



Women's Rights Report:
Discrimination
in the Punishment of Women



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INTRODUCTION

In many states around the world, women are subject to discriminatory punishment simply because of their gender. Gender inequality prevents women from fully exercising basic human rights such as freedom of movement and expression, and it is increasingly recognized as an impediment to a state's economic growth and stability.¹ The vast majority of states have recognized the importance of gender equality by signing and ratifying the Convention on the Elimination of all Forms of Discrimination Against Women and by endorsing it as one of the United Nations Sustainable Development Goals.

There are numerous sources of state duties and international standards calling for the elimination of discriminatory punishment of women and violence against women (VAW) in the form of punishment. Central is article 2(g) of the Convention on the Elimination of Discrimination Against Women (CEDAW), which calls for states to repeal all national penal provisions which constitute discrimination against women.² General Recommendations 19 and 35 by the Committee on the Elimination of Discrimination Against Women interprets discrimination against women to include VAW, the latter of which emphasizes violence by public authorities.³ The UN Working Group on Discrimination Against Women (UN WGDW)

¹ See, e.g., International Monetary Fund, *Pursuing Women's Economic Empowerment*, 31 May 2018, at 5-7, available at <https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/05/31/pp053118pursuing-womens-economic-empowerment>.

² Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) *entered into force* 8 Sept. 1981, available at <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

³ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against women*, A/47/38, 1992, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf; *General Recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35, 14 July 2017, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf.

has further recommended updating General Recommendation 19 to specifically mention that laws or judicial decisions allowing violent punishment (such as stoning or lashing) of women for adultery or other sexual behavior should be eliminated, that laws which criminally prohibit adultery are a violation of women's human rights and should be repealed, and that laws which punish women for exercising sexual or reproductive autonomy, such as through prostitution or termination of pregnancy, should be eliminated.⁴

Article 3(h) of the UN Declaration on the Elimination of VAW calls for equality for women in the enjoyment of “the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.”⁵ The Beijing Platform of Action also notes concern with VAW by police, prison, and security officials, and it recommends that they and judicial officials take measures to avoid VAW in enforcement practices, receive training to avoid VAW in the performance of their duties, and are punished if found engaging in VAW.⁶

A number of UN bodies have also called for the elimination of specific forms of punishment against women, such as the aforementioned UN WGDAW's call to states to repeal laws criminalizing adultery⁷ and the Office of the High Commissioner for Human Rights (OHCHR) Recommended Principles and Guidelines on Human Rights and Human Trafficking, which emphasizes that trafficked persons must not be prosecuted for activities involved as a

⁴ Working Group on the issue of discrimination against women in law and in practice, *Inputs on the draft update to General Recommendation 19: accelerating elimination of gender-based violence against women* (CEDAW/C/GC/19/Add.1 of 28 July 2016), 31 Oct. 2016, at 3, available at

<https://www.ohchr.org/Documents/HRBodies/CEDAW/GR19/WGDAW.pdf> (citing <https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf>).

⁵ Declaration on the Elimination of Discrimination against Women, A/RES/22/2263, 7 Nov. 1967, at art. 3(h), available at <http://www.un-documents.net/a22r2263.htm>.

⁶ The United Nations Fourth World Conference on Women, *Beijing Platform for Action*, September 1995, at paras 121, 124(g), (n), (o), available at <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm>.

⁷ Working Group on the issue of discrimination against women in law and in practice, *Adultery as a criminal offence violates women's human rights*, October 2012, available at <https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf>.

consequence of their trafficking.⁸ The Working Group on Trafficking in Persons specifically mentioned this prohibition in the context of calling for the decriminalization and end of prosecutions of trafficked women working in the sex industry.⁹

A number of UN mandates, including the Special Rapporteur on violence against women, its causes and consequences, have issued mission reports on specific state visits which have reported on discriminatory punishment of women in that state, a number of which are cited in the chapters below for Afghanistan, Iran, Iraq, and Saudi Arabia. Of special note is the 2016 report by Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Juan Mendez to the Human Rights Council on gender perspectives on his mandate, which include numerous recommendations on eliminating and preventing penal and related practices discriminatory to women.¹⁰ All of these sources leave no doubt that a duty of states to eliminate discriminatory punishment of women is well established in international human rights law.

Turning to the content this report, it examines discriminatory practices in the punishment of women in eight states varied by region and culture, consisting of Afghanistan, Indonesia, Iran, Iraq, Malaysia, Papua New Guinea, Saudi Arabia, and Yemen. These states were selected for several reasons. While discrimination against women exists in all societies, the states in this report have histories of discrimination in state action against women. Most of them regularly rank as among the worst states in the world for gender equality according to organizations such

⁸ Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2002, available at <https://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

⁹ Working Group on Trafficking in Persons, *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, 9 December 2009, at para. 6, available at https://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/WG4_2010_4_E.pdf.

¹⁰ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/31/57, 5 January 2016, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/57.

as the World Economic Forum.¹¹ Other states addressed here, such as Afghanistan, have been highlighted by the UN Committee on the Elimination of Discrimination against Women as states of “deep concern” because of the discriminatory effects of their legal systems on women.¹² Others have been singled out by the UN Special Rapporteur on violence against women, its causes and consequences as needing substantial reforms to their legal systems “to address the structural and systemic inequalities and discrimination that women face.”¹³ Each chapter of this report focuses on a particular state and begins with a brief introduction to that state’s relevant historical and legal background, as well as its international obligations relevant to equal treatment of women. Each chapter then details major issues of discrimination in the punishment of women in that state that fall short of international standards, both legal and societal, and finally offers recommendations.

The report considers multiple forms of punishment, including official punishment as a matter of law, discriminatory practices of officials, and societal punishment which is either sanctioned or tolerated by the state or where the state has been insufficient in ending the practices. Examined practices include substantive discrimination, including moral crimes such as adultery, seclusion, and dress requirements, honor killings, sorcery-related crimes, and other

¹¹ World Economic Forum, *The Global Gender Gap Report*, 2017, available at <https://www.weforum.org/reports/the-global-gender-gap-report-2017>.

¹² Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, 30 July 2013, at paras. 21-25, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AFG/CO/1-2; see also, e.g., Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Sixth Periodic Reports of Yemen*, 11 May 2009, at paras. 9-20, available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fYEM%2fCO%2f6&Lang=en.

¹³ United Nations Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (Mission to Papua New Guinea)*, A/HRC/23/49/Add.2, 18 Mar. 2013, at 19-21; see also, e.g., Yakin Ertürk, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Mission to Saudi Arabia*, Human Rights Council, Doc A/HRC/11/6/Add.3, 14 Apr. 2009.

crimes which disproportionately target women, and procedural discrimination, including by moral police, informal judicial bodies, and discriminatory practices by police and judges.

Several conclusions can be drawn from surveying these states. In some cases, laws provide for discriminatory punishment on their face, calling for legal reforms. In many other cases, discriminatory action by state officials arises due to laws and practices which allow or *de facto* tolerate them applying religious or customary law, often uncoded, either explicitly or through vagueness. These practices call for more specific reforms which explicitly prevent discriminatory application of the law and which ensure they are practiced by officials. Similar issues arise when the national legal system provides for informal judicial bodies like village councils to decide criminal cases at the local level. Highly decentralized or federalized states often have regions which diverge markedly in terms of gender equality from the national level, as is the case in Papua New Guinea and Indonesia. Many states also suffer from underinvestment in police and criminal justice programs focusing on crimes affecting women.

In every case, there is a pressing need for states to work further to ensure women's equality is accepted within the mainstream culture, as even where *de jure* discrimination has been erased, women cannot achieve full equality without the efforts of society at large.¹⁴ It is our hope that this report will raise greater awareness and understanding of these issues within the international community, and that it can play a constructive role in bringing equality to women in criminal and punitive practices in these and similar states.

¹⁴ Office of the High Commissioner for Human Rights, *Women's Rights are Human Rights*, at 27-29, 43-48, available at <https://www.ohchr.org/Documents/Publications/HR-PUB-14-2.pdf>.

General Recommendations

In light of the findings of this report, Human Rights Now offers the following general recommendations.

To state governments:

- States must repeal laws imposing discriminatory punishment on women and eliminate language in laws, such as vague or undefined terms, which may permit such punishment.
- States must prohibit public and private practices and customs which inflict or enable discriminatory punishment of women and take measures to ensure such prohibitions are widely understood and enforced.
- We urge the governments of states mentioned in this report conduct in depth national surveys to investigate the status of discriminatory punishment against women and immediately establish a national policy to end discriminatory laws and prohibit discriminatory practices if they have not already done so.

To United Nations bodies:

- We urge United Nations bodies to redouble their efforts to end public and private discriminatory punishment of women among states within the purviews of their mandates.
- We recommend that the Working Group on the issue of discrimination against women in law and in practice have the issue of discriminatory punishment of women undertaken as a thematic priority.

ISLAMIC REPUBLIC OF AFGHANISTAN

Governmental and Legal System

Afghanistan's legal and judicial systems are based on conflicting legal foundations of secular constitutional and statutory law, Islamic law (Sharia law), and customary tribal edicts.¹⁵ While certain constitutional and statutory protections for women exist, judicial institutions suffer from corruption, insecurity, an inadequate legal and regulatory infrastructure, and a lack of qualified personnel.¹⁶ Systemic deficiencies in the judicial system—including arbitrary detention, inconsistent and subjective judicial decisions, pervasive corruption, and unfair trials—drive many Afghans to turn to informal methods of dispute resolution such as *jirgas* and *shuras*¹⁷ or other customary bodies that apply tribal cultural edicts and Islamic law.¹⁸ In 2006, the Special Rapporteur on violence against women, its causes and consequence noted that “The multiplicity of normative systems in Afghanistan favours the power structures intent on oppressing women in the private sphere and in public life, facilitates their impunity, and presents a significant obstacle

¹⁵ International Crisis Group, *Reforming Afghanistan's Broken Judiciary*, Asia Report No. 195, 17 Nov. 2010, at 2, available at <https://www.crisisgroup.org/asia/south-asia/afghanistan/reforming-afghanistan-s-broken-judiciary>.

¹⁶ Afghanistan, Working Group on the Universal Periodic Review, *Afghanistan*, A/HRC/WG.6/5/AFG/2, 9 Mar. 2009, at 7.

¹⁷ *Jirgas* and *shuras* are traditional mechanisms of dispute resolution used throughout communities in Afghanistan. Adult male councils resolve tribal conflicts in accordance with tribal edicts, and women are excluded from participation. *Jirgas* and *shuras* are perceived as less corrupt and more trusted by Afghans than formal state courts. However, some studies have shown that *jirgas* and *shuras* can be influenced by local strongmen and warlords, leading to biased and unfair outcomes. See Ali Wardak, *State and Non-state Justice Systems in Afghanistan: the Need for Synergy*, 32:5 U. PA. J. INT'L L. 1305, 1315-1319 (2011), available at [https://www.law.upenn.edu/journals/jil/articles/volume32/issue5/Wardak32U.Pa.J.Int'lL.1305\(2011\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume32/issue5/Wardak32U.Pa.J.Int'lL.1305(2011).pdf).

¹⁸ Informal methods of dispute resolution refer to practices that fall outside of codified Afghan law but are widely used. The tribal edicts in use are not codified, but they have become common practice after a long history of customary usage. Formal methods of dispute resolution refer to methods such as courts of law that utilize codified Afghan law, which can include rulings that are also featured in Islamic law, depending on the situation. Even though informal methods of dispute resolution are outside of the judicial system, their decisions are substantively equal in value to formal judicial decisions due to the weakness of the formal court system.

for women and defenders of women's rights.”¹⁹ Application of Islamic law is not limited to usage by *jirgas* and *shuras*. Article 130 of the 2004 Constitution²⁰ grants courts the discretion to apply Islamic law when the Constitution and other laws are silent on a matter.²¹ The procedures and decisions of these bodies, however, often violate both Afghan and international human rights law.²²

The shortcomings of the formal Afghan judicial system have a disproportionately negative effect on women and girls, as tribal codes and Islamic law are often interpreted by community authorities in ways that discriminate against them.²³ In addition, judges reportedly often have a biased attitude toward women who seek justice through the formal judicial system, and continue to refer cases involving violence against women to the informal methods of *jirgas* and *shuras*.²⁴

Following a five-year drafting process in partnership with the United Nations Assistance Mission in Afghanistan, the government promulgated a new penal code which entered into effect

¹⁹ Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk - Addendum (mission to Afghanistan)*, E/CN.4/2006/61/Add.5, 15 Feb. 2006, at 80, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/108/06/PDF/G0610806.pdf>.

²⁰ “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.” THE 2004 CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 130.

²¹ Nadjma Yassari and Mohammad Hamid Saboory, *Sharia and National Law in Afghanistan*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT, 274, 298 (Jan M. Otto ed., 2010).

²² International Crisis Group, *Reforming Afghanistan's Broken Judiciary*, Asia Report No. 195, 17 Nov. 2010, at 3, 28, available at <https://www.crisisgroup.org/asia/south-asia/afghanistan/reforming-afghanistan-s-broken-judiciary>; see also Afghanistan, Working Group on the Universal Periodic Review, *Afghanistan*, A/HRC/WG.6/5/AFG/2, 9 Mar. 2009, at 6-7.

²³ Afghanistan, Working Group on the Universal Periodic Review, *Afghanistan*, A/HRC/WG.6/5/AFG/2, 9 Mar. 2009, at 7.

²⁴ Committee on the Elimination of Discrimination Against Women, *Summary Prepared by the High Commissioner for Human Rights*, A/HRC/WG.6/5/AFG/3, 24 Feb. 2009, at 3 (“There is still persistent prejudice against women who choose to consult lawyers rather than resort to traditional customs.”); Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, 30 July 2013, at para. 14, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AFG/CO/1-2.

on 14 February 2018.²⁵ While the 2018 Code brings Afghanistan into compliance with its obligations under numerous treaties, such as the Rome Statute, significant problems remain in the law's application to women.²⁶

In particular, the 2018 Penal Code has created ambiguity regarding the continuing validity of the Elimination of Violence Against Women (“EVAW”) Act. Before the new Penal Code was enacted, Afghanistan possessed 11 different criminal laws, including the EVAW.²⁷ On its face, the new law explicitly supersedes these laws. Articles 7 of the new Code provides that no punishment shall be enforced unless stated in the new law, and article 8 explicitly prohibits criminalization or punishment of an action not criminalized or punished “in this law”.²⁸ This *prima facie* applies to the EVAW as well. The Penal Code does not include many of the provisions which appear in the EVAW; thus, on its face, violent crimes against women criminalized under EVAW would not continue to be punishable as such.²⁹ After heavy criticisms were raised about the possibility of EVAW's supersession and arguments that articles 7 and 8 were never intended to apply to EVW, only to the other criminal laws, President Ashraf Ghani promulgated a decree on 3 March 2018 to exclude EVAW from the application of Articles 7 and 8 of the Code, validating its continued legal effect. However, some conservative groups in Afghanistan have criticized the original validity of the EVAW for being promulgated by

²⁵ PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 15 May 2017 (unofficial English translation on file with Human Rights Now).

²⁶ Global Legal Monitor, *Library of Congress, Afghanistan: Government Announces New Draft Penal Code*, 1 July 2016, available at <http://www.loc.gov/law/foreign-news/article/afghanistan-government-announces-new-draft-penal-code/>.

²⁷ *Id.*

²⁸ PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 15 May 2017, arts. 7, 8.

²⁹ UN Assistance Mission in Afghanistan, *UNAMA Welcomes Afghanistan's New Penal Code – Calls for Robust Framework to Protect Women Against Violence*, 22 Feb. 2018, available at <https://unama.unmissions.org/unama-welcomes-afghanistan%E2%80%99s-new-penal-code-calls-robust-framework-protect-women-against-violence>; LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN, 20 July 2009, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/102060/123253/F2103117289/AFG102060%20Eng.pdf>.

presidential decree and lacking formal Parliamentary approval (to say nothing of the validity of the second presidential decree exempting it from legislative supersession), and they have asserted that, whatever the case, the law is no longer valid.³⁰ This debate has created ambiguity about the legal effect of EVAW and whether and how courts will apply it under the new Code.

Human Rights Obligations under International Law

Afghanistan ratified the Convention on the Elimination of Discrimination against Women (CEDAW) in March 2003 without reservation.³¹ However, Afghanistan has not ratified the Optional Protocol to CEDAW, which would allow the UN Committee on the Elimination of Discrimination Against Women to hear petitions from women who have exhausted national remedies.³² Under article 7 of the Constitution, Afghanistan must “abide by the UN Charter, international treaties and international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.”³³

In addition, Afghanistan is a party to the International Covenant on Civil and Political Rights (ICCPR),³⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR),³⁵ and the Convention on the Rights of the Child (CRC).³⁶ Article 3 of the ICCPR

³⁰ PRESIDENTIAL DECREE NO. 262, 3 Mar. 2018; UN Assistance Mission in Afghanistan, *Injustice and Impunity: Mediation of Criminal Offences of Violence against Women*, May 2018, p. 17, available at https://unama.unmissions.org/sites/default/files/unama_ohchr_evaw_report_2018_injustice_and_impunity_29_may_2018.pdf; Torunn Wimpelmann, *Adultery, rape, and escaping the house: The protection and policing of female sexuality in Afghanistan* (Working Paper), 2017, at 9, available at <https://www.cmi.no/publications/6404-adultery-rape-and-escaping-the-house>.

³¹ Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) *entered into force* 8 Sept. 1981.

³² Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art 4, 6 Oct. 1999, 2131 U.N.T.S. 83.

³³ AFGHANISTAN CONST., art. 7.

³⁴ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171.

³⁵ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3.

³⁶ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989).

requires its signatories to ensure the equal right of all to enjoy civil and political rights.³⁷ Article 3 of the ICESCR requires its signatories to ensure the equal right of all to enjoy economic, social, and cultural rights.³⁸ Article 2 of the CRC obliges its signatories to ensure that all children are protected against all forms of discrimination, including that of gender.³⁹ However, Afghanistan made a general reservation to the CRC, stating that it “reserves the right to express reservations on all provisions of the Convention that are incompatible with the laws of Islamic Sharia and the local legislation in effect.”⁴⁰ The reservation is problematic as it is overly-broad and generally international law does not allow local or national legislation to excuse treaty violations.⁴¹

Zina (Adultery)

Zina refers to sexual intercourse outside of marriage, also known as adultery. The crime of *zina* is codified by article 643 of the Penal Code and is punishable by two to seven years in prison.⁴² While the criminalization of *zina* applies to both men and women, it is discriminatory in different aspects. Firstly, polygamy in Afghanistan allows men to have multiple sexual partners as wives and thereby avoid being falsely accused of unfaithfulness or adultery.⁴³ In addition, according to Afghan legislation and jurisprudence, it is easier for men than for women to divorce

³⁷ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407.

³⁸ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3.

³⁹ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989).

⁴⁰ *Id.*; United Nations Treaty Collection, *Convention on the Rights of the Child: Declarations and Reservations*, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en.

⁴¹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 Jan. 1980.

⁴² PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 15 May 2017, arts. 643-644. In the new Penal Code, *zina* by an unmarried person is punishable to a maximum of two years in prison. If the perpetrator is married, the punishment is between 2 and 5 years. If the perpetrator is a close family member (*mahram* in the term of Islamic jurisprudence), a teacher, superior, or someone else with influence or dominance over the other party, they can be sentenced to up to 7 years in prison.

⁴³ CIVIL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 86.

in case of an unhappy marriage, and thus easier for men to avoid committing and being punished for *zina*.⁴⁴ These conditions create a discriminatory criminal punishment regime regarding *zina*, where men are not punished for polygamy while women would be, and the difference in divorce laws allows men to avoid punishment for *zina* more easily than women.⁴⁵ Different institutions such as the UN special rapporteur on violence against women and the Committee on the Elimination of Discrimination against Women have urged Afghanistan to “abolish laws, including those related to *zina*, that discriminate against women and girls and lead to their imprisonment and cruel, inhuman and degrading punishment”⁴⁶ and to “ensure the adequate implementation of the Anti-Human Trafficking and Abduction Law (2008) in order to ensure that victims of trafficking are not prosecuted for having committed *zina*.”⁴⁷

The second way in which the Afghan prohibition of adultery is discriminatory is the fact that *zina* may, in practice, include non-consensual sex, although new legislation qualifies this. The issue is that crime of *zina* may apply in a discriminatory fashion to women who have been raped, as a woman reporting rape is admitting to sex outside marriage.⁴⁸ As a legal matter, article

⁴⁴ Mina Habib, *Divorce Rights Still Elusive for Afghan Women*, INSTITUTE FOR WAR AND PEACE REPORTING (15 Sept. 2015), available at <https://iwpr.net/global-voices/divorce-rights-still-elusive-afghan-women>.

⁴⁵ *Id.*

⁴⁶ UN General Assembly, *Situation of Women and Girls in Afghanistan*, 6 Oct. 2003, A/58/421, at 11, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/556/46/PDF/N0355646.pdf?OpenElement>; Frances Raday, *Background Information on the Statement issued by the Working Group on Discrimination Against Women*, OHCHR, available at www.ohchr.org/Documents/Issues/Women/WG/BackgroundNoteAdultery2.doc.

⁴⁷ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, 30 July 2013, at para. 27(b), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AFG/CO/1-2.

⁴⁸ Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk - Addendum (mission to Afghanistan)*, Feb. 2006, E/CN.4/2006/61/Add.5, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/108/06/PDF/G0610806.pdf>. Although the Elimination of Violence Against Women Law, passed into law in 2009, represents some progress with regard to prosecution of violence against women by establishing rape as a crime, it fails to clearly define rape or the element of coercion, which would be necessary to set it apart from *zina*. As a consequence, when rape is prosecuted, it is mostly done so as the crime of *zina* or, less often, as kidnapping. Akhilesh Pillalamarri, *Afghanistan Finally Prosecutes Rapes*, THE DIPLOMAT, 1 Nov. 2014, available at <http://thediplomat.com/2014/11/afghanistan-finally-prosecutes-rapes/>.

642 of the new penal code specifically prohibits prosecution of victims of rape. However, by using the phrase “the victim shall not be prosecuted”, article 642 may still allow prosecution of women unable to prove the rape offense, and explicit protection should also be offered to women reporting rape.

Zina Cases and Legal Precedent

This manner of discriminatory rape prosecution existed under the previous penal code, which creates concern about practice under the new code. Under the previous 1976 Penal Code, in 2011, a rape victim was sentenced to two and a half years in juvenile prison for *zina*. The court, in considering the victim’s case, “warned that women should know that it is unsafe for them to go out at night and said the victim must not have screamed very much or someone would have heard her,”⁴⁹ even though the court found that two men had taken the victim to an abandoned building and “sexually assaulted” her.⁵⁰ Another example is of a woman who was raped in 2009, resulting in both her and her attacker’s conviction for *zina*. The woman was originally sentenced to two years’ imprisonment but, on appeal, her sentence was increased to 12 years. Her attacker, by contrast, successfully appealed his case, resulting in a reduction of his original 12-year sentence to seven years. In December 2011, President Karzai pardoned the woman after she had served two years of her sentence; however, the difference in their sentences after appeal highlights the punishment’s discriminatory character. While it is too early to determine how the 2018 Penal Code will be interpreted and implemented, convictions such as

⁴⁹ “*I Had to Run Away*” – *The Imprisonment of Women and Girls for “Moral Crimes” in Afghanistan*, Human Rights Watch, Mar. 2012, 5, available at https://www.hrw.org/sites/default/files/reports/afghanistan0312webwcover_0.pdf.

⁵⁰ *Id.* at 68-70.

these may still be possible under the new code's text, as the courts' language and actions suggest they did not view the women as "victims".

Besides these legal impediments, the prevalence of conservative and patriarchal views results in women being seen as dishonoring their family when subjected to sexual violence.⁵¹ Thus, *zina* victims also face additional punishment by societal reprisal and ostracization, such as being seen as unfit for marriage, facing imprisonment, or being subject to extrajudicial killing.⁵²

Honor Killings

Honor killings constitute a serious problem in Afghanistan. Between 2011 and 2013, over 240 cases of honor killings were recorded, and the Afghanistan Independent Human Rights Commission has described honor killings as one of the most serious problems of violence against women.⁵³ This issue was reported several times in 2014 during the Universal Periodic Review of Afghanistan.⁵⁴ A weakness of the Elimination of Violence Against Women Law (EVAW), assuming it is still valid, is that it does not create a separate offense for honor killings. Instead, Article 22 provides that if the beating of a woman results in death, then the offender is to be sentenced in accordance with the Penal Code.⁵⁵ Article 213 of the Penal Code then provides that it is a mitigating factor for criminal liability if the act is immediately committed "as a result of

⁵¹ Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk - Addendum (mission to Afghanistan)*, E/CN.4/2006/61/Add.5, Feb. 2006, at 19, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/108/06/PDF/G0610806.pdf>.

⁵² United States Department of State, *2015 Human Rights Report: Afghanistan*, at 37, available at <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015>.

⁵³ Afghanistan Independent Human Rights Commission, *National Inquiry on Rape and Honor Killing in Afghanistan Report*, available at <http://www.aihrc.org.af/en/research-reports/1571/national-inquiry-on-rape-and-honor-killing-in-afghanistan-report-summary.html>.

⁵⁴ Human Rights Council, Report of the Working Group on the UPR - Afghanistan, 4 Apr. 2014, A/HRC/26/4, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/129/52/PDF/G1412952.pdf>.

⁵⁵ LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN, 20 July 2009, at art. 22(2), available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/102060/123253/F2103117289/AFG102060%20Eng.pdf>.

strong mental excitement, produced by [an] unlawful and provoking act of [the] victim or a third person.”⁵⁶ Because adultery is an unlawful act under Article 643, an offender could receive a reduced sentence for an honor killing merely because the victim was engaged in adultery.⁵⁷ This would discriminate against women as it suggests that a woman’s life is less valuable than that of a man, and the majority of honor killings are against women.⁵⁸ Part of the historical context is that under article 398 of the former penal code, a reduced sentence was provided for homicides if the victim was a spouse or another “close relation” of the offender caught “in the act of committing adultery or being in the same bed with another.” While the new penal code avoids such a direct textual connection between violence against women by close relations, adultery, and a reduced sentence, its wording still allows courts to continue to appeal to adultery as a mitigating factor to crimes against women based on their “unlawful and provoking acts” without granting women the same allowance.

Even though the jurisdictions of many states, including Western states such as the United States, recognize that the killing of one’s spouse immediately after the discovery of adultery can be considered mitigating circumstances calling for a reduced sentence, there are some important differences between these provisions and Article 213. For instance, this common “heat of passion” rule only provides mitigation when the victim was the offender’s spouse, whereas Article 213 could apply to adultery committed by any person, regardless of their relation to the offender.⁵⁹ For these same reasons, different states and organizations including the Special

⁵⁶ PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 15 May 2017, art. 213.

⁵⁷ *Id.*, art. 643.

⁵⁸ The Penal Code could apply equally to men or women, but EVAW applies the Penal Code to female victim cases. Article 22 states that “[i]f a person beats *a woman*” resulting in her death, the offender shall be sentenced according to the Penal Code. In practice, the overwhelming majority of targets of honor killings are women.

⁵⁹ PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 15 May 2017, at art. 213.

Rapporteur on violence against women, its causes and consequences⁶⁰ at the Afghanistan Universal Periodic Review of the UN Human Rights Council urged Afghanistan to repeal Article 398 under the former penal code.⁶¹ While the new penal code does not use article 398's precise wording, measures should be taken to ensure that the new article 213 does not permit the former discriminatory practice of reduced sentences for honor killings to continue.

