

# Women and the Law: A feminist treatment of gender inequality in Islamic society and culture

---

*By Cindy F. Daniel\**

## Introduction

One of the hallmarks of feminist discourse is the fact that it seeks to explain the role of women in society and the exploitation which they experience. In addition, it attempts to challenge the false assumptions of women's identity in various cultures. Of particular interest is the treatment of women in Islamic societies who have suffered discrimination as a result of gender-biased Islamic laws.

The laws in Islamic societies are reflective of female subjugation under a label of divine instruction, a position which feminists have found to be a clear violation of the right to equality to which all women are entitled naturally, if not legally. Many of them argue that these laws are a promulgation of male dominance, simultaneously viewing them as anachronistic in themselves, as well as posing flagrant violations of contemporary international human rights obligations.

The main focus of this paper is to analyze jurisprudentially with feminist perspectives the laws present in Islamic societies, with particular emphasis on those relating to rape, violence toward women and honor killing (murder). The jurisprudential analysis will also seek to question the validity of these laws, in light of the fact that they may bolster the actual violation of constitutionally protected human rights, while promulgating the subjugation of women and perpetuating male supremacy. Consequently, the feasibility of a shift from the patriarchal structure to one in which women enjoy equality with men in Islamic society will also be examined.

## Background and History of Islamic Law

Islam is derived from the Arabic word meaning 'peace' and is supplemented by two holy scriptural texts. The Qur'an, one of the holy texts of Muslims, is believed to be the word of God or *Allah*, sent through the Prophet Muhammad of Mecca 570-632 EC. Mecca

was a major pilgrimage site, but since polytheism was dominant at the time that the prophet had proclaimed his message, it was not initially accepted. It is believed that Muhammad was requested to be an arbiter/judge by the people of Yathrib (an oasis north of Mecca), so he and his followers left Mecca to pursue this request. There the community thrived. The institution of the *Ummah* or 'Community of believers' and loyalty to it was established as the main point of identification for early Muslims rather than a concept of the State, though this city went on to become known as al-Medina or 'city of the prophet' and is considered to be the archetype of an Islamic state.

As a result of the respect and esteem with which the prophet Muhammad's guidance as an individual were held, a documentation of the accounts of his teachings (known as *hadith*) were made, thus creating the second Holy Text i.e. the *Sunnah*. After the death of the prophet, there was no decline but rather an upsurge in the religion as it spread rapaciously over Asia, the Middle East (Persia) and to parts of North Africa including Morocco. The religion was maintained and presided over by successive *kaliphas* or caliphs, who had been the disciples of Muhammad striving to preserve his teachings.

The foundation of the law in Islamic states is extracted from the aforementioned holy texts, which are interpreted by the *Qadi* (Muslim religious judge) to produce *Shar'ia* or 'The Sacred Law'. All acts are categorized in the Shar'ia as

- Things commanded
- Things recommended
- Things left legally Indifferent
- Things reprobated
- Things forbidden by God himself

The Qur'an is holistic as an instructional tool, in that it delineates certain activities which are contradictory to the principles of Islam and declares the appropriate castigation. Punishment is separated into *Hadd* (fixed) and *Ta'zir* (discretionary) where Hadd punishment is deemed to be established by God in the Qur'an and Ta'zir is imposed by the Qadi where Hadd punishment has not been prescribed. Of note is the fact that class and social status is relevant to discretionary punishment. For example, a doctor would be given a lighter sentence than a janitor for committing the same offence. Hadd is the most severe of punishment

and offenses attracting this punishment include fornication (100 lashes), false accusation of fornication (80 lashes) and the drinking of wine (40 lashes), adultery (death by stoning for a woman) and theft (amputation of the hand).<sup>1</sup>

Since Islamic law is a combination of the divine law derived from the Holy texts of the Sunnah and Qur'an, as well as the social policies created for maintenance of order, the law found in Islamic countries experiences a greater rigidity of form and enjoys a marked reverence from the societies which it regulates. There is also a notable lack of the distinction between rules deemed to be legal and those deemed to be ethical in nature, and in its stead is found a marriage of the two. In many Islamic countries, there is a federal court applying Shariat law which is an official organ of the state, as well as *jirgas*<sup>2</sup> which operate independently using their discretion to pass judgments. The Federal Shariat court of Pakistan which was established in 1980, for example, has the power to annul any codified law that it considers to be in conflict with Islamic injunctions.

