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# *Muslim World Journal of Human Rights*

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*Article 7*

THE TRANSNATIONAL MUSLIM WORLD, HUMAN RIGHTS, AND  
THE RIGHTS OF WOMEN AND SEXUAL MINORITIES

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## Dual Subordination: Muslim Sexuality in Secular and Religious Legal Discourse in India

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# Dual Subordination: Muslim Sexuality in Secular and Religious Legal Discourse in India\*

Aziza Ahmed

## Abstract

Muslim women and Muslim members of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community face a specific form of dual subordination in relation to their gender and sexuality. A Muslim woman might seek solace from India's patriarchal religious judicial structures only to find that the secular system's patriarchal structures likewise aid in their subordination and create a space for new forms of such subordination. Similarly, a marginalized LGBT Muslim might attempt to reject an oppressive religious formulation only to come to find that the secular Indian state might criminalize a particular form of sexuality. This analysis explores how Indian laws "give meaning" to sexuality through the legal structures manifested by state and religious regulatory bodies and argues that both religious and state legal institutions need to be reformed to create a legal environment that furthers rather than inhibits a full realization of sexual rights.

**KEYWORDS:** India, Islamic Law, LGBT rights, human rights

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## I. INTRODUCTION

Muslims in India account for 12 percent (101.59 million) of the population and are India's largest religious minority. Muslim women in India have lower work participation rates and educational levels compared to other minority groups in India.<sup>1</sup> Data on the LGBT community in India, particularly the Muslim LGBT community, is very sparse. What information does exist tends to focus on men who have sex with men (MSM) highlights the highly stigmatized existence of sexual minorities<sup>2</sup> manifesting in police abuse, "moralistic judgmentalism," and increased vulnerability to sexual violence and abuse.<sup>3</sup>

Muslim women and members of the Muslim Lesbian, Gay, Bisexual, and Transgender (LGBT) community face a specific form of dual subordination in relation their sexuality. For example, Muslim women might seek solace from the patriarchal structures of the religious judicial bodies only to find that the patriarchal structures of the secular system both aid in their subordination and create a space for new forms of such subordination.<sup>4</sup> Likewise, a marginalized LGBT Muslim might attempt to reject an oppressive religious formulation only to come to find out that the secular Indian state might criminalize a particular sexual act that they engage in. The rise of communal violence has further alienated the Muslim population both socially and economically and as a result turned the Muslim community further inwards.<sup>5</sup> Social and economic disenfranchisement also contributes to the vulnerability of Muslims to HIV/AIDS, particularly women and members of sexual minorities given their stigmatized sexuality (and in the case of women an assumed lack of agency). Given these various dynamics

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<sup>1</sup> Minority Rights Group International. *Muslim Women in India*. (United Kingdom: Minority Rights Group, 1999).

<sup>2</sup> Naz Foundation International. *MSM and HIV/AIDS in India*. (Naz Foundation International, 2004, accessed April 21, 2007) available from <http://www.nfi.net/NFI%20Publications/Essays/2004/MSM,%20HIV%20and%20India.pdf>; Internet.

<sup>3</sup> Human Rights Watch. *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*. (Human Rights Watch, 2002, accessed April 21, 2007. available from <http://www.hrw.org/reports/2002/india2/india0602-01.htm>; Internet.

<sup>4</sup> This is not only specific to Muslim communities in India, this duality exists in other Muslim minority settings. For example: "Muslims in the United States are in a complex position when it comes to applying family law, because they are governed by two sets of relevant rules, one religious and the other secular: Islamic law governs the family relations of those Muslims who want to validate before God their most intimate relations, while, simultaneously, US law binds them through simple territorial sovereignty." Asifa Quraishi and Najeeba Syeed-Miller, "No Altars: a Survey of Islamic Family Law in the United States," *Women's Rights and Islamic Family Law Perspectives on Reform*, ed. Lynn Welchman. (London: Zed Books., 2004), 179.

<sup>5</sup> Human Rights Watch. *We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat*. (Human Rights Watch, 2002, accessed 21 April 2007); available from <http://hrw.org/reports/2002/india/>.

surrounding the Muslim community, this analysis explores how Indian laws “give meaning”<sup>6</sup> to sexuality through the legal structures manifested by state and religious regulatory bodies. Given the dual subordination of Muslims by religious and secular codes of law, both religious and state legal institutions need to be reformed to create a legal environment which furthers rather than inhibits a full realization of sexual rights.

Section II begins with an explanation of relevant legal frameworks including the role of Islamic law in India and the international human rights framework for sexual rights and the right to health. Section III locates the sexual rights of Muslim women and sexual minorities within domestic and secular discourse by a presentation and analysis of the various ways in which scholars have located rights within Islam and then moves to an analysis of the struggle with state and religion in the Indian context regarding the sexuality of women and sexual minorities. This analysis acknowledges that activism in the arena of women’s rights is not necessarily a site of resistance for a broader movement for gender identity and gender expression. Rather, the construction of women’s rights has often “encoded” the definition of “woman” premised on a common experience of subordination.<sup>7</sup> Finally, while the struggle over national identity co-opted by the Hindu Right is not discussed as a section on its own it is integrated throughout the paper with full acknowledgement that a conversation about Muslim rights in India cannot ignore a fundamentally violent and anti-Muslim movement that remains authoritative in legal, policy, social, and cultural realms.<sup>8</sup> Section IV reminds us of the HIV/AIDS implications for India’s failure to realize sexual rights.

## II. LEGAL FRAMEWORKS

### A. A BRIEF HISTORY OF ISLAMIC LAW IN INDIA

Shariat law, or divine law according to most Muslims,<sup>9</sup> was first introduced in India by the Sultanates of Afghani and Turkish rulers around the 12<sup>th</sup> and 13<sup>th</sup>

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<sup>6</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

<sup>7</sup> Wendy Brown, “Suffering the Paradoxes of Rights,” in *Left Legalism, Left Critique*, eds. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 422.

<sup>8</sup> Hindu Unity. *Home Page*. Available from [www.hinduunity.org](http://www.hinduunity.org) (accessed 21 April 2007); Vishva Hindu Parishad. *Why Vishva Hindu Parishad?* Available from [http://www.vhp.org/englishsite/a-origin\\_growth/whyvhp.htm](http://www.vhp.org/englishsite/a-origin_growth/whyvhp.htm) (accessed 21 April 2007); Human Rights Watch. *We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat*. (Human Rights Watch, 2002, accessed 21 April 2007); available from <http://hrw.org/reports/2002/india/>.

<sup>9</sup> Mohammad Hashim Kamali. *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society, 2003), 324.

century AD. There are several schools of interpretation of Islamic law including the Hanafi, Maliki, Hanbali, Shafi'i, Zahiri, and Shi'i.<sup>10</sup> In India the majority of Muslims are Hanafi, however, there are several large Shi'i communities including the Dawoodi Bohra and Ismaili communities. In western India, depressed classes generally converted to Sunni Islam, while individuals belonging to intermediate castes generally became Shias. Today Shias are approximately 10-15 percent of the total Muslim population.<sup>11</sup> Amongst Muslims there are over 350 regional or ethno-linguistic Muslim groups. India's Muslims have always been closely connected to the Hindu communities and have maintained many similarities in practice and custom.<sup>12</sup>

The development of Shariat law in India is a product of India's colonial legacy. In *Gender and Community: Muslim Women's Rights in India*, Vrinda Narain argues that while the British asserted that the establishment of personal law was to "facilitate the freedom of the individual in the marketplace" the underlying objective was to utilize a decentralized power structure vis-à-vis scriptural and religious norms to maintain strict constraints upon individuals in families and communities.<sup>13</sup> In doing so, the British were able to maintain power and the political and economic goals of the colonial state through supporting a framework that allowed for the religious elite to maintain their own power.<sup>14</sup> Narain further argues that one cannot see Indian Muslim law as representative of Shariat law. Rather, one must recognize that Islamic law as influenced under British rule is substantially different from strict Islamic Shariat law and could be more appropriately called Anglo-Mohammedan law<sup>15</sup> diverging significantly from its original sources. The effort of the British to create a formal space for Muslim Personal Law was codified in the Muslim Personal Law (Shariat) Application Act of 1937.<sup>16</sup>

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<sup>10</sup> Id.

<sup>11</sup> Minority Rights Group International. *Muslim Women in India*. (United Kingdom: Minority Rights Group, 1999).

<sup>12</sup> Flavia Agnes. *Law and Gender Inequality: The Politics of Women's Rights in India*. (Delhi: Oxford University Press, 1999).

<sup>13</sup> Vrinda Narain. *Gender and Community: Muslim Women's Rights in India*. (Toronto: University of Toronto Press, 2001).

<sup>14</sup> Vrinda Narain. *Gender and Community: Muslim Women's Rights in India*. (Toronto: University of Toronto Press, 2001).

<sup>15</sup> Id.