Baad (Compensation Marriage)

Another form of discriminatory legal punishment is the custom of *baad*. *Baad* refers to a traditional practice of settling disputes by giving away girls as compensation for crimes.⁶² Thereby, an innocent girl is punished in lieu of the culprit. These girls are often exposed to cruel treatment, physical violence and humiliation as retribution for the crime that one of her relatives committed.⁶³ For example, a 12-year-old girl and her younger sister, whose uncle attempted to commit a murder, were given away in marriage to the victim's relatives as compensation. The two girls were beaten, forced to live with the livestock, and treated like slaves by their in-laws. When the 12-year-old attempted to flee, she was caught by her husband, who cut off her ears and nose, leaving her bleeding and unconscious, as further punishment.⁶⁴

⁶⁰ Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, on her mission to Afghanistan*, 12 May 2015, A/HRC/29/27/Add.3, at 73(b), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/094/90/PDF/G1509490.pdf>.

⁶¹ Office of the High Commissioner for Human Rights, *Universal Periodic Review: Afghanistan*, 27 Jan. 2014, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights27January2014pm.aspx>.

⁶² Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, 30 July 2013, at para. 22, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AFG/CO/1-2.

⁶³ Alissa Rubin, *For Punishment of Elder's Misdeeds, Afghan Girl Pays the Price*, N.Y. TIMES, 16 Feb. 2012, at <http://www.nytimes.com/2012/02/17/world/asia/in-baad-afghan-girls-are-penalized-for-elders-crimes.html>.

⁶⁴ United Nations Assistance Mission in Afghanistan, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*, Dec. 2010, at 13, available at https://unama.unmissions.org/sites/default/files/harmful_traditional_practices_english.pdf.

The historical context is that *baad* was illegal under article 517 of the former 1976 Afghan Penal Code. However, this prohibition applied only to widows and adult women over the age of 18,⁶⁵ whereas most victims of *baad* are young girls.⁶⁶ Moreover, punishment was very mild, with article 517 establishing a maximum two-year term of imprisonment. In this regard, the ERAW Act provided some progress in criminalizing *baad* by penalizing it up to a maximum sentence of ten years and extending the application to women of any age.⁶⁷ However, as mentioned above, there are issues about the continuing validity of the ERAW Law under the new Penal Code. Because the code does not criminalize *baad* itself, these ambiguities regarding the continued validity of the ERAW Law may mean that perpetrators of *baad* are not adequately prosecuted under the current regime.⁶⁸ More action is needed to ensure that the law protecting women from *baad* is comprehensive and clearly established under Afghan law.

There are issues about whether *baad* may be punishable in the new Penal Code under the crime of “trafficking in persons,” which is defined as “dominating [or] transferring... a person to exploit him/her through... threat or use of power or other form of compulsion, [or] misuse of vulnerability or necessity.”⁶⁹ The crime carries a penalty of up to 10 years or more than 10 years if the perpetrator is the parent, spouse, or guardian of the trafficked person.⁷⁰ However, the crime of trafficking requires the dominating or transfer of a person for the purpose of “exploitation”, which the code defines as “taking advantage of the victim” through, *inter alia*, buying, selling,

⁶⁵ PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 7 Oct. 1976, art. 517(2).

⁶⁶ Alissa Rubin, *Afghan Girl Pays the Price*, THE N.Y. TIMES, 16 Feb. 2012, available at <http://www.nytimes.com/2012/02/17/world/asia/in-baad-afghan-girls-are-penalized-for-elders-crimes.html>.

⁶⁷ LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN, 20 July 2009, art. 25, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/102060/123253/F2103117289/AFG102060%20Eng.pdf>.

⁶⁸ Torunn Wimpelmann, *Adultery, rape, and escaping the house: The protection and policing of female sexuality in Afghanistan* (Working Paper), 2017, at 10, available at <https://www.cmi.no/publications/6404-adultery-rape-and-escaping-the-house>.

⁶⁹ PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 15 May 2017, art. 510.

⁷⁰ *Id.*, art. 511.

sexual exploitation, enslavement, or forcing the girl to do other illegal activities.⁷¹ The purpose of *baad* may be interpreted to not fall into any of these categories, and no explicit mention is made of *baad* itself as a form of exploitation, which may make it lack the exploitation element of the crime of trafficking.

Aside from the ambiguities in the law itself, many barriers to effective implementation also exist. Many women are illiterate and lack knowledge of the applicable laws and their corresponding legal rights.⁷² Even where women are aware, a lack of access to key services (such as legal and health services and shelters) is a fundamental impediment to women achieving justice.⁷³ Also, in many areas of Afghanistan, in particular rural and conflict areas, official law enforcement is weak and the government lacks authority and legitimacy. For these reasons, despite legal reforms through the new Penal Code and the ERAW act, *baad* is still frequently practiced in Afghanistan as a discriminatory punishment against women for the crimes of another.⁷⁴ Four years after the adoption of the ERAW act, the CEDAW Committee expressed concerns regarding “the persistence of adverse cultural norms, practices and traditions which are harmful to women, such as child marriage, *baad* (settlement of disputes by giving away girls), *badal* (exchange marriages) and forced marriages, including forced marriages of widows.”⁷⁵

⁷¹ *Id.*, art. 510(3).

⁷² United Nations Assistance Mission in Afghanistan and United Nations Office of the High Commissioner for Human Rights, *Justice through the Eyes of Afghan Women: Cases of Violence against Women Addressed through Mediation and Court Adjudication*, Apr. 2015, at 23, available at https://unama.unmissions.org/sites/default/files/unama_ohchr_justice_through_eyes_of_afghan_women_-_15_Apr._2015.pdf.

⁷³ *See id.* at 18 & 23.

⁷⁴ United Nations Assistance Mission in Afghanistan, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*, Dec. 2010, at 11, available at https://unama.unmissions.org/sites/default/files/harmful_traditional_practices_english.pdf.

⁷⁵ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, 30 July 2013, at para. 27(a), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AFG/CO/1-2.

Running Away

When the legal, social, and cultural context does not allow women to protect themselves against violence and harmful actions, they sometimes resort to running away. Unfortunately, neither the 2018 Penal Code nor the EVAW Law offer protection to women and girls who escape from violence.⁷⁶ Instead, women who flee abusive marriages or leave home without permission from their husbands or close male relatives are often arrested for offenses like “home escape” or “moral” crimes that are not specified as criminal offenses under the Penal Code.⁷⁷

Although running away is not a crime under Afghan law,⁷⁸ courts often invoke article 130 of the Constitution, which allows the application of Sharia where other laws are silent, to prosecute women for fleeing their homes.⁷⁹ In 2010, the Afghan Supreme Court ruled that as running away, even in circumstances of abuse, “could cause crimes like adultery and prostitution ... it is against Sharia principles, [and] therefore ... prohibited and prosecutable based on discretionary punishment.”⁸⁰ Unless a woman can prove she was escaping to a relative’s house or an approved institute addressing domestic violence, she is prosecuted for both “running away” and “attempted *zina*” regardless of her motives for escaping.⁸¹ As this is only enforced against

⁷⁶ Torunn Wimpelmann, *Adultery, rape, and escaping the house: The protection and policing of female sexuality in Afghanistan*, 2017, at 9, available at <https://www.cmi.no/publications/6404-adultery-rape-and-escaping-the-house>.

⁷⁷ UN Assistance Mission in Afghanistan, *Still a Long Way to Go: Implementation of the Law on Elimination of Violence against Women in Afghanistan*, Dec. 2012, at 11, at <http://www.refworld.org/docid/50c72e0d2.html>.

⁷⁸ In 2012, the Attorney General issued a directive that running away is not an offense under Afghan law. Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Initial and Second Periodic Reports of Afghanistan*, 30 July 2013, at para. 25, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/AFG/CO/1-2.

⁷⁹ AFGHANISTAN CONST., art. 130.

⁸⁰ Letter No. 1497/1054 of The Supreme Court of the Islamic Republic of Afghanistan. The statement presumes that women who run away may commit adultery/*zina* crimes, implying it only applies to females, discriminating women. UN Assistance Mission in Afghanistan, *Still a Long Way to Go: Implementation of the Law on Elimination of Violence against Women in Afghanistan*, Dec. 2012, at 22, at <http://www.refworld.org/docid/50c72e0d2.html>.

⁸¹ The latter is based on a mere assumption that the act of *zina* could take place, and as such has no legal basis either in the Penal Code or in Sharia. Still, women in Afghanistan are often charged with the “intent” to commit *zina* or “pre-emptive” *zina* in the formal judicial system for escaping. *Id.*

women who face violence and often do not have access to law enforcement institutions or have any relatives they can trust (as noted by the United Nations High Commissioner for Human Rights⁸²), this defense has been viewed as unrealistic by experts.⁸³

The ability of state prosecutors to press criminal charges against women for undefined “moral” crimes is symptomatic of the absence of formal standards of statutory interpretation and application of law to fact in the Afghan criminal justice system. When issuing decisions, the (predominantly male) Afghan judges often omit any explanation of, for example, how they weighed evidence or which factual findings led to the decision to convict or acquit.⁸⁴ They often cite irrelevant information, provide limited legal analysis, and sentences are handed down “without any explanation of how aggravating or mitigating factors had been considered in arriving at the sentence imposed.”⁸⁵ Such shortcomings are exacerbated by the fact that the Penal Code provides only general ranges, rather than set terms, for prison sentences, allowing for great discretion in sentencing.⁸⁶

As of 31 July 2015, approximately 51 percent of female prisoners were incarcerated for “moral crimes.”⁸⁷ In most cases, either (i) men—and sometimes other women—abuse women

⁸² Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on situation of human rights in Afghanistan*, 28 Jan. 2013, A/HRC/22/37, at 10, available at <http://www.ohchr.org/Documents/Countries/AF/A-HRC-22-37.pdf>

⁸³ United Nations Assistance Mission in Afghanistan, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*, Dec. 2010, at 39, available at https://unama.unmissions.org/sites/default/files/harmful_traditional_practices_english.pdf.

⁸⁴ *Id.* at 79.

⁸⁵ *Id.* In one case, a court took into consideration a letter from a woman’s husband complaining of her disobedience and asking that she be punished.

⁸⁶ PENAL CODE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, 15 May 2017, arts. 145-147; United Nations Assistance Mission in Afghanistan, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*, Dec. 2010, at 119, available at https://unama.unmissions.org/sites/default/files/harmful_traditional_practices_english.pdf.

⁸⁷ United States Department of State, *2015 Human Rights Report: Afghanistan*, at 39, available at <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dldid=252957#wrapper>.

with impunity or (ii) women are arrested and imprisoned for “moral crimes”, often on no basis other than the uncorroborated testimony of their abusers.⁸⁸

Recommendations

1. Afghanistan should accede to the Optional Protocol to the CEDAW and allow the UN Committee on the Elimination of Discrimination Against Women to hear petitions from women in Afghanistan who have exhausted national remedies.
2. The Afghan national legislature should amend legal provisions related to *zina* to ensure they cannot discriminate against women and lead to their imprisonment or inhuman punishment or treatment.
3. The legislature should explicitly clarify the continued validity of the EVAW law.
4. The Afghan government should prosecute and hold accountable those who attempt to impose *baad*.
5. The President of Afghanistan should issue an administrative decree that “running away” must not be treated as a crime under national law.
6. The Supreme Court of Afghanistan should withdraw the 2010 guidance which criminalizes running away and replace it with instructions that moral crimes such as running away do not constitute crimes.

⁸⁸ Rod Nordland, *Moral ‘Crimes’ Land Afghan Women in Jail*, N.Y. TIMES, 28 Mar. 2012, available at <http://www.nytimes.com/2012/03/29/world/asia/report-finds-continued-jailing-for-afghan-girls-running-from-abuse.html>.

REPUBLIC OF INDONESIA

Government and Legal System

Located in Southeast Asia, Indonesia is the world's largest archipelagic nation. The country consists of more than thirteen thousand islands and is divided into 31 provinces and a central government.

The Constitution of Indonesia was adopted in 1945⁸⁹ and has the highest legal authority in the state.⁹⁰ The Constitution guarantees certain rights and freedoms including equality and non-discrimination.⁹¹ Specifically, article 27 provides that “[a]ll citizens shall be equal before the law and the government” and article 28 states that “[e]very person shall have the right of recognition, protection and certainty of equal treatment before the law.” Furthermore, article 28 adds that “[e]very person shall have the right to be free from discriminatory treatment based on any grounds whatsoever and shall have the right to protection from such discriminatory treatment.”

Indonesia also has statutory enshrinement of human rights protection. The government made a major contribution to Indonesia's human rights situation by adopting Law No.39/1999.⁹² This law expressly stipulates that women's rights are human rights⁹³ and guarantees women's

⁸⁹ THE 1945 CONSTITUTION OF THE STATE OF THE REPUBLIC OF INDONESIA (unofficial English translation), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf.

⁹⁰ LAW OF THE REPUBLIC OF INDONESIA, No. 10/2004, ART. 7 §1, *available at* http://www.flevin.com/id/lgso/translations/JICA%20Mirror/english/4818_UU_10_2004_e.html.

⁹¹ *See* THE 1945 CONSTITUTION OF THE STATE OF THE REPUBLIC OF INDONESIA, Chapters X, XA, *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf.

⁹² LAW NO. 39 YEAR 1999 – CONCERNING HUMAN RIGHTS, *available at* <http://www.hsph.harvard.edu/population/womenrights/indonesia.women.99.doc>.

⁹³ *Id.* at art. 45.

equality and non-discrimination.⁹⁴ Article 50 stipulates that “[w]omen of full age and/or who are married have the authority to take both criminal and civil legal action as individuals,” but the article reserves that this authority can be “determined otherwise under religious law.”⁹⁵

Overview of Sharia Law in Indonesia

Indonesia is the world’s largest Muslim state, with approximately 87.2 percent of the population following Islam.⁹⁶ As such, the state’s legal system is complex, composed of national law and Sharia law.⁹⁷ In most of Indonesia, Sharia law is limited to civil cases, which are enforced in Sharia courts of limited jurisdiction, with the exception of the Aceh region.⁹⁸ Besides Aceh, the country adopted “a unitary national judiciary that applies a uniform body of national law,”⁹⁹ and thus, Sharia courts fall under Supreme Court review.¹⁰⁰

Aceh has the authority to implement Sharia law formally in the province.¹⁰¹ And since 2001 when special autonomy legislation was passed, the province has extended Sharia law to apply to Islamic criminal law.¹⁰² This law allows Aceh to be the only province that can adopt regional bylaws completely derived from Sharia law.¹⁰³

⁹⁴ *Id.* at § 9.

⁹⁵ *Id.* at art. 50.

⁹⁶ U.S. Central Intelligence Agency, *The World Factbook – Indonesia*, 12 Jan. 2017.

⁹⁷ See Mark E. Cammack & R. Michael Feener, *The Islamic Legal System in Indonesia*, 21 PACIFIC RIM LAW & POLICY JOURNAL 13, 29 (2012), available at <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1091/21PRPLJ013.pdf>.

⁹⁸ *Id.* at 28, 38.

⁹⁹ *Id.* at 20.

¹⁰⁰ *Id.* at 23.

¹⁰¹ *Id.* at 38; ACT ON THE SPECIAL STATUS OF THE PROVINCE OF ACEH SPECIAL REGION, ACT NO.44 OF 1999, art. 3(2); ACT ON THE SPECIAL AUTONOMY FOR THE PROVINCE OF THE SPECIAL REGION OF ACEH AS THE PROVINCE OF NANGGROE ACEH DARUSSALAM, ACT NO.18 OF 2001, General Elucidation.

¹⁰² International Crisis Group, *Islamic Law and Criminal Justice in Aceh*, ASIA REPORT NO. 117, 31 July 2006, at 5, available at http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/117_islamic_law_and_criminal_justice_in_aceh.ashx; see also Center for Human Rights & Humanitarian Law, *Indonesia’s Aceh Province Adopts Sharia Law in Conflict with Human Rights Standards*,

Although regional bylaws generally have the lowest legal authority,¹⁰⁴ they are becoming more influential on peoples' lives due to the decentralization of the Indonesian government.¹⁰⁵ While Aceh is the only region that has criminal bylaws enforcing Sharia law,¹⁰⁶ other regions have non-Sharia derived bylaws that severely discriminate against women.¹⁰⁷ These bylaws will be discussed further below.

Several new acts of legislation, bylaws, and amendments over the years have continued to disproportionately punish women. In 2014, the Aceh Parliament approved the Aceh Islamic Criminal Code, "*Qanun Jinayah*", which translates to behavior-governing bylaw.¹⁰⁸ This law mandates that every individual in the province follow Sharia Law.¹⁰⁹ Its significance lies in its effect: the law criminalizes acts like consensual same-sex sexual acts,¹¹⁰ adultery,¹¹¹ intimate relationships between unmarried people (*khalwat*), consuming alcohol, and violations of body-

HUMAN RIGHTS BRIEF, 13 Nov. 2012, *available at* <http://hrbrief.org/2012/11/indonesia's-aceh-province-adopts-sharia-law-in-conflict-with-human-rights-standards> (describing criminal activity punishable under Aceh's Sharia law including gambling, homosexuality, and disobeying rules on attire).

¹⁰³ *Id.*

¹⁰⁴ LAW OF THE REPUBLIC OF INDONESIA, NO. 10/2004, *available at* http://www.flevin.com/id/lgo/translations/JICA%20Mirror/english/4818_UU_10_2004_e.html.

¹⁰⁵ See Mark E. Cammack & R. Michael Feener, *The Islamic Legal System in Indonesia*, 21 PACIFIC RIM LAW & POLICY JOURNAL 13, 36 (2012), *available at* <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1091/21PRPLJ013.pdf>.

¹⁰⁶ Rishi Iyengar, *A Non-Muslim Has Been Punished Under Shari'a Law in Indonesia for the First Time*, TIME, 13 Apr. 2016, *available at* <http://time.com/4291832/indonesia-aceh-christian-muslim-sharia-law-alcohol/> (explaining that Aceh is the "only part of the country that enforces sharia law for crimes like adultery, consumption of alcohol and homosexuality").

¹⁰⁷ Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women – Indonesia*, CEDAW/C/IDN/CO/6-7, 27 July 2012, at 4, *available at* <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-IDN-CO-6-7.pdf> (mentioning the various "severely discriminatory by-laws, including those in the province of Aceh, which restrict women's rights in the conduct of their daily life" identified by the National Commission on Violence against Women and the Ministry of Law and Human Rights).

¹⁰⁸ Hotli Simanjuntak & Ina Parlina, *Aceh Fully Enforces Sharia*, THE JAKARTA POST, 7 Feb. 2014, *available at* <http://www.thejakartapost.com/news/2014/02/07/aceh-fully-enforces-sharia.html>.

¹⁰⁹ *Id.*

¹¹⁰ Patrick Winn, *Gay in Aceh? Brace for 100 Lashes in Front of a Jeering Crowd*, PUBLIC RADIO INTERNATIONAL, 5 Oct. 2014, *available at* <https://www.pri.org/stories/2014-10-05/gay-aceh-brace-100-lashes-front-jeering-crowd>.

¹¹¹ Reza Munawir, *Indonesia's Aceh Province Enacts Islamic Criminal Code*, THE SYDNEY MORNING HERALD, 24 Oct. 2015, *available at* <http://www.smh.com.au/world/indonesias-aceh-province-enacts-islamic-criminal-code-20151024-gkhkdm.html>.

covering rules for Muslim women, including requirements on the *hijab* and loose-fitting pants,¹¹² and it allows punishments to reach 100 lashes by cane.¹¹³ In 2015, one Aceh district enacted a bylaw mandating that schools provide instruction to boys and girls separately.¹¹⁴ In the same year, the first non-Muslim was punished under the religious law as allowed by the explicit language of the code,¹¹⁵ stating that non-Muslims violating the law can choose to be subjected to Sharia Law, but that violations not covered by the national penal code will be tried in Sharia courts.”¹¹⁶

Human Rights Obligations under International Law

Indonesia has ratified eight key international human rights treaties, one of which is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹¹⁷ CEDAW is often described as an international bill of rights for women, as it defines the meaning of gender equality and provides ways in which states can achieve it.¹¹⁸ Indonesia’s only reservation concerning CEDAW relates to methods of dispute resolution under article 29.¹¹⁹

¹¹² Hotli Simanjuntak & Ina Parlina, *Aceh Fully Enforces Sharia*, THE JAKARTA POST, 7 Feb. 2014, available at <http://www.thejakartapost.com/news/2014/02/07/aceh-fully-enforces-sharia.html>.

¹¹³ Patrick Winn, *Gay in Aceh? Brace for 100 Lashes in Front of a Jeering Crowd*, PUBLIC RADIO INTERNATIONAL, Oct. 5, 2014, available at <https://www.pri.org/stories/2014-10-05/gay-aceh-brace-100-lashes-front-jeering-crowd>.

¹¹⁴ Reza Munawir, *Indonesia’s Aceh Province Enacts Islamic Criminal Code*, REUTERS, 23 Oct. 2015, available at <http://www.reuters.com/article/us-indonesia-aceh-law-idUSKCN0SI02H20151024>.

¹¹⁵ Rishi Iyengar, *A Non-Muslim Has Been Punished Under Shari’a Law in Indonesia for the First Time*, TIME, 13 Apr. 2016, available at <http://time.com/4291832/indonesia-aceh-christian-muslim-sharia-law-alcohol/>.

¹¹⁶ *Indonesia’s Aceh Province Minorities Alarmed at New Shariah-based Law*, HUMAN RIGHTS IN ASEAN – ONLINE PLATFORM, 7 Oct. 2014, available at <https://humanrightsinasean.info/article/indonesias-aceh-province-minorities-alarmed-new-shariah-based-law.html>.

¹¹⁷ Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) entered into force 8 Sept. 1981. See also <http://cedaw-in-action.org/en/indonesia/>.

¹¹⁸ United Nations Human Rights Office of the High Commissioner, Introduction: Convention on the Elimination of All Forms of Discrimination against Women New York, 19 Dec. 1979, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

¹¹⁹ Indonesia has entered a reservation to the effect that “[t]he Government of the Republic of Indonesia does not consider itself bound by the provisions of article 29, paragraph 1 of [CEDAW] and takes the position that any

Additionally, Indonesia is a state party to the International Covenant on Civil and Political Rights (ICCPR).¹²⁰ The practice of public caning is one example of a violation of an ICCPR provision which has particularly negative effects for women. These canings have continued as recently as 2017, when a woman was caned for being in close proximity with someone who was not her husband.¹²¹ Caning is a punishment for violating Sharia law in Indonesia and a form of cruel, inhuman and degrading punishment prohibited under article 7 of the ICCPR.¹²² Furthermore, caning violates the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment (CAT), to which Indonesia is also a state party.¹²³ Finally, Indonesia has also ratified the Convention on the Rights of the Child (CRC).¹²⁴

Sharia Law in Aceh

Sharia Law in Aceh is codified under the *Qanun* (the Regional Regulation)¹²⁵ and has been slowly expanding its mandate ever since.¹²⁶ In Aceh, Sharia Law now covers all aspects of

dispute relating to the interpretation or application of [CEDAW] may only be submitted to arbitration or to the International Court of Justice with the agreement of all the parties to the dispute.” United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, Declarations & Reservations, Indonesia, *available at* https://treaties.un.org/PAGES/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en.

¹²⁰ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

¹²¹ *Woman in Indonesia Caned for Kissing and Hugging Outside of Marriage*, WOMEN IN THE WORLD, 23 May 2017, *available at* <http://nytlive.nytimes.com/womenintheworld/2017/05/23/woman-in-indonesia-caned-for-kissing-and-hugging-outside-of-marriage/>.

¹²² *See* International Covenant on Civil and Political Rights, part III, art. 7. *See* Josua Gantan, *Aceh Rape Victim Caning Prompts Soul Searching in Indonesia*, THE JAKARTA GLOBE, 11 May 2014, *available at* <http://jakartaglobe.beritasatu.com/news/shariah-question-aceh-caning-controversy/>.

¹²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 86.

¹²⁴ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, *entered into force* 2 Sept. 1990.

¹²⁵ Letter from the Governor of Aceh: Shariah Law in Aceh, 15 Dec. 2015, at 7, *available at* <http://humas.acehprov.go.id/wp-content/uploads/2016/01/SHARIAH-LAW-IN-ACEHh.pdf>.

¹²⁶ *Women Living Under Muslim Laws, Indonesia: New Law in Aceh Makes Adultery Punishable by Stoning*, 16 Sept. 2009, *available at* <http://www.wluml.org/node/5431>.

Muslim life including what constitutes criminal conduct and acceptable punishments.¹²⁷ In 2012, the CEDAW Committee recommended Indonesia to “[a]mend all discriminatory by-laws adopted at the provincial level, including those in the province of Aceh and certain districts, which restrict women’s rights in the conduct of their daily life, including in social and public life, impose dress codes and restrict freedom of movement; and review the penal sanctions against alleged immoral relationships”¹²⁸ and to “Repeal, without delay, the discriminatory laws adopted in Aceh province that severely discriminate against women in family relations.”¹²⁹ The *Wilayatul Hisbah* (WH), officers who are often also referred to as the Sharia police, enforce the *Qanun* and collaborate with civil police and the public prosecutor’s office to bring cases to Islamic courts.¹³⁰ In 2014, the Aceh Legislative Council passed a Sharia-based criminal procedures code, the *Qanun Acara Jinayat*, which applied Islamic rules and punishments to everyone residing in Aceh.¹³¹ Thus, non-Muslims in Aceh charged with offenses under the *Qanun* can be tried in Sharia courts.¹³² Despite public outcry over applying Muslim law to non-Muslims in Aceh, a

¹²⁷ See e.g., Letter from the Governor of Aceh: Shariah Law in Aceh, 15 Dec. 2015, at 4, available at <http://humas.acehprov.go.id/wp-content/uploads/2016/01/SHARIAH-LAW-IN-ACEHh.pdf>; Hotli Simanjuntak & Ina Parlina, *Aceh Fully Enforces Sharia*, THE JAKARTA POST, 7 Feb. 2014, available at <http://www.thejakartapost.com/news/2014/02/07/aceh-fully-enforces-sharia.html>; Unrepresented Nations and Peoples Organization (UNPO), *Aceh: Discriminatory Bylaws Violate Human Rights*, 26 Oct. 2016, available at <http://unpo.org/article/19592> (explaining that the Qanun punishes immoral behavior that are considered crimes against Islamic law, but not against Indonesia’s Criminal Code).

¹²⁸ Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women*, CEDAW/C/IDN/CO/6-727, July 2012, at 18, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IDN/CO/6-7&Lang=En.

¹²⁹ *Id.* at 48.

¹³⁰ See Mark E. Cammack & R. Michael Feener, *The Islamic Legal System in Indonesia*, 21 PACIFIC RIM LAW & POLICY JOURNAL 13, 40 (2012), available at <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1091/21PRPLJ013.pdf#search='indonesia+legal+system+islam'>.

¹³¹ Simanjuntak, Hotli, *Sharia Should Not Apply for Non-Muslims: Aceh Ulama*, THE JAKARTA POST, 8 Feb. 2014, available at <http://www.thejakartapost.com/news/2014/02/08/sharia-should-not-apply-non-muslims-aceh-ulema.html>.

¹³² *Indonesia’s Aceh Province Laying Down God’s Law*, THE ECONOMIST, 15 Feb. 2014, available at <http://www.economist.com/news/asia/21596577-politics-much-faith-behind-harder-line-laying-down-gods-law>.

non-Muslim woman was publicly caned for violating sharia law as recent as April 2016.¹³³ However, the head of Aceh's Sharia Department explained that non-Muslims are not forced to follow Islamic law but instead may choose to submit to the *Qanun Jinayat* if they wish.¹³⁴ As the fundamental rationale behind punishing violators through public caning is "to shame the guilty, rather than inflict pain,"¹³⁵ non-Muslims have strong incentive to choose being subjected to Islamic law instead of the national law punishment of jail time, where conditions are deplorable.¹³⁶

The Institute for Criminal Justice Reform (ICJR) reports that the way that Sharia law is currently enforced in Aceh has a severely negative impact on women's rights.¹³⁷ For example, police data in 2014 revealed that women were accused twice as much as men.¹³⁸

Prohibition of *Khalwat* (Seclusion with a Man)

After the passing of *Qanun* 14 in 2003, *khalwat* became illegal in Aceh.¹³⁹ *Khalwat* refers to a situation where two individuals of the opposite sex who are not married or related by blood

¹³³ Rishi Iyengar, *A Non-Muslim Has Been Punished Under Shari'a Law in Indonesia for the First Time*, TIME, 13 Apr. 2016, available at <http://time.com/4291832/indonesia-aceh-christian-muslim-sharia-law-alcohol/>.

