



FACULTY OF LAW
Lund University

Rasha El-Shehawy

Justice Denied in the Name of
'Honour':
A Study of Honour Killing
between Human Rights and
'Shari'a' in Egypt

Master thesis
30 credits (30 ECTS)

Ida Elisabeth Koch

Master's Programme in International Human Rights Law

Autumn 2009

*To whom they lost their life in the name of honour,
throughout the world*

Contents

SUMMARY	1
ACKNOWLEDGMENTS	3
ABBREVIATIONS	4
1 INTRODUCTION	5
1.1 Background on Social Aspects	6
1.2 Research Problem	7
1.3 Aim and Objective of the Study	9
1.4 Delimitations	9
1.5 Methodology	10
1.6 Structure	10
2 UNITED NATIONS FRAMEWORK TO HONOUR KILLING	12
2.1 Development on Gender- Based Violence within the UN	12
2.2 Honour Killing as a Human Rights Violation	15
2.2.1 <i>Human Rights Treaty Bodies</i>	16
2.2.2 <i>United Nations General Assembly</i>	17
2.2.3 <i>The Commission on Human Rights and its Successor The Human Rights Council</i>	20
2.3 Concluding Remarks	21
3 ISLAMIC LAW 'SHARI'A' ASPECTS IN RESPECT TO CRIME OF HONOUR	22
3.1 Background on Relevant <i>Shari'a</i> Aspects	22
3.2 Aspects of Islamic Jurisprudence -Approach to Criminal Justice	24
3.2.1 <i>Basic Principles</i>	25
3.2.2 <i>Fair Trial Guarantees</i>	26
3.3 Islamic Jurisprudence Approach to Sexual Crimes	28
3.3.1 <i>Adultery</i>	28
3.3.1.1 Exceptional Burden of Proof	29
3.3.1.1.1 <i>Testimony</i>	29
3.3.1.1.2 <i>Confession</i>	30
3.3.1.1.3 <i>'Li'an'</i>	30
3.3.2 <i>'Qathf'</i>	31
3.4 Concluding Remarks	31

4	NATIONAL LEGAL FRAMEWORK	33
4.1	Background on the Legal System	33
4.2	Legal Codification of Honour Killing	35
4.2.1	<i>Article 273 Penal Code</i>	35
4.2.2	<i>Article 17 Penal Code</i>	37
4.3	State Reservation to Human Rights Instruments	39
4.4	Concluding Remarks	42
5	HONOUR KILLING BETWEEN ISLAM, CULTURE AND HUMAN RIGHTS	44
5.1	' <i>Sharia</i> ' and Honour Killing	44
5.2	The Interplay between <i>Shari'a</i> and Human Rights Law	46
5.2.1	<i>Culture and Honour Killing</i>	47
5.3	State Obligation	48
5.3.1	<i>On the National Level</i>	48
5.3.2	<i>On the International Level</i>	49
5.4	Concluding Remarks	50
6	RECOMMENDATIONS	51
6.1	Judicial Reform	51
6.2	Preventive and Protective Measures	52
6.3	Community Mobilisation	52
6.3.1	<i>Activities on the Community Level</i>	52
6.3.2	<i>Promotion of Women Rights on the Community Level</i>	53
7	CONCLUSION	54
8	GLOSSORY OF TECHNICAL TERMS	56
	BIBLIOGRAPHY	57

Summary

Throughout the world, harmful traditions to women are carried out within the family, *e.g.*, female genital mutilation, forced marriage and dowry murder. Honour killing practice is considered to be the extreme form thereof for its violent consequences on females' right to life.

The practice refers to crimes directed toward women on the ground of gender; crimes 'whereby the family kills a female relative deemed to have defiled the honour of the family'.

The concept of honour, being the motive behind the practice, is crucial to the understanding of honour killing. However, providing a concrete definition of 'Honour' is not possible, as the word refers to a powerful concept grounded by social perception about the idea of masculinity and the historical male domination over women. Nevertheless, the concept is understood as 'the good reputation of man or family in the surrounding society'. The concept further portrays women embodying the honour of men and therefore the interference within her private life to control her sexuality comes as an inalienable consequence. The interference can have many forms, *e.g.*, interference with her choice to marry, physical assaults and the extreme form is honour killing. Moreover on consequences, the concept of honour and the non-codified rules of conduct imposed by the society to the end of preserving honour, can sometimes drive women to commit suicide after being considered dishonoured by the society, for instance in case of rape.

The crimes occur among societies that still suffer from domination over women, *e.g.*, Jordan, Syria, Lebanon, Yemen, Morocco and other Mediterranean and Gulf countries. It also takes place in countries such as Germany, United Kingdom, and France within the migrant communities.

Egypt is amongst the countries where the practice is tolerated by society and the perpetrator is deemed a real 'man' who stood for his honour and cleaned the shame by shedding the blood of a close female. Beyond tolerating the practice, society views the killing as an inalienable penalty of breaching its social norms and thus condemns the victim and pays respect to the killer. As to the national legal system, the practice is codified implicitly through two provisions contained in the penal code, which is closely examined in the research.

Although honour killing is not limited to Muslim societies, it occurs widely therein. Bearing this in mind, together with the fact that most Islamic countries lodged a reservation to many CEDAW provisions invoking Islamic '*Shari'a*', renders the latter a potential ground to justify the killing. Moreover, the culture and gender construction of society may play another potential ground. Therefore, we are before two potential grounds for honour

killing: culture and '*Shari'a*'. In this context, both are investigated in the research.

To this end, this study investigated the UN framework to honour killing as a preliminary matter to understand the universal perception and treatment of the problem in the light of equality and prohibition of discrimination norms. The study moves further, to examine '*Shari'a*' basic concepts and approach to criminal justice with special focus on the treatment of sexual crimes and the exceptional burden of proof stipulated therein. Having done that, the next chapter provide an overview of the research problem in the national context, the two legal provisions used to mitigate the sentences over crimes committed in the name of honour are investigated, and the hierarchy of legal sources and status of '*Shari'a*' besides international convention therein are illustrated.

As the study moves towards its end, the fifth chapter provides an analysis of honour killing between culture and '*Shari'a*', illustrating the interplay between human rights and '*Shari'a*', leaving culture as the sole ground for honour killings.

Finally, the last chapter contains some recommendations to tackle the problem and eradicate honour-killing practice.

Acknowledgments

I would like to express my sincere gratitude to the many people who contributed in diverse ways to help me completing this degree.

Primarily, my appreciation goes to Raoul Wallenberg Institute and SIDA for providing me with the scholarship that made my participation in the Human Rights Master Programme possible and joyful as it was.

My profound gratitude for Dr. Ida Elisabeth Koch for her guidance and direction that has made me complete this degree

In writing my thesis, I greatly appreciate to Dr. Christina Johnsson for providing me with constructive guidelines throughout the research and to Prof. Alfredsson Gudmundur for his help and continuous support.

Many thanks go to RWI staff, most particularly Habteab Tesfay for providing beyond help and friendship that will last forever, Hanna Johnsson for support and precious career advices and Lena Olsson for help and friendship.

My appreciation to Ali Zafar being my opponent and my friend, and to all my classmates who made my stay in Lund unforgettable. In that regard, I wish to specially thank Carla Reyes, Dewi Novirianti, Fatuma Nanziri and Zahna Krukova for the remarkable moments we spent together. My love to Anna, for enjoyable moments that kept me warm with sun from the south and for providing me with a second home in Europe.

My deep love to my friends in Egypt who supported me with their love. I am blessed with your friendship.

Very special thanks and love to Mrs. Rabab El-Ghandour for support and encouragement.

My profound love and respect for Dr. Mustafa and Zeinab Tag EL-Deen. I have benefited from their moral support along with precious career advices, I also enjoyed the lovely evenings we spent together.

Finally, I remain most indebted to my family. Indebted to my parents for their care, support and beyond love that made me the person I am. Indebted to my sister for unlimited love and care, for endless support, and for always believing in me. This degree would have not been finished, had it not been for her. To her I say, "You are the Best".

Lund, 14 September 2009
Rasha El-Shehawy

Abbreviations

CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CHR	United Nations Commission on Human Rights
CSW	United Nations Commission on the Status of Women
DEVAW	Declaration on the Elimination of Violence against Women
ECOSOC	United Nations Economic Social Council
GA	United Nations General Assembly
GC	UN General Comment of the Human Rights Committee
GR	UN General Recommendation of the Committee on the Elimination of Discrimination against Women
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SR	Special Rapporteur
UDHR	Universal Declaration of Human Rights
UN	The United Nations
UNIFEM	United Nations Development Fund for Women

1 Introduction

On 8 January 2009, in Alexandria, Egypt, a man stabbed his wife before his two-year old girl, and walked out, proudly, announcing his crime to the neighbourhood. The motive behind the murder – as claimed by him - was rumours and suspicions about the victim's sexual conduct.

On the same day, another honour killing occurred; a young woman was murdered by her husband after four months of marriage.¹

Honour crimes refer to crimes against women "whereby the family kills a female relative deemed to have defiled the honour of the family".² Moreover, as defined elsewhere, they refer to "a murder of a woman by her male family for a perceived violation of the social norms of sexuality imposed by traditions".³ The crimes occur in, Jordan, Syria, Lebanon, Yemen, Morocco and other Mediterranean and Gulf countries. It also takes place in countries such as Germany, United Kingdom, and France within the migrant communities.⁴

Egypt is among the countries where practice of honour killing, is tolerated by society. In a study of female deaths in Alexandria, Egypt, 47 percent of the women found to be killed by a male-relative after the woman had been raped.⁵ Although, the practice is an acknowledged crime, grounded by male privileges and subordinate social status of women, it has not been much on public debate. Few studies addressed the mentioned practice and statistics are mostly lacking, specially official ones.⁶

The Egyptian penal law, implicitly, codifies the practice, through acknowledging the right of the husband to punish the wife for adultery, by mitigating the sentence for such crimes according to Art. (237). In addition, Article (17) grants the judiciary, discretionary authority to reduce the penalty, when the motive behind the murder is deemed emotional, which

¹ Hassan Abou-Shakra, 'High Season for Wives Killing in Alexandria', *Al-Dostor Newspaper*, 8 January 2009,

<http://dostor.org/ar/index.php?option=com_content&task=view&id=12347&Itemid=29>
Visited on 12 March 2009.

² UN Economic and Social Council, *Report of the Special Rapporteur on Violence against Women: Violence against women in the Family*, (E/CN.4/1999/68) para. 18.

³ UN Division for the Advancement of Women, *Honour Killing in Egypt*, Expert Paper prepared by Fatma Khafagy (The Association for Legal Aid, Egypt), for Expert Group Meeting on "Violence against women: Good practices in combating and elimination of violence against women", May 2005 Vienna, p. 4.

⁴ UN Economic and Social Council, *Report of the Special Rapporteur on Violence against Women: Cultures Practices in the Family that are Violent towards Women*, (E/CN.4/2002/83), para. 21.

⁵ UNIFEM, *Violence against Women - Facts and Figures*, November 2007, <http://www.unifem.org/attachments/gender_issues/violence_against_women/facts_figures_violence_against_women_2007.pdf>, visited on 12 March 2009.

⁶ Mahmmod Abd AL-Rasheed and Zen All-Abbedeen Makhlof, *Honour Crimes, A form of Violence Towards Women*, (CEWLA Publications), p. 24. Available for download at <http://www.cewla.org/details_issue.php?id_issu=33>, last visited 12 April 2009.

have been used in regard to honour killing, and whereby the sentence can be reduced to a minimum of six month in prison-term.

Honour, known as '*Sharaf*', stands as the motive behind the crimes. The social perception of the term refers to the 'good reputation' of male-persons or family, which is to be judged by the surrounding society based on females' sexual conduct; actual or potential. Therefore, the crimes are grounded by social aspects, *i.e.*, the preservation of concept of honour '*Sharaf*'.

1.1 Background on Social Aspects

Being a female in the Egyptian society implies that you are, and always will be, under supervision of males, because simply their honour '*Sharaf*', is claimed to reside in you. Growing old, gaining practical and professional experience, achieving success in private and professional life do not help eliminating this supervision, as it does not depend on the female-person rather her gender.

The forms of supervision over females vary between direct and indirect. While the male members of the family carry out the direct form of supervision, the indirect form is done by the surrounding society. Indeed, the surrounding society interferes within the female's private life and judges her reputation by analysing her attitude toward men. Sometimes they sentence her to death by spreading out rumours shaming her family, which is handled typically by shedding her blood by a male member of the family in order to regain clean the shame alleged to be violated by the inappropriate behaviour. After the murder, society perceives the killer as a 'true man' who stood for his honour and to whom it pays respect.⁷

Appropriate and inappropriate behaviour is determined by the traditions and customs imposed by society, which portrays the women as 'embodying' the honour of the male members of her family and therefore imposes social behavioural norms on females in order to preserve it.⁸ The core of these social norms is sexual conduct. Society considers women who have reached puberty a risk to be eliminated by different means, *e.g.*, female genital mutilation, segregation of sexes and imposing norms upon the relationship between men and women to avoid extramarital sex-relationship.⁹

Breach of social norms provokes harsh and violent physical attacks on women, for retrieving the honour claimed to be lost due to the breach. The murder known as 'honour killing' is the extreme form thereof.

⁷ The Special Rapporteur on Violence against Women, *supra* note 4 para 26.

⁸ *Ibid.*, para. 28.

⁹ Lama Abu-Odeh, 'Crimes of Honour and the Construction of Gender in Arab-Societies', in Mai Yamani (ed), *Feminism and Islam: Legal and Literary Perspectives* (Ithaca Press, 1996), pp. 149-153.

1.2 Research Problem

Although human rights instruments that address discrimination and women's full enjoyment of human rights on an equal footing with men, are widely accepted, discrimination and violence against women yet stands as problems occurs worldwide.

Egypt has ratified eight out of the nine core UN human rights instruments. The Egyptian Constitution enshrines '*Shari'a*' as a principal source of legislation, therefore the national legislation must comply with fundamental '*Shari'a*' principles commonly agreed upon among Islamic jurists.

