CONFERENCE PROCEEDINGS

GENDER AND “THE LAW”: Limits, Contestations and Beyond

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Artwork “Scenarist” by Elif Karadayı
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Her recent researches are about the potential honour killing victims’ asylum applications which she aims to reveal the lack of uniformity in asylum policies referring to particular social group criteria set up by the Geneva Convention-1951 that negatively affects the adjudication of honour killing asylum claims, resulting in inconsistent judgments and unjust disparities. She is working on the theory of political opinion, stating that ‘if a woman resists gendered oppression, her resistance is political.’” And she has numerous articles published concerning the refugee women and honour killings. She is an associate editor at Review of Social Sciences, RoSS London. She is recently working as an academic coordinator at London Centre for Social Studies, Gender Platform and as a lecturer in Public International Law Department at Gediz University.

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FOREWORD

I am delighted to have been asked to write the foreword to the Gender and Law Conference Proceedings following the International Conference on Gender and "The Law": Limits, Contestations and Beyond 4-6 June 2014 that took place at Dokuz Eylul University and Gediz University in Izmir Turkey. The conference drew together scholars from a very wide range of social science and humanities backgrounds. It is rare to attract academics and practitioners from such a diversity of disciplines, countries, cultures and perspectives and the papers brought together in this collection provide an insight into the richness of the debates that took place in and around the conference. The focus on Gender and the Law was timely; although many of the scholars who participated in the conference would agree that attempts have been made within many nations and sectors of society to reduce gender inequality, it is clear that there is much still to be done. Further, some of the papers demonstrated that responses to gender equality can, at times, lack nuance, they have failed to take into account the constructed and contested nature of gender identity, and its inter-sectionality with race, religion, age, socio-economic and other statuses. And worryingly there were papers at the conference that provided evidence that gender discrimination may be increasing in some parts of the world; its elimination is not inevitable.

Gender is a thorny issue for many of us to grapple with and the selection of papers included in this book has been made so as to limit problems associated with essentialism and gender realism. It is accepted that all (wo)men do not experience the world in similar ways, and these papers examine gender as one form of social stratification through which differences may lead to inequality, others are also highlighted too. The sex/gender distinction remains a lively source of controversy and has been addressed in different ways within this collection. Those who seek to label role differentiation between men and women as a naturally occurring phenomenon, and stratification between the sexes as an expression of difference rather than inequality, largely rely on sex as a marker of difference, and sex categorisation as biologically determined. But the conference focused on “gender” rather than “sex”, to be inclusive of a range of stances including those that examine the social construction of the “masculine” and the “feminine” and also of identity, sexuality and much more. This has allowed for a demarcation between individuals’ physical attributes, often (if not necessarily) considered as ascriptive of sex (although even these categorisations are increasingly difficult to contain within such a stark binary), and the more fluid spectrum of gender. Biological determinism, that gender and sex are both naturally occurring conditions resulting from biological differences between men and women, may have lost favour in the academic literature given the lack of robust evidence that the heterogeneity within the groups of “woman” or “man”, “feminine” or “masculine” appear to be lesser than as between them. But this has not prevented governments and state agencies from allowing persistent discriminatory distinctions between people on grounds of sex and gender. The papers that follow provide evidence of these ongoing inequalities, but also of recent strides towards greater equality in many societies. They also provide evidence of ways in which gender may be used as a powerful lens through which we may challenge our assumptions about institutions such as family, religion, the market, nationality and race.
GENDER AND “THE LAW”

The papers gathered in this collection are not just of interest to feminist scholars and those who campaign for equality and justice, they also offer insights into a wide range of methods that may usefully be employed to research and to interrogate concepts of gender, identity, the role of law and of justice systems, as well as ways in which the lived experience of women and men differs in different cultural spaces. The papers encompass research methods typically used by anthropologists, sociologists, legal, literary, linguistics and cultural scholars, amongst others. And they are positioned within a range of ontological and epistemological traditions. Some of the papers focus on case studies and draw upon the experiences of informants, others focus on documents as data sources, others still interrogate what it means to be a woman in a particular era, to be lesbian or gay, to be intersex, a parent or a worker.

These conference proceedings are arranged to illustrate some of the main themes that emerged from the Gender and Law conference. Papers in Part 1 of the proceedings, on Language, Structure and the Legal System, demonstrate the diversity of approaches to research in this broad conceptual field, with reference to ethnographic linguistic analysis (Turkish Women in Alsace: Language Maintenance and Shift in Negotiating Integration by Feray J. Baskin) and the role that literature can and does play in constructions of gender (Literature and Law: The Role of Literature in Gender Equality by Lerzan Gultekin). In Part 2, the role of gender and gender stratification are examined in employment and labour markets, spanning experiences in the US and the EU (Transfer as an Accommodation for Victims of Sexual Harassment in the U.S. & EU by Stacy A. Hickox, and Work-Life Balance – A Rationalized Myth of the European Employment Strategy by Christina Wolff) and in Pakistan (Exploring the Limits of Law: Gender Empowerment and Women Domestic Workers in Pakistan by Ayesha Shahid). Part 3 focuses on Migration with a paper by Amira Awad Osman on The Dynamics of Legal and Illegal Livelihoods and Gender Relations, the Case of Displacement Camps in Khartoum, Sudan. Thus gender experience is uncovered via a range of research methodologies, and in a number of countries, and in key sites of power and vulnerability, employment and migration.

Part 4 of this collection turns its attention to the role of the State and the Law, including papers on violence and responses to violence (Male Violence, Female Behaviour, the Self and the Other by Daniela Alaattinoğlu (Akers); the Feminist Agenda, Gender Based Violence And Judicial Practices: Considerations Understood Under The Premise Of Luhmann’s Social Systems Theory by Ana Paula Sciammarella and Andrea Catalina León Amaya; and Rape versus Rope: Critical Analysis of the Media-State Nexus during the N.Ç. Case in Turkey by Umut Özkaleli). It also examines gender norms and gender mainstreaming (Soviet Norms, Traditionalism, and Gender Equality in Dagestan by Khalida Nurmetova; Gender Mainstreaming in Post-conflict Countries: An Analysis of Postconflict Reconstruction Process in Some Selected Countries by Shanthi Hettiarachchi). Part 4 also provides insights into women’s realities of inequality and the difficulties of seeking justice through legal recognition (One Step Forward, Three Steps Back: Women’s Rights in Turkish Civil and Penal Codes of 1926 by Zuzana Giertlova; and Violation Of Women’s Right To Life: Honour Crimes In Turkey by Ayse Kulahli). It also examines sexuality and the state’s response to LGBT prisoners with reference to international human rights provisions (A Study on LGBT Prisoners in Turkey Based on the X vs. Turkey Decision in the European Court of Human Rights by Emir Ozeren and Onder Canveren).
In Part 5 Power and Hegemony are considered, including heteronormative frameworks and assumptions in respect of gender (You Can’t get a House on Campus, You are not Married: Gendered Codes, Institutional and Customary Laws in Pakistan by Shirin Zubair; The Issue of Gender-Sensitive Penal Law in Appearance and Practise: A Case of Honour (Namus) Killings in Turkey by Derya Tekin; and Gender And The New Reproductive Technologies In Slovenia by Marina Vrhovac). Part 6 addresses Affect and the Law (For and Against Emotional Law – an English Case Study by Adrian Howe) alongside religion and culture (Gender Equality and the Freedom to Practise Religion: Sharia Law in Australia, Canada and the United Kingdom by Amira Aftab; New Perspectives on Gender in Shari’ a-based Family Law Studies: Moving Beyond Women’s Rights by Zainab Alwani), constructions of motherhood, marriage and family (The debt of motherhood, the crisis of values, and the bankruptcy of human rights - Neo-Nazi discourse on women in Greece by Marianne Anastasiadou, Athanasios Marvakis and Jasmine Samara; Gender and Legal Technicality: Rethinking the Discourse of Divorce Mediation by Shu-Chin Grace Kuo; “Family” And The Oppression Of Women: The Role Of Law by Isabel C. Jaramillo and Helena Alviar) and nationality and identity (Love Under Suspicion: Legal Limits To Binational Marriages In Spain by Verónica Anzil, Jordi Roca Girona and Roxana Yzusqui). Finally, Part 7 addresses International Law and Gender Politics. Papers in this section examine justice (Women’s Access to Justice: The Connection Between Violence Against Women and Prohibition of Discrimination in the Jurisprudence of the European Court of Human Rights by Nisan Kuyucu and the legal aspects of intersex (Intersex – Legal Aspects and Responsibility by Franziska Brachthäuser and Theresa Richarz). They provide compelling evidence of the contested space of gender, in law and beyond.

This was an ambitious conference, which has given rise to a thought-provoking collection. I would like to thank the conference organisers, the London Centre for Social Studies, for all their work to bring to fruition the Gender and The Law conference and subsequently so as to edit this collection. I hope that you enjoy reading the papers as much as I have.

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London, April 2015
European political themes in the 21st century are overwhelmingly dominated by concerns about the nature of national identity, the role of Islam in democratic society, and the impact of immigrants and their descendants on the perceived cultural homogeneity among the majority of EU countries. The immigration policies of the European Union have been critical towards immigrant populations in the sense that policies have been inconsistent and heavily focused on assimilationist processes. France is known for having an assimilationist model of integration, in which immigrants are asked to become fully integrated into the French society, that is, to give up their own culture and language in exchange for the French language and culture. What is unique to the French case is that culture is prescribed through linguistic competence. As Yagmur and Akinci (2003) highlight, “[the mastery of the French language is] seen as the most fundamental aspect of the acculturation process because language is considered to be the overarching value to achieve social cohesion and national unity in France.” I propose to examine ethnolinguistically the process of language shift and/or maintenance and its relationship to integration and identity among Turkish women in Alsace, France based on the following research questions. What is the correlation between language maintenance or shift and integration? What is the role of Turkish media in language change? What linguistic varieties are transferred within the generations? In essence, what is the correlation between integration and the linguistic varieties spoken by the Turkish migrants and their offspring?

**Keywords:** assimilation/integration policies, identity, (im)migration, language maintenance-shift, women.

**INTRODUCTION**

European political themes in the 21st century are overwhelmingly dominated by concerns about the nature of national identity, the role of Islam in democratic society, and the impact of immigrants and their descendants on the perceived cultural homogeneity among the majority of EU countries. The immigration policies of the European Union have been critical towards immigrant populations in the sense that policies have been inconsistent and heavily focused on assimilationist processes.

French immigration policies are dictated by the assumption that full citizenship and inclusion in the French state is only achieved through proficiency in the French language and culture. While such a model of national identification is not unique to France, French immigration policies have upheld the assimilationist model vehemently often excluding...
recent immigrant newcomers, such as Turkish communities. Furthermore, it is difficult to make a clear-cut generational distinction with the immigrants who arrive to European countries through marriage. What should one call these new grooms and brides? Is this a repetition of the first generation? In contrast to the largest immigrant ethnic group in France, i.e. the North African, the Turkish community, despite sharing the same religion with Algerians, Moroccans and Tunisians, has a different migration background. The Turkish community is described as being the least integrated in France. According to a 1994 survey by l’INED, the Turkish case is described as: “aucun group d’immigrés ne comporte les signes d’un repli identitaire aussi nets et répétés que celui de Turquie”... les femmes “sont presque totalement coupées de la société.” (Bozarslan 1996 footnote 20 p.14)

The Migration Policy Institute defines immigrant integration as: “the process of economic mobility and social inclusion for newcomers and their children.” (Migration Policy Institute, www.migrationpolicy.org) There are four important domains where integration can be measured: work, education, social inclusion and active civic rights, which are all intertwined and attained through language.

RESEARCH QUESTIONS

The four major research questions are: (1) What varieties of Turkish and French are transferred between the generations? (2) What role does media, in particular Turkish television, play in language maintenance and language shift? (3) What are the perceptions about the uses of different linguistics tools (French, Turkish, “immigrant Turkish, code-switching) in order to communicate among the different generations within the ethnic community as well as the local French community? (4) How is integration understood and evaluated between and within generations? However, in this paper, which is part of a larger project, I address the question of integration by doing discourse analysis of an interview extract with a couple participants. The focus is on language and identity and the preservation of culture through language in Turkish community in Alsace.

MIGRATION AND POLICIES IN EUROPE

Definitions

In the media as well as in academia, assimilation, integration and multiculturalism are sometimes not properly understood and used interchangeably. This is especially the case for the terms assimilation and integration. Also, the notion of multiculturalism is representative of the American context, and therefore, should be used with caution in the European context. Assimilationist policies “require ethnic minorities to become essentially undifferentiable from the host population, embracing its culture and identity along with its language, customs and traditions.” (Hale-Williams, 2013 p. 22-23) The goal of this model is “sameness and unity” therefore homogeneity. Integration can be defined as representing “an inclusive state strategy whereby host societies provide clear legal and procedural channels for immigrant incorporation without requiring that they set aside all differentiating cultural manifestations

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3 Institut National Etudes Démographiques ‘the national institute of demographic studies’
4 My translation: “No other immigrant groups show communalism as clear and repeated as the Turkish one...women are almost completely cut off from the society.”
of their native culture.” (Hale-Williams, 2013 p. 2). In contrast “Multiculturalism attempts to celebrate diversity while promoting harmonious coexistence.” (Hale-Williams, 2013 p. 2) These three definitions can be represented on a continuum with ‘assimilation’ and ‘multiculturalism’ on each end and ‘integration’ somewhere in the middle with different degrees of integration embraced by immigrants throughout time in the host society.

Turkish Migration in Europe: France

After War World II, Western European countries needed cheap labor in order to rebuild their economies. Therefore, West Germany, France, and other European countries signed bilateral agreements (starting in the early 1960s) with Turkey. These agreements made it possible for 640,214 Turkish citizens to migrate to Western Europe in search of work between 1968 and 1971 (Abadan-Unat 2011 p. 14). In 1973, France allowed “family reunification” for its immigrants. This was done in order to promote the integration of migrants into the host society. And, thus the influx of Turkish women happened between 1974 and 1990.

There are currently about half a million Turkish immigrants residing in France. In the French media, one hears negative discourses on Turkish immigrants and their poor assimilation of French values, especially women who are portrayed as insulated within their own ethnic communities and unmotivated to learn the French language.

Caught between the standard and prestigious forms of both French and Turkish (Turkish ‘media’), Turkish immigrant women in France are pressured to understand and use both languages. Can one assume that there is a continuum between the two linguistic codes? My research will demonstrate whether or not there is a continuum and how these women are developing their own ways of speaking, including code-switching and/or “immigrant Turkish” (Backus 2005).

In France, Turkish women negotiate the use of their linguistic varieties, i.e. French and Turkish and their variants within their social networks (e.g. family, friends) and national institutions (e.g. public spaces, government agencies). This helps them build their monolingual and bilingual communities, and it allows, to some extent, language maintenance across generations. It also facilitates or hinders their integration into French society. France is known for having an assimilationist model of integration, in which immigrants are asked to become fully integrated into the French society by giving up their own culture and language in exchange for the French language and culture. What is unique in the French situation is that culture is prescribed through linguistic competence. Although the assimilationist model has failed in France (Tribalat 2013), does it mean that the French government should give up on integrating its immigrants altogether? How and to what extent should France expect them to acquire French language and culture? What are some of the viable alternatives to assimilationism and how can that be measured? What are the consequences of these policies for the everyday existence of immigrants in France? In my study I will address these questions and will specifically investigate the role of language and language attitudes in this process. I will examine the sentiment that if one does not speak ‘proper’ French, one is not considered French.
MEASURING INTEGRATION

How can integration be measured? ‘Immigrant integration’ is defined, by the Migration Policy Institute, as: “the process of economic mobility and social inclusion for newcomers and their children.” (Migration Policy Institute). Even this definition is not accurate in the sense that it applies to newcomers and not necessarily to those who migrated in the 1960s and 1970s for instance. There are four important domains where integration can be measured, which are: work, education, social inclusion and active civic rights. These domains are all intertwined and attained through language. This way of measuring integration may vary within the European countries. In France, for instance, integration is defined as language mastery and that it is measured in work, education, and social inclusion. As Yagmur and Akinci (2003) highlight, “[the mastery of the French language is] seen as the most fundamental aspect of the acculturation process because language is considered to the overarching value to achieve social cohesion and national unity in France.”

METHODOLOGY

The Venue

The research was carried out in Wissembourg, France. The area is geographically advantageous as it is a border town between France and Germany. The town has a population of less than eight thousand inhabitants of which five hundred are of Turkish descent. In Wissembourg, national (French) and regional (Alsatian) identities and values are reinforced by the locals. Immigrants as well as locals are crossing ‘linguistic borders’ (France-Germany) to go run errands on a weekly basis. Three of my participants, shop owners, expressed the importance of knowing German in order to do business with the German tourists when they visit the region. The linguistic market (Bourdieu 1991) is very well defined for these female entrepreneurs in order to enable economic growth and make tourism attractive. These intrinsic identity and linguistic negotiations in Wissembourg are key to the study and examination of Turkish women’s practices, attitudes and what they can tell us about immigrant integration in Europe, more specifically in France.

The bulk of my data collection comes from a generational sample of 38 adult Turkish women living in Alsace, France. However, for this paper, my sample consists of 16 female members of generation 1.5 (born in Turkey but raised in France) and members of the 2nd and 3rd generations (born and raised in France). I met with each of these women and conducted semi-structured interviews in their homes. The language of the interview was only French, only Turkish, or a mix of French and Turkish. I also conducted participant observation in public spheres such as the work place. Each participant was asked to complete a questionnaire either in French or in Turkish. In the semi-structured interviews the following modules were introduced: basic demographic information, language proficiency evaluated through a scaling method, language choices and uses in different settings with different interlocutors, identity and integration, importance of cultural activities, connections with Turkey. The question on language proficiency was measured on a 5-point scale where participants were asked: “How would you rate your speaking, reading, listening, and writing in Turkish and French?”

The interviews enabled me to gather data about participants’ uses of their language, for instance: “Which languages do you use with your siblings, your parents, your grandparents, your peers? Which languages do you use at work? ” It also enabled me to elicit
information that I was not able to observe during participant observation. Having conducted participant observation in the household has enabled me to describe and investigate the importance of media, especially T.V., in language maintenance or loss. This is a project that I have started for another paper. It is worth noting that television, in most Turkish households, is regularly on. The programs are all in the Turkish language and diffused through a satellite dish, effectively bringing Turkey into Turkish households all across Europe since the late 1990s.

**PRESERVING CULTURE THROUGH LANGUAGE**

Studies in the literature on gender and language demonstrate the relationship between gender roles and language change in different migration contexts. Gal’s bilingualism study (1978) on Oberwart, a small town in Eastern Austria, where German and Hungarian are spoken, showed that women were leading language shift by moving away from using Hungarian because of its association with ‘peasantry’ (hence the rejection of that identity) to German, which was associated with job opportunities, better life as a spouse, i.e. socially prescribed modernity. Another study in which social mobility and prestige is demonstrated through language shift is in McDonald (1995) in which Breton women associated their language with “the peasant lifestyle and the French language with finery and a city life.” (p. 55).

Cavanaugh (2006) also demonstrated the prestige of the standard language versus the dialect. She studied the language shift of the vernacular of Bergamo, a small town in Northern Italy, to standard Italian. She stated that women are not maintaining the vernacular-on the contrary; they are encouraging and facilitating the use of standard Italian within the household and elsewhere. In fact, women are blamed, in a social context, when using the vernacular with their children because “they are responsible for their children’s linguistic habits and abilities, just as they are held responsible for their socioeconomic futures through their education” (Cavanaugh 2006 p. 200), which is in standard Italian and not in their regional dialect. This is an expectation from within a female community to see pressure to speak standard Italian, to their children early on, so that “they will not endure the linguistics difficulties and social humiliation their parents and grandparents suffered in school as they struggled to learn Italian.” (Cavanaugh 2004 cited in Cavanaugh 2006 p. 201). If standard Italian is associated with women and social prestige, the dialect of Bergamasco is associated with a particular type of blue-collar man, either isolated shepherds or manual unskilled labour, and thus with a low social economic status.

Furthermore, there is a stigma attached to bilingualism in this community among the teachers who describe the situation as follows: “[children] arrive at school speaking a localized Italian, with numerous Bergamasco features. Children who speak in this way are often judged to speak incorrectly in general and deemed rough and uneducated.”(Cavanaugh 2006 p. 202) For these reasons women do not maintain the (ethnic) vernacular language because of its association with ‘non-modernity.’ In all three studies, upward cultural and economic mobility is associated with the language of the host society at large. Is this a universal generalization? Are all women leaders of language shift? Do they all decide to speak the dominant and more prestigious language rather than their ethnic language? Is there a correlation between language shift and ‘loss’ of culture? These are questions that are best answerable through ethnographic fieldwork.

In my own research one of my 2nd generation informants’ brother made the point by saying that he and his siblings were required to speak Turkish until their 15th birthday. The reason being
that it was in order to preserve the Turkish culture. The interesting part in his utterance is when he switches to Turkish (line 13.3) to refer to the Turkish culture.

13.1 parce qu’on avait

because we had

pour pas qu’on oublie le turc

so that we don’t forget Turkish

13.3 kendi kültürümüzü falan

unutmyalım dine

so that we don’t forget our own culture

(Extract from interview-Baskin 2014)

Later in the same conversation I asked about whether losing one’s own language means losing the culture (line 14). For my female participant, the response was partly affirmative (line 15), because only a part of the culture will be lost if language is not preserved, whereas dining practices may still be observed.

Nevertheless, she thinks that the transmission of the culture occurs through language. In contrast, her brother strongly believes that if the language is forgotten, everything is forgotten (line 18). The utterance “on oublie tout” (line 18) refers not only to culture, but also to the identity of the individual.

14. FB⁵: OK

ok

alors est-ce que oublier la langue c’est oublier la culture

so does forgetting the language mean forgetting the culture

15. Z : une partie quand même

some of it though

16. FB : comment ça

how so

17. Z : ben pour comprendre la culture faut quand même avoir des connaissances en langue

so in order to understand the culture you must at least have some knowledge of the language

enfin j’ai pas

well I don’t know

⁵ [Key: FB: Feray Baskin, Z: Züleyha, B: her brother. The use of Turkish is indicated in bold.]
This phenomenon, of culture being maintained through language in ethnic communities, has been accounted for in the literature (Mukherjee 2003, Zuercher 2009). For instance, in Malaysia, Bengali immigrant women with a close network use the Bengali language more than those who have a diffused network (Mukherjee 2003). Furthermore, in order to preserve their culture through language, the elderly women in the community advocate for brides from India, because they are more valued than the young women born into the Bengali Malay community in preserving the language (Mukherjee 2003). Thus, women in the community are involved in different activities to preserve their ethnic language, and so consciously decided to use Bengali as an identity marker (Mukherjee 2003) as well as a form of loyalty toward their culture. In comparison, the younger generation chooses to speak English primarily for economic reasons.

In essence, through linguistic practices, i.e. speaking the minority language in the household, the ethnic culture is preserved and passed on to the future generations. In contrast to the Bergamasco case, in some cultures, such as Turkish for instance, women are perceived as bearers of tradition and culture specifically through their choice of language. However, there are reasons to think that language contact will result in language shift and that women are the primary leaders of this process. Nonetheless, this is not universal, as women are also the gatekeepers of their culture through language (Mukherjee 2003).

DISCUSSIONS

Studies of (regional) bilingualism have examined choices and uses of different varieties of languages by women and their significance for the community as well as for the larger society. Since in many cultures the mother is the primary caretaker of the infant (Cavanaugh 2006) she decides what language to speak to her children. For this reason, when it comes to the preservation of the ethnic language, women are either conservative, and use the ethnic language as the main linguistic tool within the household and with their friends, or they are un-concerned with the preservation of their ethnic language and encourage the use of the host country’s language within the household (Cavanaugh 2006, Khemlani 2003). In Wissembourg, France, the Turkish language of the immigrants is still alive within the household and the ethnic community.

The intergenerational transmission issue reveals that it is much more complicated and complex than it appears, especially among the younger generations. Generations 1.5, 2 and 3 maintain their parents’ dialectal Turkish language to some degree, within the household and in the communities, they may speak French with their friends; and they may even mix both languages when talking to a peer, as some of my participants have noted “whatever is the easiest.” In addition to parental use of Turkish, Akinci (1996) argued for the role of TV in the maintenance of the language among children in Turkish immigrant families in France, however, there was no data nor references to what should be considered as ‘Good Turkish’ and what should not.

In a sociolinguistic study, about the future of the Turkish language in France, conducted among participants from Lyon, Akinci’s (2003a) concluded that there is a
generational difference. The first generation did not see a future for their ancestral language; on the other hand, the younger generation believed that “the Turkish language is going to obtain a strong status in the future.”( Akinci 2003a p. 140) Why this disconnect from what the youth believe and what adult predicts? Who is right? Are both groups right in a way?

References


Migration Policy Institute, www.migrationpolicy.org


Abstract

The aim of this paper is to discuss the contribution of literature to develop a new consciousness in society to prevent social repression and violence on women, referring to a couple of famous, Western and Turkish novels such as Scarlet Letter, The Mill on The Floss, Tess, Anna Karenina and a recent novel by Z. Livaneli Bliss, including a short story based on the memoir of Faruk Erem in his The Memoir of a Criminal Lawyer.

The common theme of these works is psychological and physical violence (such as honour killings) against women which continues throughout history because culture has always been patriarchal, so is the legal system in any given society and period. Since literature reflects the culture and society that produce it, each of this works mentioned above reflect the cultural codes, customs and traditions and ideologies of the periods and societies they were written in.

Literature is always ideological as Bakhtin and New Historicists, Foucault, Althusser always claim, because man is ideological as a subject. In this respect, what makes literature unique is not the fact that it reflects social reality as an ideology, but how it represents and refracts it. In other words, literature is not a mere reflection of social reality. Any item of social meaning when enters a novel or a short story or drama is transformed, refracted to become a part of artistic action, the work itself. Hence, it re-enters social reality as a different category as Bakhtin argues. Therefore, literature reflects conflicting ideologies because human consciousness is surrounded by various ideologies which can be in conflict.

In Turkey, despite the recent changes in the new Penal Code due to the process of EU membership which has brought legal measures to prevent honour – killings, do not seem sufficient to achieve a change in consciousness unless it is completed by economic development and good education system.

Therefore, the answer to a simple question such as why do these writers write these novels is: to attract the attention of the reading public as much as possible to develop a new consciousness about women issue and gender equality as much as other social problems.

Keywords: literary theory, gender equality, honour

The aim of this study is to discuss the role of literature in consciousness raising about honour- killings and violence against women in Turkey, particularly, through an analysis of some famous literary works, to start a change in awareness along with new legal measures.

Gender-based violence in various forms such as rape, domestic violence and honour-killings is a serious violation of basic human rights which is not specific to any religion, nor is it limited to any one region of the world. However, the ideology and practice of family honour, though varies from culture to culture, country to country, goes back to Ancient Greece and Rome. In Ancient Rome, chastity and loyalty of members of family was an important factor which constituted family honour as the most significant aspect of its social standing. Therefore, it was legal for men to kill their wives or daughters when they were involved in sexual activity outside of their marriage because it was regarded as dishonor to family.

In the Classical period, the status of women was quite low. Both Grecian and Roman women’s sphere of life was limited to their family. Leading a life of confinement, Athenian women were not allowed to speak in public (Papazov n.d. pp.1-3), because women were
considered inferior to men. In Athenian law, women could not own property (Papazov n.d. p3). In Rome, despite the diversities, the overall picture was not so different: a husband ‘had the power of life and death over his wife’ (Papazov n.d.p.3). Famous Greek philosophers such as Plato, Aristotle, Philo, made negative comments on women in their works. Plato, even though suggested that women be part of the guardian class and therefore, receive the same education as men, they were weak creatures, because for him, ‘appetites and pleasure and pains one would find chiefly in children and women and slaves and in the rabble of those who are freemen in name (Republic, Book IV,431c 1969). Similarly, Aristotle, in his famous work, Poetics, where he discussed the characteristics of tragedy and epic as two ancient literary genres, stated that

In respect of Character there are four things to be aimed at. First and most important, it must be good. … the character will be good if the purpose is good. This rule is relative to each class. Even a women may be good, and also a slave; though the women may be said to be an inferior being, and the slave quite worthless. The second thing to aim at is propriety. There is a type of manly valour, but valour in a woman or unscrupulous cleverness, is inappropriate (1970 p.64).

Here, Aristotle meant women of upper class when he attributed goodness to women characters in tragedies, because the intention of tragedies is to teach the public moral values of the ruling class, namely, Greek aristocracy, to be proper citizens.

Hence, in Classical literature, particularly, in epic and tragedy, aristocratic women such as Antigone, Ismene, Electra, Phaedra, Clytemnestra were portrayed as powerful characters who appear in public sphere together with men and played important roles in the lives of great commanders and heroes. The main theme of these works was the concept of honour and loyalty of family members. When the Trojan prince, Paris and Helen, the wife of Menelaus, the king of Sparta, eloped together, Trojan war started. Greeks attacked Troy to restore the honour of Menelaus and finally rallied it and killed everybody, even the king and his wife and their brave son Hector. Homer’s The Iliad is a great epic in which the Trojan war is recounted in details.

As seen, members of the family must defend their honour and seek reparation or revenge if the family honour is somehow abused or treated with disrespect as Clytemnestra did by committing adultery and murder of her husband with the help of her lover Aegisthus. Orestes avenged his father’s death by killing both of them. All these events were the subject of various tragedies and epics written by various poets and playwrights of the classical period such as Homer, Sophocles, Euripides, Aeschylus etc.

The concept of family honour is an important and highly esteemed theme in Western culture as reflected in literary works, written in different periods, particularly, those written in the past. In these works, the concept of family honour is usually based on the idea of social class as seen in the 18th and 19th century fiction such as Tolstoy’s Anna Karenina, Hardy’s Tess, or on religion and conservative principles as in George Eliot’s The Mill On The Floss, and Nathaniel Hawthorne’s The Scarlet Letter. In all these works, victims are women who are punished at the end of these works simply because of their transgressive sexual relationships. The punishment of Hester Prynn in The Scarlet Letter was to wear a scarlet letter, “A”, which stands for Adultery. Anna Karenina who had an affair with Count Vronsky, committed suicide in the end because she was rejected by her friends. Tess who was turned down by her husband, Angel, because she was raped by Alex before their marriage, and Maggie Tulliver was turned down by her brother Tom because of her relationship with Stephen Guest who was
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the fiance of her niece. All of these heroines are victims who have to carry the burden of their deviations from traditional or orthodox gender expectations. In *The Mill On The Floss*, Maggie is directly accused by her brother Tom when she tries to defend herself and express her motives:

‘You will find no home with me,’ he answered with tremulous rage. ‘You have disgraced us all’, you have disgraced my father’s name. … You have been base-deceitful-no motives are strong enough to restrain you. I wash my hands of you for ever. You don’t belong to me (Eliot 1979 p.612).

As seen, in these novels, it is women who are shunned publicly rather than men who only experience some personal setbacks whereas their female counterparts are regarded as sinners who bring disgrace, dishonour and shame through their disapproved actions. Therefore, the heroines in these novels suffer psychological and socio-cultural damage deeply.

Turkey like all the other Middle East Mediterranean and Latin American countries, is a country which belongs to a region where honour-based collectivism is prevalent (Uskul, Oyserman, and Schwarz 2010 pp.191-195). Honour-based collectivism is different from East Asian, Confucian based collectivism, the focus of which is modesty, harmony, fitting in, not sticking out, and not bragging (p.192) and western individualism which ‘highlights separateness’ because ‘each person is a unique and worthwhile individual’ with ‘different goal preferences and attitudes’ (pp.192-3). In other words, collectivism ‘highlights connectivity between and among persons’ who ‘gain meaning and worth through connection’ (p.192) and honour-based collectivism focuses on honour as ‘the central collective dimension’ for the maintenance of a good reputation ‘within the group and with regard to relationships with outgroups’ (p.192). Therefore, ‘reputation is gained and lost not only through one’s own actions but also through the actions of others with whom one is closely associated’ (pp.192-93) which is the case in Turkey, particularly, in certain parts of Eastern Anatolia as portrayed in Zülfü Livaneli’s novel *Bliss*. Sociological researches reveal that ‘honour belongs to individuals as well as family members’ and therefore used as a means for the ‘maintenance of gender specific codes’ (p.195) which is the cause of honour crimes that persist in Turkey (p.195). Studies have further shown that reputation and honour as social constructs, are mainly based on masculine reputation, which ‘includes the esteem to which one’s group is held’ rather then personal attainments (p.195).

As Livaneli, himself, points out, crimes of honour are more common in Eastern Anatolia, within communities where harsh tribal ties and relations, based on astron sense of loyalty and the concept of honour, continue to exist (‘Honor Killings’ n.d.). He writers that ‘patriarchal norms and hierarchies can stil be found in their harshest and most anachronistic forms’ in Eastern Anatolia where ‘women are denied all of their rights’. For him, honour crimes occur in big cities of Western Turkey as well as the major cities of Europe ‘where migrant communities reproduce their traditional cultural norms and practices’ ( p.1). Furthermore, despite to recent changes in the new Penal Code in Turkey, due to the process of EU membership, which has brought legal measures to prevent honour killings, the changes do not seem sufficient to prevent honour killings to achieve a change in consciousness because such a grave problem requires a consistent state policy to establish a good education system and improvement of the economic conditions in these rural areas.

As known, *Bliss*, published in 2002, focuses mainly on the fundamental problems of contemporary Turkey, narrating the themes of contrast: East/West, rich/poor,
education/ignorance, tradition/modernity, male/female, violence/peace. The novel, in fact, narrates different social layers of Turkish society through the depiction of the main characters, namely, Meryem, a teenage rape victim who is raped by her uncle. She refuses to hang herself although it is expected from the girls who bring dishonour to their families because they are regarded as stained, impure, in their community; Cemal, her cousin, who, upon returning to his village in Van, after finishing his military service, is charged with the task of carrying out Meryem’s death sentence, as decreed by her family; and professor İrfan, an academician who revolts against the routine of his elite life, particularly, its insincerity and materialism, leaves his wife and job and hires a boat and sails off on the Aegean sea. The three characters’ paths intersect and they embark upon a journey together. It is through this journey that they influence and change one another and the journey turns into an inner-journey through which they explore themselves and undergo significant changes. İrfan who represents western mentality and life style learns of the Eastern Anatolian culture and its traditions whereas Cemal and Meryem become familiar with western life style and its values which is a shocking experience for them. However, Professor İrfan is also shocked when he finds out that Meryem is a rape victim who is raped by her own uncle and Cemal’s intention is to kill her. Hence, as a consequence of their relationship with each other, they are finally able to come to terms with their lives. In a sense, they heal each other’s wounds and they seem to gain some inner strength to start a new life, leaving their past experiences behind.

When compared with the other two male characters, Meryem seems the strongest and the most determined of them to survive and to succeed in life. Livaneli, himself explained his view of Meryem as a representative of women, in an interview in August 2010.

When she entered the story, she got bigger and bigger. She created herself and I followed her. Of course, she represents women in Turkey generally. I think women are stronger than men. Not only in Turkey but anywhere. They give birth, work and raise children. Everybody thinks women are more emotional than men. No! maybe they are emotional but they’re rational as well (cited in http://www.todayszaman.com/newsDetail-2 2011).

In fact, Meryem’s strong character emerges even at the beginning of the novel when she seems weakest as an innocent victim, doomed to die. She refuses to hang her self despite her helplessness. She is defiant, yet also too innocent and childish. When she is told to be taken to Istanbul, she assumes that it must be a wonderful place since no one has returned. She does not even realize that those girls have only been the innocent victims of honour-killings. However, Meryem shows an amazing ability to adapt herself to change and to her new circumstances which is emphasized throughout the novel. Her eagerness and quickness to learn surprises both the professor and Cemal in different ways. The Professor teaches her to read, to use the charts, and buys modern clothes for Cemal and her. He even teaches her to swim and makes her wear a bathing suit, all of which annoy Cemal more, because as a male, shaped by traditional patriarchal culture, he cannot bear to watch Meryem’s achievements and the praises she recieves from the professor, which obviously hurts his male ego. Therefore, Cemal, time to time, jumps into the water and swims long distances, while he thinks that at least he could swim better than Meryem. However, Cemal who misinterpretes the professor’s fatherly attitude towards Meryem, in fact, is in dilemma:

A strange man and a girl from his family should not have been permitted to go anywhere alone together. In their village, this could have been a reason for murder. Circumstances had changed so much in the
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last few weeks that when something unfamiliar or unexpected happened, he did not know what to do. He could no longer tell right from wrong. (p. 235).

Throughout the novel, Cemal’s attitude towards Meryem is ambivalent. He seems to hate her because she is ‘stained’. Yet he cannot kill her. Furthermore, there are times he takes care of her and acts like a protector. At the fish farm, he even begins to think of ways to keep Meryem safe from snakes, scorpions: ‘Then he realized with a start that he was trying to protect the girl whom he had been ordered to kill’ (pp. 211-12).

As seen, Cemal, who seems utterly confused about what he used to know and what he learns, is also on the verge of change. However, the change he will undergo is a rather slow process when compared with that of Meryem. This may be due to the fact that, in the past, as a man, he was more powerful than her. However, in this modern world, he is reduced to nothingness. He thinks: ‘Besides, he had no money, no job, no home, nor anywhere to go. He was like a refugee on the professor’s boat’ (p. 236). Nevertheless, he refuses to go back to his village which has lost its meaning for him as a ‘sordid place’, because, he finally learns that Meryem has been raped by his father. However, he knocks the professor down, because he misunderstands his fatherly conduct towards Meryem. In fact, he is also a victim of his own traditional culture like Meryem.