¹³⁴ Ahmad Pathoni, *For the First Time in Indonesia, Non-Muslim Caned Under Islamic Law*, L.A. TIMES, 16 Apr. 2016, available at <http://www.latimes.com/world/asia/la-fg-indonesia-caning-20160416-story.html>; see also Reza Munawir, *Indonesia's Aceh Province Enacts Islamic Criminal Code*, THE SYDNEY MORNING HERALD, 24 Oct. 2015, available at <http://www.smh.com.au/world/indonesias-aceh-province-enacts-islamic-criminal-code-20151024-gkhkdm.html>.

¹³⁵ Reza Munawir, *Indonesia's Aceh Province Enacts Islamic Criminal Code*, THE SYDNEY MORNING HERALD, 24 Oct. 2015, available at <http://www.smh.com.au/world/indonesias-aceh-province-enacts-islamic-criminal-code-20151024-gkhkdm.html>.

¹³⁶ Ahmad Pathoni, *For the First Time in Indonesia, Non-Muslim Caned Under Islamic Law*, LA TIMES, 16 Apr. 2016, available at <http://www.latimes.com/world/asia/la-fg-indonesia-caning-20160416-story.html> (explaining that the non-Muslim charged with violating Sharia law chose public caning as her punishment instead of jail time because "prison conditions are bad and there's little welfare there").

¹³⁷ Anastasia Ika, *Activists Say Sharia Law Perpetuates Violence Against Women in Aceh*, INDONESIA EXPAT, 20 Aug. 2016, available at <http://indonesiaexpat.biz/featured/activists-say-sharia-law-perpetuates-violence-against-women-in-aceh/>.

¹³⁸ *Id.*

are found alone together in an isolated place.¹⁴⁰ One of the biggest problems with *Qanun* 14/2003 is its use of overly broad language, which facilitates arbitrary enforcement practices, many of which severely violate women's rights. Specifically, article 2 provides that the definition's scope includes "all actions, activities, and circumstances that could lead to the commission of *zina*."¹⁴¹ Thus, although many people believe that the Islamic *khalwat* law criminalizes only adultery, in practice, the police have applied the law to a broad spectrum of circumstances solely at their own discretion.¹⁴² Aceh's Sharia police have arrested people for doing a range of activity without any evidence of sexual intimacy, from riding a motorcycle together to talking in a private location.¹⁴³ As such, there need not be any proof of the intent to commit *zina* as the "simple physical proximity [is] indicative of an intent to commit *zina*."¹⁴⁴ Furthermore, while a large number of people are detained, only a small proportion of those are convicted of the crime; this is because local communities are often allowed to take control of

¹³⁹ Mark Cammack, *The Punishment of Islamic Sex Crimes in a Modern Legal System: The Islamic Qanun of Aceh, Indonesia*, 45 SOUTHWESTERN LAW REVIEW 595, 597 (2016), available at http://www.swlaw.edu/pdfs/lr/45_3cammack.

¹⁴⁰ *Id.* at 612 (providing the *Qanun*'s definition of "*khalwat*" as the "proximity in a secluded place of two or more legally responsible adults of the opposite sex who are not prohibited because of kinship from marrying and are not married to each other").

¹⁴¹ *Id.* (citing the *Qanun* on *Khalwat* ["Improper Covert Association"], *Qanun* No. 14 of 2003, art. 2).

¹⁴² See *id.* at 613 (describing *khalwat* as being "punishable as a 'preventative' or 'preemptive' measure" to reduce the commission of *zina* "based on the Islamic legal maxim that 'a command to perform or refrain from some act includes a prohibition against [any and all] actions leading to commission of that act'").

¹⁴³ See e.g., Yenni Kwok, *Gang Rape then Caning: Welcome to Aceh's Bizarre Moral Crusade*, TIME, 8 May 2014 (noting that a student was raped by police after being pulled over for riding a motorbike with her boyfriend), available at <http://time.com/91873/aceh-sharia-law-islam-rape-kelantan-brunei/>; Regina Wang, *Indonesia City to Prohibit Women Passengers from Straddling Motorcycles*, TIME, 7 Jan. 2013, available at <http://newsfeed.time.com/2013/01/07/indonesia-city-to-prohibit-women-from-straddling-behind-male-motorists/> (reporting that the mayor of Lhokseumawe in Aceh created the prohibition of straddling motorcycles and bicycles when given a ride to "save women from things that will cause them to violate Shariah law"); Ed Adamczyk, *Unmarried Indonesian Couple Caned for Being Affectionate*, UNITED PRESS INTERNATIONAL, 31 Dec. 2015, (reporting on a couple accused of *khalwat* after being found alone in a room), available at http://www.upi.com/Top_News/World-News/2015/12/31/Unmarried-Indonesian-couple-caned-for-being-affectionate/6231451567080/goo.

¹⁴⁴ Mark Cammack, *The Punishment of Islamic Sex Crimes in a Modern Legal System: The Islamic Qanun of Aceh, Indonesia*, 45 SOUTHWESTERN LAW REVIEW 595, 613 (2016), available at http://www.swlaw.edu/pdfs/lr/45_3cammack.

meting out punishment.¹⁴⁵ The legal punishment for this crime consists of “no less than three and no more than nine strokes with a cane and/or a fine of between Rp. 2,500,000 and Rp. 10,000,000,” which is equivalent to about \$36,700 and \$145,800 in U.S. dollars.¹⁴⁶ The two main rationales for the punishment of caning are its shaming and deterrent effects.¹⁴⁷ In 2013, those punishments were condemned by the Committee on Economic, Social and Cultural Rights:

The Committee regrets the use of corporal punishment in the penal system, particularly in Aceh province, where the Acehnese Criminal Law (Qanun Jinayah), inter alia, provides for penalties that violate article 7 of the Covenant, such as flogging, for offences against . . . the qanun khalwat (prohibiting a man and a woman from being alone in a quiet place) The Committee also regrets that the execution of these sentences by sharia police (Wilayatul Hisbah) disproportionately affects women (arts. 2, 3, 7 and 26).¹⁴⁸

Public Shaming and Stigma

Public shaming through caning or parading of the accused, in particular, produces a special type of harm for women. In Indonesian society, women are seen as “delicate creatures” that must be “honored” and “saved” from immorality.¹⁴⁹ Thus, when they are punished for violating morality laws, women suffer a deeper, more prolonged social disapproval that is sometimes irreversible.¹⁵⁰ An attorney advocating for women’s rights under Sharia law explained

¹⁴⁵ R. MICHAEL FEENER, *SHARI’A AND SOCIAL ENGINEERING: THE IMPLEMENTATION OF ISLAMIC LAW IN CONTEMPORARY ACEH, INDONESIA*, 175 (Oxford University Press, 1st Ed. 2013) (noting that most *khalwat* offenses are “settled outside of the formal structures of Aceh’s Shari’a Courts”).

¹⁴⁶ Mark Cammack, *The Punishment of Islamic Sex Crimes in a Modern Legal System: The Islamic Qanun of Aceh, Indonesia*, 45 *SOUTHWESTERN LAW REVIEW* 595 (2016), at n.138, available at http://www.swlaw.edu/pdfs/lr/45_3cammack.

¹⁴⁷ R. MICHAEL FEENER, *SHARI’A AND SOCIAL ENGINEERING: THE IMPLEMENTATION OF ISLAMIC LAW IN CONTEMPORARY ACEH, INDONESIA* (Oxford University Press, 1st Ed. 2013), at 133.

¹⁴⁸ Human Rights Committee, *Concluding observations on the initial report of Indonesia*, 21 Aug. 2013, CCPR/C/IDN/CO/1, at 15, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IDN/CO/1&Lang=En.

¹⁴⁹ Regina Wang, *Indonesia City to Prohibit Women Passengers from Straddling Motorcycles*, *TIME*, 7 Jan. 2013, at <http://newsfeed.time.com/2013/01/07/indonesia-city-to-prohibit-women-from-straddling-behind-male-motorists/>.

¹⁵⁰ See Ismira Lutfia, *Aceh Teenage Suicide Puts Focus on Sexist Laws*, *JAKARTA GLOBE*, 15 Sep. 2012, available at <http://jakartaglobe.id/archive/aceh-teenage-suicide-puts-focus-on-sexist-laws/> (discussing the shame that follows

the situation as follows: “the worst kind of punishment for women is the social stigma, even excommunication they receive from their communities. The caning hurts them for only one or two days but the condemnation is something they will face for the rest of their lives.”¹⁵¹ Furthermore, women involved in sexual crimes, like rape and *khalwat*, suffer from common discriminatory views that women are in some way responsible for the transgression.¹⁵² For instance, one panel of judges and the alleged rapist’s attorney inquired into a victim’s dress during trial as to insinuate her culpability in the rape.¹⁵³ And in 2011, the Jakarta governor at the time admonished women for wearing short skirts in public because such behavior indicated that they desired a sexual reaction from men.¹⁵⁴

As mentioned above, stigma and community pressure resulting from insensitive enforcement, arrest, and discriminatory punishment can have serious consequences. In 2012 a teenage girl was driven to commit suicide following a public broadcast of her alleged moral crime.¹⁵⁵ The police arrested her at a concert on the grounds of prostitution, and in the following days her situation became public knowledge and she committed suicide allegedly as a result of the social stigma and guilt she felt for shaming her family.¹⁵⁶ Another young woman from Aceh who was found guilty of *khalwat* explained “[t]he social punishment is more terrifying than the

women accused of immorality and the reported cases of suicide as a result); *see also Aceh Laws Discriminate Against Women*, INTERNATIONAL REGIONAL INFORMATION NETWORKS (IRIN), June 2010, *available at* <http://www.irinnews.org/report/89383/indonesia-aceh-laws-discriminate-against-women> (describing the common consequence of “flee[ing] their villages because of the shame they have brought upon their families”).

¹⁵¹ *Indonesian Province Turns Up Sharia Law After Devastating Tsunami*, PBS, 19 Aug. 2014, *available at* <http://www.pbs.org/newshour/bb/indonesian-province-turns-sharia-law-devastating-tsunami/>.

¹⁵² Dewanti A. Wardhani, *Rape Victims ‘Blamed’ in Indonesian Culture*, THE JAKARTA POST, 8 Aug. 2014, *available at* <http://www.thejakartapost.com/news/2014/08/08/rape-victims-blamed-indonesian-culture.html>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Ismira Lutfia, *Aceh Teenage Suicide Puts Focus on Sexist Laws*, JAKARTA GLOBE, 15 Sept. 2012, *available at* <http://jakartaglobe.id/archive/aceh-teenage-suicide-puts-focus-on-sexist-laws/>.

¹⁵⁶ *Id.*

execution by the court” and “the hardest thing is to be seen as a cheap available woman.”¹⁵⁷

Thus, the women suffer additional punishment in the form of public shaming by the authorities who publicize their actions against the women.

In 2008, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment estimated that this social exclusion “can equally amount to inhuman and degrading treatment”¹⁵⁸ and that expressed concerns that

women are disproportionately affected by corporal punishment provided for by the Aceh Criminal Code, which is based on Sharia law.... Moreover, the fact that these punishments are carried out in public generates stigmatization and social sanctioning lasting beyond the execution of the punishment, as women sentenced to such public punishments are labelled as immoral by their husbands, families and communities.¹⁵⁹

Sharia Police Actions and Misconduct

These effects are furthered by the Sharia police’s often discriminatory and violent law enforcement practices. One egregious example is the case of Nita, a 20-year-old woman who was arrested and detained overnight for riding on a motorcycle with her boyfriend on an isolated road.¹⁶⁰ During her detainment, she was aggressively interrogated and raped by three police officers.¹⁶¹ While two of her rapists were placed on trial, the third has not been apprehended.¹⁶²

Unfortunately, rape is not the only example of humiliation specific to women during the course of detention. The commonality in these arrests and interrogations, however, is violence

¹⁵⁷ Friedrich Ebert Stiftung, *Women in Islam-Feminist Orientations and Strategies for the 21st Century*, 2009, at 19, available at <http://library.fes.de/pdf-files/akademie/berlin/06745-20100412.pdf>.

¹⁵⁸ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/7/3/Add.7, 10 Mar. 2008, at 46, available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/7/3/Add.7>.

¹⁵⁹ *Id.*

¹⁶⁰ *Aceh Laws Discriminate Against Women*, INTERNATIONAL REGIONAL INFORMATION NETWORKS (IRIN), June 2010, available at <http://www.irinnews.org/report/89383/indonesia-aceh-laws-discriminate-against-women>.

¹⁶¹ *Id.*

¹⁶² *Id.*; *Policing Morality Abuses in the Application of Sharia in Aceh, Indonesia*, Human Rights Watch, 30 Nov. 2010, available at <https://www.hrw.org/sites/default/files/reports/indonesia1210WebVersionToPost.pdf>.

and shame.¹⁶³ Sharia police officials “impose their own punishments, including physical punishments, payment of a penalty to the village, being forced to walk around the village in a type of shaming ritual, or being doused with sewer water.”¹⁶⁴ Other times, the police demand that the parents marry their children caught engaging in *khalwat*¹⁶⁵ or force female detainees to take virginity exams to prove their innocence.¹⁶⁶ The virginity test is particularly problematic because it not only violates a woman’s bodily integrity, but it also constitutes a form of discriminatory treatment of women in violation of the Indonesian Constitution and CEDAW.¹⁶⁷ In 2008, the Committee against Torture expressed its concern that

the enforcement of [local regulations] is under the authority of a “morality police”, the Wilayatul Hisbah, which exercises an undefined jurisdiction and whose supervision by public State institutions is unclear.... In addition, it is reported that the punishments meted out by this policing body have a disproportionate impact on women (arts. 2 and 16).¹⁶⁸

Note that such tests are not only prevalent for detainees, but also women who wish to become police officers.¹⁶⁹

¹⁶³ National Commission on Violence Against Women, *Violence against Women and Islam: Dispelling Stereotypes and Telling Truth, A View from Indonesia*, presented on 4 Feb. 2016, at 5, available at <http://www.lse.ac.uk/WomenPeaceSecurity/pdf/2016/4FebRiriAli.pdf> (stating that cases of *khalwat* arrests and interrogations conducted by Shariah police were “often violent, by way of shouting, slapping, and humiliating”).

¹⁶⁴ *Policing Morality Abuses in the Application of Sharia in Aceh, Indonesia*, Human Rights Watch, 30 Nov. 2010, <https://www.hrw.org/sites/default/files/reports/indonesia1210WebVersionToPost.pdf>.

¹⁶⁵ Tim Lindsey & Helen Pausacker, RELIGION, LAW AND INTOLERANCE IN INDONESIA, 340 (Routledge, 2016).

¹⁶⁶ Andreas Harsono, *Human Rights are Under Attack in Post-Tsunami Indonesia*, THE GUARDIAN, 27 Dec. 2013, available at <https://www.theguardian.com/commentisfree/2013/dec/27/human-rights-are-under-attack-in-post-tsunami-indonesia> (explaining that the dress requirements “impose far more onerous restrictions on women, requiring them to cover their hair with the *hijab* headscarf in public and forbidding them from wearing body-hugging clothing”).

¹⁶⁷ See Joe Cochrane, ‘*Virginity Test*’ Stokes Indonesia Debate, THE N.Y. TIMES, 11 Dec. 2014, available at <https://www.nytimes.com/2014/12/12/world/asia/for-police-career-in-indonesia-some-women-must-first-pass-virginity-test.html> (noting that “similar tests are not carried out for men”, “men are not even asked about their virginity”, and that a female police recruit “may get fewer points if her hymen is not intact”).

¹⁶⁸ Committee Against Torture, *Concluding observations of the Committee against Torture - Indonesia*, 2 July 2008, CAT/C/IDN/CO/2, at 15, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/IDN/CO/2.

¹⁶⁹ Sarah Kaplan, *Indonesia’s Crudely Invasive ‘Virginity Tests’ for Female Military Recruits*, THE WASHINGTON POST, 15 May 2015, available at <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/15/indonesia->

Although Sharia police themselves patrol the streets to find immoral conduct, Sharia law encourages community members to enforce rules as well.¹⁷⁰ Discriminatory enforcement is just as pervasive in this informal type of policing, which consists of community surveillance and vigilantism.¹⁷¹ Moreover, Sharia policemen themselves encourage community members to find and report possible violations.¹⁷² The public, however, “should not act directly, but report offences to the sharia police.”¹⁷³ Despite this directive, “vigilantes and overzealous officials” have been reported to have “abused” their roles. Vigilantism has become a common method to control sexuality and prevent *khalwat* in Aceh,¹⁷⁴ and individuals are even more motivated to take direct action against *khalwat* violators because such perpetrators often go unpunished.¹⁷⁵

Community Enforcement and Justice

Often community members may deliver punishment themselves, but then the accused is further subject to additional punishment by the police and courts.¹⁷⁶ For example, when eight

slammed-for-using-virginity-tests-on-female-recruits/?utm_term=.28138fe41e91; see also Josephine McDermott, *Why Does Indonesia Demand that female Military Recruits are Virgins?* BBC NEWS, 19 May 2015, available at <http://www.bbc.com/news/world-asia-32748248>.

¹⁷⁰ *Indonesia's Islamic Laws are 'Abusive'*, BBC NEWS, 1 Dec. 2010, available at <http://www.bbc.com/news/world-asia-pacific-11883781>.

¹⁷¹ Sebastian Strangio, *The Heavy Hand of Religious Police in Aceh*, AL-JAZEERA, 21 Dec. 2014, available at <http://www.aljazeera.com/indepth/features/2014/12/heavy-hand-religious-police-aceh-2014122071758539966.html>.

¹⁷² David Kloos, *In the Name of Syariah? Vigilante Violence, Territoriality, and Moral Authority in Aceh, Indonesia*, 98, *Indonesia* 1, 3 (2014) (describing local authorities encouraging community policing either explicitly or implicitly), available at http://www.academia.edu/26608881/In_the_Name_of_Syariah_Vigilante_Violence_Territoriality_and_Moral_Authority_in_Aceh_Indonesia.

¹⁷³ Michael Bachelard, *Aceh Woman, Gang-Raped by Vigilantes for Alleged Adultery, Now to be Flogged*, SYDNEY MORNING HERALD, 6 May 2014, available at <http://www.smh.com.au/world/aceh-woman-gangraped-by-vigilantes-for-alleged-adultery-now-to-be-flogged-20140506-zr5x3.html>.

¹⁷⁴ Tim Lindsey & Helen Pausacker, *RELIGION, LAW AND INTOLERANCE IN INDONESIA*, at 340 (Routledge, 2016) (commenting on the increased prevalence of direct action taken by villagers against offenders).

¹⁷⁵ Marie Dhumieres, *Young and In Love in Indonesia?* THE INDEPENDENT, 21 May 2014, available at <http://www.independent.co.uk/news/world/asia/young-and-in-love-in-indonesia-beware-the-sharia-police-are-watching-9405776.html>.

¹⁷⁶ See e.g., Hotli Simanjuntak, *Raped Woman Could Face Cane*, THE JAKARTA POST, 8 May 2014 (noting that a *khalwat* case that ended with community members raping the female would be “divided into two stages,” consisting

men entered the home of a young woman and found her with a married man, they violently gang-raped her, beat the man, and poured sewage on them both.¹⁷⁷ After the two were turned over to the police, the Sharia police did not show any leniency and sentenced the rape victim to public caning for the alleged adultery.¹⁷⁸ Effectively, the accused transgressors were violently punished twice for allegedly committing one crime.

This community enforcement practice is promoted by both the authorities and the law. First, local government officials generally call on the public to “look out for themselves and their families to prevent any violations of sharia.”¹⁷⁹ As for the legal procedures dealing with *khalwat* offenses, these cases are usually “turned over to community leaders to be ‘settled by [*adat*, or] local custom.’”¹⁸⁰ This idea of “village justice” includes lectures from village elders, forced marriage, being drenched in sewage water, receiving physical blows, “and [being] subjected to various forms of traumatic public humiliation” and “various forms of physical and emotional abuse.”¹⁸¹ Essentially, this deference to community-level resolutions sanctions individual villages and villagers to identify, apprehend, and punish the transgressors. The government promoting this environment fosters further enforcement of *khalwat* against women as a needed protection for community morals and values.¹⁸²

of first the rape and then the *khalwat*), available at <http://www.thejakartapost.com/news/2014/05/08/raped-woman-could-face-cane.html>.

¹⁷⁷Michael Winter, *Indonesian Woman Gang-Raped, Faces Caning for Adultery*, THE WASHINGTON POST, 8 May 2014, available at https://www.washingtonpost.com/national/religion/indonesian-woman-gang-raped-faces-caning-for-adultery/2014/05/08/45e81380-d6dc-11e3-8f7d-7786660fff7c_story.html?utm_term=.265ed4f38165.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ R. Michael Feener, *SHARI’A AND SOCIAL ENGINEERING: THE IMPLEMENTATION OF ISLAMIC LAW IN CONTEMPORARY ACEH, INDONESIA*, at 175 (Oxford University Press, 1st Ed. 2013).

¹⁸¹ *Id.* at 175-76.

¹⁸² *Id.*

The case of Rosmiati illustrates the arbitrariness of some community accusations.¹⁸³ One early evening, a woman named Rosmiati went to her male friend's house to deliver some books.¹⁸⁴ After staying for 20 minutes, despite the fact Rosmiati and her friend were both fully clothed and were not shown to have violated any statute,¹⁸⁵ community members accused her of seclusion and she was arrested and detained by the police as punishment.¹⁸⁶ Further, some communities implement arbitrary standards such as a curfew time after which any unmarried and unrelated man and woman found together is *prima facie* evidence of seclusion.¹⁸⁷

Community-based enforcement and punishment practices often violate due process and impose unequal and arbitrary penalties such as forced marriages, arbitrary fines, and village expulsion.¹⁸⁸ Forced marriages violate CEDAW article 16(1)(b), which requires that states allow women to “enter into marriage only with their free and full consent.”¹⁸⁹ Furthermore, many of the women apprehended were teenagers around the age of 17, which may violate articles 3 and 12 of the Convention on the Rights of the Child,¹⁹⁰ which state, respectively, that “the best interests of a child shall be a primary consideration” in “all actions concerning children” and that the child has the right to “express [her] views freely in all matters that affect [her],” which should include the decision to marry.¹⁹¹

¹⁸³ *Policing Morality Abuses in the Application of Sharia in Aceh, Indonesia*, Human Rights Watch, 30 Nov. 2010, available at <https://www.hrw.org/sites/default/files/reports/indonesia1210WebVersionToPost.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Convention on the Elimination of All Forms of Discrimination against Women, art. 16(1)(b), 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) *entered into force* 8 Sept. 1981.

¹⁹⁰ A child is defined as a person under the age of 18. *See* CONVENTION ON THE RIGHTS OF THE CHILD, 20 Nov. 1989, arts. 3 & 12, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

¹⁹¹ *Id.*

Moreover, arbitrary enforcement practices and discriminatory punishments would violate article 2(d) of CEDAW, which states that the state must “ensure that public authorities and institutions shall act in conformity with [the obligation] to refrain from engaging in any act or practice of discrimination against women.”¹⁹² Because women are often singled out in *khalwat* crimes and then subject to violent punishment or heavier social stigmatization, the *khalwat* laws promote discrimination against women in violation of CEDAW.

Dress Requirements

In Aceh, the local government has also enacted laws dictating dress requirements.¹⁹³ The Committee on the Rights of the Child expressed concerns regarding such requirements for students in 2014: “The Committee is deeply concerned about repressive government actions against the freedom of religion of children belonging to religious minorities..., in particular: ... (c) Explicitly requiring non-Muslims to follow Sharia law in Aceh or as indicated by the State party, social pressure on non-Muslim students to wear Islamic dress at school.”¹⁹⁴ According to *Qanun* No. 11/2002, women must wear a headscarf and are prohibited from wearing tight clothes that reveal their body shape in public spaces.¹⁹⁵ In some areas, the local *qanun* forbids women from wearing pants, presumably for their more suggestive nature than long amorphous skirts.

¹⁹² Convention on the Elimination of All Forms of Discrimination against Women, art. 2(d), 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) *entered into force* 8 Sept. 1981.

¹⁹³ Women Living Under Muslim Laws, *New Regulation Forbidding the Wearing of ‘Tight Clothing’ by Women May be Open to Abuse*, 7 June 2010, available at <http://www.wluml.org/node/6380>; see also Hotli Simanjuntak, *Moral Bylaws Thrive, Get in the Way of Tourism in Aceh*, THE JAKARTA POST, 28 Mar. 2016, available at <http://www.thejakartapost.com/news/2016/03/28/moral-bylaws-thrive-get-way-tourism-aceh.html>.

¹⁹⁴ Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Indonesia*, 10 July 2014, CRC/C/IDN/CO/3-4, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IDN/CO/3-4.

¹⁹⁵ See e.g., Hotli Simanjuntak, *Aceh mulls sharia for non-Muslim*, THE JAKARTA POST, 6 Feb. 2014, available at <http://www.thejakartapost.com/news/2014/02/06/aceh-mulls-sharia-non-muslims.html>.

Someone who breaks these requirements is made to immediately come into conformity with varying levels of force. On their face, these laws prescribing dress are gender neutral because they require both men and women to wear Islamic attire; however, Islamic attire is gendered and thus places a heavier burden on women than men.¹⁹⁶ Anyone who breaks these laws is subject to caning, and because these laws are stricter on regulating women's apparel, these restrictions lead to a discriminatory impact on women.¹⁹⁷

Furthermore, enforcement standards for women, which include police patrols, warnings, and nine lashes if warned three times, are often vague and arbitrary as officers interpret the law differently.¹⁹⁸ These unclear expectations make it difficult for women to choose appropriate attire that would avoid Sharia police attention and punishment. This ambiguity also allows for *de facto* discrimination of women to the extent it allows law enforcement to arbitrarily target women more than men.¹⁹⁹

Lesbian and transgender women are especially affected by the dress code. They are required to dress according to their prescribed gender;²⁰⁰ but even when they do wear clothing

¹⁹⁶ Andreas Harsono, *Human Rights are Under Attack in Post-Tsunami Indonesia*, THE GUARDIAN, 27 Dec. 2013, available at <https://www.theguardian.com/commentisfree/2013/dec/27/human-rights-are-under-attack-in-post-tsunami-indonesia>.

¹⁹⁷ Women Living under Muslim Laws, *West Aceh, Indonesia: New regulation forbidding the wearing of 'tight clothing' by women may be open to abuse*, available at <http://www.wluml.org/node/6380>; Andreas Harsono, *Human Rights are Under Attack in Post-Tsunami Indonesia*, THE GUARDIAN, 27 Dec. 2013, available at <https://www.theguardian.com/commentisfree/2013/dec/27/human-rights-are-under-attack-in-post-tsunami-indonesia>.

¹⁹⁸ Women Living under Muslim Laws, *West Aceh, Indonesia: New regulation forbidding the wearing of 'tight clothing' by women may be open to abuse*, available at <http://www.wluml.org/node/6380> (commenting that Sharia police in Banda Aceh specifically look out for tight jeans); see e.g., Hotli Simanjuntak, *Aceh mulls sharia for non-Muslim*, THE JAKARTA POST, 6 Feb. 2014, available at <http://www.thejakartapost.com/news/2014/02/06/aceh-mulls-sharia-non-muslims.html> (noting that some areas go as far as forbidding women from wearing pants).