In the holy books, the distinction between men and women is made clear and the resulting law as interpreted by Islamic scholars treats the man as a distinct being from the woman. The roles of women found in the Holy books are domestic and the scriptures advocate subjugation of women to their husbands and male relatives. As a result of the imbalanced power distribution found in the Holy texts, in the vast majority, if not on all occasions, the male in an Islamic society is elevated to a level of prominence while the female is given a subordinate role and must obey the male i.e. the notion of *qawwamun*, which provides men with a degree of authority over women. Since this male domination is buttressed by the holy texts, it is considered by Muslims to be a substantial ground for validating the credibility of this approach.

## The Current Islamic Legal and Social Position

### The Constitution of Pakistan:<sup>3</sup>

Article 25(1): All citizens are equal before the law and are entitled to equal protection of law.

Article 25(2): There shall be no discrimination on the basis of sex alone.

## Comment: "Islam grants an inferior status to women."

Reply: "This is wholly contrary to fact. Muslim scholars agreed that Islam accords women virtually the whole gamut of rights including the right to property, to work and wages, to choice of spouse, to divorce if marriage does not prosper, to education and to participation in economics, social and political activity. These are guaranteed to Muslim women by Shariat."

The comment has been made and the reply has been given, yet the prized ideal is not the morose reality. Even in the face of growing international outrage at the discrepancies between obligations to protect human rights and the enforcement of Islamic laws, women in Islamic societies experience the brunt of gender-biased laws aimed at female suppression. Islamic law debatably facilitates violence against women because it legitimizes various forms of violence and creates a difficult social situation whereby restitution for violations cannot be comfortably sought. Since these laws have their foundation in the Islamic Holy texts, it is exceedingly difficult for women to have them derailed and in many instances, the women themselves agree to their perpetuation since they fear *Allah* from whom these laws are viewed as religious derivatives.

### Examples of Legislation: Lebanese Penal Code of 1949<sup>s</sup>

Article 562: Whoever having surprised his wife, his female ascendant or descendant or his sister in the act of adultery or having illicit sexual relations with a third person and having committed non-premeditated homicide or injury on one or the other of the persons involved shall benefit from a defense which **wholly excuses him**.

*Whoever commits such homicide or injury where he surprises his wife or his female ascendant or descendant or his sister in compromising circumstances shall benefit from extenuating circumstances.*

### Pakistani Penal Code of 1860

*Section 300: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which death is caused is done with the intention of causing death...*

Exception 1: Culpable homicide is not murder if the offender whilst deprived of the power of self control by *grave and sudden provocation*, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Thus, in Pakistan, Syria and Lebanon for example, the baseness of murder is mollified if it is perceived to be in defense of family honor. The accused generally are acquitted by *jirgas*<sup>6</sup> when they have acted with the aim of preservation of family honor. This lacuna in the law has been indiscriminately exploited by persons who fraudulently present these defenses to evade conviction after committing murder for unrelated issues such as property disputes. There have been cases where a bride has been purchased simply to be murdered along with an enemy framed as being her paramour. This practice has become so widespread that there has been a request that honor killing cases be heard before a federal court instead of the *jirgas*.