<sup>16</sup> Muslim Personal Law (Shariat) Application Act of 1937: all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mabaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslims shall be the Muslim Personal Law (Shariat).

## B. CURRENT STATUS OF MUSLIM LAW IN INDIA

Partition saw the division of South Asia into countries primarily distinct on the basis of religion. Muslim law in India, and in particular the status of women in Muslim law, has evolved into a complex mixture of religious freedom, minority rights, and state policy towards the “accommodation of difference.”<sup>17</sup>

The constitution of India safeguards minority rights. Article 14 of the Constitution grants equality to all citizens on grounds of caste, language, or religion.<sup>18</sup> Articles 26, 27, and 28 of the Indian constitution minorities have the right to manage their own religious affairs, are not compelled to attend state-funded religious institutions, and receive equal treatment for minority-managed institutions.<sup>19</sup> Article 44 of the Indian Constitution which includes provision for a Uniform Civil Code (UCC) that was initially introduced when the Congress Party appointed a National Planning Committee (NPC) in 1939 and 1940 to plan for economic and social development in the future independent India.<sup>20</sup> Designed by the Women’s subcommittee, the idea was that a UCC would eventually replace the personal law system. Women’s rights groups consistently advocated for the eradication of the personal law system through the 1940s. In 1947 the formal proposal to enact a UCC was introduced to the Constituent Assembly. Although

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<sup>17</sup> Vrinda Narain. *Gender and Community: Muslim Women’s Rights in India*. (Toronto: University of Toronto Press, 2001).

18 14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

19 26. Freedom to manage religious affairs.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—(a) to establish and maintain institutions for religious and charitable purposes;(b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

27. Freedom as to payment of taxes for promotion of any particular religion.—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.—(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

<sup>20</sup> Article 44. Uniform civil code for the citizens.—The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.



conceptualized as a fundamental right the provision was only included in the constitution as a directive principle. The constitution through Article 37 establishes that it is the duty of the state to apply the directive principles in order to bring about “positive social change.”<sup>21</sup> It has been argued that the inability during the time of independence to forward the UCC as a fundamental right was largely due to fear of Muslims and Sikhs that their religious rights would be overridden in the context of partition.

A foundational moment in the state’s validation of Islamic law is the oft cited case of *Mohd. Ahmed Khan vs. Shah Bano Begum & Ors (Shah Bano)* decided in the Supreme Court of India in 1985. Shah Bano, a 73 year old Muslim woman, divorced by her husband brought a petition of maintenance from her husband under Section 125 of the Criminal Procedure Code (CPC).<sup>22</sup> In accordance with Muslim personal law (as asserted by Muslim scholars), she would have been entitled to maintenance for the period of *iddat*, defined as the period three months after the divorce.<sup>23</sup> The Supreme Court overrode the interpretation of the Shariat by Muslim leadership and ruled that under Section 125 of the CPC Shah Bano was entitled to maintenance beyond the period of *iddat*.<sup>24</sup> The Muslim community, inspired by conservative and orthodox Muslims protested the decision under the auspices that Islam was in danger, arguing that the court had overstepped its bounds given that the view of Muslim theologians that they alone were able to interpret the Quran.

Largely due to the backlash inspired by the Shah Bano decision, an independent member of parliament introduced the Muslim Women’s (Protection of Rights on Divorce) Act, 1986 which provided that Section 125 of the CPC does not apply to divorced Muslim women.<sup>25</sup> A strange political pairing of feminists and the Hindu Right campaigned against the bill, the Hindu Right often co-opting the arguments of the feminist movement. Further, the Hindu Right saw the bill as an exemplification of the governments’ “pandering to minorities”. The active involvement of the Hindu Right in opposing the *Shah Bano* decision raised suspicion within the Muslim community that the judgment was intended to undermine Islamic law in accordance with the agenda of the Hindu Right.<sup>26</sup>

In 1985, the *Danial Latifi & Anr. vs. Union of India* decision the court found that the liability of a Muslim husband to his divorced wife to pay maintenance is not confined to the *iddat* period. In *Danial Latifi* the court’s

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<sup>21</sup> Vrinda Narain. *Gender and Community: Muslim Women’s Rights in India*. (Toronto: University of Toronto Press, 2001).

<sup>22</sup> *Danial Latifi vs. Union of India*, 1985 (2) SCC 556.

<sup>23</sup> Muslim Women’s (Protection of Rights on Divorce) Act, 1986

<sup>24</sup> *Mohd. Ahmed Khan vs. Shah Bano Begum & Ors*, 1985 (2) SCC 556

<sup>25</sup> *Id.*

<sup>26</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

interpretation held that the Muslim Women's (Protection of Rights on Divorce) Act would be unconstitutional if not understood to mean that women would get a reasonable and fair provision of maintenance. However, despite reasoning that the bill actually contained a provision for Muslim women's maintenance beyond *iddat* the court stopped short of declaring the act unconstitutional.<sup>27</sup> The court's interpretation of Muslim women as deserving of the fundamental rights protections offered in the constitution was furthered by the decision *In re, Smt. Amina* decided in the High Court of Bombay in 1991 in which the court articulated that the "Constitutions framers did not intent to exclude personal laws from the ambit of Article 13<sup>28</sup> of the Constitution."<sup>29</sup>

The Panchayat system also plays a key role in governing Muslim lives. Panchayat's are codified in the constitution of India in Part IX Section 243.<sup>30</sup> There is evidence to suggest that Panchayats in India date back to 1200 B.C. Joti Sekhon outlines the history of the Panchayat:

These councils, usually controlled by upper-caste men, were responsible for governing village affairs and managing land and taxes...Initially the British, who consolidated their rule in India in the 18<sup>th</sup> century, did not pay much attention to the villages as long as the local elite collected and paid taxes, but after the revolts of 1857, the British initiated a series of measures to decentralize local government. However, the administrative structure remained very hierarchical with little effective control at the local level.

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<sup>27</sup> "Hullabaloo over triple Talaq in India." South Asian's Citizen's Wire. (India : South Asian Citizen's Wire, accessed 21 April 2007) available from <http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-64559>.

<sup>28</sup> Article 13. Laws inconsistent with or in derogation of the fundamental rights.—(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

<sup>29</sup> *In re, Smt. Amina*. In the High Court of Bombay. Manu/MH/0039/1992

<sup>30</sup> Indian Const. § 243 a-o.

After independence, calls for greater local participation in development projects led to the government's establishment of commissions that "recommended measures to facilitate local involvement through Panchayats." The 1993 73<sup>rd</sup> amendment to the Indian constitution provided a three-tier structure of elected representation which include the village, intermediate (group of villages), and the district level. The amendment requires that one third of the total seats are reserved for women and includes a separate reservation for scheduled castes and tribals.<sup>31</sup> Despite the constitutional provision for reservation, many Muslim women's rights activists have decried the lack of representation of women and the subsequent lack of monitoring of the Panchayat system by the government.<sup>32</sup>

Several other private institutions have had a key voice in advocacy around the formalization of Islamic Personal Law. One such organization is the All India Muslim Personal Law Board (AIMPLB) which claims to have formed in 1973 "at a time when the Government of India was trying to subvert Shariat law applicable to Indian Muslims." The AIMPLB has argued in court that in accordance with Shariat law, Muslim women should not be given maintenance beyond the *iddat* period.<sup>33</sup> The AIMPLB's role as an actor in the shaping of Muslim personal law is self appointed.<sup>34</sup>

More recently the All India Muslim Women Personal Law Board (AIMWPLB) has been established and has rebutted the advocacy of the AIMPLB to further the role of Shariat law and separate courts<sup>35</sup> while openly rejecting fatwas by Islamic seminaries.<sup>36</sup>

### C. SEXUALITY AND SEXUAL RIGHTS: INTERNATIONAL NORMS

The standards established through international human rights documents and discourse provides a context through which to assess the realization of sexual rights and think critically consider the assumptions made about sexuality by the law. In a discussion on sexual rights in the context of sexual and reproductive health and rights, Alice Miller summarizes the definition of sexual rights as the

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<sup>31</sup> Joti Sekhon. "Engendering Grassroots Democracy: Research, Training, and Networking for Women in Local Self-Governance in India." *National Women's Studies Association* 18, no. 2 (2006), 101-122.; Indian Const. § 243 a-o

<sup>32</sup> Email on file with Naish Hasan, Executive Director of Tehreek.

<sup>33</sup> *Danial Latifi vs Union of India*, 1985 (2) SCC 556.

<sup>34</sup> Another such organization is the Islamic Shariat Board who also advocated that women not be given maintenance beyond the *iddat* period in the *Danial Latifi* case.

<sup>35</sup> "Plea against Muslim Personal Law Board Setting Up Parallel System," *The Hindu*. 17 August 2005 (accessed 21 August 2001) available from <http://www.hindu.com/2005/08/17/stories/2005081703311300.htm>.