The international conventions are deemed national laws by virtue of Article (151) of the constitution, with a special status though. Whereas they rank immediately after the constitution, they rank higher than national laws. Accordingly, national laws must be in compliance with the international conventions and in case of conflict, national laws shall be subject to review by the Supreme Constitutional Court.¹⁰

Having accorded the legal status of national legislation to international convention presumes that the latter must be in compliance with '*Shari'a*' as the principal source of legislation and in case of conflict '*Shari'a*' prevails.

To that end, upon ratifying ICCPR¹¹ and ICESCR,¹² the State lodged a declaration that conditions the application of rights and obligations enshrined therein by compliance with Islamic '*Shari'a*';

"Taking into consideration the provisions of the Islamic *Shari'a* and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

For CEDAW¹³, the State lodged a reservation to Art (2), (16) and (29). The reservation to Article (2) conditions its application by the compliance with Islamic '*Shari'a*';

"The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic '*Shari'a*'."

The research problem resides in the codification of honour crimes. Although not explicitly codified in the Egyptian legislation, the penal code implicitly confers mitigation of sentences on perpetrators, through article 237 and 17 of the penal code.¹⁴

¹⁰ Egyptian National Council for Human Rights, *Annual Report* (2004/2005), Chp. 2, http://www.nchr.org/En/human_rp2_4.html, Visited in 25 April 2009.

¹¹ ICCPR was ratified by Egypt on 14 January 1982.

¹² ICESCR was ratified by Egypt on 14 January 1982.

¹³ CEDAW was ratified by Egypt on 18 September 1981.

¹⁴ Egyptian Penal Code no. 58/ 1937, (as amended in 2003).

Article 237:¹⁵

Whoever surprises his wife in the act of committing adultery *flagrante delicto*, and immediately kills her and her partner shall be punished with an imprisonment sentence instead of the penalties set out in Articles 234 and 236.¹⁶

Article 17. It reads:¹⁷

In respect to provisions of felonies, the court may substitute for heavy penalties that of lenient ones as stipulated hereafter:

For death penalty that of life-imprisonment¹⁸ or strict-imprisonment sentence.¹⁹

For life-imprisonment sentence, that of strict-imprisonment or imprisonment sentence.²⁰

For strict-imprisonment sentence, that of imprisonment or prison-term sentence²¹ of not less than six-months.

For imprisonment sentence, that of prison-term sentence of not less than three-months.²²

Whereas the first article is understood to confer direct mitigation of sentence, *i.e.*, a maximum of three years imprisonment instead of a minimum of three years and maximum of seven, the second one does not lead directly to a specific sentence for honour killing. Nevertheless, the second article confers on judiciary discretionary powers to mitigate the sentence when the motive of the crimes is deemed emotional, which have been heavily used in case of honour killing crimes and led to the mitigation of sentence to a lower one considering honour, as a motive, entitles the perpetrator for sentence reduction

¹⁵ *Ibid.*, Article (237). Noteworthy, the text is an unofficial translation from the original Arabic text to English by the author.

¹⁶ These two articles provide *inter alia*, for a penalty that varies between three and seven years of imprisonment sentence for manslaughter, and for heavier sentences for unpremeditated murder.

¹⁷ Egyptian penal code, *supra* note 14, Article (17). The text is an unofficial translation from the original Arabic text by the author.

¹⁸ Egyptian penal code, *supra* note 14, Article 14, defines, *inter alia*, life-imprisonment as confining the convicted in a strict-regime prison for life-time.

¹⁹ *Ibid.*, Article 14, defines, *inter alia*, strict-imprisonment sentence as confining the convicted in a strict-regime prison for a minimum of three years and maximum of fifteen years.

²⁰ *Ibid.*, Article 16 defines, *inter alia*, imprisonment sentence as confining the convicted in a regular-regime prison for a minimum of three years and maximum of fifteen years

²¹ *Ibid.*, Article 16, defines, *inter alia*, prison-term sentence as confining the convicted in a regular-regime prison for a maximum of three years.

²² Noteworthy, the categorisation of penalties stipulated in the Egyptian penal code no. 58/1937 differentiates between strict-imprisonment, imprisonment and prison-term sentences on the basis of their length and place of the confinement. Strict-imprisonment and imprisonment have the same length that is a minimum of three and maximum of fifteen years. The confinement takes place for the former in a special strict-regime prison, and in a regular-regime prison for the latter. Imprisonment and prison-term have the same place of confinement in a regular-regime prison but there is a difference in the length; imprisonment sentence is for a minimum of three and a maximum of fifteen years and the prison-term sentence has a maximum of three years.

These legal provisions by providing mitigation of sentences for honour killing may discriminate directly against women on ground of gender. They may violate women's human rights, *i.e.*, the right to life and to a fair trial. Moreover, they may breach the positive obligation undertaken by Egypt under the international human rights to respect and ensure the full enjoyment of the rights enshrined therein, the equality between men and women in the enjoyment of such rights and the obligation to provide an effective remedy for such violation.

These facts raise the question of whether honour killing is grounded by '*Sharia*' principles, to the render the implicit legal codification in compliance with the reservation made by State to the international human rights instruments.

Therefore, the compliance or contradiction between '*Shari'a*' and honour crimes stands as a key factor in respect to honour crimes. On one hand, it will reflect upon the legitimacy of the implicit legal codification of honour crimes in the light of international human rights instruments along with the reservations made by Egypt thereto, and the national legal system. On the other, it will help emphasising or refuting the social justification largely adopted by perpetrators of honour killing, as a duty that complies with '*Shari'a*'.

1.3 Aim and Objective of the Study

The aim and object of the study is to investigate the legitimacy of the implicit legal codification of honour crimes in the Egyptian penal code. To that extent, the study analyses honour killing from a human rights and '*Shari'a*' perspective. The study further, examines whether or not, a contradiction exists between human rights law and '*Shari'a*' in that regard and, accordingly examines the legal effect of the reservation made by Egypt to the human rights instruments, for exempting the State from its obligation therein.

1.4 Delimitations

Delimitations in regard to manifestations of violence toward women encompassed by the term 'crimes of honour' and to '*Shari'a*' are made as follows.

As to 'crimes of honour', the concept encompasses a variety of violence manifestation against women, including physical assaults, confinement, suicide and honour killing. The study focuses only on honour killing where the justification is attributed to a social order claimed to require interference within female private life to the end of preserving 'honour' as embodied in their sexual behaviour; actual or potential.

As to '*Shari'a*' the present study will be looking therein alongside with Islamic Jurisprudence '*Fiqh*' to examine the compliance or conflict of honour killing practice with '*Shari'a*'. However, as '*Shari'a*' and '*Fiqh*' are a well-developed and fairly sophisticated discipline of social science, the study will be limited to relevant aspects thereof in respect to research purposes. In addition, as the Egyptian legal system limits the implementation of '*Shari'a*' to the fundamental basic principles the study will be limited to commonly agreed upon basic norms within Islamic Jurists and the punishment of adultery stipulated therein will not be discussed as it is not implemented at the national level.

1.5 Methodology

The present study intends to tackle the research question using the traditional legal method complemented by the law and sociology method.

The traditional legal method is used to interpret the applicable national, international law, and '*Shari'a*' related to honour killings with a view to investigate the legitimacy of the implicit codification of the practice enshrined in the Egyptian legal system. In that regard, the study draws from existing legal sources and research at the national and international level. In addition, international law and human rights conventions relevant to the study alongside with '*Sharia*' are used. Moreover, the study draws from relevant textbooks, journals and articles, in addition to UN governmental organisations and NGOs reports. Finally, relevant press notes and newspaper reports are among the sources used by the present study.

As the research problem encompasses a social aspect, i.e., the social perception of the honour '*Sharaf*' being the motive to the crimes, the law and sociology method is used to complement the traditional legal method. For the study, the method is intended to clarify the social factors that influence the law. In that regard, the study draws from text analysis of studies conducted to this end, in addition to relevant newspaper reports.

1.6 Structure

Starting with an introductory chapter about honour crimes and background on the social aspects, the study moves on to review the UN framework to violence against women and the emerge of honour killing as a separate human rights violation in the next chapter.

The third chapter will be dedicated to examine relevant Islamic law '*Shari'a*' aspects. Fourth chapter provides an overview about the national legal system and the position of '*Shari'a*' in the hierarchy of legal sources. Moreover, it provides an overview of the State reservation to international human rights instruments.

The fifth chapter analyses honour crimes between three aspects, international human rights law, '*Shari'a*' and culture as potential grounds for the practice.

While the sixth chapter offers some recommendations to combat honour crimes through law-based strategies accompanied by awareness-raising programmes, the last chapter presents the conclusion of the study.

2 United Nations Framework to Honour Killing

When it comes to universal standards of women rights throughout the world, culture and tradition, in the name of honour, are strongly pleaded. Gender-based violence perpetrators escape justice and victims are prejudiced guilty in the name of 'honour'.

Violence directed against women is well-recognised as "a manifestation of the historically unequal relation between men and women, which have led to domination over and discrimination against women by men to the prevention of the full advancement of women".²³

Recognising the above stated fact is a key step on the way to eliminate gender-based violence. However, what the international community offers beyond recognition of this fact stands as a question.

The following paragraphs attempt to provide an answer to the above mentioned question, which encompasses reviewing the development of the UN approach to gender-based violence and marking the emerge of honour killing as a gross human rights violation.

2.1 Development on Gender- Based Violence within the UN

The UN approach to violence against women initiated as a form of violence within the family.²⁴ The first world conference on women held in Mexico in 1973 marked the change in the UN approach to women from passive objects to human rights to subjects equally entitled to equal rights and opportunities with men. The World Plan of Action²⁵ adopted by the conference came to reflect the change and set three key objects to become the basis of UN work on behalf of women; full gender equality, full participation of women in developments and increase of the participation of women in strengthening world peace. However, violence against women was not mentioned explicitly in The Word Plan of Action, although wording associated to dignity, equality and security of the family was mentioned.

²³ United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, (A/RES/48/104), para. 6.

²⁴ Jane Connors, United Nations Approaches to 'Crimes of honour', in Lunn Welchman and Sara Hossain (eds.), *'Honour' Crimes, paradigms and Violence against Women* (spinifex Press 2005).

²⁵ UN, *Report of the World Conference of the International Women Year*, (E/CONF.66/34).

The report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace held in Copenhagen²⁶ in 1980 was the first UN official document to mention explicitly domestic violence, calling for States to adopt, where appropriate, all possible measures, including legislative ones, to fairly treating the victims in criminal procedures.²⁷

However, it was not until Nairobi World Conference in 1985 that violence against women truly emerged as a serious concern on the international scene. The conference presented a culmination of ten years of action for women empowerment and the discussion, held therein about the achievement throughout the past ten years, illustrated the need for more steps to be undertaken on the way to full realisation of equality. The Nairobi Forward-Looking Strategies²⁸ recognised gender-based violence as strongly influencing the promotion and maintenance of peace and therefore the document urged the adoption of gender-sensitive legislation for the eradication of all forms of violence against women in the public as well as the private sphere. In December 1985, the GA adopted a resolution on the implementation of the Nairobi Forward-Looking Strategies,²⁹ recommending, *inter alia*, States to endorse the outcome strategies with a forward-looking result to end all forms of inequality by 2000. To this end, the document urged States to raise awareness of the Strategies' content throughout the wider spectrum of society.

As the Nairobi World Conference aimed at providing for a course of forward-looking action on the advancement of women's rights, the initiative to tackle gender-based violence continued afterwards. In November, same year, the GA adopted the first explicit resolution on domestic violence.³⁰ The resolution called on UN bodies to conduct research on domestic violence from a criminological and socio-economic perspective and called upon States to, *inter alia*, enact civil and criminal procedures that deal with instances of domestic violence and adopt preventive measures including the creation of social-awareness.

Yet, the theme of violence against women was mainly addressed as an issue that occurs within the family with the aim of achieving advancement of women and criminal justice. However, the more attention devoted by the UN to this theme, the more forms of violence directed against women revealed, and it became certain that this theme encompasses much more forms than the one within the family.

²⁶ UN, *Report of the World Conference of the United Nations Decade for Women*, (A/CONF.94/35).

²⁷ *Ibid.*, pp. 67-68.

²⁸ The Nairobi Forward Looking Strategies, *The Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, (A/CONF.116/28Rev.1), pp. 2-90.

²⁹ United Nations General Assembly, *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women*, (A/RES/40/108).

³⁰ United Nations General Assembly, *Domestic Violence*, (A/RES/40/36).

The association of violence directed against women with gender, stereotypes of women, subordination to men and inequality directed the change of the UN approach from one focusing on the advancement of women and crime control to one approaching the theme from a human rights perspective.

The Committee on the Elimination of Discrimination against Women with its General Recommendations helped filling the gap found in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³¹ in regard to gender-based violence as nothing beyond trafficking and sexual exploitation of women was mentioned. The Committee explicitly stated that gender-based violence falls within the meaning of discrimination against women thus directly linking the gender-based violence to a human rights form of violation.

The HRC, the monitoring body of the ICCPR,³² also added to violence against women as a human rights issue with its GC on Article 3 of the ICCPR on equality between women and men. The work of these two committees will be examined in detailed in the next section.

In 1993, a key conference on the way to recognition of violence against women as a central human rights issue was The Vienna World Conference on Human Rights. The outcome document, The Vienna Declaration and Programme of Action,³³ led to the adoption of the GA Declaration on Violence Against Women in 1993,³⁴ and appointment of the Special Rapporteur on 'Violence against Women, its causes and consequences', which was mandated by the CHR in 1994 and extended by the Human Rights Council in 2008.³⁵

A decade after the Nairobi World Conference, the fourth world conference on women took place in Beijing and led to the adoption of The Beijing Declaration and Platform for Action.³⁶ The declaration recognised the issue among the twelve critical areas of concern to be tackled by the international community to achieve gender equality, and linked these areas to human rights of women. Moreover, while the document adopted the same definition of violence against women as the Declaration on the Elimination of Violence Against Women (DEVAW),³⁷ it highlighted the violence

³¹ The Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981.

