

## Honour and Violence Against Women in a Modern *Shar`i* Discourse

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### Abstract

*In 2005, against the background of increased internal as well as external violence in the West Bank and Gaza Strip, the Chief Islamic Justice of the Palestinian Authority made a public intervention against 'murder as revenge or in defence of honour'. This article considers the intervention in light of the jurisprudential, legislative and social arguments it invokes, and examines both commonalities and differences in the Qadi al-Qudah's discourse and the position taken by women's rights activists on this particular form of violence against women.*

In March 2005, after a report in the West Bank press of a girl killed by her brother after being raped by her father, the Palestinian *Qadi al-Qudah* (Chief Islamic Justice) issued a press statement on incest and murder for 'honour', which opened as follows:

Recent news reports have told of the twofold crime against an innocent girl, who was a victim of incest from her father and of honour-motivated murder by her brother, adding to the stories of these vile and ghastly crimes that are reported from time to time. I am absolutely certain that this girl fell through the effect of her father's power into a crime in which she was guiltless, so she was murdered twice. [...] As for he who appoints himself ruler and judge and executor of punishment, he is corrupt on the earth (*mufsid fi'l-`ard*) even if he was motivated to take vengeance (*tha'r*) or revenge (*intiqam*) for honour.<sup>1</sup>

A week or so later, in his regular Friday column in the local newspaper, Shaykh Taysir al-Tamimi expanded this original statement in an intervention

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<sup>1</sup> Statement on the ruling (*bayan al-hukm*) in the crimes of incest and murder for honour, by the *Qadi al-Qudah* of Palestine, Shaykh Taysir Rajab al-Tamimi, *Diwan* of the *Qadi al-Qudah*, Jerusalem, 23<sup>rd</sup> March 2005.

addressing murder for revenge (*tha'r*) and for 'honour.' This intervention, translated later in this article, illustrates a number of commonalities and differences between the leading figure in the Palestinian *shar`i* judiciary and rights activists, particularly in human rights and women's rights organisations, in their approach to issues of 'honour-based' violence against women. The Chief Islamic Justice is not the only prominent figure in the Palestinian *shar`i* establishment to intervene in the context of cases of violence against women in recent years. Given that criminal law in Gaza and the West Bank does not fall under *shar`i* jurisdiction, a number of issues are raised in a consideration of such interventions. What is the apparent intent and impact of the Islamic law commentary and/or findings on these and other cases? How does the discourse address particular actors, the central authorities, wider society? How does it envisage the protection of women against violence, and what are the parameters of that protection? What precedents are selected to underpin the interventions? How do the interventions address the role of the state in protecting women against violence, and how do they deal with 'lawful' violence to be exercised by the state? Before considering the particular intervention, however, a few preliminary contextual points are in order.

## **Context**

In the spring of 2005, it was becoming clear that the forms of 'internal violence' considered by Shaykh Tamimi's intervention had increased after the outbreak of the second uprising in 2000 and the intensely violent response by the Israeli armed forces. The Occupied Palestinian Territories remained under different forms of siege and blockade; there was a severe economic crisis (which of course has deepened since then with the withdrawal of development aid from Western state donors following the

2006 victory of Hamas in the elections for the Legislative Council); and the reach of the central authority, and that of its legal and executive organs (including the debilitated police) was enfeebled and weak.<sup>2</sup> This was the period that Gaza's largest human rights organisation, the Palestinian Centre for Human Rights, started issuing press releases and interventions under the general heading of 'security chaos and proliferation of small arms.'<sup>3</sup> There was mounting public concern at what was termed *al-falatan al-amni*, the breakdown of public security manifested by, *inter alia*, assassinations and armed clashes between different agencies of the security forces as well as between official security forces and the armed wings of political factions (or those claiming such affiliations),<sup>4</sup> along with reports of 'vigilante' activities. There was also a more generalised use of arms in the course of private and inter-familial disputes, often with the invocation of the concept of *tha'r* or private vengeance. Along with this, there was substantial concern at a reported rise in domestic violence, linked by researchers to the ongoing conflict situation, in particular the increased violence against Palestinians by the Israeli army; as elsewhere in the world, externally imposed violence substantially increased the vulnerability of Palestinian women and children to violence at home.<sup>5</sup> From the beginning of 2005, the Palestinian press reported a series of alleged 'honour killings' against young women in the West Bank.

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<sup>2</sup> For an overview of the situation in the West Bank from the previous summer, see International Crisis Group (2004). Particular attention is paid in this report to difference between different areas of the West Bank. For an analysis of the challenges facing the Palestinian judicial system, see Naser al-Rayes, (2000, 2003) *Al-Quda' fi filastin wa mu`awaqat tatawwurihi*, Ramallah: al-Haq

<sup>3</sup> See [www.pchr.org](http://www.pchr.org).

<sup>4</sup> Again, this had considerably worsened by the winter of 2006-2007.

<sup>5</sup> See 'NGO Alternative pre-sessional report on Israel's implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in the Occupied Territories.' Submitted to the pre-sessional working group of CEDAW, January 2005. Researched by al-Haq, PCHR and WCLAC. Compiled by Joyce Song (WCLAC) 2005. See also report by Yakin Erturk, UN Special Rapporteur on violence against women, its causes and consequences, 'Report on Mission to Occupied Palestinian Territory,' E/CN.4/2005/72/Add.4 2 February 2005. In 2006, the Palestinian Authority's Central Bureau of Statistics (PCBS) made available preliminary findings from a major survey on the incidence of domestic violence in the Occupied Palestinian Territories, 'the first one of its kind on the national level'. Palestinian Central Bureau of Statistics (2006) 'Domestic Violence Survey (December 2005-January 2006). Main Findings Report.' Ramallah: June, 2006. [retrieved 14<sup>th</sup> August 2006 from <http://www.pcbs.gov.ps>].

The statement of the Chief Islamic Justice discussed in this article was one of a number of public responses provoked by alarm at these circumstances. In May 2005, Palestinian human rights organisations in Gaza, along with a range of political factions, highlighted serious concerns over the ‘continuation of the state of security disorder’ and the numbers of casualties from ‘internal violence.’<sup>6</sup> In the West Bank, in the context of similar protests over *al-falatan al-amni*, women’s organisations joined by other civil society institutions, religious leaders and political factions condemned the ‘femicides’ taking place from the beginning of the year, with women killed by relatives on alleged pretexts of ‘family honour.’<sup>7</sup>

The subject of ‘honour killing’ has been an increasing focus, both of domestic attention in different countries of the Middle East and of international attention in recent years.<sup>8</sup> Local organisations and activists in Palestine, as in Jordan, Lebanon and Egypt, have been actively engaged with the phenomenon, working on legislative and policy responses and seeking the establishment of refuges and shelters for women at risk.<sup>9</sup> They have also called on religious leaders (Christian and Muslim) to make public statements on the absence of religious endorsement of violence in the name of ‘honour.’<sup>10</sup> International human rights organisations – notably Amnesty International

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<sup>6</sup> *Al-Quds* 11 April 2005 and 1 May 2005.

<sup>7</sup> For example *al-Quds* 4 April 2005 and 12 May 2005.

<sup>8</sup> See generally ‘Introduction: Honour, Rights and Wrongs’ in Lynn Welchman and Sara Hossain (eds), *‘Honour’: crimes, paradigms and violence against women* (London: Zed Books 2005). An annotated bibliography of literature on the subject can be found at [www.soas.ac.uk/honourcrimes](http://www.soas.ac.uk/honourcrimes).