<sup>36</sup> "Muslim women's Law Board Rejects Fatwa on Imrana." *Rediff.com*. 30 June 2005 (accessed 21 April 2007) available from <http://www.rediff.com/news/2005/jun/30rape1.htm>.

right to life, liberty, security of person, equality, non-discrimination, bodily integrity, freedom of information, access to health care, protection from epidemic diseases, equality within the family, as well as right to marry and found a family and to the highest attainable standard of mental and physical health.<sup>37</sup> She also acknowledges that sexual rights might include freedom from torture, arbitrary killing and execution, and arbitrary detention.<sup>38</sup> Sherifa Zuhur in her article *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study* outlines some of the issues of sexual rights pertaining to Muslim women:

sexual rights are matters of sex, sexuality, and bodily integrity because it is concerned with issues such as rape, adultery, honor killings, battery and wife-beating, murder, abortion, infanticide, sex trafficking, sex work, sexual abuse, incest, homosexuality,[ transgender] and transexuality.<sup>39</sup>

Miller argues that sexual rights must go beyond those rights proscribed by reproductive health and rights, including those rights pertaining to non-heterosexual and non-procreative sex. She broadly locates sexual rights in human rights documents, recognizing the problematic history of sexual rights as the desire of the state to “uphold social norms regarding honor and chastity.”<sup>40</sup> Several international documents and treaties touch on sexual rights both from an empowerment and protective perspective including the UN Convention on the Elimination of Discrimination Against Women (CEDAW)<sup>41</sup>, corresponding general recommendations, and the 1989 Convention on Rights of the Child (CRC)<sup>42</sup>. Other applicable provisions of CEDAW include General Recommendation 19 which calls for protections against sexual violence and exploitation. The CRC contains “protections”<sup>43</sup> against sexual exploitation and sexual abuse as well as the traffic of children.

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<sup>37</sup> Alice M. Miller, “Sexual But Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights.” *Health and Human Rights*. 4, no. 2 (2000): 17-29.

<sup>38</sup> Alice M. Miller, “Sexual But Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights.” *Health and Human Rights*. 4, no. 2 (2000): 17-29.

<sup>39</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women’s Human Rights, 2005, accessed 1 May 2007) available from <http://www.wwhr.org/images/GenderSexualityandCriminalLaws.pdf>.

<sup>40</sup> Alice M. Miller, “Sexual But Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights.” *Health and Human Rights*. 4, no. 2 (2000): 17-29.

<sup>41</sup> India ratified CEDAW on July 9, 1993.

<sup>42</sup> India ratified CRC on December 11, 1992.

<sup>43</sup> Alice M. Miller, “Sexual But Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights.” *Health and Human Rights*. 4, no. 2 (2000): 17-29.

India has made reservations to CEDAW in reference to Articles 5 and 16(1)<sup>44</sup>. Of particular relevance is CEDAW's Article 5:

state shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.<sup>45</sup>

India's reservation to Articles 5 and 16(1) states that the

Government of India declares that it shall abide by and endure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent.<sup>46</sup>

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<sup>44</sup> Article 16 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. 2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

<sup>45</sup> Article 5 States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

<sup>46</sup> National Commission for Women (India). *CEDAW, The Reservations and the Optional Protocol*. (National Commission for Women, January 2006, accessed 23 April 2007) available from <http://ncw.nic.in/pdfreports/CEDAW%20The%20Reservations%20And%20Optional%20Protocol.pdf>.

The reservation is demonstrative of India's desire to accommodate religious preference at the cost of women's rights. The specific reference to "initiative and consent" from religious communities begs the obvious question of whose consent represents the consensus and attitudes of a community.

Although non-binding, several human rights documents provide further guidance on the realization of sexual rights. The International Conference on Population and Development (ICPD) provides a definition for reproductive health and rights recognizing that "reproductive health is a state of complete physical, mental, and social-well being...in all matters relating to the reproductive system."<sup>47</sup> The Beijing Declaration and Platform for Action extends reproductive rights to cover sexuality: the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality: "the human rights of women include the right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence."<sup>48</sup> The UN Declaration on the Violence Against Women (VAW) recognizes that VAW is a manifestation of historically unequal power relations between men and women which have led to domination over and discrimination against women."<sup>49</sup> While the importance of such treaties cannot be more greatly underscored, aspects of the sexual rights agenda forward, largely speaking human rights treaties and documents fail to recognize a more comprehensive constellation of rights that are often violated. These violations are often perpetuated through the legal, cultural, and religious constructions of sexuality.<sup>50</sup>

More recently, in response to a lack of convergence on issues of sexual rights, human rights groups issued a statement entitled the Yogyakarta Principles which outline a range of human rights standards and their applicability to sexual orientation and gender identity. The Yogyakarta Principles acknowledge that states and societies "impose gender and sexual orientation norms on individuals through custom, law, and violence and seek to control how they experience

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<sup>47</sup> International Conference on Population and Development. A/CONF.171/13: Report of the ICPD (94/10/18). Available at <http://www.un.org/popin/icpd/conference/offeng/poa.html> (last visited April 23, 2007).

<sup>48</sup> Fourth World Conference on Women. Beijing, China. Available at <http://www.un.org/womenwatch/daw/beijing/beijingdeclaration.html>. (last visited April 23, 2007).

<sup>49</sup> Ratna Kapur. *Erotic Justice: Law and the New Politics of Post Colonialism*. (London: Glasshouse Press, 2005), 97; Declaration on the Elimination of Violence Against Women. A/RES/48/104. available at <http://www.un.org/documents/ga/res/48/a48r104.htm>. (last visited April 23, 2007).

<sup>50</sup> Ratna Kapur. *Erotic Justice: Law and the New Politics of Post Colonialism*. (London: Glasshouse Press, 2005), 92.

personal relationships and how they identity themselves.”<sup>51</sup> The Human Rights Committee when interpreting the International Covenant on Civil and Political Rights, ratified by India on July 10, 1979, has identified sexual orientation as a protected category.<sup>52</sup>

India’s ratifications of human rights documents commit the state to respecting, protecting, and fulfilling obligations that will enable the realization of these rights.

### III. LOCATING SEXUAL RIGHTS IN DOMESTIC RELIGIOUS AND SECULAR DISCOURSE

Legislative change within both the secular and Islamic Personal law frameworks is necessary to achieve full realization of sexual rights for Muslim women and sexual minorities in India. Often women’s rights activists have argued for the abolition of the Personal law system and establishment of a Uniform Civil Code (UCC). In the case of sexuality and sexual rights, however, reliance on the UCC as is, given the existence of Section 377<sup>53</sup> means that secularism serves to further subordinate rather than provide an outlet to the subordination of sexual diversity in the religious context. As such, I would argue that secularism does not provide the answer given the subordination of sexuality in secular and religious legal codes, jointly and separate from one another. The following analysis attempts to locate the discourse of Indian Muslim sexual rights within the context of secular and religious law.

#### A. MUSLIM FEMINISTS AND THE STRUGGLE WITH STATE AND RELIGION

##### *Feminist Analysis of Sexuality and the Law*

In *Danial Latifi v. Union of India*, the Supreme Court was tasked with interpreting the Muslim Women (Protection on the Rights on Divorce) Act of 1986. The court held that the Act which limited maintenance for women after divorce, would be

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<sup>51</sup> Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. (accessed 23 April 2007) Available from <http://www.yogyakartaprinciples.org/index.php?item=25>.

<sup>52</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

<sup>53</sup> Section 377 of the Indian Penal Code States: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine. Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

unconstitutional if not interpreted to grant fair provision and maintenance.<sup>54</sup> The court considered several perspectives represented by various constituencies in making their decision including the All India Muslim Personal Law Board (AIMPLB). In their decision, the court summarized the input of the AIMPLB:

the aim of the [Muslim Women (Protection on the Rights of Divorce)] Act is not to penalize the husband but to avoid vagrancy and in this context Section 4 of the act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that social ethos of Muslim society spreads a wider net to take care of a Muslim divorced wife and not at all dependent on the husband.<sup>55</sup>

The AIMPLB argued for a limited maintenance requirement for men. The AIMPLB also suggests that the community to take responsibility faced with the threat of “vagrant” women produced by a lack of maintenance from their husbands. In making these arguments, the AIMPLB supports the idea that men, family, state, and joint family<sup>56</sup> that have a role to play in defining the boundaries of Muslim women’s sexuality while outlining their own desire to control women’s sexuality through the authority of the AIMPLB.

When understood together, the secular and religious legal frameworks exemplify the dual subordination faced by Muslim women trapped between two patriarchal norms that deflect the potential for legal respite to the other. These inequalities in the law as they pertain to women exhibit the underlying principle that power over women is justified given that the value of those lives that control women are greater than the value of women’s lives.<sup>57</sup>

Fatima Mernissi, a prominent Muslim feminist scholar, notes that Islamic law consistently reminds us that the primary social identification of women is as reproductive and sexual beings constrained by men, the family, and the state.<sup>58</sup> While Mernissi speaks to Islamic law, the Indian secular context only serves to validate her point as seen in the court’s description of the *Shah Bano* case in the *Danial Latifi* decision. As stated by Justice Rajendra Babu:

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<sup>54</sup> “All Unjust Personal Laws Have to Go, Be They Hindu, Muslim, or Christian.” South Asian’s Citizen’s Wire. (India : South Asian Citizen’s Wire, accessed 21 April 2007) Available from <http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-64559>.