Like Cemal and Meryem, the professor who still seems to be searching for his identity, also does not want to go back to his former life in Istanbul. The days he has spent with Meryem and Cemal have made him a new person in many ways. His heart is softened and he even thinks of adopting Meryem as his daughter, when he learns her story. Furthermore, Harvard-educated professor also realizes that he has been only vaguely familiar with traditional Eastern Culture with its fundamental value, “honour” and the common crimes in this part of the country, namely, honour crimes, rape and incest: He remembers what a retired judge once told him that incest is the most common crime in these rural areas and unfortunately incidents as such are usually not brought before the law because girls are ashamed and embarrassed. Therefore, girls either commit suicide or murdered by their male relatives (p. 231). İrfan also remembers how newspapers have criticized honour crimes because Turkish justice system have tolerated and protected those who committed honour crimes through general amnesties or modification of the sentences by the judges who use their judicial discretion.

The novel ends with hope, at least for Meryem who undergoes a tremendous change by overcoming her fears. Since, she is determined to take care of herself, she immediately refuses to continue her journey with Cemal. She even finds a job at a small restaurant as a cook, and a family who run the restaurant, even a young boy, Mehmet Ali, ready to love her. Hence, Meryem is healed through a process of acculturation which is ‘the process when one is confronted with another culture’(Broeck 2001 p.11) even within the same country, since, culture is never ‘absolutely uniform in any society’( p.10). ‘In this process, cultural values are rearranged and changed’. Sometimes ‘cultural estrangement causes the traditional culture to be abandoned and replaced by the cultural values of the dominant group’( p.11) as in the case of Meryem. However, as Livaneli states, she is brave enough to resist and create herself out of her ashes, she certainly represents women with her strength and determination.

A very short story in Faruk Erem’s The Memoir of a Penal Lawyer (1985), entitled ‘Getting Him to Pull the Trigger’, also portrays Turkish women’s strength, determination and pride despite her helplessness. The story takes place in a village near mount Munzur in Erzincan: Beautiful Elif marries Mustafa and soon becomes the mother of four children at a
PART I: LANGUAGE STRUCTURE AND LEGAL SYSTEM

very young age. Then Mustafa goes to Germany as a worker, because of their poverty-stricken life. Four years pass and Elif waits for him patiently. One day, Mustafa returns with a blond German woman and a second-hand car which surprises everybody, because they have not seen a foreign woman as a *kuma* (the second wife of a married man, who in fact lives in the same house with his legal wife) before. According to the tradition of Eastern and Central Anatolia, the duty of a *kuma* who is always much younger than the legal wife, is to serve her and show respect to her. But in the story, it is Elif who serves the German girl silently and obediently because she is the guest of Mustafa and his family, and it was Elif’s duty to show hospitality to their guest. However, days pass quickly and one morning, Mustafa and his German lover get prepared to go back to Germany. Mustafa kisses the children and the hands of his parents, but Elif is not there. Thinking that she must be in the barn, Mustafa wants to thank her for her hospitality towards his German lover. He knocks on the door to the barn and Elif tells him to open the door. As he pulls the door to himself to open it, Elif falls on the ground dies on the spot. In fact, Elif has prepared a trap to make Mustafa pull the trigger and kill her, which is her revenge on him. What she does is simply to fasten the trigger of the double-barrelled shot-gun to the handle of the door with a piece of rope and place its double-barrel directly into her mouth. Mustafa is tried; finally, his lawyer proves that Mustafa’s intention is not to kill Elif, and he is released. But the judge, despite his release, asks him if there is any penal code that would sentence him for such a crime. He answers that he does not know. The judge admits that he does not know either.

Published in 1985, Faruk Erem’s book is based on his past experiences as a penal lawyer, but not a documentary work because some parts of the stories are fictionalized by him. However, most of these stories are based on true incidents. In this story, it is very difficult to decide whether Mustafa is really guilty or not. Unfortunately, patriarchal traditions and ignorance have always prevailed in these poverty-stricken rural areas in Anatolia as a consequence of a long term of negligence. The state should have developed a policy long time ago to establish an effective education system which could alter such patriarchal norms and hierarchies and improve the economic conditions through the establishment of vocational schools which could pave the way for the creation of job opportunities in these rural areas. Therefore, Mustafa, though he is guilty, is also a victim, like Cemal. He does not even realize what he has done to Elif because in his traditional culture, a girl’s duty is to obey her elder male relatives, particularly, her father or her brother, or her husband if she gets married. In fact, Mustafa, like Cemal, has undergone some cultural changes through a period of acculturation and he seems quite adapted to this new culture. However, as a cultural hybrid, he is in between two cultures. Therefore, he treats his German mistress kindly and lovingly while making Elif serve her silently and obediently because his traditional culture which privileges only male honour, denies women’s pride. Hence, he fails to understand how deeply he has offended Elif, by damaging her pride as a woman.

To conclude, as observed, literature reflects the culture and society that produce it. It both reflects and questions the cultural codes, customs and traditions and ideologies of any given society and period. However, literature does not only reflect social reality with its ideology but it also represents and refracts it as claimed by the Russian thinker, Bakhtin. It is this very quality that makes literature unique which is the transformation and refraction of any given social reality into a part of artistic action, namely, the work itself. Therefore, literature, be it fiction, drama or poetry, always reflects conflicting ideologies, because human consciousness is surrounded by various ideologies which can be in conflict as the characters in *Bilss* who have undergone changes as a consequence of their acquaintance with conflicting cultures and their ideologies. Literature offers a new outlook through alternative life styles to develop a new consciousness, free from traditional, cultural norms. Hence, alongside the
recent legal measures, literature can also play an important role in the transformation of consciousness as a part of education, particularly at schools. As the acclaimed critic and writer Susan Sontag puts it, literature, is ‘a passport to enter into larger life’ which is ‘the zone of the freedom’ (n.d. p.12) because it tells us ‘what the world is like’ (n.d. p.9). Sontag further argues that ‘one task of literature is to formulate questions and construct counter-statements to the reigning pieties’ as both literary works analysed above question and construct counter statements against the reigning traditional, cultural codes that oppress women in Turkey. For Sontag ‘literature is dialogue’ and ‘responsiveness’ that ‘might be described as the history of human responsiveness to what is alive and what is moribund as cultures evolve and interact with one another’ (n.d. p.9) and in that sense, both works reflect what is already moribund and what is alive in Turkish culture. Therefore, writers are not only transmitters, but they are also makers of myths, even counter myths (Sontag, n.d. p.9) as Livaneli’s heroine, Meryem who creates her counter myth finally by creating herself out of her ashes like Phoenix and starts a new life as a free individual.

References


PART I: LANGUAGE STRUCTURE AND LEGAL SYSTEM


Transfer as an Accommodation for Victims of Sexual Harassment in the U.S. & EU / STACY A. HICKOX

Abstract

Discrimination law in the United States has prohibited harassment based on sex and other protected classes for 50 years. Similarly, the EU Equal Treatment Directive prohibits sexual harassment in the workplace. Yet the number of harassment charges filed in the U.S. continues to grow, with over 30,000 filed in the last three fiscal years; 36% of those charges have alleged sexual harassment. The U.S. Equal Employment Opportunity Commission encourages employers to — take all steps necessary to prevent sexual harassment from occurring, including — developing appropriate sanctions. Both settlements and judgments in harassment claims tend to focus on monetary relief even though the victim may be more interested in getting away from her harasser. This research focuses on the availability of a transfer to a different job away from a harasser as relief in discrimination claims. Harassment victims are unlikely to be granted a transfer as part of a court’s relief in a discrimination claim in the U.S., and employers cannot be directly forced to discharge or transfer a harasser. Victims who can show that harassment caused a work-related injury may be eligible for workers’ compensation, but not a transfer. Even victims of harassment who develop a disability such as post-traumatic stress disorder as the result of the harassment have been unsuccessful in obtaining a transfer as an accommodation in the United States. In contrast, Sweden’s Ordinance against Victimization specifically provides for transfer of a victim of workplace bullying to protect against further victimization. This research takes the position that to successfully prevent from sexual harassment from continuing, victims of sexual harassment should be able to force their employers to transfer them or the harasser. Without such relief, a victim is much more likely to resign and potentially claim constructive discharge, resulting in higher damages as well as replacement recruitment costs for the employer.

Keywords: harassment, accommodation, discrimination

Both the United States and the European Union have prohibited sexual harassment in the workplace. Yet harassment persists: for example, in the United States (U.S.), more than 10,000 charges of sexual harassment have been filed in each of the past three years. (EEOC) Reported sexual harassment in the European Union (EU) ranged from 1.3% in Belgium to 56.3% in Italy in 2004. (Irish Presidency 2004) These figures suggest that the employer’s obligation to take reasonable actions to prevent harassment and even the provision of monetary damages are insufficient to prevent harassment from occurring.

This paper explores a different type of remedy: empowering the victim of harassment to obtain a transfer to a different position with the same employer to remove herself from the harasser without loss of compensation or other benefits. Courts in the U.S. typically do not order an employer to provide such a remedy in harassment claim – the focus is on whether the employer responded reasonably to the harassment to stop it and monetary damages for the victim if the response was not reasonable. Even if nondiscrimination standards do not provide for a transfer as a direct remedy for sexual
harassment, victims who are rendered disabled by the harassment should be able to obtain a transfer as an accommodation for this disability. Without such relief, the harassment is likely to continue and the damage to the victim can escalate.  

**Defining Harassment**

Definitions of what conduct constitutes harassment are fairly consistent across national boundaries. American nondiscrimination statutes do not specifically define sexual harassment, but U.S. courts have identified harassment as a form of discrimination based on its severity, frequency, impact and effect on the victim’s work. In hostile working environment cases in the U.S., the illegality of the harassment comes from the perspective of a “reasonable person,” considering "all the circumstances.” (Burke 2004)

Like the U.S., members of the EU have recognized that nondiscrimination includes freedom from harassment. The 2002 Equal Treatment Directive provides that harassment “shall be deemed to be discrimination on the grounds of sex and therefore prohibited.” Sexual harassment is broadly defined by the EU as “any form of unwanted verbal, non-verbal or physical conduct of a sexual nature ... with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.” Most EU members have similarly defined sexual harassment broadly. (Irish Presidency 2004)

**Preventing a Hostile Work Environment**

Victims of harassment seek a reasonable response from their employer, which can prevent further harassment and help that employer avoid liability. In the U.S, a reasonable response should fit the circumstances, including “remedial and preventative action was reasonably calculated to end the harassment.” Discharging the harasser may not be part of a reasonable response in every situation, since nondiscrimination laws are meant to be “remedial, not punitive.” Transferring or reassigning the harasser away from the victim to prevent future harassment has been seen as a reasonable response. Reassigning the victim so that she can avoid working with the harasser in the future may also be a reasonable response, if the transfer does not result in greater harm to her. Even though such transfers may be reasonable and help an employer avoid liability, U.S. courts do not order any type of reassignment as part of the remedy for proven sexual harassment;

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6 See, e.g., Bivens v. Jeffers Vet Supply, 873 F. Supp. 1500, 1509 (M.D. Ala. 1994), aff'd, 58 F.3d 640 (11th Cir. 1995) (constructive discharge may be shown if management had chance to rectify situation).  
9 Id.  
11 Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244-45 (10th Cir. 2001).  
13 See, e.g., Alvarez v. Des Moines Bolt Supply Inc., 626 F.3d 410, 421 (8th Cir. 2010)(harasser transferred to another department, harassment stopped).  
victims are limited to monetary damages and perhaps an order for an employer to take further steps to stop the harassment.

The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing U.S. nondiscrimination laws, encourages employers to “take all steps necessary to prevent sexual harassment from occurring,” including “developing appropriate sanctions.”\(^{15}\) Such a response can help an employer avoid liability in both the U.S. and the E.U. If an employer does not prevent harassment from occurring, relief for the victim tends to focus on monetary damages. In the U.S. and many EU members, monetary damages can include lost wages as well as compensatory and punitive damages.\(^{16}\)

In the EU, the nondiscrimination directives require that judicial and/or administrative procedures are available to victims of discrimination, including harassment.\(^{17}\) These systems should include “measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered.”\(^{18}\)

Harassment bans have been adopted widely by EU members. (Echikson & Trinephi 1998, Crawley 1999, Irish Presidency 2004) Employers can be held liable for harassment in their workplaces, particularly where the employer fails to respond appropriately once aware of the harassment; individual harassers can also be held liable in many countries. (Irish Presidency 2004) Sanctions in at least some of these countries include written warnings, reprimands, suspensions and dismissals for gross misconduct by the harasser; however, most of the sanctions focus on monetary damages for the victim of harassment. (Irish Presidency 2004) These penalties for harassment in the EU have been characterized as small and enforcement as spotty. (Echikson & Trinephi 1998)

Some EU members do provide other alternatives for victims. For example, in Germany, an employer’s appropriate, necessary, and reasonable disciplinary measures against a harasser can include a warning, a reassignment of the harasser, or dismissal.\(^{19}\) Similarly, the United Kingdom’s Equality Act 2010 allows a tribunal to recommend that an employer take action to obviate or reduce the adverse effects of the harassment, including recommending that the victim never come into contact with the harasser. (Irish Presidency 2004)

Sweden stands out as an EU member which specifically provides that the employer should seek to return the victim's work situation to normal, which could include moving the victim to alternative duties if it helps protect an employee from further victimization. (Hoel and Einarsen 2010) However, some have characterized the transfer of victims as “a declaration of failure and an abdication of responsibility on the part of managers as well as a breach of their duty of care toward employees.” (Hoel & Einarsen 2010) Rather than seeing a transfer of the victim as a failure, courts should consider whether such a remedy is an appropriate way to end the harassment and ensure the victim’s continued employment, when the employer has not discharged the harasser.

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\(^{15}\) See EEOC Guidelines, 29 C.F.R. § 1604.11(f).

\(^{16}\) For example, damages are available in Austria, Belgium, France, and the U.K. See INTERNATIONAL LABOR & EMPLOYMENT LAWS (Bloomberg BNA, William L. Keller, et al., Eds. 2013) Austria 9-64; Belgium 3-107, France 4-95; U.K.’s EHRC Employment Code of Practice 2011, ¶ 15.40.


\(^{18}\) Id.

\(^{19}\) BNA Section on Germany 5-107; Sec. 12 of General Equal Treatment Statute (Allgemeines Gleichbehandlungsgesetz) of Aug. 14, 2006.
Accommodations for Victims of Harassment

The need for accommodations for victims of harassment arises based on the negative mental health outcomes that can result from workplace harassment. (Pascoe & Richman 2009) These effects include physical and psychological injuries, some of which can be severe and long-standing, including depression, anxiety, posttraumatic stress disorder and personality disorders. (Banks 2006) Development of such psychiatric disabilities may call for accommodations, including a transfer to a different position as well as modification of workplace rules or policies.20

The Americans with Disabilities Act of 1990 (ADA) prohibits an employer in the U.S. from discriminating against an "individual with a disability" who, with "reasonable accommodation," can perform the essential functions of the job.21 A person with a disability includes any person with a “physical or mental impairment that substantially limits one or more major life activities.”22 The ADA covers persons with posttraumatic stress disorder and other mental impairments which are associated with victims of harassment.23 Similarly, the European Court of Justice has interpreted the General Framework Directive to prohibit discrimination against a person with “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”24

Under the ADA, "discrimination" includes an employer's "not making reasonable accommodations to the known physical or mental limitations,"25 which can include reassignment to a vacant position.26 An employer must accommodate an employee's disability unless the steps in question "would impose an undue hardship on the operation of the business" of the employer.27

Like the ADA, the EU’s General Directive prohibits an employer from dismissing employees “on grounds of disability that, in light of the obligation to provide reasonable accommodation to people with disabilities, is not justified by the fact that the person is not competent, capable, or available to perform the essential functions of his or her position.”28 The Directive’s preamble explains that accommodations may include “adapting premises and equipment, patterns of working time, the distribution of tasks, or the provision of training or integration resources.”29

Following the lead of the ADA’s interpretation of the duty to accommodate, Recital 21 of the Preamble to the EU Directive on accommodations discusses whether an accommodation would impose a “disproportionate burden” on the employer: “account should be taken in particular of the financial and other costs entailed, the scale and financial

20 See Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1087 (10th Cir. 1997) (some accommodation for disability-caused conduct necessary to prevent rendering ADA meaningless).
21 42 U.S.C. §§ 12112(a) and (b).
22 42 U.S.C. § 12102(1).
28 Chacón Navas, ¶ 52.
resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance.\textsuperscript{30} (Jimenez 2000)

This interpretation has been applied in member states including the United Kingdom, where the obligation to reasonably accommodate requires that employers take appropriate measures to enable a particular employee with a disability to have access to, participate in, or advance in employment, “unless such measures would impose a disproportionate burden on the employer.”\textsuperscript{31} Thus, British employers may be required to treat an employee with a disability more favorably than others, including transferring that person to a job he or she can perform, even if that person is not the “most suitable” candidate.\textsuperscript{32} Several other EU members have likewise required that employers accommodate employees with disabilities.\textsuperscript{33}

**Limitations on Transfer as Accommodation**

The duty to accommodate while avoiding undue hardship on the employer raises the question of whether the victim of sexual harassment should be allowed to transfer away from her harasser as an accommodation. The U.S. Supreme Court consistently has required the transfer of persons with disabilities to alternative open positions as an accommodation,\textsuperscript{34} as long as the employee with a disability can perform the duties of that position.\textsuperscript{35} In 2002, the U.S. Supreme Court reaffirmed an employer’s obligation to transfer an employee with a disability as an accommodation unless the transfer imposed an undue hardship, which could include conflict with an employer’s seniority policy.\textsuperscript{36}

Despite this general obligation to transfer as an accommodation, the inability to work under a particular supervisor may not be enough to show that a claimant is a person with a disability under the ADA.\textsuperscript{37} For example, an employee who was the victim of her supervisor’s sexual harassment, which led to her nervous breakdown, was not a person with a disability under the ADA because working in proximity to the harassing supervisor was not a major life activity.\textsuperscript{38}

Even if the victim of harassment can show that she is entitled to accommodation under the ADA because she has a disability, U.S. courts have been hesitant to find that reassignment to a different supervisor is a reasonable accommodation,\textsuperscript{39} often based on deference to an

\textsuperscript{30} BNA EU Section 1-247.
\textsuperscript{31} Id. at 1-246.
\textsuperscript{32} Archibald v. Fife Council, 2004 UKHL 32.
\textsuperscript{33} See, e.g., Bulgaria: employers must adapt the workplace to the needs of a person with a disability unless the expenses for the adaptation are unreasonably excessive and would impose a serious burden on the employer; Law on Protection Against Discrimination art. 16; BNA, Bulgaria 10-127, Hungary 14-91, Ireland 15-160; Danish Act on Discrimination on the Labor Market, Consolidated Act no. 1349 of Dec. 16, 2008, as amended.
\textsuperscript{34} School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n. 19 (1987).
\textsuperscript{35} See, e.g., Donahue v. CONRAIL, 224 F.3d 226, 230 (3d Cir. 2000)(right to transfer to vacant position as accommodation).
\textsuperscript{36} U.S. Airways, 535 U.S. at 397.
\textsuperscript{37} See, e.g., MacKenzie v. City and County of Denver, 414 F.3d 1266, 1276 (10th Cir. 2005)(working not substantially impaired based on inability to work under certain supervisor); Aldrup v. Caldera, 274 F.3d 282, 287 (5th Cir. 2001) (anxiety of working with certain employees not evidence of inability to work).
\textsuperscript{38} Frazier v. Delco Electronics Corp., 263 F.3d 663, 668 (7th Cir. 2001).
\textsuperscript{39} See, e.g., Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 384 (2d Cir. 1996) (assignment to different supervisor not reasonable accommodation).
employer’s freedom to assign supervision.\textsuperscript{40} (Stefan 1998) Courts have recognized that “[e]mployers are entitled to assign personnel as their needs dictate.”\textsuperscript{41} Requiring a transfer as an accommodation would “undermine an employer’s ability to control its own labor force.”\textsuperscript{42}

Essential qualifications for a position often include the ability to get along with others in the workplace.\textsuperscript{43} Some courts have reasoned that even if the supervisor was a “cause” of the employee’s symptoms, the “ability to follow the orders of superiors is an essential function of any position.”\textsuperscript{44} One U.S. appellate court found that a request to work under a different supervisor was unreasonable, because working under her supervisor was an essential job duty.\textsuperscript{45}

U.S. Courts have also reasoned that reassignment away from a supervisor as an accommodation would “give disabled employees preferential treatment to transfers over non-disabled persons.”\textsuperscript{46} These courts have explained that “Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons.”\textsuperscript{47} This position conflicts with the general understanding that the duty of reasonable accommodation may require an employer to adjust its policies. (Weber 2000) The reluctance to extend “special” accommodations to victims of harassment who are suffering from a mental impairment may be based on an underlying “assumption that the employee does not suffer any limitations at all but is simply trying to extract unwarranted concessions from management.” (Stefan 1998)

This assumption of unreasonableness has been adopted even where the claimant has alleged that the supervisor or manager has aggravated or exacerbated the symptoms of her impairment.\textsuperscript{48} For example, employees suffering from mental illnesses, which may have been aggravated by their supervisors, have been unable to force their employers to reassign those employees to different supervisors as accommodations.\textsuperscript{49}

In contrast to this line of reasoning, one U.S. trial court recognized the transfer of an employee alleging discrimination away from coworkers with whom she was unable to work as “the classic example of a reasonable accommodation,” where her essential job functions did not require that she work with them.\textsuperscript{50} This conclusion may have been supported by the


\textsuperscript{41} See Lewis, 908 F. Supp. at 948.

\textsuperscript{42} Id.


\textsuperscript{45} Wernick, 91 F.3d at 384. See also Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 14 (D.D.C. 2000)(claimant could not perform essential duty of interacting with co-workers and supervisors after displaying abusive and threatening conduct).

\textsuperscript{46}Id.

\textsuperscript{47} Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 581 (3d Cir. 1998).

\textsuperscript{48} See, e.g., Mancini, 820 F. Supp. at 143, 148 (transferring disabled employee to allow work under different supervisor not reasonable accommodation).

\textsuperscript{49} Weiler v. Household Finance Corp., 101 F.3d 519, 526 (7th Cir. 1996)(ADA does not require that employer allow employee to establish who will supervise her ); Bradford v. City of Chicago, 121 Fed. Appx. 137, 140 (7th Cir. 2005)(unpublished opinion)(choice of supervisor belongs to employer, not employee).

\textsuperscript{50} Palmer v. Circuit Court of Cook Co., 905 F. Supp. 499, 509 (N.D. Ill. 1995).
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court’s impression that the claimant’s difficulties may have been due in part to the behavior of her supervisor and coworker.\(^{\text{51}}\)

Despite some recognition of the reasonableness of transfers as accommodations, courts have refused to extend this duty to transfer as an accommodation to victims of workplace harassment. Even where workplace harassment led to stress and depression in the victims, courts have required that employers transfer those victims as an accommodation.\(^{\text{52}}\) One court specifically stated that “a change in supervisor is not a reasonable accommodation because this is unduly burdensome on the employer.”\(^{\text{53}}\)

This failure to recognize a transfer as a reasonable accommodation for victims of harassment leaves them with only monetary damages to compensate them for their injuries. Nothing in the U.S. nondiscrimination laws compels an employer to discharge or discipline a harasser, other than the potential avoidance of liability for any future harassment. Therefore, a victim of harassment may be forced to choose between continuing to work with her harasser or resigning. Allowing the victim to transfer away from a harasser and remain employed, while maintaining her benefits, would accommodate the mental impairments caused by the workplace harassment.

\textit{Undue Hardship}

Even if a transfer is considered a reasonable accommodation, an employer in either the U.S. or the EU can avoid its obligation to accommodate an employee with a disability if that transfer causes the employer undue hardship.\(^{\text{54}}\) An accommodation imposes an undue hardship only based on various employer-specific factors, including cost, the effect on operations, the overall financial resources and size of the employer, and the type of operation involved.\(^{\text{55}}\)

Under this approach, a victim of harassment may not obtain a transfer away from her harasser if the employer can show that the costs were “clearly disproportionate to the benefits.”\(^{\text{56}}\) Courts have found that administrative burden on the employer would result from a transfer where assigners of work or projects would need to consider the claimant’s stress level, which would require “far too much oversight.”\(^{\text{57}}\) Similarly, another court refused to require that the employer “constantly” monitor the workplace for actions that caused the complainant stress.\(^{\text{58}}\)

Transfer away from a harassing supervisor may be provided as an accommodation in courts which are willing to examine the reasonableness of the accommodation request on a case-by-case basis. Using this approach, one appellate court rejected adopting a “per se rule

\begin{itemize}
  \item \textit{Id.}
  \item \textit{Gidge, 2010 U.S. Dist. LEXIS 118310. at *25.}
  \item \textit{42 U.S.C. §§ 12112(a), (b)(5)(A).}
  \item \textit{42 U.S.C. §12111(10)(B); Barnett, 535 U.S. at 405.}
  \item \textit{Gaul, 134 F.3d at 580-81.}
  \item \textit{Id.}
  \item \textit{Williams v. New York State Dept. of Labor, No. 98 Civ. 3816(RMB), 2000 U.S. Dist. LEXIS 9540 at *61 (S.D.N.Y. May 25, 2000).}
\end{itemize}
stating that the replacement of a supervisor can never be a reasonable accommodation."\(^{59}\)
Therefore, the claimant could still show that in her particular situation, such an accommodation would be reasonable because the costs do not clearly exceed the benefits.\(^{60}\)
A court using such an analysis then considers whether the assignment to another supervisor would be possible or would involve excessive organizational costs.\(^{61}\)

Since EU members have adopted this same approach of reasonableness and undue hardship when reviewing requested accommodations, enforcing courts should individually assess a request to transfer by a victim of harassment. If the victim can still perform her essential job duties after moving away from her harasser, or a vacant position exists for which she is qualified, then transfer would be a reasonable accommodation. Then the transfer should only be denied if the employer can show that hardship would result from that transfer.

**Conclusion**

It is concerning that the duty to accommodate has not extended to situations where the claimant has established at least questions of fact as to whether the supervisor in question has created a hostile environment. Victims of harassment may need more relief than the damages attributed to the harm they have suffered from the harassment. Despite the harassment, some may wish to keep their job, without suffering further harassment. This could be achieved through accommodation of the person’s mental impairment resulting from the harassment. Both the U.S. and the EU might experience fewer claims of harassment if employers were required to provide such an accommodation.

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\(^{60}\) Id.

\(^{61}\) Id. at 123.


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Exploring the Limits of Law: Gender Empowerment and Women Domestic Workers in Pakistan / AYESHA SHAHID

Abstract

Domestic work is a major source of employment in the informal labour market that provides livelihood to the disadvantaged social groups across the globe. It is perceived as work with low economic value and an extension of unpaid household duties that hardly get any recognition for the work performed. Historically domestic work for others' households has remained a principal way of earning a living for women. Affluent families in the developed and developing countries employ both local and migrant women domestic workers. Pakistan is one such developing country where women in large numbers are employed as domestic workers by the upper and middle class echelons of society. Yet of the eleven labour policies framed by various governments since the creation of Pakistan in 1947, none has addressed the issue of domestic workers, nor are domestic workers covered under the general labour laws of the country. Through the lens of postmodernist legal feminism and legal pluralism, this paper attempts to deconstruct the role of law as a 'site for discursive struggle' by exploring the relationship between law, gender and empowerment in a legally pluralistic society as Pakistan. It advances the argument that women's lives are shaped by sharp gender and socio-economic disparities leading to unequal power relations vis-à-vis their employers, state and society. Access to justice through formal legal system is very often contingent upon the socio-economic position of the domestic workers. Women in domestic service have to negotiate the barriers of poverty and inequality before being able to employ the law as their ally.

It is in this background that the paper questions the potential and efficacy of formal black letter law as a tool for empowering women domestic workers in their struggle against exploitative treatment in the workplace? As a critique of the impact of legality it attempts to find out what factors are at play, which limit the domestic workers' scope for legal action? What are the obstacles that hinder the implementation of the principles of equality and nondiscrimination? And finally considering the limits of law and by looking beyond formal law what could be the future strategy to address gender discrimination and inequality faced by the Pakistani women domestic workers?

Keywords: Women Domestic Workers, Pakistan, Informal labour, Legal Feminism and Legal Pluralism

Introduction

Domestic work is a major source of employment in the informal labour market that provides livelihood to the disadvantaged social groups across the globe. Domestic work around the globe is considered an unregulated, under-valued, unorganized and underpaid form of work performed by the disadvantaged social groups of society. It is perceived as work with low economic value and an extension of unpaid household duties that hardly gets any recognition for the work performed. Historically domestic work for others' households has remained a principal way of earning a living for women. Not only affluent families in the developed world engage local and migrant women domestic workers but women domestic workers are also found in developing countries working for upper and middle-class echelons of society. Pakistan is one such country where large numbers of women are employed as domestic workers. Yet of the eleven labour policies framed by various governments since the creation of Pakistan, none has addressed the issue of domestic workers, nor are domestic workers covered under the general labour laws of the country.

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Through the lens of postmodern legal feminism this paper questions the potential and efficacy of black letter law as a tool for empowering women domestic workers in their struggle against exploitative treatment in the workplace? As a critique of the impact of legality the paper attempts to find out what factors are at play, which limit the domestic workers’ scope for legal action? To what extent can formal legal mechanism provide protection and what are its limitations? Is there a way to empower women domestic workers by looking beyond law? And finally by considering law as a discourse, what could be the future strategy for addressing inequality and gender-based discrimination affecting Pakistani women domestic workers in the workplace?

Theoretical Perspectives on Women, Law, and Empowerment in Plural Legal Settings

This section examines the relationship between women, law, and empowerment by using post-modernist legal feminism. Post-modernist legal feminism is critical of mainstream legal discourse because of its failure to take into account women’s voices, experiences, and practices (Taylor et al., 1999; Nafine, 2002; Fredman, 2002; Cain, 1991-1992; Fineman and Thomsden, 1991; Andleu, 2000). Post-modernist legal scholarship engages with law not as a set of formal rules, but as a discourse. It exposes the gendered content of law which leaves women in a disadvantaged position. It sets out to show how gender neutral laws can treat men and women differently and the way law constructs gender by invoking certain stereotype images of woman which she must identify herself with. Legal feminists within the Western and non-Western societies contest such images of women (MacKinnon, C., 1987; Davies, 2003; Kapur and Cossman, 1998; Chunn and Lancombe, 2000; Chamallas, 1998; Mohanty 2003Ali, 1998; Jilani, 1998; Jhappan, 2002; Basu, 2001; Mukhapadyay, 1998). They consider such law as androcentric, meaning based on male value reflecting in legal rules and legal institutions. This view of law as ‘male’ suggests that law differentiates between men and women to such an extent that it works to the disadvantage of women by allocating them fewer resources, judging them with different standards and denying them equal opportunities. MacKinnon (1987) argues that the question of equality should be addressed by analysing the male/female power relationship, an unequal relationship is due to the continuous existence of male supremacy. The task of feminism is to unmask women’s subordination and lack of power by challenging the male-dominated structures of society. MacKinnon seeks to dismantle the dominant/subordinate relationship through empowering women’s voices with a view to achieve legal, social, and political equality.

On the other hand, Smart disagrees with the view that law is sexist and male. In her view, such approaches could be dangerous as these presume law to be unitary and always representative of male values. Smart views law as gendered in its vision and practice. She critically examines how law constitutes gender and becomes a ‘site’ in which gendered positions and identities are articulated. She considers law as a ‘site for discursive struggle’

Like feminism in general, legal feminism has different strands liberal, radical and post-modernist. The liberal perspective in feminist legal theory expects law to become gender-neutral if women’s experiences and perspectives are included. It promotes the ideal of global sisterhood by ignoring the religious, racial, cultural, and ethnic diversities among women around the world. Radical feminist strand, on the other hand, views law as purely masculine, where legal institutions and the entire legal discourse reflect male concerns and priorities and can never incorporate women's experiences. Post-modernist feminists consider equality as a social construct that reflects patriarchal ideas and needs reconstruction. The post-modernist strand is anti-essentialist as it does not focus on the single category of a ‘woman’ rather it focuses on the situated realities of women and emphasizes that there is no single theory of equality that will work for the benefit of all women.
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which must take into account the political, cultural, and economic aspects of a society that affect women’s lives. Smart further argues that law is not the only and primary site of this ‘discursive struggle’, rather it is one of the many other sites where such struggle takes place over the meaning of equality and liberty, political agendas, and affirmative action in relation to the socio-legal status of women (Smart, 1989).

Smart advises us to decentre law by not giving so much power to it. She considers that

‘There are other power structures operating at the same time for which law alone is not sufficient. For example the issue of women’s low pay cannot be resolved by achieving equality provisions for equal wages in law unless we address this issue in a wider context of segregation in job markets, racism, division of public/private and undervaluation of women’s work.’ (Smart 1989, p165)

Thus, one can argue that law has its own limitations as it cannot displace dominant discourses of class, gender and socio-economic positions; therefore, its ability to bring about social change on its own becomes questionable. However, Smart does not suggest a complete disengagement from law, rather advises to explore ‘other non-legal strategies and local struggles’.

In the context of Pakistan, feminist legal scholars Ali (1997) and Jilani (1998) have attempted to expose the limits of law in a plural legal setting. They are of the view that neither litigation nor legal reforms have been able to deliver gender justice. Ali argues that ‘Laws operate in a specific social, cultural, economic, and political environment which affects and informs debates and discourses therein… thus law becomes gendered and the male bias entrenched even in apparently gender-neutral laws’

Jilani is of the view that law-making process and its implementation has been carried out through institutions that have always remained male dominated whether it is the legislature, police or judiciary. These institutions have always served the interests of men and protected patriarchal privilege, thus access to justice and implementation of laws has always been difficult for women in Pakistan. Despite the dramatic increase in the number of women in legislative assemblies every effort is made to silence women’s voices in these law and policy making forums. The male face of law, Jilani insists, should not preclude women from using it and for the application of law social institutions need to be changed. She is of the view that if law is made to overcome injustice then social institutions should not be able to override it by appealing to social norms and values or religion.

I draw inspiration from the works of the above mentioned legal feminists and I utilise Carol Smart’s critique of law as a ‘site for discursive struggle’ to re-examine the role of law by exploring the relationship between law, gender, and empowerment. (Smart, 1987) I engage in a theoretical discussion to critique law as a tool for empowering women domestic workers by raising a series of questions: Can formal/state/secular law situated within the patriarchal, capitalist, plural legal settings provide remedy for the grievances and sufferings of women and can formal legal mechanisms provide protection to women domestic workers in Pakistan? And whether such law provide physical and economic security to women and can women use law as a strategy for social change?

To address these questions, this article engages with the law not as a set of formal rules, but as a discourse to examine its scope as well as limitations by exposing the gendered content of law, which leaves women in a disadvantaged position. It advances the argument that women's lives are shaped by sharp gender and socio-economic disparities leading to
unequal power relations vis-a-vis their employers, the state, and the society. Access to justice through the formal legal system is often contingent upon the socio-economic position of the domestic workers.

Women in domestic service have to negotiate the barriers of poverty and inequality before being able to employ the law as their ally. I further argue that a simple set of rules cannot bring equality and remove disparities in the presence of the deeper injustices that exist in the form of patriarchal values, gender and class differences. Therefore, it is essential that the extent of the law’s power to bring about social change must be measured against the very real constraints of patriarchy, gender and class hierarchies.

Research Methods

To assess the situation of women domestic workers, I carried out a small sample of exploratory empirical research by conducting semi-structured interviews with women domestic workers in order to find out their lived experiences.

Semi-structured, in-depth group and individual interview techniques were used for data collection. The group discussions/interviews helped inspire women to express their views. It also led to an active involvement of my respondents in the construction of data about their lives. After gaining some confidence through group interviews, my respondents were more expressive in individual interviews and were able to speak and express themselves about issues that they avoided in the presence of their co-workers. The individual interviews helped in extracting information on issues that were otherwise difficult to address due to cultural constraints. The technique of conducting individual interviews provided women with a confidential platform to openly express themselves on a more personal basis about the nature of work, self-perception, their real needs, and the relationship with their employers. The empirical data collected through these interviews assisted in looking at the perspectives of both domestic workers and their employers. Listening to these voices also helped in understanding whether any formal legislative framework will have an impact on women domestic workers’ lives. In addition, it helped in understanding the gendered and class-based nature of domestic service. Listening to their lived experiences led me to more dimensions of their problems which I would have otherwise failed to identify.

Group interviews were carried out in the form of two to three-hour discussion sessions, whereas individual interviews lasted for sixty to ninety minutes. Some of the individual interviews were conducted in two or three sessions. Most of the interviews were carried out in the evenings when women domestic workers were at home, while some of the interviews with live-in domestic workers were conducted on Sundays when they came to visit their family or friends. These interviews were administered in two cities, Karachi and Peshawar. In Karachi, the Hijrat Colony and Bhit Islands were the two sites where interviews were conducted. In Peshawar, data was collected from the Christian Colony and Acheena Village. Respondents for the interviews were selected bearing in mind the wide variations of

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64 In Karachi, I interviewed women domestic workers who work in the affluent localities of the Defence Housing Society and Clifton and lived in a squatter settlement called Hijrat Colony, which is an illegal settlement near the Clifton railway track. Clifton is a mixture of commercial offices, residential apartment buildings, and private houses. In sharp contrast to modern skyscrapers and expansively designed and decorated bungalows (with all sorts of amenities for comfortable and luxurious life styles), the Hijrat Colony presents the picture of a completely neglected area with no basic amenities.