³² The International Covenant on Civil and Political Rights Adopted by the United Nations, adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 23 March 1976.

³³ United Nations General Assembly, *Vienna Declaration and Programme of Action*, (A/CONF.157/23).

³⁴ United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, (A/RES/48/104).

³⁵ Office of the High Commissioner on Human Rights, *Special procedures assumed by the Human Rights Council*, <<http://www2.ohchr.org/english/bodies/chr/special/themes.htm>>, visited on 6 April 2009.

³⁶ United Nations, *Report of the Fourth World Conference on Women*, (A/CONF.177/20).

³⁷ United Nations General Assembly, *supra* note 34.

directed to women in armed conflict and within minorities or indigenous group due to their extra vulnerability.

The platform for action set three strategic objects for the eradication of gender-based violence: integrated measures to prevent and eliminate violence against women, the study of the causes and consequences of violence against women, and the elimination of trafficking in women. The recommendations were for governments to condemn this form of violence, to exercise due diligence in prevention, to adopt legislative measures along side with awareness-raising and providing effective remedy for victims.

After the Beijing World Conference, the UN held two reviews of the implementation of its outcome documents. Firstly, in 2000, the GA in its twenty-third special session held a Five-year Review of the implementation of the Beijing Declaration and Platform for Action (Beijing + 5). The outcome document entitled "Women 2000: gender equality, development and peace for the twenty-first century"³⁸ shed light on forms of gender-based violence that emerge after the Beijing Conference, *inter alia*, crimes of honour.

Secondly, in 2005 at the 49th session of the Commission on the Status of Women (CSW), the UN carried out a Ten-year Review of progress of the implementation of Beijing Declaration and Platform for Action. The review had two themes; reviewing the implementation of the Beijing Platform for Action and the outcome document of the Five-year Review held in the 23rd GA special session and current challenges and forward-looking strategies for advancement of women. The CSW adopted a Declaration³⁹ as an outcome document reaffirming the Beijing Declaration and Platform for Action and the called upon UN system, intergovernmental organisations, States and NGOs to work in their full capacity to the implementation of the aforementioned documents.

2.2 Honour Killing as a Human Rights Violation

Violence against women as addressed by the UN constitutes "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life".⁴⁰ Honour killing falls within the meaning of violence against women as a form of 'Harmful Traditional Practices' that violate

³⁸ United Nations General Assembly, *Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action*, (A/RES/S-23/3).

³⁹ United Nations Economic and Social Council, Commission on the Status of Women, *Follow up to the Fourth World conference and to the special session of the General Assembly entitled "Women2000:gender equality development and peace for the twenty-first century": implementation of strategic objectives and action in the critical areas of concern and further actions and initiatives*, (E/CN.6/2005/L.1).

at its forty-ninth session as orally amended.

⁴⁰ United Nations General Assembly, *supra* note 23, Article 1.

fundamental rights and freedoms of women and impair their enjoyment of these rights.⁴¹

Today honour killing is well recognised as a human rights violation. The struggle to achieve this recognition started by bringing violence against women as a separate theme within the work of the UN and then shedding extra light on honour killing for being an extreme form of such violence. Culmination of works done by UN bodies substantiated this recognition, remarkably UN GA, UN treaty bodies and SR mechanisms.

2.2.1 Human Rights Treaty Bodies

The work of the Committee on the Elimination of Discrimination Against Women, the treaty body established in 1982 to monitor implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) contributed significantly to the recognition of gender-based violence as a human rights concern. Although no reference to violence directed to women on the ground of gender is found in CEDAW, the Committee tackled the issue and succeeded to establish a direct link between gender-based violence and discrimination against women on the ground of gender throughout its GR.

The first of these general recommendations was No. 12 entitled Violence against Women.⁴² The recommendation calls on States parties to the convention to protect women from the form of violence directed to them merely on the ground of gender in private and public life. Moreover, the committee urges States to include in their periodic reports information about the legislation in force for the protection of women and other measures to eliminate this form of violence. For issuing informed recommendations, the committee requested States to include statistical data on the incidences occurring within their jurisdiction.

On the way to linking violence against women to discrimination against women, GR No. 14 was a step further.⁴³ The recommendation expressed the committee's concern about female circumcision and other forms of traditional traditions harmful to women. Furthermore, it recommended the adoption of effective measures to eliminate the matter, *inter alia*, encouragement of politicians, activists and religious scholars as well as the media to tackle these traditions throughout the wider spectrum of society.

The most significant and substantiated GR was No. 19 as it explicitly link gender-based violence to non-discrimination norms on the ground of sex by mentioning in paragraph (6) and (7) thereof that gender-based violence is

⁴¹ UNIFEM, *supra* note 5

⁴² Committee on the Elimination of Discrimination Against Women, General Recommendation No.12, *Violence against Women*, (eighth session, 1989).

⁴³ Committee on the Elimination of Discrimination Against Women, General Recommendation No.14, *Female Circumcision*, (eighth session, 1990).

discrimination within the meaning of Article 1 of CEDAW.⁴⁴ The recommendation goes on to touch upon State obligations stating that State obligations under CEDAW apply to violence against women, although the provisions of the convention do not mention gender-based violence explicitly. Moreover, the recommendation provides for State accountability for breaches perpetrated by public authority as well as private actors.

The HRC, the monitoring body of ICCPR, has significantly added to the issue by its GC No. 28 on Article (3) of the ICCPR; equality of rights between men and women.⁴⁵ The GC provides that the obligation borne by States, under Art (3) to respect and ensure equality between men and women imposes an obligation on States to combat any form of discrimination against women. More significantly, the committee states that the non-punishment of honour killing constitutes a violation of the Covenant, in particular, violation of Art (6) right to life, Art (14) equality before the law and Art (26) freedom from discrimination. In addition, the GC explicitly stated that imposing unequal penalties for adultery violates the equality before the law.

2.2.2 United Nations General Assembly

By bringing for the first time, violence against women as a separate theme in an official UN document and then specifically addressing honour killing as an extreme form thereof, the GA has significantly contributed to highlighting honour killing as a problem which needs to be urgently tackled on both international and national level.

To that end, the resolution adopted on domestic violence was significant for being the first official document to mention explicitly domestic violence.⁴⁶ The document viewed the problem from a criminological perspective and recommended the UN system to conduct research and provides for effective measures to eliminate the violence and that States Parties introduce civil and criminal procedures to penalise instances of violence and create social-awareness.

By the time the link between gender-based violence and prohibition of discrimination on the ground of sex became well-established by the Committee on the Elimination of Discrimination Against Women a parallel development was undergoing within the CSW to draft a declaration on violence against women. The draft was successfully adopted by the GA in 1993 as the Declaration on the Elimination of Violence against women.⁴⁷ In Art. (1) the Declaration gives a definition of violence against women both

⁴⁴ Committee on the Elimination of Discrimination Against Women, General Recommendation No.19, *Violence against Women*, (11th session, 1992).

⁴⁵ Human Rights Committee, General Comment No. 28, *Equality of rights between men and women (article 3)*, (CCPR/C/21/Rev.1/Add.10).

⁴⁶ United Nations General Assembly, *supra* note 30

⁴⁷ United Nations General Assembly, *supra* note 23.

in the public and the private sphere and in Art (2) the declaration stipulates non-exhaustive forms of violence that fall within the definition of gender-based violence. The significance of the declaration comes in Art (4), which stipulated States obligations in regard to violence against women, *inter alia*, not to invoke custom, tradition or religious aspects as grounds for tolerance to such violence and to exercise due diligence to prevent, investigate and punish incidences of violence perpetrated by States or private actors. Although the declaration does not explicitly link the violence directed toward women to a human rights violation, Art (3) reaffirms that women are entitled to equal enjoyment and protection of human rights and fundamental freedoms.

In 2001, the impetus provided by The Fourth World Conference on Women held in Beijing, the twenty-third special session of the GA, entitled "women 2000:gender equality, development and peace for the twenty-first century", and the general recommendation No. 19 issued by the Committee on the Elimination of Discrimination Against Women,⁴⁸ resulted in resolution 55/66.⁴⁹ The resolution is the first devoted specifically to address crimes committed in the name of honour and the first to indentify explicitly the crimes as a human rights issue. The resolution further stipulates that States bear an obligation to exercise due diligence to prevent and punish the perpetrators and urges States to fulfil their obligations under international human rights by adopting measures to eliminate crimes committed in the name of honour. The measures to be adopted by States include enacting gender-sensitive legislation, starting social awareness-raising campaigns, preventive measures and protective ones for the victims.

In the same session where the above-mentioned resolution was adopted, another supporting instrument was the resolution 55/68 on the elimination of all form of violence against women.⁵⁰ The resolution linked the violence against women and the crimes identified in the outcome document of the twenty-third special session of the GA, *inter alia*, crimes of honour, to treaty and soft law on human rights. In addition, the resolution also requested the Secretary-General to submit a comprehensive report on the matters raised therein to the GA at its fifty-seventh session.

In the fifty-seventh session of the GA, the Secretary-General submitted two reports. The first one was the report on 'Working towards the elimination of crimes committed against women in the name of honour'⁵¹ pursuant to

⁴⁸ Committe on the Elimination of Discrimination Against Women, General Recommendation, *supra* note 44.

⁴⁹ United Nations General Assembly, *Working towards the elimination of crimes against Women Committed in the name of honour*, (A/RES/55/66).

⁵⁰ United Nations General Assembly, *Elimination of all forms of violence indentified in the outcome document of the twenty-third special session of the General Assembly, entitled 'women 2000: gender equality, development and peace for the twenty-first century'*, (A/RES/55/68).

⁵¹ United Nations General Assembly, Report of the Secretary-General, *Working towards the elimination of crimes committed against women in the name of honour*, (A/57/169).

resolution 55/66.⁵² The report provided information about the work done within the UN system in regard to crimes committed in the name of honour and the measures undertaken by State to eliminate it. The second report⁵³ came pursuant to the resolution 55/68⁵⁴ and has reported on the measures taken within the UN and States parties for the elimination of all forms of violence identified in the outcome document of the twenty-third special session of the General Assembly, entitled 'women 2000: gender equality, development and peace for the twenty-first century'.

After considering the first report, the GA has adopted the resolution 57/179 requesting the Secretary-General to submit a substantive report on the issue including an analysis of the root causes of the problem and initiatives taken by States to eliminate the occurrence of the crimes.⁵⁵ Another resolution was adopted in the same session after considering the second report was the resolution 57/181, also requesting the Secretary-General to submit a comprehensive report on the matter.⁵⁶

As per request of the GA, the Secretary-General submitted a report on Violence against Women⁵⁷ pursuant to resolution 57/179⁵⁸ and 57/181.⁵⁹ The report provided information on policy and legislative measures implemented by UN bodies and States to eliminate all forms of violence against women as well as crimes committed in the name of honour. The GA adopted the resolution 59/165 in the light of the aforementioned report, calling on States to intensify their efforts to eliminate crimes of honour, increasing social awareness campaigns and involving the media to contribute thereto, and to address effectively the complaints submitted by victims providing for institutional support. The resolution called on UN bodies and NGOs to intensify their work to tackle the root causes of the problem.

Yet, the work of the GA has not ended. The resolution 61/143, calls upon intensifying the work to eliminate all forms of violence against women, which marks that since the fifty-fifth session violence against women and crimes committed in the name of honour became a separate theme of concern on the GA agenda.⁶⁰

⁵² United Nations General Assembly, *supra* note 49.

⁵³ United Nations General Assembly, Report of the Secretary-General, *Elimination of all forms of violence identified in the outcome document of the twenty-third special session of the General Assembly, entitled 'women 2000: gender equality, development and peace for the twenty-first century'*, (A/RES/57/171).

⁵⁴ United Nations General Assembly, *supra* note 50.

⁵⁵ United Nations General Assembly, *Working towards the elimination of crimes committed against women in the name of honour*, (A/RES/57/179).

⁵⁶ United Nations General Assembly, *Elimination of all forms of violence identified in the outcome document of the twenty-third special session of the General Assembly, entitled 'women 2000: gender equality, development and peace for the twenty-first century'*, (A/RES/57/181).

⁵⁷ United Nations General Assembly, Report of the Secretary-General, *Violence against Women*, (A/59/281).

⁵⁸ United Nations General Assembly, *supra* note 55.

⁵⁹ United Nations General Assembly, *supra* note 56.

⁶⁰ United Nations General Assembly, *Intensification of efforts to eliminate all forms of violence against women*, (A/RES/61/143).

2.2.3 The Commission on Human Rights and its Successor The Human Rights Council

The United Nations Commission on Human Rights (CHR) has tackled violence against women and crimes committed in the name of honour throughout many of its resolutions and more remarkably through individual special procedures; the SR procedure.⁶¹

The SR on violence against women its causes and consequences mandated by the CHR in 1994 and extended by the Human Rights Council in 2008⁶² has expressed her concern on honour used as a ground for defence in crimes committed against women in many of her reports to the CHR. The report submitted to the fifty-eighth session in 2002 concerning violence against women in form of cultural practices indicated that honour killings are widely carried out in societies that still tolerate culture as a ground for violence against women and that such ground of defence is legally codified in penal codes. She stressed that these crimes are not grounded by religious beliefs but merely cultural ideologies.⁶³

The report submitted to the sixty-second session discussed the due diligence obligation as a mean to eliminate violence against women and suggested a potential due diligence standard to be considered by the international community.⁶⁴ In addition, the report submitted to the Human Rights Council in its fourth session discussed interrelation between culture and violence against women⁶⁵ and the report submitted to the seventh session to the Human Rights Council suggested indicators on the national level for measuring violence against women, as well as indicators for State responses.⁶⁶

⁶¹ United Nations General Assembly, Report of the Secretary-General, *supra* note 51, paras. 23-30.

⁶² Office of the High Commissioner on Human Rights, *Special procedures assumed by the Human Rights Council*, *supra* note 35.

⁶³ Economic Social and Cultural Council, Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Cultural practices in family that are violent towards women*, (E/CN.4/2002/83).