<sup>55</sup> *Danial Latifi vs Union of India*, 1985 (2) SCC 556.

<sup>56</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

<sup>57</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women’s Human Rights, 2005, accessed 1 May 2007). available from <http://www.wwhr.org/images/GenderSexualityandCriminalLaws.pdf>.

<sup>58</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women’s Human Rights, 2005, accessed 1 May 2007). available from <http://www.wwhr.org/images/GenderSexualityandCriminalLaws.pdf>.



The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared 5 children...The husband, a successful Advocate with an approximate income of Rs 5000 per month provided Rs 200 per month to the divorced wife, who had shared his life for over half a century and mother his five children and was in desperate need of money to survive.<sup>59</sup>

There are several ironies embedded in the state's discussion of the *Shah Bano* and *Danial Latifi* decisions. First, we have the secular courts attempting to reconcile injustice towards Muslim women vis-à-vis maintenance as prescribed by Islamic law but, in doing so the courts, as stated, reinforce gender norms that underlie women's inequality. These assumptions define the standards of what it means to be a "good wife and sacrificing mother" reinforcing the roles of economic dependence through rewarding, in this case, a good Muslim wife with alimony.<sup>60</sup> Ratna Kapur and Brenda Crossman, in their book *Subversive Sites* assert that beyond rewarding behavior, judges are able to "mediate the legal code they administer" through invoking shared cultural assumptions regarding the "nature of sexuality and the act of procreation."<sup>61</sup> Second, the *Shah Bano* and *Danial Latifi* cases exemplify the assumptions about women's roles and identity in family embedded in the law. Here the secular state court rewards *Shah Bano* (and in turn *Danial Latifi*) for fulfilling their obligations as reproductive and child rearing agents facilitated by economic support from their husbands, men who are also forced to fulfill their role in the state-encouraged hetero-normative/procreative family structure.

Legal discourse is a site of political struggle over sex difference and whether the creation of rules is based on the "natural" differences between sexes or are differences produced by the rules themselves.<sup>62</sup> The status of Muslim women and the rhetoric of difference employed by the state and community leaders between Muslim men and women (compared to one another and to the Hindu majority) exemplify the production of culture and norms through legal discourse. For the Muslim community in India, Muslim women have become markers of the cultural community. The separation of the public and private spheres has been maintained by the state and religious leaders. Religious leaders, in particular, maintain group autonomy as defined through these cultural

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<sup>59</sup> *Danial Latifi vs Union of India*, 1985 (2) SCC 556

<sup>60</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996), 87.

<sup>61</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

<sup>62</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996), 34 citing Mary Joe Frug.

markers.<sup>63</sup> Although the constitution of India guarantees all citizens equality and freedom from discrimination, personal law determines a woman's rights in the family and community and therefore the experience of Muslim women is one of inequality and subordination. In turn, any claim for Muslim women's rights confronts religious hierarchy and traditions as well as state policy that have protected dominant religious traditions and the patriarchal structures of authority.<sup>64</sup>

The notorious 2005 Imrana case exemplifies the extremity of enforcing strict "religious" community norms. Imrana was a 28 year old woman raped by her father-in-law. When she took the case to the Panchayat the body of men ruled that she must now marry her father-in-law and treat her husband as her son. The prominent Islamic seminary Darul-uloom Deoband supported this judgment.<sup>65</sup>

In India rape is a crime that is typically governed by the criminal courts,<sup>66</sup> however, individuals may choose to have judgment for the accused administered through a personal law system. While there is a lack of data to suggest how Panchayat's normally rule on such decisions, critiques of Muslim court decisions by Muslim feminists regarding rape as well as specific examples such as the Imrana case are illustrative of underlying norms pertaining to sexuality regulated by the personal law system. In Islamic law, for example, rape is treated both an act of physical damage, and a theft of sexual property which alters a virgin's financial worth. Each Islamic legal school differs in their approach to rape. The Hanafi school, for example, spells out the notion of this injury as being one to the man's property— rather than to the woman herself.<sup>67</sup> In the Imrana decision, Imrana is treated as property of the men in the family at large and her rape represents the taking of property from son to father when the rape occurs.<sup>68</sup> Zuhur points out also that marriage of the man to his rape victim, i.e. saving the woman from shame, is an "escape hatch" for men who rape. Zuhur further points out that this complicated system enacted upon rape represents the patriarchal management of female sexuality.<sup>69</sup> Other cases are also indicative of the desire

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<sup>63</sup> Vrinda Narain. *Gender and Community: Muslim Women's Rights in India*. (Toronto: University of Toronto Press, 2001).

<sup>64</sup> Id.

<sup>65</sup> "Father-in-Law Gets 10 Years for Imrana rape." Pervez Iqbal Siddiqui. *The Times of India* 20 October 2006. (accessed 23 April 2007) Available from <http://timesofindia.indiatimes.com/articleshow/2210881.cms>.

<sup>66</sup> Indian Penal Code § 375

<sup>67</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women's Human Rights, 2005, accessed 1 May 2007), 30-34.

<sup>68</sup> Until 2006, India's Penal Code Section 375 which outlaws rape had an exception to rape "sexual intercourse by a man with his own wife, the wife not being under sixteen years of age is not rape" illustrating supporting the notion of women as property in the secular legal code.

<sup>69</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women's Human Rights, 2005, accessed 1 May 2007), 30-34.

for a religious structure that controls the sexuality of women. In Lucknow, for example, the case of another young woman whose fiancé visited her in the evening led to the Panchayat ruling that as punishment she must parade naked through her community; she was, in fact, forced to do so.<sup>70</sup>

The desire to pacify the Muslim minority for political reasons has resulted in the state's acceptance of fundamentalists as representatives of Muslim interests and have aided in the subordination of Muslim women. For example, Muslim women in India are the only group of women whose right to a monogamous marriage<sup>71</sup> is not protected. Muslim men, in deference to personal law, are exempt from the provision of the Indian Penal Code that criminalizes bigamy.<sup>72</sup> Muslim women do not have equal rights of inheritance and succession, generally female heirs receive half of the share of male heirs. Widows only take a quarter share in property of their husband if there is no children. This rule applies regardless of the number of wives that a man has. A Muslim mother can never be the legal guardian of her children, in the case of death of the father, guardianship passes to the paternal grandfather or the paternal grandfather's executor. Muslim women do not have the freedom to choose whom they want to marry. Muslim men can marry non-*kitabbiya* (of the book) women and the marriage is seen as irregular but not void. If a Muslim woman marries a non-Muslim man the marriage is void.<sup>73</sup>

The refusal of state agents to become involved in intervening for the sake of more equal judgments is reflected by one Muslim women's rights activist in India. She retold her experience of approaching the State Women's Commission in Uttar Pradesh upon the Imrana Panchayat decision to Frontline Magazine, reporting that:

When Tehriq [Tehreek],<sup>74</sup> a Lucknow-based organization working on violence among the urban poor, especially Muslim women, approached the State Women's Commission, it was told that as the matter concerned "them," that it is

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Zuhur also talks about how this challenge is one that exists in all Abrahamic traditions.

<sup>70</sup> Conversation with Naish Hasan, Executive Director, Tehreek.

<sup>71</sup> This is phrased as a right as it reflects a demand as articulated in women's rights literature. Where cultural norms for polygamy have not changed however women may suffer at the hands of pro monogamy statutes and laws. Agnes points out the lessons learned from the Hindu Marriage of 1955 which have given Hindu men the ability to claim that their wife is actually their second wife or concubine and therefore ineligible for maintenance on the grounds that validity of the marriage can be questioned before the law. Flavia Agnes. *State, Gender and the Rhetoric of Law Reform*. (Bombay: Research Centre on Women's Studies, 1995).

<sup>72</sup> Vrinda Narain. *Gender and Community: Muslim Women's Rights in India*. (Toronto: University of Toronto Press, 2001), 25.

<sup>73</sup> Vrinda Narain. *Gender and Community: Muslim Women's Rights in India*. (Toronto: University of Toronto Press, 2001), 25-28.

<sup>74</sup> Conversation with Naish Hasan, Executive Director, Tehreek.