¹⁹⁹ Marjaana Jauhola, *POST-TSUNAMI RECONSTRUCTION IN INDONESIA*, 40 (Routledge 2013).

²⁰⁰ International Gay & Lesbian Human Rights Commission, *The Relationship between Homophobia, Transphobia, and Women's Access to Justice for the Forthcoming CEDAW General Recommendation on Women's Access to Justice*, OHCHR, at n.32, 5 Feb. 2013, available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/IGLHRC.pdf>.

that satisfies the strict requirements of Islamic law, penalties are enforced on lesbians who do not look “feminine enough” and on transgender women who “act[] like women.”²⁰¹ Lesbian women who break this law risk punishment by fines, jail time, or canings up to 100 lashes, while transgender women face being forced to assume the clothing of their sex at birth.²⁰² Thus, this law also discriminates against women on the basis of biology and sex, inconsistent with article 1 of CEDAW²⁰³ and article 28 of the Indonesian Constitution, which prescribes the freedom of every individual to “develop him/herself” and “to live and to defend his/her life and existence.”²⁰⁴

Regional Bylaws in other Parts of Indonesia

Regional bylaws, known as *perdas*, are the lowest level in the country’s legal hierarchy.²⁰⁵ However, following Indonesia’s political decentralization, increased regional autonomy meant increased force of regional bylaws.²⁰⁶ For the period of 2009 to 2015, the Indonesian National Commission on Violence Against Women (*komnas perempuan*) reported that there were at least 389 discriminatory local regulations targeting women and minorities.²⁰⁷

²⁰¹ *Id.* at 8.

²⁰² Ayunda Nurvitasari, *Transgender Community Demands Legal Protection*, available at <http://magdalene.co/news-1103-transgender-community-demands-legal-protection.html>.

²⁰³ Convention on the Elimination of All Forms of Discrimination against Women, art. 1, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) *entered into force* 8 Sept. 1981 (defining discrimination against women).

²⁰⁴ THE 1945 CONSTITUTION OF THE STATE OF THE REPUBLIC OF INDONESIA, arts. 28(a), (c), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf.

²⁰⁵ LAW OF THE REPUBLIC OF INDONESIA, No. 10/2004, art. 7 §1, available at http://www.flevin.com/id/lgsso/translations/JICA%20Mirror/english/4818_UU_10_2004_e.html.

²⁰⁶ See Mark E. Cammack & R. Michael Feener, *The Islamic Legal System in Indonesia*, 21 PACIFIC RIM LAW & POLICY JOURNAL 13, 36 (2012), available at <http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1091/21PRPLJ013.pdf>.

²⁰⁷ *Time to Act on Discriminatory Local Regulations*, INDONESIA AT MELBOURNE, 14 June 2016, available at <http://indonesiaatmelbourne.unimelb.edu.au/time-to-act-on-discriminatory-local-regulations/>.

These were put into place in at least 141 cities across 30 provinces.²⁰⁸ This was an increase from the 282 discriminatory regional bylaws the commission reported as of August 2012.²⁰⁹

Some of these bylaws (ninety-six reported in the August 2012 statistics) impose criminal sanctions on women by regulating acts like prostitution and pornography,²¹⁰ and a major problem with these regulations is the ambiguous language used. For instance, article 4 of the 2006 Perda of Tangerang on the Prohibition of Prostitution (hereinafter “Perda of Tangerang”) states that anyone suspected of being a prostitute is prohibited from loitering on public roads, in parks, at hotels, etc.²¹¹ This vague language leads to multiple interpretations over what proof is required to arrest someone for prostitution, which leaves room for arbitrary or mistaken arrests.²¹² With no clear guidelines for authorities, “any woman, on account of her dress or behavior could be arrested, even punished based [solely] on suspicion.”²¹³ The National Commission on Violence against Women’s investigation on the enforcement of the *Perda* of Tangerang revealed at least 30 cases of wrongful arrests.²¹⁴ Furthermore, *perdas* facilitate the criminalization of women under the pretext of religion and public morality.²¹⁵ As such, these laws are particularly applied

²⁰⁸ Nurfika Osman, *Violence Against Women on the Rise*, THE JAKARTA POST, 8 Mar. 2014, available at <http://www.thejakartapost.com/news/2014/03/08/violence-against-women-rise.html>.

²⁰⁹ Johnson, Constance, *Indonesia: Commission Finds Many Laws that Discriminate Against Women*, Law Library of Congress, 19 Sept. 2012, available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403336_text.

²¹⁰ *Id.*

²¹¹ Arskal Salim, *The Shari’ah Bylaws and Human Rights in Indonesia*, 15(1) INDONESIA JOURNAL FOR ISLAMIC STUDIES 1, 23 (2008), available at <http://journal.uinjkt.ac.id/index.php/studia-islamika/article/viewFile/536/425>.

²¹² *Id.* at 18 (explaining how problematic this regulation is because it “arbitrarily put[s] a label on women who are going out at night as prostitutes without valid evidence”).

²¹³ National Commission on Violence Against Women, *Violence against Women and Islam: Dispelling Stereotypes and Telling Truth, A View from Indonesia*, at 4, presented on 4 Feb. 2016, available at <http://www.lse.ac.uk/WomenPeaceSecurity/pdf/2016/4FebRiriAli.pdf>.

²¹⁴ *Id.*

²¹⁵ NURSYAHBANI KATJASUNGKANA & SASKIA E. WIERINGA, *THE FUTURE OF ASIAN FEMINISMS: CONFRONTING FUNDAMENTALISMS, CONFLICTS AND NEO-LIBERALISM*, 335 (Cambridge Scholars Publishing, 2012).

in more religious areas where women's rights violations are already prevalent.²¹⁶ Although some NGOs, such as LBH APIK Jakarta, have filed for judicial review of the *Perda* of Tangerang, the Supreme Court has rejected to review this and similar *perdas*.²¹⁷ On the surface, the Court provided a legal reason, namely a statute of limitations argument, but the reasoning is specious and indicates a politicization of religion.

Discriminatory Laws

In recent years, Indonesia has made some progress in promoting women's rights, such as enactments of laws to protect against human trafficking in 2015.²¹⁸ However, Indonesia still has around 389 laws that are discriminatory against women on both local and national levels.²¹⁹ Many of these laws impose punishments that specifically burden women. For example curfews are imposed on women, associated with the assumption of illicit behavior of women out at night, which restrict their mobility and ability to work late shifts.²²⁰

²¹⁶ See National Commission on Violence Against Women, *Violence against Women and Islam: Dispelling Stereotypes and Telling Truth, A View from Indonesia*, at 4, presented on 4 Feb. 2016, available at <http://www.lse.ac.uk/WomenPeaceSecurity/pdf/2016/4FebRiriAli.pdf>.

²¹⁷ *Constitutional Court lets local governments off the leash*, INDONESIA AT MELBOURNE, 4 July 2017, available at <http://indonesiaatmelbourne.unimelb.edu.au/constitutional-court-lets-local-governments-off-the-leash/>.

²¹⁸ LAW NO. 21/2007; International Organization for Migration, *Guidelines for Law Enforcement and the Protection of Victims of Trafficking in Handling Trafficking in Persons Cases*, 2009, at 15; see generally, Department of State, *2016 Trafficking in Persons Report*, June 2016, available at <https://www.state.gov/documents/organization/258876.pdf>.

²¹⁹ *Time to Act on Discriminatory Local Regulations*, INDONESIA AT MELBOURNE, 14 June 2016, available at <http://indonesiaatmelbourne.unimelb.edu.au/time-to-act-on-discriminatory-local-regulations/>.

²²⁰ Tim Lindsey & Helen Pausacker, *RELIGION, LAW AND INTOLERANCE IN INDONESIA* (Routledge, 2016) (describing the discriminatory impact the Tangerang Perda No. 5 of 2006 on the Prohibition of Prostitution has on women); see also National Commission on Violence Against Women, *Violence against Women and Islam: Dispelling Stereotypes and Telling Truth, A View from Indonesia*, at 4, presented on 4 Feb. 2016, available at <http://www.lse.ac.uk/WomenPeaceSecurity/pdf/2016/4FebRiriAli.pdf>.

Recommendations

Indonesia and the special autonomous region of Aceh should take measures to limit restrictions on women's rights and freedoms. The Government of the Special Autonomous region of Aceh, in particular, should adopt the following measures:

1. Repeal the crime of *khalwat*, and do not enforce the current law based on unclear, ambiguous, or arbitrary standards.
2. Take effective measures to minimize the social stigma attached to women for moral violations.
3. Prevent local laws from promoting community-centered enforcement and punishments for the crime of *khalwat* and other moral violations.
4. Amend the Criminal Code to specifically designate what constitutes appropriate Islamic dress code for women. Alternatively, the legislation may be amended to describe inappropriate dress. Regardless of the specific wording, the law must be revised to provide clarity and guidance for women to reduce the number of arbitrary arrests.

Regional governments should:

5. Repeal all dress-related legislation that requires people to wear sex-appropriate clothing in order to limit the harassment of transgendered individuals.
6. Amend broadly written *perdas* and promote a uniform and narrow definition of the specified crime. The Supreme Court should review the regional *perdas* that are challenged by NGOs and proactively review other *perdas* that use broad language and are being implemented in a way that unduly burdens women.

ISLAMIC REPUBLIC OF IRAN

Government and Legal System

The Constitution of the Islamic Republic of Iran (the Iranian Constitution) creates a governance structure that combines theocratic and representative democratic elements. The Iranian Constitution institutes a representative democratic government. Article 6 mandates that the government should be administered based on public opinions through elections,²²¹ while article 3 imposes a duty on the government to secure the rights of all citizens and provide legal protection for all in addition to equality before the law.²²² It also provides for three branches of government: a national legislature called the Islamic Consultative Assembly, which is empowered to enact laws,²²³ an executive branch with the president as chief executive,²²⁴ and a judiciary that is responsible for the resolution of disputes.²²⁵

However, the Iranian Constitution also superimposes a religious regime onto this democratic ordering. According to article 1, the Iranian government is to be an “Islamic Republic” with endorsement coming from the people’s “longstanding belief in the sovereignty of truth and Qur’anic justice.”²²⁶ Though Iranian citizens are to enjoy equal protection and human rights, they may only do so “in conformity with Islamic criteria.”²²⁷ The Islamic Consultative Assembly is barred from enacting laws contrary to Islamic principles, a Guardian Council is charged with determining violations, and the judiciary may not issue decisions in conflict with

²²¹ CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN (1979).

²²² *Id.* at art. 3.

²²³ *Id.* at art. 71.

²²⁴ *Id.* at art. 113.

²²⁵ *Id.* at art. 156.

²²⁶ *Id.* at art. 1.

²²⁷ *Id.* at art. 20.

Islamic law or norms. While the Iranian Constitution provides some surface features of a liberal democratic structure, in practice religious law operates as the highest authority of the state.

In addition to being the controlling principle of governance, Islamic law serves as the backbone of Iran's criminal justice system. The Islamic Penal Code of the Islamic Republic of Iran (hereinafter "Penal Code") consists of crimes and punishments of *hadd* (plural: *hudud*), *qisas*, *diyya* (plural: *diyat*), and *ta'zir*, all of which are based on Islamic principles.²²⁸ *Hadd* refers to punishment fixed in the Quran and the hadith for crimes against God, including theft, illicit sexual relations, making unproven accusations of illicit sexual relations, drinking intoxicants, apostasy, and highway robbery.²²⁹ *Qisas* and *diyya* refer to ways by which murder, bodily harm, or property damage may be punished. *Qisas* means retribution, where the nearest relative of a murdered party may take the life of the killer with court approval.²³⁰ *Diyya* means compensation, where the perpetrator of a crime may pay a sum to the victim or the victim's nearest relatives to avoid retribution.²³¹ *Ta'zir* refers to lesser crimes of a similar nature to *hadd* for which specific punishments have not been fixed by the Quran and are left to judicial discretion.²³² The Penal Code itself defines certain crimes and punishments, but only in limited cases, and in absence of codified law, judges are mandated to "deliver [their] judgment on the basis of authoritative Islamic sources."²³³ This effectively means that Islamic law remains predominant in Iran's criminal justice system.

²²⁸ ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN (2013) at book 1, art. 14, *available at* <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html>.

²²⁹ OISO *Hadd* (2017), *available at* <http://www.oxfordislamicstudies.com/article/opr/t125/e757>.

²³⁰ OISO, *Qisas*, (2017), *available at* <http://www.oxfordislamicstudies.com/article/opr/t125/e1931>.

²³¹ Nesrine Malik, *Paralysis or Blood Money? Skewed Justice in Saudi Arabia*, THE GUARDIAN, 5 Apr. 2013, *available at* <http://www.theguardian.com/commentisfree/2013/apr/05/sharia-law-diyaa-saudi>.

²³² OISO, *Tazir* (2017), *available at* <http://www.oxfordislamicstudies.com/article/opr/t125/e2363>.

²³³ CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN (1979), art. 167.

Human Rights Obligations under International Law

Iran has not yet ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as of April 2018,²³⁴ but it has ratified numerous international human rights treaties relevant to women's rights, including the International Covenant on Civil and Political Rights (ICCPR),²³⁵ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²³⁶ and the United Nations Convention on the Rights of the Child (CRC).²³⁷ Article 3 of the ICCPR requires its signatories to ensure the equal right of all to enjoy civil and political rights.²³⁸ Article 3 of the ICESCR requires its signatories to ensure the equal right of all to enjoy economic, social, and cultural rights. Article 2 of the CRC obliges its signatories to ensure that all children are protected against all forms of discrimination, including that of gender. Upon ratifying the CRC, Iran stated that it would reserve the right not to apply any portion of the CRC that is incompatible with Islamic Laws.²³⁹ On the other hand, Iran has not made any reservation or declaration on the ICCPR and ICESCR.²⁴⁰ However, since the two conventions were ratified before the current government came into place and article 2 of the current Iranian Constitution provides that the Islamic Republic is a system based on belief in God, the incorporation of both conventions is likely still subject to the bounds set by Islamic law.

²³⁴ Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980), *entered into force* 8 Sept. 1981.

²³⁵ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

²³⁶ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

²³⁷ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, *entered into force* 2 Sept. 1990.

²³⁸ International Covenant on Civil and Political Rights, art. 3, 16 Dec. 1966 999 U.N.T.S. 171 & 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

²³⁹ "Convention on the Rights of the Child: Declarations and Reservations, Iran", UNTS, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en.

²⁴⁰ "International Covenant on Civil and Political Rights: Declarations and Reservations, Iran", UNTS, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en; United Nations Treaty Collection, *International Covenant on Economic, Social and Cultural Rights: Declarations and Reservations*, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.

Adultery

Adultery is prosecuted in Iran in a biased way against women. Under the Penal Code, adultery is considered a crime against God and is punishable by stoning to death provided both parties have consummated their marriages.²⁴¹ This severe charge differs based on gender in two respects. First, women are at a higher risk of being convicted of and punished for adultery. As men are allowed to have four permanent wives and multiple temporary ones in Iran,²⁴² they could refute adultery charges by claiming that they were or are temporarily married to the woman with whom they were found committing adultery.²⁴³ Women, on the other hand, have no recourse to this defense, and as a result face punishment for adultery at a greater rate than men.²⁴⁴ While this distinction makes no difference when two married parties are concerned, as men can only take on unmarried women as temporary wives, men will be more readily found innocent than women when a married party is caught cheating on his or her partner with an unmarried party. In 2005, the UN Special Rapporteur on Violence against Women reported that out of 397 women in Evin Prison, 200 were sentenced for moral crimes or sexually oriented offenses of which she attributed to as “the gender-biases in the attitudinal and institutional structure of the country.”²⁴⁵

²⁴¹ ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN (2013), arts. 225-226, *available at* <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html>. In Farsi, the first sentence stipulates that a defendant accused of adultery will be put to death and a judge will decide on the manner of capital punishment. (Stoning is one option.) It further states that the adultery has to be seen, not merely assumed. When assumed, the punishment is 100 lashes.

²⁴² Temporary marriages are for a specific period of time where a man and woman may have lawful sexual relations but the wife is not entitled to the husband’s support and cannot inherit from him. *See Iran HRDC, Gender Inequality and Discrimination: The Case of Iranian Women*, 8 Mar. 2013, *available at* <http://www.iranhrdc.org/english/publications/legal-commentary/1000000261-gender-inequality-and-discrimination-the-case-of-iranian-women.html>.

²⁴³ UK Home Office, *Country Policy and Information Note: Iran*, at para. 5.1.1-5.1.4, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565819/CPIN-Iran-Adulterers-v2-November-2016.pdf.

²⁴⁴ *Id.*, at para. 2.3.4.

²⁴⁵ Economic and Social Council, *Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women. Mission to the Islamic Republic of Iran*, E/CN.4/2006/61/Add.3, 27 Jan. 2006, *available at*

Second, the severity of the punishment for adultery differs between genders. A man convicted of adultery would be customarily buried in a ditch up to near his waist whereas a woman convicted of the same would be buried up to near her chest.²⁴⁶ Since persons are spared from stoning if they are able to escape the ditch, the implication is that in some cases women would be stoned to death whereas men would not, even though the circumstances surrounding their convictions may be the same.²⁴⁷

Despite Parliament initially omitting stoning from the Penal Code in a 2013 review of the law, it was subsequently reinserted by the Guardian Council, a body of theologians and jurists that must approve bills based on consistency with the constitution and Islamic law.²⁴⁸ As a result, although it hasn't been carried out in recent years, under article 225 of the Penal Code, adultery continues to be an offense punishable by stoning to death, and where stoning is not possible, those convicted face the death penalty by hanging or one hundred lashes.²⁴⁹ While official statistics regarding the use of stoning as a punishment for adultery are not available, there was at least one stoning sentence in 2015 for a woman convicted of adultery.²⁵⁰

<http://www.iranhrdc.org/english/human-rights-documents/aadel-collection/10028-integration-of-the-human-rights-of-women-and-a-gender-perspective-violence-against-women.html>.

²⁴⁶ AFP, *Iran Amends Law on Stoning for Adultery*, THE TELEGRAPH, 30 May 2013 available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/10089270/Iran-amends-law-on-stoning-for-adultery.html>.

²⁴⁷ *Id.*

²⁴⁸ Emma Batha, *Factbox: Stoning - Where Does it Happen?*, THOMSON REUTERS FOUNDATION, 29 Sept. 2013, available at <http://news.trust.org/item/20130927165059-w9g0i>; Iran: *Guardian Council*, BBC, available at http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/iran_power/html/guardian_council.stm.

²⁴⁹ ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN (2013), arts. 225-226, available at <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html>.

²⁵⁰ UN Secretary General, *Report of the Secretary-General on the Situation of Human Rights in Iran*, Human Rights Council, 31st session, U.N. Doc A/HRC/31/26, 3 Mar. 2016, at para. 17.

Discriminatory Punishment of Women and Age

Iran's criminal justice system also discriminates against gender based on age. Article 146 of the Penal Code stipulates that children who have not reached legal maturity have no criminal responsibility.²⁵¹ However, article 147 differentiates between girls and boys by setting the age of maturity for girls at 9 lunar years and for boys at 15 lunar years.²⁵² In practice, legal punishment is divided into 3 categories: (1) children under 9 years old, (2) children between 9 and 15 years old, and (3) juveniles between 15 and 18 years old. For children under 9 years old, no criminal responsibility follows irrespective of gender. For juveniles between 15 and 18 years old, criminal liability attaches irrespective of gender. Children between 9 and 15 years old who commit *ta'zir* crimes will also be subject to correctional measures irrespective of gender.²⁵³ For girls between 9 and 15 years old who commit crimes punishable by *hudud* and *qisas*, girls may be subject to such punishments because they have reached the age of maturity.²⁵⁴ However, if a boy commits the same crimes, he will only be subject to minor correctional measures given that he has not yet reached the age of maturity. This distinction punishes girls more harshly and directly contravenes the ICCPR, which provides that children should not be discriminated against based on gender.²⁵⁵ In 2016, the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran

²⁵¹ ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN (2013), art. 146, *available at* <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html>.

²⁵² *Id.*, art. 147 (9 lunar years is roughly equivalent to 8 years and 9 months and 15 lunar years is roughly equivalent to 14 years and 7 months.).

²⁵³ ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN (2013), art. 148, *available at* <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html>.

²⁵⁴ Mohammad H. Nayyeri, *Criminal Responsibility of Children in the Islamic Republic of Iran's New Penal Code*, Iran Human Rights Documentation Center, 22 Feb. 2012, *available at* <http://www.iranhrdc.org/english/publications/legal-commentary/1000000054-criminal-responsibility-of-children-in-the-islamic-republic-of-irans-new-penal-code.html>.

²⁵⁵ International Covenant on Civil and Political Rights, art. 24, 16 Dec. 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976.

expressed concerns that “the Islamic Penal Code retains the death penalty for boys of at least 15 lunar years of age and girls of at least 9 lunar years for *qisas* (“retribution in kind”) or *hudud* crimes, such as homicide, adultery or sodomy (arts. 146-147).”²⁵⁶

Blood Money

Women’s lives are treated as less valuable than those of men under the Penal Code. Article 550 provides that the *diyya*, colloquially known as “blood money”, for murdering a woman is half that for murdering a man. According to Islamic law, a victim’s next of kin is allowed to take the life of the offender (known as *qisa* or retribution in kind) if the *diyya* for the victim is the same or higher as what the offender’s *diyya* would be; otherwise, the victim’s next of kin must pay the difference to retaliate. Thus, if a man is killed by a woman, the man’s next of kin may retaliate simply with the court’s approval. However, if a woman is killed by a man, the woman’s next of kin must pay half of a man’s *diyya* to the perpetrator, in addition to receiving court’s approval, to retaliate. Article 545 attempts to remedy this inequality by providing that the difference in such homicide cases shall be paid from a government fund.

As for non-fatal bodily injuries, article 560 provides that the *diyya* is equal for men and women up to one-third of the full *diyya*; any compensation for women beyond one-third is to be decreased by half. For example, a man who was injured would receive the full *diyya* while a woman with the same injury would receive just half, and this difference is not made up by the aforementioned fund. This may lead to absurd outcomes whereby a woman who deserves 30

²⁵⁶ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran*, 26 May 2016, A/HRC/31/69, at 19, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/105/97/PDF/G1610597.pdf>.

percent of the full *diyya* would get just that, a woman who deserves 50 percent of the full *diyya* would receive only 25 percent, whereas the *diyya* for men undergoes no reductions.

In 2012, the Special rapporteur on the situation of human rights explained that “the revised Islamic Penal Code continues to contravene international law.... For example, a woman’s testimony in a court of law is regarded as half that of a man’s and, despite amendments that now establish a monetary fund to equalize the *diya* (blood money) for men and women in the case of *qisas* (retribution in kind), a woman’s life is still valued as half that of a man’s.”²⁵⁷

Gender Discrimination and Legal Immunity

The Penal Code provides certain legal immunities for men that do not also apply to women. Article 299 provides that the punishment of *qisa* (retribution in kind) will not be imposed on the perpetrator if the perpetrator is the father or the paternal grandfather of the victim. This means that no male paternal ascendant can be subject to *qisa* for killing his descendant. Though paternal ascendants may still be subject to other forms of punishment, this exception allows them to engage in what is often known as honor killing to punish family members perceived to have brought dishonor upon an entire family.

In 2016 the Committee on the Rights of the Child expressed concerns that “article 301 combined with article 612, of the Islamic Penal Code of 2013, provides for lighter punishment if a murder is committed by a father or paternal grandfather of the victim (‘crimes committed in the

²⁵⁷ General Assembly, *Situation of human rights in the Islamic Republic of Iran*, A/67/369, 13 Sept. 2012, at 41, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/508/13/PDF/N1250813.pdf>.

name of so-called honour’).”²⁵⁸ Notably, the Penal Code also expressly condones a specific category of honor killing by sanctioning a husband to kill his wife and her sexual partner if he sees them committing *zina* (sexual intercourse) consensually. In practice, this means women and girls may be killed by their father, grandfather, or husband with impunity. The absence of official statistics on both honor killing incidents and conviction rates of perpetrators makes it difficult to evaluate the prevalence of honor killings in Iran. However, according to police statistics, between March 2011 and March 2012, there were a total of 340 honor killings against women.

Dress Requirements

The Penal Code punishes women for violating the official dress code; however, these same punishments do not apply to men. Article 638 stipulates that it is a crime against public morality for women to appear in public places without wearing an Islamic *hijab*, which generally refers to a headscarf that covers the head and chest. The punishment for this offense is ten days to two months’ imprisonment or a fine of between 500 to 50,000 *rials*.²⁵⁹ Because of this law, women have been harassed and threatened by law enforcement officials, including the morality police, undercover agents and the *Basij*, a paramilitary volunteer militia that follows the order of the Supreme Leader.²⁶⁰ However, there is no similar rule regarding how men must dress in the Penal Code. Regarding this matter, the Committee on the Rights of the Child explained that “the

²⁵⁸ Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of the Islamic Republic of Iran*, 14 Mar. 2016, CRC/C/IRN/CO/3-4, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IRN/CO/3-4.

²⁵⁹ ISLAMIC PENAL CODE OF THE ISLAMIC REPUBLIC OF IRAN (2013), art. 638, available at <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.html>.

²⁶⁰ Denise Hassanzade, *Why So Many Iranians Have Come to Hate the Hijab*, THE GUARDIAN, 28 Apr. 2016 available at <https://www.theguardian.com/world/2016/apr/28/iranian-women-hate-hijab-tehranbureau>; Marketa Hulpachova, *Hijab: A Woman’s Rite of Passage in Iran*, THE GUARDIAN, 19 Dec. 2013 available at <https://www.theguardian.com/world/iran-blog/2013/dec/19/iran-hijab-islamic-veil>.

hijab requirement for girls as young as 7 years of age irrespective of their religious affiliation constitutes a serious breach of article 14 of the Convention.”²⁶¹

President Hassan Rouhani has spoken out against the enforcement of the *hijab* requirement, specifically criticizing the use of undercover agents by the morality police, noting that the duty of the police is to enforce the law and not Islam.²⁶² In early 2015, the Guardian Council also rejected a bill proposing to give greater power to police and other agencies to enforce the compulsory *hijab* law and included measures such as fining companies where workers do not observe the *hijab* regulation.²⁶³ However, the Supreme Leader Ayatollah Ali Khamenei has stated that the first priority of the police is “to serve the society of the Islamic republic” “in the name of God.”²⁶⁴ Given that the Supreme Leader controls Iran’s law enforcement agencies and operations, movements to loosen or abolish *hijab* regulations may be hindered and women will continue to be discriminatorily punished for their attire.²⁶⁵ Despite signs in 2017 that the police in Tehran would no longer arrest women for breaking Islamic dress code, at least 29 people were detained in February 2018 for not wearing compulsory headscarves and were reportedly charged with “disturbing public security.”²⁶⁶

²⁶¹ Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of the Islamic Republic of Iran*, CRC/C/IRN/CO/3-4, 14 Mar. 2016, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/IRN/CO/3-4.

²⁶² *Rouhani Clashes with Iranian Clergy over Women Arrested for ‘Bad Hijab’*, THE GUARDIAN, 27 May 2015, available at <http://www.theguardian.com/world/iran-blog/2015/may/27/iran-hijab-rouhani-versus-senior-clergy-enforcement>; Bozorgmehr Sharafedin, *Rouhani Clashes with Iranian Police Over Undercover Hijab Agents*, REUTERS, 20 Apr. 2016 available at <http://www.reuters.com/article/us-iran-rights-rouhani-idUSKCN0XH0WH>.

²⁶³ AFP, *Iran shoots down controversial new hijab law*, THE TIMES OF ISRAEL, 3 Jan. 2015 available at <http://www.timesofisrael.com/iran-shoots-down-controversial-new-hijab-law/>.