⁶⁴ Economic Social and Cultural Council, Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, The due diligence standard as a tool for the elimination of violence against women*, ((E/CN.4/2006/61).

⁶⁵ United Nations Human Rights Council, *Report of Rapporteur on violence against women, its causes and consequences, Intersection between culture and violence against women* (A/HRC/4/34).

⁶⁶ United Nations Human Rights Council, *Report of Rapporteur on violence against women, its causes and consequences, Indicators on Violence against women and state response*, (A/HRC/7/6).

2.3 Concluding Remarks

After many years of consistent work of UN bodies, honour killing is recognised as a form of discrimination against women on the ground of gender and consequently violates women rights *inter alia*, the right to life, to equality before the law and freedom from discrimination.

The committee on the Elimination of Discrimination Against Women took the initiative of linking gender-based violence and honour killing to the norm of non-discrimination by its GR No.19. To this end The HRC has contributed with its GC No. 28.

The Beijing Declaration and platform for action and the outcome document of the twenty-third special session of the GA, entitled 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century' have strongly led to the recognition of honour killing as a human rights concern.

Finally, The GA with its resolution 55/66, the first devoted explicitly to honour killing and thereafter resolutions in that regard, has richly added to the matter as well as the CHR and its successor The Human Rights Council with the SR procedure.

3 Islamic Law '*Shari'a*' Aspects in respect to Crime of Honour

"We believe in God, and the revelation given to us, and to Abraham, Ismail, Isaac, Jacob and the tribes, and that given to Moses and Jesus, and that given to (all) Prophets from their Lord: We make no difference between one and another of them: and we bow to God (in Islam)" ⁶⁷

As stated by the '*Qu'ran*', Islam presents the last expression of the divine will on earth; a culmination of the divine spiritual commands delivered to humankind through Moses, Jesus and Muhammad, the last Prophet.

Islamic '*Shari'a*' is the Islamic law, which contains sources of law and rules of interpretation alongside with rules organizing Muslim Society *i.e.*, rules governing the relation between Muslims and God, the relation between Muslims themselves and finally the relation between Muslim and the State. Islamic '*Aqidah*' contains the basics of the Islamic belief. ⁶⁸

Islamic jurisprudence '*Usul Al-Fiqh*' deals with the Islamic '*Shari'a*' and '*Aqidah*' as defined above. ⁶⁹

Islamic '*Shari'a*' and '*Usul Al-Fiqh*' is a well-developed and substantiated discipline of social science. Therefore, as explained in the introductory chapter of the present study, looking into '*Shari'a*' and '*Usul Al-Fiqh*' will be limited to the relevant aspects in regard to the research aim. The following few paragraphs are devoted to present a simple background on the relevant '*Shari'a*' aspects to the study.

3.1 Background on Relevant *Shari'a* Aspects

Literary, the word Islam in Arabic means 'surrender' and in the given context surrender to Allah (god) as the sole creator. The basic of the Islamic '*Aqidah*' is to believe in Allah as the sole creator and source of law, and to surrender to (accept) his divine will.

The Islamic approach to sovereignty is derived from the Islamic '*Aqidah*', which implies that god is the only sovereign and source of law. Therefore,

⁶⁷ *Qu'ran* II:136, translated by Abdullah Yusuf Ali, in *The Holly Qur-an, Text, Translation and Commentary* (printed by thr Murray printing company Cambrige, Massachussets, 1946), hereinafter *Qu'ran*. Noteworthy, the sentence between bracts is my explanation to respective versus of '*Qu'ran*'.

⁶⁸ Ferris K. Nesheiwat, 'Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Laws' *Penn State International Law Review*, 32:2, (2004) pp. 261-264.

⁶⁹ *Ibid.*

Muslims are given law-making and not law-creating power, *i.e.*, they may only interpret and apply the law created by god, and develop complementary laws thereto. The validity of these complementary laws depends on their compliance with the '*Shari'a*'.⁷⁰

The '*Qu'ran*', the holy book of Islam delivered by Prophet Muhammad, contains rules governing all sectors of human life *i.e.* relations between humans and God, between humans themselves and between humans and other aspects of life. '*Sunnah*' is the tradition of the Prophet, which consists of sayings of the Prophet (*Hadith*) in addition to his acts.

Muslims commonly agree that the '*Qu'ran*' is the first source of '*Shari'a*', and that '*Sunnah*' is a complementary source to the '*Qu'ran*'. Therefore, '*Sunnah*' is to explain and complement the '*Qu'ran*' but never interpreted to contradict therewith. While the '*Qu'ran*' followed by '*Sunnah*', are the very substance of '*Shari'a*', other sources of law also exist. All these sources and rules of interpretation are, *inter alia*, the subject of the Islamic jurisprudence.⁷¹

Over fourteen centuries the body of Islamic jurisprudence has well-evolved, different traditions and schools therein have emerged, and each differs in the approach to interpretation and application of the law. '*Sunni*' and '*Shi'a*' traditions are the two major ones within the evolved body of jurisprudence.

Four major schools (*Mathahb*) form the core of the '*Sunni*' tradition: Hannafi, Malki, Shafei and Hanbali. The four schools share the same general framework of '*Shari'a*' but they differ with regard to their approach to interpretation.⁷²

Islamic law '*Shari'a*' is the principal source of legislation in the Egyptian legal system. However, The Egyptian supreme constitutional court, the judicial body competent to interpret the constitution, limits the application of '*Shari'a*' to the general basic principles found in the '*Qu'ran*' and '*Sunna*' within the '*Sunni*' tradition.⁷³

⁷⁰ M.Charif Bassiouni (ed.), 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System', in *The Islamic Criminal Justice System* (Oceana Publication, Inc. 1982) p.10.

⁷¹ *Ibid.*, Introduction.

⁷² *Ibid.*

⁷³ H.C. Rudiger Wolfrum et al. (eds.), 'The Arab Republic of Egypt, Commentary', in *Constitutions of the Countries of the World* (Oceana, 2007) pp..5-6.

3.2 Aspects of Islamic Jurisprudence - Approach to Criminal Justice

The cornerstone of Muslims' society is the individual and the collective morality. Rights in Islam are categorised as 'rights of god' and 'rights of individuals'.

While a right falls into the former category when it is granted for the public morality, it falls into the latter category if it deals with the protection of individual interests.⁷⁴ The categorisation of rights, as aforementioned, finds its foundation in the way Islam views individual, *i.e.*, "The individual is viewed by Islam both a single and unique unit and also as part and parcel of a composite unit; *i.e.* mankind. The individualistic feature of Islamic Law rests in part in "the fact that Islamic law generally aims at the public good, which does not detract from its fundamental and individualistic character".⁷⁵

Crimes in Islam are set into three categories: '*Hudud*', '*Qisas*' and '*Ta'zir*'. The first category '*Hudud*' deals with offences against god's rights. The second '*Qisas*' concerns offences to individuals, *i.e.* crimes of physical assaults and murder. '*Ta'zir*', the third category is about offences against God or individual rights, but their punishment is not fixed and subject to discretion. While the punishment and prosecution of '*Hudud*' are mandatory, '*Qisas*' can be subject to civil resettlement, and the prosecution of '*Ta'zir*' depends on the public interest in prosecuting the case and the punishment thereof is discretionary.⁷⁶ Sexual crimes in '*Shari'a*' are considered '*Hudud*'.

The importance of the differentiation between crimes resides *inter alia* in the initiation of the criminal procedures and the obligation to punish. Whereas crimes violating rights of God '*Hudud*' are initiated by the State and their punishment is obligatory, '*Ta'zir*' is initiated also by the State but the punishment is discretionary, and finally crimes of '*Qisas*' can be initiated either by the State or by the victim and the punishment depends on the victim's will.⁷⁷

However, an essential aspect to pinpoint is that regardless of the crime category, people are not given the right to inflict punishment; the Islamic criminal system provides for precise criminal procedures and guarantees fair trial. The next sections provide further explanation of relevant aspects of the Islamic criminal system.

⁷⁴ Adel Omar Sherif, 'Generalities on Criminal Procedure under Islamic Shari'a', in Muhammed Abdel Haleem *et al.* (eds.), *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (I.B. Tauris 2003) pp. 4-13.

⁷⁵ M.Charif Bassiouni, *supra* note 70, p. 20.

⁷⁶ *Ibid.*, p. 24, *See also*, Adel Omar Sherif, *supra* note 74.

⁷⁷ Adel Omar Sherif, *supra* note 74.

Formaterat: Italienska
(Italien)

Ändrad fältkod

Formaterat: Italienska
(Italien)

3.2.1 Basic Principles

Human dignity is the underlying concept of Islam:

"We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation."⁷⁸

The Islamic approach to inherent dignity of human beings views man as created to be the successor of Allah on earth, to that end Allah conferred on him from His ultimate knowledge and breathed into him from His spirit:

"Behold, the Allah said to the angels: 'I am about to create man from sounding clay from mud moulded into shape; when I have fashioned him (in due proportion) and breathed into him of My spirit....'"⁷⁹

Moreover, Islam respects and accords a special status of the right to life, as it considers a person intentionally murdering another not only violating an individual right but violating the right to life of all humankind:

"[I]f anyone slew a person, unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole people: and if any one saved a life it will be as if he saved the life of the whole people...."⁸⁰

The recognition of capital punishment in Islam does not detract from the respect to right to life, as strict procedures and guarantees for fair trial and punishment are granted therein *e.g.* presumption of innocence, right to remain silent, right to be trial within a reasonable time and nullification of punishment by doubt:

"[T]ake not life, which God has made sacred, except by way of justice and law..."⁸¹

Whilst Islam respects the inherent human dignity and right to life, it strongly recommends people to respect private life and avoid suspicion and not talk about a person in his absent:

"O Ye who believe! Avoid suspicion as much (as possible), for suspicion in some cases is a sin; and spy not on each other, nor speak ill of each other behind their backs...."⁸²

Furthermore, on the protection of private life, Islam considers unfounded allegation of sexual offences a crime of defamation '*Kathf*':

⁷⁸ *Qu'ran* XVII:70.

⁷⁹ *Qu'ran* XV:28-29 Noteworthy, the sentence between brackets is my explanation to respective verses of '*Qu'ran*'.

⁸⁰ *Qu'ran* V:35.

⁸¹ *Qu'ran* VI:151.

⁸² *Qu'ran* XLIX:12.

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors..."⁸³

Additionally, men and women are equally protected before criminal law, as criminal procedures and punishment are equal between women and men and do not differ on the ground of gender.

The above mentioned basic principles of Islamic criminal justice are just a part of a whole concept. The next few paragraphs will elaborate more on the right to fair trial in 'Shari'a as the cornerstone of criminal justice.

3.2.2 Fair Trial Guarantees

The non-retroactivity of criminal offences and punishment is considered a fundamental principle '*Quaeda Usulia*' in 'Shari'a' any criminal legislation must comply therewith.⁸⁴ The fundamental norm of non-retroactivity finds its basic in many versus of the '*Qu'ran*' where Allah explains the concept of punishment in the after-life time as based on the pre-knowledge of His spiritual rules given through Apostles and Prophets:

"[n]or would We visit with our wrath until we had sent apostle(to give warning)."⁸⁵

Presumption of innocence is another fundamental principle of Islamic criminal justice that has many aspects. The first aspect is the nullification of punishment by doubt, which implies that doubt must be interpreted in favour of the accused and circumstantial evidences can be relied upon only when it is in his favour.⁸⁶ The Prophet was quoted to strongly supporting this aspect:

"Avoid condemning the Muslim to '*Hudud*' whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favour of innocence than in favour of guilt"⁸⁷

"Avoid killing Muslims as much as you can"⁸⁸

Another aspect is that the accused has the full right to defence. 'Shari'a jurists were very strict on this point, the '*Hanafi*' school of jurisprudence

⁸³ *Qu'ran* XXIV:4. Noteworthy, the sentence between brackets is my explanation to respective versus of '*Qu'ran*'.

⁸⁴ M. Cherif Bassiouni, *supra* note 70, pp. 24-32.

⁸⁵ *Qu'ran* XVII:15. Noteworthy, the sentence between brackets is my explanation to respective versus of '*Qu'ran*'.

⁸⁶ Muhammad Slim Al-Awwa 'The Basis of Islamic Penal legislation', in M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publication, Inc. 1982) pp. 143-147.

⁸⁷ M. Cherif Bassiouni, *supra* note 70, p 26.

⁸⁸ Gamil Muhammed Hussein 'Basic guarantees in the Islamic Criminal Justice System', in Muhammed Abdel Haleem *et al.* (eds.), *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (I.B. Tauris 2003) pp. 45-46.

Formaterat: Italienska
(Italien)

Ändrad fältkod

Formaterat: Italienska
(Italien)

Formaterat: Italienska
(Italien)

Ändrad fältkod

Formaterat: Italienska
(Italien)

does not allow inflicting penalties for '*Hudud*' crimes on persons with inability to speak. Their rationale is that the inability to speak impairs the person's ability to defend himself and renders him in an unequal position with other persons.⁸⁹

The right to defence further grants the accused the right to be informed of the offence charged to him. In addition, the accused has the right to remain silent and not to testify against oneself. To this end, any confession under duress or coercion is to be declared null and void in trial.⁹⁰

Lastly to mention on aspects of fair trial guarantees, both the right to trial within a reasonable time and the right to legal aid are accepted in '*Sharia*'. While the right to trial within a reasonable time finds its ground in justice, the foundation of Islam, the right to legal aid is not explicitly mentioned in '*Shari'a*.' However, since it does not conflict with basic principles of '*Shari'a*', one can say that it complies with the underlying principle of Islam and that is again, Justice:⁹¹

"God commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion..."⁹²

A final aspect to mark; rules of evidence provided in each category of crimes and due process of law must be strictly followed. If doubt arises at any stage of the trial and thereafter, the accused must be released and a right to compensation must be granted.⁹³

Sexual crimes in '*Shari'a*' fall within the '*Hudud*' category of crimes. Although their prosecution is mandatory, very strict procedures, and exceptional burden of proof are stipulated. For instance, requiring four witnesses as a threshold for substantiating the allegation of a sexual crime while it is two witnesses for other crimes, and the failure to meet such exceptional burden after alleging the charge constitutes a crime of defamation '*Qathf*'.⁹⁴ The next section provides a close examination of Islamic jurisprudence approach to sexual crimes and strict criminal procedures stipulated therein.