<sup>9</sup> See case studies in Welchman and Hossain 2005 by Danielle Hoyek, Rafif Rida Sidawi and Amira Abou Mrad, ‘Murders of Women in Lebanon: crimes of ‘honour’ between reality and the law’; Centre for Egyptian Women’s Legal Assistance, ‘Crimes of ‘honour’ as violence against women in Egypt’; Nadera Shalhoub-Kevorkian, ‘Researching women’s victimisation in Palestine: a socio-legal analysis’; Reem Abu Hassan and Lynn Welchman, ‘Changing the rules? Developments on ‘crimes of honour’ in Jordan’; Aida Touma-Sliman, ‘Culture, national minority and the state: working against the ‘crime of family honour’ within the Palestinian community in Israel.’ All these contributors had been engaged in work against ‘crimes of honour’ for years prior to their contribution of case studies to this volume of papers. The Palestinian Human Rights Monitoring Group dedicated an issue of its bi-monthly *Monitor* to the subject of ‘Killing of women on the basis of family honour’ (Volume 6 issue 4, August 2002).

<sup>10</sup> At a meeting convened by the Coalition of Civil Society Organisations Against Violence Against Women in Ramallah on 7 May 2005, there were statements from representations of the Chief Islamic Justice and the Greek Orthodox Patriarch. Against the background of a number of ‘honour killings’

and Human Rights Watch – have investigated ‘honour crimes’ in the general context of violence against women in the Occupied Palestinian Territories.<sup>11</sup>

On the international level, ‘honour killings’ are problematically associated with, variously, Muslim communities, Arabs, ‘the East’ and so on. This is problematic on a number of levels, not least because it involves the ‘othering’ and ‘scandalising’ (if not ‘exoticising’) of certain forms of violence against women largely to the exclusion or at least obscuring of other forms of violence against women both in Western societies and in those ‘other’ societies by the West, including the violence of war.<sup>12</sup> It is also the case that the way in which those in the powerful West seek to engage with this issue can and at times has considerably complicated the strategies of response formulated and implemented locally by domestic actors, notably women’s rights groups. For example, Muslim state representatives at the United Nations have taken exception to what they consider to be a projected link between Islam and ‘honour violence’, while the profile of a Western-funded women’s rights agenda is used to attack local activists as going against their own society and allying themselves with a hostile West that is elsewhere in the region militarily engaged in Muslim majority states. These and other factors are part of the context in which local activists work. There are also problems with using the term ‘honour killing’ or ‘honour crime’ not least because this takes the claimed perspective of the perpetrator and may also act to obscure ‘real’ motivations for an act of violence – which may for example be

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over the previous months in the West Bank, the immediate context was the family murder of a young Christian woman in Ramallah.

<sup>11</sup> Amnesty International, ‘Israel and the Occupied Territories: Conflict, occupation and patriarchy; women carry the burden,’ AI Index MDE 15/016/2005 (March 2005); Human Rights Watch, ‘A Question of Security: Violence Against Palestinian Women and Girls’ November 2006 Vol.18 No.7 (E). The former was better received locally than the latter.

<sup>12</sup> See generally Welchman and Hossain (*supra* note 8).

economic. Definitions are thus particularly fraught, and some women's groups in the region and elsewhere prefer use of a term that translates more as 'femicide'.<sup>13</sup>

### **'Honour' killings and the law**

Despite the problems, the terms 'honour killings' or 'honour crimes' (*jara'im al-sharaf*) are widely recognised and used in Palestine as well as in neighbouring countries, broadly referring to what Lama Abu Odeh terms the 'paradigmatic example of a crime of honour' – that is 'the killing of a woman by her father or brother for engaging in, or being suspected of engaging in, sexual practices before or outside marriage.'<sup>14</sup> In the posited paradigm, we have a set of possible crimes under classical Islamic law, and the invocation of a set of acts of lawful or unlawful violence. We have the alleged or suspected 'sexual offence', the commission of the *hadd* offence of *zina* (sexual relations outside marriage); we have the act of murder; and we have invocation of the violence of the state vis-à-vis the alleged act of *zina*, hence the issue of the *hadd* penalties, and vis-à-vis the act of murder and the issue of the lawfulness in these circumstances of *qisas* ('exact retaliation' or talion) and *diya* (financial compensation or 'blood wit'). Also, in regard to the crimes of *zina* and of killing, we have the issue of *ta`zir*, the 'discretionary' penalty that may be imposed by the state for such offences, should they not give rise to liability under the rules of *hadd* or *qisas*.

In other words, we are potentially concerned here with all three categories of offences broadly defined in Islamic criminal law, categorised according to the type of

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<sup>13</sup> See, in particular regard to Palestine, Shalhoub-Kevorkian *supra* note 9; 'Femicide and the Palestinian Criminal Justice System: Seeds of Change in the Context of State Building?' 36/3 *Law and Society Review*; and (2000) 'Mapping and Analysing the Landscape of Femicide in Palestine,' research report submitted to UNIFEM by the Women's Centre for Legal Aid and Counselling, Jerusalem.

<sup>14</sup> Lama Abu-Odeh, 'Crimes of Honour and the Construction of Gender in Arab Societies' in Mai Yamani (ed.), *Feminism and Islam* (Reading: Ithaca Press, 1996).

penalty the offences incur: *hudud*, *qisas* and *ta`zir*.<sup>15</sup> It is not the purpose of my commentary here to set out the arguments as to why ‘honour killings’ – in the sense just given – are neither lawful nor excusable under the terms of ‘classical’ Islamic law. Indeed, much of the intervention by the Chief Islamic Justice translated below goes to setting out these arguments. The intervention also criticises particular aspects of statutory criminal law that currently govern killings for ‘honour’ in the Palestinian West Bank, where the cases that provoked his response occurred. Years of work on a draft Palestinian Penal Code have yet (as of spring 2007) to result in legislation, so for the moment the terms of the 1960 Jordanian Penal Code continue to apply, including those contained in article 340:

1. He who surprises his wife or one of his close female relatives [*mahrims*]<sup>16</sup> in the act of committing unlawful sexual intercourse with somebody and kills, wounds or injures one or both of them, shall be exempted from penalty;<sup>17</sup>
2. He who surprises his wife or one of his ascendants or descendants or siblings with another in an unlawful bed, and kills or wounds or injures one or both of them, shall have a reduced penalty.<sup>18</sup>

As Lama Abu Odeh has shown, similar (if not identical) provisions appeared in the original texts of the penal codes of a number of other post-colonial Arab states, including Syria, Lebanon and Iraq.<sup>19</sup> These articles provided the man who killed his wife or female relative on finding them in the act of unlawful sex with an absolute

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<sup>15</sup> For a recent narrative of the ‘classical’ doctrine, see Rudolph Peters, *Crime and Punishment in Islamic Law*, (Cambridge: Cambridge University Press, 2005): 6-68.

<sup>16</sup> The term *mahram* denotes a person related to another person in such a degree that they would be prohibited from marrying each other.

<sup>17</sup> Literally, ‘shall benefit from the excuse of exoneration/exemption’ (*`udhr muhill*). See Abu Hassan and Welchman, *supra* note 9, 201.

