of opinion among the jurists, see IbnRushd (1996, p. 521-530).
20. A 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 ibnAnas, founder of the Maliki school of jurists, was reputed to have been a sleeping foetus. See Jansen (2000), Mir-Hosseini (1993, p. 143-46).

21. Translated by Abdullah Yusuf Ali, see Yusuf Ali (1997).
22. The 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).
23. For a groundbreaking study, see Kugle (2003, 2010).
24. For instance, the Islamic Republic of Iran uses the notion of '*elm-e qazi* ('judge's knowledge') 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).
25. This discussion is concerned with marriage as defined by classical jurists, not marriage in practice; for more detailed treatment of the subject, see Ali (2006, 2010a), Mir-Hosseini (2003, 2009). *Mahr* is sometimes inaccurately translated as 'dowry,' but this means property or cash that a wife brings her husband on marriage, as occurs in India and used to occur in Europe; the Muslim *mahr*, by contrast, is property that a husband gives his wife, and thus resembles the English 'dower,' a more appropriate translation.
26. For similarities in the juristic conceptions of slavery and marriage, see Marmon (1999) and Willis (1985).
27. For these disagreements, see Ali (2003, 2006) and Maghniyyah (1997); for their impact on rulings related to *mahr* and the ways in which classical jurists discussed them, see Ibn Rushd (1996, p. 31-33).
28. In 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).
29. Classical 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).
30. Many terms commonly used today in different countries for 'the veil,' such as *hijab*, *purdah*, *chador*, *burqa*, are not found in classical *fiqh* texts.
31. For the evolution of *hijab* in Islamic legal tradition, see Mir-Hosseini (2007).
32. For a critical discussion of these two assumptions, see Abou El Fadl (2001, p. 239-247). In some extremist circles today, even a woman's voice is defined as '*awra*.'
33. There is an extensive debate in the literature on this, which will not be entered into here. 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) and Spellberg (1991).
34. As Abou-Bakr (2003) 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.
35. There is a growing literature on the politics and development of 'Islamic feminism'; for discussions and references, see Badran (2002, 2006) and Mir-Hosseini (2006, 2011a, 2011b).
36. Feminist studies in Islam are too numerous to list here, but see especially Ahmed (1992), Al-Hibri (1982, 1997), Ali (2003, 2006, 2010a, 2010b), Barlas (2002), Hassan (1987, 1996) Mernissi (1991), Mir-Hosseini (2003, 2006, 2009, 2011a, 2011b), Wadud (1999, 2006).
37. For general introductions and some sample texts, see Kurzman (1998, 2002); Abu Zayd (2006).
38. For a discussion of Muslim feminists' discourse on *zina*, see Serrano (2009).
39. For examples, see Burton (1978, 1993), Engineer (2007), Kamali (2000).
40. For 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).
41. See also Karamah (n.d.).
42. For an incisive discussion of dilemmas encountered by international NGOs working in Muslim contexts, see Modirzadeh (2006).

## RESUMO

A autora oferece uma crítica feminista e baseada em direitos sobre as leis de *zina* na tradição jurídica muçulmana, a qual define como crime todas as relações sexuais fora do casamento civil.

No início do século XX, as leis de *zina*, que raramente eram aplicadas na prática, tornaram-se também juridicamente obsoletas em quase todos os países e comunidades muçulmanas; mas com o ressurgimento do Islã como uma força política e espiritual durante o século XX, em vários estados e comunidades as leis de *zina* foram seletivamente restabelecidas, codificadas e introduzidas no sistema de justiça penal, e aplicadas pela estrutura do Estado moderno.

A autora examina campanhas em curso para descriminalizar o sexo consensual, e argumenta que as leis de *zina* também devem ser abordadas a partir de dentro da tradição jurídica islâmica.

Explorando as interseções entre cultura, religião e direito que legitimam a violência na regulamentação da sexualidade, a autora propõe uma estrutura que pode conciliar os princípios islâmicos e de direitos humanos.

## PALAVRAS-CHAVE

Sexualidade – Violência – Gênero – Islã – Direito – Direitos humanos

## RESUMEN

La autora, desde una perspectiva feminista y basada en los derechos, critica las leyes de *zina* de la tradición jurídica musulmana, que penalizan todas las relaciones sexuales extramatrimoniales.

A principios del siglo XX, las leyes de *zina*, que rara vez se aplicaban en la práctica, se volvieron también obsoletas legalmente en casi todos los países y comunidades de tradición musulmana; sin embargo, con el resurgimiento del islamismo como fuerza política y espiritual a fines de ese mismo siglo, en varios países y comunidades fueron resucitadas, codificadas e implantadas en el sistema penal en forma selectiva, y fueron aplicadas por medio de la maquinaria estatal moderna.

La autora repasa campañas actuales destinadas a despenalizar las relaciones sexuales consentidas y sostiene que las leyes de *zina* también deben ser consideradas desde la tradición jurídica islámica.

Explorando las intersecciones entre la religión, la cultura y el derecho que legitiman la violencia en la reglamentación de la sexualidad, la autora propone un marco que puede unir los principios del derecho islámico y los derechos humanos.

## PALABRAS CLAVE

Sexualidad – Violencia – Gênero – Islam – Derecho – Derechos humanos