65 In Peshawar, the Acheena Village was the first site where women domestic workers were contacted. This is a small village, part of the tribal belt, and lies on the outskirts of Hayatabad Township. The poor community in the village comprises of small farmers and labourers. As the earnings are very low, women also go out of their
age, marital status, and ethnic background. Around 25-30 women domestic workers were interviewed from each site. The table below indicates the total number of women interviewed, their age groups, and marital status per site.

Besides interviewing domestic workers I also interviewed employers (from both middle-class and upper-class backgrounds), government officials from the Ministry of Labour and Manpower, women rights activists, lawyers, and labour leaders. Qualitative method was applied for data analysis as it is useful for analysing concrete cases in their temporal and local context (Merriam, 2002; Denzin and Lincoln, 2005). The use of a qualitative method helped in providing a better understanding of the social world of women domestic workers through an examination of the interpretation of their world by women themselves.

Findings

Conditions of Work and Job Insecurity

Women domestic workers reported that they enter into domestic services for various reasons such as poverty, illiteracy, or if the male breadwinner is unable to fulfill his role; therefore, the burden of providing for the family’s basic needs falls on the woman’s shoulders. The female domestic worker’s main duties include laundry and ironing, household cleaning, cooking, elderly care, child-care whereas men work as cooks, gardeners, drivers and guards. Domestic service in Pakistan is based on an informal verbal contractual arrangement between the employer and the employee. There is no written contract and domestic workers find jobs by word of mouth through friends and relatives. There is no fixed wage structure for full-time, live-in, or part-time domestic workers and wages vary from one thousand to eight thousand Pakistani rupees according to the economic status of the employer, the type of work performed, as well as the employee’s age and gender. For example, ZB, who works as a nanny in Karachi for an affluent family, gets six to eight thousand rupees per month compared to her previous job with a middle-class family where she performed the same duties but was only paid three thousand rupees per month. Women domestic workers are also discriminated against male domestic workers in terms of wages and working conditions. Men are paid around ten to twelve thousand rupees where as women receive less than half of male domestic workers’ wages.

Time schedules vary according to the needs of both the employer and the employee, for example a full-time worker starts at 8am or 9am and finishes by 5pm or 6pm. However, live-in workers are engaged in work from early morning till late at night and have one day off per week, fortnightly, or sometimes per month depending on the will of the employer. Women domestic workers complained that live-in workers are in a worst position: they usually do extra tasks which may not be part of their job. Not only are they asked to be available almost twenty four hours, seven days a week but are also not allowed appropriate breaks. S is a live-in worker and her day starts at 6am and she works until 10pm or 11pm with hardly any breaks in between. The only time she is able to relax is while having her lunch or tea and sometimes she is given permission to watch television for half an hour in the evening. Live-in workers like S also experience social isolation, as many employers do not allow them to visit their families and friends or even other co-workers in the neighborhood. The employers fear that by socializing with other co-workers, domestic workers might
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compare wages and demand a pay increase, find new jobs with better prospects, or reveal personal matters regarding the employers’ family.

Women domestic workers also reported that they are not paid any overtime or bonus for extra work.

Employers have their own views on the issue of wages and working hours. A schoolteacher argued that

‘employing a domestic worker even at a low wage should be seen as a measure to combat poverty and unemployment...if the minimum wage is set too high, some households will not be able to afford a domestic worker, which will lead to more unemployment and even greater poverty...many unemployed workers are desperate to get jobs and are willing to work for lower wages.’

Another employer commented that domestic service is more beneficial than other informal sector jobs because domestic workers get food, shelter, and clothing, which is not the case in most jobs.

**Employer-Employee Relations**

During the interviews, employers assured that their relations with their employees were based on goodwill and their domestic workers were part of the family. Many of the workers had been with them for years and had become part of the family; therefore, they were ‘kind and caring’, not only to their domestic worker, but also towards their workers’ families and children. Employers claimed that they also provide extra monetary help to domestic workers when they need it for instance to pay the school fees for their children or in case of any family emergency.

However, domestic workers considered that despite the employers’ claims for treating them as family members, at the end of the day they still remained outsiders. They were often reminded of their low-class status by being treated in such a way that would not be expected towards a family member, such as being given old, used, and torn clothes or leftover food.

They accepted that there had been goodwill gestures on the part of employers on different occasions, but in some cases employers expected more services from the domestic worker in return for the help extended.

Women domestic workers also reported that their actions and movements are under the employer’s constant surveillance. The live-in workers suffer more in this respect because they stay with the employer twenty-four hours a day. Live-in workers have to give up their privacy and freedom of movement. They are under scrutiny all the time, even during non-working hours.

Another aspect of control is that in many households, domestic workers are answerable to all members of the family; therefore, they work under several bosses at the same time. Theft and pilferage allegations are also very common. Constant suspicion between the employer and employee has resulted in the lack of trust for each other. There are several other barriers to good relations between employees and female domestic workers for instance employees were accused of negligence of duties and wastefulness in using their employers’ resources, employee failure to give adequate notice of intention to leave, employer restrictions
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on access to food and disputes over leave days or rest time and failure to pay for over time and periodic increase in wages.

Class Hierarchies and Degrading Treatment

Hiring of domestic workers represents the reinforcement and replication of gender and class inequalities, for instance in terms of wages a male cook gets more salary as compared to a woman domestic worker doing the same work. Another indication of class difference between the employer and employee appears in the form in which food is given to domestic workers in different households. Women domestic workers in their interviews openly complained that they are given leftovers to eat.

While interviewing one woman, laughed out and said ‘I can’t even dream of sitting and eating on the same table with my employer... We are inferiors and that is also one of the reasons why our work has not brought any significant change in our status in the society.’

The inequality of class status is also visible in the way these workers are addressed. They are not called by their actual names, but instead domestic workers are always addressed as ‘maasi’, ‘mai’, ‘Ayah’, ‘babbo’, ‘jamadarni’; these names are like calling a cleaner ‘cleaner’ or a bin man ‘bin man’. Similarly, the manner in which domestic workers address their employers, by their titles such as ‘begum sahib’ and ‘baray saab’, (meaning ‘Madam’ or ‘Sir’), reflects class hierarchies and widens the gap between the employees and the employers. Use of such names in everyday language reflects class-based tendencies of society, where people are still judged by their social and economic status. These names also obscure the truth that all domestic workers are real workers who deserve to have basic rights, respect, and dignity. Non-discrimination and dignity of labour are completely ignored, and in reality, women domestic workers are forced to believe that they belong to the lowest social category and their work has no value and they don’t deserve respect and recognition.

Women’s Perception of the Formal Legal System

To assess how effective formal law could be as a tool for empowerment, women domestic workers were asked about their experiences with the formal and informal legal system, how they perceive the legal system in Pakistan, and what has been their experience of formal courts and other informal mechanisms to seek justice. They were also asked if their services were to be regulated and given legal protection, would they use law as a recourse for their protection?

Women domestic workers reported that they knew that legal protection was available to factory workers and public sector workers, and labour unions support workers against exploitative employers. When asked whether they would like their jobs to be regulated by the formal law, the majority of them responded in the affirmative. However, they expressed their deep concern about the possibility of using the law. This concern and reluctance to approach the courts was due to their own socio-economic position in society, as litigation itself is a costly and time-consuming process. Moreover, for women domestic workers who are illiterate, the language of the law is incomprehensible and far too complicated for them. Women domestic workers also mentioned that the formal legal system is an expensive process and involves court fees and lawyers’ fees which are beyond the means of women domestic workers as well as other marginalised groups. Therefore, women strongly felt that they are in
need of some support structures that could help them in obtaining legal aid as well as in
organising them on a more formal level.

Data Analysis

The data from the field shows that in the absence of any formal contractual arrangement domestic workers are easily exploited in terms of wages and working hours. There is also no job security and can be fired for no rhyme or reason as the employer knows that a surplus labour force is always available. The availability of a surplus labour force is a basis for exploitation because the employer and worker both know that no worker is indispensable; if one is fired or refuses to continue, there is another worker willing to take her place.

The employer-employee relations are not straightforward contractual relations. It is a relationship based on power in which one party is much stronger and influential than the other. The power relationship is reflected both in the direct abuse which domestic workers face and also in the degrading and demeaning status attached to this type of work. The employer-employee relations in domestic service are imbalanced and often leave the employee in a vulnerable position. The employers’ control over their lives is clearly visible in many aspects of their existence. It is the employer who decides and organizes the work schedule and hours according to their own lifestyle and convenience, completely ignoring the domestic worker’s basic right to rest periods and right to privacy.

The data also illustrates the roles of gender and, class in placing domestic service at the bottom of the employment ladder. It shows that it is the gendered nature of this form of work, which underestimates domestic service as having no value at all. Gender and class hierarchies are demonstrated the way privileged class women exploit their employees. This exploitative attitude is depicted in the indifference of privileged women who simply turn a blind eye towards a system that creates class hierarchies and reinforces patriarchy. Privileged women escape some of the consequences of patriarchy by using the labour of working class women. In the majority of Pakistani households, the division of labour by gender-specific roles exists and men do not involve themselves in household work. By delegating household functions to the domestic worker, a woman employer escapes some of the limitations of patriarchal culture; however, this results in reinforcing the gender stereotyping of housework. By hiring female domestic workers, middle and upper-class women solve the problem of their double burden of work and full responsibility for household chores. Without challenging the patriarchal idea that ‘house work is only women’s work’, the female employers shift the burden of work by hiring women domestic workers. This gives relief to women employers from their household responsibilities by transferring their burden to other women who are lower in class and social status.

However despite all odds women domestic workers have accepted the challenge to come out of their homes and make use of whatever skills they have for earning a living for the sake of their families. Their work has given them the courage to face the world and struggle for survival in an environment in which class disparities are apparent and a constant source of discrimination and humiliation. They have accepted the challenge to come out of their homes and make use of whatever skills they have for earning a living for the sake of their families and gained the courage to face the world and struggle for survival in an environment in which class disparities are apparent and a constant source of discrimination and humiliation. The data from the field also demonstrates the presence and use of these strategies, even among the
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Pakistani women domestic workers, who, if given further support, are capable of bringing some positive changes in their lives.

The data also demonstrates the limits of law as an effective process and mechanism for empowering women domestic workers. It shows that law cannot exist in a vacuum, abstracted from the lived realities of women. Formal law on its own cannot be a tool for the empowerment of women in the presence of class hierarchies, patriarchy, and socio-cultural norms that are more powerful than legislation. Formal laws will remain an under-utilised and partially effective strategy for women seeking equal rights in the workplace, until perceptions towards women and their work undergo a transformative process and domestic workers are recognised as workers and their work is valued.

Legal and Non-Legal Strategies for Empowering Women Domestic Workers in Pakistan

The first step should be a countrywide survey to document and register domestic workers in Pakistan. Any strategy for improving the situation of women domestic workers is dependent on this information. The National Database and Registration Authority (NADRA) has issued registration forms to the residents of the capital city, Islamabad, on the orders of the Ministry of Interior to collect data about people employed across the city as domestic workers. The form includes questions related to the employee’s nationality, nature of the work and other personal details. At present, this initiative is limited to the capital city, and needs to be initiated all over the country.

Recognizing domestic work as a form of productive labour under a separate sector in the service industry is another important step that needs to be taken. Women domestic workers are producers contributing towards society through their services. To gain recognition as a service industry, domestic workers should be included in the definition of ‘worker’ in all legislation pertaining to employment. Only two pieces of legislation specifically include domestic workers within their remit. The Provincial Employees Social Security Ordinance 1965 sets out the employers’ responsibility to provide medical care for ‘domestic servants’ in section 55-A. The Minimum Wages Ordinance of 1961 includes those employed in domestic work within the definition of ‘employee’. However, the application of the Ordinance to domestic workers remains unclear, and no further steps have been taken to specify the minimum wages applicable to the domestic work sector; its application in particular to live-in domestic workers is unclear.

A Bill to extend labour protections to domestic workers was introduced in the Senate in 2013, but remains (at the time of writing), pending. The Domestic Workers (Employment Rights) Bill seeks to regulate terms and conditions of work, payment of wages and rest periods, as well as providing access to remedies through a proposed ‘dispute resolution committee’. The Domestic Workers (Employment Rights) Bill would cover only the Islamabad Capital Territory (ICT) as labour related laws are a provincial subject under the 18th Constitutional Amendment. The proposal, however, is that each province would follow with their own legislation once the bill passes for the Capital Territory. 66 The ILO, in its Decent Work Country Programme for Pakistan, 67 notes the challenges in implementing labour legislation in Pakistan, and in bringing domestic laws and practice into alignment with

international standards. Such challenges are exacerbated in the informal sector of domestic work, where the reach of labour legislation and inspectorate mechanisms is non-existent.

For drafting legislation for domestic workers at the provincial levels it is also important to initiate a consultative process involving activists, government officials, legislators, domestic workers, and employers. It would also be beneficial to take the opinion of the members of Tripartite Labour Conference who are already in negotiations with the government on the issue of a new labour policy and are involved in the process of the codification of labour laws in the country. For this purpose, coordination among policy makers, legislators, non-governmental organizations is vital.

The International Labour Organisation (ILO), in its recent standard setting initiatives, adopted the Convention Concerning Decent Work for Domestic Workers (189) and a General Recommendation 301. Pakistan is already a party to most of the ILO Conventions, including the Forced Labour Convention 1930 (No. 29), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Equal Remuneration Convention 1951 (No. 100), Abolition of Forced Labour Convention 1957 (No. 105), and the Minimum Age Convention. In light of these conventions, Pakistan has already made changes to its own labour law. If the ILO Convention 189 is ratified by the Pakistan government, it will be bound to include domestic workers in labour legislation and to take steps for the protection of domestic workers in Pakistan. The Convention is the yardstick by which the rights of domestic workers should be measured.

The absence of worksite monitoring mechanisms results in creating space for forced labour and exploitation. Therefore for an effective enforcement of legislation, mechanisms of labour administration and inspection that minimize exploitation in the workplace need to be put in place. Along with monitoring mechanisms, for achieving access to justice efficient and accessible channels are needed through which local and migrant workers can lodge complaints and seek remedy without discrimination, intimidation or retaliation. These might take the form of human rights commissions, tribunals and ombudsman systems. In Pakistan, there are separate labour tribunals for deciding labour disputes; however, these tribunals are already overburdened by the caseload. One possibility to avoid delays could be in the form of setting up a separate tribunal at the district and divisional level, under the supervision of every provincial high court. During the past few years, the Supreme Court of Pakistan has taken suo moto actions through which it has intervened in areas where there have been gross violations of human rights, as well as violations of laws made in the social sector. The Supreme Court on the basis of suo moto action can also directly take up any case where there is a violation of domestic workers’ rights in Pakistan.

It is also crucial to organise women domestic workers by establishing networks, support groups, and organisations for advancing the interests of women domestic workers. In their interviews, women workers mentioned their need for support to organise themselves in grassroots and community-based organisations. These organisations could take the initiative and streamline efforts of women domestic workers in the right direction. There is considerable optimism that an organised ‘voice’ would be able to change the terms on which women domestic workers are employed and improve their living and work conditions.

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68 The Supreme Court of Pakistan has taken suo moto action on a number of social issues. A ban on serving meals in weddings is imposed under the marriage ordinance, however there have been blatant violations of this law. Another important case is of tribal practice of vani and swara in which the federal government has been asked to amend Section 310 of the Pakistan Penal Code or the Family Act, 1964, to provide for dissolution of marriages of women given in vani or sawara. All these cases suggest that the judiciary is playing a proactive role in upholding the rights of individuals and in having existing laws implemented.
However, any change in the present structure would only be possible by recognising and validating the ‘worker role’ and by organising women domestic workers and enhancing their collective strength. They have accepted the challenge to come out of their homes and make use of whatever skills they have to earn a living for the sake of their families and gained the courage to face the world and struggle for survival in an environment in which class disparities are apparent and a constant source of discrimination and humiliation. The data from the field also demonstrates the presence and use of these strategies, even among the Pakistani women domestic workers, who, if given further support, are capable of bringing some positive changes in their lives.

In accordance with Article 17 of the Constitution of Islamic Republic of Pakistan, ‘every citizen has the right to form associations or unions, subject to reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.’ In view of above, domestic workers are free to form associations/unions. Currently, there is no exclusive union or association of domestic workers in Pakistan. There are women organisations and unions in other employment sectors; therefore, setting up organisations for women in domestic service would not be something exceptional. Working together as a pressure group with these organisations could be a more effective strategy for women in domestic service. These organisations could help the domestic workers, as well as workers in other informal sectors, to take a collective action to solve their problems. They can also play the role of a bridge in linking women in domestic services to the trade unions as their interaction with trade unions could provide a base for a larger organisation of domestic workers. Presently there is one small women domestic worker association that was formed by a local NGO called ‘Lawyers for Human Rights and Legal Aid’ (LHRLA) in Karachi. There is also a ‘Centre for Rehabilitation of Child Domestic Workers’ in Islamabad which was launched by the Ministry of Women Development.

However, the two organisations have gone quiet on the issue which suggests that a commitment to the cause of women in domestic service is needed because the mere formation of organisations would not bring any change in their situations. Several associations and centres that are committed to the cause of women in domestic services are needed all over the country. Such associations could assist workers in obtaining jobs, solving disputes among the employers and domestic workers, run awareness campaigns, and provide training.

Women domestic worker organisations in Pakistan could also benefit from the experiences and various strategies adopted by organisations working at the international level, such as ‘INTERCEDE’ in Canada, ‘KALAYAAN’ in the UK, ‘Break the Chain Campaign for Domestic Workers Rights’ in the US, and the National Women Domestic Workers Movement (NDWM) in India, which has played an important role in organising domestic workers in India. Raising awareness among women in domestic services is another non-legal strategy which could help in the implementation of any legislative provisions. There is a need to hold regular awareness raising sessions aimed at imparting information to these workers about their inherent and rudimentary rights. This could be achieved through training programmes and holding community meetings and discussion groups/support groups. An awareness of their own rights can lead to collective action because a domestic worker who works within a closed environment of a private home where interaction with other co-workers is limited, would not know about her rights. This process should not be limited to domestic workers as it is equally pertinent to make employers aware of the rights of domestic workers.

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69 The Pakistan Institute of Labour, Education and Research, All Karachi Labour and Hosiery Garments Labour Association, Working Women Forum, and Fisher Folk Forum to name a few.
A change in the thinking and attitude of employers is essential for improving the status of domestic workers. Media can also play an important role in bringing to light the issue of domestic workers. Newspaper articles, radio and television talk shows, and street theatre can be useful tools. Women domestic worker organizations could regularly invite journalists to their seminars and group discussions so that the issue is continuously reported in the press. Besides media awareness campaigns, it is also important to initiate a consultative process involving activists, government officials, legislators, non-governmental organizations, labour trade unions, researchers, domestic workers and employers. A tripartite process is already taking place for codification of labour laws in the country.

The state also has a pivotal role in providing primary education, health care, housing, water, and sanitation. It cannot be absolved from its responsibilities of providing these basic facilities to its citizens. Women domestic workers from all the four squatter settlements complained about the lack of basic civic amenities, health-care, and education systems. It raises the concern of whether the public in Pakistan has still not recovered from the colonial mind-set that views the government as rulers and not as service-providers, and whether or not there is a need to change the ethos of governance so that those in government should consider themselves as service providers and not the ruling elite who cannot be challenged for their mismanagement. Improving the infrastructure by providing civic amenities, education, and healthcare systems is the responsibility of the government. By improving the general living conditions of these workers and by providing a simple decent living standard, some of their main problems could be solved and it would be taking a burden off their shoulders.

Finally, in Pakistan, a unique institutionalised approach for the welfare system has been laid down through Zakat system. Pakistan is among one of the few Muslim states to operate an official Zakat system. Zakat is collected through banks and the Government of Pakistan has established a Central Zakat Council to oversee the collection and disbursement of Zakat at federal, provincial, district, and local levels. The Zakat funds collected from the public could easily be utilised for the welfare of domestic workers. Labour welfare facilities, such as unemployment allowance, financial assistance to disabled or disadvantaged workers, educational and health provisions for workers and their children can be financed from the Zakat funds. Proper use of these resources can help in improving the situation of domestic workers in Pakistan.

Conclusion

This study has provided an understanding of law in its social context, and it has exposed the limitations of law as an effective tool for empowering domestic workers. It has demonstrated that due to the presence of patriarchal structures and class hierarchies, any effort to empower women through black letter law will remain ineffective and will have little acceptability and ownership amongst the people. However, it does not mean that law reform is always meaningless – clearly, it is frequently of great significance - but that it needs to be framed in a broader context of legal, political, economic and social interventions to achieve gender quality and non-discrimination in the informal labour market.

70 The six main categories for codification of labour laws are Industrial Relations, Employment Conditions, Wages, Human Resource Development, Occupational Safety and Health and Labour Welfare and Social Protection.

71 The government of Pakistan's Zakat and Ushr Ordinance (1980) mandates that 2.5 percent of the value of all declared, fixed assets for those possessing Nisaab (assets) are to be automatically deducted at source by the state as Zakat at the beginning of the Islamic holy month of Ramadan.
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PART II: EMPLOYMENT AND LABOUR MARKET


Work-Life Balance – A Rationalized Myth of the European Employment Strategy / CHRISTINA WOLFF

Abstract

This paper addresses the European guidelines concerning Work-Life Balance as a pattern of modern models of employment. Based on a qualitative document content analysis embedded in the theoretical assumptions of neo-institutionalism (cf. Wobbe 2001), the idea of a political concept of Work-Life Balance is understood as a cultural pattern which is accelerated by European Commission and European Council. Since 1998, the employment guidelines are legally determined and continuously reformulated in the Treaty of Amsterdam (ex-Art. 125-130 EGV, today Art. 145-150 AEUV). The main objective is to establish equal job opportunities for women and men in Europe (cf. European Commission).

Work-Life Balance has become a buzzword - not only as an employment strategy, but also as a career expectation of employees. Employees seek to have free time for family, leisure, sport and time-outs. On the other hand they claim a stable working environment, sufficient payment and flexible working time. Organizations are encouraged to do their best for improving working conditions and increase the employee satisfaction.

In European Policy, Work-Life Balance has become an institutionalized pattern ('script') of the modern sphere of employment since the 2000s. This institutionalization leads to the assumption that there has to be harmony between different spheres of life for men and women. In the 1980s and 1990s, the problem of reconciling family and work is only understood as a women issue. In this paper, the shift to Work-Life Balance in the guidelines of the European Union is analyzed as rationalized myth of gender-neutral measures.

The paper demonstrates that language and formulation of the provision of the law and the configuration of measures diverge. Formal structures are used as legitimation and appear as norms; national organizations copy this rationalized myths. However, Work-Life Balance is basically just a new label of family-friendly measure for women designed along gendered perceptions of work-family reconciliation.

Keywords: European Employment Strategy, Work-Life Balance, Flexibility, Equal Opportunities, Gender Arrangements, Rational Myth

1 Introduction

This paper addresses the progress of the European social and employment policies and within this process the establishment of the concept Work-Life Balance as a pattern of modern employment. Work-Life Balance and Flexi-Curity have become guiding principles of the social and employment policies of the European Union (EU) since the beginning of the 2000s. These issues are not only discussed in supranational and national employment policy-making as market strategies to adapt to globalized markets (Hielscher 2003 p.161), but are also vital questions surrounding the job market as they concern employees’ career expectations. The initial results of my qualitative document analysis of European documents show that the political concept of work-life balance is observable as a cultural pattern of employment policies in order to create employability for men and women. This is in accordance with the theoretical assumptions of sociological institutionalism. It can be seen as a “rationalized myth” as outlined by Meyer and Rowan (1977). Since the European Employment Strategy

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(EES) in 1998, employability and empowerment of employees are one of the main aims of the EU. To reach these aims, the European Commission formulated a number of measures and instruments. The new formal structures as juridical norms, such as directives and decisions, reinforce the idea of employability and constitute it as rational. These rational purposes are able to act as a legitimisation for certain policies in the national states and in the organisations and institutions. In this way, organisations or institutions - as formal structures within a supranational constitution - are rational. And at the same time, their institutional structures are rational. The rational structures are adapted, highly institutionalised and no longer questioned (ib. p. 342). If work-life balance has become an institutionalized pattern within the modern sphere of employment, it is a rational myth because the rational structures used to attain employability are a highly institutionalised value of employment.

Considering this assumption, I assume that the idea of work-life balance is filtered by national gender arrangements and labour market trends and redefined by national concepts. I will mainly argue on the level of supranational policies and their relation to patterns of national gender arrangements. I will show in which way knowledge about work and life influences the European Council’s decisions and the European Commission’s regulations and frameworks of work-life balance measurements and indicators and flexible working regulations to establish norms of employability. As well, I will delineate how policies are linked to cultural patterns, since work-life balance measures and practices are shaped by varying norms and values of national labour market structures. The norms and values that I will focus on in this paper are gender regimes. Formal differences between male and female employees do not exist in the formulation of juridical norms anymore. I assume that the norm of gender equality legitimates the concept of work-life balance as a rational model of adult worker conceptions and as an instrument to create good quality work and employment combined with flexible working arrangements. In fact, the buzzword work-life balance is often just exploited as a further label for family-friendly policies towards women, i.e. the concept is used along the lines of the gendered division of labour. Thus, work-life balance as a concept is only comprehensible as far as national employment policies and gender regimes are concerned.

In the following, I will start with a short historical overview of the EES and define the formulation of the measures in EU social policies. Second, I will examine the norms and values surrounding work and gender in the national arrangements and job market trends. Finally, I will emphasize the mechanisms that create a rationalized myth about the balance between work and life.

2 European Employment Strategy

2.1 Historical overview

In the founding days of the Union, European policies concerned economic issues and economical harmonization in order to deal with the post-war situation in Europe. Since the 1950s, the EU has pushed forward the process of ‘market-building’ (Wobbe 2009 p.75). Thenceforth, the economic union became a political entity with more responsibilities.

The term ‘quality of work and employment’ became within a short time a major topic of discussion about the progress in the European job market (Eurofound 2002 p. 6). In 2001 the agency set up a working group, which proposed an analytical framework based on four key dimensions of quality of work and employment for further foundation research: career and employment security; health and well-being; skills development; and the reconciliation of working and non-working life. In the following paper this term will be used against this backdrop.
involving social, monetary and security policies. In this context, gender policies were pushed at the end of the 1970s after the first three gender-directives were adopted. They concentrated on equal pay for women and men (Directive 75/117), equal access to occupation, education, and training, and equal treatment (Directive 76/207), especially in the legal system of social security (Directive 79/7). Gender issues are mostly connected with social policy matters, like equal opportunities for employment, working conditions, pay, maternal leave, reconciliation of family and job and matters of social security (see also Walby 2005; Drobnic 2011). These new issues of the European Social Model mostly date back to the 1980s and 1990s. They are connected with the globalization of markets, the project of the European Single Market, and with the Lisbon Strategy (Wobbe 2010 p. 109/110). The Lisbon Agenda, launched in 2000 and relaunched in 2005 (Strategy Europe 2020), and was aimed at making Europe ‘the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’ (European Parliament 2000 p. 5). Full employment is one of the main targets of the Lisbon Agenda.

According to the stronger ‘market-building’ process and the European integration, the European Employment Strategy (EES) was formulated. Since 1998, the employment guidelines are legally determined and were reformulated by the Treaty of Amsterdam (ex.-Art. 125-130 Treaty of the European Community, today Art. 145-150 Treaty of the European Union). The agenda of the employment strategy aims to improve the quality of work, to create ‘more’ and ‘better’ jobs and to provide a framework for all EU member states and candidates to share information, and to discuss and coordinate their employment policies (European Commission 2014).

Under the EES employment guidelines from 1998, and during the process of EU enlargement from 2004, issues of job quality and quality of working life have become an explicit goal (Drobnic 2011 p. 1; Eurofound 2002). Due to the fact that the EU states faced economic problems (e.g. high unemployment rates, migration as competition-relevant), EU institutions had to harmonize the various national social and political situations. In order to react to new challenges in the national labour markets, the first four important principles of the 1998 employment guidelines were entrepreneurship, employability, flexibility and equal opportunity. These four principles allow careful examination of the shift to a new constellation of social provision and employment as central to modern welfare states (Lewis/Giullari 2006 p. 79). The European Commission’s promotion of the concept for the relationship between social policies and employment policies highlights the specific ‘neo-liberal ideas’ (Crompton et al. 2007 p. 10) of linking the social to economic policy. These principles give the first reference for changing patterns of employment, which are individualistic and in gender-neutral language: ‘it is now assumed that women as well as men will be “citizen workers”’ (Lewis/Giullari 2006 p. 79). During the next few years, the guidelines were reformulated and increasingly integrated into the overall objectives of the growing Union and the aims of the Europe 2020 Strategy.

Neoliberal’ is also a buzzword, which often does not have an explicit definition. First, the Chicago School used it to theoretically explain a new form of social market economy. The way I am using it, it concerns the idea of the new employee, an individualistic view of the employee and market relation and how work becomes progressively more subjective in a free market and ruled by a strong state (see Crompton et al. 2007; Voß/Pongratz 1998).

Therefore, to the mid-term review of the Lisbon Strategy, the reports of the national states and the implementations were combined. The problems of productivity, growth and unemployment were still not solved. The Lisbon Strategy should be relaunched (2005). The answer of the ‘extension to both social and economic agendas and more policy coordination in these areas meant more integration of social and economic goals. This integration was further underlined by the integration of the employment guidelines with the micro-
Against this backdrop, three factors have brought work-life balance to the agenda of European social policies (Guest 2002): First, the subject of reconciling family and work came up after women’s employment rates increased in the 1970s. The lack of public resources and services for daily childcare facilities, especially for working women, created imbalances in many European countries (Sullerot 1970). Therefore, childcare facilities cushioning the problems reconciling work and family became necessary to improve the arrangements between paid work and private life.

Second, flexible working arrangements increased in the last decades in various ways and for different groups of employees (Hielscher 2003 p. 166-168). These changes created new demands and risks for employees. The social consequences of flexible working hours created opportunities but also ambivalences. Especially for female employees, part-time arrangements provided suitable alternatives for reconciling work and family. It became possible to take gender issues into account and, furthermore, to consider divergences between women’s and men’s employment rates and different working contracts as well as the still-existing gender pay gap with an annual average gap of 16% in Europe (see Table 1-3). To connect these issues, the European Commission started to speak about flexibility and equal opportunities in their guidelines for women and men. A few years later, they extended the guidelines to create a framework for the realisation of personal needs of time for family life, freetime and work (European Commission 2003). On the face of it, the term work-life balance became a plug to overcome the focus on differences and to concentrate on equality. Also, here the gender-neutral language emerged on the agenda of the European Commission.

Third, at the same time, attitudes and values of work have been changed. Education times are getting longer and the demographic structures of the workforce are changing. Work and non-work times interfere with each other and employee’s expectations change along with their life courses. Social and economic scientists call this new type of employee - born after 1975 - ‘Generation Y’ (Parment 2009; Rump/Eilers 2013). Employees seek to have time for family, leisure, sports and sabbaticals or ‘time for themselves’. On the other hand, they claim a stable working environment, sufficient pay and flexible working time with enough security, but no restrictions on career opportunities.

In short, these issues are discussed in the political, public and scientific discourses about work-life balance. Hereinafter, a definition is necessary. The definition functions as a working hypothesis to analyse the knowledge behind the concept of work-life balance and the relation between the public sphere and the private sphere. In particular, reconciling work-life balance means then the organization of work and non-work. Work as a productive activity is compared to life, which is first of all non-productive. The dichotomous structure of the concept describes, on the one hand, the contrast between two spheres: gainful work and non-work, which means family, leisure, and home; it is also linked to ideas of reconciliation of family and work. On the other hand, the word ‘balance’ conveys a sense of harmony between these spheres (Drobnic 2011 p. 2).

The following maps give a short overview of the European situation on the job market for employment rates, part-time employment rates and the gender pay gap.

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macroeconomic guidelines in 2005’ (Bekker/Wildhagen 2008 p. 69). Thus, the Europe 2020 Strategy came to the agenda and is still the level of ambition: ‘Europe 2020 is the EU’s growth strategy for the coming decades’ (European Commission 2014). Issues of employment are more integrated in the EU objectives and have become an inalienable right of the European policies.
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Table 1: Employment Rate Women and Men in Europe 28 2013, Source: Eurostat

Table 2: Part-Time Employment Rate Women and Men in Europe 28 2013, Source: Eurostat

Table 3: Gender Pay Gap in Europe 27 2006-2011, Source: Eurostat

2.2 Work-Life Balance and Flexi-Curity in the Employment Strategy
The discussion of work-life balance is very much linked to the transformations of the EU labour market during the last 30 years. In the 1970s, the European actors recognised the problems involved in reconciling work and family issues – as Sullerot (1970) shows – during the increase in women’s employment in Europe. The term ‘reconciliation’ has been used since the first Social Action Program (1974). Before those developments in the European labour market, gender issues were primarily embedded in programs or directives for the expansion of equal opportunities in and equal access to the job market (cf. Ostner/Lewis 1995; Walby 2005; Wobbe 2009). The main goals were to increase female labour participation by addressing the need for daily childcare institutions. EU policies tried to react to the different life courses of women and men and different gender arrangements in the European states. Up until the 1970s, reconciliation issues have been discussed as women’s topics; this is still the case in the guidelines from 1998. Within the topic of ‘equal opportunities,’ the issue of reconciling family and work for women is identified as a specific challenge and focused on women only (see also Lewis/Giullari 2006 p. 83).

However, based on a document analysis, I can observe a shift in 2003. Based on the principles of the employment guidelines and the reformulation as well as the integration into the Europe 2020 Strategy, the term ‘reconciliation’ is no longer restricted to work and family. It is broadened into the term work-life balance to address also people without family responsibilities. It includes family life, private life, working life and spare time (Davione et al. 2008 p. 165) and it takes individual flexible work organization into account as well. The term work-life balance is not just used in a gender-neutral way; it is also used without an obviously gendered assignment to different life spheres; it concerns the individual self-management of time. In this way, the European Commission specifies the indicator ‘work organization and work-life balance’ as follows: ‘the introduction of more flexible methods and forms of work, including flexible working time; the availability of adequate care provision for children and other dependents, a more balanced approach between flexibility and security; a better application of existing legislation on health and safety; and the adaptation of workers to changes at work through lifelong learning at enterprise level’ (European Commission COM(2003)728 p. 16). The concept work-life balance has been embedded in the European social and employment policies.

Another concept that appeared in this context is flexi-curiosity. The idea of flexi-curiosity is straightforward: ‘This calls for flexibility on the part of the firms and of workers with regard notably to work organisation, working time, contractual arrangements and national or geographical mobility. At the same time quality requires adequate security for the workers to ensure sustainable integration and progress on the labour market, and to foster a wider acceptance of change’ (ib. p. 14). Flexi-curiosity embodies the possibility of combining flexible working conditions within companies and organizations, and security of employment for employees to ensure employability’. Similar to the concept of work-life balance and flexi-curiosity, employability is a concept which sets out as one of the four pillars of the European Employment Strategy from 1998. It refers to terms used to assess the capability of a person to gain a job. Furthermore, the concept

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76 In this context ‘Gender Arrangements’ are the embedded beliefs about the different sexes in one society. Up to these beliefs different life courses are structured which are related to public life (Goffman 1977 p. 330). The sociologist Pfau-Effinger (2001) enhanced the term Gender Arrangement: ‘in every modern society this kind of gender arrangement exists, based on the dominant values and models of the relations between the sexes and it is reproduced and modifiable by interaction of the social actors, by discourses, by conflicts and negotiation processes’ (Pfau-Effinger 2001 p. 492).
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‘aims to prevent long-term unemployment and to facilitate access to the labour market, including employment guidelines aimed at developing training and skills, combating age barriers and reviewing tax and benefit systems. The first guideline of 1998 set a target that every unemployed person is offered a new start before reaching one year of unemployment (or in the case of young persons, six months). This new start could take the form of training, retraining, work practice, a job or other employability measure […]’ (Eurofound 2014: employability).

In this paper, I argue that national adjustments in the labour market are oriented towards the rational instrument exported by the EES to improve the work quality of European employees - regardless of gender. National states implement it with specific programs and laws. Indeed, imbalances between different life spheres, especially for women, which still diminish women’s employment rates (see Table 1), are still sticking points.

3 National re-defining of the supranational idea

3.1 European adult worker model

The employment rate of women has increased in the last decades. In order to increase it even more, European social policy put it on the agenda of employment targets. Annesly (2007) argues that the Lisbon Agenda has a strong social democratic underpinning and she analyses how the social policy of the EU promotes a ‘European model of adult worker’. The Adult Worker Model is used to describe a social system in which all adults – male and female, old and young, abled and less-abled – are required to take formal employment to secure economic independence (ib. p. 196). It is opposed to the male breadwinner model (Ostner/Lewis 1995; Pfau-Efinger 2001) that ‘referred to a social system which assumed full-time, lifelong employment of a male wage earner with a female being responsible for caring for children and other dependants’ (Annelsy 2007 p. 196 f.).

European models of welfare regimes vary strongly from one country to the other (Esping-Anderson; cf. Crompton et al. 2007 p. 6 f.), and are linked with different arrangements of employment and family life. Esping-Anderson identifies three types of regimes: the democratic welfare regime, the conservative welfare regime and the liberal welfare regime. In short, the social democratic welfare regime supports employed mothers and dual-earner families with a high level of daycare facilities; employment relationships are moderately regulated. They achieve a high level of de-familialization and commodification of care. Characteristics are a low level of gender inequality and a high employment rate of women because of extensive labour market and family policy measures. Employment flexibility is publicly supported (Höfäcker et al. 2011 p. 305).