<sup>18</sup> Literally, ‘shall benefit from the excuse of reduction’ or mitigation (*`udhr mukhaffaf*). *Loc cit.*

<sup>19</sup> For the translations of these and other relevant provisions, see [www.soas.ac.uk/honourcrimes](http://www.soas.ac.uk/honourcrimes).

defence and rendered him not liable to any penalty for killing in these circumstances. Such provisions have become the target of advocacy on the part of women's rights (and human rights) activists in different countries; in Lebanon, the relic of the original provisions is a target for repeal now by advocacy campaigns, while the high profile Jordanian campaign to amend article 340 led in 2001 to a reduced penalty rather than no liability.<sup>20</sup> In Palestine, advocacy continues against the inclusion of any form of this provision in a Palestinian penal code.<sup>21</sup> The advocacy insists on the removal of such provisions because they represent the state's gender-based sanction of violence by men against women in certain circumstances. However, the advocacy does not ignore the fact that in practice, these provisions do not describe the 'paradigmatic' circumstances of an 'honour killing' and are not relied upon as defence by perpetrators. Rather, an assortment of provisions going to a defence of provocation are relied on in different countries to reduce the liability of a man<sup>22</sup> who kills his wife or female relative because of her actual or alleged sexual activities outside marriage. Under the Jordanian Penal Code in force in the Palestinian West Bank, the key provision here is article 98, which provides that:

Whosoever commits a crime in a state of extreme rage resulting from an unrightful and dangerous act on the part of the victim shall benefit from mitigation.

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<sup>20</sup> On the Jordanian amendments of 2001 see Abu Hassan and Welchman, *supra* note 9. The amendments were issued by the King and Cabinet as 'temporary' legislation while parliament was dissolved. Article 94(1) of the Jordanian constitution requires that such temporary legislation be reviewed by Parliament when it re-convenes. The parliament must repeal such temporary legislation if it is no longer to be valid. In the summer of 2003 these amendments to the Penal Code were twice rejected by the House of Deputies, having been accepted by the Senate; their future is thus not yet settled. For a political science analysis of the civil society movement against 'honour crimes' in Jordan, see Stefanie Nanes, 'Fighting honor crimes: evidence of civil society in Jordan,' *Middle East Journal* 57/1 (2003): 112-129.

<sup>21</sup> Recommendations regarding the issues of women's rights – and particularly violence against women – in the light of the draft Palestinian Penal Code are collected in WCLAC (Women's Centre for Legal Aid and Counselling), *Wada'iyat al-mar'a al-filastiniya fi zill mashru' qanun al-'uqubat* (Jerusalem: WCLAC, 2005).

<sup>22</sup> Or sometimes a male relative who is legally a minor, further reducing criminal liability.

Judicial interpretation here concentrates on the terms ‘extreme rage’, ‘unrightful’ and ‘dangerous’.<sup>23</sup> The element of ‘honour’ is not mentioned in the statute but is added in by social and judicial practice. On the other hand, the terms of article 340 become attached to the symbolism of ‘honour’ despite the fact that the article does not apply in law or in practice to the cases of ‘honour crimes’ that come to the attention of the authorities, such as the case cited at the beginning of this article.

The intervention of the Palestinian *Qadi al-Qudah* resonates both with the rulings of ‘classical’ Islamic law and with the advocacy of civil society activists in regard to the current statutory defences available to perpetrators of ‘honour’ killings. In order to set the document in context, it is useful to note a few pertinent aspects of the way in which both Islamic criminal law and current statutory law appear to have developed in relation to this issue.

### **Classical Islamic jurisprudence**

To begin with Islamic criminal law, in the texts of the classical jurists, we find some discussion of the ruling that should apply should a husband come across another man committing adultery with his wife and kill him, or her, or both of them. There are two areas of law being discussed here. Firstly there is intentional homicide and the identification of situations in which *qisas* can be demanded by the heirs of the victim,<sup>24</sup> the rulings on which are apart from any consideration of a *ta`zir* punishment imposed by the ruling authority. Secondly there is the crime of *zina*, which must be prevented if at all possible, since it is a *hadd* offence. Two further points regarding the

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<sup>23</sup> For earlier Jordanian judicial application of this provision see Abu Odeh (*supra* note 13); for more recent developments, following the civil society campaign against ‘honour’ killings, see Abu Hassan and Welchman (*supra* note 9).

<sup>24</sup> See on this JND Anderson, ‘Homicide in Islamic law,’ *Bulletin of the School of Oriental and African Studies* 13/4 (1951): 811-828.

crime of *zina* in classical jurisprudence are raised by the jurists' discussions on this point. These are, first, the ruling that if a person who commits *zina* is (or has been) married (that is, is *muhsan/a*) the penalty is death by stoning, while the unmarried person (the non-*muhsan*) is liable to a hundred lashes;<sup>25</sup> and second, the extremely high standard of evidence required to establish the crime of *zina* in a manner that will render the perpetrator liable to the *hadd* penalty. This comprises 'the concurring testimonies of four male eyewitnesses.'<sup>26</sup> Noel Coulson explains further:

In the case of most criminal offences two witnesses suffice. But the burden resting upon the prosecution in a case of *zina* is doubly severe. Four witnesses must testify orally. They must be male, adult Muslims. They must be thoroughly trustworthy – not merely in the sense that they must have no criminal record: scrutiny must show them to be men of unblemished integrity of character. Finally, they must testify to nothing less than their own individual clear eyewitness of the carnal act itself.<sup>27</sup>

Coulson goes on to comment that '[t]he circumstances of a couple convicted upon such evidence must surely constitute the most graphic definition of the Latin maxim: "apprehended *in flagrante delicto*".' In the absence of such a 'public' offence, the only other way for *zina* to be proven in order to provoke the *hadd* penalty is the perpetrator's fourfold confession in court. Asifa Quraishi explains the 'nearly insurmountable evidentiary restrictions' placed on prosecution of *zina* liable to the *hadd* penalty as indicating that 'the crime is therefore really one of public indecency rather than private sexual conduct':

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<sup>25</sup> See Peters (2005): 61 on the status of *muhsan* in Sunni law: adult, free, Muslim and having 'previously enjoyed legitimate sexual relations in matrimony (regardless of whether the marriage still continues).' For a more in-depth discussion see Mohamed El-Awa, *Punishment in Islamic law: a comparative study* (Indianapolis: American Trust Publications, 1982): 18-20.

<sup>26</sup> Peters (2005): 14.

<sup>27</sup> Noel Coulson, 'Regulation of sexual behaviour under traditional Islamic law,' pp.63-68 in Afaf Lutfi Sayyid Marsot, *Society and the Sexes in Medieval Islam* (Malibu: Undena Publications, 1979): 65.

[W]hile the Qur'an condemns extramarital sex as an evil, it authorizes the Muslim legal system to prosecute someone for committing this crime *only* when the act is performed so openly that four people see them without invading their privacy.<sup>28</sup>

Along with other scholars, Quraishi thus argues that the combination of the evidentiary restrictions and the harshness of the penalty go to deterrence of the 'public aspects' of such sexual conduct and the consequent protection of public morality.<sup>29</sup> This is given further weight by the jurists' consensus that while in general 'witnesses to *hadd* crimes are neither legally nor morally obliged to give testimony,' in cases of alleged *zina* 'it is even considered commendable not to notify the authorities or testify in court.'<sup>30</sup> This preference for the 'covering' of the offence, keeping it out of the public sphere, is referred to in the *Qadi al-Qudah*'s intervention.