These laws create an environment whereby male members may kill with impunity a *siabkar*<sup>7</sup> female member of the family and her lover. The legal implications of such provisions tend to lead to complications in the criminal process. In the case of *Behram v. The State of Pakistan*,<sup>8</sup> the 25 year old appellant and his 20 year old cousin Mahmud were being tried for the murder of Mahmud's sister and her lover. Mahmud had discovered his sister in a compromising position and had called out to his cousin to help him kill the adulterers by stabbing them repeatedly. The obvious defense available to the both of them was that of "grave and sudden provocation."<sup>9</sup>

Mahmud was sentenced to imprisonment until the end of the day's court session, but Behram was sentenced to transportation for life.<sup>10</sup> The court held the defense to be unavailable to him since he had not witnessed the act, but was called by his cousin and so he could not have suffered the provocation. He appealed on the ground that he was a close relative, living in the same settlement yard so that knowledge alone of this travesty was sufficient to make him impassioned to a degree that would afford him the provocation defense. His appeal resulted in the substitution of his sentence to 3 years rigorous imprisonment.

A report on the Aspects of the Rule of Law and Human Rights in the legal system of Pakistan<sup>11</sup> has shown that there is an alarmingly high rate of violence and sexual offences against women, but the victims

insist that they are afraid to use the criminal justice system. Women continue to be arbitrarily detained, raped and tortured by officers of the State, such as police and security personnel. Custodial rape is one of the most notorious of problems plaguing Pakistani women, yet in the majority of these cases nothing is reported. This stems from their trepidation of being charged under the *Zina Ordinance of 1979*<sup>2</sup> should their claim fail to be substantiated in court. The prevalence of this ordinance flouts Pakistan's international obligations since the State had ratified the Convention on the Elimination of all Forms of Discrimination against women in March 1996, after their gross human rights abuses were documented in Amnesty International's Report in December 1995.<sup>13</sup>

The Convention protects these fundamental rights of women which are constantly being infringed through the manipulation of current legislation by villainous individuals. In addition to this, the ratified Convention requires all state parties to repeal existing laws which are discriminatory and to ensure the prevention of possible future discriminatory laws against women.

### **Article 2 of the convention states:**

State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:...

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women<sup>14</sup>

To compound problems, women must seek the consent of their *wali* or paternal guardian i.e. the father or paternal grandfather for the validation of a marriage contract. Although there is no law which elaborates this specifically, (with the marriage license having slots allotted for the signatures of the bride, groom and two witnesses only) the generally accepted custom allows for a marriage to be vitiated if there is no consent from the *wali*. This would mean that a father who is displeased with his daughter's independent choice of a spouse

can challenge the validity of the marriage, thus exposing the couple to the harshness of the Zina Ordinance if the marriage has been consummated.

The cases of Ayesha Ijaz of Toba Tek Singh and Shabina Zafar of Faisalabad illustrate the plight of young women who wish to exercise their right to freedom of choice in determining a mate, but are thwarted by the patriarchal dominance of their society. After having married men of their choice, their fathers registered cases against the two women contending that their marriages were void for lack of consent from their *walis* and asserting that as a result, they had committed the offence of Zina. The women attempted to have the cases quashed since they affirmed that they were *sui juris*.<sup>15</sup> It was held that the couples were to be prosecuted in accordance with the Zina Ordinance. The judgment, however, was suspended by the Supreme Court following the admission of the appeals. The daughters were returned to the custody of their fathers pending the outcome of the trial.<sup>16</sup> This decision must be seen in light of the suspected 95% of Pakistani women experiencing domestic violence<sup>17</sup> and the then piqued importance of spouse selection.

Systematically, women have been marginalized and mistreated as a consequence of the laws enacted in these Islamic states. These abrasions of Human Rights and overt discrimination against women have been deemed sacrilegious by many in the international community including feminist groups, and it has been argued that the shield of Islamic culture is insufficient to ameliorate the indignation elicited by these violations.

## **Feminist Theories of Jurisprudence**

### **► Brief History of Feminism**

The Feminist movement may arguably have had its origins with a lady named Mary Wollstonecraft, born in 1759, who was a vociferous advocate for women's rights and equality of opportunity with respect to education and employment. Her work was not greatly popular as a result of the gender climate at the time, but the Women's Suffrage movement in the early 1900s led a marked increase in the leverage afforded to women in the 20<sup>th</sup> century. This movement was headed mainly by Emmeline Pankhurst and her daughter Christabel. The more substantial foundation of feminist awareness though, began to flourish

from the late 1960's and 1970's during the sexual revolution. These female activists sought to promulgate equality between the sexes and encouraged female independence founded in economic and political stability on par with that of males. These feminists included Katherine MacKinnon, Simone de Beauvoir and Carol Gilligan.