On the contrary, in the conservative welfare regime ‘most social and family policies as well as labour market practises are still oriented towards a “male breadwinner” or at best a “female additional earner” model’ (ib. p. 306). The employment relationships are strongly regulated; flexibility in employment models takes place at the ‘margins’ of the labour market; and finally increasing social inequalities because of the labour market systems are compensated through public transfer (ib.). Mostly the commodification and de-familialization of care is low. The employment rates of women are less than in the democratic welfare regime; nevertheless, a lot of women are working in part-time or precarious jobs.

The liberal welfare regime characteristically provides an adult worker model but without providing a so-called safety net. This means that the level of public spending for daycare and social security is low, the market forces regulate the labour market and employment flexibility
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is mostly individualized (ib.306). But, on the other hand, women’s employment rate is relatively high. The reconciliation between family and work is totally left to the individual (Crompton et al. 2007 p. 7ff.).

The adult worker model promoted by the EES concentrates mostly on policies for reconciliation of work and family life, which recognize that work for some non-core employees is only possible with the support of a broader social system and reflects the efforts of the European social policies for gender equality and gender mainstreaming since the 1990s (Annelsy 2007 p. 201). Especially in the 1990s and 2000s, directives for equal access to services and supports (1986), for part-time work (1997), maternal (1992) and parental leave (1996/2010) as well as gender-equality for women and men in employment (2006) are the link between social policies and employment issues. Reconciliation in the context of employment can be seen as a key element of the EES and, after 2005, also included in the macro- and microeconomic guidelines of the EU. Nevertheless, besides this stronger focus on the adult worker model the diversity of breadwinner and care regimes within the EU still exist. 77

‘Thus [it] not only hinders the formulation of coherent women's policies on a supranational level, but it also means that even where EU action succeeds, implementation may take a different shape from country to country. On the national level, gender regimes operate as gatekeepers, favouring policies compatible with culturally transmitted assumptions and tenets about gender roles’ (Ostner/Lewis 1995 p. 192/193).

3.2 Work-life balance as rational myth

The theoretical framework for this paper consists in the approach of neo-institutionalism. At a structural level, this approach gives an analytic instrument to observe how specific patterns of social actions are embedded in structures and are ‘institutionalised’. According to Meyer and Rowan (1977), ‘institutionalization involves the processes by which social processes, obligations, or actualities come to take on a rule-like status in social thought and action’ (Meyer/Rowan 1977 p.341). Applied to the topic of this paper, this approach interrogates how work-life balance has become a pattern in employment policies and which institutional rules influence these policies. Work-life balance has become an institutionalized pattern in the modern sphere of employment since the 2000s. In the 1980s and 1990s, the problem of reconciling family and work was only understood as a female issue. Reconciliation was tied to the political concept of shaping the sharing between women in households for care and the public facilities of care services.

As I mentioned above, different gender welfare regimes in Europe promote different national arrangements between employment and family life. These conditions provide different basic frameworks for the efficacy of supranational social and employment policies. As Ostner/Lewis (1995) discussed, the implementation could vary between the regimes. Differences and inequalities between the sexes are reproduced by the gender arrangements which embody various models of labour division. Studies in the field of industry and labour sociology mention different strategies to achieve work-life balance in national companies (Jurczyk et al. 2005; Lewis 2006; Crompton 2006) to implement the supranational concept for

77 For instance, Sweden and Denmark are typically states with a dual-earner model, while Austria and Germany are primarily promoting the male breadwinner-model (Blome 2011 p. 22).
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achieving the desirable employability around Europe. Most of the practices are observable as a ‘disguised reconciliation strategy’ (Jurczyk 2005 p. 115). The main practical instruments are flexible working time models like working time accounts, agreements of teleworking, sabbaticals and time accounts per year. This kind of measure aims to ensure flexibility. Behind the buzzword work-life balance, family-friendly policies are actually hidden, like the establishment of company nursery schools, family-friendly management skills, family-oriented continuing education measures, support in returning to work after having a child, possibilities of job sharing, parental leave options and close-to-family services within the real implementation in national companies. The implemented politics are not questioned. They function as highly institutionalised structures - norms and values – which are rational for the capable employability of every female or male employee. However, these management policies are yet perceived as part of a growing phenomenon in the modern understanding of employment and employability: the ‘entreployee’ (in German ‘Arbeitskraftunternehmer’). This concept first became famous in the sociology of industry and labour markets and describes the societal pressure on employees to develop enterprising selves (Voß/Pognatz 1998). It is another level of discussion: on the one side the implementation of fake family-friendly work-life balance measures, and on the other side the globalized idea of the modern individualist ‘entreployee’, who is her or his own boss over time and work. Following this assumption, the person has become a neo-liberal ‘entrepreneur of the self’ and autonomy, free choice-making, high commitment, managerial techniques in all levels of employment and in all individual actions are targets of every employee (Crompton et al. 2007 p. 9 f.). The discussion surrounding the ‘entreployee’ is strongly linked with the discussion of work-life balance, since “entreployees” seek to achieve an individual harmony between all spheres of their lives. It legitimates the use of the work-life balance arrangements, but not as a responsibility of political actions or management actions but rather as individualistic accountability.

This neo-liberal idea of employees is created and launched by the EES. The EES and the ideas of work-life balance and flexi-curity address specific persons. These are individuals as human resources who are enterprising themselves and who are able to optimise their own resources. In this way, the EES empowers the idea of the individualistic ‘entreployee’. Indicators and measures were formulated and created certain knowledge of the quality of work and the demands for political actions and individualistic arrangements for employees. Furthermore, the idea of balance as a positive impression for harmonizing the life spheres emerged. The measures which are used to create the balance as elements of rationalized formal structure, like legitimated through laws, strategies of the EES, directives and decisions following this individualistic idea of the ‘entreployee’ within the adult worker gender-neutral model. The supranational norm of balance for female and male employees creates a gender-neutral and individualistic understanding though the measures.

At this point, the rationalized myth of balance between work and life - because the rational structures to reach employability are a highly institutionalized value of employment - covers various social purposes: with regard to policies of reconciliation of family and work, it means harmony and satisfaction for women and men within the family structure; with regard to the needs of Generation Y, it means freetime and free decision-making as an employee, but also flexible working organization; with regard to the organisations and firms, it means reinforcing the neo-liberal ideas of employment. The concept of work-life balance is not questioned anymore, although it has several social meanings as needed in certain contexts and is implemented in different ways with different purposes according to the national gender arrangements and national social and family policies.
The concept of work-life balance as promoted by the EES is a specific idea of individual and gender-neutral persons as 'entreployees' who are able to decide by themselves how to reconcile all areas of life. The capacity to act in line with EU norms resides with the national social and employment policies. The realities in the national states and on the different job markets are filtered through national gender arrangements and the conditions of social, family and employment policies – depending on the welfare regimes. In this way, my assumption that the supranational idea of work-life balance is redefined by the national politics for employment and social policies is reinforced. Thus, the balance between work and life is a rational myth designed along gendered perceptions of labour division between women and men and creates in this way a definition of employability as needed in the particular context.

In this paper, I give just a theoretical point of access to think about the processes of the generation of knowledge at a supranational level of policy. The diffusion or implementation of these policies was not the focus of this paper.

4 Conclusion

To sum up, this paper asked about the rationality of the instruments of the European Union to achieve the goals of ‘quality of work’ within the European Employment Strategy. I assumed that the idea of work-life balance and its measures for flexibility and security are legitimated as rational instruments to fulfil the aims of the Lisbon Strategy. The ideas of full employment, flexibility, security and care institutions came onto the agenda. After the relaunch of the Lisbon Strategy in 2005 and the breakthrough of divergent implementations of the supranational policy concepts on the national political levels of decision-making became visible; work-life balance was formulated as a concept. Formal differences between male and female employees do not exist in the formulation of measures anymore. There still remains a strong gap between women's and men’s employment rates and wages (see Tables 1-3). Factors explaining these divergences are the different gender arrangements and different patterns of employment, like the primary models of male breadwinner or adult worker. I conclude that these norms legitimate work-life balance measures as a rational model of adult-worker conceptions and the ‘quality of work and employment’. In fact, the buzzword is just utilized as a further label of family-friendly policies toward women, who are perceived along gendered perceptions of labour division. Thus, work-life balance as a concept is only comprehensible as far as national employment policies and gender regimes are up to the task.

In the EU policy, work-life balance is used as a label to meet the needs of a new generation of employees, as an adaption to labour market changes and for maintaining the individual ‘entreployee’. In this way, the concept of the EES work-life balance can be seen as a rational myth of employability.

References

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Friedrich-Ebert-Stiftung.


PART II: EMPLOYMENT AND LABOUR MARKET

PART III: MIGRATION

PART III
MIGRATION

The Dynamics of Legal and Illegal Livelihoods and Gender Relations, the Case of Displacement Camps in Khartoum, Sudan / AMIRA AWAD OSMAN

Abstract
The Sudanese Islamic patriarchal state has used its power to frame and define the legality of different livelihood strategies and to criminalise those who practice what the state refers to as, illegal livelihood strategies. For example, the Khartoum State Public Order Act (KSPOA), which was introduced in 1996 marginalised women’s role in public life, praised their roles at domestic level and prevented them from working in certain occupations, such as restaurants, hotels and petrol stations.

Based on empirical research data, this paper investigates the patterns of the newly developed livelihoods strategies (legal and illegal) practiced by women and men at the camps and argues that internally displaced women at Al-Salam and Mayo displacement camps in Khartoum were able to develop a wide range of legal and illegal livelihood strategies. To protect their illegal livelihood, women were able to develop risk minimising and protection techniques, such as building personal relations with police officers, who would inform them when and where a kasha (rounding up and arresting) was most likely to happen, thus showing resilience and great ability to cope with the laws that tended to criminalise their livelihood activities. On the other hand displaced men seemed less fortunate in developing new livelihood strategies.

The paper also highlights the impact of these livelihoods on gender roles and relations by first exploring the ‘adjustment period’ during which gender roles and relations began to change and how men reacted to the change. Second, it highlights men’s roles at the reproductive level, women’s non reproductive roles and women and men community roles.

Keywords: Law, livelihood, displacement, gender

Introduction

The Sudanese Islamic patriarchal state has used its power to frame and define the legality of different livelihood strategies and to criminalise those who practice what the state refers to as, illegal livelihood strategies. Based on empirical research data, this paper investigates the patterns of the newly developed livelihoods strategies (legal and illegal) practiced by displaced persons, notably women at Al-Salam and Mayo displacement camps at the outskirt of Khartoum, the capital of Sudan and argues that internally displaced women at Al-Salam and Mayo displacement camps were able to practice a wide range of legal and illegal livelihood strategies and to develop different mechanisms to protect their livelihoods and that these newly developed livelihoods led to changes in gender roles and relations. This paper is based on a research carried out in the two camps in 2002 and 2009. The research

78 This article is part of my PhD research entitled the dynamics of livelihood and gender relations in Sudan: the case of displacement camps in Khartoum, University of Bradford, 2012
involved in-depth interviews of 50 women and 15 men from each camp, 17 focus group discussions (women-only focus groups, men-only focus groups and mixed focus groups) in both camps and oral testimonies.

Al-Salam and Mayo camps

Al-Salam and Mayo displaced persons’ camps, at the outskirts of Khartoum, became the home for many displaced persons from Eastern, Western and Southern Sudan who escaped drought, famine and war. Some of the displaced had been living at these camps for more than 10 years and some had just arrived, escaping the war. Therefore, life at the camps formed a crucial part of their displacement cycle.

Before displacement both female and male research participants were engaged in productive roles in different ways, and farming and rearing of animals were the major traditional livelihood activities. There were, of course, variation across regions. For example, in Western Sudan the gender division of labour revealed that women made a greater contribution to subsistence farming around their houses. By contrast, men were involved with cash crops. Women were also involved in cash crops as household labour, undertaking planting, wedding and harvesting. However, empirical evidence shows that only men earned income from cash crops. Women were denied financial gain from their labour, because their contribution was regarded as reproductive.

In Eastern Sudan men were responsible for taking care of camels far from home, looking for pasture, whereas women took care of household animals such as goats and chickens. Men were more mobile compared with women and had opportunity to look for alternative livelihood strategies, as they could migrate to nearby cities leaving women at home. These gender divisions of labour were based on norms and traditions which limited women’s movement and restricted their behaviour.

In Southern Sudan, subsistence and semi-subsistence farming, which depended on family labour and simple tools, were the main livelihood activities. Rearing of animals such as cattle and goats was another livelihood activity practiced by people in Southern Sudan, in particular the Nilotic tribes such as Dinka, Nuer and Shilluk. These livelihood responsibilities were gendered. Men were responsible for the large animals such as cattle and grazed them far from home, whereas women took care of household animals, such as goats and sheep. Fishing, hunting and gathering of wild food were additional livelihood activities for both women and men in Southern Sudan, and the children there used to collect wild food and fruits.

These former livelihoods which people had relied on for a long time were disturbed by crisis, notably drought, famine and war. These triple factors also became push factors that led people to flee to destinations far from home, such as Al-Salam and Mayo displaced persons’ camps. These camps were on infertile land, which was unsuitable for farming. They had poor pasture to rear animals, lacked streams to practice for fishing and had no wild food to gather. Therefore, previous livelihood strategies became irrelevant at the camps and the challenge for the displaced was to build new livelihoods and to survive in their new alien environment. Some of these livelihood strategies were legal but some were not.
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Legality of livelihoods

The Sudanese Islamic patriarchal state has used its power to frame and define the legality of different livelihood strategies and to criminalise those who practise what the state refers to as, illegal livelihood strategies (Osman 2001 p. 13). For example, the Islamic regime relied on Shari’a (Islamic) law and since then Sudan entered an era which was characterised by Islamisation of life where people's daily practices and behaviour, particularly those of women, were constrained by what Islamic scholars declared. This included what women should wear, how to behave on the street, how to obey their husbands etc. In terms of people’s livelihood strategies, making and selling of alcohol, for example, has become illegal and sinful since the introduction of Shari’a law in 1983. Those who were caught making, selling or consuming alcohol were subject to severe punishment, such as imprisonment, fine, and confiscation of the utensils and/or whipping in public (Osman 1985 p. 124).

Ms. Mahjoub from Sudan Human Rights Organisation (SHRO), who was a human rights activist and an advocate for displaced women representing them in courts, indicated that court hearings dealing with alcohol could last for a few minutes and lawyers were not necessarily present. In fact many of those accused were denied lawyers. She also indicated that Omdurman prison for women had a high percentage of displaced women with their children who were caught trading in marisa (local alcoholic drink). Nevertheless, marisa, which was made mainly of sorghum, a cereal rich in protein, was an important food source in Southern Sudan and parts of Western Sudan.

Moreover, the Khartoum State Public Order Act (KSPOA), which was introduced in 1996 by the governor of Khartoum criminalised women who worked in certain jobs, such as restaurants and petrol stations (Doebbler 2001 p. 10). In this sense the KSPOA minimised the chances of less-educated and poor women, of which there were plenty, in the displaced persons' camps, of getting jobs.

Illegal livelihood strategies

Making and selling of marisa and ‘araqi (local alcoholic drink) was the main illegal livelihood activity which was practiced by women from Southern Sudan and Nuba Mountains. Women from Eastern Sudan did not practice such livelihood activity. This is perhaps because they came from a much more restricted background. Women made alcoholic drinks either to sell them from home to customers they trusted or to supply local bars where customers, mainly from the camps, were gathered. Only ten female respondents (10%), mainly female heads of households, served customers in their household compounds. No woman had mentioned selling alcohol outside the camp for fear of prosecution. Customers from outside the camps had come into the camps to buy it. By this strategy women managed to minimise chances of being caught and kept their livelihoods secure.

Some women practiced prostitution, which was one of the better-paid jobs practiced by displaced women at the camps. Interview data reveal that the number of female respondents who practiced this occupation, at different stages of their lives in the camps, as a means of earning an income was 3 (8.1%), a small but significant number. These prostitutes represented the rainbow of the displaced community, as they came from Nuba Mountains, Darfur and Southern Sudan. Their ages were 21, 25 and 50 years old. The two youngest prostitutes were single and the third was a widow. They earned a lot from prostitution. These

79 In-depth interview, Khartoum, July 2002.
80 In-depth interviews, Al-Salam and Mayo camps, June -August 2002.
three prostitutes indicated that they had many clients not only from the camps but also from outside.\(^{81}\) In fact, those who came from outside the camps were mainly middle class men who could afford to pay a good price for such scarce service, as prostitution was a criminal act in Sudan and according to Shari’a law those who were caught doing it were subject to stoning. This was the main reason why this occupation was done secretly.

Although making and selling of alcohol (as well as prostitution), according to the state policy, is illegal, it was in high demand by customers not only from the camps but also by the host community, the people from the capital. This gave the providers a chance to earn a good income but also put them and their clients at risk.

To minimise the risks involved in prostitution, the prostitutes tended to limit their service to people they knew, to their old customers or to new customers introduced to them by their old customers or local people they trusted. Although this strategy may help to reduce the chances of being caught, thus saving the livelihood itself, it reduced the income a prostitute could get.

Female Genital Mutilation (FGM) was another source of illegal livelihood. Here it is worth mentioning that displaced persons from Southern Sudan and the Nuba Mountains did not use to practice FGM at their place of origin. In all the other areas they did. Therefore, midwives who relied on FGM, as an illegal means to earn a living, mainly practiced this way of earning income outside the camps because they had a few customers at the camps, mainly from Darfur and North Kordofan.

To sum up, criminalising some livelihood strategies did not prevent displaced women from adopting them. This could be attributed to three main reasons. First, some illegal livelihood practices, such as the making of marisa, was a traditional practice, as marisa was an important food intake for people from Southern Sudan as well as the Nuba Mountains, especially during celebrations such as wedding parties. In this sense, those who were involved in trading marisa did not see their actions in the same way their government perceived them. Second, despite the risk involved, marisa production and prostitution were profitable sources of income which were difficult to resist. Third, as many displaced persons at the camps did not believe that marisa and 'araqi should be forbidden, they may have been reluctant to report those who were involved in making, selling or consuming them, including customers, to the police.

**Legal livelihood strategies**

As most of the profitable jobs were concentrated outside the camps, in the Triple Capital, the majority of female respondents moved into jobs outside the camp, which included street trading, domestic service and ghasil (laundry work).

Ghasil, unlike street trading, for instance, was one of the legal livelihood strategies where those who were involved in it did not have to worry about materials needed to do the job. These materials included soaps and water or livelihood assets such as ghasil equipments and space, as employers had to supply them. Some displaced women had customers for up to ten years, and they were able to build good relationships with their customers. This good relationship could be seen as not only a relationship between an employer and his employee but also as a relationship between the host community and the displaced community.

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81 In-depth interviews, Al-Salam and Mayo camps, June-August 2002.
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Women also practiced street trading. They sold food, tea and second hand clothes in streets inside the camps and at the city. Those who traded in the city earned more money than those who traded in camps, but, they had to make the journey into the city. This meant they either had to first carry out their reproductive role; preparing breakfast, cleaning, fetching water and wood for fuel if their husbands were not helpful, or they had to leave their reproductive tasks undone until later in the day when they were back from work.\(^ {82} \) Women street vendors, especially in the city, were also subject to police harassment, on the spot fines or confiscation of items.\(^ {83} \) By contrast, those who traded in the camps did not need transport to get to their work area, had more time to do their domestic tasks before they started their productive tasks but they earned less money unless they sold alcohol, secretly, along with food and tea.\(^ {84} \) In this regard, an illegal livelihood strategy would go hand in hand with a legal livelihood strategy to generate more income. Here it is relevant to mention that many women were practising more than one livelihood strategy, for instance, doing laundry in the morning and making and selling of alcohol at night.

To protect their trade in food and tea and to avoid being caught if they were and unable to renew their licenses, some women petty traders were able to build personal relationships with the police who would tell them to be vigilant and when kasha (rounding up and arresting) would be done. This was at least the case with Fatma, a woman from the Nuba Mountains, and lived in Al-Salam camp, but had to serve a prison sentence, at Omdurman women’s prison, for repeatedly selling food without a license in Khartoum city centre. At the prison she met a police man, who showed sympathy to the prisoners, and managed to develop a good relationship with him. Later he became one of her customers. This demonstrated how displaced women were flexible in building relationships beyond their gender and displacement community. It also shows a relationship between the displaced and the host community which demonstrated support rather than a hostile attitude.

Displaced women also worked as maids and domestic servants. Kibreab (1995 p. 13) pointed out that since the 1970s there has been an increasing demand for domestic service in Sudan. This could be attributed to the fact that domestic activities were women’s duties even among professional families. Thus, lack of men’s contribution to domestic work as well as absence of time-saving equipment such as washing machines, dishwashers, vacuum cleaners, electric irons, etc. were the main factors behind employing domestic servants.

Moreover, in Sudan, it seemed that there was no legislation to protect maids and domestic servants or to set minimum wages for such occupations. Those who worked as maids or domestic servants were more likely to work long hours with little pay. However, no respondent mentioned physical or sexual harassment from their employers, which might be seen as a positive sign encouraging many displaced women to seek working in this sector. Nevertheless, the fact that the respondents did not testify to sexual harassment did not mean that it did not occur, as respondents might be afraid to talk about it due to cultural constraints, which put more blame on the victims than on the violators.

Another relevant issue to the new livelihood strategies developed by women was the ability of some to gain transferable skills, as demonstrated by the following narrative from Fayza, a displaced woman aged 51 and from Mayo camp.

\(^ {82} \) Women-only focus groups, Al-Salam and Mayo camps, August-September 2002.  
\(^ {83} \) In-depth interviews, Al-Salam and Mayo camps, June-August 2002.  
\(^ {84} \) In-depth interviews, Al-Salam and Mayo camps, June-August 2002.
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My husband died last month. He left me with three children and no money or skills. First I did not know what to do. I would go to houses in Omdurman and ask for any job. I had done all sorts of jobs and gained skills from that. Sometimes I did laundry, washed dishes and slaughtered chickens etc. I am now a middle woman helping women to buy furniture. If a woman wants to buy furniture I go with her and do the bargaining so nobody cheats her. I can do laundry if that is available. Sell food if possible. I am beta kolo [can do everything].

As the above narrative shows, the respondent had managed to gain transferable skills that allowed her to multi-task in order to survive. She also showed persistence in her efforts to do a wide range of jobs even when she did not have any particular skill, so gaining the abilities that allowed her to obtain future employment.

Men’s livelihood strategies

Any visitor to the camps would see many men sitting under trees chatting or playing cards, suggesting that men had no jobs. Some of the women perceived the displaced men as lazy and frustrated by displacement conditions and loss of their former livelihood traditions. However, it would be misleading and simplistic to conclude that displaced men did not manage to develop any new livelihood strategies. My fieldwork data reveal that 37% of my male in-depth interviewees had managed to gain work, as compared with 86.6% before displacement.

Displaced men’s work included trading in grains (mainly sorghum), second hand furniture such as tables and chairs as well as building materials such as thatch. On the other hand a very few of them were able to work as guards with the NGOs at the camps or casual labour at Omdurman or Khartoum markets. These casual labour jobs included making mud bricks. However, changing livelihood strategies and finding new ones was not an easy task as mentioned by many male respondents. A displaced man from Southern Sudan aged 47 years in Mayo camp who was trading in second hand chairs said:

I had cattle but I lost them due to war…I then had to search for any job in the city…I spent two years looking for a job…I later found a job as a casual labour in Khartoum. I did not earn a lot from that. After a year I became sick and unemployed for three years. I borrowed some money from a relative to develop a business in trading of second hand furniture…my situation is now better.

It seems that competition for casual labour was high. Hamid (1992 p. 233) pointed out that job availability depended on the availability of materials needed for the job, such as building materials in the case of construction, the number of those who were queueing for the jobs and the health of the labourers themselves. All of these factors led to job insecurity, even though the work sought was legal.

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85 Oral testimony, Mayo camp, August 2002.
86 Men-only focus groups, Al-Salam and Mayo camps, August-September 2002.
87 In-depth interview, Mayo camp, June 2002.
PART III: MIGRATION

Gender relations

The study examined gender arrangements at places of origin and finds that gender roles at places of origin used to be of a ‘traditional’ nature. Men were seen as ‘natural’ main income earners and breadwinners of their families, with no clear reproductive roles and despite some women’s involvement in productive tasks, such as farming, as mentioned earlier, women’s tasks were seen as ‘ancillary’ because their main role was a reproductive one and they had less change than men to access resources such as credit and land. Women’s failure to perform their reproductive duties might not be tolerated by their community and could lead to questioning of their motherhoods.

Another important finding in relation to the traditional gender arrangements at places of origin is that both women and men seemed happy about them, so there was no evidence of gender conflicts, resistance and/or complaints about them from either women or men.

However, the new livelihood strategies women developed inside and outside the camps led to significant transformation of gender roles and relations. This transformation included new responsibilities, new obligations and access to resources. However, before this transformation took place, there was an ‘adjustment period’ during which men showed signs of resistance to the new emerging gender roles and relations, and there were conflicts and tensions within many households, regardless of places of origin and time of arrival to the camps.

The ‘adjustment period’ was also a period of uncertainty, during which women suffered from violence, conflicts within the households, stress, exhaustion, tiredness, inability to perform their reproductive tasks and sexual duties in a way that would please their husbands, and husbands leaving home. Despite this, most women did not reject their husbands or ask for a divorce because, apart from the stigma and risk of blame, women believed that good wives needed to stick to their husbands during hard times even if the husbands became abusive.

Nevertheless, the long-held traditional gender belief which assigned women to domestic tasks while men had to do productive tasks was shaken. Men became unhappy, as they were denied services they used to get from their wives, refusing to accept changes in gender roles or to perform domestic tasks.

However, men’s attitude and resistance to changes in gender roles was different from one household to another, and so change as a social phenomenon was difficult to measure. Relying on my fieldwork data, the study finds that men’s resistance to the emerging new gender roles and relations gradually started to weaken when women were able to earn an income and to make significant contributions to the provision for their families. Then more men than before started to accept the new gender roles and became more involved in domestic tasks, such as preparing meals, cleaning the house and doing laundry, challenging the traditional perception which saw reproductive tasks as entirely women’s work. There were limitations to the men’s reproductive duties, as they were reluctant to fetch water or to wash dishes. So, despite displacement conditions and men’s acceptance of new roles, fetching water and washing dishes were still seen by displaced men and the displaced community as ‘feminine duties’ and it was inappropriate for men to do them.

Men’s active involvement in reproductive tasks eased some of women’s reproductive burden and also suggested co-operation within the household after the conflict or ‘adjustment period’. It also strengthened the women’s position as breadwinners and motivated them to take on further non-reproductive duties. In this sense, the new gender relations the displaced
developed at the camps were, in several ways, different from the ones people used to practice in their homeland.

Displaced women were further able to demonstrate their resourcefulness and to develop social relationships within their gender and to from tajammu‘at (groups). These groups provided assistance, comfort and advice to women in the camps. Women invested in their social assets to boost their financial and social institutions by, for example, developing financial self-help schemes, child care facilities, and to have fun and to settle down. These achievements promoted women’s self-hood and self-esteem based on their gender and displacement experience and made them proud of themselves. On the other hand, men were unable to develop such community networks within their gender, though men could meet to socialise with each other or to drink alcohol, secretly, but their networks would not provide services that the women’s groups could provide.

Conclusion

Despite laws that have been developed to criminalise certain livelihood activities, displaced women were able to be actively engaged in the so called illegal livelihoods, such as making and selling of homemade alcohol and prostitution. Women were also able to practice legal livelihood such as street trading and domestic services. To protect their legal and illegal livelihoods, women were able to develop risk minimising and protection techniques, such as selling homemade alcohol at the camps and providing their services, notably, sexual services, to customers they knew and by building personal relations with police officers, who would inform them when and where a kasha was most likely to happen, thus showing resilience and great ability to cope with the laws that tended to criminalise their livelihoods. On the other hand displaced men seemed less fortunate in developing new livelihood strategies. Therefore, the new livelihood strategies developed at the camps by both women and men did not correlate with livelihood activities at their places of origin. These new livelihood activities led to changes in gender roles and relations – men became more involved in reproductive tasks, while women became more involved in productive duties. Women were also able to invest in their gender by developing women’s only groups, thus revealing resilience and ability to cope with displacement.

References


PART III: MIGRATION


Male Violence, Female Behaviour, the Self and the Other / DANIELA ALAATTINOĞLU (AKERS)

Abstract

This paper is an intersectional, interdisciplinary study of the constructions of gendered violence in Finland and Turkey, in particular with reference to majority and minority positions in society. The paper is based on the findings of the author's LL.M. thesis, and particularly well suited for the conference theme "Power and Hegemony". The study investigates the perception of "the violence of the other" i.e. the essentialised violence, and the normalisation process of (certain kinds of) violence. The categorisation of the so-called collective gendered violence and so-called individual gendered violence are investigated in the thesis as social constructions.

The paper accounts for a discourse analysis of twelve (six Finnish + six Turkish) judgements, inspired by Foucauldian views on discourses, where knowledge and power are intertwined. Four discourses are found in the study: male violence, female behaviour, normalised/individual violence and essentialised/collective violence. The discourse analysis mainly focuses on the creation of legal facts in the argumentation of the court. In the study, context is particularly stressed. Therefore, the paper observes a general analysis of gendered violence and majority/minority positions in Finnish in a societal, political, legal and historical context. The majority/minority positions in focus are Finnish majority population/(Muslim) immigrant minority population in Finland, and Turkish majority population/Kurdish minority population in Turkey.

The paper has a feminist and intersectional theoretical framework, where social constructionism and discourse analysis are used as methodology and method. As a main focus of the paper, means of alterity are investigated. The study is critical in its nature and poses a challenge to the legal paradigm of objectivity.

The conclusion of the paper is that the constructions of legal facts in courts are often discriminating upon vulnerable groups. In the study, these are mainly women and minority group members. The interaction and interconnections of the discourses often lead to multiple discrimination, where the female minority member is particularly vulnerable, her perspective being invisible in the construction of the legal facts.

Keywords: intersectionality, feminism and feminist theory, alterity, gendered violence, violence against women, discourse analysis, comparative study

1 Introduction

Femicide, gendered violence with death as outcome, can be described and categorised in a multitude of ways, referring to various sets of linguistics. One example is to use so-called collectivity or individuality, or honour or passion, as concepts to explain gendered violence and by doing so, create a context for the violence and ultimately appeal to an audience. In retellings of gendered violence, the way of (re)creating the context of violence is crucial for how subsequent moral and legal judgements are made. The law, largely blind to its own subjectivity, includes value judgements and categorisations beyond its legislative recognition,
particularly when practiced. Hence, the alleged objectivity of the law becomes an area of concern in descriptions of gendered violence in legal sources.

In this paper, I account for four discourses on gendered violence and their intersections. The paper is based on the research results of my Master’s thesis, which is an intersectional and interdisciplinary study of legal constructions of gendered violence in Finland and Turkey (see Åkers 2014). The discourses described are investigated through a Foucault-inspired discourse analysis, performed on twelve (six Finnish and six Turkish) court cases. The discourse analysis mainly focuses on the creation of legal facts in court argumentation, and pays particular importance to the recreation of gender and majority and minority positions. The majority/minority positions in focus are Finnish majority population/(Muslim) immigrant minority population in Finland, and Turkish majority population/Kurdish minority population in Turkey. The discourses found provide answers to the research question whether there are differences in the descriptions of gendered violence in the judgments, depending on gender and perceived culture (largely connected to ethnicity and/or race) of the perpetrator and/or victim.

The four discourses found are: male violence, female behaviour, normalised/individual violence and essentialised/collective violence. The discourses investigated represent social categorisation of gendered violence as expressions of alterity. The descriptions of gendered violence are investigated in the discourses with a reference to the self and the other, the perception of the individual and the collective.

2 Methodology

The discourses found are results of utilising a feminist and intersectional theoretical framework, where social constructionism and discourse analysis are used as methodology and method. In the judgments chosen for analysis, women had been killed by their partners, former partners and/or family members. In all the cases investigated, the perpetrators were male. The cases were chosen on the basis of earlier academic writings and media reporting, an aim of broad geographic representation, legal impact and personal contacts with feminist lawyers. The cases analysed are all relatively new, in order to best represent the current legal situation of each country. In total, six cases from Finnish courts and six cases from Turkish courts were analysed. Three of the Finnish cases are Supreme Court decisions, and three are not. All six of the Turkish cases are from the Turkish Supreme Court of Appeals.

Discourse analysis challenges the foundations of legal assessment. In this paper, the main focus of critique is essentialising strategies and alterity in legal argumentation on intersectional grounds, with a focus on gender and minority/majority positions, appearing in variables of ethnicity, culture and/or race. The discourse analysis performed focuses on social interaction that is conveyed as discourses within language, connected to power and constructions of power (Stets and Carter 2012). I chose discourse analysis as a method to analyse the connections between knowledge and power, as described by Michel Foucault (see Foucault 2002, 1995 and 1990). Discourse analysis allows the researcher to reveal the focus of the court and recognise whose perspective is regarded as valid in the construction of legal facts, a task difficult to perform using traditional legal research methods (Niemi-Kiesiläinen et al 2006).
3 Discourses Found

In this section, I will account for the four main discourses investigated in the judgments. The discourses are named after the focus of the court, referred to as male violence, female behaviour, normalised/individual violence and essentialised/collective violence. It was common that several discourses occurred in the same judgment, even though one discourse was often dominating. The discourses can be coupled into male violence – female behaviour and normalised/individual violence – essentialised/collective violence, one of the pair often dominating the other. The last couple of discourses can both be seen as variations of the male violence discourse. The interactions and interconnections between the discourses are shortly investigated later in this paper.

It is important to highlight that the number of cases analysed in this study is limited. The cases investigated do not necessarily represent the multiplicity of the national legal culture, even though they might be representative for parts of it. Furthermore, conclusions that do not take into consideration the context of the individual cases should not be made.

3.1 Male Violence

Approaching his wife as if his intention was to talk and shooting her with seven shots, mainly from the back, suggests that the act was premeditated.

- Extract from one of the Turkish judgments analysed

The discourse referred to as male violence is a discourse where the perpetration of the gendered violence is the court’s main focus of attention. The discourse consists of violence descriptions, where the focus clearly is on the violence perpetrated, and not on the behaviour of the victimised woman. This discourse focuses on the violence as an illegal act, rather than the perpetrator as a person. In the criminal legal doctrines of both Turkey and Finland, the male violence discourse is often officially recognised as the only discourse given legal value (Chomsky 2003 and Bladini 2013 pp. 38–43). However, other discourses can also be recognised in the legal argumentation analysed.

In all the judgments analysed, the male violence discourse was frequently occurring. The discourse was more dominant in the reasoning of the Finnish courts than in the arguments used in the Turkish judgments. The Finnish courts were generally less focused on the behaviour of the female victim than the Turkish courts. In general, the courts were less hesitant to regard male perpetrators guilty of a qualified form of homicide if the dominant discourse in the case was male violence (rather than female behaviour). Thus, a conclusion of the study is that the dominating discourse is linked with the outcome of the judgment (see Koğacioğlu 2004 p. 120).

3.2 Female Behaviour

[...] one should take into consideration the fact that it is evident from the stories of both S [the female victim] and A [the male perpetrator] that the events described in
The prosecution were preceded by hours of nagging and acting up by S. This caused a sense of annoyance for A, and finally took him to a stage of uncontrollable anger [...]
both discourses lies on the descriptions of the perpetrated gendered violence, described either as normal violence/violence perpetrated by an individual due to an individual decision, or as essentialised or abnormal violence, perpetrated by an individual or a group due to a decision of a group (a collective decision). Thus, the descriptions of the violence perpetrated have different elements involved. However, both discourses focus on the narrative of the male perpetrator (Lundgren and Westerstrand 2002).

   The *normalised/individual violence* discourse describes the violence perpetrated as deviant, while the perpetrator is largely depicted as normal. In this discourse, the perpetrator is identified as part of the *collective self*. The gendered violence, on the other hand, is experienced as deriving from deviant factors; the perpetrator might be described as particularly jealous, blinded by extreme anger, or otherwise mentally deviant. A defence strategy relating to feelings of so-called *passion* can repeatedly be observed in the occurrence of the discourse in the cases analysed. The narrative of the perpetrator occurring in the judgments is that he killed the woman because he saw no other, or little, alternative at the time. The perpetrator often claims to have few or vague memories of the killing, and is overall described as later distancing himself from the events (Lundgren and Westerstrand 2002).

   In the Finnish judgments, the legal objectivity paradigm, an ideal particularly strong in the Nordic legal culture (Bladini 2013 pp. 38–43), is visible in the strong position of the *individual* (and normalising) discourse. The individualist approach is also occurring in some of the Turkish cases analysed, but it tends to be more dominant in the Finnish judgments investigated. However, the *normalised/individual violence* discourse was occurring in the judgments of both countries.

   In the construction of gendered violence, what is described as *normalised or individual violence* is often perceived as the *violence of the (collective) self*, while what is described as the *essentialised or collective violence* is often perceived as the *violence of the (collective) other* (Lundgren et al 2001 and Sirman 2011). The results of the study support the theory that majority positions tend to be described as the *collective self*, while minority positions become the *collective other*. Commonalities of both discourses are that they both regard the female victim as the *other*.

3.4 Essentialised/Collective Violence

   *I regard the crime as an act, which has traces of brutish, ritual slaughter […].*

   - Extract from one of the Finnish judgements analysed

   As opposed to the previous discourse, the final discourse investigated describes gendered violence as clearly abnormal and particularly belonging to members of certain groups. I refer to this discourse as *essentialised or collective violence*, primarily describing gendered violence as the violence of the *other*. The main element of the discourse is that the violence is attached to a certain person or group as a characterising feature, while the *normalised/individual violence* is described as deviant and separate from a person or a group.