⁸⁹ Awad M. Awad, 'The Right of The Accused under Islamic Criminal Procedure', in M.Charif Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publication, Inc. 1982) pp. 91-107.

⁹⁰ *Ibid.*

⁹¹ Gamil Muhammed Hussein, *supra* note 88, pp. 45-51.

⁹² *Qu'ran* XVI:90

⁹³ Gamil Muhammed Hussein, *supra* note 89.

⁹⁴ Ferris K. Nesheiwat, *supra* note 68, pp. 265-266.

3.3 Islamic Jurisprudence Approach to Sexual Crimes

As explained above, Islam is a religion that governs all aspect of life. The Islamic society is considered an entity regulated by common morality and the individual is a unit therein. Morals of society are to be respected by individuals and the State bears the duty to respect and enforce these morals.

Sexual crimes are considered violating the common morality of the society, thus it falls within '*Hudud*' category of crimes:

"Nor come nigh to adultery: For it is a shameful (deed) and an evil, opening the road (to other evils)."⁹⁵

The punishment of the crime depends on the marital status of the accused; a married person committing a sexual crime will receive a more severe punishment than an unmarried one. Moreover, due to the high respect that Islam accords to family, the basic of the Muslim society, the punishment to crimes committed by a married person is obligatory as stipulated in '*Qu'ran*', while the punishment of unmarried perpetrators can be stipulated by a year-term of exile.

A close examination of the precise and strict procedures for the indictment of sexual crimes implies that sexual crimes are to be punished when they have a potential of violating the common morality of society. The negative form of the last stated sentence implies that conduct constituting the material element of the crime is not to be punished when it happens on the private individual level. More elaboration upon this statement will be done in the fifth chapter of the study after reviewing the procedures regulating adultery indictment below.

3.3.1 Adultery

Adultery '*Zenah*' is one of the sexual crimes in '*Shari'a*', it is understood to mean the conduct of sexual intercourse outside marriage relationship.

The punishment of the crime differs between married and single perpetrators: while death penalty is stipulated for a married perpetrator, stripes penalty is stipulated for a single perpetrator. In other words, both partner committing adultery are considered perpetrators and the punishments may vary between death penalty and strips penalty on ground of their marital status. While the punishment of adultery in case of married status is decreed by '*Shari'a*' and while the judge is not granted power to replace the punishment thereof, '*Sunnah*' provides for a substitution of the decreed punishment in '*Qu'ran*', which is stripes punishment, to a one-year

⁹⁵ *Qu'ran* XVII: 32. Noteworthy, the sentence between brackets is my explanation to respective versus of '*Qu'ran*'.

term of exile.⁹⁶ The reason behind a more severe punishment is the protection of the concept of family and its values.

Establishment of adultery indictment is subject to severe procedures of proof and evidence; while generally in '*Shari'a*' proving a crime by testimony requires two witnesses. In regard to adultery four witnesses are required. Moreover, more strict requirements of the testimony processes are stipulated and the failure to meet the burden of proof after initiating the allegation constitutes a defamation criminal offence '*Qathf*'. The defamation offence, in the given context, is established to protect the individual right to privacy against false claims and to people not to interfere therein unless the individual himself interferes within the public morality. Thus, interfering in this case would be in favour of common values of society.

3.3.1.1 Exceptional Burden of Proof

As to adultery, Islamic '*Shari'a*' provides mainly for two forms of evidence to substantiate the reasoning of criminal offence ruling: testimony '*Shahada*' and confession '*Iqrar*'. A third form exclusive to adultery is religious oath '*Al-Yamen*', which takes the form of '*Li'an*' ordinance, by which the punishment of crime is left to Allah in the after-life time.

3.3.1.1.1 Testimony

It is commonly agreed that adultery has an exceptional burden of proof. While the threshold for substantiating the criminal offence for '*Hudud*' the category of crimes that deals with offences against God's rights, and '*Qisas*' the category concerns offences to individuals, is to provide two witnesses, adultery requires four.

The exceptional burden of proof in regard to adultery stipulates for four witnesses who have seen the conduct constituting the *mens rea* of the crime, which is the sexual intercourse. Besides requiring an extra-ordinary burden of proof, '*Shari'a*' sets more specific conditions for testimony than in other crimes.

Generally, requirements for accepting the testimony before a court are that the witness must be mature, sane, and capable to have perceived the incident visually and audibly.⁹⁷ Witnesses in adultery (the four of them) must present an identical testimony and must state that they have seen the sexual intercourse (*mens rea*) and describe its details. A testimony without describing the conduct constituting the *mens rea* of the crime should be declared void. The strict aforementioned requirements aim at proving the occurrence of the crime beyond doubt.⁹⁸

⁹⁶ Adel Omar Sherif, *supra* note 74, pp. 37-40.

⁹⁷ Ma'amoun M. Slama, 'General principles of Criminal Evidence in Islamic Jurisprudence', in M.Charif Bassiouni (ed.), *The Islamic Criminal Justice System* (Oceana Publication, Inc. 1982) pp. 115-121

⁹⁸ Gamil Muhammed Hussein, *supra* note 88, pp.37-38.

Should some of the testimonies meet the requirements set above and some not, all the witnesses are to be charged with defamation offence.

3.3.1.1.2 Confession

Confession is the admission of the accused of the commitment of the crime charged to him. 'Shari'a sets a legal criteria for confession, which must be fulfilled to legally substantiate the sentence of adultery.

The first condition for the judge to accept the confession is for the confessor to be of age, mature and sane. Secondly, the confession must be grounded by the free will of the confessor, which implies that any confession made under coercion or duress, or taken due to misleading, is to be declared void by the judge. Thirdly, the confession must be repeated as much as witnesses are required to prove the charge, *i.e.*, in regard to adultery to be repeated four times, to guarantee that the confessor is determined about the confession he is making. Finally, the confession must be made during a trial process before the judge and the latter has the right to evaluate the confession in the light of other evidential presumptions. Moreover, the confessor has the right to withdraw his confession at any stage of the trial and thereafter or during the execution of the sentence.⁹⁹

3.3.1.1.3 'Li'an'

If the accuser made no confession of committing the crime or if four witnesses were not available, a third mode of evidence is possible that is 'Li'an' ordinance.

'Li'an' ordinance is an exceptional mode of proof provided only in case of adultery. The rationale behind is to fill the gap when a partner in a marriage relationship is the sole witness of the crime which implies that the fulfilment of the strict conditions explained above is impossible and that he/she might be subject to defamation 'Qathf' punishment in case of initiating the claim. Thus, 'Li'an' is a tool to balance the right of a partner to redress his right claimed to be violated in case of adultery and the right to the other to be protected against falsely accusation.¹⁰⁰

Since 'Li'an' is an exceptional mode of proof, the punishment that follows substantiating the crime thereby is not the regular one. Actually, there is no punishment in the common understandable meaning of the word; the power granted to the judge under the given mode of proof is to dissolve the marriage, leaving the judgement to Allah in the after-life.¹⁰¹

⁹⁹ Ma'amoun M. Slama, *supra* note 97.

¹⁰⁰ Muhammed Salim Al-Awwa, *supra* note 86, pp. 137-138.

¹⁰¹ Ferris K. Nesheiwat, *supra* note 68.

Formaterat: Italienska
(Italien)

Ändrad fältkod

Formaterat: Italienska
(Italien)

Formaterat: Italienska
(Italien)

Ändrad fältkod

Formaterat: Italienska
(Italien)

The given mode of proof finds its ground in the Islamic believes in life after death and that Allah has the unlimited knowledge beyond human.

Furthermore, it implies that the inability to prove the crime pursuant to requirement stipulated in '*Shari'a*' leads to the non-punishment of the alleged crime.

3.3.2 '*Qathf*'

Those who claim the occurrence of adultery and fail to meet the burden of proof are to be punished for defamation '*Qathf*'. The crime and punishment are explicitly stated in the '*Qu'ran*':

"Those who launch a charge against chaste women, and produce not four witness, flog them with eighty stripes, and reject their evidence ever after: for such men are wicked transgressors."¹⁰²

Two aspects to be noted in regard to '*Qathf*'. The first is that the punishment of defamation include the witnesses to the crime, and the second is that the punishment is the same as the one provided for adultery in case of non-married perpetrator, in addition to the refusal of their testimony ever after as they are considered untrustworthy.¹⁰³

'*Sharia*' jurists commonly explain the severe punishment for defamation stipulated above to further rendering the process of accusation of adultery more strict and full of guarantees to private life.

3.4 Concluding Remarks

Balancing respect to private life and respect to public morality is the underlying principle of the '*Shari'a*' approach to criminalise sexual conduct outside the marriage relationship. Therefore, '*Shari'a*' provides for very strict criminal procedures for indictment of adultery and an exceptional burden of proof to meet, which render the substantiation of the crime very difficult.

A double-faced rationale is behind the requirements of: four witnesses to see the conduct constituting the *mens rea* of the crime, detailed description thereof and compliance between the four testimonies. One face of the rationale is to strongly encourage individuals not to interfere with other's private life unless the conduct is at a point rendering it not public. The other is to ensure that the interference within individual private life would not be made unless the public morality is endangered.

¹⁰² Qu'ran 24:4.

¹⁰³ Gamil Muhammed Hussein, *supra* note 88, pp. 37-39.

Moreover, charging the claimer of adultery - in case of failure to fulfil the burden of proof, along with the witnesses - serves further to achieve the balance between privacy and public morality.

A final important remark to be made is that '*Shari'a*' provides for sophisticated criminal procedures for indictment and judgement in adultery crimes, which render the illegitimacy of individual's executing the punishment beyond doubt.

4 National Legal Framework

Partially in the northern-eastern part of Africa and partially in the southern-western part of Asia, the Arabic Republic of Egypt stands with a population estimated over 80 million as to 2009.¹⁰⁴ Islam is the religion of the State and a majority of 'Sunni' Muslims, alongside with a significant minority of Coptic Christians, constitute the people of the State.

The national legal system is based on a combination between '*Shari'a*' and civil law. However, when it comes to '*Shari'a*', the system adopts it as a principal source of legislation but limits its scope of application to the absolute norms that enjoy the consensus of Islamic jurists. The constitutional law is the supreme law of the State and International treaties, after ratification, enjoy a special status being ranked under the Constitution and above national law.

More elaboration on the national legal system in terms of illustration of the legal sources' hierarchy and the status of '*Shari'a*' and international norms therein, and an examination the two legal provisions implicitly codifying honour killing in theory and practice, are to be done next.

4.1 Background on the Legal System

The Egyptian Constitution stipulates as follows in article (2):

"Islam is the Religion of the State and Arabic its official language. Islamic law (*Sharia*) is the principal source of legislation."¹⁰⁵

Although '*Shari'a*' is enshrined as the principal source of law, the Egyptian legal system stands as a mix between '*Shari'a*' and civil law. The introduction of the mixed system started when a judicial reform, marking the independence from the Ottoman Empire in regard to legal and administrative affairs, took place in late eighteenth century.

Whilst the judicial reform, a penal code, based on the French criminal and procedures law, was proclaimed in 1883. The code explicitly conditioned the legitimacy of its provision by the compliance with '*Shari'a*' in article (1) thereof.¹⁰⁶ The 1883 law was replaced by the current penal code in 1937.¹⁰⁷

¹⁰⁴ USA Central Agency Intelligence, World Factbook, Egypt, <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> Visited on 21 April 2007.

¹⁰⁵ The Constitution of the Arab Republic of Egypt, 1971, (as amended in 2007), Article (2).

¹⁰⁶ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press, 2005) pp. 133-141.

¹⁰⁷ Egyptian Penal Code, *supra* note 14.

A similar provision with regard to compliance with 'Shari'a' is stipulated in Article (7):¹⁰⁸

"The present code does not, in any way, infringe rights provided for individuals in Islamic 'Shari'a'."

Whereas, the constitution explicitly provides for 'Shari'a' as a principal source of law, it remains silent as to which schools therein should be applied. Bearing in mind the diversity of the Islamic jurisprudence, traditions, schools and sub-schools, a competent body to interpret the Constitution had to clarify this legal dilemma.

The Egyptian Supreme Constitutional Court, the judicial body competent to interpret the Constitution, clarified the dilemma in its ruling in 18 May 1996 by limiting the application of 'Shari'a' to the basic legal principles found in 'Qu'ran' and 'Sunnah', stating that the Court shall only overturn legislation when it contradicts the fundamental principles of 'Shari'a'.¹⁰⁹

By virtue of Article (151) of the Constitution, the international conventions are deemed national laws:

"The president of the republic shall conclude international treaties and forward them to people's assembly with the necessary explanations. The treaties shall have the force of law after conclusion, ratification and publication in accordance with the established procedure. However, peace treaties, alliance pacts, commercial and maritime and all the treaties involving modifications in the national territory or affecting the rights of sovereignty, or imposing charges on the State treasury which are not provided for in the budget must be approved by the People's assembly."¹¹⁰

Nevertheless, they enjoy a special status; they rank after the Constitution, but they are deemed higher than national laws. Therefore, the latter must comply with human rights and the Supreme Constitutional Court has the competence of reviewing in case of conflict.¹¹¹ Having accorded the legal status of national legislation to international conventions presumes that the latter must be in compliance with 'Shari'a' as the principal source of legislation and in case of conflict 'Shari'a' prevails.

Therefore, in the light of the above provided background on the Egyptian legal system, one can state that speaking about a hierarchy in the legal system, ultimately means fundamental 'Shari'a' principles on top of the legal hierarchy, and that any contradictory legislation including international conventions shall be overturned by the Supreme Constitutional Court.

¹⁰⁸ Egyptian Penal Code, *supra* note 14, Article (7). Noteworthy, the text is unofficial translation from the original Arabic text to English by the author.