## ► Feminist Jurisprudence

'Feminist thought seeks to analyze the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated.'<sup>18</sup> This branch of jurisprudential thought is also concerned with proffering a critique of law through attempting to legitimate social relations and questioning the masculine hierarchical structures and institutions created by the law. They approach jurisprudence in the same manner that traditional jurists do, simply modifying the questions to be asked by encompassing women specifically.

Initially, we must acknowledge the basic difference between sex and gender for this discussion to be well grounded. Sex is determined by genitalia at birth, though gender refers to that role which the individual is socialized to fill, considered either masculine or feminine. Feminists argue that the role women have been socialized to fill preempts their enjoyment of the same rights afforded to men and thus, an imbalanced construct is created forming a mechanism for gender inequality. Feminists aim to demolish this stereotype and to create a new image of woman equal to that of man in terms of status and bargaining power.

The Feminist investigation into law is characterized by three features.

1. Asking "the woman question"- i.e. determining and recognizing the experiences of women in relation to the law in that they may be disadvantaged by existing standards.

2. Employing Feminist Practical Reasoning which arises from the context which pays attention to the differences between all individuals and appreciates the experiences of those lacking power.

3. Consciousness Raising whereby individual awareness of the collective struggle through a sharing of the experiences of women.

Within the feminist school of thought, there exist divisions.



Although they all agree that women are dominated by men, they vary in their explanation of the root cause for the subjugation of women by men. Furthermore, it has been the topic of debate among feminists that although they claim to be equal to men i.e. the “sameness approach,” they are biologically and sociologically fundamentally different “the difference approach.” Thus, there exist subcategories all falling under the umbrella of feminist legal theory. However, these caucuses may be distributed under five major headings:

- Liberal feminists
- Radical Feminists
- Marxist and Social Feminists
- Cultural Feminists
- Postmodern feminists

### ► **Liberal Feminism**

‘Liberal Feminists equate equality with equal treatment without accommodating for any difference between men and women.’<sup>19</sup> For these women, equality can be achieved through gradual social, political and economic change. They view the patriarchal system as harmful to both males and females by depriving both sexes of what the other is socialized into having. Their main aim is the creation of equal opportunities for work and education and the eradication of gender stereotypes.

### ► **Radical Feminism\***

As the name suggests, radical feminists take an aggressive approach to their application of theory. They believe that the exploitation of women should be blamed on men since men have benefited most from the subordination of women. There is a sense of antagonism associated with men as some radicals see rape and violence toward women as the methods by which men have wielded continuous power over women. Furthermore, they attest that only revolutionary change can offer liberation. For them, the family is perceived as the main oppressive institution.

A general promotion of androgyny where men and women are not significantly different would therefore be desirable. Catherine MacKinnon is perhaps the most notorious of the radical feminists considered equality in terms of power distribution. Legislation regulating the workplace would remove with one hand and replace with the other

since the power struggle would then be transposed from the public to the private domain of the home.

### ► **Marxist and Socialist Feminism**

This group of feminists does not ascribe the manipulation of women entirely to men since they view capitalism as a major contributing factor to women's oppression. The unpaid domestic labour of women aids the capitalist structure and their childbearing aids in the proliferation of the workforce. Unlike radicals, the Marxist feminists see an opportunity for cooperation between the working class men and women, whereas a distinction is to be drawn between the ruling class women and those of the proletariat.

### ► **Cultural Feminism\***

This group of feminists, of which Carol Gilligan is a member, suggests that the differences between men and women should be embraced. They conclude that women are not men and they may be afforded the same rights without having to lose their special identity as women. Biological differences are integral to gender socialization for this faction and they seek to promote the positive attributes of womanhood such as emotional sensitivity and connectedness.