Muslim women, the Commission could not intervene beyond a point....they told us, 'yeh aap logon ka maamla hai.' [this is your community's problem]<sup>75</sup>

The denial of access to justice experience by Muslim women and Muslim women's rights groups is reflective of the tacit support of the state in the continued sexual subordination of Muslim women. As argued by Narain "the Indian state has retained personal law as a means to regulate gender roles, the family and the community." Further, the privileging of group rights over individual rights has resulted in the subsuming of Muslim women's rights and interests under the presumed need of the Muslim collective. As such, the state reinforces women's subordination by reaffirming patriarchal structures of authority vis-à-vis personal law.<sup>76</sup> Furthermore, the lack of concern for women in the private spaces regulated by religious laws lead to what Crossman and Kapur have noted to be a space of cultural production and re-inscription of sexual norms consistent with ideas of women's sexual purity. Also exemplifying this "norm" is the Indian Penal Code provision Section 497:

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offense of rape, is guilty of the offense of adultery.

The state's assumptions about female sexuality manifest in a more nuanced way according to IPC Section 497 whereby the lack of punishment for a female for adultery women lack total agency. Furthermore, women are constructed as victims of adultery.<sup>77</sup> Here the state seeks to protect a woman for her lack of agency in sexual decision making.

Women's sexuality in India is defined vis-à-vis the state and religious governing bodies. Both the secular and religious entities forward a patriarchal and heteronormative view of sexuality that values traditional roles for women and sexual subordination. The state's relegation of sexuality largely to the religious legal sphere does not answer the question of who has been chosen to be the representative of culture and community leaving decisions to self declared Muslim authorities largely consisting of men.

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<sup>75</sup> "Fighting for Imrana." T.K. Rajalakshmi. *Frontline*. 29 July 2005. (accessed 23 April 2007) Available from <http://www.hinduonnet.com/fline/fl2215/stories/20050729006512100.htm>.

<sup>76</sup> Vrinda Narain. *Gender and Community: Muslim Women's Rights in India*. (Toronto: University of Toronto Press, 2001), 25.

<sup>77</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

*National Discourse and Muslim Sexuality*

Hindu nationalist discourse has furthered the use of women's bodies and lives to define the boundaries of cultural and religious identity. Acts of violence conducted by agents of the Hindu right-wing serve as examples of not only the state's failure to protect but also its active role in violating sexual rights. This is best exemplified through the recent pogrom of Muslims in Gujarat that resulted in over 2000 dead and 160,000 displaced.<sup>78</sup> Much of the violence was targeted specifically towards women and was inspired by hate rhetoric by Hindu nationalists to destroy communities of Muslims by raping and killing women.<sup>79</sup> Women's bodies become carriers of not only children, but nations. A report by the People's Union for Democratic Rights entitled "*Maaro, Baalo, Kaato*" (Kill! Hack! Burn!) documented numerous acts of sexual violence including the raping of women in front of their families, the cutting of breasts, and destruction of fetuses through attacking women's bodies.<sup>80</sup> A women's panel noted that women were subject to unimaginable "inhuman and barbaric" sexual violence.<sup>81</sup> The harm associated with rape becomes harm to the community rather than a violation of an individual woman's right to bodily autonomy or bodily integrity.<sup>82</sup>

The extreme amount of violence experienced by the Muslim community alongside existing levels of discrimination may foster distrust of the state and, thereby, strengthen the community's insularity and help revive an intra-community nationalistic discourse that defines women as carriers of culture. These community based norms, as defined by self appointed Muslim leadership, define good Muslim woman as one who is chaste, virginal while maintaining a premium on marriage.<sup>83</sup>

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<sup>78</sup> Human Rights Watch. *We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat*. (Human Rights Watch, 2002, accessed 21 April 2007); available from <http://hrw.org/reports/2002/india/>.

<sup>79</sup> Ratna Kapur. *Erotic Justice: Law and the New Politics of Post Colonialism*. (London: Glasshouse Press, 2005).

<sup>80</sup> People's Union for Democratic Rights. *Maaro! Kaapo! Baalo!* (People's Union for Democratic Rights 2002, accessed 23 April 2007) available from [http://www.pucl.org/Topics/Religion-communalism/2002/maro\\_kapo\\_balo.pdf](http://www.pucl.org/Topics/Religion-communalism/2002/maro_kapo_balo.pdf); Human Rights Watch. *We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat*. (Human Rights Watch, 2002, accessed 21 April 2007); available from <http://hrw.org/reports/2002/india/>.

<sup>81</sup> "Gujarat Muslim Women Rape Victims." Jyotsna Singh. *BBC News*. 16 April 2002 (accessed 23 April 2007) Available from [http://news.bbc.co.uk/2/hi/south\\_asia/1933521.stm](http://news.bbc.co.uk/2/hi/south_asia/1933521.stm).

<sup>82</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

<sup>83</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996). While Kapur and Crossman are discussing Agnes talking about the state I apply their discussion to Muslim community leadership.

## B. RIGHTS OF PEOPLE PRACTICING DIVERSE SEXUALITIES

In January of 2006 the police in Lucknow, India carried out a sting operation of gay men and arrested men that they deemed to have engaged in “unnatural acts.”<sup>84</sup> Human Rights Watch has highlighted other such instances, including Naz Foundation International’s Lucknow staff who were jailed for 47 days after police raided their office and seized HIV/AIDS related information materials and were accused of running a gay “sex racket.”<sup>85</sup> The police have charged these individuals and others under Section 377 of India’s Penal Code:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine.

Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The potential array of activities that fall under “carnal intercourse against the order of nature” is an ambiguous term as defined by the courts and has left it up to judges to determine what kind of sexual acts qualify as unnatural offences. Alok Gupta notes two trends:

- (a) at one level the definition of sodomy is being broadened to include sexual activities apart from anal sex to oral sex, thigh sex, mutual masturbation etc....
- (b) Simultaneously, the age of 377, and the criminal law, is not this “grossly indecent” act anymore but the person himself, the sodomite, the sexually depraved and perverse—the consenting homosexual.

Alongside defining which acts constitute natural offenses the discourse of Section 377 has taken on a communal tone. As documented by Ratna Kapur in *Erotic Justice: Law and the New Politics of Post Colonialism*, homosexuality was framed by Hindu nationalists as an issue that Muslims engage in as an effort to communalize “deviant sexuality” and equate it with the intentions of Muslims to

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<sup>84</sup> “Anger at Shameful India Gay Law.” *BBC News*. (accessed 23 April 2007) Available from [http://news.bbc.co.uk/2/hi/south\\_asia/4602068.stm](http://news.bbc.co.uk/2/hi/south_asia/4602068.stm); Human Rights Watch. *Letter to Indian Prime Minister Singh On the Arrest of Four Men on Charges of Homosexual Conduct in Lucknow*. (Human Rights Watch, 2006, accessed 23 April 2007) Available from <http://hrw.org/english/docs/2006/01/11/india12399.htm>.

<sup>85</sup> Human Rights Watch. *Letter to Indian Prime Minister Singh On the Arrest of Four Men on Charges of Homosexual Conduct in Lucknow*. (Human Rights Watch, 2006, accessed 23 April 2007) Available from <http://hrw.org/english/docs/2006/01/11/india12399.htm>.

harm the community and nation, “perpetuated by the outsider, or externalized by the enemy, that is, the Muslim.”<sup>86, 87</sup>

Janet Halley argues that the existence of laws that criminalize homosexuality should be understood as “not purely symbolic, but [as laws that] define and injure”<sup>88</sup>:

This particular effect of public conflict over sexual-orientation issues cannot adequately be described if we assume that the cultural effects of legal practices are “merely” symbolic. The role of the law in constituting persons by providing a forum for their conflicts over who they shall be understood to be is deeply material, even though it involves not physical force but the more subtle dynamics of representation.<sup>89</sup>

The existence of sodomy laws has particular relevance for a discussion on religious law and sexuality. Based on qualitative data gathered in South Africa, Ryan Goodman argues that there is a connection between religious and legal castigations of sexuality in that anti-gay religious convictions are “prompted and legitimized by the law’s criminalization of homosexual acts.” Further, Goodman argues that discourse affects the substance and strength of religious mobilization over homosexuality.<sup>90</sup> Ratna Kapur and Brenda Crossman, speaking about the Indian context, have asserted that the provisions of the criminal law dealing with marital and non-marital sex including those surrounding “...homosexuality...” allow for the state to forward an assumption of “familial ideology wherein the privacy of the and the honor of good women—chaste wives, virgin daughters—is held sacred.”<sup>91</sup> With specific regard to Muslim communities, Sherifa Zuhur argues

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<sup>86</sup> Ratna Kapur. *Erotic Justice: Law and the New Politics of Post Colonialism*. (London: Glasshouse Press, 2005).

<sup>87</sup> It is not difficult to find examples of such rhetoric. On the website Hinduunity.org (the website of the Bajrang Dal) we see the following post: “A Warning to Hindu and Sikh Girls! The Muslims won’t rest until they convert you to Islam! £10,000 rewards are being given to Muslim youths by Islamic organizations in the U K to any Muslim boy who can convert a Hindu or Sikh girl....Beware! Be careful of being trapped into having a relationship with Muslim Boys in your school and college. The love they show is love based on an ulterior motive. To get you to accept Islam, Hindu girls have suffered dire consequences from these Muslim men who promise to love them but treat them like dogs.” Hindu Unity. *Home Page*. Available from [www.hinduunity.org](http://www.hinduunity.org) (accessed 21 April 2007);

<sup>88</sup> Ryan Goodman. “Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics.” *California Law Review* 3 (2001) 643.