As in the case of other offences, a discretionary punishment (*ta`zir*) may imposed for an act of *zina* that cannot be proven in accordance with the procedural requirements rendering the perpetrator liable to the *hadd* penalty. And also as in the case of other offences, the jurists insist that the *hadd* penalty for *zina* may be imposed only by the judge endowed with this authority by the ruling authority. The eleventh century Hanafi jurist Sarakhsi, for example, observes that if four upright witnesses testify that a certain person committed *zina*, and then someone deliberately kills the accused person before the judge has sentenced him to the *hadd* penalty, the killer

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<sup>28</sup> Asifa Quraishi, 'Her honor: an Islamic critique of the rape laws of Pakistan from a woman-sensitive perspective,' 18 *Michigan Journal of International Law* (1996-1997): 287-320 at p.296

<sup>29</sup> See for example Mohamed El-Awa (1982): 17.

<sup>30</sup> Peters (2005): 13. See also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964): 198.

would be liable to *qisas*, since ‘testimony gives rise to nothing unless followed by judgement.’<sup>31</sup>

As noted above, the discussions of the classical jurists that have a relevance to the current debates on modern statutory provisions invoked by ‘honour killings’ come when they consider the criminal liability of a man who kills his wife and/or her partner on finding them in the act of adultery. In his summary of the rulings of the four Sunni schools, `Abd al-Rahman al-Jaziri notes a difference of opinion as to whether or not a killing in such circumstances gives rise to the prospect of *qisas*: ‘a man finds another man with his wife in adultery, and he kills him, so is he [then] killed or not?’<sup>32</sup> The majority of the jurists, continues al-Jaziri, held that a man may not kill either of the adulterous couple in such circumstances, and if he does so he is liable to *qisas* unless he can prove his defence, establishing that the adulterer was *muhsan* and proving the act of *zina* by four witnesses or the confession of the adulterer. The *hadith* on which the majority position was based is explained as seeking to avert the risks of deception that might otherwise arise:

A man might invite another man into his house to do something and then kill him for a grudge, and lie that he had found him with his wife. Or a man might kill his wife in order to be rid of her for some reason, and then falsely claim that he found a man committing *zina* with her.<sup>33</sup>

Apart from this majority position, al-Jaziri reports that the dominant opinion of the Hanbalis and Malikis was to avert penalty if the victim was *muhsan* and the husband was able to bring two witnesses to testify that he killed because of *zina*,

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<sup>31</sup> Muhammad Ibn Ahmad al-Sarakhsi, *Kitab al-mabsut* (Misr: Matba`at al-Sa`adah, 1324/1906) Volume 9 p.62.

<sup>32</sup> For a summary see `Abd al-Rahman al-Jaziri, *Kitab al-fiqh `ala al-madhahib al-arba`a* (Beirut: Dar al-kutub al-`ilmiyya n.d.), Vol.5, p.61.

<sup>33</sup> Al-Jaziri (n.d.) 62. The *hadith* he cites is narrated by Abu Hurayra and begins with Sa`ad Ibn `Ubada asking the Prophet: ‘Do you consider that if I found a man with my wife, I should grant him a respite till I bring four witnesses?’

rather than four to establish the crime of *zina* as required by the majority. Earlier opinions attributed by al-Jaziri to ‘certain of the Successors’ held that the man would not in any event be liable to the death penalty for the murder, and might be pardoned if there were ‘pre-existing suspicions of the ill conduct of the wife, or if the dead man was known for committing *zina*’, or there was circumstantial evidence for the crime.<sup>34</sup>

### **Post-classical developments**

The majority ruling summarised by al-Jaziri appears to have lost currency in post-classical jurisprudence. In 1964, Joseph Schacht summed up the *fiqh* consensus on the lapse of criminal liability as follows:

There is no liability for acts against a person who is not protected, whose blood is *hadar* (opposite of *ma`sum*, inviolable). [...] There is further no liability, of course, for carrying out the death penalty, or for death caused by carrying out *hadd* or *ta`zir* punishments; also if a man surprises his wife or his female *mahram* in unlawful intercourse and kills her and/or her accomplice...<sup>35</sup>

JND Anderson went a little further on this point, including addressing the rights of the state to act against the killer:

Neither talion nor blood-wit are applicable where the victim is not a legally protected person (*ma`sum*). This term would include a *harbi*,<sup>36</sup> an apostate from Islam, or one liable to the death penalty for illicit sexual relations [...] In regard to all except the *harbi*, the killer is liable to punishment for having taken the law into his own hands and acted without

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<sup>34</sup> *Ibid* p.62.

<sup>35</sup> Schacht (1964): 184.

<sup>36</sup> Schacht defines a *harbi* as ‘a non-Muslim who is not protected by a treaty’, ‘in a state of war’, an ‘enemy alien.’ (*ibid* p.131).

the authority of the Ruler, but the normal legal incidents of homicide are none the less inapplicable.<sup>37</sup>

How these two scholars of Islamic law came to give such an account of the juristic position despite – rather than because of – the consensus of the classical schools can perhaps be explained by subsequent, post-classical developments in the jurisprudence of Islamic criminal law. On this issue, some later scholars and legislators appear to have been considerably less stringent than the classical jurists. Uriel Heyd's translation of the (probably) late 15<sup>th</sup> century Ottoman Criminal Code includes the following:

If a person finds his wife somewhere committing fornication with [another] person and kills both of them together - provided he immediately calls people into his house and takes them to witness - the claims of the heirs of those killed shall not be heard in court.<sup>38</sup>

Here we notice the attention given to the need to prove the defence to murder, taking the lesser burden of two witnesses to the killer's subsequent statement, rather than four to the act of *zina*, with the heirs in this circumstance procedurally excluded from claiming *qisas* or *diya* for an unlawful killing. The provision does not stipulate a penalty for the killer to be imposed by the state, but nor does it expressly exclude one. Also of relevance is the following provision, again in Heyd's rendition:

If a woman is spoken ill of [as having secret and illicit relations] with a man [and people] see the two at a secluded spot and testify [to that effect]

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<sup>37</sup> JND Anderson, 'The Maliki law of Homicide' p 9.

<sup>38</sup> Uriel Heyd, *Studies in Old Ottoman Criminal Law* (ed. V.C. Ménage) Oxford: Clarendon Press (1973): page 98 (article 13).

the *cadi* shall chastise [them] and a fine [or: fines] for fornication shall be collected, as [mentioned(?)] before.<sup>39</sup>

In this case, there is no question of the *hadd*, and indeed no requirement for any evidence of the act of *zina* whatsoever, yet the fine for *zina* may be imposed by reason of seclusion and suspicion and previous ‘ill-repute’ of the woman involved.<sup>40</sup> It should be noted that there is no consideration in the statute of exoneration should one or both of such a couple be killed, or a ruling that the heirs’ claims would not be heard in court should this occur; this is rather a matter of the judge chastising (*ta`zir*) individuals for social conduct not liable to the *hadd* penalty for *zina*. Even in regard to this era of post-classical Ottoman statute therefore, current penal codes and judicial practice appear to go much further in contemplating an absence of liability.