²⁶⁴ *Rouhani Clashes with Iranian Clergy over Women Arrested for ‘Bad Hijab’*, THE GUARDIAN, 27 May 2015, available at <http://www.theguardian.com/world/iran-blog/2015/may/27/iran-hijab-rouhani-versus-senior-clergy-enforcement>.

²⁶⁵ See PBS FRONTLINE, *The Structure of Power in Iran*, (2014), available at <http://www.pbs.org/wgbh/pages/frontline/shows/tehran/inside/govt.html>.

²⁶⁶ See, e.g., Aya Batrawy, *Iranian police in Tehran announce women who break Islamic dress codes no longer face arrest*, THE INDEPENDENT, 29 Dec. 2017, available at <https://www.independent.co.uk/news/world/middle->

Recommendations

1. Iran's legislative branch should abolish stoning as a punishment, which has been held to constitute torture, and cruel and inhuman punishment under international human rights law.
2. Iran's legislative branch should amend the Penal Code to ensure the age of criminal responsibility is the same for girls and boys.
3. Iran's legislative branch should abolish retribution in kind (*qisa*) as a punishment, which has been held to violate the right to life under the Universal Declaration of Human Rights (considered customary international law) and article 6 of the International Covenant on Civil and Political Rights (of which Iran is a signatory).²⁶⁷ Under the current law, *qisa* should not be used to as a basis to discriminate against women.
4. Iran's legislative branch should abolish legal immunity for a husband that kills a wife and her sexual partner upon finding them having sexual intercourse.
5. Iran's legislative branch should abolish the compulsory *hijab* law.
6. Given that Islamic law is constitutionally supreme in Iran, favor interpretations of the Quran that favor gender equality to facilitate the eradication of legal discrimination.

east/irairan-police-tehran-women-rights-islamic-dress-code-arrests-police-hijab-hasan-rouhani-reform-a8132726.html; *Iran arrests 29 women for not wearing hijab in protests*, AL JAZEERA, 2 Feb. 2018, available at <https://www.aljazeera.com/news/2018/02/iran-arrests-29-women-wearing-hijab-protests-180202084416823.html>.

²⁶⁷ *The Structure of Power in Iran*, PBS FRONTLINE, 2014, available at <http://www.pbs.org/wgbh/pages/frontline/shows/tehran/inside/govt.html>.

REPUBLIC OF IRAQ

Government and Legal System

Iraq's legal system is a mixture of Islamic and civil law.²⁶⁸ Article 2 of the newest Constitution, drafted and approved by national referendum in 2005, establishes Islam as the official religion and the main source of legislation.²⁶⁹ Specifically, article 2 states that “no law may be enacted that contradicts the established provisions of Islam.” Accordingly, article 41 allows personal status issues (such as marriage, divorce and inheritance) to be governed individually by the different religious groups in Iraq. Not only does this provision contradict article 14, which provides that all are equal before the law without discrimination, but human rights advocates criticize article 41 as deepening divisions between religious groups and as inviting male religious leaders to violate women's rights in their determination of family matters.²⁷⁰ This article has strong potential “to strip women of many of their previous legal rights and place them under the control of religious authorities and tribal customs.”²⁷¹ According to a 2010 report by Freedom House, Article 41 was suspended at the time to consider revisions and resolve the dispute following the criticisms.²⁷² Although personal status matters are currently determined by state courts under a unified personal status law,²⁷³ there have been discussions

²⁶⁸ Central Intelligence Agency, *The World Factbook: Iraq*, 12 Jan. 2017, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html>.

²⁶⁹ IRAQI CONSTITUTION, art. 2, available at <http://www.wipo.int/wipolex/en/details.jsp?id=10027>.

²⁷⁰ UNICEF, *Iraq: MENA Gender Equality Profile, Status of Girls and Women in the Middle East and North Africa*, Oct. 2011, at 1, available at <https://www.unicef.org/gender/files/Iraq-Gender-Eqaulity-Profile-2011.pdf>.

²⁷¹ Huda Ahmed, *Iraq in WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE*, 2010, available at https://freedomhouse.org/sites/default/files/inline_images/Iraq.pdf.

²⁷² *Id.*

²⁷³ UNICEF, *Iraq: MENA Gender Equality Profile, Status of Girls and Women in the Middle East and North Africa*, Oct. 2011, at 1, available at <https://www.unicef.org/gender/files/Iraq-Gender-Eqaulity-Profile-2011.pdf>; see also PERSONAL STATUS ACT (Act No. 188 of 1959).

about the article's future. The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) raised concern over the possible discriminatory implementation of article 41 amid political instability, sectarian tensions and increasing patriarchal attitudes in society and in the State party.²⁷⁴ In 2014, the Jaafari ("Al-Jafaari", "Ja'afari") Personal Status Bill proposed a revision based on Shiite Islamic jurisprudence of the personal status law, which included three troubling provisions: lowering the legal marriage age to nine for girls; automatically giving custody of girls to male guardians (*wali*); and requiring women get consent from the male guardian before marriage.²⁷⁵ The bill, however, was rejected by parliament.²⁷⁶

Aside from legislation, some schools of thought in the various Iraqi communities espouse practices that perpetuate discrimination against women. For example, the Hanafi Sunnis, the most prevailing school for family and personal law issues in Iraq, emphasizes the interpretation of law through the decision-maker's opinions, which opens the door to exploitation in situations not defined in the laws where traditional patriarchal male leaders can then unilaterally make decisions about marriage and guardianship, ownership and use of property, and individual freedoms without respecting women's rights.²⁷⁷ It also does not change the stigma that

²⁷⁴ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Iraq*, CEDAW/C/IRQ/CO/4-6, 10 Mar. 2014, at para. 17(a), available at [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fCO%2f4-6&Lang=en.17\(a\)](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fCO%2f4-6&Lang=en.17(a)).

²⁷⁵ Suad al-Salhy, *Iraqi Women Protest Against Proposed Islamic Law in Iraq*, REUTERS, 8 Mar. 2014, available at <http://www.reuters.com/article/us-iraq-women-islam-idUSBREA270NR20140308>; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Iraq*, CEDAW/C/IRQ/CO/4-6, 10 Mar. 2014, at para. 52(a), available at [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fCO%2f4-6&Lang=en.17\(a\)](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fCO%2f4-6&Lang=en.17(a)).

²⁷⁶ OHCHR, *Committee on Economic, Social and Cultural Rights Examines Report on Iraq*, 30 Sept. 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16538&LangID=E>.

²⁷⁷ Christie S. Warren, *The Hanafi School*, 28 May 2013, available at <http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0082.xml>; see e.g. Naureen Shameen, *The Future of Abortion Rights in Islam*, 2011, available at <http://www.musliminstitute.org/blogs/abortion/future-abortion-rights-islam> (explaining that the majority of Hanafi

women face when trying to assert their legal rights.²⁷⁸ In any event, activists also report that “in practice ... disputes relating to marriage and the family are settled inside the family and community itself, rather than being taken to the police or the courts.”²⁷⁹

The highest courts in Iraq are the Federal Supreme Court and the Court of Cassation, with judges appointed by the Higher Juridical Council.²⁸⁰ The Supreme Court consists of nine judges who are appointed for life, and the jurisdiction of the court is limited to constitutional issues.²⁸¹ The Court of Cassation consists of a president, five vice-presidents and at least 24 judges.²⁸² Subordinate courts include the Courts of Appeal and personal status, labor, criminal, juvenile, and religious courts.²⁸³

Human Rights Obligations under International Law

Iraq ratified the Convention on the Elimination of All forms of Discrimination Against Women (“CEDAW”) in 1986, with reservations on articles 2, 16, and 29(1).²⁸⁴ The UN

allow for abortions only when there is an “acceptable justification” and commenting on how the “male dominated society” attempted to “circumvent or restrict” the rights granted to women in Islam during the 17th-century Hanafi Sunni school).

²⁷⁸ Naureen Shameen, *The Future of Abortion Rights in Islam*, 2011, available at <https://musliminstitute.org/freethinking/islam/future-abortion-rights-islam> (describing the “taint of shamelessness” that “society attaches to [a woman’s assertion of her legal rights] despite the legal parameters”).

²⁷⁹ Minority Voices, *Iraq: Violence against minority women is rife and poorly addressed*, 2011, available at <http://www.minorityvoices.org/news.php/en/1333/iraq-violence-against-minority-women-is-rife-and-poorly-addressed>

²⁸⁰ Central Intelligence Agency, *The World Factbook: Iraq*, 12 Jan. 2017, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html>.

²⁸¹ *Id.*; CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN (1979), art. 89-90.

²⁸² Central Intelligence Agency, *The World Factbook: Iraq*, 12 Jan. 2017, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html>.

²⁸³ *Id.*

²⁸⁴ Articles 2 (f) and (g) call on states to modify or abolish existing laws and penal codes that discriminate against women; Article 9 requires equal rights regarding changes and transfers of nationality; Article 16 concerns the elimination of discrimination in marriage and family relations; Article 29, paragraph 1, requires disputes regarding the interpretation or application of the Convention to be submitted to arbitration if not settled by negotiation. *See* Convention on the Elimination of All Forms of Discrimination against Women, arts. 2, 9, 16 & 29, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) *entered into force* 8 Sept. 1981.

Committee on the Elimination of Discrimination against Women (the “Committee”) has raised particular concern about Iraq’s reservations on articles 2 and 16, which require states to ensure that legislation and penal codes do not discriminate against women, and that women are not discriminated against in matters relating to marriage and family relations.²⁸⁵ While a joint committee of government ministers and civil society representatives has been set up to review these reservations, the Committee has called on Iraq to “strengthen its efforts” to withdraw these reservations.²⁸⁶ Further, Iraq has not ratified the Optional Protocol to CEDAW, which would allow the Committee to hear petitions from women who have exhausted national remedies.²⁸⁷

Iraq is also a state party to the International Convention on Civil and Political Rights (ICCPR),²⁸⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁸⁹ the Convention on the Rights of the Child (CRC),²⁹⁰ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²⁹¹ However, Iraq has not yet ratified the Optional Protocols to these Conventions. Article 3 of the ICCPR requires signatories to ensure the equal right of all to enjoy civil and political rights;²⁹² article 3 of the ICESCR requires signatories to ensure the equal right of all to enjoy economic, social, and

²⁸⁵ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Iraq*, CEDAW/C/IRQ/CO/4-6, 10 Mar. 2014, at paras. 15-6, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fCO%2f4-6&Lang=en.17(a).

²⁸⁶ *Id.*

²⁸⁷ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art 4, (6 Oct. 1999), 2131 U.N.T.S. entered into force 22 Dec. 2000.

²⁸⁸ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407, entered into force 23 Mar. 1976.

²⁸⁹ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3, entered into force 3 Jan. 1976.

²⁹⁰ Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, entered into force 2 Sept. 1990.

²⁹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 86.

²⁹² International Covenant on Civil and Political Rights, art. 3, 16 Dec. 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407, entered into force 23 Mar. 1976.

cultural rights;²⁹³ and article 2 of the CRC requires signatories to ensure that all children are protected against all forms of discrimination, including that of gender.²⁹⁴

Honor Killings

The practice of honor killings in Iraq remains a concern for the human rights community²⁹⁵ and was pointed out in 2014 during the Universal Periodic Review of Iraq.²⁹⁶ The practice is based on the idea that “women who ‘dishonor’ the family by engaging in sex outside of marriage should be punished with ostracization or even death.”²⁹⁷ While murder, assault leading to death and manslaughter, and intentional wounding, beating and damage are penalized by the Penal Code, many cases of honor killings either go unreported or are covered up by families due to deep-seated patriarchal attitudes.²⁹⁸ When cases are actually brought to police, officers fail to open investigations²⁹⁹ or are lenient on perpetrators,³⁰⁰ and incidences are often presented to courts as suicides.³⁰¹ Furthermore, in southern and central Iraq, honor killings are

²⁹³ International Covenant on Economic, Social and Cultural Rights, art. 3, 16 Dec. 1966, 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976.

²⁹⁴ Convention on the Rights of the Child, art. 2, 20 Nov. 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), *entered into force* 2 Sept. 1990.

²⁹⁵ Human Rights Committee, *Concluding observations on the fifth periodic report of Iraq*, CCPR/C/IRQ/CO/5, 3 Dec. 2015, at 25, *available at*

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IRQ/CO/5; *see also* United Nations Office of the High Commissioner for Human Rights and United Nations Assistance Mission for Iraq, *Report on Human Rights in Iraq: January-June 2014*, at 14, Aug. 2014, *available at* http://www.ohchr.org/Documents/Countries/IQ/HRO_Jan-Jun2014Report_en.pdf.

²⁹⁶ Human Rights Council, *Report of the WG on the UPR - Iraq*, A/HRC/28/14, 12 Dec. 2014, at 127.133, 127.134, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/241/84/PDF/G1424184.pdf>.

²⁹⁷ International Rescue Committee, *Honor Killings in Northern Iraq: IRC Works to Break the Cycle of Violence and Revenge*, RESCUE, 24 Feb. 2010, *available at* <http://www.rescue.org/news/honor-killings-northern-iraq-irc-works-break-cycle-violence-and-revenge-6869>.

²⁹⁸ UNICEF, *2016 Annual Report: Iraq*, at 14, *available at* https://www.unicef.org/about/annualreport/files/Iraq_2016_COAR.pdf.

²⁹⁹ *Id.* at 14-15.

³⁰⁰ Yara Bayoumy and Aseel Kami, “Honor Killings” Require Tougher Laws, Say Iraqi Women, REUTERS, 6 Mar. 2012, *available at* <http://www.reuters.com/article/us-iraq-women-idUSTRE82510920120306>.

³⁰¹ *Id.*

considered to be “a mitigating excuse” when it comes to penalizing these types of murders.³⁰² In 2015 the Human Rights Committee expressed concerns “at reports that violence against women, including domestic violence and ‘honour killing’, remains a serious problem in the State party.”³⁰³

Furthermore, legislation provides reduced sentences where crimes are committed in protection of one’s honor. Article 409 of the Penal Code stipulates that if a man catches his wife or girlfriend in the act of adultery or cheating, and kills or permanently disables her and/or her lover, the man will be punished by a maximum 3-year prison term.³⁰⁴ Given that the offense of murder can attract life imprisonment or the death penalty in certain circumstances,³⁰⁵ this provision grants men protection from a much more serious punishment on the grounds that the crime was committed to regain his honor. There is also no equivalent provision for women who kill adulterous husbands. In addition, Article 128(1) of the Penal Code provides that where an offense is commissioned due to “honourable motives,” such is to be considered a “mitigating excuse” that may reduce a penalty at the court’s discretion.³⁰⁶ This includes reducing the penalty for murder.³⁰⁷ These provisions can significantly reduce the punishment for offenses that disproportionately affect women, creating a culture minimizing violence against women and thus not guaranteeing women adequate protection against violence.

³⁰² Kvinna till Kvinna Foundation, *Violence Against Women in Iraq*, 2014, available at <http://kvinnatillkvinna.se/en/files/qbank/217b4c71837fac172fabebfc299f755b.pdf>.

³⁰³ Human Rights Committee, *Concluding observations on the fifth periodic report of Iraq*, CCPR/C/IRQ/CO/5, 3 Dec. 2015, at 25, available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IRQ/CO/5.

³⁰⁴ IRAQI PENAL CODE (LAW NO. 111 OF 1969), art. 409, available at

http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=57206&p_country=IRQ&p_count=235.

³⁰⁵ *Id.*, art. 405-6.

³⁰⁶ *Id.*, art. 128(1).

³⁰⁷ *Id.*, art. 130.

Honor Killings in Kurdish Region

Although the Kurdish region of Iraq enacted a law against domestic violence in 2011, violence against women through honor killings also persists in Kurdish communities. In 2014, the CEDAW Committee stated it was “deeply concerned at: . . . (c) The low number of criminal charges brought to court despite the enactment of legislation repealing legal concessions to perpetrators of crimes committed in the name of ‘honour’ (Act No. 14 (2002)) in the Kurdistan Region, with the cause of death in cases involving killings of women commonly being recorded as unknown or suicide.”³⁰⁸ The challenge with understanding the scope of this practice in the region, however, is the difficulty in obtaining accurate and clear data. The Warvin Foundation for Women’s Issues identified 60 murders and 27 suicides that occurred from January to June of 2013 in the Kurdistan region, but the previously stated reasons of inaccurate death registration, family cover ups, and unreliable law enforcement suggest that these numbers do not accurately reflect the frequency of honor killings in the region.³⁰⁹ Additionally, the inconsistency of these numbers with the 2013-2013 numbers reported by the Kurdistan Regional Government and Forensic Institute in Kurdistan for 2013 reveal the difficulty in accurately estimating honor killing data in the region.³¹⁰ Furthermore, the variety of physically violent means used to carry out honor killings makes it difficult to discern whether a death resulted from an honor killing.³¹¹

³⁰⁸ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Iraq*, CEDAW/C/IRQ/CO/4-6, 10 Mar. 2014, at para. 25, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRQ%2fCO%2f4-6&Lang=en.17(a).

³⁰⁹ Kvinna till Kvinna Foundation, *Violence Against Women in Iraq*, 2014, available at <http://kvinnatillkvinna.se/en/files/qbank/217b4c71837fac172fabebfc299f755b.pdf>.

³¹⁰ *Id.*

³¹¹ Honor-based deaths can result from “physical violence (including assault, maiming and killing), coerced suicide (including by enforced self-immolation), starvation, forced marriage of women (often to a man who has already raped her), forced abortion, removal of children, female genital mutilation, forced virginity, forced hymen repair, and the curtailment of liberty, basic rights and/or education.” Kvinna till Kvinna Foundation, *Id.*

To make matters more complex, doctors often do not register honor killing deaths as such for fear of retaliation from relatives and tribes.³¹²

Discriminatory Law Enforcement Practices

The Iraqi Penal Code (Law No.111 of 1989)

As written, the Iraqi Penal Code is inconsistent with both the country's constitution and international human rights standards.³¹³ First, the constitution stipulates the principle of equality before the law and prohibits discrimination based on gender as well as violence in the family.³¹⁴ However, the Penal Code does not treat both sexes equally when it comes to criminal sanctions. Article 409 provides an exception for male perpetrators with regards to honor killings as explained above. Given that the offense of murder can attract life imprisonment or the death penalty in certain circumstances,³¹⁵ this provision grants men broad protection from a much more serious punishment on the grounds that the crime was committed to regain his honor. There is also no equivalent leniency for women who kill adulterous husbands. A woman who commits the same crime can be punished with life imprisonment or even death.³¹⁶ Article 407 of the Penal Code also carves out another exception that discriminates against women. A male parent killing his out-of-wedlock child is not criminalized, whereas the same action is a crime for the female parent.³¹⁷

³¹² Kvinna till Kvinna Foundation, *Id.*

³¹³ IRAQI PENAL CODE.

³¹⁴ IRAQ CONST., arts. 14, 29.

³¹⁵ IRAQI PENAL CODE, art. 405-6.

³¹⁶ IRAQI PENAL CODE, arts. 405-406.

³¹⁷ IRAQI PENAL CODE, art. 407.

Gender Discrimination in the Penal Code

Lastly, women are more likely than men to be convicted of adultery due to discriminatory laws and customs.³¹⁸ For example, article 377 of the Penal Code provides that a man is to be punished by detention for adultery only if the act takes place in the marital home.³¹⁹ However, a woman faces the same punishment regardless of where the act took place.³²⁰ Although stoning is not formally legal in Iraq, it is reported that “tribal leaders, and others” carry it out as punishment for adultery.³²¹ According to a 2013 survey, of the 91 percent of Iraqis who believed that Sharia should be the law of the land, 58 percent favored stoning as a punishment for adultery.³²²

The aforementioned provisions in the Penal Code also do not conform to the requirements under CEDAW,³²³ the UN Charter,³²⁴ the U.N. Declaration on the Elimination of Discrimination against Women,³²⁵ and the Universal Declaration of Human Rights.³²⁶ Under these laws, Iraq is required to prevent violence against women and to take active steps to investigate any such incidences, which the Penal Code fails to do. In 2015, the Committee on

³¹⁸ Emma Batha, *Special Report: The Punishment was Death by Stoning. The Crime? Having a Mobile Phone*, THE INDEPENDENT, 29 Sept. 2013, available at <http://www.independent.co.uk/news/world/politics/special-report-the-punishment-was-death-by-stoning-the-crime-having-a-mobile-phone-8846585.html>.

³¹⁹ IRAQ PENAL CODE (Act No. 111 of 1969), art. 377(2) (Note, however, that this provision has been abolished in the Kurdistan region: Law No. 9 of 2001).

³²⁰ *Id.* at art. 377(1).

³²¹ Emma Batha, *Special Report: The Punishment was Death by Stoning. The Crime? Having a Mobile Phone*, THE INDEPENDENT, 29 Sept. 2013, available at <http://www.independent.co.uk/news/world/politics/special-report-the-punishment-was-death-by-stoning-the-crime-having-a-mobile-phone-8846585.html>.

³²² Pew Research Center, *Chapter 1: Beliefs About Sharia* (30 Apr. 2013) available at <http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/>.

³²³ Convention on the Elimination of All Forms of Discrimination against Women, arts. 2, 5, 6 & 15, 18 Dec. 1979, 1249 U.N.T.S. 13, entered into force 8 Sept. 1981.

³²⁴ United Nations Charter, arts. 1 & 2, available at <http://www.un.org/en/sections/un-charter/chapter-i/index.html>.

³²⁵ Declaration on the Elimination of Discrimination against Women, A/RES/22/2263, 7 Nov. 1967, at art. 4 (mandating that states “condemn violence against women”, “not invoke any custom, tradition or religious consideration to avoid [this] obligation[]”, and “pursue by all appropriate means and without delay a policy of eliminating violence against women”), available at <http://www.un-documents.net/a22r2263.htm>.

³²⁶ Universal Declaration of Human Rights, A/RES/217 A (III), 10 Dec 1948, art. 3 (stating that “everyone has the right to life, liberty, and the security of person”), available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

Economic, Social and Cultural Rights recommended Iraq to “[r]epeal provisions 128, 130, 131, 398 and 409, among others, of the Penal Code, with a view to ensuring zero tolerance of gender-based violence.”³²⁷

Despite moves made to amend the Penal Code and to “provide better support for victims of violence and monitor cases of violence against women,”³²⁸ the most recent version from 14 March 2010 still does not meet this requirement. Factors including a lack of political will and entrenched discriminatory customs are to be blamed for the stand still.³²⁹

Although the face of the Iraqi Criminal Procedure Code which governs the detention and arrest of individuals does not espouse discriminatory punishment against women, the effect of its application does. The Iraqi Constitution provides for the right to a defense in all phases of an investigation and preserves the right to be treated with justice in judicial and administrative proceedings for all.³³⁰ But the current procedures in the Iraqi Criminal Procedure Code do not adequately protect women. For instance, Article 109 allows the detention period to be extended from 24 hours to 48 hours if a preliminary investigation report requires additional time, but in practice, the detention is often extended to 72 hours.³³¹ During lengthy periods of detainment, women are vulnerable to sexual assaults and rape.³³²

³²⁷ Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Iraq*, 27 Oct. 2015, E/C.12/Iraq/CO/4, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/Iraq/CO/4.

³²⁸ Marilou Gregoire-Blais, *Iraqi Women: Lost Liberties*, ALTERNATIVES LA SOLIDARITE EN ACTION (2010), at 12, available at http://iraq.alterinter.org/IMG/pdf/Final_Policya116.pdf.

³²⁹ *Id.* at 11-13.

³³⁰ IRAQ CONST., art. 19.

³³¹ OHCHR, *Report on the Death Penalty in Iraq*, Oct. 2014, at 12, available at http://www.ohchr.org/Documents/Countries/IQ/UNAMI_HRO_DP_1Oct2014.pdf.

³³² See e.g., *Women Tortured and Raped in Iraqi Prisons*, HUFFINGTON POST, 6 Feb. 2014, available at http://www.huffingtonpost.com/2014/02/06/iraq-illegally-detains-th_n_4735144.html; Peter Beaumont, *Iraqi Prisons Leave Women Doubly Vulnerable*, THE GUARDIAN, 15 Mar. 2013, available at <https://www.theguardian.com/world/2013/mar/15/iraqi-prisons-women-doubly-vulnerable>.

Recommendations

1. Implement an effective judiciary to combat the systemic problem of lengthy detentions without due process. Specifically, the government should hire a sufficient number of judges and trained personnel.
2. Ensure equal and meaningful participation of women and minorities in parliament, pursuant to the constitution which mandates that women constitute at least 25 percent of parliamentary and provincial council membership. Although there has been an increase in the number of female parliamentarians, political discussions still often marginalize female members and there was only one female minister in the Council of Ministers.
3. Modify the law to disallow mitigation sentences for honor killings, which remain a serious problem in Iraq, and other laws which have a discriminatory impact on the punishment of women.

MALAYSIA

Government and Legal System

Malaysia consists of thirteen states and three federal territories divided between Peninsular Malaysia and East Malaysia.³³³ It is a constitutional monarchy and its parliament is governed by a written constitution.³³⁴ The Federal Constitution of Malaysia (Constitution) guarantees certain rights and freedoms including equality and non-discrimination.³³⁵ Specifically, article 8(1) of the Constitution states “[a]ll persons are equal before the law and entitled to the equal protection of the law.” In addition, article 8(2) of the Malaysian Constitution stipulates that “there shall be no discrimination against citizens on the ground only of ... gender ... in any law.”

Malaysia has a dual judicial system and the Malaysian Constitution ensures that each system is independent from the other.³³⁶ One system comprises of civil and criminal courts and the other system comprises of Syariah courts for matters relating to Islamic law.³³⁷ Syariah (the Malaysian term for Sharia) courts apply only to Muslims, who are governed by Islamic personal and family law.³³⁸ These Islamic laws are codified either by state legislation or, for federal territories, by the Parliament.³³⁹

³³³ The Equal Rights Trust In Partnership with Tenaganita, *Washing the Tigers –Addressing Discrimination and Inequality in Malaysia*, at III, ERT Country Report Series 2, Nov. 2012, available at <http://www.equalrightstrust.org/ertdocumentbank/Malaysia%20CR%201.pdf>.

³³⁴ *Id.*

³³⁵ FEDERAL CONSTITUTION OF MALAYSIA, arts. 5-13, available at <http://www.jac.gov.my/images/stories/akta/federalconstitution.pdf>.

³³⁶ *Id.*; see also FEDERAL CONSTITUTION OF MALAYSIA, Part IX, especially art. 121(1)(A), available at <http://www.jac.gov.my/images/stories/akta/federalconstitution.pdf> (“The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts”).

³³⁷ The Equal Rights Trust in Partnership with Tenaganita, *Washing the Tigers –Addressing Discrimination and Inequality in Malaysia*, at IV, 17, ERC Country Report Series 2, Nov. 2012, available at <http://www.equalrightstrust.org/ertdocumentbank/Malaysia%20CR%201.pdf>.

³³⁸ *Id.*

³³⁹ Li Hua Chew, *Legislating Faith in Malaysia*, SINGAPORE JOURNAL OF LEGAL STUDIES 264, 265 (2007).

The Syariah Courts (Criminal Jurisdiction) Act of 1965 governs Malaysia's Islamic criminal law, which takes on a milder form.³⁴⁰ Conservative states in Malaysia, like Kelantan, have recently moved towards stricter application of Islamic law by including more traditional punishments such as stoning into their state's penal code.³⁴¹ Because the Malaysian population is over 61 percent Muslim, the majority of Malaysian people are within the jurisdiction of Syariah courts.³⁴² However, because the Syariah court system's jurisdiction is mainly over state-enacted Syariah law, under the Constitution federal law is still supreme in the case of conflicts or inconsistencies.³⁴³

Human Rights Obligations under International Law

While Malaysia ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995,³⁴⁴ it has declared that its accession is subject to compatibility with the Malaysian Constitution and Syariah law.³⁴⁵ Malaysia had also made a series of reservations to the application of CEDAW, although some have been withdrawn in

³⁴⁰ See Syariah Courts (Criminal Jurisdiction) Act of 1965 (Revised 1988), available at [http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20355%20-%20Syariah%20Courts%20\(Criminal%20Jurisdiction\)%201965.pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20355%20-%20Syariah%20Courts%20(Criminal%20Jurisdiction)%201965.pdf).