¹⁰⁹ The Arab Republic of Egypt, Commentary, *Supra* note 73.

¹¹⁰ H.C Rudiger Wolfrum *et al.* (eds.) 'The Arab Republic of Egypt, Constitution', in *Constitutions of the countries of the World* (Oceana, 2007).

¹¹¹ Egyptian National Council for Human Rights, *supra* note 10.

4.2 Legal Codification of Honour Killing

Unlike other Arabic countries *e.g.* Jordan, Lebanon and Syria, honour killing is not explicitly codified in the Egyptian legislation.

Nevertheless, Article (17) alongside with Article (263) of the Penal Code, are widely used to mitigate the sentences in crimes committed in the name of honour. Whereas, Article (263) of the Penal Code limits the beneficiaries of sentence mitigation only to the husband, Article (17) provides for a general principal of mitigation conferring discretionary power to the judiciary to examine evidential presumptions and mitigate the sentence when they deem the motive behind deserves compassion.

The above mentioned two articles by implicitly providing for mitigation, cause a controversial question as to whether or not the Egyptian Legal system recognises honour killing through the law. The next close examination of the two articles aims at answering the question.

4.2.1 Article 273 Penal Code

Noteworthy, the categorisation of penalties stipulated in the Egyptian penal code differs between death penalty, life-imprisonment, strict-imprisonment, imprisonment and prison-term.

Article 14 of the penal code defines *inter alia* life-imprisonment as confining the convicted in a strict-regime prison for lifetime and strict-imprisonment sentence as confining the convicted in a strict-regime prison for a minimum of three years and maximum of fifteen years. Article 16 thereof defines *inter alia*, imprisonment sentence as confining the convicted in a regular-regime prison for a minimum of three years and maximum of fifteen years and prison-term sentence as confining the convicted in a regular-regime prison for a maximum of three years

The difference between strict-imprisonment, imprisonment and prison-term sentences is based on their length and place of the confinement. While strict-imprisonment and imprisonment have the same length that is a minimum of three and maximum of fifteen years, the confinement takes place for the former in a special strict-regime prison and in a regular-regime prison for the latter. Imprisonment and prison-term have the same place of confinement in a regular-regime prison but differ in the length. Imprisonment sentence is for a minimum of three and maximum of fifteen years whereas the prison-term sentence has maximum of three years.

Having explained the sentences provided in the penal code and differences therein, we shall proceed to discuss Article (237). The article reads:

"Whoever surprises his wife in the act of committing adultery *flagrante delicto*, and immediately kills her and her partner shall be punished with an

imprisonment sentence instead of the penalties set out in Articles 234 and 236."¹¹²

Articles (234) and (236), which the above stated article provides for substitution of the sentences therein by imprisonment-sentence provide *inter alia* for a penalty that varies between three and seven years of imprisonment sentence for manslaughter and for heavier sentences for unpremeditated murder.

Therefore, Article (237) is understood to confer a mitigation of sentence in the given case to a maximum of three years imprisonment instead of a minimum of three years and maximum of seven.

In the giving article, limiting the beneficiaries entitled for sentence reduction to the husband was the ground for the claim made by the State and other observers that the article is more to passion crimes than honour crimes. The claim is substantiated by the fact that the beneficiaries of sentence reduction in case of honour killing usually encompass other male relatives, *e.g.* the father, male brothers and cousins¹¹³

'Passion' opposing 'honour' as a motive for the crime is understood as private relationship between a man and women committing themselves to a marriage relationship, opposing a collective relationship involve a female and males (members of the family) defending their public image in the surrounding society. In other words, while 'passion' in the given context has two key players; male and female in a marriage relationship, 'honour' has three key players; female, male relatives of her family, and society, as the later embodies the 'honour' of males in the female. Consequently, while 'passion' is the motive when the sexual misbehaviour constitutes an assault to the feeling of partners sexually engaged in marriage relationship (husband or wife), 'honour' is the motive when the assault is directed to the public image of males.¹¹⁴

Noteworthy, the concept of passion as stated above is objective meaning that gender is not a factor therein. In other words, the feeling that the adultery crime constitutes an assault to the concept of passion encompasses both partners in the marriage relationship (husband and wife).

However, due to the fact that the Egyptian legal system does not provide for honour as a general ground of defence, there is no interpretation of honour killing. Nevertheless legal commentators explain the rationale behind granting such mitigation is:

"The legislature has taken into account the psychological state of mind that hits the husband whose honour had been violated, the most precious thing

¹¹² Egyptian Penal Code, *supra* note 14, Article (273).

¹¹³ Azza Sulaiman, 'Crimes of honour and the law', in Lunn Welchman and Sara Hossain (eds.), *'Honour' Crimes, paradigms and Violence against Women* (Spinifex Press 2005). pp 142-146.

¹¹⁴ Lama Abu-Odeh, *supra* note 9, pp. 153-156.

Formaterat: Spanska
(Argentina)

Ändrad fältkod

Formaterat: Spanska
(Argentina)

that he possesses. At the moment that he catches his wife committing adultery he will no doubt lose his reason and kill his wife and her partner."¹¹⁵

The above commentary explicitly states honour as the motive behind mitigation of sentence for the husband marking the social background by stating honour as "the most precious thing that he (the husband) possesses."

Therefore, marking the fact that the legislator provides the mitigation of sentence only for the husband (male) and not for the wife (female) alongside with the above-mentioned commentary stating honour as the reason for mitigation, one may conclude that the given provision is about crime of honour not crimes of passion.

Article 17 of the penal code further, emphasises that 'honour' as a ground for sentence mitigation is recognised.

4.2.2 Article 17 Penal Code

Article 17 confers on judiciary discretionary powers to mitigate the sentence when the motive of the crimes is deemed emotional and the examination of the circumstances persuades the judge to entitle the perpetrator for sentence reduction. The Article reads:

"In respect to provisions of felonies, the court may substitute for heavy penalties that of lenient ones as stipulated hereafter:
For death penalty that of life-imprisonment or strict-imprisonment sentence
For life-imprisonment sentence, that of strict-imprisonment or imprisonment sentence
For strict-imprisonment sentence, that of imprisonment or prison-term sentence of not less than six-month
For imprisonment sentence, that of prison-term sentence of not less than three-months."¹¹⁶

The provision gives the judge a broad authority to interpret the circumstances and motive of the crimes, yet in the light of evidential presumptions, but still the interpretation is done from a factual standpoint. Bearing in mind that females were not to be appointed as judges until a few years ago, and yet no female judges are appointed in criminal courts, which ultimately means that the judiciary refers to male judges.

Granting the authority to interpret the motive of the crime and to confer mitigation of sentence to a judiciary composed of male judges reflect on the legislature implicit acceptance of honour as a ground to sentence reduction. As judges who are part of a society that portrays the 'honour' of male as 'embodied' in female and justifies violent acts toward females when committed for the preservation of male public image, ultimately implies

¹¹⁵ Lama Abu-Odeh , *supra* note 9, quoting Abdul-Hamid Shawarbi, *on aggregating and Extenuating Circumstances* (Dar al-Matbu'at al-Jami'yya, 1986) p. 36.

¹¹⁶ Egyptian Penal Code, *supra* note 14, Article (17). Noteworthy, the text is an unofficial translation from the original Arabic text by the author.

their tolerance and application of honour as a ground to mitigate the sentence.

The tolerance of honour as a motive entitles sentence mitigation is further emphasised by the reasoning given by judges in court rulings as it illustrates acceptance of 'honour' as a ground for defence in their interpretation of the crime circumstances. Awad Al-Morr in the study prepared by the Centre for Egyptian Women's Legal Assistance reviews some of the court rulings concerning honour killing, we shall quote the reasoning of a court ruling whereby the perpetrator enjoyed a sentence reduction. Noteworthy, the perpetrator of the crime murdered his female cousin because she refused to marry him and fled the village where she lived to marry a man who is not one of her relative. The victim's behaviour of refusing her cousin and fleeing the village to marry a man against the will of her family considered by the surrounding society a 'shame' defiling the honour of her family, consequently the perpetrator murdered her to defend the family's public image. Significantly important to notice in the given case, the brother of the victim accepted the murder and pardoned the perpetrator before the court.

The court reasoning reads:

"Although the marriage of the victim was lawful (according to '*Shari'a*'), the fact that she fled with her husband to Cairo and accompanied him there far from her family and clan and the place where she live, went against the traditions of the rural areas, and without doubt brought shame to her family and left them socially reviled. The court taking into consideration, the fact that the victim's brother pardoned the accused in his statements in the record of the final session and thus applies the text of Article 17 of the Penal Code and sentence him to heavy Labour for seven years, along with confiscation of the crime weapon".¹¹⁷

The quoted reasoning reflects on the social background of the court. Therein, the court recognises and accepts "the traditions in rural areas" as un-codified social code and deems the victim marriage against her family's will a violation "without doubt" which shamed her family and thus deserves punishment.

Therefore, the use of Article 17 in practice further emphasises the implicit acceptance of honour as a ground for mitigating the sentence in the Egyptian legal system.

¹¹⁷ Awad Al-Morr, 'Crimes of honour and Court rulings', in Lunn Welchman and Sara Hossain (eds.), '*Honour' Crimes, paradigms and Violence against Women* (Spinifex Press 2005), p. 150.

4.3 State Reservation to Human Rights Instruments

Given that the national legal system undoubtedly accords international conventions a legal status that ranks below '*Shari'a*', the compliance between the former and the latter is necessary. Otherwise, when conflict exists the '*shari'a*' would prevail. Accordingly, when ratifying human rights instruments the State has to ensure the non-conflict between the two.

To that end, upon ratifying the ICCPR the State lodged a declaration that conditions the application of rights and obligations enshrined therein by compliance with Islamic '*Shari'a*';

"Taking into consideration the provisions of the Islamic *Shari'a* and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."

As for the CEDAW, the State lodged a reservation to Art (2), (16) and (29). Amongst the reservations, the most relevant to the purpose of the study is the reservation to Article (2) whereby the reservation conditions its application by the compliance with Islamic '*Shari'a*':

"The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic *Shari'a*."

The definition of reservation is stipulated in Article (2) of The Vienna Convention on the Law of Treaties (hereafter the Vienna Convention):¹¹⁸

"Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State."

In that regard, the reservation is understood to be a statement enabling a State to become a party to the convention despite the expressed unwillingness to comply with minor provision of the convention. Therefore, reservation as a concept is permissible; conditions for permissibility are stipulated though.

The Vienna convention stipulates two conditions for a reservation to become binding or opposable; the first is the permissibility in principle and the other is the acceptance by another State party to the respective

¹¹⁸ The Vienna Convention on the Law of Treaties, entry into force on 25 January 1980.

convention.¹¹⁹ Article (19) of the Vienna convention addresses the permissibility of reservation:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

Whereas the first two paragraphs of the article provoked no difficulties to the extent of their application, the third provoked a doctrinal debate between the so-called "opposability school" and "permissibility school". In very general terms, the "opposability school" conditions the validity of reservation merely by the acceptance of reservation by other State parties. The "permissibility school" argues for an opposite thesis, i.e., the permissibility of reservation must be determined, independently of State's acceptance, in the light of its compatibility to the core and object of the convention. However, the Vienna convention establishes no procedure for authoritative determination of the reservation's nature and remains silent in regard to the effect of incompatible reservation.¹²⁰

As to human rights monitoring bodies, the HRC in its GC No 24¹²¹ addressed the issue of reservations. The committee stated that despite the silence of the ICCP in that regards, the issue is governed by general international law and Vienna Convention, establishing the authority to the compatibility of the reservation to fall within its competence:

"The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance..."¹²²

"It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant..."¹²³

Moreover, the committee explicitly stipulated that the effect of incompatible reservation is that the treaty shall be operative for the reserving party without the benefit of the reservation:

¹¹⁹ Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers 2009) pp. 76-77.

¹²⁰ *Ibid.*, pp. 81-83.

¹²¹ Human Rights Committee, General Comment No. 24(52), *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.* (CCPR/C/21/Rev.1/Add.6).

¹²² *Ibid.*, para 6.

¹²³ *Ibid.*, para 16.

"...The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."¹²⁴

A parallel trend to the HRC was undertaken by CEDAW, as the latter attempted by all appropriate means to address the matter of reservations in the examination of States' periodic reports and through recommendations and statements.

In its GR No 4, the committee suggested *inter alia* suggested to all States parties to reconsider their reservation in case they fall incompatible with the core object and purpose of the convention. In addition, the committee in its statement on reservations adopted by the committee as its contribution to the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights held the view that Article 2 is central to the objects and purpose of the convention.¹²⁵

Moreover, the committee addressed the matter as part of examination of States' periodic reports. As for Egypt, in the concluding observations adopted on the consideration of the third and combined fourth and fifth periodic reports, the committee urged the State:

"...to expedite the steps necessary for the withdrawal of its reservations and in that regard draws its attention to the committee's statement on reservation in its report on its nineteenth session 8 and , in particular, its view that articles 2 and 16 are central to the object and purpose of the convention and that, in accordance with article 28, paragraph 2, they should be withdrawn"¹²⁶

However, remarkably to notice that although CEDAW was very active on the issue of reservations to the covenant, the HRC went further in that regards in GC No 24 by explicitly establishing its competence to determine the compatibility criterion.

Reviewing the reservation made by Egypt to ICCPR, and CEDAW in the light of the above provided overview, one can conclude that the reservation lodged by Egypt to CEDAW is made incompatible to the core object and purpose of the convention and therefore the State shall not benefit thereof. Moreover, the State declaration to the ICCPR in connection to discrimination norms and fundamental human rights stipulated therein is also made incompatible.

¹²⁴ *Ibid.*,

¹²⁵ Ekaterina Yahyaoui Krivenko, *supra* note 119, pp 204-205.

¹²⁶ Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt. 02/02/2001. (A/56/38, para. 327).*

Formaterat: Svenska (Sverige)

Ändrad fältkod

Formaterat: Svenska (Sverige)

4.4 Concluding Remarks

The present chapter provided an overview on the Egyptian legal system: the position of '*Shari'a*' in the hierarchy of legal sources on one hand and the codification of honour killing on the other.