On the other hand, the rulings of Ottoman jurists are examined by Colin Imber, who traces what he calls an ‘increasing confidence’ over the 12<sup>th</sup> – 16<sup>th</sup> centuries in ‘a rule which gives – especially males – the right to kill a female in the same family and her lover, if he catches them *in flagrante*.’<sup>41</sup> Examining a *fatwa* by Ebu’s-su`ud, the sixteenth century Mufti in Istanbul, he finds that this had developed to the position that ‘the men and senior women in a family may kill a female family member and a man who is not a close relative, if they find the two associating in any way.’ Imber’s comment is as follows:

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<sup>39</sup> *Ibid* page 99 (article 17). See pages 95-103 for Heyd’s translation of the Code’s provisions on sexual offences. It might be noted that another article of this code allowed the imposition of fines for *zina* in the event that the perpetrator ‘does not suffer the [death] penalty.’ Heyd (p.95) notes that these were ‘probably those cases in which no sufficient evidence is produced’ for the imposition of the *hadd* offence, which would render the statutory fines a sort of codification of *ta`zir*. For his part, in regard to cases where the *hadd* was lifted for lack of evidence, Heyd comments that ‘[t]here is, however, reason to doubt whether this was done in such cases only. It seems that the *kanun* reflects a general tendency of Islamic legal practice to restrict as much as possible the application of the severe *shari`a* penalties.’

<sup>40</sup> Compare Peters (2005) p.16 on the discretionary punishment of ‘a man who enters his house with a woman of bad reputation and remains there for some time.’

<sup>41</sup> Colin Imber, *Ebu’s-su`ud, The Islamic Legal Tradition*, EUP 1997, 251.

It is not a classical Hanafi doctrine, but it is nevertheless one that emerges logically from the laws of fornication. The Hanafi tradition treats fornication as a heinous crime but, at the same time, renders prosecution impossible. A consequence of this is to remove the punishment of fornication from the public to the private sphere, making it the responsibility of the female offender's family. However, the real source of post-classical Hanafi doctrine that allows the private punishment of fornicators seems to be the customary law of the Islamic world, the jurists having assimilate the popular 'code of honour' to formal legal practice.'<sup>42</sup>

Thus, the argument is that the establishment *muftis* had moved away from the classical consensus against taking the law into one's own hands in the specific circumstance of alleged or suspected sexual offences by a female member of the family. On the other hand, away from the sphere of very public *fatwa*-giving at the highest echelons of the Ottoman establishment (that is, parallel to the legislators) there remained local juristic resistance to any idea of family members enforcing norms of sexual morality through acts of violence. Writing on private *muftis* in 16<sup>th</sup> and 17<sup>th</sup> century Ottoman Syria and Palestine, Judith Tucker notes that they 'repeatedly lamented and condemned the prosecution and punishment of sexual offences by family members':

In denying family members, specifically a husband or a brother, any defined role in the punishment of women for sexual crimes, the *muftis* were adhering to the doctrine that unlawful sexual intercourse was a crime against religion, not an offence against one's relatives. [...] The *muftis* took

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<sup>42</sup> *Ibid*, 251-2.

a clear position here against social customs that assigned fathers, brothers, and husbands the role of enforcer of female sexual behaviour.<sup>43</sup>

This is very much the position taken by those at the top of the *shar`i* establishment in current-day Palestine, as the Chief Justice's intervention shows; the classical consensus is invoked against certain social practice that, on Imber's evidence, was accommodated by certain prominent post-classical jurists while being resisted by local practitioners. However, it should be noted that the *fatwas* on which Imber draws for his conclusion do not indicate endorsement of a killing perpetrated outside the context of a 'suspicious situation' or 'association' of a female suspected of having engaged in an illicit relationship. That is, the idea that an act of murder could take place without liability in isolation from the alleged illicit act (in terms of time and place) does not appear: the couple have to be caught 'in the act' – even if the act is 'illicit association' rather than actual fornication. The jurisprudential discussions do not cover defences of 'extreme rage resulting from an unrightful and dangerous act' (as in the above-cited Article 98 of the Jordanian Penal Code) on the basis of which contemporary 'honour killings' are liable to be defended in the West Bank; rage, provocation and other such defences are not part of the classical jurisprudence.

The criminal liability of a man who kills a woman – particularly a wife – caught in the act of adultery has equally preoccupied other legal systems. This fact of comparative law has direct relevance for the arguments made by the *Qadi al-Qudah* in the intervention translated below. Tracing the development of English law on the defence of sexual provocation, Ian Leader-Elliot notes that in the nineteenth century a man would have a defence against a murder charge if he caught his wife in the act of having illicit sex: '[t]he killing had to be an immediate response to catching the

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<sup>43</sup> Judith Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*, University of California Press (1998): 166.

adulteress in the act. There was an absolute requirement of ‘ocular inspection,’ as it was called...’<sup>44</sup> Leader-Elliott goes on to examine how these stricter evidentiary requirements for a successful defence were relaxed in subsequent judicial practice, in the development of a ‘steadily widening conception of provocation.’<sup>45</sup> French legislation for its part showed a close resemblance to the statutory provisions that emerged in different Arab states in the twentieth century. Lama Abu-Odeh has examined this point in some detail, comparing the French Penal Code of 1810 and the later Ottoman Criminal Code of 1858, both of which granted the killer exemption from penalty if his wife or female relative was caught in the act of illicit fornication, and a reduction in penalty if she was caught (respectively) in a ‘suspicious situation’ or an ‘unlawful bed.’<sup>46</sup> Earlier scholars did not pay similar attention to these comparative paradigms and statutes. Writing in 1975, Herbert Liebesny opens his chapter on contemporary criminal law in the Middle East as follows:

In most Near and Middle Eastern countries modern penal codes have been enacted which follow generally the continental European system. [...] In some instances, particularly where family honour is involved, local customs have, however, been taken into account, either by statutes or by the courts. Syria and Lebanon are examples of countries with statutory

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<sup>44</sup> Ian Leader-Elliott, ‘Passion and Insurrection in the Law of Provocation,’ in N. Naffisen and R.J.Owens (eds) *Sexing the Subject of the Law* (1997) at p.153.

<sup>45</sup> *Ibid* p.169.

<sup>46</sup> See Lama Abu Odeh:

Article 188 Ottoman Penal Code 1858: He who has seen his wife or any of his female *mahrims* with another in a state of disgraceful adultery and has beaten, injured, or killed one or both of them will be exempted [from liability]. He who has seen his wife or one of his female *mahrims* with another in an unlawful bed and has beaten, injured or killed one or both of them will benefit from mitigation.

Article 324 French Penal Code 1810: He who catches his spouse, his female ascendant, female descendant or his sister in the act of adultery or illegitimate sexual relations with a third party and commits unpremeditated murder or wounding against the person of one or the other of them may be exempted from liability.

He who commits murder or wounding may be liable to a lesser penalty if he has surprised his spouse, female ascendant or descendant with a third person in a suspicious situation.

provisions, which in this case are identical. [...] In Iraq where the Baghdad Penal Code, in force until 1969, did not contain a comparable provision, executive clemency was used for a long time to shorten sentences imposed by the courts in cases where homicide was committed in the protection of family honour.<sup>47</sup>

Liebesny here seems unaware of the historical antecedents in the law and practice of the Mandatory powers (France and Britain) under whose rule and according to whose model these law and practices took shape. French law was the historical basis for the Lebanese and thence the Syrian penal codes. The statutory provisions Liebesny cites from Lebanon and Syria in the above passage are the ‘*in flagrante*’ articles that as noted above have precedents not only in Ottoman but also in French legislation, grating impunity or reduced liability if a man finds his wife or female relatives in the act of illicit sexual intercourse or other compromising situation.<sup>48</sup> As for Iraq, the 1969 Iraqi Penal Code that replaced the British-issued Baghdad Penal Code did include a provision similar to those of Lebanon, Syria and Jordan.<sup>49</sup> The ‘executive clemency’ exercised before this – starting under British Mandate rule – might perhaps be compared to the ‘grave and sudden provocation’ defence which was applied in the courts of British-ruled India and continued in the courts of Pakistan in cases of ‘honour killings’ where – to the dismay of rights activists – it is still successfully invoked, even after the ‘Islamisation’ of criminal law

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<sup>47</sup> Herbert J. Liebesny, *The Law of the Near and Middle East. Readings, Cases and Materials*, Albany: State University of New York Press (1975): 233.