³⁴¹ *Id*; see also Lora Moftah, *Malaysia Shariah Law: Islamic Party Passes Bill to Implement Harsh Islamic Criminal Punishments*, INTERNATIONAL BUSINESS TIMES, 19 Mar. 2015, available at <http://www.ibtimes.com/malaysia-shariah-law-islamist-party-passes-bill-implement-harsh-islamic-criminal-1852948>.

³⁴² See Department of Statistics – Malaysia, Official Portal, *Population Distribution and Basic Demographic Characteristic Report 2010 (Updated 05/08/2011)*, 29 July 2011, available at https://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=117&bul_id=MDMxdHZjWTk1SjFzTzNkRXYzcVZjd09&menu_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09.

³⁴³ FEDERAL CONSTITUTION OF MALAYSIA, arts. 75, available at <http://www.jac.gov.my/images/stories/akta/federalconstitution.pdf>.

³⁴⁴ The Equal Rights Trust in Partnership with Tenaganita, *Washing the Tigers –Addressing Discrimination and Inequality in Malaysia*, at VII-VIII, 49-50, ERT Country Report Series 2, Nov. 2012, available at <http://www.equalrightstrust.org/ertdocumentbank/Malaysia%20CR%201.pdf>; see also Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13, entered into force 8 Sept. 1981.

³⁴⁵ See *id*.

recent years.³⁴⁶ Still, the remaining reservations (on Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) of CEDAW) leave women without equal rights with respect to passing their nationality to their children, entering into marriage, and parental and family rights.³⁴⁷ The Committee on the Elimination of Discrimination against Women in its 2006 comments expressed concern that despite the Malaysian Constitution's express prohibition of discrimination based on gender, neither the Constitution nor the country's other legislation contain a definition of discrimination against women that is in accordance with Article 1 of CEDAW,³⁴⁸ nor a principle of equality of men and women that is in line with Article 2(a) of CEDAW.

Additionally, in the same report, the Committee noted that adherence to major human rights instruments would further women's rights and recommended that Malaysia consider ratifying the major human rights treaties to which it was not a party, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, among others.³⁴⁹

Sex Crimes

The most apparent discrimination against women under Syariah Law, specifically the Syariah Criminal Offences Act,³⁵⁰ is in the area of sex crimes.³⁵¹ For example, out of 39 people

³⁴⁶ See *id* (In 1998, Malaysia notified the U.N. Secretary-General of a partial withdrawal of its reservations in respect of articles 2(f), 9(1), 16(b), 16(d), 16(e), and 16(h); see also U.N. Women - United Nations Entity for Gender Equality and the Empowerment of Women, *Declarations, Reservations and Objections to CEDAW (Malaysia)* (last updated 2009), available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>).

³⁴⁷ See ERT Report on Malaysia, at VII-VIII, 49-50

³⁴⁸ See Convention on the Elimination of All Forms of Discrimination against Women, art. 1, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) entered into force Sept. 8 1981.

³⁴⁹ Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia*, CEDAW/C/MYS/CO/2, 31 May 2006, at 6.

³⁵⁰ The articles of the Syariah Criminal Offences mentioned in this report refers to the Syariah Criminal Offences (Federal Territories) Act 1997, which is a federal act that governs Malaysia's federal territories such as Kuala

tried and convicted of sex crimes in the state of Johor, 22 were women.³⁵² One important factor that contributes to this discriminatory outcome is the evidentiary requirements for establishing sex crimes under the Act. Section 41 of the Syariah Criminal Offences Act describes the evidence required to convict a Muslim of a sexual offense.³⁵³ To establish a sexual offense, the court requires presentation of either the accused's confession or the testimony of four male witnesses.³⁵⁴ If the accuser fails to procure four male witnesses, then the accuser would be liable to a fine or potential imprisonment.³⁵⁵ This necessarily means that a Muslim woman in Malaysia risks being charged under the criminal law should they come forward to report their sexual assault without producing four male witnesses. Thus, in effect, this section serves to punish women who are victims of a variety of sexual offenses. Not only does this encourage the underreporting of sexual assaults, but it adds to the woman's burden of having to go out and secure the right number of male witnesses or else be punished for being the victim of a crime.

Lumpur. States have similar Criminal Offences Acts. *See* The Commissioner of Law Revision, Malaysia, SYARIAH CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 (incorporating all amendments up to 1 Jan. 2006), *available at* http://www.mylawyer.com.my/pdf/Syariah_Criminal_Offences_Federal_Territories_Act.pdf.

³⁵¹ *See* AWAM, Repeal Syariah Criminal Offences Laws, 26 June 2013, *available at* <http://www.awam.org.my/2013/06/1077/> (listing concerns such as whipping as a form of punishment for crimes such as incest where the victim is rendered liable).

³⁵² *Id.*; *see also* Mariam Mokhtar, *Public Whippings in Johore?*, FMT NEWS, 15 June 2013, *available at* <http://www.freemalaysiatoday.com/category/opinion/2013/06/15/public-whippings-in-johore/>.

³⁵³ The Commissioner of Law Revision, Malaysia, SYARIAH CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 (incorporating all amendments up to 1 Jan. 2006), § 41, Part V, *available at* http://www.mylawyer.com.my/pdf/Syariah_Criminal_Offences_Federal_Territories_Act.pdf.

³⁵⁴ *See id.* ("Except in cases of *li'an*, any person who accuses another person of committing *zina* without procuring four male witnesses or an *iqrar* of the accused person in accordance with Islamic Law shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both." The first phrase – "except in cases of *li'an*" – means that if four witnesses cannot be procured, the accuser can swear a *li'an* oath that they are telling the truth (and that they would be condemned by Allah if they are not), and someone accused of *zina* can also swear an oath that they have not committed it.).

³⁵⁵ *Id.*

Zina (Adultery)

Another discriminatory evidentiary requirement that weighs on subsequent punishment is section 23(3) of the Syariah Criminal Offences Act. This subsection allows “the fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent [to] be prima facie evidence of the commission of [extramarital sexual intercourse]”, also known as the crime of *zina*.³⁵⁶ This subsection results in a disproportionate number of women being punished under section 23 than men because there is no equivalent prima facie evidence for convicting men. While the pregnant woman is convicted, her sexual partner would often be left alone because of insufficient evidence. For example, a pregnant Muslim woman was arrested for *zina* when she went to the police to look for her missing boyfriend because she was unmarried.³⁵⁷ This subsection results in more women being charged for sex crimes under section 23 than men.

In 2010, Malaysian authorities caned three Muslim women for the crime of *zina* because they admitted to having sex before marriage.³⁵⁸ Caning women is prohibited in section 289 of the Criminal Procedure Code.³⁵⁹ By violating the code, the Malaysian authorities do not give these women equal and non-discriminatory treatment before the law, which is against Constitutional guarantees. Furthermore, caning as a form of punishment violates international human rights principles, which regard these types of corporal punishments as cruel, inhumane and degrading.

³⁵⁶ The Commissioner of Law Revision, Malaysia, SYARIAH CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 (incorporating all amendments up to 1 Jan. 2006), § 23(3), Part IV, available at http://www.mylawyer.com.my/pdf/Syariah_Criminal_Offences_Federal_Territories_Act.pdf.

³⁵⁷ Boo Su-Lyn & Ida Lim, *Hudud will Drive Rape Survivors Deeper into Shadows, Say Women's Groups*, MALAYMAIL ONLINE, 3 May 2014, available at <http://www.themalaymailonline.com/malaysia/article/hudud-will-drive-rape-survivors-deeper-into-shadows-say-womens-groups>.

³⁵⁸ Joe Sterling, *3 Women Caned in Malaysia for Adultery*, CNN, 17 Feb. 2010, available at <http://edition.cnn.com/2010/WORLD/asiapcf/02/17/malaysia.adultery.caning/>.

³⁵⁹ See CRIMINAL PROCEDURE CODE § 289 (“No sentence of whipping shall be executed by instalments, and none of the following persons shall be punishable with whipping: (a) females”), available at [http://54.251.120.208/doc/laws/Act_593_-_Criminal_Procedure_Code_\(CPC\).pdf](http://54.251.120.208/doc/laws/Act_593_-_Criminal_Procedure_Code_(CPC).pdf).

Punishment against Women for Rape Allegations

In rape cases, not only is a woman's testimony of her own rape inadequate evidence in court, but on top of the punishments stipulated in section 41, a woman who comes to court alleging rape also confesses to having had sex. Thus, if the woman is married at the time, she may risk being charged and potentially punished for adultery under section 23.³⁶⁰ Section 23 does not have a consent requirement so it is possible for a rape victim to be convicted under this section so long as she had sex with someone "who is not her husband" and cannot prove her rape.³⁶¹ In contrast, as long as a male rapist does not confess to the crime, he can go free because it is unlikely that four male witnesses will be present or willing to testify against him. These consequences further deter women from reporting rape.

There are numerous sources that show the actual effects of this discriminatory evidentiary structure with respect to rape cases. In an interview, the Sisters in Islam program manager revealed that in Muslim countries, female rape victims as young as 12 or 13 years old can be convicted of adultery and publicly whipped.³⁶² Only two out of every ten cases are reported and the All Women's Action Society (AWAM) found that between 1994-1998, only ten percent of the reported cases resulted in successful convictions of the rapist.³⁶³ This underreporting is a

³⁶⁰ See *id.*, § 23(2) ("Any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof").

³⁶¹ See *id.*

³⁶² Boo Su-Lyn & Ida Lim, *Hudud will Drive Rape Survivors Deeper into Shadows, Say Women's Groups*, MALAYMAIL ONLINE, 3 May 2014, available at <http://www.themalaymailonline.com/malaysia/article/hudud-will-drive-rape-survivors-deeper-into-shadows-say-womens-groups>.

³⁶³ Tarrence Tan, *One Female Raped Every 35 Mins in M'sia, Study Shows*, FMT NEWS, 22 Apr. 2015, available at <http://www.freemalaysiatoday.com/category/nation/2015/04/22/one-female-raped-every-35-mins-in-msia-study-shows/>; see also Asrul Hadi Abdullah Sani, *Rights of Muslim Rape Victims Spark Debate in Malaysia*, ASIAONE, 28 Apr. 2015, available at <http://news.asiaone.com/news/malaysia/rights-muslim-rape-victims-spark-debate-malaysia>; AWAM, *Press Statement on Sexual Assault Cases in Malaysia*, 10 Sept., 2014, available at

significant issue of women's rights in Malaysia and shows that many rape victims are discouraged from seeking protection from authorities because of the potential punishments.

Because some states recently moved towards a more conservative application of Islamic law, Muslim women convicted of adultery can receive the maximum punishment of stoning. For example, in 2002, the state of Terengganu approved a bill to bring Islamic laws into the state's legal system, including stoning for adultery.³⁶⁴ More recently, Kelantan, a conservative Malaysian state modified its penal code to include the Islamic punishment of stoning for adultery.³⁶⁵ Although no one has yet been sentenced to stoning, this punishment is now a legal possibility in some states.

Discrimination against Transgender Women

Transgender women also face arbitrary discrimination within Malaysian society, for example under section 21 of the Minor Offences Act of 1955, which punishes "indecent behavior" with a fine or imprisonment up to 14 days, and a larger fine or up to 3 months prison for subsequent convictions.³⁶⁶ Transgender women are often charged under section 21 for

<http://www.awam.org.my/web/wp-content/uploads/2012/11/AWAM-Press-Statement-on-Sexual-Assault-Cases-in-Malaysia.pdf>.

³⁶⁴ Emma Batha, *FACTBOX: Stoning – Where Does It Happen?*, THOMSON REUTERS FOUNDATION, 29 Sept. 2013, available at <http://news.trust.org/item/20130927165059-w9g0i/> (The Islamic criminal laws were, however, opposed by the federal government, which means that these laws have no legal effect.).

³⁶⁵ Ludovica Iaccino, *Malaysia: Kelantan State Introduces Amputation for Theft and Stoning for Adultery*, INTERNATIONAL BUSINESS TIMES, 20 Mar. 2015, available at <http://www.ibtimes.co.uk/malaysia-kelantan-state-introduces-amputations-theft-stoning-death-adultery-1492928>.

³⁶⁶ LAWS OF MALAYSIA, ACT 336 - MINOR OFFENSES ACT, 1955 (incorporating all amendments up to 1 January 2006) § 21, available at <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20336.pdf> ("Any person who is found drunk and incapable of taking care of himself, or is guilty of any riotous, disorderly or indecent behaviour, or of persistently soliciting or importuning for immoral purposes in any public road or in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or of any public office or police station or place of worship, shall be liable to a fine not exceeding twenty-five ringgit or to imprisonment for a term not exceeding fourteen days, and on a second or subsequent conviction to a fine not exceeding one hundred ringgit or to imprisonment for a term not exceeding three months or to both.").

“indecent behavior” and “importuning for immoral purposes” even though neither term is defined in the Act.³⁶⁷ When arrested, transgendered women are imprisoned with men and are often mistreated verbally and sexually by the police and other inmates.³⁶⁸ In addition to the arbitrary enforcement of federal law against transgender women, Muslim transgender women also face significant legal hurdles. Every Malaysian state has passed Syariah enactments that criminalize Muslim men for dressing as women.³⁶⁹ These laws effectively institutionalize discrimination against transgender individuals and are enforced by the state’s Islamic Religious Departments.³⁷⁰ However, none of these laws explicitly define transgender dressing or posing.³⁷¹

Initial optimism for the protection of transgender women’s rights in a decision by the Court of Appeal was crushed when the Federal Court overturned the decision.³⁷² In 2014, sixteen transgender women were arrested by the state’s Religious Department for violating section 66 of

³⁶⁷ U.S. Dept. of State, *Country Reports on Human Rights Practices for 2015 – Malaysia*, at 28, available at <https://www.state.gov/documents/organization/252989.pdf>.

³⁶⁸ *Id.*; see also Women’s Aid Organisation, *CEDAW & Malaysia – Malaysian Non-Government Organisations’ Alternative Report Assessing the Government’s Progress in Implementing the United Nations CEDAW*, Apr. 2012, at 237, available at <http://wao.org.my/file/file/Malaysian%20NGO%20CEDAW%20Alternative%20Report%202012%206MB.pdf>.

³⁶⁹ See, e.g., The Commissioner of Law Revision, Malaysia, SYARIAH CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 (incorporating all amendments up to 1 Jan. 2006), § 28, Part IV, available at http://www.mylawyer.com.my/pdf/Syariah_Criminal_Offences_Federal_Territories_Act.pdf (“Any male person who, in any public place, wears a woman’s attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.”).

³⁷⁰ See Tahir Rawther, *The Rise of Malaysian Religious Tyranny*, THE HUFFINGTON POST, 20 May 2016, available at http://www.huffingtonpost.com/tahir-rawther-/the-rise-of-malaysian-rel_b_10059788.html (reporting that the government announced plans to place “two officers and a sergeant” at an Islamic Religious Department “to assist the department in Shariah law enforcement” after an incident with a transgender woman).

³⁷¹ See generally The Commissioner of Law Revision, Malaysia, SYARIAH CRIMINAL OFFENCES (FEDERAL TERRITORIES) ACT 1997 (incorporating all amendments up to 1 Jan. 2006), available at http://www.mylawyer.com.my/pdf/Syariah_Criminal_Offences_Federal_Territories_Act.pdf.

³⁷² *Muhamad Juzaili Bin Mohd Khamis v. State Government of Negeri Sembilan* (Court of Appeal, Putrajaya, Malaysia, Nov. 7, 2014); see also Praveen Menon, *Malaysia Court Upholds Ban on Cross Dressing by Transgender Muslims*, REUTERS, 8 Oct. 2015, available at <http://www.reuters.com/article/us-malaysia-verdict-crossdressing-idUSKCN0S21CE20151008>.

the state's Syariah Law.³⁷³ The section prohibits "any male person who in any public place wears a woman's attire or poses as a woman."³⁷⁴ The Court of Appeal held that section 66 is unconstitutional and void because it violated numerous human rights, as well as the constitutional guarantee of equal protection. The court found that transgender people will have violated section 66 the "very moment they leave their homes," thus placing a burden on their ability to "attend to the basic needs of life, to earn a living, or to socialize."³⁷⁵ The court further notes that the section is "discriminatory[,] oppressive and denied [transgender individuals] the equal protection of the law."³⁷⁶ However, the Federal Court in 2015 dismissed the lower court ruling and upheld the Syariah provision based on a technicality.³⁷⁷ The Federal Court struck down the Court of Appeal's decision, claiming that the case should have been directly taken to the Federal Court instead of going to the Court of Appeal first.³⁷⁸

Recommendations

1. Immediately remove the reservations to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as they prevent women in Malaysia from having equal rights as men. The Malaysian government maintains reservations to Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) of the CEDAW, all of which relate to the right to equality.³⁷⁹

³⁷³ Muhamad Juzaili Bin Mohd Khamis v. State Government of Negeri Sembilan (Court of Appeal, Putrajaya, Malaysia, 7 Nov. 2014).

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ Praveen Menon, *Malaysia Court Upholds Ban on Cross Dressing by Transgender Muslims*, REUTERS, 8 Oct. 2015, available at <http://www.reuters.com/article/us-malaysia-verdict-crossdressing-idUSKCN0S21CE20151008>.

³⁷⁸ *Id.*

³⁷⁹ Convention on the Elimination of All Forms of Discrimination against Women, arts. 9(2) & 16(1)(a), (c), (f) & (g), 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) *entered into force* 8 Sept. 1981.

2. Section 21 of the Minor Offences Act 1955 should be repealed along with any related clause in the Syariah Criminal Enactments because this section is discriminatory against transgendered individuals and does not afford them equal rights as citizens.
3. In addition to the amendment or abolishment of the provisions mentioned above, the Malaysian government should review all federal and state legislations and policies, and amend or remove, if necessary, existing legislation and policies that are in conflict with the right to be free from discrimination and the right to equality.

Article 9(2) provides for equal rights for women with respect to the nationality of their children;
Article 16(1)(a) provides that men and women have the same right to enter into marriage;
Article 16(1)(c) provides that men and women have the same rights and responsibilities during marriage and at its dissolution;
Article 16(1)(f) provides for the same rights and responsibilities with respect to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; and
Article 16(1)(g) provides for the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

INDEPENDENT STATE OF PAPUA NEW GUINEA

Government and Legal System

Papua New Guinea (hereinafter “PNG”) is a constitutional, parliamentary democracy, and a member of the British Commonwealth, having achieved independence from Australia in 1975.³⁸⁰ Under PNG’s constitution, the “underlying law” of the country consists of a combination of British common law as it stood on 16 September 1975 (the date of independence) and customary law based on indigenous practices.³⁸¹ As such, the legal system in PNG is based on a mix of statutes, British common law, PNG common law as developed since independence, and customary law.

A unique feature of PNG’s legal system is the use of what are known as village courts. The village courts are meant to provide a forum for adjudicating local disputes by mediation and, if mediation fails, by exercising compulsory jurisdiction.³⁸² These courts tend to function as *ad hoc* dispute resolution forums, in contrast to the more formal district courts.³⁸³ The Village Courts Act of 1973 authorizes the village courts to hear various types of cases of local interest, including assault, property damage, public drunkenness, and sorcery.³⁸⁴ While the village courts are allowed to impose civil penalties to enforce judgments, orders of imprisonment must be approved by a local or district court magistrate.³⁸⁵

³⁸⁰ *Papua New Guinea Profile—Timeline*, BBC NEWS, 10 Jan. 2017, available at <http://www.bbc.com/news/world-asia-15593238>.

³⁸¹ PAPUA NEW GUINEA CONSTITUTION Sch. 2 (1975), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=199188#LinkTarget_1990.

³⁸² Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, June 1986, available at <http://www.alrc.gov.au/publications/30.%20Indigenous%20Justice%20Mechanisms%20in%20some%20Overseas%20Countries%3A%20Models%20and%20Comparisons/pa>.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

The village courts are meant to function as a system for localized, informal dispute resolution that runs parallel to the district and national courts.³⁸⁶ In reality, the village courts often act as the only source of legal redress for many citizens of PNG, especially given the country's population is largely spread out among many remote villages.³⁸⁷ As a result, most women's first and oftentimes only, if at all, experience with the legal and penal system is with the local village court. The vast majority of village courts are also staffed by male magistrates; however, policies introduced since 2000 have gradually increased the number of female magistrates. (In December 2011, there were 700 female magistrates.)³⁸⁸

Human Rights Obligations under International Law

PNG has ratified a number of various international treaties and conventions concerning women and women's rights, including the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).³⁸⁹ It has made no reservations to CEDAW.³⁹⁰ PNG is also a party to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).³⁹¹

³⁸⁶ *Id.*

³⁸⁷ See Cyndi Banks, *Engendering the Courts in Papua New Guinea*, 42 INTL. JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 1 (1998), at 42, available at http://www.academia.edu/2581929/Engendering_the_Courts_in_Papua_New_Guinea; see also Helen Clark, *Sorcery and Sexism in Papua New Guinea*, THE DIPLOMAT, 2 June 2015, available at <http://thediplomat.com/2015/06/sorcery-and-sexism-in-papua-new-guinea/>.

³⁸⁸ See Cyndi Banks, *Engendering the Courts in Papua New Guinea*, 42 INTL. JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 1 (1998), at 44, available at http://www.academia.edu/2581929/Engendering_the_Courts_in_Papua_New_Guinea; *Papua New Guinea: Social Institutions and Gender Index*, OECD Development Centre Gender Index, 16 July 2015, at 8, available at <http://www.genderindex.org/sites/default/files/datasheets/PG.pdf>.

³⁸⁹ United Nations, *List of Countries that have Ratified the CEDAW*, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

³⁹⁰ United Nations Entity for Gender Equality and the Empowerment of Women, *Declarations, Reservations and Objections to CEDAW*, available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

³⁹¹ OHCHR, *Status of Ratification Interactive Dashboard*, available at <http://indicators.ohchr.org/>.

PNG's constitution incorporates the provisions of various international conventions and treaties, including the Universal Declaration of Human Rights.³⁹² Section 39 specifically asserts that international conventions, standards, and rulings may be considered by PNG courts.³⁹³ However, PNG has adopted a gradualist approach to implementing international human rights instruments; international treaties must be first passed as legislation domestically before they can be implemented.³⁹⁴

Sorcery-Related Crimes

PNG is a hotbed for sorcery-related crimes, including murder, rape, and assault stemming from accusations of witchcraft. About 90% of the population reportedly believes in witchcraft.³⁹⁵ Additionally, women are disproportionately affected by accusations of witchcraft; it has been reported that women are six times more likely to be accused of witchcraft than men.³⁹⁶

Until recently, the Sorcery Act of 1971 defined sorcery and criminalized certain acts related to it.³⁹⁷ Actions criminalized by the Sorcery Act included: pretending to be a sorcerer, using or threatening to use sorcery malevolently, and possessing tools of evil sorcery.³⁹⁸ On the other hand, the Sorcery Act also made false accusations of sorcery an offense.³⁹⁹ Nevertheless,

³⁹² PAPUA NEW GUINEA CONSTITUTION Sch. 2 (1975), art. 39, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=199188#LinkTarget_1990.

³⁹³ *Id.*

³⁹⁴ Papua New Guinea, *Working Group on the Universal Periodic Review*, A/HRC/WG.6/11/PNG/1, 9 May 2011, at 4-5, available at http://lib.ohchr.org/HRBodies/UPR/Documents/session11/PG/A_HRC_WG.6_11_PNG_1_E.pdf.

³⁹⁵ United Nations Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (Mission to Papua New Guinea)*, A/HRC/23/49/Add.2, 18 Mar. 2013, at 8, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Mission%20to%20Papua%20New%20Guinea.pdf>.

³⁹⁶ *Id.* at 9.

³⁹⁷ Law Reform Commission of Papua New Guinea, *Occasional Paper No. 4 on Sorcery*, Oct. 1977, available at http://beta.paclii.org/pg/LRC/OP_04.htm.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

the Sorcery Act made sorcery-related motives a mitigating factor in murder cases.⁴⁰⁰ After experiencing international pressure following some high-profile cases of accused women being attacked and tortured by mobs, the PNG government repealed the Sorcery Act in 2013.⁴⁰¹

Despite recent progress, multiple provisions remain in PNG law that criminalize sorcery. Section 409 of the PNG Criminal Code makes it a misdemeanor for someone to pretend to use sorcery, undertake the telling of fortunes, and pretend to use his or her skill in occult sciences to discover where a stolen or lost object may be found.⁴⁰² While section 299 of the Criminal Code was amended in 2013 to expressly define homicide on account of an accusation of sorcery as murder, sorcery remains a crime under section 409.⁴⁰³

In addition, it is important to note that the vast majority of sorcery-related cases are heard in the village courts.⁴⁰⁴ This is reflective of the fact that village courts are often the only forum for justice or dispute resolution in remote areas.⁴⁰⁵ However, many village courts, whose magistrates often have little or no education and legal knowledge, are not aware of the repeal of the Sorcery Act and hence still apply it.⁴⁰⁶ Moreover, under the Village Courts Act of 1973,

⁴⁰⁰ SORCERY ACT 1971, art. 16, available at <https://archive.org/details/Sa1971117>.

⁴⁰¹ Helen Clark, *Sorcery and Sexism in Papua New Guinea*, THE DIPLOMAT, 2 June 2015, available at <http://thediplomat.com/2015/06/sorcery-and-sexism-in-papua-new-guinea/>.

⁴⁰² PAPUA NEW GUINEA CRIMINAL CODE (1974), art. 409, available at http://www.pacii.org/pg/legis/consol_act/cca1974115/.

⁴⁰³ CRIMINAL CODE (AMENDMENT) ACT 2013, § 1, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98691/117507/F-1310328162/PNG98691.pdf>.

⁴⁰⁴ Melissa Demian, *Sorcery Cases in Papua New Guinea's Village Courts: Legal Innovation Part IV, In Brief*, Australian National University (2015), available at http://ips.ccapssgmips.ccapssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/IB-2015-27-Demian_0.pdf.

⁴⁰⁵ Jo Chandler, *Violence Against Women in PNG: How Men are Getting Away with Murder*, LOWY INSTITUTE, 29 Aug. 2014, available at <http://www.lowyinstitute.org/publications/violence-against-women-png-how-men-are-getting-away-murder>.

⁴⁰⁶ Melissa Demian, *Sorcery Cases in Papua New Guinea's Village Courts: Legal Innovation Part IV, In Brief*, Australian National University (2015), available at http://ips.ccapssgmips.ccapssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/IB-2015-27-Demian_0.pdf.

which created the village courts, it is an offense to practice or pretend to practice sorcery, threaten someone with sorcery, make somebody else do sorcery, possess the implements of sorcery, or pay for sorcery.⁴⁰⁷ The penalty for violation of these offenses is either a fine of up to 50 PGK (about \$15 USD) or community service for up to four weeks.⁴⁰⁸ If the convicted sorcerer fails to pay the fine or do community service, then he or she may be sent to jail for as many as five weeks.⁴⁰⁹

Gender-Based Sorcery Discrimination

Therefore, although the Sorcery Act has been repealed, sorcery remains criminalized in PNG. Since in practice, women compose the overwhelming majority of people who are accused of sorcery, these anti-sorcery laws result in disparate legal punishments against women.⁴¹⁰ In addition, the pervasive reliance on the village courts system in sorcery-related cases often has discriminatory ramifications. First, as stated above, a majority of magistrates in the village courts are men, and so this unequal power relation between men and women poses a barrier to justice for women in the village courts. For example, women might be too intimidated to assert their legal rights in court; some evidence has also indicated that male magistrates tend to rule using a stricter, more traditional jurisprudence for cases involving women than in cases that do not.⁴¹¹

⁴⁰⁷ Law Reform Commission of Papua New Guinea, *Occasional Paper No. 4 on Sorcery*, Oct. 1977, available at http://beta.paclii.org/pg/LRC/OP_04.htm.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ The Committee on the Elimination of Discrimination against Women expressed a similar concern for the treatment of women and girls accused of witchcraft in its 2010 concluding observations. Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women – Papua New Guinea*, CEDAW/C/PNG/CO/3, at 6 (30 July 2010).