### ► **Postmodern Feminism**

Unlike the other branches of feminism, postmodern feminists are problematic to the unified vision of the other groups. These feminists reject the essentialism propounded by the other segments since they find it inimical to feminist progress to believe that there is one ideal sought by all women regardless of religion, age, culture etc. They avoid the discreet categorization of the essential woman and fail to see how any single aim can benefit all women. They are instead concerned with the practical solutions for equality problems.

## **Analysis of the Law using Radical Feminist Discourse**

'Feminism has no theory of the state. It has a theory of power: sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other.

This is the social meaning of sex and the distinctively feminist account of gender inequality.<sup>720</sup> Accordingly, we must question the distribution of power. In the Islamic societies examined, the man is afforded power rationalized by the holy texts of the Qur'an and the Sunnah. This fulfills Katherine MacKinnon's first element of female subjugation in that greater power is allocated to the males in society, providing them with the dominant role, leaving the females with the submissive role. This dynamic facilitates the exploitation and manipulation of women in a twofold method i.e. women are subjugated because it is the law, and also because it is the law as per *Allah* i.e. the naturalist/positivist marriage. A patriarchal hegemony is created.

The Islamic laws make the assumption that women are not interested in sharing the same positions in society and in having the same opportunities as men. This clearly reveals a patriarchal approach to lawmaking having adopted the stereotypical assumptions of the roles of women. Of the legislation highlighted, the laws regarding adultery and extramarital sex in particular create an object of punishment for the male victim's ego, usually the sexually objectified woman. Though this may include the male adulterer involved, it invariably includes the female. It cannot be sensibly argued that these laws offer any rehabilitary purpose but rather seek to cultivate fear in women as a preventative measure for adultery or fornication. The ability to murder an adulteress assuages only the immediate anger of the murderer and not the social problem of adultery. These can undoubtedly be interpreted as gender-biased laws

Furthermore, it has been debated that through the exemplification of murder as collateral damage for female honor, the sanctity of life is denigrated resulting in a perpetuation of violence against women. Violent acts against women are actually legalized in these societies making the distinction between the crime of murder and the act of murder nebulous. The absence of domestic violence legislation in Pakistan is also in itself an indicator of the inability of the masculine state to protect the rights of women and further facilitating violence toward them, though this time through a negative act of failing to legislate. Concerns of women are not represented legislatively, leading to a further erosion of the abstract concept of equality before the law.

"Gender equality requires that the State be held responsible in situations where the criminal justice system does not investigate and prosecute violence against women and consequently infringes the

equal protection guarantee contained in the constitution.”<sup>23</sup>

The plethora of custodial rape cases which never get to the courts is also of paramount importance in determining whether the laws are gender biased and infringe the right to justice. As MacKinnon states, where the legal system has seen the intercourse in rape, the victims see the rape in intercourse. While, Islamic law requires the testimony of 4 male witnesses to possibly secure a conviction, the testimony of 10 women will not be accepted. This anomaly is further exacerbated by the fact that losing a case for rape will expose the victim to possible punishment under the Zina Ordinance. This demented miscarriage of justice may be argued to be tantamount to cruel and inhumane punishment. The maintenance of this Order can only lead to a further pungency of fear in women.

Upon closer examination, this piece of legislation contravenes the right to the protection of the law by having mechanisms which protect the men from wrongful detention but not the women. There is instead the double jeopardy involved in this heinous and violent offence whereby the male demonstrates his supremacy. It is submitted that the Zina Ordinance is the most empirically discriminatory piece of legislation examined.

## **Recommendations**

### **General**

- Gender sensitization of judges, lawyers, police and executive is indispensable
- Women should be encouraged to become economically independent of husbands, employers, partners, fathers
- More women should be recruited to the police force and prison services with the same powers afforded to them as to their male counterparts
- The Zina Ordinance should be omitted from State law Rape (Custodial and non-Custodial)
- Regimented application of the existing safeguards which are currently ignored such as the necessity of having a female officer present during custody and questioning of women.
- Stringent guidelines need to be adopted for the procedure associated with the medical examination of rape victims.