   Even though accounting for structural violence is unusual within a (criminal) legal framework – typically individually oriented – it is sometimes visible in practice when it comes to the descriptions of gendered violence perpetrated by the perceived *other*. Here,
structural patterns of gendered violence are addressed, often implicitly in the judgments, at times even explicitly. Addressing the concept of collective honour was sometimes done in the court judgments analysed in order to express the essentialised/collective violence discourse. This discourse is intersectionally problematic, since it recognises the structural problems of gendered violence, however only regarding the minority, and not the majority. Thus, the gendered violence occurring among the majority population is rendered invisible, while the minority population is labelled as the problem (Ertürk 2009 and Koğacıoğlu 2011). The normalised violence, perpetrated by the men of the majority population, is not recognised as a structural problem (UN Human Rights Council 2009 p. 42).

There are examples of this essentialising discourse in both Finnish and Turkish cases: however, the circumstances surrounding the legal environment and legal argumentation are somewhat different. Due to the official policies of the Turkish government regarding the Kurdish minority in Turkey, Kurdish perpetrators and victims are not typically addressed as such in the judgments analysed (see Aslan 2009). However, Kurdish people are addressed by other means in the cases, often referring to geography, such as rural areas, eastern or south-eastern parts of Turkey, but also expressions like villagers or people living in feudal systems are commonly used. Thus, the discourse is evident (see Bayr 2013). In the Finnish context, the aforementioned objectivity paradigm within law largely excludes explicit remarks about arguments without (official) legal value. In the Finnish judgments, the discourse was more often expressed implicitly, such as in the formulation of the narrative of the male perpetrators (or the lack of such) and the choice of facts brought forward in the judgments (see Carbin 2010 p. 34). However, in some cases, it occurred explicitly in order to provide an explanation for the violence.

4 Interconnections

The discourses investigated in this study are interconnected, meaning that they occur simultaneously, and that they are not exclusive of each other. There are some general conclusions that can be made about the interaction of the discourses. The general and most common interconnections and interactions are available in the following table, providing for patterns found in the court cases studied.

<table>
<thead>
<tr>
<th>Perceived Culture</th>
<th>Majority Population</th>
<th>Minority Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>Individual/Deviant Violence (A)</td>
<td>Collective Violence (B)</td>
</tr>
<tr>
<td>Female</td>
<td>Provocation (C)</td>
<td>Culture (D)</td>
</tr>
</tbody>
</table>

The combination of the male violence and the normalised/individual violence discourses (A) was the most common in the court cases analysed. In this combination, the focus lies on the male perpetrator, regarded as a member of the collective self. This is often defined through means of implicit identification, often depending on the

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89 Membership in an ethnic, religious or racial minority is generally not considered legally relevant.
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ethnicity/race/perceived culture of the male perpetrator. In this combination, the court approaches the male perpetrator as an individual, and the violence perpetrated is not regarded as a result of culture or the impact of a collective society, but of individual decisions. This means that patterns of structural gendered violence are rendered invisible, resulting in the disadvantaged status of female victims (see SOU 2004 and Lundgren et al 2001).

The combination of the male violence and the essentialised/collective violence discourses (B) frequently occurred in the judgments. Here, the focus lies on the violence of the male perpetrator, regarded as a member of the collective other, often defined through what the court perceives as his own culture and/or ethnicity. The court regards the perpetrated violence to be part of a societal pattern, allowing for a structural approach. Since these forms of gendered violence are perceived as the violence of the collective other, it seems to be easier to recognise them as such. Here, the direct disadvantaged group is the men of the minority population or members of what is perceived as ‘minority culture’ (Volpp 2000 and Koğacioglu 2011).

The combination of the female behaviour and the normalised/individual violence discourses (C) was evident in a couple of the judgments analysed. In these cases, the focus lies on the behaviour of the woman as a cause or explanation of the violence. The violence directed against her is experienced as individual, often referred to as jealousy, or even love. Cultural membership is seldom addressed, since the woman is perceived to be a member of the ‘majority culture’. Alternatively, her cultural membership not regarded as important in the case. According to the analysis performed, the cultural membership of the woman seems to be determined more based upon her social environment, e.g. family and partner, than her person, which differs from the male cultural membership. This combination of discourses is particularly harmful to women, since the behaviour of the woman is marked as significant and abnormal, while the violence is normalised (Abu-Odeh 1997).

Finally, the combination of the female behaviour and the essentialised/collective violence discourses (D) also occurred in the judgments analysed. In this combination, the focus of the court lies on the behaviour of the woman, perceived as belonging to the ‘minority culture’. Again, the cultural membership is dependent on her environment. However, unlike the previous discourse combination, culture is addressed in these cases: either explicitly or implicitly. The problem of this combination is that it is both discriminating and harmful for women because of their gender and as a part of a perceived minority culture, making minority women particularly vulnerable (Al-Hibri 1999). The women concerned are simply regarded as victims of their culture or even victims of (cultural) hatred against women; this explanation also justifying and allowing for more violence towards them, as long as they belong to this other culture (see Kukathas 1998). Most importantly, their narratives and realities are seldom presented, or even represented, and their voices are rarely visible in the court constructions; only given the role of victims in the courtroom (Koğacioglu 2011).

5. Conclusions

The occurrence of the discourses and intersections described shows that the construction of legal facts is combined with various subjective value judgements. This is true for both Finnish and Turkish legal cultures. It is noteworthy that there seem to be two processes simultaneously directed at the constructions of gendered violence in the court cases: one where the gendered violence is normalised and one where gendered violence is essentialised. In this paper, I’ve shown that the construction of legal facts is often discriminating upon vulnerable groups: mainly women and minority group members. In the
interactions and interconnections between the discourses, multiple discrimination can occur, where the female minority member is particularly vulnerable, as her perspective is discredited and invisible in the construction of the legal facts.

This paper challenges the legal ideal of objectivity, and suggests that gendered violence is an area where power structures play out with results that are not merely biased, but directly legally unjust. These power relations, reflected in the language of the court, are not only affecting the way that the perpetrator of gendered violence – with whom criminal law typically is most concerned with – is judged by the court. On the contrary, they have particular importance for the legal treatment of the victim.

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GENDER AND “THE LAW”


Feminist Agenda, Gender Based Violence And Judicial Practices: Considerations Understood Under The Premise Of Luhmann’s Social Systems Theory / ANA PAULA SCIAMMARELLA\textsuperscript{90}/ ANDREA CATALINA LEÓN AMAYA\textsuperscript{91}

Abstract

The critical feminist theory of law characterizes the legal system as closed and refractory with regards to the demands of women. The legal system is seen as yet another mechanism that upholds traditional gender norms, a system that reproduces with in its practice gender archetypes, which reinforce gender inequality and discrimination against women (Lavigne: 2009; Smart: 2012; Campos: 2011). The empirical analysis and framework provided by critical feminist legal theory precedes the enforcement of Law 11.340/06 (The Maria da Penha Act) which encourages new reflections on legal decisions regarding so-called ‘gender conflicts,’ in Brazil. Heavily influenced by standards laid out in international decrees regarding the rights of women, the Maria da Penha law introduces many innovative elements. Simultaneously, the legislation creates the normative or standard category, definition for what is to be identified as ‘gender based violence,’ in Brazil. The objective of this study is to reflect theoretically and empirically on the role of the judiciary in the administration of conflicts that involve the application of Law 11.340. The introduction of the ‘new normative category’ of ‘gender-based violence,’ its management, treatment by those pertaining to the legal system in Brazil (i.e. judges, defense and prosecuting lawyers, members of the multidisciplinary teams within specialized courts, network of protection and preventive services) will be analyzed. Simultaneously, it is the purpose of this paper to point out the contributions of Niklas Luhmann’s social systems theory (1983 and 1985) to the understanding of socio-professional practices and relations in Brazil’s legal system; and their impact on the realization of the outlook and prospects surrounding efforts focused on the creation and implementation of the Maria da Penha Law. The analysis and findings presented in this article are the result of participant observation carried out by the authors, of cases tried in the Specialized Courts for Domestic and Family Violence against Women in Rio de Janeiro, Brazil.

Keywords: Gender, Domestic violence, Legal System

I. Introduction: the Maria da Penha Law and the implications of the concept of gender

The debate about mechanisms in Brazil’s legal system to combat gender based violence, so-called GBV, and in particular domestic violence against women, is not a new one.

The process of state regulation of GBV began with the creation of specialised police stations for affected women. Beforehand, cases of domestic violence weren’t considered as criminal acts and were not brought to court. But after the introduction of law 9.099/95, cases of GBV could now be dealt with in front of a judge and not simply by the police authorities.

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GENDER AND “THE LAW”

But yet, this law was criticised by feminist organisations. The main reason for this was the contradiction that despite years of struggle for the recognition of GBV as a violation of women’s human rights, the new law viewed these cases as only minor offences. The penalties were a maximum of two years in prison with the option for plea-bargains.

Feminist and critical legal theory developed studies that showed that the legal system in Brazil was in fact characteristically hermetic and unresponsive to women’s claims. Feminists also argued that within legal practice, archetypes of discrimination could be seen. Hence law 9.099/95 actually served only to reinforce and to promote gender inequality against women, by considering cases of GBV as minor offences, in contrast to global advances made in the field of human rights.

It was exactly this that encouraged and strengthened the mobilization of feminist organisations in Brazil to seek change in judicial practices. They focussed on a new law, which would deal specifically with GBV cases. This process of legal reform was made concrete through a litigious strategy in front of the Inter-American Human Rights Commission, using an emblematic case known as the Maria da Penha case, which had huge international repercussions.

It was as a consequence of the recommendations of the Inter-American Commission on Human Rights (IAHRC) to the State of Brazil that feminist organisations formed a consortium to join in order to create a new law.

The Maria da Penha Law (law 11.340/06), which was adopted in September 2006, was the first to specifically approach the issue of GBV and violence against women (VAW) in Brazil.

Two aspects stand out in this context: Firstly, the new law built into the legal system the category gender in order to define VAW according to what was established at the Belem do Para Convention. Secondly, the new law created Courts for Domestic and Family Violence Against Women with both civil and criminal jurisdiction. This means that nowadays these courts can adopt civil preventative measures in favour of women in situations of violence, and also rule on crimes of domestic violence that are committed against them.

For Brazilian feminist theorists who defend the use of the Law in order to promote changes to gender stereotypes, the Maria da Penha Law would launch a new legal paradigm. In addition to providing visibility to the issue of VAW in its normative aspect, it would incorporate a gender perspective for the administration of this type of conflict.

In her analysis of women’s political struggle for equality and the legal system, Mariana Assis shows the relevance of gender analysis to the legal field. Simultaneously, her analysis allows for the comprehension of the difficulties the Brazilian legal system poses with respect to the aspirations of feminist organizations and other efforts focused on gender based violence, in the country:

‘There is this uncontestable and paradoxical relationship between women's political struggle for equality and the legal system- women's struggle for emancipation can be characterized, among other elements, as an ongoing process for, first, entering the legal system and second, attempting to change it’ (Assis 2013 p. 3).

However, the approval of the Maria da Penha Law and the introduction of the normative category of ‘gender’ within the legal system, does not necessarily imply that
Brazil’s judicial system, and those working in it, will automatically change their views regarding gender. Nor that they will adopt and interpret GBV as is laid out in the legislation, nor modify the manner in which they manage cases of domestic violence. This is supported by our field research, and participant observation of domestic violence cases, that were handled by the Courts for Domestic and Family Violence Against Women in Rio de Janeiro.

Regarding Luhmann’s conceptualization of law as a differentiated social sub-system, helps us to understand the Maria da Penha Law, by recognizing the limits of the statue under the legal system in which it emerges (Garcia 2004).

Through his concept of the process of ‘differentiation of the legal system that leads to the universalization of its code’, Luhmann argues that it is the legal system itself which establishes and determines what is going to be subject of law and what will not (Assis 2013 p. 9). About this, Assis says,

‘Luhmann claims that law is positive law, which means, law is that body of norms produced by the state according to a previously established procedure. If this is so and if the state has a patriarchal bias when planning and executing its policies and actions, the legal system will, to a lesser or greater extent, embody this same bias, in the way feminist legal scholarship has demonstrated’ (2013 p. 12).

Also, that perspective helps us to analyze the following: the legislation is created and carried out amidst a continuous process of adjustment from the interaction between civil society, feminist organizations, and global human rights efforts and the legal sub-system of Brazil. Considering Luhmann’s theory, the expectations of feminist organizations (prior to, during ratification, and approval of Law 11.340/06) regarding gender relations, will be key to comprehending in what ways Brazil’s legal system is closed and refractory with regards to the demands of women.

II. Feminist organizations in Brazil and legal mobilization

Initially, socio-legal studies regarding GBV and VAW sought to relate gender, law and judicial power (Ardaillon and Debert 1987; Pasinato 1998; Pimentel 1998), placing an emphasis on the analysis of Judiciary discourse and legal procedures. In general, they pointed out the discriminatory treatment accorded to women in their declarations as victims, in the necessary production of evidence of aggression in legal proceedings, and the content of legal decisions and jurisprudence.

Feminist and critical legal theory has developed studies that indicate that the legal system is characteristically hermetic and unresponsive to the claims of women. Simultaneously, the analysis brought forth by feminist and critical legal theory argues that within legal practice, archetypes of discrimination, which can be observed in the concrete practices of administrators and enforcers of law, work to reinforce and promote gender inequality against women. Thus, the ‘law’ serves as a mere mechanism for the affirmation of traditional gender roles, (Reis 2009; Smart 2010; Fields 2011). For example in accordance with Law 9.099 of 1995 offenses deriving from GBV conflicts were treated as crimes of a lesser offense, considering those with imprisonment of not more than two years (Reis 2009).

Although, the statute aimed to provide better and faster responses to social conflicts involving crimes regarding GBV, avoiding the penalty of imprisonment for minor offenses, it also instituted differential treatment for less serious offenses. Feminist legal theory
demonstrates the relationship that exists between the legal system and the patriarchal system. The women’s movement, feminist organizations, and individuals from academia played a major role in bringing forth discussions regarding the relationship between the ‘state’ and the ‘citizen,’ ‘power and agency’, by declaring that existing power and gender arrangements did not function to produce equality between men and women in Brazil. The concept of gender enters the realm of law and politics in Brazil both during the country’s process of re-democratization and the government’s adherence to international human rights treaties that include the term ‘gender’ within their texts and recognize discrimination and VAW as a violation of human rights.

Luhmann contends that law evolves in relation to the development and changes of society and the rules are created as a demand from the society in order to solve social problems (Assis 2013). The ill treatment of GBV cases, the less than satisfactory action of the legal system, weak legislative treatment accorded to the phenomena, and the decisions held up by the same legal system, worked to reaffirm traditional gender roles and the social hierarchy in Brazil. Legal mobilization strategies (McCann 1999) that were used initially at the international level (i.e. The Case of Maria da Penha) were used by feminist organizations in Brazil as tools for social transformation. Through legal mobilization, feminist organizations aimed at transforming the way the legal system managed and handled GBV cases.

Both the dissatisfaction with respect to lack of symbolic, moral, and legal significance given to such cases of violence and the lack of specific mechanisms for treatment and compensations for damages rendered in such cases (Piovesan e Pimentel 2002) provoked the use legal mobilization strategies. Luhmann’s view of law as a social system assists in the analysis of legal mobilization by feminist organizations in Brazil. Seeing law as a social system means to characterize law as a dependent variable of society, just as society is a dependent variable of law (Assis 2013 p.8). Legislation focused on GBV would evolve because of the demands of feminist organizations. However, VAW, and GBV in general, would not be identified as human rights violations, and issues such as domestic violence, traditionally considered ‘private’ would not have finally been placed in the public realm, without public policy. Public policies focused on issues pertaining to women serve as mechanisms of communication between women and the state.

In 2001 when the IACHR decided in favour of the case (Maria da Penha), a consortium of feminist organizations was set up for the preparation of a bill to provide legal treatment to specific cases of VAW. The fundamental objectives of the bill were to include the following: diverge the management of Special Criminal Courts (those set up under Law 9.099) for domestic violence, and create a specialized legal system for consideration of GBV cases. Through campaigns focused on the elaboration and development of an “Integrated law for confronting domestic and family violence against women” and in support of the law project 4559/2004, the efforts of feminist organizations gain force via public audiences and debates throughout the country. The law project receives a substitute with content that covers a number of issues raised in these hearings and debates, confirming its significance and subsequently making it the Project Substitute in 37/2006. In 2006 it is finally approved by the National Congress, becoming Law 11.340/06, symbolically receiving the name of Maria da Penha. Because it is legal, that law is legitimated and serves as a mechanism for the empowerment of women, victims of domestic violence; it represents the political right to protection. Even though it only establishes such a right ‘formally’ and ‘symbolically,’ Law 11.340 increases the autonomy of women because it supports and upholds the right to live free of violence. The inclusion of a gender perspective in public policy is consolidated
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through the implementation of Law 11.340/06, which definitively creates the 'normative' for the category gender based violence (Campos and Carvalho, 2011)92.

The situation described above is critical to the comprehension of the expectations held by feminist organizations with respect to the legal system, understood as pertaining to the political arena93. Today, Law 11.340/06 is a legal and political resource that can enhance changes in legal practice of cases of GBV, and transformations of gender stereotypes94. Women can use the legislation as a resource to hold those that violate their right to live free of violence accountable for their actions. Thus, all efforts explained above - as interpreted by feminist critics of law – would seem to have shown that such a legislative change could function as a lever for access to legal public policy. However, it also produced new elements of debate regarding the legalization of social relations and in particular that of gender conflicts commencing from the normative creation of the category of gender violence.

III. Gender as… a normative category?

According to Campos and Carvalho (2011), the incorporation of gender as a normative category, into the Law 11.340/06, inaugurates a new legal paradigm. In addition to providing visibility to the issue of VAW in its normative aspect, would implement a legal policy that includes a gender perspective for the management of this type of conflicts. The inclusion of a gender perspective would work as a means of attaining substantive equality between men and women as Rios (2012) explains as the policy of ‘equality and difference’ and from the understanding of Fraser (2001, 2007) on ‘distribution and recognition’.

However, that does not necessarily imply that within Brazil’s judicial system and those working in it (i.e. judges, lawyers, law enforcement), will automatically change their views regarding gender, adopt and interpret GBV as laid out in the legislation, nor modify the manner in which they manage cases of domestic violence. Recognizing the limits of the statute under the legal system in which it emerges (García 2004) it’s essential.

Through his concept of the process of ‘differentiation of the legal system that leads to the universalization of its code’, Luhmann argues that that it is the legal system itself which establishes and determines what is going to be subject to law and what will not be (Assis 2013 p. 9).

The preamble of the Maria da Penha Law acknowledges that family violence is characterized by power and intimacy dynamics, which underlie relations of subordination and domination. Therefore, the concept of ‘gender’ is fundamental to its understanding. Actually, the Maria da Penha Law uses this notion according to the Belem do Para Convention, in order to define VAW but also gender as an analytic category, which points to gender relations as asymmetric power relations.

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92 The law defines under article 5, “domestic and family violence against women as any action or omission based on gender that causes a woman's death, injury, physical, sexual or psychological suffering and moral or patrimonial damage whether in the domestic-unit (understood as the permanent space shared by people, with or without family ties, including people sporadically aggregated), within a family (understood as the community formed by individuals that are or consider themselves related, joined by natural ties, by affinity or by express will), or in any intimate relationship of affection, in which the aggressor lives or has lived with the abused woman, regardless of cohabitation.
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Despite this, the fact is that the conceptualization of the category gender doesn’t actually belong to the field of law. It’s part of a process of a more complex conceptualization in the field of social-sciences. At the same time, the Law 11.340/06 doesn’t provide legal parameters with which to translate this complex conceptualization when it’s time to apply the law. As a result, the entire construction process of norms and codes of behaviour, between the sexes, becomes a responsibility of the legal system. Thus, legal rulings would function as a communicative and regulatory tool, reinforcing a distinctive framework of belonging or not belonging to the legal system (García 2004 p. 309).

A shift or change in communication in the Brazilian legal system would depend on its self-constitutive and self-referencing capacity, its use of ‘social sensitivity’ in determining what can and cannot be accepted, that which remains within or out of the legal system itself. For example, during observation of a case in which a judge argued the following:

‘It is necessary in each case to assert if the relations, having been of affective or sexual nature, fall within the framework laid out in the legislation in question, without losing sight that the term intimate relationship of affection should not be extended in order to include a transient, fleeting or episodic relationship’95.

Luhmann claims that what each system receives from its environment is not the result of a causal impulse without participation from the same system itself. Rather, ‘what is needed is a subsequent “interest”, one that is perceived by the system and that conforms to its own codes, in the production of a change in the environment’ (García 2004 p. 317).

Accordingly, in another verdict the judges strive to approach the category of gender utilizing another classification from law that is associated with the notion of vulnerability and in this sense seek to equate gender to vulnerability or disadvantage, stating that:

‘The field of action and application of the respective law is outlined by binomial disadvantage and vulnerability in which culturally the gender of a woman is presented in the concept regarding family, which includes diverse relationships, motivated by affection or affinity. However, a simple analysis of the persons involved in the process, or even the reputation of its public figures, since both are parties of interest, leads us to conclude that the referred victim, in addition to not cohabiting and being in a long term stable relationship, with the defendant, cannot be considered a disadvantage or vulnerable woman’96.

This is evidence that García mentions using Luhmann’s theory, he says: ‘The system itself determines the informative value of the data it incorporates [...] all information obtained is reduced to a simple state, that allows for its assumptions of affirmation and disapproval to be expressed through simple terms’ (García 2004 p. 318).

Therefore, what is happening is that the judges are using conceptual baggage to simplify the conceptual complexity of the notion of gender. In this case, defining it through the familiar and pre-existing terms vulnerability and disadvantage.

95 Motion for reconsideration 0376432-04.2008.8.19.0001, 7th Camera Criminal - reviewed, Vowel appointed for the judgment: Citing judge: Sydney Wheel da Silva, June 25, 2013. Translated by the authors of this paper.
96 Criminal Appeal in 0042033-61.2009.8.19.0203, 7th Camera Criminal - reviewed, Reporter Maria Angelica G. War Guedes, August 14, 2012. Translated by the authors of this paper.
Hence, the term gender is established as the object of dispute. Initially to classify violent events that took place in family and domestic settings as criminal met the expectations of feminists. However, the choice to leave out incidences of VAW in public spaces seems to have contributed to women's representation being limited to their traditional domestic roles. Although the legal framework of the Maria da Penha Law has increased awareness of GBV, extending beyond domestic violence, the case mentioned above seems to define GBV simply as domestic violence.

The use of the notion of gender in judicial practice would become another tool with which to restrict access to specialized courts. These courts end up having jurisdiction only in disputes between couples in intimate and stable relationships. They also need to demonstrate the vulnerability or disadvantage of the victim. As a result, cases of women considered well-off, such as actresses or public figures that have already suffered at the hands of their partners, haven’t been able to submit their cases to a specialized court.

IV. Final considerations

If the concept of gender in law is considered as one ‘borrowed’ from social sciences, it is interesting to note the extent to which its significance changes between the discourses and classifications, of those working in the justice system who give it meaning.

Recognizing this fact is not trivial, because it helps to reveal trends regarding the performance of institutions. The point here is not to argue that the category of gender loses significance or purpose in the field of law. On the contrary, the category of gender is given meaning through the management of conflicts involving violence. However, these meanings allocated to the category of gender are those of a legal sense, defined by law and its own code of interpretation. Therefore, now it is the justice system that will define how the category 'gender' functions in cases that fall under the Maria da Penha Law.

It is in this sense that the previously mentioned contributions of Luhmann are relevant and help us understand how the legal system reproduces itself and how, in fact, it reproduces the entire social system (Assis 2013), but through its own code of interpretation.

The aim of this paper was to draw attention to a few aspects commonly neglected in the formulation of public policies in the legal field. For example, how the Maria da Penha law serves society and also how the Brazilian legal system participates in the construction of the reality of female victims of violence. Our analysis identifies issues regarding the implementation of effective strategies, which in general disregard the impact of the functionality of the justice system. This is to say: how can we work with the legal system to guarantee women’s rights, if we do not comprehend mechanisms that enable the system to function in a given way? This exclusive focus on changes within the content of The Maria da Penha Law has only served to draw attention away from issues that arise from the manner in which the justice system functions and how cases of GBV are managed.

References


PART IV: STATE AND THE LAW


GENDER AND “THE LAW”

Rape versus Rope: Critical Analysis of the Media-State Nexus during the N.Ç. Case in Turkey / UMUT ÖZKALELI

Abstract
The perception of and response to the rape of women and girls signifies the essence of sexism and the objectification of the female sex in Turkey. Rape has been perceived as a crime against the family and society and not as a violation of individual rights. Cases where underage girls are raped continuously appear in newspapers. This paper examines a serial rape case where a 12-year-old girl known as “N.Ç.” was raped by 26 men, most of whom were civil servants. The paper applies critical discourse analysis by focusing on intertextuality among legal decisions, court processes, judge’s statements and their reflections in the media to reveal the state’s attitude towards the rape of a child. Male public servants are taken as the embodiment of the state, and intertextual analysis shows how state justification of child rape is negotiated and perpetuated through the news media.

Keywords: gang rape, Turkey, individual rights, law, patriarchy

Introduction
Rape has been treated as a crime against family and society (Parla 2001 p. 65-88). Diner and Toktaş’s (2013) study shows that rape is not only seen as a crime against the family but that “the state institutions involved in combating violence against women try to protect the family rather than the women. The laws and policies designed to support women and combat domestic violence contradict the prevailing mentality within society and state institutions, which support the integrity of the family” (p.343). Only after 2005, with the introduction of the new Penal Code (5237), did rape become a crime against the individual and regulated under crime against sexual autonomy. Still, after a rape occurs, the issue is perceived as one of “chastity.” Being “unchaste” is not attributed to the rapist, but to the raped woman whose family has subsequently lost honor (namus). Men are not expected to have chastity, and their honor (namus) is directly related to the situation of the women in their family, such as their wife, daughter, sister, niece, or aunt. It was because of this belief that, until the law was changed, a rapist could avoid being prosecuted for rape if he married the woman or girl he assaulted. Both in the eyes of the community and of the law, rapists were not guilty because of the violent act of harming another’s bodily, emotional and psychological integrity. The rapist was not seen as a violent person stepping over the boundaries of another individual’s rights and freedoms. Perhaps one of the most important freedoms of an individual is freedom from torture or purposefully inflicted pain. If violence happens within the confined space of a household under the institution of marriage, the message is clear: the woman (the girl, the rape victim) is not a person with the rights and freedoms that constitute the core of one’s individuality.

97 Assistant Professor, Zirve University - Department of Political Science and Public Administration
98 Male and family “honor” (namus) is directly linked to women. Murders of women due to this fact are named “honor killings” (namus cinayeti). For studies on honor killings, see Arın (2001); Sev’er and Yurdakul (2001); Kogacıoglu (2004).
99 Article 5 of the Universal Declaration of Human Rights states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
Today, the law has changed, and the rapist, at least before the law, cannot be protected through the institution of marriage. However, the change in the law does not guarantee recognition of individuals’ rights. Nor does it protect individual integrity against rape.\(^{100}\)

The aim of this paper is to present how rape victims’ individuality has been suppressed by the legal system and the media by analyzing a decade-long serial rape case, known as the N.Ç. trial. How are rapists positioned in the eyes of the court and the media? What does rape victims’ positioning tell us about their individuality? Whom and what does rape violate? And most crucially, in this particular case, how was rape “negotiated” and understood by the state and delivered through the media?\(^{101}\) An intertextual analysis will be presented aiming to investigate the state’s attitude towards the rape of a child through the news coverage of court processes and judge’s statements. Male state employees are taken as the embodiment of the state, and intertextual analysis presents how state justification of child rape is negotiated and perpetuated through the news media.

This paper focuses on media coverage of a rape case that involves multiple rapists who are mostly public servants and a survivor who was an underage girl. The case is known through the initials of the survivor’s name, N.Ç., who was a 12-year-old girl at the time of the rapes. The rapes occurred in 2002, and the court case concluded in 2013. There has been vast media coverage of this case.

At least 26 men raped N.Ç., including a school administrator, a manager in the District Governor’s Office (Kaymakamlık), an administrator in the Department of Forestry, and an officer of the Turkish Military. There were also two adult women involved, who arranged the meetings with these men and forced N.Ç. into prostitution. All of the accused were discharged at the early stages of the trial, and none of them were detained during the trials. All of the rapists received the maximum of five years, while the two women were sentenced to nine years in prison, receiving the highest sentence among all those tried. The court justified these higher sentences for the women by stating that they forced their unchaste-life (i̇fettsiz hayat) onto the girl. They were found guilty of being accomplices to rape and encouraging prostitution (irza geçme suçuna iştirak ve fuuşa teşvik) (Gürsel 2014 p.137-161). The media coverage emphasized that “the court decision did not have any comment about whether [rapist] men’s behavior was unchaste or not” (Bianet 2011). While the court used a “good behavior” argument to reduce the rapists’ sentencing, the women who were the intermediaries of N.Ç.’s rapes were not awarded with similarly reduced sentences. Another reason the rapists received reduced sentences was that the court ruled that the rapes did not include “force, violence, threat and deception” (cebir, şiddet, tehtit ve hile) because N.Ç. knew the “moral wrong” in doing the act and consented to meet these men. In one of the rulings, the court stated that “the accused may acquire the victim’s consent for sexual intercourse by saying that he would tell her family about the other sexual relations she had in exchange for money. Even though, for a moment, this may be perceived as a threat, a precedent from a higher court states that element of threat must not be based on victim’s own actions” (Gürsel 2014 p. 3). The case was brought to the Appeals Court, which affirmed that 12-year-old N.Ç. had “consented” when adult men anally raped her. The Appeals Court paid more attention to the “bone” age of N.Ç., which was still under 15. N.Ç. started as a 12-year-old rape survivor, and based on the declaration of her bone age in a Forensic Medicine Institute report, she faced the court as a

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\(^{100}\) For a detailed feminist legal perspective on the problems of Penal Code 5237 that continue to give rapists an advantage, see Canikoglu 2013.

\(^{101}\) See Alat (2006) for a general analysis of the media’s role in “misogyny and maintenance of status quo gender relations” (p.295).
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14-year-old. Later, the case judge of the Appeals Court made a media statement arguing that “she went along with all the events by her consent and ‘the girl’ was close to 15 years of age” (Hürriyet 2011c, my emphasis).

Rape Can Mean…

There are two ways that people can inform each other about how “someone has been raped” in Turkish language: “Tecavüz edilmek” or “Irzına geçilmek.” The latter is used more often. Other than individuals such as feminists, who use rights discourse, many people use these terms interchangeably. However, these phrases do not mean the same thing. Underlying meaning of these two concepts is quite different. *Irz* is defined as “one’s chastity that has to be respected and not touched by others” in the Turkish Language Institution’s (TDK) Grand Dictionary. “Chastity” (iöffet) here is defined by the same dictionary as “showing commitment to moral rules in regards to sexual subjects”. The meaning of *ırza geçmek*, holds dominance in society. Usage of the phrase *ırza geçmek*, both in legal texts and in everyday language, signals the emphasis to the damage to familial and social “honor” rather than the invasion to an individual’s integrity through attack or assault. *Irzına geçilmek* is used for rape, and the phrase literally means “to take someone’s chastity”. In TDK dictionary, *ırza geçmek* is defined as “using someone as a tool for one’s sexual pleasure by using force; rape”, and the second meaning is given as “taking one’s virginity”. Every time the phrase *ırza geçmek* is used, then, it reinforces the notion that rapist is the “pleasure seeker”, who may be changing the “virginity” status of the rape victim. What is lost for the rape victim is a “commitment to moral rules about sexual conduct, in some cases by losing virginity.” The rape victim is possibly considered to have lost a commitment to moral rules by encountering sexual activity outside of marriage (Gürsel 2014, Cf.). Social norms about moral rules of sexuality are strict in two ways: they are intolerant both of sex among unmarried people and adultery. However, this strict morality is mostly applied to women in Turkey, as previous laws punished adultery by women more severely than by men. Adultery was decriminalized in 1998, but the government put forth a proposal in 2004 to recriminalize it. The proposal was withdrawn after reactions from civil society. “[These] changes to the Penal Code included increasing sentences for ‘honor crimes’. However, it still accepts a wife’s adultery as a severe provocation and gives reduced sentences to husbands who kill their wives on this basis” (Müftüler-Baç 2005 p. 28). What needs to be stressed here is that the definition of rape through *ırz* (chastity) does not emphasize violence against individual integrity. Perhaps because of this approach to rape, *Hürriyet*, one of the most widely circulated newspapers, sent mixed messages about the rapists. The newspaper stated that one man told N.Ç. “my girl, please excuse me, the devil entered our heart; you are old enough to be my daughter; if necessary, we can even die for you” (Armutçu 2003). While on one hand, *Hürriyet* used the name that is given to this case, “the case of disgrace,” and talked about rape of a small girl, on the other hand, it presented rapists to its audience as “weak but somewhat humane men” who simply did not have enough willpower to suppress their sexual urges.

The word *tecavüz*, unlike *ırza geçme*, means an attack on one’s rights. The TDK dictionary offers four different meanings for the word *tecavüz*. The first is “attacking someone’s rights.” Interestingly, the example sentence for this word uses one nation attacking

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102 Until the new penal code, 5237, it was *ırza geçme*; now, the wording is “sexual assault” and “sexual abuse of children.”

103 See Canikoğlu’s (2013) discussion of how the new penal code still focuses on criteria for establishing an intent to “satisfy sexual desires” for classifying a behavior as a “sexual attack.” Alat (2006) states that Benedict (1992) stresses that, in the U.S., rape is also perceived to be a sexual act rather than a physical attack (p.298).
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another. The second meaning is given as “assault/attack,” the third as “taunting someone’s honor” (namusa sataşmak), and the last as “to overrun/overstep.”

While the word tecavüz is more accurate, as it is directly related to attacks and violence against somebody’s rights, the law and media’s representation of rape cases with the language of ırz continues to depict girls and women not as individuals with rights, but as objects of family and societal honor. This objectification continuously denies the fact that females are individuals who have a right to their bodily, emotional, and psychological integrity. It denies that rape victims’ rights are violated and their freedoms are stolen. Rather, it marks female rape survivors as “things” that no longer fit society’s expectation of moral conduct as they become the object of male sexual pleasure.

“Consent” as a Discourse to Eliminate Individual Rights

There has been a repetitive use of the following sentence in the newspapers: “the court decided that N.Ç. consented to her abuse,” automatically using an authority to strip N.Ç. of her autonomy and have the final word about her consent. Additionally, audiences are constantly bombarded by the concept “istismarda rıza” (consenting to abuse). Consequently, the audience is moved away from discussing whether this is “rape” or “consensual sex.” Due to her age, “consensual sex” would not stick and was dismissed immediately. Instead, the debate revolved around whether one can consent to her own abuse despite the inherent contradiction of this statement (Cf. Gürsel 2014 p. 137-161). News outlets ignore the fact that it is an oxymoron to use “consent” and “abuse” together and uncritically note that “the court decided that the victim has given her consent to her abuse.” The constitutive functions of discourse, which give meaning to “an experience, or articulate our ways of seeing the world [and organize the structure] to the manner in which a particular topic, object, process is to be talked about” (Kress 1985 p. 6–7 in Sunderland and Litosseliti 2002 p. 13), are useful for understanding how “consent to rape” can be discussed within the framework of accepting 12-year-old girls as sexual beings. In this construction, a sexual being can give consent and there are situations that can make rape acceptable. The usage of “consent to abuse/consent to rape” continuously reinvents the discursive construction of the powerful. While people debate whether one can consent to her abuse or not, a deeply embedded problem that protects and preserves the dominant group is not addressed. Court decisions and judge’s statements do not accept the “act” as a rape, as an attack, or as a violation of the rights of the individual. Instead of arguing this point, “consenting to abuse” compromises the discussion by defining rape through ırz, which is a “moral” argument. “Moral argumentation is implicated in various dimensions of human life. At the same time, it is a terrain characterized by ambiguity and one inevitably raising the question of moral relativism, i.e., what counts as moral and according to what criteria…” (Litosseliti 2002 p. 131). Many argue that moral standards, especially about sexuality, are rigid in Turkey. In the general moral framework, adultery is unacceptable, and girls’ innocence has to be protected by males in society, yet the rape of girls is a widespread social problem in Turkey.

A discussion about chastity, consent, and consent to rape and the objectification of girls’ sexualized bodies using moral argument can easily transform the rape survivor into a willing participant and the rapist into a misguided and weak, yet forgivable, person. Once it is termed as ırz, what concerns the patriarchal court is not the assault and attack on individual integrity, but whether this person can be accepted as someone whose “chastity” is intact. The court decisions and the arguments of the judges that appeared in the media do not use the
terms "ırza geçme" or "tecavüz" when they discuss the reasons for their ruling. In fact, none of the statements that came from the judges or the Appeals Court used these words.

Appeals Court Judge Fevzi Elmas, for example, stated, “According to the [State] Forensic Medicine Institute, N.Ç. is psychologically competent to resist this act...In all the events the victim went along of her own will…” (Sabah 2011) (emphasis mine).