⁴¹¹ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, June 1986, available at <http://www.alrc.gov.au/publications/30.%20Indigenous%20Justice%20Mechanisms%20in%20some%20Overseas%20Countries%3A%20Models%20and%20Comparisons/pa>.

Secondly, the *ad hoc*, informal nature of the village courts system is not conducive to protecting women who are designated as sorcerers. Many village courts are located in remote villages, where customs may differ substantially from national norms. At any rate, the remoteness and lack of communication and coordination between the village courts and the national government lead to significant inconsistencies in the application of law by the village courts.⁴¹² Combined with a pervasive lack of respect for the rights of women, women accused of sorcery in PNG do not have access to fair and equitable justice.

An even more fundamental problem is that many cases never even reach the village courts. Oftentimes, an accusation is closely accompanied by mob justice, with accusers rounding up alleged witches and torturing, disfiguring, and killing them among other crimes.⁴¹³ These gross violations of rule of law are perpetuated by laws that legitimize sorcery accusations, and by state failure to remedy the situation. Instead, women are essentially tried and face the punishment of mob justice without due process. In practice, many accusations of witchcraft are not even motivated by concerns about sorcery but are often the result of property or interpersonal disputes.⁴¹⁴ As a result, women feel the brunt of these punishments without due process.

Recent cases illustrate the problems that women accused of sorcery face in PNG. In 2013, a young woman named Kepari Leniata was accused of witchcraft; a mob stripped her, poured

⁴¹² Melissa Demian, *Sorcery Cases in Papua New Guinea's Village Courts: Legal Innovation Part IV, In Brief*, Australian National University (2015), available at http://ips.capcapssgmips.capcapssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/IB-2015-27-Demian_0.pdf; see also Helen Clark, *Sorcery and Sexism in Papua New Guinea*, THE DIPLOMAT, 2 June 2015, available at <http://thediplomat.com/2015/06/sorcery-and-sexism-in-papua-new-guinea/> (“Access to justice is complicated by the remoteness of many areas . . . village courts or forms of customary law often deal, or don’t, with problems. PNG may be on the way to improving legislation but this has not necessarily trickled down to those parts of the country where it is needed.”).

⁴¹³ Helen Clark, *Sorcery and Sexism in Papua New Guinea*, THE DIPLOMAT, 2 June 2015, available at <http://thediplomat.com/2015/06/sorcery-and-sexism-in-papua-new-guinea/>.

⁴¹⁴ *Id.*

gasoline on her, and set her on fire.⁴¹⁵ But as of early 2015, though two people had been charged with the crime, no one had been convicted.⁴¹⁶ Just two months after Leniata was killed, a mob in Bougainville beheaded another woman who had been accused of sorcery.⁴¹⁷ These two incidents precipitated the repeal of the Sorcery Act. Nevertheless, because of the relative structural irrelevance of the Sorcery Act as suggested above, women accused of sorcery in PNG continue to face the risk of mob attacks for their actions.

Violence Against Women

Evidence suggests that women who try to defend themselves from abusers face discriminatory punishment at the hands of the state. In her report based on an investigatory trip to PNG in 2012, Rashida Manjoo, the UN Special Rapporteur on violence against women, its causes and consequences (hereinafter “Special Rapporteur”), found that 90 percent of incarcerated women in PNG were serving life sentences for murder, and that many of them were victims of violence who had acted in self-defense.⁴¹⁸ Some of the women interviewed by the Special Rapporteur had received no assistance from either their community or the police despite enduring longstanding abuses by their attackers.⁴¹⁹ The Special Rapporteur found that most accused women had received lengthy sentences, and that courts had not been sympathetic to their

⁴¹⁵ *Amnesty International criticizes Papua New Guinea for failing to bring sorcery killers to justice*, 7 Feb. 2014, AUSTRALIAN BROADCASTING CORP. (ABC), 7 Feb. 2014, available at <http://www.abc.net.au/news/2014-02-07/amnesty-international-criticises-png-for-failing-to-bring-so/5244866>.

⁴¹⁶ Helen Davidson, *PNG women accused of sorcery saved from murder in remote village*, THE GUARDIAN, 23 Jan. 2015, available at <http://www.theguardian.com/world/2015/jan/24/png-women-accused-of-sorcery-saved-from-murder-in-remote-village>.

⁴¹⁷ U.S. Department of State, *Papua New Guinea 2013 Human Rights Report*, at 18, available at <http://www.state.gov/documents/organization/220434.pdf>.

⁴¹⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (Mission to Papua New Guinea)*, A/HRC/23/49/Add.2, 18 Mar. 2013, at 10, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Mission%20to%20Papua%20New%20Guinea.pdf>.

⁴¹⁹ *Id.*

self-defense arguments.⁴²⁰ Some judges even went so far as to say that these women “needed to pay the price.”⁴²¹ This is in spite of the existence of Article 269 of the PNG Criminal Code, which provides a self-defense claim to victims of unprovoked assaults.⁴²² This treatment stands in stark contrast to the punishment that male domestic violence offenders face, who are rarely prosecuted or are able to settle the issue via compensation agreements. Women who commit domestic violence therefore face disproportionate punishment in PNG.⁴²³

For example, in the recent case of *State v. Dei*, the defendant raised a self-defense claim after killing her husband who had been assaulting her.⁴²⁴ The defendant had asked for 20 PGK back after she had lent her husband the same amount; instead, he became enraged and began attacking the defendant.⁴²⁵ She was struck twice, including once over the head by a rock.⁴²⁶ At that point, the defendant, fearing for her safety, struck her husband in the neck with a knife, killing him.⁴²⁷ While Article 269(2) of the PNG Criminal Code permits the use of force, “even if it causes death or grievous bodily harm,” if the defendant reasonably believes it is necessary to defend him or herself from death or grievous bodily harm, the court held in this case that the

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² PAPUA NEW GUINEA CRIMINAL CODE (1974), art. 269, available at http://www.paclii.org/pg/legis/consol_act/cca1974115/.

⁴²³ The Special Rapporteur does note some progress in Papua New Guinea’s treatment of domestic violence by highlighting the Family Protection Bill, submitted to the National Executive Council by Coalition for Change Papua New Guinea in collaboration with the Family and Sexual Violence Action Committee and the CLRC. The Bill aims to establish domestic violence as an offense, and characterize it as a public, rather than private matter. Nevertheless, the Special Rapporteur also emphasized her concern that the draft still places restrictions upon victims. United Nations Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (Mission to Papua New Guinea)*, A/HRC/23/49/Add.2, 18 Mar. 2013, at 54-63, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Mission%20to%20Papua%20New%20Guinea.pdf>.

⁴²⁴ *State v. Dei*, 2011 PGNC 29 (21 Apr. 2011), available at <http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/2011/29.html?stem=&synonyms=&query=domestic%20and%20violence%20and%20self%20and%20defence#disp5>.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

wound inflicted by the defendant indicated intent beyond what was necessary for defense.⁴²⁸ Thus, the court proved unsympathetic to the defendant's self-defense argument. Regardless of whether the court's interpretation of the law was correct, the fact that the defendant had been frequently abused by her husband and the fact that she had been forced into the marriage with him raises serious questions as to the prosecution of women in such domestic violence cases. In effect, women may be punished for the potentially inevitable consequences of the abusive relationships into which they are forced.

Adultery

Adultery is considered a civil wrong in PNG. The Adultery and Enticement Act of 1988 (hereinafter "Adultery Act") provides a civil cause of action for plaintiffs whose spouses have committed adultery.⁴²⁹ Section 10 of the Adultery Act requires mediation as a threshold measure before the action may be heard by the court.⁴³⁰ If mediation fails, then a civil action for monetary compensation may proceed.⁴³¹ The amount of compensation awarded from a finding of adultery may not exceed 1,000 PGK (about \$300 USD).⁴³² Failure to comply with an order for compensation is punishable by imprisonment for up to six months.⁴³³

While the Adultery Law is not on its face discriminatory against women, its application in PNG courts can be. The U.S. State Department released a report in 2013 suggesting that

⁴²⁸ *Id.*; PAPUA NEW GUINEA CRIMINAL CODE (1974), art. 269, *available at* http://www.paclii.org/pg/legis/consol_act/cca1974115/; *State v. Dei*, 2011 PGNC 29, 21 Apr. 2011, *available at* <http://www.paclii.org/cgi-bin/sinodisp/pg/cases/PGNC/2011/29.html>.

⁴²⁹ ADULTERY AND ENTICEMENT ACT (1988), § 4, *available at* http://archive.org/stream/AdulteryAndEnticementAct1988/Adultery%20and%20Enticement%20Act%201988._djvu.txt.

⁴³⁰ *Id.*, § 10.

⁴³¹ *Id.*, § 11.

⁴³² *Id.*, § 12.

⁴³³ *Id.*, § 18.

village courts' decisions in adultery cases favor men, with women often being sentenced to prison terms under customary law while men receive minor penalties, if they are penalized at all.⁴³⁴ However, district courts have frequently overruled such prison sentences.⁴³⁵ Still, the pervasiveness of the village courts as a mechanism for dispute resolution and the relative lack of access to the district courts means that, in effect, women may be at risk to face discriminatory punishment in how the Adultery Law is applied. In other words, although the Adultery Law is not on its face discriminatory, the predominant use of customary law in village courts may discriminate against women, particularly given the discriminatory views and customs for women prevalent in rural society.⁴³⁶ Such views and customs may reinforce the inferiority of women, leading to unequal treatment and punishments under the law. Hence while the district courts have overruled discriminatory judgments by the village courts, the district courts alone cannot necessarily be depended upon to protect women from discriminatory rulings.

Discriminatory Punishment related to Trafficking of Women

Sex trafficking is a major issue of concern in PNG that disproportionately punishes women. Prostitution is outlawed by the Summary Offences Act of 1977.⁴³⁷ Under section 55 of that Act, someone who “knowingly lives wholly or in part on the earnings of prostitution is guilty of an offence.”⁴³⁸ It is unclear to what extent a woman who is engaged in acts of prostitution herself may be prosecuted under section 55. Prior to independence, the PNG Law

⁴³⁴ U.S. Department of State, *Papua New Guinea 2013 Human Rights Report*, at 15, available at <http://www.state.gov/documents/organization/220434.pdf>.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ SUMMARY OFFENCES ACT (1977) § 55, available at http://www.paclii.org/cgi-bin/sinodisp/pg/legis/consol_act/soa1977189/soa1977189.html.

⁴³⁸ *Id.*

Reform Commission recommended that the purported prostitute herself should not be punished; rather, only those who profited off of her should face criminal sanctions.⁴³⁹ However, the court, in a case that soon arose after the passage of the Summary Offences Act, held that the plain language of section 55 made clear that the alleged prostitutes themselves could be prosecuted because there was no reason to exclude them as a person who was living on the earnings of prostitution.⁴⁴⁰ A subsequent case, however, distinguished the first one on a finding that although the women in the second case had engaged in sex acts in exchange for money, there was no evidence that they had any “work history” in prostitution, and therefore were not living on the earnings of prostitution.⁴⁴¹ As a result, the current case law in PNG is unclear as to whether “one-off” transactions involving acts of prostitution are prosecutable. However, the case law appears quite clear that individuals, including the alleged prostitutes themselves, that are principally living off of earnings from prostitution may face criminal punishment.

This means that for many vulnerable women, particularly in the sex industry, may find themselves facing criminal charges and punishment for being victims of sex trafficking. In its 2014 Trafficking in Persons Report, the U.S. Department of State voiced concern that since the PNG government is not equipped to effectively identify victims of trafficking, some victims could have been prosecuted under the country’s anti-prostitution laws.⁴⁴² Additionally, the government has deported foreign trafficking victims to countries where they could face

⁴³⁹ Karen Fletcher and Bomal Gonapa, *Decriminalisation of Prostitution in Papua New Guinea*, in CIVIC INSECURITY: LAW, ORDER AND HIV IN PAPUA NEW GUINEA (2011), available at <http://press.anu.edu.au/apps/bookworm/view/Civic+Insecurity%3A+Law,+Order+and+HIV+in+Papua+New+Guinea/5631/ch05.xhtml>.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² U.S. Department of State, *Trafficking in Persons Report 2014*, available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226796.htm>.

“hardship or retribution.”⁴⁴³ Trafficking-related crimes are also commonly not prosecuted in criminal courts but are instead referred to village courts, where the majority of magistrates are male and customary law, which largely discriminates against women, is applied (as discussed above).⁴⁴⁴ In 2015, while some victims received compensation from the trafficker in village courts, no offenders were served prison sentences.⁴⁴⁵

Therefore, instead of assisting victims, these policies treat them as criminals or fail to provide appropriate relief. As a result, women who are trafficked in PNG face treatment by the state that could significantly harm them.

Recommendations

1. Implement policies to protect women accused of witchcraft, including: providing police with greater resources and training; conducting education campaigns to change attitudes about sorcery; and reviewing laws and institutions that legitimize sorcery killings.
2. Improve communications between the central government and the village courts in order to ensure greater uniformity with national laws and international obligations by the village courts.
3. Abolish or revise the law against prostitution to clarify that alleged prostitutes cannot be prosecuted. Additionally, improve identification mechanisms to quickly and effectively identify victims of sex trafficking so that they may be assisted instead of prosecuted for violating the anti-prostitution law.

⁴⁴³ *Id.*

⁴⁴⁴ U.S. Department of State, *Trafficking in Persons Report 2016*, available at <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258840.htm>.

⁴⁴⁵ *Id.*

THE KINGDOM OF SAUDI ARABIA

Government and Legal System

Saudi Arabia is an absolute monarchy ruled by the House of Saud.⁴⁴⁶ The kingdom was formed in 1932 when ibn Saud unified a dual monarchy then known as the Kingdom of Jeza and Nejd, which was itself formerly a British protectorate until 1927.⁴⁴⁷ In 1992, King Fahd issued the Basic Law of Saudi Arabia stipulating that the Quran and the Sunna (traditions of Prophet Muhammad) form its constitution.⁴⁴⁸ Sharia law serves as the sole basis of the legal system for both criminal and civil matters,⁴⁴⁹ and there is no effective penal code. Sentencings are given at the discretion of the judges in accordance with Sharia law and on the basis of whether the crime is against God or society.⁴⁵⁰ Such practice renders criminalization and sentencings inconsistent and unreliable, often resulting in arbitrary punishment. More recently, Saudi Arabia has made some attempts to reform and modernize the political and legal system to meet international standards.

Focusing on the field of women's rights, for example, the cabinet reshuffling in 2009 saw appointments of moderate ministers including Saudi Arabia's first female deputy minister; in 2015, women were allowed to cast a vote for the first time; and on 24 June 2018 women were

⁴⁴⁶ *Saudi Arabia Profile – Overview*, BBC NEWS, 24 Sept. 2015, available at <http://www.bbc.com/news/world-middle-east-14703476>.

⁴⁴⁷ Jan Michiel Otto, *Introduction: Investigating the Role of Sharia in National Law*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT, at 36 (Jan M. Otto ed., 2010).

⁴⁴⁸ BASIC LAW OF GOVERNANCE, ROYAL ORDER NO. (A/91), 27 *Sha'ban* 1412H dated 1 Mar. 1992, Part One, Article 1.

⁴⁴⁹ Royal Embassy of Saudi Arabia, *Legal and Judicial Structure*, available at <https://www.saudiembassy.net/legal-and-judicial-structure-0>.

⁴⁵⁰ Graeme R Newman, CRIME AND PUNISHMENT AROUND THE WORLD, Oct. 2010, at 352.

allowed to legally drive.⁴⁵¹ In 2017, the country was also voted onto the UN's Commission on the Status of Women in a secret-ballot,⁴⁵² and women were allowed access to government services, including education and healthcare, without the need for the consent of their guardian.

The most recent and ongoing reform is called Saudi Vision 2030, which calls for a regulatory review. However, the regulation review is mainly limited to the field of corporate and property law, a focus which seems to be unchanged over the duration of the last decade.⁴⁵³ Therefore, although there have been moderate improvements in women's status in the country, they still face discrimination in the legal system in ways such as having two women's testimony considered as equivalent to that of one man only.⁴⁵⁴ In fact, despite modernization efforts, gender equality in the country still only ranked 138 out of 144 countries in the World Economic Forum's 2017 Global Gender Gap Report.⁴⁵⁵

Human Rights Obligations under International Law

Saudi Arabia has ratified several human rights treaties, including Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). However, the country made a reservation that, in the event of a conflict between the terms of CEDAW and norms of

⁴⁵¹ Julian Borger, *Saudi Arabia Appoints First Female Minister*, THE GUARDIAN, 16 Feb. 2009, available at <https://www.theguardian.com/world/2009/feb/16/saudi-cabinet-woman-minister>. *Saudi Arabia's Women Vote in Election for the First Time*, BBC NEWS, 12 Dec. 2015, available at <http://www.bbc.com/news/world-middle-east-35075702>.

⁴⁵² UN Economic and Social Council, *Launching 2017 Coordination Segment, Economic and Social Council Adopts 10 Decisions, Elects Subsidiary Body Members amid Debate on NGO Participation*, ECOSOC/6824, 19 Apr. 2017, available at <https://www.un.org/press/en/2017/ecosoc6824.doc.htm>.

⁴⁵³ *Id.* Dr Nizar Bin Obaid Madani (Minister of State in the Ministry of Foreign Affairs), Saudi Arabia's Speech, Human Rights Commission, 61st Session, 15 Mar. 2005, available at <http://www.mofa.gov.sa/sites/mofaen/KingdomForeignPolicy/HumanRights/Pages/ArticleID20164141514592.aspx>.

⁴⁵⁴ IBP, Inc., KINGDOM OF SAUDI ARABIA CRIMINAL LAWS, REGULATIONS AND PROCEDURES HANDBOOK (2015), at 101.

⁴⁵⁵ World Economic Forum, *The Global Gender Gap Report 2017*, available at http://www3.weforum.org/docs/WEF_GGGR_2017.pdf.

Islamic law, Saudi Arabia would have no obligation to follow the contradictory CEDAW terms.⁴⁵⁶ It also made a reservation to the right of women to have equal rights as men regarding the nationality of their children, and one on agreeing to refer disputes to arbitration and the ICJ for resolution. Furthermore, Saudi Arabia is not a party to the International Covenant on Civil and Political Rights (ICCPR) nor the International Covenant on Economic, Social and Cultural Rights (ICESCR).

It is also stated in the Basic Law that provisions of any international human rights agreement approved by royal decree shall be directly applicable in the national courts of Saudi Arabia. In reality, however, such international agreements have no primacy over the country's Sharia laws and in fact the application of these practices in its court has yet been recorded.⁴⁵⁷

Zina (Adultery)

Zina is a crime punishable in Saudi Arabia, and Sharia law stipulates that it applies to both men and women. According to the *sura* where the law and the definition of *zina* have been derived from, unlike the Western concept of adultery, *zina* does not only refer to a married man or woman having an affair outside of their marriage but also sexual intercourse between an unmarried man and unmarried woman.

While any official data regarding the gender ratio of conviction for *zina* is unavailable due to the government's secrecy, as far as published sources are concerned, most of such

⁴⁵⁶ The Committee on the Elimination of Discrimination against Women urged Saudi Arabia to consider the withdrawal of its general reservation, noting that a delegation of Islam specialists assured the Committee that there is no conflict between obligations under CEDAW and Sharia law. Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women*, CEDAW/C/SAU/CO./2, 8 Apr. 2008, at 2.

⁴⁵⁷ Yakin Ertürk, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Mission to Saudi Arabia*, Human Rights Council, Doc A/HRC/11/6/Add.3, 14 Apr. 2009.

convictions are made against women. A major factor behind this is the customs surrounding marriage in Saudi Arabia. First of all, polygamy is legalized in Saudi Arabia under Sharia law. This allows for men to have more than one sexual partner as a legal wife and thus avoid being accused for *zina*, while women are left with no such option. Furthermore, it is a norm in Saudi Arabia to have arranged marriages prepared and granted by a woman's 'guardian' against her will.⁴⁵⁸ As such, it is more likely for women to be discontented with their marriage life.

There are also several factors preventing women from freely filing for divorce. While there is a stigma for both men and women getting a divorce, it is much easier for men to divorce than women. One dimension of the issue concerns the legal process for divorce. For men to initiate a divorce, they only need to submit to a judge and will not be asked to present a reason for the action. However, for women, their available grounds for divorce are highly limited, and also there are negative effects of divorcing for women which contribute to their reluctance in filing for it.

Sharia law stipulates that when a woman initiates a divorce, she does not receive any alimony, property, or income that is in her husband's name and may even be required to return the *mahr* (dowry).⁴⁵⁹ Such regulations leave women economically vulnerable after divorce. Furthermore, they will also most likely lose the custody of their children excepting the very young.⁴⁶⁰ Besides these discriminations in the legal procedure, there is a deep-rooted stigma against divorce as a result of which divorced women also often alienated from their family,

⁴⁵⁸ Khaleda Rahman, 'My family will kill me': Saudi woman, 24, fleeing to Australia to 'escape a forced marriage' makes desperate plea for help after she was held in the Philippines for 13 hours and deported, DAILY MAIL, 16 Apr. 2017, available at <http://www.dailymail.co.uk/news/article-4415706/Saudi-woman-fleeing-Australia-forced-kingdom.html>.

⁴⁵⁹ *Mahr* is a legally required dower from the husband to wife at the time of marriage.

⁴⁶⁰ Sherifa Zuhur, SAUDI ARABIA (2011), at 228.

workplace, and society, hindering their welfare even further.⁴⁶¹ Due to such undesirable complications of divorce, women may maintain their marital status even for unhappy or abusive marriage. This, in turn, renders women's risk of being convicted for *zina* much higher than their male counterparts.

In 2005, a married Sri Lankan maid living in Saudi Arabia was found to have engaged in sexual intercourse with another Sri Lankan migrant living in the country.⁴⁶² Both were convicted of adultery but their sentences differed greatly. The unmarried male offender was given 100 lashings while the woman was sentenced to death by stoning due to her marital status. Although the woman's sentence was later withdrawn and reduced after an appeal by the Sri Lankan government, this case explicitly illustrates the way in which one's marital status has an unreasonably large influence on sentencing in Saudi Arabia.⁴⁶³ With various obstacles to initiating a divorce, female offenders thus stand a higher risk of being given much harsher sentences than male offenders. Furthermore, convictions and sentencing for *zina* are carried out even without the required number of eyewitnesses (four) under Sharia law,⁴⁶⁴ which further demonstrates arbitrary enforcement of the crime.

Discriminatory Punishment related to Rape Cases

While Sharia law criminalizes rape, actual convictions are rare due to the necessary number of witness testimonies. According to the Quran, a rape victim requires four witnesses to

⁴⁶¹ *Id.*

⁴⁶² Sophie Jane, *Saudi Arabia Sentences Maid to Death by Stoning for Adultery*, DAILY MAIL, 28 Nov. 2005, available at <http://www.dailymail.co.uk/news/article-3337297/Saudi-Arabia-sentences-married-maid-death-stoning-adultery-man-slept-escape-100-lashes.html>.

⁴⁶³ *Saudi Arabia 'Spare' Sri Lankan Maid in Adultery Case*, BBC NEWS, 23 Dec. 2015, available at <http://www.bbc.com/news/world-asia-35166951>.

⁴⁶⁴ Ahmed Affi & Hassan Affi, *CONTEMPORARY INTERPRETATION OF ISLAMIC LAW* (2014), 99.

testify for a conviction.⁴⁶⁵ However, a woman's testimony is considered worth only half of a man's, and typically only the perpetrator(s) and the victim were present at the scene, the former of which will typically not testify. This is relevant to gender discriminatory punishment to the extent that, when the (typically female) victim fails to present four witnesses and the perpetrator is not their husband, the victim is considered as confessing to *zina* and punished accordingly.⁴⁶⁶ Even in cases proven to be rape, victims may still be punished for either having a sexual intercourse with an unrelated man or for simply being in the company of unrelated men (*khalwa*).⁴⁶⁷

Thus, rape cases are inappropriately mingled with adultery crimes, and women often fall victim to arbitrary and double punishment for making rape accusations without sufficient evidence, once in seeing their attackers go unpunished and again in being punished for admitting adultery.⁴⁶⁸ In 2009, a 23-year-old woman who was gang-raped by five men and became pregnant after the incident was brought before the court. Although the nature of the confession is unclear, it is claimed that she eventually "confessed" to having a "forced intercourse" with the attackers. The judge at the District Court in Jeddah then ruled that she had committed adultery and sentenced her to a year in prison and a flogging after she delivered the child.⁴⁶⁹

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Khalwa* means to be alone in the company of a member of the opposite sex who she is not related to and is punishable under Sharia law. This is considered a pre-emptive measure against *zina*. However, the definition is extremely vague and often results in arbitrary punishment.

⁴⁶⁸ The Special Rapporteur on violence against women also expresses concern about rape victims' fear of being punished for adultery should they bring rape complaints. Yakin Ertürk, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Mission to Saudi Arabia*, Human Rights Council, Doc A/HRC/11/6/Add.3, 14 Apr. 2009, at 47.

⁴⁶⁹ Liz Hazelton, *Saudi Judge Sentences Pregnant Gang-rape Victim to 100 Lashes for Committing Adultery*, DAILY MAIL, 11 Feb. 2009, available at <http://www.dailymail.co.uk/news/article-1141267/Saudi-judge-sentences-pregnant-gang-rape-victim-100-lashes-committing-adultery.html>.

Another well-known rape case in Saudi Arabia reported in 2007, referred to as the “Qatif girl” case, illustrates the relationship between rape claims and discriminatory punishment of women. It involved a then-19-year-old girl gang-raped by seven men when she was alone in the car with her former boyfriend to retrieve a picture of her so as not to upset her newlywed husband. Both the girl and the male companion were raped repeatedly. At the court, rather than investigating the rape case, the judges interrogated the girl about her relationship with the man she was with at the time of the incident.⁴⁷⁰ As a result, the attackers were only convicted of kidnapping because the act of rape could not be proven, despite the fact that video images of the act had been presented to the judges. On this basis, the attackers received one to five years in prison and 80 to 1000 lashes. The victim was also sentenced to 90 lashes for committing *khalwa*, despite the significant disparity between the victim’s and her attackers’ crimes.⁴⁷¹ A number of judges also reported thinking that the victim deserved harsher punishment, including the death penalty, for violating the gender segregation law and leaving the house without telling her husband.⁴⁷² After the victim made an appeal and complaint to the media, the court increased her sentence to 200 lashes and six months in jail. And in a follow up to the court ruling, the Saudi justice minister made a statement saying that the assaulted girl is a “married woman who confessed to having an affair with the man she was caught with”, which was factually incorrect, in order to justify their ruling.⁴⁷³

⁴⁷⁰ Richard Pendlebury, *My Harrowing Story, by the Teenage Girl Who was Sentenced to 200 Lashes after Being Gang Raped in Saudi Arabia*, DAILY MAIL, 30 Nov. 2007, available at <http://www.dailymail.co.uk/femail/article-498849/My-harrowing-story-teenage-girl-sentenced-200-lashes-gang-raped-Saudi-Arabia.html>.

⁴⁷¹ Vicky Baker, *Rape Victim Sentenced to 200 Lashes and Six Months in Jail*, DAILY MAIL, 17 Nov. 2007, available at <https://www.theguardian.com/world/2007/nov/17/saudi-arabia.international>.