<sup>48</sup> He cites Article 562 of the 1949 Lebanese Penal Code and article 548 of the 1949 Syrian Penal Code. These provisions are compared by Abu-Odeh with the parallel articles in the Jordanian Penal code currently in force in the Palestinian West Bank. The cited provisions have been modified in both Lebanon and Syria, although less substantively in the latter.

<sup>49</sup> Article 409: ‘Whosoever surprises his wife or one of his [female] *mahrams* in the act of adultery or finds her in one bed with a partner and kills them immediately or kills one of them, or attacks both or one of them in an assault that leads to death or permanent disability, shall be punished by prison for a period not exceeding three years.’ On advocacy campaigns seeking the modification of this provision in current-day Iraqi Kurdistan, see Nazand Begikhani, ‘Honour-based violence among the Kurds: the case of Iraqi Kurdistan,’ 209-229 in Welchman and Hossain (2005): 211-212.

and the formal removal of such defence.<sup>50</sup> A defence of ‘grave and sudden provocation’ more closely evokes ‘extreme anger’ at an ‘unrighteous and dangerous act’ or other such formulations of a general provocation defence (also to be found in French law) that appear in the penal codes of different Arab states and, as noted above, provide grounds for the defence in cases of the contemporary paradigmatic ‘honour killing.’ In sum, this does not mean that ‘local custom’ was not a source for the laws and practice that Liebesny cites – or at least, the part of local custom that the legislators, judiciary and political (including colonial) rulers chose to recognise. It does mean however that the matter is by no means as ‘local’ as Liebesny presents it, nor yet as particular to the Middle East. And this can be critical for resistance and advocacy for change.

### **Statement by the Chief Islamic Justice**

The ruling on murder as revenge (*tha’r*) or in defence of honour

Shaykh Taysir Rajab al-Tamimi<sup>51</sup>

Unlawful sexual intercourse (*zina*) is one of the ugliest crimes committed against morality and virtue, undermining the social edifice and threatening family security and stability, impacting negatively on the upbringing of children and the formation of their personalities. It is one of the seven major sins prohibited by all divine religions; God said: ‘Nor come not nigh to adultery, for it is a shameful (deed) and an evil, opening the road (to other

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<sup>50</sup> On Pakistani legal developments in this area, see Sohail Warraich, ‘‘Honour killings’ and the law in Pakistan,’ pp.78-110 in Welchman and Hossain (2005); on the provocation plea see p.88 ff.

<sup>51</sup> *Al-Quds* 1 April 2005. The author adds his institutional positions: Chief Islamic Justice (*Qadi al-Qudah*) of Palestine, and Head of the Supreme Council of *Shari`a* Jurisdiction.

evils).’<sup>52</sup> And for this reason God Almighty punished it severely: ‘And the woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes; let not compassion move you in their case, in a matter prescribed by God, if you believe in God and the Last Day.’<sup>53</sup>

But Islam does not establish its rule on the penalty, but rather on preventing the reasons motivating the crime, and these are the sure guarantees to keep society clear of it, to refine the mind and keep the conscience clean, and to adhere to rules set for the natural disposition by marriage, and the rules regarding dress and beautification (especially as far as women are concerned), and to observe social and behavioural manners.

The basic (rule) in a crime such as this is that a person ‘cloaks’<sup>54</sup> his own person and other people, in preservation of the dignity, cohesion and morality of society. However, if such a crime is taken before the ruler (*hakim*) then he has to carry out the *hadd* on the perpetrator: as the Prophet said (peace be upon him), ‘Forgive the *hudud* before you bring them to me, for the *hadd* that is brought before me becomes binding...’ (narrated by al-Nasa’i). And even if it is brought to the ruler, he must try to find a way out, to exert effort to avert the occurrence of the *hadd* penalty: ‘Avert the *hudud* from the Muslims as far as you can, and if there is a way out for someone then let him go, for it is better for the imam to err in forgiveness than to err in the penalty.’ (narrated by Tirmidhi)

The incidence of this crime is extremely difficult to prove definitively. The *shari`a* is very strict on this matter and allows it to be proved only in one of two ways: either through acknowledgement made voluntarily and without

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<sup>52</sup> Al-Isra’ (17) v. 32. Yusuf Ali.

<sup>53</sup> Al-Nur (24) v. 2. Yusuf Ali.

<sup>54</sup> *Satar* (hide, cover).

coercion by the adult and sane perpetrator, man or woman; or through the testimony of four trustworthy adult witnesses, provided that the four testimonies accord with each other and describe the act exactly in explicit expressions. This means that the perpetrators of *zina* must have done it in such a wanton and unrestrained, public manner that people witnessed it, and this is why a heavy penalty is prescribed, to be carried out in front of people: ‘And let a party of the believers witness their punishment.’<sup>55</sup> However, if there are not enough witnesses, or their statements do not accord, all the witnesses are liable to the penalty for *qadhaf*, and that is eighty stripes, so that the sanctity of good repute is not violated or wrongfully transgressed.

Other than this, the crime is not established against anyone; the Prophet said, in regard to a woman who had divorced from her husband by *li`an* after she gave birth to a child looking like the [man] accused [of being her partner in adultery], ‘if I had had anyone stoned without proof, I would have had this one stoned...’ (narrated by Bukhari).

And it is a requirement for a person liable to a *hadd* penalty that the perpetrator of the crime be adult, sane, and acting voluntarily, and if these conditions are not met then there can be no *hadd* imposed, especially if there is coercion. He said, ‘God has passed over among my people the mistaken, the forgetful, and the one who was coerced’ (narrated by Ibn Maja).

The *shar`i* texts hold that if the adulterer is a *bikr* who has not been married by valid contract then the *hadd* for the crime of unlawful sexual intercourse is a hundred lashes, while if he is *muhsan* and has been validly

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<sup>55</sup> Al-Nur (24) v.2. Yusuf Ali.

married then the *hadd* is stoning, with no difference in this between men and women.

And the scholars (*`ulama*) agree that the *hudud* are the right of God Almighty and a defence of society, and that nobody – whoever they may be – apart from the ruler may cause the *hadd* to occur. It is the judiciary that examines the crime, according to procedure, and if the accused is found to have committed it and the judge rules that the *hadd* is due, then the ruler or the person he has delegated for that purpose is the only one allowed to carry it out on the accused. The same applies to *qisas* (exact retaliation) and all other *hudud* and offences and crimes; no individual in society is permitted to take the law into their own hands lest this lead to chaos, oppression and killing among the people on claims of taking revenge or avenging family honour.

The *`ulama* also agree that if a man finds another man with his wife, and establishes they have committed an immoral act, he may not kill this man; if he kills him, he is liable to [be killed in] retaliation (*qisas*), unless he establishes proof for his claim [that they were committing adultery] by bringing four witnesses. Verses in Surat al-Nur were revealed regarding *li`an* between spouses and not killing, for lack of witnesses. God Almighty said: ‘As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies, [swearing] by God that he is of those who speak the truth; and yet a fifth, invoking the curse of God on him if he is of those who lie. And it shall avert the punishment from her if she bear witness before God four times that the thing

he says is indeed false, And a fifth [time] that the wrath of God be upon her if he speaks the truth.’ (Surat al-Nur verses 6-9).<sup>56</sup>

Sa`id bin al-Musib narrated that a man in Syria found a man with his wife and killed them both and Mu`awiya (may God be content with him) wrote to Abu Musa al-Ash`ari to ask Ali about this, and Ali (may God be content with him) said that if he didn’t bring four witnesses, he should be killed.