'*Shari'a*' is enshrined in the Constitution as the principal source of legislation and is understood, in the light of the Supreme Constitutional Court rulings, as the basic fundamental norms acknowledged by the Islamic jurisprudence. However, having recognised '*Shari'a*' as a principal source of law, ultimately means that the Supreme Constitutional Court shall overturned any legislation found in contradiction with fundamental '*Shari'a*' norms. To avoid the conflict between '*Shari'a*' and international Conventions, given that the latter ranks below the former, the State upon the ratification of human rights instruments lodged a reservation to the extent that conditions its application by compliance with '*Shari'a*'.

As to honour killing codification, limiting the beneficiaries entitled for sentence reduction to the husband in article 17, and the non-explicit stipulation of honour as a ground for reduction substantiated a claim made the State that Egypt that, unlike other Arabic Countries, the Egyptian legal code does not provide for 'honour' as ground for defence. Thus, honour killing is not codified through legislation. Whereas, at first glance, this statement might sound correct, but a close examination of Article (273) and (17) in theory and practice shows that the Egyptian penal code indeed tolerates honour as a motive for killing and confers mitigation of sentence upon perpetrators, implicitly though.

The national legal system, by conferring to the international conventions a legal status that ranks below '*Shari'a*', renders the compliance between the former and the latter necessary. Thus, the State when ratifying human rights instruments has to ensure the harmony between the two. To that end, the State lodged a declaration to the ICCPR and ICESCR, and a reservation to CEDAW to the extent of conditioning the application of its provisions by the compliance with '*Shari'a*'. However, whereas Vienna convention remains silent concerning the effect of reservation made incompatible to the core object and purpose of the convention, the practice developed by HRC is in favour to deem the convention operative regardless of the reservation. In this connection, CEDAW considered article 2 is central to the core object and purpose of the convention and urged States to withdraw any reservation thereto.

Therefore, based on the preceding short overview of the theoretical debate and practice developed in the context of HRC and CEDAW, one can conclude that the given reservation lodged by Egypt to CEDAW is made incompatible to the core object and purpose of the convention and therefore the State shall not benefit thereof. Moreover, the State declaration to the ICCPR and ICESCR in connection to

discrimination norms and fundamental human rights stipulated therein are also made incompatible.

5 Honour Killing between Islam, Culture and Human Rights

Besides providing a review of the UN framework to honour killing, the preceding chapters provided an examination of the Islamic '*Shari'a*' approach to criminal justice, alongside with an overview of the national legal system and the provisions in question.

Having done that brings us back to the main research question; does honour killing comply with '*Sharia*' principles and therefore render the implicit legal codification in the national system in compliance with the State constitution and the reservation made by State to the international human rights instruments.

Reviewing UN framework to honour killing illustrates the contradiction between honour-killing practice and the core concept of human rights. It further emphasises that the crime is deemed a direct human right violation to norms of non-discrimination that fall within the meaning of Article (1) of CEDAW, as well as other human rights *inter alia* the right to life and to fair trial guarantees. Bearing that in mind leave us before two potentials to justify the practice '*Sharia*' and Culture. The following section is devoted to address these potential grounds.

To that end, the next paragraphs will provide an examination of honour killing in the light of the Islamic '*Sharia*' approach to criminal justice, alongside with an examination of the underlying concepts of both human rights and '*Sharia*' with the purpose of determining whether a compliance or contradiction exists between the two. After these examinations, we would be one-step away from answering the research question and that is the examination of honour killing in the context of male-dominant societies.

Finally, in the light of the outcome of the above-mentioned examinations we will be addressing State obligation under International Law.

5.1 '*Sharia*' and Honour Killing

As a principal '*Shari'a*' criminalises sexual conduct outside the marriage relationship. The rationale, as explained in the third chapter of the study, is that '*Shari'a*' recognises two concepts; the collective morality of Muslim society and the individual private life. Reconciling the two concepts entails that society bears a duty to respect the individual private life, and the later bears a duty to respect the common morality of the society. That was the reason why sexual crimes are characterised by exceptionally strict

procedures of indictment, *i.e.*, to protect the private life unless the latter violates morals codified by '*Shari'a*' in public.

In other words, while '*Shari'ia*' prohibits sexual conduct undertaken outside the marriage relationship, it does not punish it unless it was taken out to the public. The rationale again is to protect the individual private life from State and public interference.

The close observance of the burden of proof in case of adultery further emphasises the reconciliation between the concepts of public morality together with private life. According to this burden, four persons witnessed the occurrence of the *mens rea* of the crime, which is the sexual intercourse visually and audibly, are required to substantiate the criminal offence. Given that four persons have witnessed the sexual conduct, would lead to the conclusion that such conduct is not anymore limited to private life. In contrast, the sexual conduct must have had interfered with the collective morality of society and violated the individual's duty to respect such morality.

Significantly in favour of the protection of the individual private life, comes the extraordinary requirement of four witnesses to substantiate the offence.. Whereas generally two witnesses are required to prove the occurrence of the *actus rea* of the crime, in regard to sexual offences the double is required, *i.e.*, four witnesses.

To further emphasise the protection of private life, '*Shari'a*' codifies '*Qathf*' as criminal offence that punishes the individual initiator of the adultery offence together with the witnesses in case they fail to meet the burden of proof set out for adultery offence. The codification of such criminal offence once more marks the reciprocity of respect between the common morality and the society on one hand, and the individual on the other.

Crucial to highlight, the exceptionally strict procedures regulating adultery as a criminal offence and the fair trial guarantees stipulated in Islamic criminal justice emphasises that the trial and punishment to such offences is to be carried out by the competent authority in the State with full respect to fair trial guarantees.

Given the guarantees stipulated by *shari'a* to the end of a fair trial, explained in the third chapter of the study, one can say that individual is never allowed to carry out the punishment, and if occurred the State bears a duty to punish.

In addition, bearing in mind the high respect that Islam pays to the collective morality, the concept of allowing the individual to carry out punishment contradictory to procedures stipulated therein would *per se* violates the collective morality of the society, *inter alia*, justice.

The above reflections on how '*Shari'a*' perceives the concept of common morality and the right to individual private life therein, and how balance is

stroke to the extent of respect the two, negate the foundation of honour killing on 'Shari'a' principles.

The next section is further elaborating on the compliance between human rights and 'Shari'a'.

5.2 The Interplay between *Shari'a* and Human Rights Law

As to Human Rights, the Committee on the Elimination of Discrimination Against Women in its GR the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention ...". The committee further considers the violence directed toward women is violating, *inter alia*, the following rights and freedoms:¹²⁷

- a) The right to life;
- b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;
- d) The right to liberty and security of person;
- e) The right to equal protection under the law;
- f) The right to equality in the family
- g) The right to the highest standard attainable of physical and mental health;
- h) The right to just and favourable conditions of work.

The respective GR emphasises that, out of the above stipulated rights and freedoms, honour killing mainly violates right to life, equality before the law and norm of non-discrimination.

The HRC further emphasises that in GC No. 28 on Article (3) of ICCPR:

"equality of rights between men and women explicitly states that the practice constitutes a violation of the right to life, Equality before the law and non discrimination norm."¹²⁸

As to 'Shari'a', as examined earlier in the study, the respect for human dignity is considered to be the underlying concept of Islam and the right to life is accorded a special status to the extent of considering murdering one person equivalent to the murder of all humankind. Furthermore, the protection of private life is respected. To this end, Islam considers unfounded allegations of sexual offences a crime of defamation '*Kathf*' to be severely punished

¹²⁷ Committee on the Elimination of Discrimination Against Women, *supra* note 44, para. 7.

¹²⁸ Human Rights Committee, *supra* note 45.

'*Shari'a* provides for sophisticated fair trial guarantees system *e.g.* the non-retroactivity of criminal offences together with presumption of innocence. In addition, the nullification of punishment by doubt is stipulated, and granting the accused full right to defence, which encompassed the right to be informed of the offence charged to him and to remain silent. Lastly, to mention on fair trials guarantees, the right to trial within a reasonable time and to legal aid are accepted in '*Sharia*'.

Importantly to pinpoint in respect to '*Sharia*', men and women are equally protected before criminal law, as criminal procedures and punishment are equal between women and men.

Furthermore, since the preceding examination of honour killing in context of '*Sharia*' led to a conclusion, whereby honour killing was found to contradict with '*Sharia*', this conclusion ultimately renders honour killing contradictory to all the concept and rights respected by '*Sharia*'.

Therefore, one can conclude that the interplay between '*Sharia*' and human rights in this respect resides in the common respect to right to life, to fair trial guarantees, equality before the law and respect for non-discrimination with regard criminal justice.

5.2.1 Culture and Honour Killing

The contradiction between honour-killing practice, '*Sharia*' and human rights excludes them from potential grounds to the justification of honour killing. Accordingly, culture remains the sole potential ground. Therefore, culture as a potential justification for such violent practice is addressed below.

Violence against women in the name of honour is often grounded by dominant ideologies and structures within societies.¹²⁹

As to the gender construction in the Arab societies, honour of men plays a crucial role being embodied in women, which leads to the domination of men over women to preserve '*their*' honour. '*Their*' in the last phrase reflects on why men consider women as their belonging, basically again because their honour is carried by women and they must protect themselves from being shamed.

While providing an anthropological discussion of honour in Arab societies, Lama Abu-Odeh explained that masculinity of men in Arab society resides in their female relative virginity, a male shall be considered a 'man' if his sister or others female-relative remain virgin until married. Furthermore, social sanctions are accorded to a male who refuses to adopt that concept,

¹²⁹ Report of the Special Rapporteur on violence against women, *supra* note 63, para. 98.

which considers him 'not a man' or 'rather a woman' and these statements are perceived to be very shameful.¹³⁰

Moreover, the society adopts a double standard when it comes to virginity. Whereas the society perceives the virginity of women a crucial factor to the honour of her family, the male virginity is not important, therefore, the sexuality of men outside marriage is not punished by any means in the society, and although not encouraged, it is not prohibited.

Here a strong departure from '*Shari'a*' principles exists, as the criminalisation of sexuality is provided therein regardless of gender. Moreover, the punishment stipulated in sexual offences is again equal for both genders. The departure from '*Shari'a*' adopted by the society in this case finds its foundation in the gender construction of society explained above, and the latter finds no ground in religion. Given that, it implies that society develops social norms regulating its own gender construction regardless of '*Shari'a*' principles, which can explain the adoption of honour killing practice while contradicting with '*Shari'a*'.

Therefore, having analysed honour killing in context of human rights, '*Shari'a*' and culture, one can conclude that culture stands as the mere ground for the practice.

5.3 State Obligation

One last issue to be addressed in the study, state obligation to combat culture patterns of conduct when found contradictory to '*Shari'a*' and human rights.

5.3.1 On the National Level

The examination of the two legal provisions in question, done in Chapter four of the study, illustrated that honour is implicitly accepted as a ground to mitigate sentence in honour motivated-killing. The same chapter further illustrated that national law ranks below '*Shari'a*' and International conventions in the hierarchy of legal sources.

Bearing this in mind, and given that honour killing contradicts with '*Shari'a*' and international conventions render these two legal provisions null and void and impose a duty on State to eliminate them in order to fulfil its duty under the Constitution not to legislate in contradiction with '*Shari'a*'.

¹³⁰ Lama Abu-Odeh, *supra* note 9.

Formaterat: Spanska
(Argentina)

Ändrad fältkod

Formaterat: Spanska
(Argentina)

5.3.2 On the International Level

The Declaration on the Elimination of Violence Against women adopted by the GA in 1993 requires that States:

"exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons".¹³¹

The interpretation of the CEDAW and the terms of the Declaration on the Elimination of Violence Against women, adopted by the Committee on the Elimination of Discrimination Against Women in its the GR No. 19, reflected the shift on categorising violence in the family as a violation against women on the basis of custom or tradition. The development of the concept of State responsibility, including due diligence in preventing, prosecuting and punishing violence against women committed also by non-state actors, is stipulated.

The principle of due diligence finds its sources in customary international law and treaty law. The two laws impose due diligence obligations on States to prevent, protect and provide remedies for violence against women. Furthermore, due diligence must be implemented in good faith with the aim of preventing and punishing violence against women. The due diligence obligation also imposes a duty on the State to undertake informed intervention to eliminate violence against women.¹³²

The basic principles underlying the concept of due diligence are that the State cannot delegate its obligation to exercise due diligence even if the functions is performed by another State or by non-State actors. Consequently, private actors' activities are linked to State obligation to protect, promote and fulfil human rights obligations through the exercise of due diligence obligation in the prevention and punishment of acts of violence against women, whether these acts are perpetuated by State or non-State actors.¹³³

Consequently, Egypt being party to CEDAW and ICCPR bears the obligation to exercise due diligence as it is enshrined therein.

As to the reservation lodged by State to the extend to limit the application of the convection to the compliance with '*Shari'a*'. However, given that honour killing does not comply with '*Shari'a*', makes the State by no means responsible to eliminate.

Based on the above discussion the State is to be held responsible under human rights Law for not eliminating honour killings.

¹³¹ The Declaration on the Elimination of Violence Against women, *supra* note 34, Article 4 (c).

¹³² Report of Special Rapporteur on violence against women, its causes and consequences, Intersection between culture and violence against women, *supra* note 65, p 9.

¹³³ *Ibid*, p 10.

Formaterat: Engelska
(Storbritannien)

Formaterat: Engelska
(Storbritannien)

5.4 Concluding Remarks

As human rights explicitly condemn honour killing, consequently '*Shari'a*' and Culture remain the potential grounds for the practice, the present chapter presented an analysis of these two potential grounds.

Examining honour- killing practice in the light of fundamental principles of '*Shari'a*' reveals a contradiction between the two; the practice and '*Shari'a*'. The contradiction was further emphasised by illustrating the interplay between Human Rights and '*Shari'a*'.