- Identity of victims of sexual offenses should be withheld and they should be entitled to in camera proceedings.
- The burden of proof for sexual offenses should be revised from the existing Domestic Violence
- The reporting of domestic violence cases should be made mandatory by medical practitioners.
- Support for litigants must be advocated under new laws.

## Conclusion

The laws found in the Islamic Systems that we have scrutinized are clearly the resultant of patriarchal societies which have flourished directly on account of the exploitation of women. The social conditions that we have examined have been determined to be perpetuated by the legal framework which engenders the female subordination dynamic. In addition, the evidence considered is indicative of an abuse of Islamic textual principles with the aim of the justification of the subjugation of women by men.

The shroud of shame is worn humbly by women who fear their Lord and the men in these societies have taken advantage of the women's apparent need to tolerate the divine instruction handed down to them. The product of these variables is the misuse of power, the creation of violent sexual deviants and a masculine concept of the diminished value of female life and dignity. This has obviously led to the women's human rights contraventions highlighted and the substratification of male supremacy within these societies.

It is therefore submitted that women will only enjoy the true equality which they deserve if these laws are amended and a slow but sweeping revolution of change in the attitude of the Islamic men were to result from social pressure. This social pressure must come from both the unification of the women in their effort to combat their faced dominance and from other men who have been made socially conscious of the deplorable state of oppression which exists. This ideal is not impossibility, though it will only remain an ideal unless serious effort is put into the transfiguration of the current Islamic systems by persons both outside and inside of the labyrinth.



\* Cindy F. Daniel is a first year law student at Hugh Wooding Law School, Trinidad and Tobago.

1. *Saudi Arabia still uses these punishments for larceny, fornication and adultery.*
2. *These are tribal assemblies which govern more remote areas. Civil wars in some countries have made certain vicinities virtually ungovernable and their de facto autonomy is accepted as organized government.*
3. *Equivalent to Article 12(1) and 12(2) respectively of the Constitution of Sri Lanka.*
4. *Justice Nasir Aslam Zahid, Report of the Commission of Inquiry for Women, Pakistan, 1997.*
5. *Equivalent to Article 548 of the Syrian Penal Code of 1946.*
6. *Ibid 2.*
7. *Literally means wicked; siahkari used for connoting an adulteress.*
8. *Quetta Circuit. Criminal Appeal 21 of 1963.*
9. *Exception 1 of section 300 Pakistani Penal Code. See page 6.*
10. *Transportation for life is equivalent today to rigorous punishment, approx. 20 years.*
11. *Report on Aspects of The Rule of Law and Human Rights in the Legal System of Pakistan. International Bar Association. Human Rights Institute, London. (December 1998).*
12. *Zina means extramarital sexual relations. The Zina Ordinance enables the prescription of punishment to victims whose rape claims have failed in court. This is possible because the bringing of the charge itself is irrefutable evidence that the victim did have extramarital sexual relations even though it may not have been consensual. Furthermore, the threshold for being termed an adult legally is 18yrs for males whereas it is the age of puberty for females so young girls may be sentenced to Hadd punishment under this ordinance.*
13. *Amnesty International, "Women in Pakistan: Disadvantaged and denied their rights", (December 1995).*
14. *Convention on the Elimination of all Forms of Discrimination against women, March 1996.*
15. *Having the capacity to act independently after attaining majority in the eyes of the law.*
16. *At the time of the dissemination of the article, the appeal was yet to be determined.*
17. *Amnesty International, "Pakistan: When Human Rights Remain a Dead Letter", 1997.*
18. *M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, London: Sweet & Maxwell, 2001 p. 1124.*
19. *W Williams, 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism' in K. Bartlett and R. Kennedy (eds) Feminist Legal Theory (1991) Westview Press.*
20. *Katherine MacKinnon, Feminism, Marxism Method, and the State: Toward Feminist Jurisprudence. Excerpted from its original publication in signs: Journal of women in Culture and Society 7.1983.*
21. *Shyamala Gomez and Mario Gomez, Gender violence in Sri Lanka: From Rights and Shame to Remedies and Change, CIDA's, 1999 pg 39.*