<sup>89</sup> Janet Halley. “Reasoning About Sodomy.” *Virginia Law Review* 1721 (1993) 79.

<sup>90</sup> Ryan Goodman. “Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics.” *California Law Review* 89, no. 3 (2001) 643.

<sup>91</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

that discriminatory laws enforce community definitions of proper sexual behavior.<sup>92</sup>

While it is difficult to find specific reference to LGBT people in Islamic law sources in India, Zuhur, writing on sexuality and Islam, argues that although the categories of woman and lesbian, gay, bisexual, transgender (LGBT) are not exclusive. LGBT people as a group face similar sorts of subordination vis-à-vis religious and secular patriarchal structures with one reinforcing the other with regards to the exclusion of LGBT people. In an attempt to outline some of the dominant discourses impacting sexuality, Sherifa Zuhur relied on sources for Islamic law (the Quran, *hadith*, and the *Sunnah*) and outlined the various ways “homosexuality” and “transsexuality.”<sup>93</sup> Zuhur states that under traditional forms of Shari’ah the crime of *zina* included homosexual acts, but that in fact, homosexuality was often “ignored, or tolerated with periodic crackdowns.”

According to Zuhur, Quranic verses condemning sex between men are found in Surah VII:80-1, XXVI:165-166 and IV:16<sup>94</sup> and imply the natural condition of heterosexuality, but there are no specific punishments mentioned. Various *hadith* refer to the Prophet’s abhorrence of homosexual acts. In regards to references to transgender and “trans/estism” people Zuhur quotes a passage from a *hadith* attributed to the Prophet: “Cursed are those men who wear women’s clothing and those women who wear men’s clothing.”<sup>95</sup> The law as a form of discourse in which “meanings are reflected and constructed and cultural practices organized”<sup>96</sup> applies both in the context of secular law as well as Islamic law in India and works to further the promotion of heteronormativity. While most of references to trans lifestyles are negative Zuhur cites that in *adab* literature, there is evidence of the “whore of Mecca” who researched other women’s lesbian preferences.” Reporting that women said that they had sex with other women out of fear of pregnancy.<sup>97</sup> Zuhur points out, however, that this

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<sup>92</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women’s Human Rights, 2005, accessed 1 May 2007), 9.

<sup>93</sup> Although Zuhur discusses transsexuality, she seems to reference the experience of both transsexual and transgender individuals.

<sup>94</sup> Surah VII: 80-1, Translated by Yusuf Ali: “We also (sent) Lut: He said to his people: “Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds.”

Surah XXVI: 165-166: “Of all the creatures in the world, will ye approach males, And leave those whom Allah has created for you to be your mates? Nay, ye are a people transgressing (all limits)!”

<sup>95</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women’s Human Rights, 2005, accessed 1 May 2007), 48.

<sup>96</sup> Ratna Kapur and Brenda Crossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996).

<sup>97</sup> Sherifa Zuhur. *Gender, Sexuality, and the Criminal Laws in the Middle East and North Africa: A Comparative Study*. (Women for Women’s Human Rights, 2005, accessed 1 May 2007), 9.



rationale does not necessarily hold true given that forms of birth control were “known and employed.”<sup>98</sup>

While, like women, the LGBT community faces the complicated problem of circular subordination, locating the struggle for the rights of sexually diverse communities within the struggle for Muslim women’s rights is not necessarily the most useful framework--as perhaps best articulated by Foucault: “...to have a right as a woman is not to be free of being designated and subordinated by gender.”<sup>99</sup> Wendy Brown in her critique of rights points to the dilemma in which women’s rights discourse has a tendency to “reinscribe heterosexuality” through defining the boundaries of “women” and what we understand to constitute women’s “vulnerability and violability.”<sup>100</sup> Muslim women’s discourse, both in Indian and international frameworks, can be critiqued along the lines of reconstituting the category of women and thereby explicitly and implicitly leaving little room for the possibility of a deeper analysis of sexuality and gender subordination within the women’s rights discourse. Muslim women’s constitution of “woman” is based on a self categorization describing a particular form of subordination. One can see examples of this in articles calling for women to organize around particular forms of Muslim women’s oppression (as defined by Indian Muslim women) including the *hijab* and *triple talaq*.<sup>101</sup>

Halley’s *Split Decisions: How and Why to Take a Break From Feminism* asserts that by constantly describing women’s oppression in regards to a male-female hierarchy we are in some ways helping to legitimize the authorities that enable subordination.<sup>102</sup> The western critical legal tradition offers us the ability to understand how the assumption of heterosexuality limits a broader movement for the deconstruction of gender hierarchies through the exclusion of LGBT communities from appropriate legal reform. Like women, the Muslim LGBT community experiences legalism as a dual control of sexuality perpetuated by a patriarchal and heterosexist structure. The secular system empowers social, cultural, and religious actors (comprised of religious leaders, community members, families, and individuals) to define the norms of the Muslim

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<sup>98</sup> Id.

<sup>99</sup> Wendy Brown, “Suffering the Paradoxes of Rights,” in *Left Legalism, Left Critique*, eds. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 422.

<sup>100</sup> Wendy Brown, “Suffering the Paradoxes of Rights,” in *Left Legalism, Left Critique*, eds. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 425.

<sup>101</sup> “More Than the Letter of the Law.” *India Together*. October 2004 (accessed 23 April 2007). Available from <http://www.indiatogether.org/2004/oct/wom-sakshi.htm>.

<sup>102</sup> Janet Halley. *Split Decisions: How and Why To Take a Break From Feminism*. (Princeton: Princeton University Press, 2006).

community, removing the rigid distinction that one might argue exists between state and religion or culture.<sup>103</sup>

### C. ISLAM AND RIGHTS

Zuhur's presentation of Islamic sources largely covers its condemnations of sexuality. How can we begin to reconcile sexual rights with Islam? In the context of conducting a religious analysis of human rights, the notion of the "authority," or one who makes a right binding, is perhaps the most contentious. Secular theoretical frameworks define rights as granted and protected vis-à-vis the states<sup>104</sup> in which individuals reside rather than granted and protected by God.<sup>105</sup> The secular human rights paradigm largely rests on the following assumptions: people have rights simply because they are human; human rights are universal; human rights treat all people as equals; human rights are primarily the rights of individuals; human rights encompass the fundamental principles of humanity, and the promotion and protection of human rights are not bound by the frontiers of national states.<sup>106</sup>

When reconciling the secular human rights discourse with Islamic law, scholars have attempted to locate the notion of rights within Islam. Reformist Islamic scholars have tended to ground human rights values within the Islamic law framework thereby acknowledging a divine granting of duties and rights.<sup>107</sup> In doing so, these scholars have outlined various methodologies for arriving at a preservation of human rights and human dignity within the Islamic legal and

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<sup>103</sup> Wendy Brown and Janet Halley. *Left Legalism, Left Critique*, (Durham: Duke University Press, 2002), 13. "Because law can take the shape of permissions rather than prohibitions, it can invisibly capacitate social and cultural actors to do particular kinds of social and cultural work. Suddenly seeing legalism operating as the background rules of culture, whence it is supposed to be absent, should defeat, at least for the case at hand, the presumption that culture is profoundly distinct from law."

<sup>104</sup> "A deeper paradox of the role of the state in protecting rights is the idea that rights exist as a mechanism designed to protect individuals from the overwhelming powers of the bureaucratic state...The notion of human rights as we know it today arises in the context of the evolution of the nation-state as a political system, even though some may claim a more ancient pedigree for it to date back to the Magna Carta and the French Revolution." Ebrahim Moosa. "The Dilemma of Islamic Human Rights Schemes." *Journal of Law and Religion* 15, No. ½ (2000-2001):185-215.

<sup>105</sup> Ebrahim Moosa. "The Dilemma of Islamic Human Rights Schemes." *Journal of Law and Religion* 15, No. ½ (2000-2001):185-215.

<sup>106</sup> International Federation of Red Cross and Red Crescent Societies and Francois-Xavier Bagnoud Center for Health and Human Rights. "Human Rights: An Introduction" in Jonathan Mann, Sofia Gruskin, et al. *Health and Human Rights A Reader*. (New York: Routledge,1999) 21.

<sup>107</sup> See Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate." *Human Rights Quarterly* 17.4 (1995): 587-617 for description of Abu I-A'la Mawdudi.

secular<sup>108</sup> context while recognizing the interactions of Islam through, as, and/or with state mechanisms.