What are “the act” and “events” that she accepted willingly? Avoidance of using the word rape conceals the rights violation of the individual, depowering N.Ç. against her attackers. Hence, as the court reconstructs rape through the use of language, what the judge says or refrains from saying frames the statist rape discourse through the media. In its statement to ease the public outcry, the Appeals Court mentioned “various crimes,” “The acts that are alleged of the defendants” and “partly accepted, partly overturned [District Court] decisions” (Hürriyet 2011b), once again failing to name the crime as rape.

The District Court verdict states, “the victim is capable of resisting the events, where she became a victim” (mağduresi olduğu olaylar) and in “the events that occurred, the victim’s will was not totally absent...” (meydana gelen olaylar) (Gürses 2014 p.3). This verdict depicts N.Ç. as an active subject in “becoming” a victim, and it moves away from accepting that “she was made a victim by some others.” In contrast, the statement “the events occurred” dismisses men’s agency, men who actually were the perpetrators of rape. This type of language constructs the idea that “events” [rapes] just happen, and they could have happened only through some consent by the victim. As it is stressed in the media, even if persons below 18 give their consent to enter into debt, the legal system does not accept the debts of underage people; yet in sexual experiences, the court takes consent into consideration (Tarhan 2011).

In Turkey, there is a Skeletal Age Assessment procedure widely used by courts in underage rape cases. The state’s Forensic Medicine Institute provides the “bone age” report. The age of consent in Turkish Law is 15. N.Ç. was 12 years old when she was raped. The court claimed that she was 14 based on the Forensic Report. Judges treat Forensic Reports as an unchallengeable and a most trustworthy document. However, the Skeletal Age Assessment technique in Turkey has been challenged. Not only do “Skeletal Age Assessments” on living subjects have a very limited predictive power, the way the technique is used in Turkey is problematic due both to the lack of experts working in this institute and the standards having been drawn from a very different population in the U.S. (Altınay 2009 p.165-173). Additionally, and more importantly, there are ethical problems in the lack of consent from the person whose bone age is being investigated (Atınay 2009 p.165-173). In other words, the 12-year-old who is accepted as being capable of giving consent to anal sex with adult men is not regarded as an autonomous individual whose consent has to be sought before starting this procedure. Courts in Turkey can and do eschew the consent of the individual for forced skeletal age assessment procedures. When the Forensic Medicine Institute was held as the authority on the bone age of N.Ç., there were no discussions about the burden on the victim from the method’s technical and ethical pitfalls.

Both the District and the Appeals Court Judges argued that the foundation of their decisions heavily relied on this expert report. The head of the Appeals Court, Fevzi Elmas, went one step further, arguing that she was very close to the age of 15. He argued, “according to the Forensic Medicine Institution, N.Ç. is psychologically competent to resist this act and her bone age is 14... In all the events the victim went along of her own will and she was very close to 15 years of age, this is why the minimum sentence was given” (Sabah 2011).
The media also played a role in making the “consent issue” an acceptable topic of debate through their inconsistencies about the age of N.Ç. Putting news coverage into chronological order shows that N.Ç. was presented as 12 years old by all the newspapers when the news of the rape case broke at the beginning of 2003. Towards the summer of 2003, some papers stated her age as 13. Thus, even before the Forensic Report was used by the court, the media had already increased N.Ç.’s age to 13. Shifting her age from 12 to 13 in the media blurred her age and made it contestable. By 2011, there was no mention of her as a 12-year-old victim in the media. Contesting N.Ç.’s age cleared the way for imputing her “consent” and hence reducing the sentences of the rapists.

The forensic medicine report mentioned by the local judge and the head of the Appeals Court has not been widely challenged in the newspaper coverage of the N.Ç. case, and the Forensic Medicine Institute has escaped being scrutinized or problematized by the journalists who made these news reports. On the contrary, treatment of this report as a sound and reliable source was given subtle acceptance. Only a few newspaper and web portal articles mention the unreliability of the Forensic Medicine Institute. Yaşar (2011), for example, reported on the unreliability of this technique, as its estimation has a two-year margin of error, which could change everything in a rape case. She also noted that comparing high-profile political cases indicates that Forensic Reports are mostly unfavorable for the victims.

Another one interviewed N.Ç.’s, lawyer, Eren Keskin, who mentioned very briefly that Forensic Medicine gave a report without examining her (Öğünç 2011), while others mentioned that the Forensic Report was problematic as there was no child psychiatrist signature on N.Ç.’s report, indicating that her psychological situation was not properly examined (Armutçu 2011). Even those articles lacked an investigative journalistic report about the scientific unreliability of the technique used to assess a living subject’s skeletal age, and they did not open a discussion about the ethical problems of this procedure. There is no extensive written news report that scrutinizes the technical and ethical problems of the institute.

Language of Dominance

The below statements from judges are striking examples of how “power and dominance are usually organized and institutionalized...[S]ocial, political and cultural organization of dominance also implies a hierarchy of power” (van Dijk 1993 p. 255, emphasis original). It is also important to draw attention to the way newspapers are used for the benefit of the dominant groups. Litosseliti (2002) explains the reasons:

Newspapers are a prime public site for moral arguments and for constructing values and ideologies. As Fairclough (1995) observes, analysis of media language is an important element within research on processes of social and cultural change, such as changes in cultural values, power relations and social identities... When focusing on public arguments, one must be aware that the distinction between a public and a lay/private argument is bound up with power. The distinction gives leverage to social actors in certain positions who are permitted to have access to knowledge and the authority to articulate it, while for those in other social positions, lack of knowledge can have the effect of reducing them to silence (p. 136).

Responding to media criticism, Nadir Özsoy, the head judge at the district court in Mardin—who signed off on the decision regarding consent and reduced the sentences of the rapists for their “good behavior” in court—stated, “N.Ç. is an issue that has long been
occupying the public agenda. We enforced the law and we gave the accused punishment within the framework of law. However, it seems we should have given them the death penalty! I condemn the media that has not taken any expert opinion in such a technical subject. I condemn everyone who has made a comment about such an important topic without even once reading the detailed court verdict. I also have to hide my name going forward; I am N.Ö.” (Milliyet 2011).

To begin with, N.Ç. is not a person for the judge, but an “issue.” In his explanation, Özsoy argues that “within its framework, the law was enforced.” This absolutist argument leaves no room for any interpretation; it is as if judges do not have judgment. He omitted the fact that the court accepted there was no “force, threat or violence” towards N.Ç. because they considered her as a consenting individual. He also neglects to mention that the rapists received reduced sentences, thanks to his judgment of their “good behavior” during the trial. He also omits the fact that the two women who “sold” N.Ç. to these rapists did not receive reduced sentences, as they were guilty of being “accomplices to rape and encouraging prostitution” (Gürsel 2014 p. 2). Judge Özsöy further omits the fact that the women who “sold” N.Ç. were given twice as much prison time as the rapists due to the way the court interpreted the law.

When Judge Özsöy sarcastically notes that certain crimes have certain punishments, he maintains that “we should have given them death penalty.” The law permitted sentencing these rapists to at least ten years, but they were sentenced to less than five. With the omission of the actual sentencing, pushing the “death penalty” into the discussion is an attempt to make the public look crazed with vengeance, asking for an unreasonable consequence for the crime. After treating public disapproval as unreasonable and exaggerated, he claimed his “expert” position and legal knowledge to silence criticism when he talks about “expert opinions” and “court decisions.” This hints for the audience that people in expert positions with expert knowledge are immune to being hindered by preconceived ideas such as sexism and ethnocentrism that may affect their judgments. Moreover, such rhetoric is an attempt to make the reader forget the power dynamics—the fact that law tends to protect the more powerful against the less powerful and that older men with social and economic ties to the state are readily excused from their transgressions, especially those against an economically disadvantaged girl of an ethnic minority. Other than few indications, through referring to these rapes as “booty of war” and N.Ç. as a child of a family who were “forced emigrants” (Yağız 2011; yuksekovaguncel.com 2013; yeniozgupolitika.eu 2013), there was no indication of her ethnic identity. Hence, the ethnic dimension and the disadvantages that the court system presented for minority identities were largely silenced in the mainstream media.

Judge Özsöy emphasizes his “expert” position. However, he also creates a victim out of himself by making the audience to think that he has been attacked and made so uncomfortable that he cannot use his name in public anymore. Therefore, he needs to hide himself; he is “N.Ö.” He compares himself to a 12-year-old rape victim and calls for the audience to see him, this educated, expert judge, as a victim of society who is unfairly attacked and can no longer comfortably hold his rightful position in the community.

Milliyet did not publish any commentary, it merely reported the news under the headline “Blame the Robe.” Beneath Judge Özsöy’s statement, the newspaper placed several supporting messages from judges and prosecutors and only one disapproving comment from a judge about the verdict. Judge Mehmet Gülêç (Milliyet 2011) was critical of the verdict, arguing that minimum sentencing was an injustice done to the victim and that “the good behavior” argument had no standing, as all people in front of the court always showed the
upmost respect towards the court. Hence, the interpretation of “good behavior” was also unfair.

One of the supporting comments for Judge Özoys’s statement came from another judge, Murat Karahisar. Judge Karahisar wrote:

Anyone with a mouth is talking. However, people who have knowledge are not talking and they are not allowed to talk. Absolute media anarchy [is going on]. Where were all these media anarchists when this poor girl was selling herself? They do not care. Media care only to increase their ratings through creating sensational news. There is no one who really thinks about the girl (emphasis mine).

This comment, alongside Judge Özoys’s, delivers a consistent message to the audience. Again, the public is divided into two groups, the knowledgeable and ignorant. The critical media are placed among the ignorant, and the only reason for their strong voice is because they are “anarchists.” Historically, anarchists in Turkey are equated with malevolent, violent people who wanted to pull down the Turkish state, force their way in and take charge. Hence, anyone who criticized the legal system or the court decision was “without a doubt” against the state and wanted it to crumble. After he establishes judges and the legal system as the authority to discuss rape cases, judge Karahisar puts forward a value judgment as an “unobjectionable” reality: the girl was selling herself. “The girl” here, who does not deserve to be referred to as an individual even with her initials, “sold herself,” like a consenting adult.

In fact, there was no place for the rapist men in his commentary; there were no arguments about their actions. According to this judge, she did it “herself,” she knowingly sold “herself.” The implication is obvious: needless to say, she is “pitiful” and “unfortunate,” but nevertheless, she did a “bad thing.” He presents a perception about the victim and ties it to the title, status and professional knowledge that he holds, claiming objective truth in the argument: “12-year-old girls are capable of choosing prostitution, and if they do, men in their communities do not need to protect them as children, but they are allowed to get the “service’ for which they pay.” Although judges talk about objectivity, they “make their decisions based on certain legal texts that work for the benefit of the male perpetrators and disregard other texts that would favor women or lead to a higher level of punishment for men who abuse women” (Alat 2006 p. 299).

Other newspapers, like Radikal (2011), presented the news of Özoys’s statement as “the Judge responded to the criticisms,” failing to elaborate on the comments of the judge. This implies that he answered the criticisms, and there is nothing else to be said on this matter. Hence, the media failed to remind the reader that “[e]ven when an institution operates legally or efficiently, the undermining of women’s rights may be an integral part of its daily modus operandi or its ideological structure. In other words, institutions, as themselves the products of political struggles with their own historical particularities, may not work in ways that are emancipatory for women” (Kogacioglu 2004 p.121).

There are columnists who wrote pieces that were critical of Judge Özoys’s statement in the days that followed (Mengi 2011; Evin 2011). Before the columnists wrote on the topic, however, the reporting of the news received no critical analysis, and there was no presentation of opposing ideas, such as the statements of the girl’s lawyers or the opinions of other “experts” on the subject alongside the judges. Reading only the “answer/response” of the case’s head judge with his authoritative rhetoric leaves the audience at odds with their restlessness. There is no approach in this news making to show that the feeling of injustice
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done to N.Ç. has to be addressed. There is no mention that people have the right and responsibility to speak about rape cases when there is a sense of injustice; everyone should be able to scrutinize such a rape case, not only judges and legal experts.

Similarly, the Appeals Court used “expert” rhetoric too, stating:

After the investigation done by the Mardin Public Prosecutor’s Office, various crimes were committed in the year 2002 and the year 2003 by more than one defendant; there were 6 indictments prepared in different dates, and upon these indictments public cases opened. The acts alleged to the defendants happened in the dates prior to the effectiveness of Turkish Penal Code 5237. Because of this reason, both [the old and new] laws have been compared, and there is a legal obligation to follow the articles of Penal Code765. Upon the appeal investigation after this decision, Appeals Court Criminal Office 14 decided to approve some of the verdicts of the district court and ruled to overturn part of this verdict due to various legal reasons. Because of the incompleteness of all aspects of the trial process, it is decided that further comment by our office [Appeals Court] would harm the fair trial/fair hearing principle (Hürriyet 2011b).

This statement, which is full of complicated law jargon, could have been written in lay terms and related to ordinary people. Relying on heavy legal jargon exerts authority rather than helping people to understand why it was a “just” decision. Usage of jargon conceals the fact that the rapists did not receive the highest possible sentences. The comparison of the (old) Penal Code 765 and the (new) Penal Code 5237 becomes an excuse for minimum sentencing. The gap between the prison time given to the rapists and the women is dramatic: five years for the rapists (the least possible) and nine years for the women (almost the highest possible). However, the Appeals Court statement does not specify any sentences and avoids making this dramatic gap obvious. It also does not compare the maximum possible sentence that a rapist would have been given according to the Turkish Penal Code and what the rapists in this case actually received. This statement from the Appeals court sends several messages to the audience: “The law is complicated,” “It is not your place to judge the legal system and the judges,” “Even though you do not understand, justice is served,” and “In the name of justice for the rapists, we are obliged not to give explanations to you to appease your sense of injustice in this case.” This legal jargon implicitly commands people to forget that the law is not just a technicality but has an aim to address the consciousness of people, to create a sense of justice, and open the path for higher standards of valuing human life, human dignity and human rights. This statement tries to bar people from being participants in creating a legal system that does not tolerate rapists of little girls. Such a statement sends a message that the law is detached from the people who make and live under it. Such a statement alienates people from the legal system—which is supposed to ensure a harmonious, safe and trusting social setting—by telling them that the owners of the legal system are the “experts” who have control over it; the rest have to obey their expert judgment.

In reporting this statement, newspapers did not have any journalistic explanation or any interpretation for the audience. They are just “reporting” without, for example, juxtaposing this statement with the statement of the lawyers of N.Ç., or soliciting the opinions of prosecutors, civil society organizations, legal scholars, or social scientists.

After this written statement, Appeals Court Judge Fevzi Elmas, who signed the approval for the district court verdict, joined a TV program via a phone call, and his statement appeared in the next day’s newspapers. He claims that “after our office examined the case report, we decided that the victim was held by these men with her consent, and we approved this
decision.” Judge Elmas begins his explanation with legal terms, talking about how the law cannot be interpreted differently for different cases, how the legal system cannot be harmed by different interpretations, and how the cases are analyzed to decide which articles are going to be applied (habername.com 2011). He further talks about how the concept of ırza geçme (taking chastity) has changed in the new law and become “sexual assault” and “sexual abuse of children.” During these legal explanations, he initially referred to N.Ç. as the “mağdur” (mağdur in Turkish means victim, mağdure is used to refer a female victim). After a question about whether his conscience is clear regarding the decision he says, “We do not sign any case if it is not properly lawful and suits the conscience.” Similar to the Appeals Court statement, he stresses that this is an ongoing case and that the rights of the people who are part of the case should be protected. Hence, he would not go into the details of the case. However, he also urges the public to be silent by using the following reasoning:

This child of ours went through a large trauma by experiencing these events. After she made official complaints, she was sent to the Forensic Medicine Institute three times. This child lived through these traumas over and over again. When the Mardin Court made the decision, it appeared in the media again. This trauma happened once again. And now, after the decision of the Appeals Court, the last five days there has been continuous news about this child. All this news coverage is reopening old wounds of the child that already have a scab, and this causes a continuation of the traumas (çocuk hakkında devamlı yayın yapılarak çocuğun kabuk tutmuş yarısı adeta kazınarak tekrar travmalar devam etmektedir) (habername.com 2011).

After he is asked whether his conscience is clear, Judge Elmas starts to explain the process from the perspective of N.Ç., enumerating the times she went through difficult legal processes as well as number of times the case appeared in the media, mentioning the word “trauma” four times in one sentence and using the words “our child” and “this child” rather than the word “victim.” The distant “victim” who was “held with her consent” becomes “our child” when the Judge is questioned about his conscience in front of the TV audience. He blames the media, in covering the news of this case, for traumatizing N.Ç., never once mentioning the 8 years to which the case has been stretched until that point. He also omitted the fact that much of the said “traumas” happened when N.Ç. was giving her testimony to the District Court during the first phase of the case and there was no child psychologist available. Moreover, there are striking implications in Judge Elmas’ statement about the “scabbed wound.” Rape has been a taboo subject in Turkey. When it is defined by ırz-chastity, the shame of the rape is not attributed to the rapist, but to the raped. Hence, seeking justice, talking about the details of the justice system that lets a rape go unpunished even when it is done to young girls is not something the legal system is used to. Talking about these rapes challenges the taboo silencing and the tacit agreement about blaming the victim. The only way for a rape victim to heal is simple in the implied argument: to forget and to make everyone forget that the rape happened. The only way to recover from a rape is to treat it like a wound. Not to touch it, not to bother it, not to try anything on it—just leave it to dry out and disappear. If this is a wound, a raped girl is not an individual who needs to heal spiritually, emotionally, and psychologically, but just a body. Justice and retribution, communal solidarity and accountability are not part of healing the wounds in such a statement. The judge essentially says, stop talking about rape, so she can start to forget and pretend it did not happen.
Concluding remarks

The N.Ç. case highlights the disturbing reality that, while female rape survivors are not considered to be individual enough to evoke concern about their bodily rights and freedoms, with regard to punishing the rapists of even underage girls, girls who are far below the age of consent are treated as “consenting individuals.” Consent is a concept that recognizes individuality. Consent cannot be talked about without thinking of an individual with recognized and protected rights and freedoms.

However, the Turkish state does not recognize the bodily integrity and rights that constitute the essence of individuality. The media play an important role, giving tacit approval to the state’s disregard for individuality. This is most obvious when “consent to abuse” is used unchallenged, rather than questioning whether a 12-year-old girl can consent to have anal sex with adult men. Lonswary and Archambault (2012) argue that accepting a rape as a “real rape” includes certain characteristics. According to the stereotype, such rapes are “committed by a stranger to the victim, involve a weapon, and result in physical injury of the victim” (152). The N.Ç. case and the stress of the legal texts on rapes not including “force, violence, threat and deception” (cebir, şiddet, tehtit ve hile) show the applicability of this framework in the Turkish context as well. Adding that there is also an emphasis on who is chaste and virtuous, it leads to denial of rape in the most obvious instances, as with a 12-year-old child such as N.Ç.

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PART IV: STATE AND THE LAW

Soviet Norms, Traditionalism, and Gender Equality in Dagestan / KHALIDA NURMETOVA

Abstract

The North Caucasus, and the Republic of Dagestan in particular, is a region where traditionalism in form of both Islamic and cultural norms (adat) is deeply rooted in regulating social conduct. This is especially true in regards to woman: their role, status and behavior being strictly regulated and fiercely protected. With the advent of the Soviet regime, a radical breakup of the local traditions was attempted. Soviet propaganda saw it as a fight against remnants of the past and promoting the emancipation of women, especially of mountain woman in the rural highlands. This was often followed by violent methods and the criminalization of rites and customs. Nonetheless, especially in regard with women, people continued secretly following traditions, even under the threat of criminal charges.

The collapse of the Soviet Union was followed by an Islamic revival. A discussion of the necessity of restoring Sharia law and courts, allowing plural marriages, and the wearing of hijab began. Many saw it as a natural process of going back to the origin and getting rid of alien gender equality rules imposed by the Soviet regime. Even though the mass media and common opinion in the Russian Federation presents the population of the North Caucasus, including women, as eager to return to the traditional style of life, local sociological polls, however, show a different picture. When asked Do you want to be a citizen of Islamic Republic of Dagestan and Do you want polygamy a significantly greater percentage of respondents answered negatively. This shows a disconnect: that even though there are leaders and groups that propagate Islamic and traditional legal values, common opinion continues to favor a secular state and gender equality, echoing opinions from the recent Soviet past.

In my paper I would like to demonstrate the current discussion on Sharia law and plural marriages in light of recent opinion polls in Dagestan, principally as to the limits and role of state ideology in changing established gender relationships to promote and/or hinder equality. I would be using materials that I collected during my visit this autumn to Dagestan that I obtained through interviews with academics, journalist, etc. as well as literature collected there and in Germany.

Keywords: North Caucasus, Gender, Law

Introduction

In this paper I concentrate on Dagestan, an autonomous Republic within the Russian Federation and a region in the North Caucasus where traditionalism, both in the form of Islamic and cultural norms, plays a deeply rooted role in the organization of private life. This is especially true in regards to the role of woman; their status and behavior being strictly regulated and fiercely protected. While these two traditional sources of social organization remained largely untouched during the rule of the tsarist Russian Empire, they faced fierce opposition with the rise of Soviet authorities and their self-proclaimed battle for the emancipation of women. In the Muslim peripheries of the Soviet Union this was often accompanied by violent methods and the criminalization of local rites and customs. Far from being eliminated during this period, the collapse of the Soviet Union was followed, to varying degrees, by an Islamic and cultural conservative revival in traditionally Muslim post-Soviet regions. Here, such practises as wearing hijab, polygamy, early marriages, and bride

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kidnapping increased visibly. Many saw it as a natural process of, “returning to the origins” and ridding themselves of alien gender equality rules imposed by the Soviet regime. It would be wrong, however, to jump to the conclusion that the legacy of Soviet gender policies and reforms has been totally swept away leaving no traces behind.

I argue that the processes taking place in Dagestan today is not a revival of traditional norms regarding the place of women in society, but is instead a new phenomenon. Despite traditionalist rhetoric, the old model of gender relations is too culturally and economically anachronistic in the reality of the post-soviet world and accordingly the models and “traditions” being created are new, rather than restored, cultural inventions. This is even more acute in the ongoing Islamic religious revival which often disagrees not only with ancient Dagestani religious practices but with historical Dagestani culture itself. To support my argument I examine the status of women in Dagestan throughout history. An examination of the pre-Soviet period shows that women’s status was neither as deprived nor humiliating as described by Soviet propaganda, nor as passive as required by fundamentalist Islam. I then look at Soviet gender reforms, their nature and specifics in the North Caucasus and Dagestan. I do so in order to better understand to what extent those reforms still echo, shape, and explain current tendencies in Dagestan today. Finally I give a brief view of the current cultural and religious dynamic and its impact on women.

1. Women’s status in the North Caucasus in the pre-Soviet period

Women’s status in the traditional society of Dagestan always attracted interest from European researchers. However, few were able to look under the surface and judge it free from the perspective of western understanding. In order to evaluate and understand women’s status in Dagestan and the North Caucasus, it is important to see it through the historic context and into the subjective realities of that society. Pulling features out of context or viewing the region through an exclusively Marxist or Western political lens, the way many Russian and European observers have and continue to do, presents a distorted and sensationalistic picture and in turn leads to inaccurate conclusions. Literature of the Soviet period describes women’s status in Dagestan, as well as in the whole Caucasus and other Muslim peripheries in the pre-Soviet period in exclusively negative light (Karachayli, 1929; Khubiev, 1932). According to Soviet propaganda the goranka was heavily oppressed and needed to be saved from the fetters of backwardness. Today, interest in this region is reviving revealing a lack of systematic research on gender questions or women’s history in the region. Literature on the topic, while growing, remains minimal and often written through a political lens.

Before Dagestan became part of the Russian tsarist empire social and legal life, particularly that of women, was regulated through customs (adat) and Islamic Sharia law. Following the annexation of the North Caucasus, the tsarist administration opted for keeping

105 goranka (rus.): from gora (mountain), feminine gender from gorets – appellative name of ethnic groups living in the mountainous regions; in Soviet context used to describe ethnic groups living in the highland areas of North Caucasus.

106 adat (arabic): 1. Customary law 2. Custom; adat presents a set of traditional norms, customs and legal practices that regulate all legal, moral and ethical standards of life of the North Caucasian Highlanders. Although each ethnic group had their own set of adat, as Kovalevskiy, in his famous work “Law and Custom” notes, despite the abundance of ethnic groups and languages, adat of different ethnic groups in the North Caucasus were similar to each other. Adat never disappeared from the North Caucasus – neither with the advent of Islam, nor during persecution from the side of the Soviet regime; in a modified form, it continues functioning in the North Caucasus today.
both systems while also introducing imperial legislation. This co-existence of three systems continued until the mid 1920s, when the Soviet regime abolished Sharia and adat and started its offensive on regressive religion and traditions. Nonetheless, the Soviet regime did not succeed in fully eliminating religion or local traditions. Legal pluralism continued its existence, taking on more hidden forms in times of repression.

In the 19th century, as the father of adat research Maksim Kovalevskiy notes, traditional family and inheritance laws such as marriage, personal relationships between the married, divorce, custody, and inheritance fell in the realm of Sharia, while relationships between clans (tukhum\textsuperscript{107}), villages, and communities, as well as all other administrative questions were the domain of adat. Kovalevskiy (1890) does note that borders between the two systems were blurred and both influenced the other. It would be safe to say, however, that both adat and Sharia provided higher status and greater legal rights and protections to men rather than woman. For example, as current researcher on Dagestani culture, Haybula Magomedsalikhov (2003) states, Islam worked against woman in both personal and inheritance rights: for example, woman inherited half of what a man inherited; woman were not free in their marriage decisions; the oath of two women were equal to one man, etc. Other authors note, however, that Islam was in some ways more progressive than adat. Adat gave no rights to woman to any share in the family inheritance at all. According to adat, a dowry (kalim\textsuperscript{108}) was paid only to the parents while under Sharia the whole amount, or at least a half, would go to the bride directly (kebin\textsuperscript{109}) in order to provide a woman with some security in case of divorce or widowhood (Pershits and Smirnova, 1998).

In the context of pre-Soviet Dagestan, however, it is important to look and understand both adat and Sharia as a holistic system and not isolate certain features and compare them to the standards of modern western jurisprudence. For example, yes, according to both Islam and adat women’s inheritance rights were more limited than that of a man. But, in that context, it is important to make reservation that in Dagestani understanding man was responsible for a woman and her needs. These rights were balanced by the protection and livelihood the man owed their wives, daughters, and female member of their clan. Therefore, it would be wrong to look at Islam and adat as purely discriminatory towards women, especially in the social realities of the 19th and early 20th century. Caucasus gender researcher Madina Tekueva writes that, “in the patriarchal tradition of the North Caucasus, woman did not depend on a man absolutely. They [man and woman] were equal in their dependence on the power structure and public opinion” (2009 p. 306). Woman had less legal rights, but men had more responsibilities; single individuals were accountable and dependent on their clan (tukhum), but the clan in turn was responsible for providing a certain backing and protection to their men and women.

In order to understand the status of women in Dagestani society it is not enough to look into provisions of adat or Sharia. The status of woman in tradition Dagestani society has been characterised by a number of features, substantially different from other areas of the Muslim world (Ragimova, 2008). One of the most important factors influencing the formation of Dagestani character and behavioural stereotypes, including those of gender relationships, is a natural geographical factor (Magomedsalikhov, 2012). Mountainous Dagestan is one of the most rugged areas in the world resulting in very difficult life conditions. It is a rocky and alpine region, scarce in arable land and precariously placed between the great powers of

\textsuperscript{107} tukhum (persian): clan, kin.
\textsuperscript{108} kalim (turk.): buyout for a bride, paid to the relatives of the bride (tradition according to adat).
\textsuperscript{109} kebin (turk.): 1. buyout for a bride (goes directly to the bride, either as a whole or a half; relatives get the other half.) 2. marriage according to Sharia.
Russia, Persia, and the Ottoman Empire; always in danger of occupation. This naturally led to the notion of masculinity being prized, particularly the development of a protective militaristic character. Farming and livestock herding too was difficult, requiring significant labour to protect livestock and eke food from the bare ground.

On the other hand, man’s labour is not enough. Conditions in Dagestan did not allow woman to be covered, idle in a walled compound, hidden from the alien eye, as prescribed by more orthodox Sharia interpretations. Women’s labour was inevitable and necessary. She worked in the fields, engaging with other men and women in the garden, bringing water, and engaging in small trade. This demanded physical endurance, mobility, and a certain freedom of movement and convenience in clothing; women in Dagestan almost never covered their face, but rather wore smaller and non-intrusive headdresses. Woman’s economic role was vitally important and that in turn gave woman’s labour a certain position and level of respect in society (Aglarov, 2008). Many authors note that women were involved in economic activity including the production and selling of goods; this in turn giving her an authoritative and respectable place within the family and society (Aglarov, 2008; Guketlova, 2009). Although deprived of certain public rights, her economic importance gave her an active place in family and society. As M.A. Aglarov (2008) points out women retained, to an extent, their, “independent character, dignity, outright nature, active role in public life and lived till a very old age.”

Another very important category for the Dagestani was that of honour. Damage to honour was seen not just as an injury to the individual, but rather damage to the whole tukhum. Every tukhum protected its moral face fiercely; the loss of face potentially leading to moral ostracism, a tragedy in the Dagestani mentality (Bobrovnikov, 2009a). The preservation of face was tightly bound to the protection of the honour and dignity of the women of the tukhum. That is why a “[a] woman, who lost her virginity before marriage was usually killed by her relatives; the same fate befalling an adulteress wife, who was turned back, but not killed by her husband” (Kovalevskiy 1890). So, as Magomedsalikhov points, it was not so much the husband who lost public respect, but rather the tukhum of the woman that demanded the upholding of the adat moral code. In order to protect his honour, a husband could turn the woman back to her family though adat did grant him the right kill her (Magomedsalikhov 2003). Adat punished adultery particularly strictly: a man who would catch the adultery of his wife, mother, daughter, sister, niece, granddaughter or aunt was suppose to kill both of the adulterers, without being guilty for the shed blood (Bobrovnikov 2009a). This bred a strict level of severity in policing moral codes and conventions, particularly sexual mores. However, the same category of honour gave woman a special position. She had a certain right of inviolability towards men and it was considered highly shameful to hit, insult, or kill a woman and would in turn cause revenge from her side of the tukhum to the offender (Magomedsalikhov, 2012).

In common, as many authors note, Dagestani woman felt comfortable and natural in her realm (Guketlova, 2008; Magomedsalikhov, 2008). While a woman’s position in the family was determined by patriarchal traditions and women were subordinate to men, this does not mean she had no rights and authority within the family. No important event in the family could have taken place without her participation; she was active in household activity and the production of goods (Agashirinova, 2008). What is particularly important is that Dagestani women did not on mass perceive their role as “humiliating” as presented by later Soviet propaganda; if she complied with social expectations, her position could be relatively comfortable.
2. Soviet “emancipation” reforms in the North Caucasus and Dagestan

After coming to power in 1917 the Soviet regime promised equality for its citizens and declared a battle for the emancipation of all women in the country. The “Women’s question” became one of the flagship programs of the regime. Soviet authorities launched an unprecedented campaign throughout the country with numerous legal, economic and social measures undertaken to promote emancipation. The Soviet government adopted legislation establishing civil marriage, easy divorce, and property equality for spouses, abortion services, and maternity pay with restrictions on women’s freedom of movement being abolished (Ishkanian, 2003). Additionally childcare and catering facilities were established throughout the country enabling women to work the whole day outside of traditional house and village labour.

This battle for emancipation, however, looked noticeably differently in the Muslim peripheries. In Dagestan, as well as in other Muslim areas, the Soviet regime realized very quickly that changing legislation was not enough to bring rapid results and challenge the centuries old form of traditional gender relations. A deep and forceful intrusion into everyday traditional and religious practices and norms was needed in order to get the revolutionary change they sought.

In the North Caucasus and Dagestan, the Soviet regime saw two main obstacles: Islam and adat on the one hand, and the family with its strong ties, set roles, and clan systems on the other. At the beginning, just after coming to power in 1917, the Soviet regime didn’t feel strong enough to openly confront these powerful obstacles. In this period the Bolsheviks preferred a policy of coexistence with Islamic and cultural norms and attempted to attract the Muslim population to their side with more flexible methods (Bobrovnikov, 2009b). This also coincides with the first, more accommodating stage of women’s emancipation in the North Caucasus (1918-1928), where the Soviet administration preferred softer methods of involving women in different activities. In order to expand the influence of the party over a large number of women, in 1919 the state created the zhenskii otdel (abbreviated as Zhenotdel). The idea was to spread the message of the Party to women all over the Soviet Union with special attention to the Muslim areas of Central Asia and the Caucasus, particularly rural areas. Representatives of Zhenotdel, usually ethnic Russians, were sent to remote villages to teach, mobilize and politicize local women. The main goals of the Zhenotdel was eliminating illiteracy, involving women in the economical and political life of the country, and well as drawing them into the Party (Ishkanian, 2003). However, even convincing them to attend a meeting or a conference turned out to be an enormous challenge. Traditional gender relations dictated by Islamic and traditional codes demanded sex segregation; man and women were not supposed to attend events together and be in one room. Event organizers had to consider this factor and looked for flexible ways to solve this problem such as organizing events for men and women separately. Organizers tried to demonstrate that they are not opposing Islam, with topic titles such as “Muslim Women and Communism” (Tekueva, 2009). With this, the organizers hoped to involve more women and make meetings and Communist actions more legitimate in the mind of the local population.

This, however, could not last for long. Following the civil war and consolidation of Soviet power, the regime now wanted to claim an ideological monopoly, showing little patience for Islam or traditional norms. The years 1927-1929 saw a turn from the policy of “peaceful coexistence” with traditional institutions and religious organizations towards a policy of repression and harsh actions against the “remnants of the past”. The 1928 Criminal

110 zhenskii otdel (rus.): Women’s Department
Code included a special chapter on "crimes composing the remnants of tribal customs", declaring that "tribal" customs were not a source of law any longer, but rather a challenge to the state. This is also the period when the rhetoric of complete emancipation was introduced. This, however, was not as easy a task as imagined. State officials openly noted that, "it is difficult to overcome the centuries-old enslavement of goranka; there are many obstacles on the way: the Muslim religion, adat, mullahs, and kulaks" (Tekueva, 2008 p. 318). Mosques were subsequently closed and converted into social clubs, culture houses, or even barns and warehouses.

The Soviet regime also saw family with its traditional distribution of roles, expected obedience to the husband, and automatic respect toward the elderly as an obstacle on the way to emancipation. The Soviet regime needed women as a potential workforce and wanted to involve women in active social production. In order to do so, the Soviet administration had to convince woman to leave their natural habitat and get involved in public life. The Soviet regime produced propaganda on the need of the “liberation of the goranka from family fetters and house slavery” (Tekueva, 2009). The Soviet regime presented traditional house chores as a humiliating and thankless occupation. Instead, women should work in publically oriented production. Women in Dagestan, however, did not perceive home chores such as taking care of and obeying their husband as something wrong that needed to be changed. On the contrary it was the natural order of things for them. Dagestani women largely saw their purpose and fulfilment in the family. Giving kids away to the nurseries and kindergartens was met with particular resistance from the side of women (Tekueva, 2008). They saw it as taking away some of their most important duties. It was important to bring up children in accordance with Muslim and traditional practices and people were afraid that by giving kids away into “foreign”, “Russian”, “godless” hands, they will culturally lose them. This in turn provoked a fear of assimilation from the alien Russian and a subsequent loss of identity.

One of the most important aspects in the regime’s resolution of the “women’s question” was women’s education. The Soviet regime paid a lot of attention to using school to change behavioural patterns. For example, physical education became a mandatory class at schools, with both boys and girls mixed in one class, often wearing short sport suits, which was very alien behavior for females in Dagestan. Quoting a Soviet magazine, it was boasted that “physical education – it is a bright little piece of the new mode of life… at the beginning girl-students were shy and thought it indecent to do sports…but now, they are participating with great pleasure, without considering it shameful” (Tekueva, 2008, p. 314). Clearly behavioral patterns did change little by little. The Soviet regime achieved unprecedented results in women mass education and women were actively brought into participating into the public sphere. They vigorously promoted female education and literacy classes in Muslim regions, set quotas for female students at universities and institutes, and went so far as to prosecute men who refused to allow their wives and daughters to attend school.

Soviet gender reforms did indeed result in a transformation of gender relationships in the Caucasus. Even though Soviet propaganda presented its gender reforms as successful and fully accomplished, in reality the transformation did not result in real life equality. The reforms shifted the traditional gender balance and the social role of men and women changed. Although nominally man still was perceived as a head of the family, woman stopped perceiving herself a dependant social object (Guketlova, 2008). For women, this resulted in a double burden. Women were now working fulltime while home chores and the traditional expectations of Dagestani women continued being placed on their shoulders. What did change however is that household work lost its value, now being presented as a thankless, worthless activity. Being a mother and a housewife lost its socially valued status. Furthermore the ties
between the families and tukhums were destroyed limiting individual accountability regarding women’s roles but also protection from violence or abuse.

This double burden could also be recognised as a double life. In public, woman had many public roles she was expected to uphold. She may be a member of the komsomol, a sportswoman, or a labourer but at home, and in terms of her family, she very well remembered her role and status. She was, after all, a Caucasian, Muslim woman, with a code of behavioural rules. Unofficial but very real taboos continued to exist. Traditions and religious practices never fully disappeared, instead taking on different crypto-legal forms (for example money instead of cattle as dowry for the bride), and was kept hidden in times of repression and practiced more openly in times of relative liberalization.