Moving to culture the remaining potential ground, the observance of the social construction in Arab societies and how they perceive the concept of honour showed that honour killing is an inalienable consequence of the protection of the concept.

Therefore, culture was found the mere ground of the practice, which rendered the legal codification of the practice contradictory with the national legal hierarchy of sources as well as the obligation imposed on State by international instruments.

6 Recommendations

Tackling problems encompassing social aspects is not an easy task as the reform needs to be in two parallel lines, one to reform the law and another to change the social perception of the problem. However, the most important recommendation is for the State to recognise the important role of women in society and endorse the rights contained in human rights instruments with good will to fully implement them. Moreover, to ratify the protocols recognizing the competence of Human Rights monitoring bodies to review individual complains.

On the way to tackle honour killing as a human rights violation, a preliminary step is to acknowledge the problem as a concern that need to be tackled urgently. To this end, the State may conduct statistics, collect data and set informed strategic plans to combat the problem in the light of results.

In this connection, the author recommends the State to set three-pronged plan with the following key programme areas: judicial reform, preventive and protective measures, and community mobilization.

6.1 Judicial Reform

Pursuant to State obligation set out under human rights treaties, the State shall refrain from invoking custom or religious considerations to avoid its obligation to eliminate forms of violence against women. A first step for the State to fulfil its obligation under human rights conventions is to provide a proportionate punishment for perpetrators, which can be realised by reviewing the two legal provisions in question.

In addition, as the State bears a duty to respect the Constitution being the supreme law of the country, the two national provisions that confer mitigation upon perpetrators of crime committed in the name of honour should be – in principal- considered null and void.

In this connection, the abolition of article 237 of the Egyptian penal code can be a considerable asset on the way to eliminate the honour-killing practice. Nevertheless, such total abolition of article 17 of the penal code is rather unrealistic, given the general context of sentence mitigation that can be used with other motives than honour. Therefore an explanatory memoranda issued by the legislative, followed by a commentary issued by the court of cassation (the competent court to interpret the law) on the elimination of honour and custom as a ground for mitigation, is highly recommended.

6.2 Preventive and Protective Measures

On the social level, the State shall adopt preventive measures such as provision for awareness-raising campaign for respect of women and the concept of equality. In that context the media is strongly encouraged to be involved as a high percentage of illiteracy exists in the country. Religious aspects and contradiction of honour killing should be highlighted to public in order to refute the misperception of the practice as grounded and encouraged by religious aspects.

Additionally, the State may provide for gender-sensitive training to public officials, judges and policy makers in regard to issues relating to violence against women.

Finally, effective means of protection for actual or potential victims are significantly important. The significance of the means of protections is that, in case of potential victims, they serve to eliminate the occurrence of the crimes, and in case of actual victims, they serve to their rehabilitation and protection. These means may include the provision of local shelters, rehabilitation facilities and safe homes where victims of violence can escape their family and secure their lives.

6.3 Community Mobilisation

The objective of the community mobilisation is to support communities to be better organized and strengthened, and to take actions to prevent honour-killing practice in the region.

Community mobilisation entails working with people at the local and other levels by raising awareness and engaging them to address honour-killing practice as an issue of their concern. The followings are some suggestions to achieve the respective object:

6.3.1 Activities on the Community Level

The result estimated of these activities is to raise the Community awareness on the right of women increased, as inadequate awareness of the problems and challenges, which women and girl face, is one of the main root causes of continued honour-killing practice. Such activities may include:

1. Conduct training for a number of community leaders on preventive measures.
2. Conduct consultative meetings with key community members on violence against women prevention approach

3. Organize public events during the international women days to raise awareness on women rights
4. Support Anti-violence activist groups involving women, men and youth

6.3.2 Promotion of Women Rights on the Community Level

Capacity and commitment of community leaders and community activists play a major role in promoting human rights and preventing violence against women. Such people need to be empowered to be able to play their vital role in combating honour-killing practice as a form of violence against women.

The activities to promote women rights on the community level aim at strengthening the community leaders and activists knowledge of women rights. The following activities may help achieving this result:

1. Conduct paralegal training for community leaders
2. Conduct meetings with community leaders and activists to strengthen their knowledge about the core concept of human rights and rights of women.

7 Conclusion

Violence against women is a culmination of conducts grounded by the subordinate status of women to men, which violates women's basic human rights and hinders their full enjoyment thereof on an equal footing with men. Honour killing stands as an extreme manifestation of gender-based violence whereby the society condemns the victim and respects the killer.

Over the last decade, tackling violence against women, its causes and consequences have been a key concern on the UN agenda. The work done over the decade has resulted in the recognition of the matter as a serious issue due to its severe consequences on the equal realisation of fundamental rights and achievement of peace. Additionally, the work on violence against women undertaken under the auspices of the UN resulted in the explicit recognition of honour killing as a separate human rights violation for being an extreme form of violence directed toward women.

Whereas the acceptance of culture as a ground to suspend women's fundamental rights is without a doubt a controversial subject, culture stands as the potential ground to justify the practice. Another potential ground is Islamic aspects, which have been subject to suspect due to the wide occurrence of the practice in Muslims countries.

Examining relevant '*Sharia*' aspects to honour killing revealed that Islamic law alongside with Islamic jurisprudence set for a sophisticated system for criminal justice, whereby fundamental fair trial guarantees are provided for achieving justice. Moreover, the examination revealed that '*Sharia*' provides for very strict procedures for sexual crimes indictment that render the possibility of prosecution rare. In addition, '*Sharia*' by no means accepts individuals inflict punishments. Therefore, the examination showed a contradiction between '*Sharia*' and honour killing practice.

Based on the contradiction between '*Sharia*' and honour killing practice, the reservation made by the State to human rights instruments to the effect of the unwillingness to comply therewith unless it complies with '*Sharia*', cannot be a ground for not undertaking the obligation imposed under the convention and eliminate honour killing practice.

Therefore, the above examination leaves the implicit legal codification of honour crime in the legal code illegitimate due to its contradiction to '*Sharia*' and international conventions.

The due diligence obligation entails that the State bears a duty to protect, prevent and provide remedies for violence directed toward women. The due diligence obligation further, recognises the accountability of the State for conducts undertaken by non-State actors. Furthermore on State

responsibility, CEDAW and the Declaration on the Elimination of Violence against Women, explicitly imposes an obligation on States to modify social and culture patterns of conduct that is based on the idea inferiority of women. Therefore, pursuant to aforementioned State's obligation under human rights law the State is held responsible for the codification of honour-killing practice as an extremely violent practice toward women.

Finally, here we stand before culture as mere ground for honour killing, a culture that develops social norms regulating its own gender construction regardless of '*Shari'a*' principles and perceives the masculinity in exercising the historical unequal power between women. Further, the culture views the subordinate status of women to men as the ideal social construction. For the sake of preserving this 'ideal' social construction they justify violence against women even the most severe form thereof, namely honour killing.

8 Glossory of Technical Terms

<i>Allah</i>	God
<i>Al- Yamen</i>	Religious Oath
<i>Aqidah</i>	Islamic Believe
<i>Hadith</i>	Prophet's Sayings
<i>Hudud</i>	One of Crimes Category in Islamic urisprudence that deals with offences against god's rights
<i>Iqrar</i>	Confession
<i>Kathf</i>	Defamation offence
<i>Li'an</i>	An allegation under religious Oath mode of evidence by which a husband accuses his wife of adultery to which he is the sole witness
<i>Mathahb</i>	Schools of Islamic jurisprudence
<i>Quaeda Usulia</i>	Basic norm in ' <i>Shari'a</i> '
<i>Qisas</i>	One of Crimes Category in Islamic Jurisprudence that deals with offences to individuals
<i>Shahadah</i>	Testimony confession
<i>Shari'a</i>	Islamic law
<i>Sunnah</i>	Prophetic acts
<i>Ta'zir</i>	One of Crimes Category in Islamic Jurisprudence that deals with offences against god or individual rights, but the punishment is not fixed and subject to discretion
<i>Usul Al-Figh</i>	Islamic jurisprudence
<i>Zenah</i>	Adultery

Bibliography

Books

- Cherif Bassiouni (ed.) *The Islamic Criminal Justice System* (Oceana Publication, Inc. 1982)
- Ekaterina Yahyaoui Krivenko *Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers, 2009)
- H.C. Rudiger Wolfrum *et al.* (eds.) *Constitutions of the Countries of the World* (Oceana, 2007)
- Lunn Welchman and Sara Hossain (eds.) *'Honour' Crimes, paradigms and Violence against Women* (spinifex Press 2005).
- Mai Yamani (ed), *Feminisim and Islam: Legal and Literary Perspectives* (Ithaca Press, 1996)
- Muhammed Abdel Haleem *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (I.B. Tauris 2003)
- Rudolph Peters *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press, 2005)

E-Books

- Mahmmod Abd AL-Rasheed and Zen Al-Abbedeen Makhlof *Honour Crimes, A form of Violence Towards Women*, (CEWLA Publications) Available for download at < http://www.cewla.org/details_issue.php?id_issue=33>, last visited 12 April 2009

Articles and Papers

- K. Nesheiwat 'Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Laws' Penn State International Law Review, 32:2, (2004)

U.N Documents

- A/57/169 United Nations General Assembly, Report of the Secretary-General, *Working towards the*

*elimination of crimes committed against women
in the name of honour*

- A/59/281 United Nations General Assembly, Report of the Secretary-General, *violence against Women*
- A/CONF.94/35 UN, *Report of the World Conference of the United Nations Decade for Women*
- A/CONF.116/28Rev.1 The Nairobi Forward Looking Strategies, *The Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*
- A/CONF.157/23 United Nations General Assembly, *Vienna Declaration and Programme of Action*
- A/CONF.177/20 United Nations, *Report of the Fourth World Conference on Women*
- A/HRC/4/34 United Nations Human Rights Council, *Report of Rapporteur on violence against women, its causes and consequences, Intersection between culture and violence against women*
- A/HRC/7/6 United Nations Human Rights Council, *Report of Rapporteur on violence against women, its causes and consequences, Indicators on Violence against women and state response*
- A/RES/40/36 United Nations General Assembly, *Domestic Violence*
- A/RES/48/104 United Nations General Assembly, *Declaration on the Elimination of Violence against Women*
- A/RES/40/108 United Nations General Assembly, *Implementation of the Nairobi Forward-looking Strategies for the Advancement of Women*
- A/RES/55/66 United Nations General Assembly, *Working towards the elimination of crimes against Women Committed in the name of honour*
- A/RES/55/68 United Nations General Assembly, *Elimination of all forms of violence indentified in the outcome document of the twenty-third special session of the General Assembly, entitled 'women 2000:*

gender equality, development and peace for the twenty-first century'

- A/RES/57/171 United Nations General Assembly, Report of the Secretary-General, *Elimination of all forms of violence indentified in the outcome document of the twenty-third special session of the General Assembly, entitled 'women 2000: gender equality, development and peace for the twenty-first century*
- A/RES/57/179 United Nations General Assembly, *Working towards the elimination of crimes committed against women in the name of honour*
- A/RES/57/181 United Nations General Assembly, *Elimination of all forms of violence indentified in the outcome document of the twenty-third special session of the General Assembly, entitled 'women 2000: gender equality, development and peace for the twenty-first century*
- A/RES/61/143 United Nations General Assembly, *Intensification of efforts to eliminate all forms of violence against women*
- A/RES/S-23/3 United Nations General Assembly, *Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action*
- CCPR/C/21/Rev.1/Add.10 Human Rights Committe, No. 28, *Equality of rights between men and women (article 3)*
- E/CN.4/1999/68 UN Economic and Social Council, *Report of the Special Rapporteur on Violence against Women: Violence against women in the Family*
- E/CN.4/2002/83 Economic Social and Cultural Council, Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences ,Cultural practices in family that are violent towards women*
- E/CN.4/2006/61 Economic Social and Cultural Council, Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, The due diligence standard as a tool for the elimination of violence against women*

- E/CN.4/2002/83 Economic and Social Council, *Report of the Special Rapporteur on Violence against Women: Cultures Practices in the Family that are Violent towards Women*
- E/CN.6/2005/L.1 United Nations Economic and Social Council, Commission on the Status of Women, *Follow up to the Fourth World conference and to the special session of the General Assembly entitled "Women2000:gender equality development and peace for the twenty-first century": implementation of strategic objectives and action in the critical areas of concern and further actions and initiatives*
- E/CONF.66/34 UN, *Report of the World Conference of the International Women Year*
- Fatma Khafagy UN Division for the Advancement of Women , *"Honour Killing in Egypt, Expert Paper prepared for Expert Group Meeting on "Violence against women: Good practices in combating and elimination violence against women", May 2005 Vienna.*
- General Recommendation No. 12 Committee on the Elimination of Discrimination Against Women, *Violence against Women*, (eighth session, 1989)
- General Recommendation No. 14 Committee on the Elimination of Discrimination Against Women, No.14, *Female Circumcision*, (eighth session, 1990)
- General Recommendation No.19 Committee on the Elimination of Discrimination Against Women, *Violence against Women*, (11th session, 1992).

Internet References

Office of the High Commissioner on Human Rights, *Special procedures assumed by the Human Rights Council*, <<http://www2.ohchr.org/english/bodies/chr/special/themes.htm>>, visited on 6 April 2009.

USA Central Agency Intelligence, World Factbook,Egypt, <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> Visited on 21 April 2007.

Newspaper Articles

Hassan Abou-Shakra, 'High Season for Wives Killing in Alexandria',
Al-Dostor Newspaper, 8 January 2009,
<[http://dostor.org/ar/index.php?option=com_content&task=view&id=12347
&Itemid=29](http://dostor.org/ar/index.php?option=com_content&task=view&id=12347&Itemid=29)> Visited on 12 March 2009.

Government Reports

Egyptian National Council for Human Rights, *Annual Report* (2004/2005),
Chp 2, http://www.nchr.org.eg/En/human_rp2_4.html , Visited on 25 April
2009

Miscellaneous

Egypt

Egyptian Penal Code No. 58/ 1937 (as amended in 2003)

The Constitution of the Arab Republic of Egypt, 1971, (as amended in
2007)