The traditional approach to locating rights in Islamic legal tradition is to revisit Shari'a, or divine law. According to Mohammed Hashim Kamali, a noted Muslim legal scholar, the predominant difference between western and Islamic law is that the former concept of equity is derived from natural law;<sup>109</sup> whereas the understanding of equity in Islamic law is derived from Shari'a or divine law.<sup>110</sup> Kamali states that:

...both assume that right and wrong are not a matter of relative convenience for the individual, but derive from an eternally valid standard that is ultimately independent of human cognizance and adherence. But natural law differs from divine law in its assumption that right and wrong are inherent in nature. From an Islamic perspective, right and wrong are determined, not by reference to the nature of things, but because God has determined them as such.<sup>111</sup>

Further, Kamali argues that notwithstanding different approaches to determining right and wrong both values upheld by natural law and the divine law of Islam are substantially concurrent.<sup>112</sup> The concept of equity (*Istihsan*)<sup>113</sup>, from which the notion of rights might be derived in Islamic law, is similar to the western notion of a right in that they are both inspired by principles of "fairness and conscience" while authorizing "a departure from a rule of positive law when its enforcement leads to unfair results."<sup>114</sup> *Istihsan* offers a methodology which allows for the exercising of personal opinion in order to avoid rigidity and unfairness that might result from the literal enforcement of existing law; and has allowed for adaptation

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<sup>108</sup> An-Naim argues for the creation of an Islamic specific secularism. Abdullahi Ahmed An-Naim. "A Kinder, Gentler Islam?," *Transition* 52. (1991): pp. 4-16.

<sup>109</sup> Kamali states that Natural law differs from divine law in that its assumption of right and wrong are inherent in nature. Mohammad Hashim Kamali. *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society, 2003).

<sup>110</sup> Mohammad Hashim Kamali. *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society, 2003).

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Roja Fazeli discusses *istihsan* as a type of *ijtihad*. She notes that Al-Shafii draws the conclusion that there is no canonical grounding for *ijtihad* and *istihsan*. However, the view of Islamic legal scholars and Sunni religious scholars differ in that some reject *ijtihad* while some use *ijtihad* in a much wider context or restrict the scope of its application while recognizing its legitimacy. Roza Fazeli. "Islamic Feminism and the Issues of Dependency," *Feminism and Legal Theory Project. All in the Family? Islam, Women, and Human Rights*. Emory Law School, Atlanta, GA. March 2-4, 2006.

<sup>114</sup> Mohammad Hashim Kamali. *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society, 2003).

of Islamic law to the changing needs of society.<sup>115</sup> The concept of *Istihsan* does not recognize the superiority of any other law over the divine revelation, and the solutions it offers are largely based on the principles that are upheld by divine law and therefore does not constitute an independent authority from Shari'ah.<sup>116</sup>

*Istihsan* is not a concept which has been accepted by all Muslims: the Hanafi, Maliki, and Hanbali jurists have validated *Istihsan* as a subsidiary source of law while the Shafii, Zahirī, and Shii ulama have rejected it altogether and have refused to give it any credence in their formulation of the legal theory.<sup>117</sup> For those who accept the reasoning of *Istihsan*, Kamali argues that a well defined role for the *Istihsan* methodology could potentially create a space for evolutionary thinking in the context of Islamic law.<sup>118</sup>

Alongside finding philosophical underpinnings for human rights principals within the Islamic legal and religious tradition, scholars have specifically identified the sources of 'rights' in linguistic and historic Islamic discourse. In his analysis, Ebrahim Moosa first locates the concept of a right in the Arabic language word *haqq*; acknowledging that the term *haqq* is considered "polysemous or multivalent" and thus could mean right/claim/duty/truth depending on context and the use of the word in a specific context."<sup>119</sup> Moosa states that:

The relationship between rights and duties is an interpersonal and correlative one. In the enforcement of a right jurists understand that one party has a claim to have a "right" and another "obligation" to honor a right: every right thus has a reciprocal obligation<sup>120</sup>

Upon acknowledging the location of rights in Arabic, Moosa then traces the concept of *haqq* in Islamic history. In doing so he highlights the methodological flaw in Islamic historical analysis in that it is not inclusive of notions of rights in pre-Islamic civilization history which may have influenced the practice of 'rights' upon the onset of Islam. Moosa writes that during the reign of the Prophet and caliphate (632-661 AD); landmark events such as the Prophet's farewell sermon to his followers at the last pilgrimage; passages from the Quran dealing with the sanctity of life, property, dignity and honor; and actions taken by the Prophet's

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<sup>115</sup> Id.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Ebrahim Moosa. "The Dilemma of Islamic Human Rights Schemes." *Journal of Law and Religion* 15, No. ½ (2000-2001):185-215.

<sup>120</sup> Id.

successors to rectify rights violations of their subjects are early examples of a rights discourse in Islam.<sup>121</sup>

Heiner Bielefeldt, moving away from historical and Shari'a-based foundations for rights, relies on the notion of human dignity found in various schools of religious discourse including Islamic legal reasoning to ground human rights discourse in Islam. Bielefeldt argues that there must be a genuine attempt to mediate between and reconcile the competing normative requirements of Shari'a and Human rights.<sup>122</sup> However despite this Bielefeldt argues that irreconcilable principles are in constant conflict with traditional interpretations of Shari'a law including conversion, the protected status of non-Muslims in Muslim states, and women's rights preventing full compatibility of the two frameworks.<sup>123</sup> Given these constraints of classical Islamic law, Abdullahi An-Naim argues that the Shari'a is not the framework within which one can derive human rights discourse. While acknowledging Islam as the ideal model of scriptural religion, he argues a more radical departure from Shari'a law.<sup>124</sup> An-Naim's methodology and critique is rooted in his belief that the Shari'a itself is not divine rather it is based on "human interpretation of divine sources...clearly established by the actual historical evolution of Shari'a and techniques used by its founding jurists."<sup>125</sup> He draws upon the work of Ustadh Mahmoud Mohamed Taha<sup>126</sup> who

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<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Ebrahim Moosa discusses this inherent difference in regards to conversion. Classical Islamic law prohibits conversion, which is against UDHR Article 18. Later scholars have dissented from traditional consensus because of subtle epistemological transformations that have taken place in modern Muslim thought. In placing greater emphasis on the Quranic rather than hadith sources attempts have been made to move towards the overall spirit of the Quranic teachings that does not advocate greater freedom to choose one's faith.<sup>123</sup> Under Classical interpretations of Islamic law non-Muslims would be barred from enjoying the same liberties as Muslims in an Islamic state--one could not become head of state or occupy jobs in key military and intelligence positions. The classically derived notion of citizenship that is exclusive for non-Muslims conflicts with rights-based notions of citizenship. Within modern Islamic law and ethics there is no fundamental imperative in the modern Islamic law and ethics to perpetuate this discrimination.<sup>123</sup> Classic and medieval interpretations of Islamic law mean that women do not acquire legal and moral authority in some transactions and require the guardianship of males. While some argue that women lack the capacity to contract marriages independently; women also do not have an unfettered right to sue for divorce while men have the unqualified power to repudiate their spouses. Those jurists who take a more modern approach to Islamic legal interpretation however decide more favorably in regards to women's rights in contrast to traditional jurists. Ebrahim Moosa. "The Dilemma of Islamic Human Rights Schemes." *Journal of Law and Religion* 15, No. ½ (2000-2001):185-215.

<sup>124</sup> Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate." *Human Rights Quarterly* 17.4 (1995): 587-617.

<sup>125</sup> Id.

<sup>126</sup> A Sudanese scholar, Ustand Mohamed Taha was hung by the Sudanese government for his advocacy of liberal Islamic legal reform. Chase, Anthony, "The Tail and the Dog: Constructing

states that there are two messages in Islam, one transitional and the other universal. The former was created for immediate application of the universal theme in the immediate time; the universal to be interpreted by a process appropriate for today potentially abrogating past historical formulations of Shari'a.<sup>127</sup> His work is grounded in re-reading the Qur'an such that the Suras of the Meccan period contain the eternal theological message of Islam while the Medina period Surahs refer mostly to the specific needs and circumstances of the first Muslim community and cannot be immediately applied to modern circumstances.<sup>128</sup>

An-Naim argues that in order to best reconcile differences between Islam and human rights there must be a reformation of the historical Shari'a necessitated by the "modern world": "large interpersonal urban centers, complex political relations, and globalized economies."<sup>129</sup> For An-Naim such a world requires a more specific structure for "political relations, forms of social interaction and control, and types of economic relations" that are not accounted for in traditional Islamic legal reasoning. An-Naim acknowledges classifications inherent in Islam that which define gender and religion<sup>130</sup> outlining, for example, the roles of women and men within Sharia which prevents a full realization of human rights.<sup>131</sup> It is important to also note that more traditional legal scholars, also implicitly acknowledge the inherent categorization of rights although they do not seem to problematize it. For example, Kamali states:

The third variety of *maslahah* is the discredited *maslahah* or *maslahah lulgha* which the lawgiver has nullified either explicitly or by an indication that can be found in the Shari'a. The ulama are in agreement that legislation in the pursuance of such interests is invalid and no judicial decree may be issued in their favor. An example of this would be an attempt to give the son and the daughter an equal share in inheritance on the assumption that this will secure a public interest. But since there is a clear *nass* in the Quran (al-Nisa, 4-11) that assigns to the son double the portion of the daughter, the apparent *maslahah* in this case is clearly nullified.<sup>132</sup>

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Islam and Human Rights in Political Context." *Feminism and Legal Theory Project. All in the Family? Islam, Women, and Human Rights*. Emory Law School, Atlanta, GA. March 2-4, 2006.