3. Today

The collapse of the Soviet Union brought with it a considerable roll back in terms of women’s rights not only in Dagestan but in all post-Soviet countries (Ishkanian, 2003). In the North Caucasus and Dagestan, the collapse of the Soviet Union was followed by a movement for the revival of “authentic mountainous traditions” as well as a fundamentalist Islamic revival. Many saw it as a natural process of “returning to the origins”, reconnecting with their ethnic and religious identity, and ridding themselves of alien gender equality rules imposed by the Soviet regime.

A true revival of “authentic” mountainous customs and traditions and therefore traditional gender relations, is not, however, possible for many different reasons. The Soviet period did not go by without leaving traces behind; it changed, transformed or destroyed many cultural, religious and gender norms (Bobrovnikov 2009b). The social roles of men and women changed; many women do not perceive themselves as dependent social objects, while many men got used to the idea that women are not only mothers and housewives (Sanaeva, 2013). Nevertheless the urge to conform to traditions has become part of developing a post-soviet identity. As a result new models are created where a man nominally holds the status of the head of the family, while a woman: a nurse, a teacher, a professor, and often de-facto the main bread winner takes on a subordinate role. The Soviet regime also destroyed the role of the big family, the tukhum, with its net of support and co-responsibility. This explains such new Dagestani phenomena as single mothers migrating alone from the villages to the cities in the attempt to provide for their families as well as an increase in domestic violence, female criminality, and prostitution (Djabirova, 2013). Another structural reason preventing a true return to pre-Soviet ways is the fact that some of the traditions, such as bride kidnapping or honour killings can’t have a place in the modern state and under no circumstances should be tolerated (Open Democracy Russia, 2012, Kireeva and Kuzmina, 2014). In other words, Dagestani traditions have undergone substantial changes; both artificial through Soviet persecution but also natural changes through time (Bobrovnikov 2009b).

Fundamentalist Islam is another reality of Dagestan today. This is, however, an entirely new phenomena rather than a revival. Islam was always a part of social identities in Dagestan. Even in times of Soviet persecution it could not be fully eliminated. Fundamentalist Islam though, particularly the versions influenced from the Gulf States, is new to the

111 Youth division of the Communist Party of the Soviet Union.
112 As Vladimir Bobrovnikov points out, those appealing to such clichés as reviving the “original and proper Dagestani order” have obviously not taken into account that the Dagestani are no longer “gortsi” (mountaineers) , but distant descendants of people who used to lived in the mountains.
Dagestani religious landscape (Markedonov, 2010). These “new style” Islamic clerics and converts have demand actions and attitudes of women that were never characteristic or common to Dagestani female behaviour. In regards to the hijab, many authors note that women in Dagestan never wore hijab, but a chukhta\textsuperscript{113} (Kidirniyazov and Tikova, 2008). As Dagestan State University professor S. Agashirinova (2008) points out, the hijab was a traditional dress of women of Arabic countries and therefore questions why women in Dagestan should take on a traditional Arabic style instead of following their own. There is a similar attitude towards reclusion\textsuperscript{114} which, in contrast with much of the Arab world and Gulf States, was not characteristic to Dagestani women, due, as stated before, to the physical and economic needs of highland communities. Polygamy too was never particularly widespread in Dagestan though it has become a growing trend in post-Soviet years (Djabirova, 2013; Sanaeva, 2005). All of these trends, despite being tied in with an Islamic past, are radical changes to the social positions of women, both in the Soviet influenced Dagestani culture but the older, traditionally Islamic one as well.

Despite the discourse in Russian media on Dagestan as a ‘traditional’ society, Dagestan is not homogenous; there are different, often competing trends. It is clear that after the collapse of the Soviet Union Dagestan has gone in search of its new identity. Some see it in Islam, while others see it in Dagestani and Caucasian customs and traditions. There are also those who see themselves belonging to the space of the secular Russian state. It is clearly noticeable, however, that in all these competing trends, women and gender relations take a special role; woman becomes a symbol of either cultural revival, Muslim modesty, or secular emancipation. Cultural, ethnic, and religious self-identification gets reduced to gender relations and behavioural stereotypes, in particular those of women. As Chechen gender commentator L. Kurbanova (2008) points out, attempts to revive lost gender standards are a consequence of a simplistic understanding of cultural continuity. Rather than playing an organic social role in Dagestan, women have become a symbol and a prop; their ethnic, cultural and religious identity being reduced to purely external gender attributes and behavioural practices and stereotypes.

It is important to understand that culture and traditions are not something static and unchangeable. Cultural studies professors Holtmaat and Naber state that:

‘Any cultural framework risks being appreciated as an objective and neutral ‘fact’ that is static, homogenous and detached from power as well as from the particular economic and social circumstances in which it operates. People take the framework as it stands at a certain moment as ‘true’ and ‘everlasting’, often without realising its change over time.... In fact culture is not monolithic and unambiguous, having only one fixed ant determined meaning.’ (2011 p. 53-54).

Gender relations should therefore not be understood as something static and frozen; they should stay opened for possible re-evaluation and changes according to new realities and needs.

It is interesting to notice that women themselves do not participate in this discussion. Holtmaat and Naber (2011 p. 1) further state that, “It is often male representatives or leaders of certain religious, ethnic or cultural groups that determine and declare that their culture does not allow them to acknowledge women’s equality; women’s own opinions on this topic are in

\textsuperscript{113} chukhta - a small, rather non-intrusive head cloth that did not cover all the hair; women would put a bigger headscarf over it when going out (especially for different events, funeral for example). Important – during work in the fields and at home she would usually just put chukhta and freely engage with men like that.

\textsuperscript{114} A ban on contact with men other than ones husband, father, brother either at home or outside.
most instances not voiced or not heard.” Accordingly Dagestan today is in desperate need for female voices in the cultural changes taking place, either in the form of locally developed women activism or female led civil society groups. The Soviet period brought education and public jobs but remained extremely limited in non-governmental forums for action.

How things will develop in Dagestan is difficult to predict in this turbulent region. Numerous factors are at play: outside Islamic influence, the creation of local culture (real or imagined), the modern economy, and security developments all play key roles. Ultimately developments that protect the rights of women whether politically, socially, economically, or physically will depend on the interest and ability of the Russian government to strengthen women’s voices in democracy, the rule of law, and emphasize the secular character of Federal law. More locally, however, it involves a more nuanced and less politicized view of women in Dagestani history. How society integrates recognition of the unique and complex culture of Dagestani peoples into its understanding of individual, group, and women’s rights will give it the potential to foster a more authentic, local development of gender equality. This ideal, however, might look very different from Western, Russian, and orthodox Muslim means of organizing gender rights.

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Some useful Terminology:

adat (arabic) – 1.Custonary law 2. Custom; adat presents a set of traditional norms, customs and legal practices that regulate all legal, moral and ethical standards of life of the North Caucasian Highlanders.

chukhta – headdress worn by women in Dagestan and the North Caucasus; covered the head and the hair, but not the face.

goranka (fem.), gorets (masc.), gortsi (plural) (russian) – from gora (mountain), appellative name of ethnic groups living in the mountainous regions; in Soviet context used to describe ethnic groups living in the highland areas of the North Caucasus.

kalim (turk.) – buyout for a bride, paid to the relatives of the bride (tradition according to adat).

kebin (turk.) – 1. buyout for a bride (goes directly to the bride, either as a whole or a half; relatives get the other half.) 2. marriage according to Sharia.

tukhum (persian) – clan, kin, big family.
One Step Forward, Three Steps Back: Women’s Rights in Turkish Civil and Penal Codes of 1926 / ZUZANA GIERTLOVA

Keywords: women's rights, Turkish civil, penal codes

The political emancipation of women in Turkey in the 1920s and 1930s was married to the nationalistic fervor, which dictated the legal terms of the new Republic. While at the conception of the modern-day Turkish Republic, the national founders debated over the various definitions of “Turkishness” and presented multiple competing ideologies, the secularist and Anatolia-centric characterization of the Turkish people prevailed over the other contending ideas in the end. Paradoxically, the Anatolian identity partly derived from the conscious effort to “catch up” to the West via national modernization. Therefore, the legal texts from the era, specifically the Civil Code of 1926 and the Criminal Code of 1926/27, reflected this most prominent form of Turkish national identity by outlining the Kemalist government’s expectations for the behavior of Turkish citizens. Taken as nationalist and simultaneously ‘modernizing’ documents, the two Codes in some instances complemented and at other times contradicted one another in propagating the governmental agenda, resulting in a complex and controlled definition of the citizenry, particularly in the terms of gender.

This paradoxical relationship manifested itself most clearly in the family law, which largely focused on redefining women’s roles in society. While the Westernizers, arguing for education and full political emancipation of women, took a more liberal stance in regard to granting women equal political, economic, and social rights, the Islamists strongly opposed any such proposals that would reshape the more traditional roles of women. Yet, in many ways these discussions left reality far behind, focusing on the “ideal Turkish woman” rather than addressing the various different areas of female empowerment. Thus, especially from a legal standpoint, the role of a woman in society was constrained to the ideal woman, a mother at the center of her family or one educating herself for the sake of her children and, by extension, the greater Turkish nation, while the everyday realities such as abortion or infidelity, fell in a category of “victimless” crimes regulated by the penal code. As such, the new criminal code constricted some of the key feminist concepts—control over the female body and sexuality. As this paper will argue, this governmental oversight through the penal code defied the liberalization of the civil code, which aimed to heighten the control that a woman

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115 Anatolianism, as propagated by Hilmi Ziya Ulken, came to dominate Turkish nationalistic thought as it firmly planted its nationalist ideology in Anatolia. According to anatolianism, the Turkish presence in Anatolia after the Battle of Manzikert in 1071 established its own national culture and history. Consequently, this ideology rejects the principles of pan-Turkism and pan-Islamism, which were some of the competing alternative ideologies at the time.

116 Ataturk’s reforms aimed to mimic the progress in the West. In Ataturk’s words, “If henceforward the women do not share in the social life of the nation, we shall never attain to our full development. We shall remain irremediably backward, incapable of treating on equal terms with the civilizations of the West.” (Kinross, Ataturk, The Rebirth of a Nation, pg. 343). The backwardness of Anatolia as compared to the Western civilizations runs through number of Ataturk’s writings and speeches.


118 Judith Jarvis Thomson makes women’s rights to their bodies the superseding argument over fetus rights in her article, A Defense of Abortion (1971). While Thomson’s article continues to be hotly debated, her work contributes to be one of the fundamental arguments behind abortion as a woman’s right.
had over her life and property, even if that control was meant for the ideal women alone. Atatürk’s reforms that aimed to empower women were thus actually a double-edged sword that controlled the women whom it aimed to free from the roles dictated by tradition and religion. Furthermore, the codes’ respective goals of promoting the good and regulating the bad in women stemmed from the nationalist need to define its citizenry on a semi-biological basis.

Undoubtedly, the concept of Turkish nationalism raised many issues, including the problem of Westernization in relation to the conception of Turkish identity, and most pertinently to the topic at hand, the polemic of legal governmental authority. As noted by many historians, nationalism, through its connection to positivism, often took on the issues of gender. In theoretical terms, “[n]ationalism has always been a masculine conception subordinating the feminine. It is, at one and the same time, a distinctly racial conception that stems from a certain assumption, if not a ‘scientific’ premise, of purity of blood” (Hallaq 119). Understanding nationalism to be a “masculine subordination of the feminine” as Hallaq did, the family law outlined in the Turkish Civic Code in 1926 must be understood not only in legal and political terms, but needed to be considered from the gendered perspective also. In his analysis, Hallaq continued to argue that “…the man, defined and literally constituted the nation as the subject of the state. As an archetypal figure, he likewise constituted it as an object of sovereignty. In this design, women became instruments of reproduction, while the modern state appropriated the right to determine ‘the uses of women’s reproductive skills’” (Hallaq 119). Therefore, the question at hand is whether, and if so how, the Turkish state defined the social role of women on “the uses of their reproductive skills” More specifically, how did the two legal codes appropriate this patriarchal “right?”

Since the Young Turk and Kemalist ideologies recognized the notion of “an ideal woman” when the legal codes were adopted in 1920s, the Civil and the Penal Codes functioned in conjunction; positively to preserve and heighten this ideal, and negatively, to restrict and eradicate any deviance from it. The legal delineation of women’s role paid particular attention to women as members of the public sphere, rather than the private sphere. By legally acknowledging the civil rights of women, the Civil Code invited women into the public sphere. Simultaneously, the Criminal Code defined the terms on which women could exist outside of the home, and increasingly, also within the home. Concerning women’s rights in regard to the public vs. private sphere, I tend to agree with the argument proposed by Hallaq and Miller, who both implied that the inclusion of women in the public sphere did not as much mean that women existed as individuals in the public sphere, but it rather meant that they literally and figuratively became the public sphere. In this sense, how women acted and how female bodies in particular behaved became a matter of social and political debate looking to preserve its own ethical and moral standard. Furthermore, this dichotomy between the public and private spheres became even more pronounced in the Penal Code, where, as Ruth Miller’s work on women’s rights in the Turkish Civil Code demonstrated, the very definition of criminality changed to be communal rather than individual, as “the purpose of criminal law was to protect the purity of the social organism from defect, that is, it was crimes that struck at this purity that were the most dangerous” (Miller; 2005, 86). This trend of

\[119\] Zurcher lists positivism as “[a]nother important element in the Young Turk ideological make…[it was] the belief that objective truth could be correctly interpreted by the use of scientific methods. As a corollary of this positivism, both the Unionists and the Kemalists had a great, somewhat naive, faith in the power of education as a motor for change” (Zurcher; 1990, 253). Seeing as education of women was one of the primary goals of the Kemalist government, this connection to positivism cannot be disregarded.

\[120\] In fact, the very attempt at legislating concerning women as a group emphasizes their social and therefore public roles.
thinking about criminality also applied to rape, which saw the victim of rape to be the society: for instance, if the perpetrator married his victim, the penalty was lessened (Dustur 629 n.258). As a result, the newly established legal system made special provisions to regulate women as a public space, rather than to protect them as individuals within the public sphere.

Lastly, the disconnect between the ideal woman and the realities that women faced during the Republican period and beyond, reflected a larger trend in Turkish legislation of the era. The Kemalist reforms of the 1920s and 1930s set up a framework for an ideal citizen, which became increasingly problematic as time went on because, as Miller pointed out, this was “… a system divorced from its social relevance… it [was] a system in which purity of function or purity of idea is more important than utility of function or utility of an idea. Finally, in the context of criminal law, it is a system in which crime is purely discursive” (Miller; 2005 2). Especially within women’s rights, the ideal woman alone could thrive and be protected under the new legal system while women facing less-than-ideal situations were left with minimal legal tools to combat them.

Using the above discussion as the basic ideological framework, this paper will postulate 1.) that the highly gendered nature of the Turkish Civil and Penal Codes reflected the masculine nature of Turkish nationalism, 2.) that the disconnect between women’s reality and the ideal allowed for abstract legislation of family law and criminal laws pertaining to women, and lastly, 3.) that while the Civil Code included women in the public sphere, the Penal Code failed to protect women’s individual rights in this sphere. To better understand the sources of this ideological gap, the historical shaping of Turkish women’s identity will be discussed first and secondly, the two codes’ treatment of adultery and divorce will be considered.

As discussed earlier, the rhetoric most often used by the nationalists demarcated the role and behavior of the ideal Turkish woman, who perhaps did represent some Anatolian women. This ideal paradigm however worked against protecting the rights of average women by further increasing the gap between the reality and the legislation. As the nationalists led by Mustafa Kemal formulated the government’s own national mythology, their fictional writing and particularly poetry articulated the national idealism, setting a certain standard of behavior for the general citizenry. With respect to women, Ziya Gokalp (1876-1924) and Halide Edip Adıvar’s (1884-1964) writings carried particular poignancy.

Most prolific among Kemalist thinkers, Ziya Gokalp carved a space for himself as the ideologue and national philosopher in the Turkish nationalist movement, explaining the proper roles of women in the new Turkish state. In his poetic collections, Kızıl Elma (1914) and Yeni Hayat (1930), Gokalp adumbrated his expectations for the ideal Turkish woman. To Gokalp, Turkish women ought to be partners for their husbands, which per se demonstrated that women were still to be limited by their marriage. In this sense, the ideal woman for Gokalp was one who “işçiye olunca rakip karısı, / kul artar, ücretin gider yarısı, / ikisi alırlar aynı ücreti” (Gokalp 9-11). As a “işçiye olunca rakip,” the ideal woman would certainly attain

121 While the above discussed law was a Young Turk regulation, the legitimization of rape via marriage was reaffirmed by art. 434 of the Penal Code of 1926/7.
122 I am focusing on the exempla from Ziya Gokalp and Halide Edip Adıvar here only because they were among the most prominent Republican period writers and had the most direct connection to the Kemalist government. The motif of an “ideal woman” is by no means limited to the paltry examples provided here. Additionally primary sources where similar trends occur are Omer Seyfettin’s “Zeytin Ekmek,” in which the protagonist chooses to die instead of sacrificing her sexual honor, or Reşat Nuri Güntekin’s novel Caltkusu (1922), in which the female protagonist preserves her honor/virginity, becomes a schoolteacher and thus serves her country, and eventually marries.
some control over her economic rights but solely in relationship to her husband. In this sense, even the “Meslek Kadını” (“Professional Woman”), whom Gokalp described here, would be the extension of her family and the main reason to educate her and include her in the workforce was because if “kadın çalışmazsa fikri yükselemz / tabii o zaman size denk gelmez” (35-36). In one sense, Gokalp praised women, understanding that an entire half of the population cannot be excluded from the politico-economic realms and yet, the very fact that he connected the rise of women to the rise of the nation made women a symbol of modernization and growth. Ultimately, the idea of an individual woman disappeared and what remained was a member of the household whose economic contributions bettered the state and allowed it to rise too. From an economic viewpoint, by tying women’s economic production first to her family and then to the “yukselen size” i.e. rising Turkish nation, the woman became a tool of the economic production of both her family and her state. Clearly, Gokalp’s notion of womanhood restricted women to economic partnership, thus idealizing women as a means to social improvement of the family. Gokalp’s approach represented the views of many Turkists, who as Koroglu mentioned, “…were in favor of better education for women and their introduction into the work market as a means of enlarging the social space, increasing the productivity of women and bettering the quality of family education provided to children” (Koroglu 125). By supporting the emancipation of women solely for the purposes of “enlarging the social space, increasing productivity… and bettering the quality of family education,” the actual interests of women went without proper recognition and appropriate legal protection.

Similarly, Halide Edip Adivar’s biography The Turkish Ordeal builds up this perception of an ideal woman. At one point in the book, Adivar reflected on being invited to a dinner with her peasant friends at which the local “slut” was supposed to perform for Adivar. Although Adivar generally spoke of peasant women positively, pitying them for their lower social status and empathizing with their suffering, here she noted that

…a prostitute or “slut,” as they called her, was a person to arouse intense curiosity in the peasant women. The sins of flesh, and in fact sins of all other categories too, gave rise to no outburst of virtuous indignation among the village folk, choice between prostitution and death, woman ends up choosing death. (Adivar 144)

While Adivar concluded this passage by deriding prostitution and feeling compassion for “sluts,” she also made an important assumption about peasant women in saying that a peasant woman “ends up choosing death” over dishonor. Whether true or not, this generalization upheld a social moral standard that contributed to the idealization of the Turkish woman and applied it to the larger peasant population. Adivar admitted the presence and even the need for regulation of prostitution in society (145) but despite this admission, she depicted the “virtuous indignation” of the common peasant woman at the transgression of a social more. The conclusion that naturally followed was not just the idealization of the pure peasants by an educated, elite woman and that only further increased the disjunction between the laws that meant to shield women from crime and those opening up more social, political and economic space for women. In this sense, Adivar’s writings contributed to creating the image of the perfectly virtuous Anatolian woman, clear of any kind of dishonor. Such portrayal of the female Anatolian peasantry then only elevated Turkish women to a symbol of national purity, which measured the decadence and moral righteousness of the entire nation. Using the behavior of women as the moral measurement stick of the Turkish nation would eventually problematize legislation regarding women, as the attempts to control their behavior stemmed from the desire to uphold an impossible societal more.

123 Even if condescendingly. Senghi pp. 98.
In fact, despite these lofty idealisms of Ziya Gokalp and Halide Edip Adivar, the everyday realities for most women in Turkey remained dire, even after the Civil Codes changed their legal rights and the government actively backed various programs aimed at solving “the women’s question.” The crux of this disparity rested on the fact that, much like other Kemalist policies, the laws aiming to liberate women took a ‘top-down’ approach to emancipation. In fact, the entire movement, as Hamideh Sedghi pointed out, “…was confined to the elite and failed to incorporate the interest of other women, possibly because their elite background prevented these women from acting on behalf of other women” and thus the resulting “[r]eforms were also class bound” (Senghi 98). This discrepancy between the ideal woman, who embodied the elite experience, and the real women of Anatolia materialized most lucidly in the educational statistics. The United Nations Educational Scientific and Cultural Organization’s “Evaluation and Recommendations for Programmes of Girls and Women’s Vocational and Technical Education in Turkey” (1953) noted that out of the roughly 10 million women living in Anatolia, 75% entered primary school, and out of those, 97% were still in Grade III, 31% finished Grade V or primary school. The number of women entering middle school deteriorated further, with only 10% of those who finished primary school gaining further education, and out of those 2% who graduated middle school, a paltry 2% was able to attend a Lyceee or a Technical or Vocational School. As for the number of women entering higher education, only .7% went on to college or a university in 1953.124125 Looking at these statistics, albeit 25 years removed from the passage of the Civil and Penal Codes, these women were still affected if not the actual products of the Kemalist reforms.126 As such, the reality of only 31% of women finishing primary schooling clashed powerfully with the idealized “Meslek Kadini” that Ziya Gokalp saw in the future of the Turkish Republic. In effect, in 1953, women were back at the beginning of the poem: “kadının mesleği olmaktır kari” (Gokalp 4)—for what other profession could there be for the chronically uneducated female masses? Consequently, since there was such a big disparity between the socio-educational barriers preventing women from achieving their full potentials and the reforms created to eliminate them, it can be argued that “the nationalist-secular state emancipated Turkish women but subsumed their specific interests as women” (Sedghi 98). In this way, divide between the ideology and the reality caused the ideal women’s rights to be acknowledged but the women’s actual interests still failed to be recognized, let alone protected.

Subsequently, the language of the Civil Code of 1926 and the Penal Code of 1926/7 present a fascinating example of the clash between the state-defined and highly idealized understanding of the proper role of women and the fearful and tacit acknowledgment of the reality. The family law outlined in the Civil Code of 1926, which was a slightly modified version of the Swiss Civil Code of 1907, legally recognized the social space newly open to the modern Turkish woman. In short, the Code covered the institution of marriage, the expected behavior in marriage, and divorce, which were the three most significant legal spaces for the female body and biology. On the other hand, the Penal Code of 1926/7, modeled after the Italian Code of 1889, aimed to contain the transgressions of the standards of social relations

124 Using statistics from 1953 to better understand the Republican period may seem disjointed but the implementation of Kemalist reforms takes time. In fact, using statistics 25 years into the future benefits my argument as it shows that ultimately, Kemalist reforms aimed at women did not reach and certainly did not empower the women of Anatolia 25 years later.
125 Compared to the U.S., 22.63 % of women over the age of 25 graduated high school in 1950, with 12% entering higher education (Godfield 1964 113).
126 Notably, the UNESCO International World Book of Education 1953 defined the aim of rural education in Turkey as “to prepare women for their role of housewives” (UNESCO International World Book 1953 331). Such understanding only reaffirms the constraining definition of women’s roles within the legislative system.
as maintained by the Civil Code and preserve the moral standard represent by the purity of women. Thus, with regard to marriage, the Penal Code specified how to deal with underage marriage and for divorce, the Penal Code defined adultery on a gendered basis. In a sense, the Penal Code therefore clarified the penalties for the women that failed to uphold the societal mores—those who strayed from the ideal described by the Civil Code.

Most importantly, the Civil Code granted essential provisions for marriage, characterizing it as monogamous and banning child marriage by requiring the age of the husband and wife to be eighteen and seventeen respectively. While this Code in some ways confirmed the established social practices, it contributed to the emancipation of women in Turkey just by including these provisions in the legal framework. Despite such a progressive redefinition of laws addressing women, the Civil Code fundamentally aimed to uphold a woman’s biological function over all other parts of her life. For instance, women under the legal age of seventeen could only marry with the consent of their guardian, but according to Art. 128, which elucidated the conditions of invalidity of marriage and stated that “[a] declaration of invalidity may not, however, be entered if in the meanwhile the incapable spouse has become capable marriage, or of age, or if the wife has become pregnant” (Civil Code 1926 Art. 128). As such, whether one followed the law became irrelevant if the woman in this situation became pregnant. In this case, the law changed from protecting the individual to protecting the society and the child by consigning the woman to the ideal role within the family, which then would take the precedence over any other factors in the situation. Thus, this article reaffirmed the social importance of viewing the woman as a mother. In conclusion, if a woman’s situational role can be modified to confirm to the ideal role of a mother, then the Civil Code guaranteed the legal space for this transformation.

Having clearly demarcated for whom and under what conditions marital bonds were legal, the Civil Code further outlined the roles of the spouses within the marriage. Looking to the aforementioned Hallaq’s theory regarding the male appropriation of the right to determine ‘the use of women’s reproductive skills,’ the Civil Code’s Article 152 certainly did that by recognizing “the man [as] the head of the union of marriage” (Art. 152). As the legal head of the household, the man was legally responsible for “providing for his wife and children” (Article 152/II) but his decision power easily exceeded his responsibilities. The husband had the legal right to “decide the place of residence” (Article 152/II), in guardianship disagreements, “the guardianship right [was] given to the father” (Article 263), the husband “[had] the right to benefit from the income of his children” (Article 280), and the husband represented the union of the marriage (Article 154). Evidently, the husband wielded much more power in the union than his wife, especially in regard to procreation. Since, according to Article 263, the husband decided the guardianship, even the wife’s role as a mother was legally subjugated to her husband. The husband, however, did not exercise control over his wife’s role in the household—her role as a mother—alone but his jurisdiction expanded to her professional engagement as well: “The wife can take a job or engage in a craft only upon the explicit or implicit permission of the husband. The husband on the other hand can require his wife to contribute to the ‘reasonable extent’ (Article 159 and 190). Gokalp’s ideal “Meslek Kadini” must therefore depend on her husband’s permission to earn her wage and contribute to the partnership. Perhaps the husband that listened to Gokalp’s articles and poetry would have known to let his spouse hold a job but the legislation left the actual decision to the husband.

127 Hallaq argues that polygamy was not practiced in most areas by the time this Code was passed (Hallaq 130-2). As for legal marriage age, as Yildirim points out, this provision was included in the Marriage Law of 1917 and thus was more of a continuation of the Young Turk legislation than a new Kemalist innovation (56).
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Reading Article 159 and 190 in conjunction with the Article 152/I, which stated the husband was the head of the household, dictated that the husband, being responsible for the wellbeing of the household, naturally had to be in a position to control the labor output of his wife. In this sense, the husband’s control of the wife derived from his responsibility for the household, and as such, the institution of the monogamous marriage legally superseded any concern for the individual, let alone an individual’s control over her economic production. From an ideological standpoint, this reaffirmed the importance of the union over the individuals and re-appropriated the masculine control over the female reproduction, which also constituted a significant shift from the older Shari’a law. Additionally, the husband’s control over his wife’s economic output could be read from a class perspective as well. The not being able to control her income carried much more dire and immediate consequences for a lower class woman than an upper class woman who could rely on her family assets and for whom a profession was an option, not a necessity. Within the new societal configuration, which placed its epicenter on the companionate, monogamous marriage, the wife’s role, within the private and the public sphere, was completely dependent on her husband, and thus did not reach full emancipation.

Aside from describing the proper behavior at the outset of and during the marriage on gendered terms, the Civil Code also attempted to reform the views of legal separation by creating more equal provisions for both sexes. In this respect, the Civil Code took a somewhat less biased approach, enumerating the reasons for divorce as severe incompatibility, adultery, attempts on the life of one spouse by the other, physical violence, cruelty and insults, commission of a humiliating crime, leading a dishonourable life, desertion and incurable insanity (Art. 128-134). Among these, “severe incompatibility” was the most common (Orucu 48) as it was open to the judge’s interpretation and excluded any criminal charges. What qualified as “severe incompatibility” varied greatly, ranging from “a wife riding with a male relative on his bicycle when her husband was away” ((HDK . 26/3/1976, 1957/1178) to “a husband not having intercourse with his wife for seven months” (HGK. 7/5/1979, 2441/3748) to “bad breath if it cannot be combated” (HGK. 7/7/1976, 2-1075/560-2494). Hence, the application of this provision, if not gender-neutral, dealt with some of the potential issues a wife could have faced. In this respect, while the Civil Code did not explicitly define specific reasons for divorce as described above, it left enough room for interpretation that it could have been applied to protect women (e.g. from bad breath) or to control them (e.g. by restricting their bike rides). Through this flexibility, the Civil Code’s regulation of separation was both abstract and modernizing, for it recognized women’s rights in the most abstract way as it handed the power of interpretation to the judge through its lack of specificity in “severe incompatibility.”

Conversely, the Criminal Code took a far less subtle approach in punishing the transgressions that would lead to divorce. The Civil and the Criminal Code thus overlapped in some of the situations, namely in regard to adultery and “dissolute life,” which are the most relevant to the scope of this paper. Regarding adultery, the Criminal Code took a decisively gendered attitude, delineating male adultery as a continuous relationship and female adultery as an instance of an extramarital sexual relation (Art. 440 and 441). In this respect, the Criminal Code moved away from the ideology of gender equality articulated in Article 129 of

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128 Hallaq states on 128: “Yet, the legal reduction of the matrimonial relationship (formerly predicated upon complex social relations within an extended family structure) to companionate marriage simultaneously constituted a step toward constructing the wife as a housewife in a family united headed by the husband, a notion that is entirely absent from the traditional religious law”

129 A more detailed analytic study of how was divorce law applied after 1926 would be interesting, however, at least to my knowledge, no such study exists at this point.
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the Civil Code. In effect, this provision further clarified the expectations of men and women as citizens: men were not supposed to have prolonged extramarital affairs and women should not have any affairs whatsoever. In this instance, the law became both abstract and discriminatory in how it dealt with women as it held women to a standard that differed from the reality in which their partners lived. Apart from setting double legal standards from men and women, this law also divided the proper physical spaces for men and women. As Miller noted, “[t]he notoriously adulterous male citizen, or the male citizen who kept a concubine in his marital residence, was being punished not for any sexual activity per se but for allowing private, sexual issues to enter public, nonsexual space” (Miller 370). Conversely, the woman was punished for the sexual activity per se, which again confirmed the limits of the ideal, asexual130 woman. Interestingly enough, this understanding of the law was confirmed in the 1938 amended Penal Code, which expounded on the penalty for the woman who knowingly “makes herself accomplice to the act [of adultery]” (Turk ceza kanunun 1994 sec. 8). At least for the problem of adultery, the Penal Code actively contradicted the gender neutrality of the Civil Code.

The masculine nature of Turkish nationalism compelled the legislators to see women as a standard of social morality, which view then translated into the legal definition of the rights of women at the conception, in the duration, and at the end of marriage. While certain reforms, such as the institutionalization of the legal marriage age and the emphasis on consent, were progressive steps toward the full emancipation of women, the law was undercut by the provisions that favored the purity of women within the society over the individual rights of the wife and the mother. Similarly, within the marriage, women gained in respect to the formality of their position and duties, but continued to be dependent on their husbands to provide for them and to grant them permission to participate in the workforce. The legal incongruity between men and women became most glaringly obvious in the section of the Code outlining the legal separation of the spouses, which accepted a wide range of situations as legitimate grounds for divorce but interpreted them differently for men and women. Still, within this context, adultery was defined by gender lines in the Criminal Code, which indicated the nationalist and abstract nature of the law, resulting from the predominant ideologies of the period.

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130 Istar Gozaydin concludes that during the Republic period “…a woman earns esteem only if she becomes an asexual creature who at least happens to be able to conceal her sexual self…” (Gozaydin, 59).
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GENDER AND “THE LAW”

A Study on LGBT Prisoners in Turkey Based on the X vs. Turkey Decision in the European Court of Human Rights / EMİR OZEREN* / ONDER CANVEREN**

Abstract

This study examines the issue of LGBT convicts in Turkey on the basis of the decision of X vs. Turkey in the European Court of Human Rights (ECHR), which, addressing the issue of a homosexual convict, concludes that the prohibition of torture by inhuman or degrading treatment (ECHR Art. 3) and prohibition of discrimination (ECHR Art. 14) have been violated. The said case bears significance, as it is Turkey's first case involving the issue of homosexuality concluded by the ECHR. The decision of the ECHR not only indicates the inadequacy of physical conditions of the prisons with respect to homosexual prisoners, but also demonstrates legal gaps in penal and execution laws, the lack of agenda setting at a political level in Turkey as well as the socio-cultural understanding of homosexuality.

Keywords: European Court of Human Rights, Turkey, LGBT, prohibition of torture, prohibition of discrimination, sexual orientation, homosexuality, prisoner.

Introduction

Following the entry of the European Convention on Human Rights into force in 1953, Turkey, reaching a total of 2,994 convictions and was ranked first by ECHR among the countries convicted of violating human rights (Council of Europe, 2014: 3; Janis et al., 2008: 156). A vast majority of these violations have been established with respect to the areas concerning the judicial power (Salihpasaoglu, 2009: 272). Practices and measures observed before, during, and after the trials have led to the decision that Turkey has violated, in particular, the right to fair trial, right to freedom and security, and the prohibition of torture.

Turkey, continuing to suffer structural problems with regard to basic rights and freedoms (Özdek, 2004: 351; Gözübüyük & Gölcüklü, 2013: 13), has no other option than resolving such problems during this age of internationalization for human rights. Gender identity and sexual orientation has become one of the current topics with the betterment of the human rights and freedoms among the international community. A considerable public opinion has been formed concerning the rights of LGBT (lesbians, gays, bisexuals, and transsexuals) in the “European/Western” world, in which Turkey desires to participate. Therefore, the rights of

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We would like to thank Assoc. Prof. Dr. Ethem Duygulu for his insightful comments and suggestions in the development phase of this paper.

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LGBTs, who have been ignored and marginalized and whose rights in all areas of Turkish life (politics, media, academia, society, family, and the workplace) have been denied and haven’t or cannot be discussed, need to be raised in a broader discussion (Öz, 2011: 1-9).

With this background in this study, the issue of LGBT prisoners is examined in the light of the X v. Turkey decision132 (2012, App. No: 24626/09) by the ECHR, concluded that Turkey violated the prohibition of discrimination on the grounds of sexual orientation and the prohibition of torture. The Court’s decision of X vs. Turkey bears significance for two reasons (Johnson, 2012): (I) This case is Turkey’s first case involving the issue of homosexuality and (II) the Court, for the first time in its history, has convicted a country in a case involving LGBTs on both Articles 3 and 14. Based on a qualitative research method, this study makes use of the Court’s decision as the primary source and literature review and in-depth interview as the secondary source.

The study consists of two parts. The first part is assigned to the examination of the event (the subject, claims and defences of the parties, decision of the Court) involved, through a method employed by comparable studies (Soygüt-Arslan, 2009: 160; Özar, 2012: 431). The subsequent part of the study evaluates the reasoned decision and discusses it with respect to the legal, political, and sociological reflections and consequences for Turkey.

Case

Born in 1989, residing in Izmir, X, a homosexual, goes to Police Station and admits that he has committed crimes. Thereafter, he is arrested and put in Buca Prison (ECHR, 2012: parag. 6). The High Criminal Court of Karşıyaka, sentences the applicant to 1 year and 8 months of imprisonment in the first case pursued against the applicant, and the High Criminal Court of İzmir convicts the applicant of 10 years, 3 months of imprisonment on the grounds of repeated offenses of the crimes. The convict is firstly placed in a mixed ward of heterosexual prisoners in Buca. The attorney of the prisoner requests the administration to transfer X to a ward of homosexual prisoners due to security concerns. This request is justified by the attorney on the ground that the client is oppressed and abused by other prisoners. A report issued and signed by the prisoner and guardians on the same day contains following statements (ECHR, 2012: parag. 8):

*I am still in building no 6. I caught the disease of homosexuality. I am having problems as other prisoners are becoming aware of this. I informed the Director of the Prison through my attorney. I request to be transferred to a ward that suits my situation.*

The administration decides to place the prisoner in a solitary cell in February 2009 following this petition. The report issued in relation to the decision states that: “...the inmate who states to have caught the disease of homosexuality is placed in a solitary cell instead of a ward.” (ECHR, 2012: parag. 9).

X learns of his new cell unit, which measured seven meter square in total; that the cell has only one bed and a toilet without a washbasin with full of rats, the lighting is weak, and the room is dirty. Further, the inmate has been completely disconnected from other prisoners

132Full text of the reasoned decision of the Court is available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001113876#"itemid"="001-113876"]
and any kind of social activity. He is prevented from having access to the outdoors and is not allowed to leave his cell other than to meet with his attorney or to attend hearings (ECHR, 2012: parag. 10).

The inmate request in April 2009 from the Public Prosecution Office abrogate the decisions taken against him in regards to the conditions in the prison. The prisoner states in his letter that he is not a transsexual but rather a homosexual, that he is denied the opportunity to contact other inmates due to his sexual orientation and that he is held in a solitary cell without being allowed to participate in any social activities. Further, he states that being held in a cell as described above for three months has caused him to suffer psychiatric problems.