But society is characterised by complete tyranny when it comes to its attitude towards the crime of *zina*. There is no penalty for a woman who is coerced into *zina* or a girl who is raped, as they are overwhelmed against their will. And yet they are killed, in ignorance or in violation of the rulings of the *shari`a*, and in falling under the force of tribalism and pagan (*jahili*) zeal. A woman was forced [to commit *zina*] during the time of the Prophet (peace be upon him) and the *hadd* was averted and imposed on the person who had assaulted her (Ibn Maja). Abu Musa al-Ash`ari said that they brought to `Umar ibn al-Khattab (may God be content with him) a woman they said had committed fornication; she said that she had been asleep and had woken up to find a man on top of her, and `Umar let her go and told her guardian to treat her kindly. [But in the cases I am talking about here] the attacker goes without penalty, as does the killer, he is socially and legally safe from punishment. This is despite the fact that the motivation for the crime is an exacerbating circumstance that should increase the penalty with the liability of *qisas*, rather than reduce it as is the case with the Penal Code provision taken from European laws. God said: ‘Whoso deliberately slays a believer,

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<sup>56</sup> Al-Nur v.24.

his reward is hell for ever. God is in wrath against him and he has cursed him and prepared for him an awful doom.’ (Al-Nisa’ verse 93).

Murder of this type is a wrongful aggression against a protected soul; God Almighty said ‘Slay not the life which Allah has forbidden save with right.’ (Al-Isra’ 33). The Prophet (peace be upon him) said ‘it is easier for God that the world should cease than that a believer be killed without right’ (narrated by Ibn Maja). It is a relic from the Jahiliya and its void customs that Islam fought against because of its oppression of women, and a violation of the rulings of the *shari`a*, which treated men and women equally in responsibility on this, the texts addressing both men and women without difference on the obligation to follow the guarantees that prevent the incidence of this crime, the need to avoid it, and the liability of each of them to the *hadd*, without distinction, should the crime be perpetrated.

And the uglier crime is that she is usually killed on the basis of suspicion of something she didn’t do. The Prophet said (peace be upon him) ‘If I had stoned anyone without proof, I’d have stoned the woman so-and-so, such was the doubt raised by what she said, how she looked, who went to see her’ (narrated by Ibn Maja). This is clear evidence that it not permitted to inflict the *hadd* for an allegation and that suspicion does not make it lawful to spill people’s blood.

Therefore, and in order to realise justice and ensure protection, we urge the Legislative Council to speed up its promulgation of the Penal Code and include in it the penalty of *qisas* for the crime of murder on the pretext of honour.

## Comment

The first point to note about this intervention is the title: ‘the ruling on murder as revenge (*tha`r*) or in defence of honour.’ The connection is practical, given the spate of inter-familial killings and the apparent rise in ‘honour killings’ witnessed in the Occupied Palestinian Territories in 2005, as noted at the beginning of this paper. However, the connection is also ideological and doctrinal, situating both types of killing outside the framework of lawful killing under the terms of classical Islamic jurisprudence. Scholars interpreted the Qur’anic rules on liability for murder as aiming to end pre-Islamic practices of feud and revenge killings, moving from the concept of *tha`r* to the institutionally sanctioned and highly constraining framework of *qisas*.<sup>57</sup> The emphasis of the chronologically pre-Islamic origins of *tha`r* in the title shifts in the text to ascribe a doctrinally anti-thetical (anti-Islamic) nature to ‘honour killings’: thus women are killed by people ‘falling under the force of tribalism and pagan zeal’ and honour killings are ‘a relic from the Jahiliya and its void customs that Islam fought against because of its oppression of women...’

The text itself opens with seven paragraphs on the classical doctrine on *zina*. This is the point of entry to the argument against the killing of women for alleged sexual misconduct; although *zina* is not the subject in the title of the ruling, because the preoccupation is with the sexual conduct of women, and the ‘honour’ defence is directly related to allegations of unlawful sexual conduct, the *Qadi al-Qudah* addresses this part of the jurisprudence before coming on to his main subject. Starting with the reasons for the prohibition of *zina* – the protection of the family and broader society – he then notes the severity of the punishment prescribed in the Qur’an

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<sup>57</sup> See El-Awa (1982): 69-71.

(flogging) before explaining that the ‘rule of Islam’ is based not on the penalty but rather on deterrence, on avoiding circumstances that could encourage the offence through modesty and clean-living among the members of society. This is pursued in the third paragraph where he invokes the principle of *satr*, of not revealing the offence, on the grounds discussed by Quraishi above – that is, protection of the public interest. The *hadiths* he cites in support of this point stress the need to avoid infliction of the *hadd* penalty wherever possible, while in the following paragraph, dealing with the difficulties involved in proving the offence beyond doubt, he goes back to the ‘public’ nature of the crime liable to *hadd*: if the evidential requirements are in fact met, the perpetrators ‘must have done it in such a wanton and unrestrained, public manner that people witnessed it’. Suspicion is not a basis for proof; and the offence of *qadhf*, wrongful accusation of *zina*, is there ‘so that the sanctity of good repute is not violated or wrongfully transgressed.’ These points, all taken from the classical sources, are addressing the specific context: at the end of the intervention, the *Qadi al-Qudah* comes back to the point that the victim of an ‘honour killing’ is ‘usually killed on the basis of suspicion of something she didn’t do.’ Further points made in these opening paragraphs also go directly to the context of ‘honour killings’ in which the intervention is made: that coercion is an absolute defence (as in the case of the girl whose murder most immediately prompted his statement) and that under classical Islamic law, the penalties for *zina* apply equally to men and women (whereas in ‘honour killings’ the murder victim is nearly always female).

Shaykh Tamimi then embarks on a vigorous assertion of the role of the judiciary: no-one is allowed to take the law into their own hands ‘lest this lead to chaos, oppression and killing among the people on claims of taking revenge or avenging family honour.’ In the context in which he was writing, with wide public

concern at the ‘security chaos’ and breakdown in law and order, including family feuds, this point has immediate relevance. The following paragraph invokes the classical jurisprudential consensus on the liability to *qisas* of a man who finds his wife committing adultery; there is no reason here to discuss dissenting opinions or post-classical developments.