<sup>127</sup> Anthony Tirado Chase and Abdul Karim Alaug, "Health, Human Rights, and Islam: A Focus on Yemen." *Health and Human Rights* 8, no. 1 (2004).

<sup>128</sup> Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate." *Human Rights Quarterly* 17.4 (1995): 587-617.

<sup>129</sup> Abdullahi Ahmed An-Naim. "A Kinder, Gentler Islam?," *Transition* 52 (1991): pp. 4-16.

<sup>130</sup> Also discussed by Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate." *Human Rights Quarterly*, 17.4 (1995) 587-617.

<sup>131</sup> Abdullahi Ahmed An-Naim. "A Kinder, Gentler Islam?," *Transition* 52 (1991): pp. 4-16.

<sup>132</sup> Mohammad Hashim Kamali. *Principles of Islamic Jurisprudence*. (Cambridge: Islamic Texts Society, 2003).

While not relying on the methodology outlined by An-Naim, Egyptian Judge Muhammad Said al-Ashmawy has similarly argued that the Shari'a does not form a comprehensive legal system but consists mainly of general religious and ethical principles.<sup>133</sup> He further argues that the Islamic Shari'a is largely silent on issues of state policy and law-making<sup>134</sup> and, hence, from a Muslim theological perspective it does not define law for Muslim societies. This provides a means to reconcile some of the conflict found in traditional Shari'a interpretations and human rights law by removing Shari'a from the domain of public law.<sup>135</sup>

An-Naim's perspective is challenged by the recent work of Anthony Chase, who argues that discussion surrounding 'reconciling' Islam and human rights are irrelevant to understanding how and why human rights are being realized or violated within states. He believes that rhetoric of a Islam and human rights clash is, ironically, analogous to current day orientalist and Islamist discourses of clashing civilizations. In playing into these narratives, Chase believes that human rights scholars only reinforce their rhetorical power. He argues that the vast majority of human rights violations are not caused by 'Islam' but, rather, by the economic and political forces (as opposed to religious forces) that underpin such a record of violations. In the case of the latter, he cites the example of Saudi Arabia where women are not allowed to drive. He points out that the law, rhetorically justified by Shari'a, was being reconsidered because, in the words of a Saudi diplomat, 'the average Saudi family finds it pretty hard to find a driver...Men often leave work to take kids to the doctor or to school.' Chase acknowledges the presence of an "Islamic meta-narrative," but advocates that we look toward state political and economic motivations to understand the failure or protection of the realization of human rights.<sup>136</sup>

#### IV. HUMAN RIGHTS, SEXUAL RIGHTS, AND VULNERABILITY TO HIV/AIDS

One of the predominant arenas in which a realization sexual rights in various legal paradigm's has become most relevant is HIV/AIDS and the recognition that the convergence of inequality, sexuality, subordination based on gender (and other social constructs) has led to increased vulnerability to contracting HIV for marginalized groups including members practicing diverse sexuality. Human

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<sup>133</sup> Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate." *Human Rights Quarterly* 17.4 (1995): 587-617.

<sup>134</sup> Also argued by Fazeli, Roza. *Feminism and Legal Theory Project. All in the Family? Islam, Women, and Human Rights. Emory Law School, Atlanta, GA. March 2-4, 2006.*

<sup>135</sup> See Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate." *Human Rights Quarterly* 17.4 (1995): 587-617.

<sup>136</sup> Chase, Anthony, "The Tail and the Dog: Constructing Islam and Human Rights in Political Context." *Feminism and Legal Theory Project. All in the Family? Islam, Women, and Human Rights. Emory Law School, Atlanta, GA. March 2-4, 2006.*

rights advocates have long recognized the connection between gender hierarchies and the stigmatization of diverse sexuality that have led to increased vulnerability to HIV/AIDS. As such it is helpful to understand India's obligations from a right to health perspective. The main treaty governing the right to health is the International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>137</sup> to which India acceded on July 10, 1979.<sup>138</sup> Article 12 of the ICESCR states that:

States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>139</sup>

The Committee on Economic, Social and Cultural Rights has been established by the Economic and Social Council to implement and interpret the Covenant. In so doing, the Committee has issued several General Comments indicating how it interprets certain provisions of the treaty. General Comment 14 interprets on Article 12 of the ICESCR as an "inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including sexual and reproductive health." Further, GC 14 highlights the interrelated and essential elements in order to fully realize the right to health including availability, accessibility, acceptability, and quality of health services. Accessibility to health services is specifically understood to be non-discriminatory, physically accessible, and affordable.<sup>140</sup>

The manifestations of gender hierarchies found in secular and religious legal realms have grave implications, particularly in the realm of HIV/AIDS. There are an estimated 5.7 million people living with HIV/AIDS<sup>141</sup> with the epidemic largely affecting high-risk groups. Vulnerability to HIV/AIDS increases when individuals do not have access to available, accessible, acceptable, and high quality services.<sup>142</sup> The stigma of sexual activity for women and sexual minorities silence these vulnerable communities and limits access to necessary

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<sup>137</sup> International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, art. 12(1), U.N. Doc A/6316 (1966), 999 U.N.T.S. 3

<sup>138</sup> United Nations High Commissioner for Human Rights available at <http://www.unhchr.ch/pdf/report.pdf>. Downloaded April 15, 2006.

<sup>139</sup> International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, art. 12(1), U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 12(a)-(b).

<sup>140</sup> Committee on Economic, Social, and Cultural Rights (CESCR), Gen. Comment 14, *The Right to the Highest Attainable Standard of Health*, para. 12, U.N. Doc. E/C. 12/2000/4 (2000)

<sup>141</sup> [http://www.unaids.org/en/Regions\\_Countries/Countries/india.asp](http://www.unaids.org/en/Regions_Countries/Countries/india.asp)

<sup>142</sup> Committee on Economic, Social, and Cultural Rights (CESCR), Gen. Comment 14, *The Right to the Highest Attainable Standard of Health*, para. 12, U.N. Doc. E/C. 12/2000/4 (2000).



services. While such stigmas for women and sexual minorities are common in most cultures around the world, these stigmas are higher in religious traditions (impacting culture) that place a high premium on women's chastity and heterosexuality. Alongside gender subordination, the social and economic marginalization of Muslims in India may contribute to the increased vulnerability to contracting HIV/AIDS based on an inability to access high quality health education and health services. The recognition of HIV/AIDS as real and with the potential to impact a broader segment of the population creates the space for demanding sexual rights and necessitates the redefining sexuality.

## V. CONCLUSION: MOVING TOWARDS A RIGHTS-RESPECTING SECULAR STATE

While much progress has been made, the work of sexual rights activists has been unable to break down the dominant sexual ideologies and cultural assumptions that obstruct the realization of sexual rights.<sup>143</sup> For Muslim peoples in India, this reality is exacerbated as individuals are confined within multiple layers of subordination constituted by the self-appointed Muslim leadership, the secular state (specifically Section 377 of the Indian Penal Code), and Hindu nationalist rhetoric. Kapur reminds us:

Law is constantly engaged in re-inventing and re-interpreting the subject, including the sexual subject, and the cultural story woven around this subject. In the legal stories I have related, law is a space where a cultural story is told about sexuality, often a cultural story that is rooted in dominant cultural script. When the erotic subject comes to law, whether to claim rights or challenge a punitive regime that bounds her off as someone who is stigmatized, inauthentic or foreign and to be excluded, she counters the weight of sexual and cultural normativity as she transgresses the boundaries of both.<sup>144</sup>

In a fight to realize sexual rights, protect the rights of sexual minorities, and protect individuals against vulnerability to HIV/AIDS, secularism as it stands does not provide the necessary legal framework. For Muslim women and sexual minorities (as well as for India at large) a true realization of sexual rights appears to lie in the simultaneous internal reformation of religious law and secular legal code. Without these parallel reformations, Muslim women and sexual minorities will continue to be trapped within an inescapable cycle of subordination.

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<sup>143</sup> Ratna Kapur. *Erotic Justice: Law and the New Politics of Post Colonialism*. (London: Glasshouse Press, 2005), 92.

<sup>144</sup> Ratna Kapur. *Erotic Justice: Law and the New Politics of Post Colonialism*. (London: Glasshouse Press, 2005), 92.