⁴⁷² Richard Pendlebury, *My Harrowing Story, by the Teenage Girl Who was Sentenced to 200 Lashes after Being Gang Raped in Saudi Arabia*, DAILY MAIL, 30 Nov. 2007, available at <http://www.dailymail.co.uk/femail/article-498849/My-harrowing-story-teenage-girl-sentenced-200-lashes-gang-raped-Saudi-Arabia.html>.

⁴⁷³ BBC, *Saudi Rape Victim ‘Having Affair’*, 26 Nov. 2007, at news.bbc.co.uk/1/hi/world/middle_east/7112999.stm.

Honor Killings and Crimes

Honor crimes involve punishment by private actors, often family members, against women for perceived violations of family honor. To continue the case discussed above, in addition to the punishment the Qatif girl received from the court following her rape allegations, she also faced constant physical violence from her brother who blamed her for the assault and even attempted to kill her for bringing dishonor to the family.⁴⁷⁴ Although her brother's attempt failed, it was not an isolated case. Women who take certain actions such as rejecting an arranged marriage, divorcing, running away, committing *zina* or *khalwa*, can be punished by family members who deem their act dishonoring the family.

In 2008, a girl chatting with a boy on Facebook was beat and killed by her father for committing a *khalwa* crime. Rather than targeting the father, influential individuals including religious scholars⁴⁷⁵ argued that the problem was the prevalence of Facebook and the resulting behaviors of girls acting "badly" on it, which found support among the public.⁴⁷⁶ No mention is found of the father's punishment for the murder. A year after this case, two sisters were also killed by their brother after they were released from a women's shelter in Riyadh, where they were detained for committing *khalwa*.⁴⁷⁷ There is also no report of the brother being tried in this case, despite evidence of murder. In another case in 2010, a Saudi woman named Alisha Ali was

⁴⁷⁴ Richard Pendlebury, *My Harrowing Story, by the Teenage Girl Who was Sentenced to 200 Lashes after Being Gang Raped in Saudi Arabia*, DAILY MAIL, 30 Nov. 2007, available at <http://www.dailymail.co.uk/femail/article-498849/My-harrowing-story-teenage-girl-sentenced-200-lashes-gang-raped-Saudi-Arabia.html>.

⁴⁷⁵ Religious scholars in Saudi Arabia hold a respected position not only in the society but also in the legal system as they are the ones with the qualification to interpret Quran to give religious rulings.

⁴⁷⁶ Arab Media & Society, *Al-Arabiya: "Preacher Demands Blocking of Facebook due to Saudi Women Access..."*, 29 Mar. 2008, available at <http://www.arabmediasociety.com/?article=654>.

⁴⁷⁷ *Saudi Religious Police Blamed for 'Honour Killings'*, THE JERUSALEM POST, 13 July 2009, available at <http://www.jpost.com/Middle-East/Saudi-religious-police-blamed-for-honor-killings>.

forced by her brothers to marry five men.⁴⁷⁸ When she refused a marriage or divorced, she was locked up in a room and threatened with violence or death threats by her brothers. Such private punishments predominantly affect women, and women are more negatively impacted due to their vulnerable position in society and in the family. However, the government of Saudi Arabia has been inactive in the prevention and punishment of honor killings and crimes.

Mutawa (Religious Police)

Mutawa is the religious police in Saudi Arabia deployed by the Committee for the Promotion of Virtue and the Prevention of Vice. The committee is an official body entrusted with the enforcement of Sharia law in the country. In Saudi Arabia, Sharia law not only covers criminal cases but many other areas of life it covers, from behavior to dress.⁴⁷⁹ *Mutawa*'s task, therefore, is to uphold Islamic morality, customs and traditions among Saudi citizens in their everyday life by patrolling through streets, shopping malls, and sometimes even into private households and on the internet.⁴⁸⁰ Some gender discriminatory rules *mutawa* enforce include the strict dress code and *khalwa* (as well as women driving until the law was recently changed), all based on religious scholars' interpretation of Sharia.

While dress code and the rule of *khalwa* are formally applicable to everyone regardless of gender, in practice women are more strictly monitored and rebuked for their behavior and thus more likely than men to face judicial consequences and harassment by *mutawa*. A dress code

⁴⁷⁸ Tara Abhasakun, *Saudi Still Treats Women as Property, but New Marriage Law is Effort to Pretend They Don't*, BORDERLESS, 30 Aug. 2016, available at <http://www.borderlessnewsonline.com/saudi-still-treats-women-as-property-but-new-marriage-law-is-effort-to-pretend-they-dont-3/>.

⁴⁷⁹ Shahid M. Shahidullah, "Islamic Jurisprudence, Shari'a Law, Criminal Justice in Saudi Arabia" in COMPARATIVE CRIMINAL JUSTICE SYSTEMS (2012), at 403.

⁴⁸⁰ Jeanette M. English, INFIDEL BEHIND THE PARADOXICAL VEIL: A WESTERN WOMAN'S EXPERIENCE IN SAUDI ARABIA (2011), at xiii.

also exists for men in Saudi Arabia, but its inobservance is far less punished than women. The dress code for men is also more lenient than that for women as they have the freedom to choose between the traditional *thobe* (robe) and western clothing, such as long pants, so long as their private parts are loosely covered. This partially accounts for the reason why there are less cases of men being punished in regards to dress code, while women are not only more frequently punished but they are also faced with punishments as heavy as lashings for not observing the dress code. Furthermore, the grounds on which *mutawa* can question women and eventually take them in for interrogation and/or punishment is highly arbitrary.⁴⁸¹

In 2015, a woman was harassed by six *mutawa* for wearing eye makeup, which the *mutawa* considered as “provocative”.⁴⁸² There is no mention of eye makeup being against the religious teachings, demonstrating that *mutawa* can target, report, and charge people at their discretion. In another instance, a woman named Malak Al Shehri posted a picture of herself without an *abaya* (the traditional dress). The religious police immediately filed a report to detain her, and she also faced the possibility of being lashed as a punishment.⁴⁸³

Women also face discriminatory punishment by *mutawa* for the alleged crime of *khalwa*. The crime is arbitrarily enforced as it prohibits any form of “secluded” interaction between unrelated men and women which the *mutawa* regard as possibility leading to *zina* in their

⁴⁸¹ This was before *mutawa* was deprived of their authority for such conduct. There has yet to be any cases since they resumed their operation in 2017.

⁴⁸² Chris Pleasance, *Brave Saudi Woman Turns the Tables on Religious Police who Hound Her for Wearing Eye Make-up by Filming Them until They Cower Away*, DAILY MAIL, 17 July 2015, available at <http://www.dailymail.co.uk/news/article-3164981/Brave-Saudi-woman-turns-tables-religious-police-hound-wearing-eye-make-filming-cower-away.html>.

⁴⁸³ No follow-up report was made of her sentencing.

discretion. While technically both men and women are to be punished on equal terms for this crime, in practice women receive harsher treatment than men by the *mutawa*.⁴⁸⁴

In 2008, an American businesswoman was arrested by *mutawa* for having coffee with a male colleague in a café downstairs from their workplace. While the man was simply arrested and later released, the woman was strip-searched and forced to sign a false confession in police custody.⁴⁸⁵ A judge reprimanded the woman for her clothing and for travelling alone without a guardian. Additionally, a 75-year-old woman was convicted of *khalwa* the following year for being alone with two young men. The *mutawa* disregarded their appeal that one of the men was her nephew and they were there to deliver loaves of bread to the woman. With no consideration of her age, the woman was sentenced to 40 lashings, four months in jail, and deportation.

In most cases, the woman is considered at fault for the commission of *khalwa*. Typical explanations for *khalwa* allegations include a woman not respecting the dress code, not being in the company of a male guardian, working in a mix-gender environment, and so on. Women are blamed for “seducing” men by not observing these rules. Harassment by *mutawa* was so common that in 2016, the government decided to limit their power to that of reporting suspicious behavior and acting “kindly and gently”, rather than having the authority to arrest, detain, or ask for identification.⁴⁸⁶ However, *mutawa* restarted their work in June 2017 to respond to complaints of “creeping immorality”, calling for their future behavior to be closely watched.

⁴⁸⁴ The Special Rapporteur on violence against women notes this issue in a 2008 report on Saudi Arabia. Yakin Ertürk, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Mission to Saudi Arabia*, Human Rights Council, Doc A/HRC/11/6/Add.3, 14 Apr. 2009, at 48.

⁴⁸⁵ Bonnie Malkin, *Mother Arrested for Having a Coffee in Starbucks*, THE TELEGRAPH, 20 Feb. 2008, available at <http://www.telegraph.co.uk/news/worldnews/1579285/Mother-arrested-for-having-coffee-in-Starbucks.html>.

⁴⁸⁶ *Saudi Arabia Strips Religious Police of Arresting Power*, AL-JAZEERA, 14 Apr. 2016, at <http://www.aljazeera.com/news/2016/04/saudi-arabia-strips-religious-police-arresting-power-160413141418824.html>.

Recommendations

1. Review the source of the current judicial rulings and establish and enforce an explicit and consistent penal code that respects international standards of penal protection.
2. Ensure that the penal code and extra-judicial practices do not violate international human rights protections.
3. Avoid punishing women involved in or alleging having been raped.
4. Establish a law criminalizing honor crimes, and treat the unjustified killing of women by family members equally to comparable murder claims.
5. Establish and enforce measures to prevent abuses of power by officers of the Committee for the Promotion of Virtue and the Prevention of Vice.

REPUBLIC OF YEMEN

Government and Legal System

Yemen is a republic which was formed in 1990, following the union of the former North Yemen and South Yemen.⁴⁸⁷ Since 2011, the country has been put in a state of political flux, following a revolution that led to the removal of former President Ali Abdullah Saleh.⁴⁸⁸ Ever since 2012, it is the poorest country in the Middle East.⁴⁸⁹ Between 2013 and 2014, a National Dialogue Conference (hereinafter “NDC”) was held in order to facilitate the transition to a new government.⁴⁹⁰ Among other things, the NDC’s deliberations resulted in a new draft constitution, an affirmative action-style quota system for women leadership, and assurances of greater rights for women in the new constitution.⁴⁹¹ However, in late 2014, a Shi’a group known as the Houthis took control of the capital Sana’a.⁴⁹² In early 2015, they rejected the draft constitution and announced a takeover of the government.⁴⁹³ Meanwhile, the deposed government of President Hadi fled to Aden.⁴⁹⁴ Conflict between the separatist Houthis and pro-Hadi government forces

⁴⁸⁷ United States Department of State – Office of the Historian, *A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Yemen*, available at <https://history.state.gov/countries/yemen>.

⁴⁸⁸ Brian Whitaker, *Yemen’s Ali Abdullah Saleh Resigns – But It Changes Little*, THE GUARDIAN, 24 Nov. 2011, available at <https://www.theguardian.com/commentisfree/2011/nov/24/yemen-ali-abdullah-saleh-resigns>.

⁴⁸⁹ United Nations Office for the Coordination of Humanitarian Affairs, *OCHA in Middle East and North Africa – Yemen*, available at <http://www.unocha.org/romena/about-us/about-ocha-regional/yemen>.

⁴⁹⁰ Ali Ibrahim Al-Moshki, *National Dialogue Conference Concludes*, YEMEN TIMES, 28 Jan. 2014, available at <http://www.yementimes.com/en/1750/news/3398/National-Dialogue-Conference-concludes.htm>.

⁴⁹¹ Arab Center for Research & Policy Studies, *Outcomes of Yemen’s National Dialogue Conference: A Step toward Conflict Resolution and State Building*, 27 Feb. 2014, available at <http://english.dohainstitute.org/release/c5b3a33b-644d-47f8-9e03-85fcb852c899>.

⁴⁹² *How Yemen’s Capital Sanaa was Seized by Houthi Rebels*, BBC NEWS, 27 Sept. 2014, available at <http://www.bbc.com/news/world-29380668>.

⁴⁹³ Menan Khater, *Houthis Bomb Presidential Palace Opposing Proposed Constitutional Draft*, DAILY NEWS, 21 Jan. 2015, available at <http://www.dailynewsegypt.com/2015/01/21/houthis-bomb-presidential-palace-opposing-proposed-constitutional-draft/>.

⁴⁹⁴ Mohamed Ghobari & Mohammed Mukhashaf, *Yemen’s Hadi Flees to Aden and Says he is still President*, REUTERS, 21 Feb. 2015, available at <http://www.reuters.com/article/us-yemen-security-idUSKBN0LP08F20150221>.

and divided control of the country has continued into 2018. Given the instability in Yemen, the current state of the government remains uncertain. The constitutional status of the draft constitution is unclear as well.

Regardless, the legal and *de facto* status of women is a matter of concern. Since 2006 (the first year the study was released), Yemen has ranked last of all countries surveyed by the World Economic Forum's Gender Gap Index.⁴⁹⁵ Additionally, under the constitution enacted in 1994 (hereinafter "1994 Constitution"), Islam is the official religion of the state and Sharia law is considered the source of all legislation.⁴⁹⁶ This remains the same under the new draft constitution (hereinafter "2015 Constitution").⁴⁹⁷ Although Article 31 of the 1994 Constitution declared that "[w]omen are the sisters of men. They have rights and duties, which are guaranteed and assigned by Sharia and stipulated by law," this is the only time that women were directly mentioned.⁴⁹⁸ Yemenis and the international community have also raised serious concerns about the status of women since the Houthi takeover. While supporting women's rights is the Houthis' official political stance, reports have emerged detailing misogynistic attitudes and behavior by Houthi militants in Houthi-controlled areas.⁴⁹⁹

The 2015 Constitution aims to better protect women's rights. In particular, article 57 commits the state to the welfare of women, requiring it to enact laws protecting and advancing

⁴⁹⁵ World Economic Forum, *Global Gender Gap Report*, 2014, at 373, available at http://www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf.

⁴⁹⁶ YEMEN CONSTITUTION (1994), arts. 2 & 3, available at <http://www.refworld.org/pdfid/3fc4c1e94.pdf>.

⁴⁹⁷ YEMEN CONSTITUTION (2015), arts. 2 & 4, available at http://www.constitutionnet.org/files/yemen-draft_constitution-15jan2015-_english.pdf.

⁴⁹⁸ YEMEN CONSTITUTION (1994), art. 31, available at <http://www.refworld.org/pdfid/3fc4c1e94.pdf>.

⁴⁹⁹ Fareed Al-Homaid, *What does the Houthis' Rise Mean for Women? (Part I)*, YEMEN TIMES, 2 Mar. 2015, available at [http://www.yementimes.com/en/1864/report/4934/What-does-the-Houthis%E2%80%99-rise-mean-for-women-\(Part-1\).htm](http://www.yementimes.com/en/1864/report/4934/What-does-the-Houthis%E2%80%99-rise-mean-for-women-(Part-1).htm); see also Fareed Al-Homaid, *What does the Houthis' Rise Mean for Women? (Part II)*, YEMEN TIMES, 4 Mar. 2015, available at [http://www.yementimes.com/en/1865/report/4945/What-does-the-Houthis%E2%80%99-rise-mean-for-women--\(Part-II\).htm](http://www.yementimes.com/en/1865/report/4945/What-does-the-Houthis%E2%80%99-rise-mean-for-women--(Part-II).htm).

the rights of women, while also eliminating “cultural and social norms that demean the dignity of women.”⁵⁰⁰ Article 305 also creates the National Commission for Women, which *inter alia*, is responsible for proposing public policies to advance women’s rights and ensuring that the rights of women are implemented and protected.⁵⁰¹ In terms of penal laws, the Yemeni government codified its criminal code in 1994. However, it retains much Islamic influence and is largely a codification of Sharia law.⁵⁰²

Human Rights Obligations under International Law

Yemen is bound by a number of international obligations. Both constitutions require Yemen to follow the UN Charter, the Universal Declaration of Human Rights, the Charter of the Arab League, and other “generally recognized” international law principles.⁵⁰³ Yemen is also party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵⁰⁴ However, Yemen made a reservation to article 29(1) of CEDAW on the dispute resolution process in cases disagreement over the interpretation or application of the treaty. Yemen has also ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁰⁵

⁵⁰⁰ YEMEN CONSTITUTION (2015), art. 57, available at http://www.constitutionnet.org/files/yemen-draft_constitution-15jan2015-_english.pdf.

⁵⁰¹ *Id.* at art. 305.

⁵⁰² RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY, 143 (Cambridge University Press, 2005), available at <https://books.google.co.jp/books?id=7EAsmtzXjcC>.

⁵⁰³ YEMEN CONSTITUTION (1994), art. 6, available at <http://www.refworld.org/pdfile/3fc4c1e94.pdf>; YEMEN CONSTITUTION (2015), art. 10, available at http://www.constitutionnet.org/files/yemen-draft_constitution-15jan2015-_english.pdf.

⁵⁰⁴ United Nations Treaty Collection, *List of Signatories to the CEDAW*, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#64.

⁵⁰⁵ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407, entered into force 23 Mar. 1976; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3, entered into force 3 Jan. 1976..

Honor Crimes

Honor crimes continue to be a major issue for women in Yemen. Article 232 of the current Penal Code provides leniency for honor killings by stipulating that a “husband” who catches his “wife” or a female relative committing adultery and who subsequently kills or injures her is liable at most to one year of imprisonment or a fine.⁵⁰⁶ This treatment towards honor killers stands in contrast to how murder is normally treated, which falls under *qisas* and is punishable by death.⁵⁰⁷ This constitutes explicit gender discrimination against women in punishment: if a woman kills her spouse under such circumstances she will be punished, but a man would not be. The recognition of leniency for honor killings in the Penal Code allows men to commit honor killings of women with impunity. Providing leniency for such honor killings encourages extrajudicial murders of women as a form of punishment for women who have committed infidelity, especially because the Penal Code provisions protect only men who commit the crime.

Khilwa (Seclusion with a Man)

Another common crime for which Yemeni women are punished is *khilwa* (being alone with a man who is not a relative). Even though *khilwa* is not an official crime under the Penal Code, Article 273 (criminalizing “any act which conflicts with public ethics”) has frequently

⁵⁰⁶ REPUBLICAN DECREE FOR LAW NO 12 FOR THE YEAR 1994 CONCERNING CRIMES AND PENALTIES, art. 232, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf>.

⁵⁰⁷ *Qisas* are a category of crime including murder, voluntary manslaughter, involuntary killing, intentional physical injury, and unintentional physical injury. For crimes involving intentional killing and/or physical injury, the victim or the victim’s family is entitled to compensation (retribution) in the form of retributive justice (*i.e.*, death as punishment for murder), or monetary compensation. See Oxford Islamic Studies, *Qisas*, http://www.oxfordislamicstudies.com/article/opr/t125/e1931?_hi=3&_pos=5.

been invoked in order to punish women for committing *khilwa*.⁵⁰⁸ Because terms such as “public ethics” are loosely defined under article 273, it can be broadly applied to punish women for various crimes based on traditional norms. This may lead to inconsistencies in application of the law, as well as enforcement of discriminatory rules such as *khilwa*, leading women to face imprisonment or fines for acts that are not actually crimes.⁵⁰⁹ Since the Houthi takeover, reports by the Yemen Times have indicated a number of incidents involving Houthi soldiers harassing and detaining women for failing to adhere to traditional norms such as being in public without a male relative.⁵¹⁰ For instance, multiple women came forward to report harassment from the Houthis for failing to wear traditional dress, as well as for leaving home without a *mahram* (male relative).⁵¹¹

Arbitrary Detention

Many Yemeni women face discriminatory policies and laws that lead to their arbitrary detention. As discussed above, vague language in article 273 of the Penal Code (acts against public ethics) permits arbitrary or inconsistent interpretation, exposing women to punishment and arbitrary detention for honor-related crimes and other purported crimes. The law against prostitution, articles 277 of the Penal Code, which punishes women by up to three years

⁵⁰⁸ See REPUBLICAN DECREE FOR LAW NO 12 FOR THE YEAR 1994 CONCERNING CRIMES AND PENALTIES, art. 273, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf> (“Disgraceful act in violation of chastity is any act which conflicts with public ethics or loosing chastity including undressing and intentional exposure of the genital organs and the saying and gesticulation violating the chastity and contradictory to good conduct.”).

⁵⁰⁹ *Joint Shadow Report to CEDAW Commission at United Nations by civil society organizations in Yemen*, Aug. 2002, at 6, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/SAFHRYemen41.pdf>.

⁵¹⁰ Fareed Al-Homaid, *What does the Houthis’ Rise Mean for Women? (Part 1)*, YEMEN TIMES, 2 Mar. 2015, available at [http://www.yementimes.com/en/1864/report/4934/What-does-the-Houthis%E2%80%99-rise-mean-for-women-\(Part-1\).htm](http://www.yementimes.com/en/1864/report/4934/What-does-the-Houthis%E2%80%99-rise-mean-for-women-(Part-1).htm).

⁵¹¹ *Id.*

imprisonment under article 278,⁵¹² has also led to arbitrary arrests of women due to its vagueness. It broadly defines prostitution as committing an act “touching the honor ... for the purpose of spoiling the morals of others or gaining thereof.”⁵¹³ Under the law, women have been arrested for only walking with a man in the street or walking in the street at night.⁵¹⁴ The anti-prostitution law is thus discriminatory; in application, its use has been primarily to prosecute women for acts for which men would not be punished.⁵¹⁵ Such arrests are particularly problematic because of the social stigma associated with women who have been imprisoned. Larger Yemeni society tends to reject previously imprisoned women, as imprisonment is considered shameful.⁵¹⁶ Some Yemenis may cast-off such women regardless of their innocence, suggesting a cultural element to the rejection.⁵¹⁷ Oftentimes, families will abandon their imprisoned female relatives.⁵¹⁸ As a result, women who have been detained often have nowhere to go after their release. As a result, many women, particularly prostitutes, may become repeat offenders, being forced to support themselves by committing the very crimes they were accused of originally.⁵¹⁹

⁵¹² *Id.* at art. 278.

⁵¹³ REPUBLICAN DECREE FOR LAW NO 12 FOR THE YEAR 1994 CONCERNING CRIMES AND PENALTIES, art. 277, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf>.

⁵¹⁴ Majida Rasul, *Detention of Women in Yemen: Procedures and Facilities*, SAFERWORLD, Dec. 2014, at 3, available at <http://www.saferworld.org.uk/downloads/pubdocs/detention-of-women-in-yemen---procedures-and-facilities.pdf>.

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ See Amal Al-Yarisi, *Families in Yemen Shun Female Prisoners*, YEMEN TIMES, 30 Apr. 2012, available at <http://www.yementimes.com/en/1568/culture/785/Families-in-Yemen-shun-female-prisoners.htm>.

⁵¹⁸ United Nations, *Country Assessment on Violence against Women: Yemen*, 2010, at 10, available at http://www.un.org/womenwatch/ianwge/taskforces/vaw/Country_Assessment_on_Violence_against_Women_August_2_2010.pdf.

⁵¹⁹ Majida Rasul, *Detention of Women in Yemen: Procedures and Facilities*, SAFERWORLD, Dec. 2014, at 3, available at <http://www.saferworld.org.uk/downloads/pubdocs/detention-of-women-in-yemen---procedures-and-facilities.pdf>.

Zina (Adultery)

Accusations of adultery and its repercussions are still an issue for women in Yemen. Adultery is outlawed in Yemen. According to the Penal Code, if the adulterer and adulteress are not married, it is punishable by one hundred strokes of whipping; if the adulterer or adulteress is married, then the punishment is stoning.⁵²⁰ Article 266 of the Penal Code, however, does provide a number of mitigating factors that may neutralize an accusation of adultery, mostly revolving around evidentiary issues.⁵²¹ Another issue for consideration is that under article 15 of Yemen's Personal Status Law, a marriage contract is not legally valid until a woman's male guardian has given his permission by signing the contract.⁵²² This means that until a male guardian gives permission for the marriage, a couple can be charged with committing adultery under the Penal Code. Women who marry against their guardian's will can thus face adultery charges at their guardian's discretion.

The situation is improving but still has room to improve. While stoning remains an 'official' punishment, in practice it has not been employed for centuries.⁵²³ Nevertheless, the vagueness of various laws, the inconsistency of their application, and the persistence of traditional norms means that women continue to face discriminatory punishment under the country's adultery laws. For example, a woman who elopes with a man without her male guardian's (father, uncle, or brother if not married) permission could face adultery charges under the Penal Code. As stated above, this is due to the provision in Yemen's Personal Status Law

⁵²⁰ REPUBLICAN DECREE FOR LAW NO 12 FOR THE YEAR 1994 CONCERNING CRIMES AND PENALTIES, art. 263, available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf>.

⁵²¹ *Id.*, art. 266.

⁵²² Elham Manea, *Yemen*, in WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE, 9 (Freedom House / Rowman & Littlefield Publishing Group, Inc. 2010), available at https://freedomhouse.org/sites/default/files/inline_images/Yemen.pdf.

⁵²³ U.N. Human Rights Office of the High Commissioner, *Report on Human Rights in Yemen*, 1 Feb. 2012, at 5, available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRW_Yemen_HRC104.pdf.

that requires a male guardian's permission before a marriage can be considered legal. Because of that rule, women lack freedom of marriage in Yemen; if a woman fails to secure her male guardian's acceptance, she could be punished as an adulteress.

Cases of Discriminatory Punishment against Women

Although certain honor-related crimes such as *khilwa* may not be specifically addressed in the Penal Code, because of the vague provisions such as articles 273 and 232, women may face discriminatory punishment anyway. Example cases include:

- In 2013, a father killed his fifteen-year-old daughter after allegedly catching her on the phone with her fiancé without permission.⁵²⁴ According to a statement by the Yemeni government, the claim that the daughter was on the phone was merely a pretext for the murder.⁵²⁵ Article 232 of the Penal Code makes it easier to commit these types of extrajudicial killings by allowing perpetrators to claim they were committing an honor killing, thereby receiving a lesser punishment.
- The Houthi-controlled areas may be experiencing an increase in discriminatory policies against women. According to an article from the Yemen Times, multiple women from Houthi-controlled Sana'a have reported harassment from Houthi soldiers for failing to wear traditional dress or for leaving home without a *mahram* (male relative).⁵²⁶ Reports have also emerged of women being detained by Houthis for being in the company of men who are not

⁵²⁴ Mohammed Jamjoom, Hakim Almasmari, & Saad Abedine, *Yemeni girl, 15, 'burned to death by father'*, CNN, 24 Oct. 2013, available at <http://edition.cnn.com/2013/10/24/world/meast/yemeni-girl-burned-to-death-by-father>.

⁵²⁵ *Id.*

⁵²⁶ Fareed Al-Homaid, *What does the Houthis' Rise Mean for Women? (Part 1)*, YEMEN TIMES, 2 Mar. 2015, available at [http://www.yementimes.com/en/1864/report/4934/What-does-the-Houthis%E2%80%99-rise-mean-for-women-\(Part-1\).htm](http://www.yementimes.com/en/1864/report/4934/What-does-the-Houthis%E2%80%99-rise-mean-for-women-(Part-1).htm).

their relatives.⁵²⁷ Houthi rule therefore raises concerns that discriminatory policies will be imposed against women who fail to adhere to traditional norms.

Recommendations

1. Review and repeal all laws and practices that constitute legal and *de facto* discriminatory punishment for women. Specifically, criminal provisions such as articles 232 and 273 should be abolished in order to discourage the arbitrary killings and arbitrary detention of women.
2. Introduce a non-discriminatory set of laws to assess the punishment of women convicted for a wrongdoing.

⁵²⁷ Yara Bayoumy, *Yemeni women fear Houthis are restricting their freedoms*, REUTERS, 18 Dec. 2014, available at <http://english.alarabiya.net/en/perspective/features/2014/12/18/Yemeni-women-fear-Houthis-are-restricting-freedoms.html>.