The entry point, the focus on the venality of the act of *zina* and its dangers to society, is both doctrinal and strategic. The *Qadi al-Qudah* first upholds the principles of lawful sexual conduct and a moral society before proceeding to condemn acts justified by some as combating immoral behaviour. Local rights activists have to deal with the same context, which may be exacerbated by the perceptions that campaigns against honour killings, and for changes in statutes accommodating them, are fuelled and funded ‘from outside’, from Western donors and feminist organisations. Here the local context includes widespread perceptions of immorality endemic in current Western society combined with the dissipating potential of a hostile Western agenda of cultural imperialism along with economic and military aggression in the region, and a failure to challenge in any meaningful way the violence of the Israeli occupation.<sup>58</sup> In the case that had been the immediate cause of the *Qadi al-Qudah*’s intervention, there was no doubt of the victim’s innocence of any act of consensual extra-marital sex, and when he comes to the ‘complete tyranny’ of modern-day society in dealing with sexual offences, the *Qadi al-Qudah* focuses his intervention specifically on cases of rape and coercion. The killing of such women is un-Islamic: it

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<sup>58</sup> During one of the debates in the Jordanian parliament around amending the Penal Code, certain deputies charged that a national campaign and efforts to get the relevant criminal code article repealed were ‘attempts by the West to infiltrate Jordanian society and make Jordanian women immoral.’ *Jordan Times* 23 November 1999. In Egypt, Nadjia Al-Ali tells us that: ‘Contemporary constructions of an imperialist, corrupting, decadent and alienating West take place in a variety of contexts: in left-nationalist as well as Islamist fora, such as newspapers, books, seminars, discussions in universities, in public meetings of intellectuals and artists etc. [...] It can be said with certainty that arguments about western conspiracies against Muslims, the failings and decay of western civilisation and the threat of western cultural imperialism ring a bell among many Egyptians.’ Nadjia Al-Ali, *Secularism, Gender and the State in the Middle East: The Egyptian Women’s Movement*, CUP (2000): 26-27.

is ‘in violation of the rulings of the *shari`a*’ and is a relic of ‘tribalism’ and of pre-Islamic times. Illustrating his point with *hadiths* and the Qur’an, Shaykh Tamimi insists that this is wrongful killing of a protected soul, and reminding his readers of the stand of Islam against the ‘void customs of the Jahiliyya’ that Islam ‘fought against because of its oppression of women’. He recalls again the principle of equal liability of men and women, and returns to the theme of suspicion: firstly, baseless suspicion and the killing of those entirely innocent of the offence, and then the procedural principle that even apparently well-grounded suspicion provides no basis for the taking of a life.

In such points, the *Qadi al-Qudah* is doing what rights activists in Palestine and across the region have called on establishment figures in different religions to do, setting out why and how ‘honour killings’ are unlawful in their respective doctrines.<sup>59</sup> In the case of Islamic law, what is appealed to is the ‘classical’ doctrine with a focus on the ‘lawful’ state-imposed penalty for unlawful sexual conduct (the *hadd*), and the unlawfulness – and indeed, sinfulness – of other or extra-judicial penalties. That said, for women’s and human rights activists, the invocation of classical Islamic law principles is limited. Those engaged in advocacy efforts in Palestine and elsewhere to stop the occurrence of honour killings do not endorse calls for a full application of the dominant classical Islamic law interpretations – notably, the implementation of the *hadd* penalties for unlawful sexual relations. They may invoke the classical Islamic rules in order to discount claims of lawfulness of violent response by private actors, but they do not endorse the prospect of the violence of the state in relation to the sexual conduct of citizens. Nor, for that matter, does the Chief Islamic Justice call for this here. The statement at the beginning of the intervention, that ‘Islam does not

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<sup>59</sup> See above note 10.

establish its rule upon the penalty’, could be read as holding that the mark of an ‘Islamic society’ is not that it has *hadd* legislation in place, but that it conducts its affairs in such a manner as to ‘prevent the reasons motivating the crime.’ Unlike certain other establishment ‘*ulama*’ asked to pronounce on this issue, the *Qadi al-Qudah* makes no criticism of the Palestinian legal system for not contemplating the introduction of *hadd* provisions, nor does he hint at any compassion to be exercised in favour of those who take the law into their own hands in the absence of *hadd*-based regulation of sexual relations by the state. His stand here is one of uncompromising censure of those who commit violence against women in the name of ‘honour.’<sup>60</sup>

However, like rights activists, the Chief Islamic Justice does have demands to make on role of the state in demanding the protection of women from violence at the hands of private actors. In his address to the Palestinian Legislative Council at the end of the intervention, Shaykh Tamimi does make an appeal for the inclusion of classical Islamic law principles in applicable statutory law– not to the *hadd* for *zina*, but to *qisas* liability for the perpetrators of ‘honour killings’. The ‘motivation for the crime’ of ‘honour killing’, he asserts, is an ‘exacerbating circumstance that should increase the penalty with the liability of *qisas*, rather than reduce it as is the case with the Penal Code provision taken from European laws.’

There are two points to be made here. The first is the reference to the European origins of the relevant provision of the existing Penal Code. This description probably refers to the *in flagrante* rules of article 340 of the Jordanian Penal Code currently applicable in the West Bank, although it might also apply to the ‘extreme anger at an unrightful act’ of article 98, as discussed above. Both articles stand to reduce the penalty applicable to a man perpetrating an ‘honour crime’, in

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<sup>60</sup> His only concession is the implication (in the second paragraph) that as private actors women are more responsible than men in regard to the way they dress and present themselves, in the interests of public morality.

various circumstances. The *Qadi al-Qudah*'s allusion has immediate resonance with similar features in the women's rights discourse in the region, stressing non-indigenous origins of the relevant statutory provisions in order to undermine claims that such provisions reflect authentic Arab (as compared to Islamic) legal heritage, as is claimed by those opposing statutory changes. Strategically this seeks to turn the tables on those who claim that attempts to change these statutory provisions are proposed by 'agents of the West' to undermine Arab society. While Western attention has tended to localise and essentialise the various phenomena of 'honour crimes' – and legal provisions accommodating them – to the Arab/Muslim/'Eastern' contexts, the interventions and advocacy efforts of local groups have, *inter alia*, stressed the Western origins of statutory provisions contemplating a permissive attitude to the killing of women.

Secondly, in his call for the increase in penalty for perpetrators of 'honour killings' through the liability of *qisas*, the Chief Islamic Justice is setting the Islamic doctrine of retaliation for intentional and unlawful killing in apposition to the reduction in penalty provided for under current statutory law. So far from being 'justified' or 'lawful', and provoking reduced liability or none at all, the invocation of the liability of *qisas* locates an 'honour killing' as a crime and a sin in the politically and doctrinally resonant language of the classical doctrine. There is of course no statutory doctrine of *qisas* in the current law; and moreover, under the classical rules, *qisas* would not be applicable in many cases of 'honour killings' – for example, where a father kills his daughter, or where the victim's heirs agree to waive the right to demand *qisas*.<sup>61</sup> Is the *Qadi al-Qudah* making this call on the Palestinian legislature

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<sup>61</sup> For how the 1990 Law of Qisas and Diyat has affected the treatment of perpetrators of 'honour killings' in Pakistan, see Warraich (2005): 85-87. The penal codes in various Middle Eastern states, while not legislating on *qisas*, do allow the court to further reduce the sentence in the event that the close relatives of the murder victim waive their

in the expectation that the inclusion of the liability of *qisas* would underline the gravity of the offence, in ‘*shar`i`*’ as well as in ‘legal’ terms, even though it would be unlikely to be applied? Or is he suggesting that perpetrators be statutorily liable to the death penalty as in certain other cases of intentional murder? Either way, while wishing to see ‘honour’-based killings of women treated for all intents and purposes as other cases of intentional murder, rights activists are more likely to call for the constraint or abolition of the death penalty than to endorse calls for the expansion of capital punishment liability, however symbolic and whatever the motives of the *Qadi al-Qudah*.

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‘personal right’ or personal claim to compensation from the perpetrator. For the impact of the waiving of such personal claims by the families of victims of ‘honour killings’ in Jordan and Lebanon, see respectively Abu Hassan and Welchman (2005): 206, and Hoyek, Sidawi and Mrad (2005): 127.