X, denied his request, applies as a second step through his attorney in May 2009 to the execution judge in İzmir responsible for the supervision of prison conditions. The execution judge, after examining the case just over the file, concludes that no judgment is required to be established as to the substance for the case. The judge notes that the prison administration has discretion over the issue and states that: “...the person concerned is held in a solitary cell unit, because the government, in no event, may take on risk of a transsexual being lynched [in a prison]...” (ECHR, 2012: parag. 13-14). The prisoner once again doesn't receive a positive response for the objection submitted to the High Criminal Court of İzmir in May 2009. The High Criminal Court also doesn't make any assessment other than finding the Execution Judge’s decision compliant with the law.

During the trial of the prisoner in June 2009, the Fifth High Criminal Court of İzmir decides to send a letter to the administration of Buca Prison for all necessary measures be taken relating to the concerned person’s complaints on the conditions of the prisons. The Office of Prosecution, with reference to this letter, transfers the prisoner to Manisa Psychiatric Hospital for treatment in July 2009. Three psychiatrists issue a medical report states that X suffers from homosexual identity disorder and his disease corresponds to reactive depression symptoms of disorders caused by the conditions of prison (ECHR, 2012: parag. 16-18).

Claims and Defences of the Parties

Applicant

The prisoner states in his petition that he has been held for thirteen months in a solitary cell due to his sexual orientation and the heavy conditions during his isolation and imprisonment have caused irremediable and irrecoverable impacts on his mental and physical health. The applicant further states that he has been placed in a solitary cell without any legal basis and kept in isolation for 24 hours of each day and denied contact with other inmates and not allowed access to the outdoors (ECHR, 2012: parag. 10). According to his attorney, the applicant has suffered psychological pain (depression and insomnia) due to his isolation in Buca Prison and had to take anti-depressants and other medicines in order to calm down and sleep (ECHR, 2012: parag. 22). The prisoner, with reference to these claims and concrete facts, submits a petition to the ECHR against Turkey putting forward as the legal grounds the Article 3 of ECHR, regulating the prohibition of torture,\[133\] and Article 14, regulating the prohibition of discrimination.\[134\]

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133 Article 3 regulating the prohibition of torture is as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

134 Article 14 regulating the prohibition of discrimination is as follows: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race,
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Government

The Government claims in its defence that the detention conditions to which the applicant is exposed to, does not carry the minimum requirements to be considered as inhuman and degrading treatment that might violate the Article 3 of the Convention. Accordingly the applicant was placed in the solitary cell upon the request of himself due to the oppressive and abusive acts of heterosexual inmates (ECHR, 2012: parag. 30) and the cell offered essential daily necessities. The government states that the prisoner remained in his cell alone until another homosexual prisoner came to the prison (ECHR, 2012: parag. 11).

Reasoned Decision of the ECHR

The ECHR firstly evaluated the complaint with respect to Article 3, taking into consideration the period the applicant remained in the solitary cell. The ECHR underlined that the Government is obliged to ensure that every person is kept in conditions as required in respect to human dignity and that, taking into account the conditions that the manner of execution may not subject the prisoner to despair or heavy distress that exceeds the level of inevitable pain suffered during imprisonment which is the Government’s obligation to ensure the prisoner’s health and well-being (ECHR, 2012: parag. 33).

ECHR has noted that the isolation imposed on the applicant was not an emotional or a full-scale social isolation, but rather a relative isolation (ECHR, 2012: parag. 37). However, the Court has underlined that certain aspects of these conditions are stricter than the regime applied to the prisoners serving life sentences in Turkey. The ECHR notes that the Government has failed to explain why the applicant was deprived of having access to outdoor exercise or contacting other prisoners, albeit to a limited extent, as requested repeatedly by the applicant. (ECHR, 2012: parag. 42):

There is no doubt that, taking into consideration the oppressive and abusive acts to which the applicant is exposed while with other inmates and which constitute the complaint of the applicant himself, these concerns are not baseless. However, even if such concerns required safety measures to be taken for the protection of the applicant, they do not adequately justify total segregation of the applicant from the community of other prisoners.

ECHR also highlights that the applicant’s requests submitted to the Execution Judge and High Criminal Court were rejected without being reviewed in substance and, therefore, the issue had not been settled through domestic legal remedies (ECHR, 2012: parag. 44).

In the light of these observations and reasons, the ECHR has concluded that the applicant was deprived of securing an effective remedy as to his complaint regarding the prison conditions and that the applicant had not been kept in proper conditions that would honour the right to respect of human dignity. It was concluded that these harsh conditions represent “inhuman and degrading treatment” and that Article 3 of the Convention was violated (ECHR, 2012: parag. 45).

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colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

This section of the study is collected from the written text of the reasoned decision of ECHR.
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The ECHR, secondly has evaluated the event that is subject of the case under Article 14 regulating discrimination. The Court recalled that the government is required to submit valid reasons in order to justify the measure that is the subject of the dispute. If the discriminatory act is related to gender or sexual orientation: (I) it is underlined that the discretion reserved to the government is limited; (II) it is repeated that, pursuant to the principle of proportionality, the measure applied is required to be compliant with the objective pursued; and (III) that such a measure is required to be proven to be necessary without any reference to the conditions (ECHR, 2012: parag. 50). The ECHR assessed that the government implemented its safety measures for the protection of the applicant based on the homosexuality of the prisoner; in other words, the fact that the government, when trying to justify the unequal treatment, builds its defence on the sexual orientation of the applicant, constitutes discrimination under the Convention (ECHR, 2012: parag. 50).

The ECHR is not convinced of the reasons submitted by the Government with respect to the measures and implementations applied to the applicant. According to the Court, the Government failed to provide any explanation regarding the claim that the solitary confinement was the “best measure” against the risk of being exposed to a serious attack.

Discussion

It can be asserted that this case and the conviction of Turkey can be regarded as a reflection of the heteronormative\textsuperscript{136} structure (Karadağ, 2007: 81; Ali, 2013: 9) and heterosexual ideology\textsuperscript{137} (Ertin, 2012: 263; Ataman, 2011: 131) embedded in Turkish judicial system. As clearly expressed in the reasoned decision of the Court, the homosexual prisoner was exposed in the prison to psychological/physical violence in violation of the prohibition of torture and to discrimination due to his sexual orientation.

Similar findings have been previously expressed by the United Nations (UN) and the European Union (EU). In this context, according to the UN report entitled the *Handbook On Prisoners With Special Needs* (UNODC, 2013: 104), it bears significance to bring to the fore the issue of LGBT prisoners and to examine what types of discrimination they face in the punishment-execution process and to discuss solution proposals by creating awareness among the public opinion, and judicial and bureaucratic authorities. Similarly, the European Union, of which Turkey is a candidate country carrying out negotiations, criticizes Turkey as follows in the Progress Report (European Commission, 2012: 29) in the chapter on fight against discrimination:

...

\textit{...lesbians, homosexuals, bisexuals, and transsexuals have remained exposed to discrimination, intimidation and violence... Deficiencies encountered during the investigation and prosecution of the crimes committed against persons of different sexual orientation have spared perpetrators from any punishment...}

\textsuperscript{136} Heteronormativity is the process whereby heterosexuality (being sexually interested in the opposite sex) becomes the basis of social institutions and theories widely but invisibly, and non-heterosexuals are ignored in formation of these social institutions and theories. The term is frequently employed as it explains that the norms, rules, and policies in the social, political and legal establishment are built solely by heterosexuals. For details, see. (Weiss, 2008: 6672–6676).

\textsuperscript{137} Heterosexism is the entirety of systems ideologically rejecting, degrading, and stigmatizing all non-heterosexual identities, behaviours, and groups. This system is also the cause of homophobic attitude widely observed in attitudes and behaviours of individuals, which appear in all institutions and aspects of social life together with prejudices. For details, see (Berien, 2001: 6672-6676).
In the light of the Court’s reasoned decision the first question to be asked with respect to Turkey is what meaning this decision legally bears. According to Article 90 of the Turkish Constitution: “In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.” Firstly, within the perspective of constitutional law, the articles of the European Convention on Human Rights and the decisions of the ECHR have become binding on national law (Eren, 2004: 47-77; Başlar, 2004: 1-62). Upon this article, the judicial and bureaucratic bodies are expected to apply the Convention as a primary/principal source in their decisions and practices in the case of conflicts relating to human rights and fundamental freedoms.

Secondly, the European Convention on Human Rights is binding on partner states with its substance and spirit. Such binding effect is defined as “flexible-soft” in the Convention (Moravcsik, 1995: 169; Moravcsik, 2000: 217-252). (ECHR, Article 1): “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Similarly, Article 46 of the Convention, addressing the binding effect and execution of the decisions, states that: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties,” and subsequent statements vest the responsibility of execution of the decision in the Committee of Ministers.

In order for these necessary legal, administrative, and bureaucratic measures be taken, it appears to be a requirement to regulate the principle of equality, first of all, at a constitutional level in such a manner that will cover LGBT individuals. According to Article 10 of the Constitution of the Republic of Turkey (TBMM, 1982: 2): "Everyone is equal before the law without distinction in regards to language, race, colour, gender, political opinion, philosophical belief, religion and sect, or any such grounds."

The absence of the expression “sexual orientation” in the Constitution leaves LGBT individuals out of the scope of the constitutional equality (Yenisey, 2005: 245). It can be asserted that an explicit mention of the expression “sexual orientation” and “gender identity” in the Constitution may alleviate this controversial situation. It is undoubtedly misleading to consider that a legislative regulation alone can fully resolve the issue. As a matter of fact, it is as important as, or even more important than the inclusion of these expressions in the Constitution, to create a consciousness and awareness in the mind of “law making, practicing, and dispute resolving bodies.” For example, in the United Kingdom, LGBT individuals are more likely to be exposed to indirect or implicit discrimination, in practice, in spite of all laws and regulations (Colgan and McKearney, 2011: 625). Nevertheless, it can be argued that inclusion in the Constitution of the expressions “sexual orientation” and “gender identity” will constitute the first step of an overall mental transformation.

In the case in question, in line with Zevkliler (1988), the judicial and administrative authorities have difficulty in perceiving and evaluating the concept of “homosexuality,” and in particular male homosexuality, and consider male homosexuality identical to transvestite and transsexual identities. As a matter of fact, the confusion of the concepts with relation to the sexual orientation and identification of prisoner X is proof of the actual fact as experienced. In the administrative communications exchanged in relation to this referral, the condition of the prisoner is expressed as the individual catching the “disease of homosexuality.”

138For detailed field work carried out in relation to the identification, see http://www.lambdaistanbul.org/s/wp-content/uploads/2013/02/ne-yanlis-ne-de-yalniziz.pdf.
states in his petitions that he caught the “disease of homosexuality.” Furthermore, considering and identifying homosexuality as a disease are founded not only upon medical or legal regulations, but rather the socio-cultural structure that considers the heterosexual lifestyle as compulsory, constant, and unquestionable for individuals. The prisoner himself states in his petitions that he caught the “disease of homosexuality.” Such a case leads us to the conclusion that the prisoner himself considers his homosexuality as a disease in order to legitimately request from the prison administration his protection from potential physical violence and psychological abuse. The male homosexuality of the prisoner, in other words, having a sexual orientation outside heterosexual norms, may be interpreted as a serious assault and challenge against the hegemonic ideal of manhood, which has penetrated the mildest of the overall society. In such a socio-cultural background, suppression and violence against and social exclusion of male homosexual individuals is legitimized through social practices. We should also add that social dynamics that reveal and even reproduce and consolidate hegemonic masculinity are deeply rooted and embedded in the streets, school, family, workplace and various social institutions (Özturk & Özbilgin, 2014). At this point, male homosexual individuals, who do not choose to conform to the socially accepted gender roles and do not perform the expected definition of masculinity, are more likely to become an open target of hegemonic masculinity (Sancar, 2009). In fact, the factors that give rise to hegemonic masculinity should be questioned within the patriarchal mentality of masculinity and the related power system based on gender that has been constructed.

Not surprisingly the most powerful and important instrument employed by hegemonic “ideal manhood” in order to remain in force and reproduce itself is homophobia (Kimmel, 2004). Hegemonic masculinity consolidates itself by excluding, suppressing, and subjecting (Connell, 1998) the pattern of male homosexuality which deems to reduce and impairs “ideal manhood.” For this very reason, homophobia emerges as an important component of heterosexual, hegemonic masculinity by its psychological function underlying the definition of who the individual is (heterosexual) and is not (homosexual) (Göregenli, 2011).

The transformation of the heteronormative structure addressed in various aspects in this study such as legal, bureaucratic, sociological is a principal issue of LGBT organizations, and the question of “what is to be done?” is frequently asked among these circles. Kurtoğlu with whom we conducted an in-depth interview makes the following striking analysis:

Whether or not the case will find a reflection in Turkey or any regulation will be made is directly related to the position of political will. The political will must exercise a will for this subject in the same manner we observe with regard to the fight against violence against women. The stance of the political will is also important for changing the prevalent structure in the legal system and reconstructing the same. As such, LGBT will be included, and raise awareness among judicial and administrative bureaucracy by cleaning out heteronormative components in the legal texts... Addressing the matter from the perspective of the fight against discrimination, the political will to put the issue of “homosexuals in the prisons” on the agenda and taking the necessary legal and administrative measures is important. However, even if these measures will contribute to the change in society’s perspective, the change in the social perspective must be expected in the long run.

Conclusion

\[139\] The relevant interview was conducted with Ayça Kurtoğlu, a women’s rights activist and lecturer at METU, online on September 26, 2013 and she was asked open-ended questions. Her consent was obtained by e-mail before relevant quotation is incorporated in the study.
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Considering that heterosexist and homophobic\textsuperscript{140} attitudes are widespread in prisons, it may seem understandable that necessary protection measures are taken by the prison administration and relevant authorities in favour of homosexual prisoners against the verbal, physical, and psychological violence homosexual prisoners may be exposed to due to their sexual orientation. However, these protection measures must be in conformity with the law and intended purpose, reasonable, consistent, and proportionate. Solitary confinement imposed on homosexual prisoner X for more than eight months, albeit upon his own request, is held by the ECHR to be a practice that goes beyond the intended purpose of protecting the prisoner and breaches the principle of proportionality.\textsuperscript{141}

It is required to take protection measures for prisoners vulnerable to violence and abuse due to their sexual orientation or gender identity and to ensure that such protection measures, to the greatest extent possible, do not cause restrictions greater than those on other prisoners. In this context, the facility assigned to homosexual prisoner X is the cell unit where detainees accused of aggravated crime, paedophilia or rape, or convicts serving disciplinary punishment are held. Prisoner X was deprived of any kind of contact and social activity, access to the outdoors and was rarely allowed to leave his cell. Considering that the crime of which X was convicted is a petty crime, it is held that the assignment of such a facility for security reasons was due to his sexual orientation.

The question of why no special prisons or wards exist for LGBT individuals in Turkey arises. The X vs. Turkey decision of the ECHR not only indicates the inadequacy of physical conditions in the prisons for homosexual prisoners, legal gaps pertaining to punishment and execution, and lack of policy, but also indicates that no separate regulation is brought to agenda and therefore constitutes a significant jurisdiction implying structural change. At this point, the statement by Bekir Bozdağ, the Minister of Justice (BBC, 2014), that a separate prison is planned to be built for LGBT prisoners, albeit controversial with respect to its content, can be considered a significant development since the issue has been put on the agenda.

Secondly, this case is no surprise due to the widespread “heteronormative” structure and “oppressive masculine” mentality in the judicial and bureaucratic system and related homophobic attitudes and behaviours. As a matter of fact, insistent use of the word “disease” when identifying the prisoner and even referral of the prisoner to the hospital for identification and registry of the disease and suggestions by the prisoner to use this expression in his written applications display this “problematic” approach in the bureaucratic practices.

Thirdly, the defence and arguments put forward by Turkey at the ECHR draw attention as they show the legal perception and interpretation of homosexuality in Turkey. Turkey’s frequent citing in its defence of the prisoner as “homosexual” and justifying disproportionate “protection measures” on the grounds that “the government in no event may take on the risk of a transsexual being lynched [in a prison],” in other words, founding its defence only on the “sexual orientation” of the applicant when trying to justify unequal treatment has been considered by the ECHR as discrimination with respect to the Convention. This expression

\textsuperscript{140} Homophobia represents fearful and hateful attitudes and behaviours towards homosexuals. This subjective and irrational fear is fundamentally based on the presumption that homosexuals harm individuals and society. Homophobia, arises not from individual fears but rather as cultural prejudices in general. For details, see. (Berien, 2001: 6672-6676).

\textsuperscript{141} The principle of proportionality is considered a fundamental principle of law and ensures under human rights the prevention of excessive interference of the state with the sphere of individual. Three instruments are usually important for the principle of proportionality: supervision of the restrictive measures for fundamental rights and freedoms, employing an instrument to achieve the goal, and abiding by a value measure. The Constitutional Court enlists the sub-principles of the principle of proportionality as “expediency,” “necessity,” and “proportionality.” For details, see (Yüksel, 2002: 19-26).
alone as contained in the reasoned decision emerges as a striking example of the fact that the difference between sexual orientation (homosexual male) and gender identity (transvestite/transsexual) is not comprehended.

Turkey should be able to face the issue of sexual minorities who are involved in every medium from social norms to law, from bureaucracy to daily life and the workplace whose even ‘mention’ are problematized. Considering that, the fact “compulsory heterosexuality” has penetrated all social and political institutions in particular, family, school, media, workplace, prisons and military, further research should be conducted by Turkish academia, which has remained almost “silent” so far to a great extent will contribute to the literature.

References


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GENDER AND “THE LAW”


PART IV: STATE AND THE LAW


ZEVKLILER Aydın (1988) *Medeni Hukuk ve Cinsiyet Kargaşası*, İstanbul: TBBD.
Gender Mainstreaming in Post-conflict Countries: An Analysis of Post-conflict Reconstruction Process in Some Selected Countries / SHANTHI HETTIARACHCHI

Abstract

Gender mainstreaming in post-conflict reconstruction is very significant issue prevalent in the contemporary world because when the conflict reaches its logical end within a particular country, the dividends of war remain overwhelmingly: especially, in the context of women. Hence, integrating women’s experiences of civil war into post-conflict context is significant. Therefore, this paper discusses the issue of gender mainstreaming of post-conflict countries in some regions and their reconstruction process. This paper addresses the question of how post-conflict countries have mainstreamed gender and what strategies have they followed and what measures have they taken in their post-conflict reconstruction processes. It also examines their strengths and weaknesses in utilising the gender mainstreaming policies, programmes and projects. This also recognises the fact that gender mainstreaming policies, programmes and projects which practiced by post-conflict countries have had quite similar approaches such as legal and constitutional reforms, institutional and structural change, education and employment, empowerment, economic and livelihood and ensuring political rights of women and etc. Most of the countries have focused on welfare activities and anti-poverty programmes rather to establishing institutional changes such as political and social institutions, social structure and ideological changes.

Key words: gender mainstreaming, post-conflict, fivefold policy approach, reconstruction, integrate

Introduction

Gender mainstreaming in post-conflict reconstruction is very significant issue prevalent in the contemporary world. When the conflict reaches its logical end within a particular country the dividends of war remain overwhelmingly: especially, in the context of women. Therefore, integrating women’s experiences of civil war into post-conflict context is significant. Since they have important and essential roles to play within all phases of post-conflict reconstruction, it is imperative to offer opportunities to value and acknowledge the contribution of women in reconstruction. Therefore, in this paper I address the question of how post-conflict countries have mainstreamed gender and what measures have they taken in their post-conflict reconstruction processes.

Armed conflicts affect both women and men, but the recent explanations and analyses of international armed conflicts demonstrate that wars affect women and men differently; because women faces additional challenges during wars that men do not, such as sexual violence, forced impregnation, and forced abortion (Sorenson 1998; Cahn 2006). Women are differently affected than men not only since their role as primary caregivers of the household and family, but also the second-class status they occupy in most conflict zones. Different experiences of war have serious consequences for both short-term survival and long term recovery and development of women.

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However, most writings deal with post-conflict recovery and reconstruction adopt a gender-blind approach largely disregard these differences (Sorensen 1998; Cahn 2006). The influence of conflict on women ranges from psychological to the physical realm. It includes reproductive issues, health concerns, economic survival and breakdown of the families as well as communities. Women experience conflict as civilians and also as combatants. According to global surveys, 40% of all child soldiers in armed conflicts are girls. Apart from the combat role, women and girls may act as health care professionals, providers of domestic labour and sexual services, also as participants in the essential task of collecting information (Cahn 2006). Therefore, all these significant roles provide a voice of requirement for women in the context of post-conflict reconstruction and integration of gender in the post-conflict process.

In the dialogue of gender and post-conflict reconstruction, national and international (UN, UNIFEM, USAID) actors and other local actors, human rights organisations, scholars have highlighted the importance of integrating wartime experiences of women into post-conflict context. Therefore, significant policies, strategies and programmes ensuring the inclusion of women’s experience and voices into post-conflict process have been developed. Gender mainstreaming is one of such significant policy strategies among others.

Theorizing Gender Mainstreaming in Global Policy Process

Gender mainstreaming (GM) provides a new conceptual grammar for organizational reform. It is a part of global policy architecture for gender equality whereas the strategy originally informed by feminist theory. The idea of GM emerged from the women in development (WID) policy approaches which were adopted by development organisations in the 1980s (Sweetman 2012). It is an international phenomenon that originated within the development policies and adopted at the United Nations Beijing conference of 1995. In the Platform for Action of the Fourth World Conference on Women held in Beijing, the term was broadly defined; and institutions of the UN system have committed to include systematically a gender perspective into policy-making with the UN endorsing GM in 1996 (Morely 2007; True 2001). Between 1975 and 1997, over 100 countries embraced GM in their state machineries. At the UN International Women’s Year conference held in 1975 in Mexico City, the representatives of the all global regions have decided that all governments should establish agencies dedicated to promote gender equality and improve the status and condition of women (True 2001).

GM is a strategy that claims to make women’s and men’s experiences an integral dimension in designing, implementing, monitoring and evaluation of policies and programmes. It considers the implications on women and men of any planned action, including legislation, policies and programmes in any area and at all levels. The key principle is the systematic intervention for change. According to Rai, GM is a process of gender democratisation, inclusion of women and their perceptions, political interests, political projects into policy-making processes (Morely 2007 p. 609). Mainstreaming is a systematic integration of equal opportunities for women and men into organisations, cultures, and into all programmes, policies and practices (Morely 2007; Rees1998). It is both a new form of gendered political and policy practice and a new gendered strategy for theory development (Walby 2005). As a practice it is a process to promote gender equality. Though, Daly (2005) says that the theoretical literature has focused specially on GM as a political strategy but the particularity of literature is striking in other ways as well. The division or the separation is unclear between the attempt that seeks to advance mainstreaming as a theory, and that which focuses on its articulation as a policy approach. However, development of gender
mainstreaming as a theoretical concept and its promotion as a model of policy making have proceeded simultaneously. In this background, Daly considers that gender mainstreaming has developed better as policy approach rather than a theoretical concept (Daly 2005 p. 434).

Methods

This study is exclusively based on literature review and it draws heavily from qualitative methods. Qualitative data were gathered from existing written materials. These include existing academic research papers, policy documents and reports prepared by national and international organisations and non-governmental organisation (NGOs): the United Nations, UNICEF, USAID, Asian Development Bank (ADB) and Oxfam GB. Since this study was based on qualitative method, techniques of qualitative content and thematic analysis were used. Although there is a bulk of literature on post-conflict reconstruction available for a comfortable study, only a selected number of countries representing different regions of the world were selected. Post-conflict countries such as South Africa, Afghanistan, Nicaragua, Rwanda, El-Salvador, Guatemala, Cambodia, Iraq, Iran and Kosovo, Bosnia, East-Timor, Nepal, Pakistan and Bangladesh have thus been selected. In analysing the level of gender mainstreaming and gender equity of the post-conflict countries attention was given on different policies, programmes and measures that have been utilized. In examining this gender mainstreaming process, attention was paid to the questions of how these post-conflict countries have mainstreamed gender and what measures have they taken in their post-conflict reconstruction process.

Analytical Framework

The fivefold social development policy approach identified by both Buvinic (1983) and Moser (1989) was used as the analytical framework for this study. Welfare, equity, anti-poverty, efficiency and empowerment are the five social development policy approaches were used as the framework to analyse qualitative data of this research. Main reason for selecting Moser’s (1989) fivefold policy approach to social development was that this detailed policy approach attempts to explain the most important areas of gender mainstreaming and development process. At the same time, this analytical framework provides a structured tool that can be easily used to analyse any policy document, programme and project documents through a simple checklist to understand the level of mainstreaming in the gender and equality. It also provides a good structure to analyse activities of post-conflict countries. In the post-conflict reconstruction scenario, this approach provides systematic structural basis and tools to analyse policy, programmes, strategies and approaches implemented by any particular authority worldwide.

Results and Discussion

Applying Moser’s fivefold policy approach on post-conflict countries all over the world in the context of reconstruction process, it is clear that most of the communities have practiced and implemented quite similar policies, programmes, strategies and measures. Generally, these five social development policies often based on interrelated rights: right to participate meaningfully in policy making and resource allocation, right to benefit equally from public and private resources and services and right to build a gender equitable society for lasting peace and prosperity (Zuckerman & Greenberg 2004); which must be guaranteed
to women in the post-conflict reconstruction process. Findings of the study highlight the fact that similar approaches have been adopted worldwide for legal and constitutional reforms, improvement of education, increasing employment opportunities, economic and livelihood development and also in ensuring women’s rights including political, social, reproductive health, trauma management and women’s safety.

Recognising the necessity of women’s involvement in post-conflict reconstruction, countries in the South and North have taken different types of actions to mainstream gender in their process of reconstruction. These can be categorised into five main types of approaches as discussed by feminist development theorist Caroline Moser (1989). These categories are: welfare, equity, anti-poverty, efficiency, and empowerment. Together they are called the fivefold policy approach in development and post-conflict reconstruction (Moser 1989; Buvinic 1983). The first three approaches were recognized by Buvinic in 1983 and the last two were added by Moser in 1989 (Moser 1993; Massaquoi 2007). As most of the gender mainstreaming programmes and projects which are practiced by post-conflict countries fall into this fivefold approach, it is worth explaining what each entails although it is difficult to separate and discuss all the policy programmes, projects, and activities carried out by these counties.

**Welfare Approach**

This was introduced in 1950s and 1960s and it is concerned with women in developing countries. This is the oldest and still popular ‘social development policy’ (Moser 1993). While its purpose is to bring women into development as better mothers, women are seen as passive beneficiaries of development. Some post-conflict countries have taken measures to welfare facilities for women mainly through legal and constitutional methods and some policies, programmes and projects. They have set some legal and constitutional frames for eliminating disadvantageous conditions and positions for women in order to enhance their status in society. Among these are the prohibition of prostitution, and the guaranteeing of social services to help abandoned working mothers and their ‘illegitimate’ children (Molyneux 1985). Providing training, providing raw material, distributing essential equipment and land to engage in agriculture; launching housing programmes; implementing reproductive health and trauma management programmes; establishing programmes for safety of women’s in cities, designing programmes to give socio-psychological support to traumatised individuals (particularly children and victim of rape) are other significant welfare programmes carried out by the post-conflict countries (Byrne et al 1995).

Due to post-war conditions, an environment has been created; in which there is a disproportionate number of widows, engaged in protecting and stabilising the position of single mothers is considered to be vital. Therefore, some countries have taken measures to respond to this situation through welfare action (Cupples 2004). Another important aspect of a welfare approach is based on creating that of an environment in which women’s health is protected. As HIV/AIDS often increases dramatically in post-conflict environments, very often in African countries, those countries have focused on health: especially since women at risk of contracting and spreading HIV/AIDS (Greenburg & Zuckerman 2009). There are number of programmes which have been designed to give psycho-social support to traumatised individuals including children and women who are victims of rape during the war period. Reproductive health and trauma management programmes are also implemented in countries like Rwanda and Cambodia (Byrne et al 1995). Programmes aimed at repairing
gender relations in the community, improving communication and literacy skills, and providing shelter for displaced people are the other vital welfare practices. For instance, Mandela Peace Village (MPV) in Rwanda becomes important in this respect. UNESCO established Mandela Peace Village (MPV) in Rwanda to provide shelter and literacy programmes to displaced widow-headed and orphan-headed households. However, conditions are poor: many of the impoverished MPV women still walk several hours daily to fetch polluted water and fuel. Pro-Femms Twese-Hamwe, a women’s umbrella organization in Rwanda trains members as leaders.

Kosovo Women’s Initiatives (KWI) under the UNHCR direction is one of the significant welfare programmes. Three similar initiatives have been employed: Kosovo Women’s Initiatives, Rwanda Women’s Initiatives and the Afghanistan Women’s Initiatives have been developed under UNHCR direction (Kalungu-Banda 2004). The main objectives of KWI were to promote the recovery of traumatised women to address gender inequalities within Kosovo via programmes aiming to support the sustainable reconstruction of the society. The ultimate aim of the KWI project in Gjilan is to support gender equality needs that must be treated as a long-term initiative which involve potential beneficiaries at all stages of the project cycle. However, at the beginning, KWI aimed at enabling women to participate in decision-making and democratic processes, improving the livelihood for vulnerable women and men in communities, to have discussions with the communities on gender roles and relations, give support to activities that aimed to balance the existing inequalities, all the aims were not succeeded. KWI failed to ensure the participation of potential beneficiaries (Kalungu-Banda 2004).

Nicaraguan, structural adjustment programmes (SAPs) have a specific gendered impact. In Nicaragua, as a consequence of reduction in social services and welfare provision and also decline in formal-sector employment, the burdens shouldered by low-income women have significantly increased (Cupples 2004). In early 1990s, as a result of increasing the level of unemployment and the failure of the Chamorro government to reintegrate thousands of demobilised soldiers into civilian life widespread unrest was marked. Shortly after the election, the size of the army was also extremely reduced. This situation significantly affects women’s lives also. Although ex-Contra women in Waslala expressed their relief at the end of the war, it was aggravated by the economic difficulties they encountered since 1990. In post-conflict situation, gendered issues impact on women in general and special on women ex-combatants. To Cupples (2004), the best example is Mónica Avilés; she had been combatant for four years and she missed out on demobilization and its benefits because she has just given a child-birth. Therefore, she was unable to leave Honduras and travel to the place in Nicaragua where ex-Contras were being disarmed.

Equity Approach

Equity was introduced during period of 1976-85, the UN Women’s Decade and it aims at to gain equity for women in the development process (Moser 1993). While this policy sees women as active participants in development it challenges women’s subordinate position. Most of the measures taken under equity approach are enclosed within constitutional and legal documents and are ensured and safeguarded legally in countries such as South Africa, Rwanda and El Salvador. Some countries have made constitutional reforms and drafted new constitutions to guarantee equal rights for women. Examples include ‘state feminism’ in Iraq (Martin 2009), new South African constitution that enshrines equal rights and new Nicaraguan constitutional background that provides equal rights for women (Molyneux 1985).
The Iraqi government has established new family laws and regulations on marriage, divorce and inheritance so that women might enjoy equal rights with men instead of being controlled and subordinated by men. These rights have been assured through legal and constitutional frameworks. South African democratic reforms are an example of good practice in advancing gender equity in governance. In 1994, South Africa introduced a non-sexist constitution and put in the place a machinery for advancing national gender equality (Beall, 2005).

Apart from, the post-conflict countries have taken other approaches under different fields. The ‘Gender Budget Programme’ in Rwanda is a significant practice within its reconstruction process (Kiwla 2008). Under this progressive gender quality programme, women Members of Parliament have been trained on gender responsive budgeting, promoting the participation of women at all administrative levels - from the smallest cell to provincial and national level. For instance, the triple balloting system adopted in Rwanda in 2001 guarantees the election of a percentage of women for seats at district level. Bolivia has also taken legal steps to enhance the social, economic and political status of women in its reconstruction process. The Law of Popular Participation (LPP) or Law 1551 has introduced new laws to increase women’s participation in politics (Clisby 2005). The LPP is a written law to integrate gender awareness and gender equality into politics.

Another step is taken in this regard is the establishment of new property rights. Gender imbalance and patriarchal practices of property rights hamper the handing over of land titles and deeds. Therefore, post-conflict countries like Eritrea, Namibia, Rwanda, South Africa, Uganda and Sri Lanka have taken some steps to establish new property rights for women under funding facilities of World Bank (WB). Women in most of the post-conflict countries face difficulties when they get ownership to properties after their spouse because of the traditional laws and cultural values in their countries. Customary laws in Namibia, Rwanda and Uganda which does not recognize women’s right to own property; and this prevails even after new civil laws which support and maintain gender equality are circulated; this is quite similar also in Sri Lanka due to some customary laws of Sharia and Thesawalamei in Muslim and Tamil cultures during programs of post-war reconstruction and post-Tsunami. In Namibia, if the spouse of Namibian woman dies, she generally loses access to land that farmed and become homeless. If she herself becomes ill, she may experience violence, be abandoned by her family and her right to property and also children (Zuckerman & Greenberg 2004). Therefore, these post-conflict reconstruction processes must guarantee women’s full equal rights to own property and their ability enjoy those rights; and these reconstruction programs must also develop legal literacy and access to justice among them.

The poorest population especially female-headed households face obstacles in accessing property. Some donor projects often neglect gender issues. For example, An Angolan, WB funded PCR project which focuses on resettlement and land acquisition does not consider gender issues affecting female-headed households and another project for Cambodia by WB that includes land titling for the poor does not consider gender needs. However, a WB PCR project for Sri Lanka that reconstructs houses and regularises titles for war-affected population gives preference to female-headed households. The case of Sri Lanka provides a good example for other post-conflict reconstruction processes (Greenberg & Zuckerman 2006).

Ensuring ‘diversity’ and guaranteeing equality within policy practices is another vital step. South Africa in its new constitution, expressly premises itself on ‘diversity’ (Phillips 2004). Yet, another equal policy practice is the strengthening of national legal framework and local and provincial government laws to change the structure which existed in pre-war
societies such as customary law, family law, for instance ‘Sharia Court Law’(Gupta & et al 2000; Pennells 2008; Babiker et al 2011).

**Anti-poverty Approach**

The purpose of anti-poverty is to ensure that poor women increase their productivity and women’s poverty is seen as the problem of underdevelopment not of subordination. While most countries recognise that poverty increases because of war, it is also important to acknowledge that poverty has gender dimensions. Therefore, anti-poverty programmes constitute the process of mainstreaming gender among other approaches employed by post-conflict countries. Very often these countries focus on gender based post-conflict reconstructions (PCR) and socio-economic developments. PCR programmes have taken into consideration that gender impact of resource allocation affect women’s economic status. Most of the post-conflict countries have focused on employment opportunities for both men and women and micro-economic programmes to enhance their economy. Establishing microfinance programme is viewed as an effective strategy of anti-poverty programmes. It is a development strategy that provides credit and savings services to the poor, particularly for rural women. South African micro finance project in Limpopo Province is one of the best examples. In addition, providing economic benefits, this micro finance project also provides an effective vehicle for women’s empowerment (Kim et al 2007).

Enhancing opportunities for employment is one of the key strategies of the anti-poverty approach to reconstruction. Employment in the regular sector and income contribute to the prevention of poverty. Therefore, these countries have introduced formal sector employment training programmes for both men and women. Women’s entrepreneurship generates jobs and increases income from which children and extended families benefit. Therefore, increasing infrastructure, improving skills and loans programmes have all been introduced often with World Bank funding.

**Efficiency Approach**

Efficiency approach aims to ensure that development is more efficient and effective through women’s economic contribution. This approach involves important steps such as institutional change and restructuring, establishing new institutions, drafting new constitutions and providing adequate legal backgrounds. These steps have been put into practice at both national and local levels. Examples of important national and local institutional reforms included establishing Ministries of Women’s Affairs, establishing bureaus in all Ministries to deal with gender matters, ratifying the CEDAW, setting gender responsive budgets in order to ensure gender equalities and recognising gender equality as a critical issue in the National Development Framework, and taking a strong policy framework on gender to establish institutional mechanisms to ensure its delivery (Kandiyoti 2007; Greenburg & Zuckerman 2009; Babiker et al 2011). And the same time, creating the office of the State Minister for Women, setting up a Gender Advisory Group, establishing Women’s Bureaux, taking efforts to strengthen the NGOs working for women’s equality and constructing stronger working relationships between them and the government are some of the important extended programmes introduced by post-conflict counties. For instance, the Ministry of Women’s Affairs in Afghanistan has attempted to set up Women’s Development Centres in all provinces aiming at linking resources with women’s needs at the community level. As its national policy on gender and development processes, the Afghan government has attempted
to increase women’s participation in national peace and reconstruction process (Babiker et al 2011).

Some countries, especially those in southern Africa, have become signatories to international conventions such as International Covenant on Civil and Political Rights (ICCPR), the Child Rights Convention (CRC), and Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Babiker et al 2011). When drafting new constitutions priority should be given to ensure legal rights in order to secure women’s rights and status. For example, the constitution in Cambodia during the United Nations Transitional Authority for Cambodia and the 1985 constitution of Guatemala can be quoted. They involved a consultative process that covers women of all socio-economic classes and from all parts of the country. The reconstruction of the country during the transitional period provided an opportunity for Khmer women to further their rights and interests. This constitution mandates specific attention to rural women. It also provides the legal provisions that women cannot be dismissed from employment because of pregnancy. Likewise, many concerns of women were incorporated into the constitution. However, in practice, the majority of these provisions remain only ‘paper rights’ (Byrne et al 1995; Mckay 2004). The program called ‘Khemara’ works with disadvantaged female-headed households in Phnom Penh. It focuses on promoting craft work and assisting with their marketing. Establishing new norms and rules, new leadership and building new institutions are also a part of this approach. Generally speaking, these programs provide opportunities to focus on women’s rights and respect them, and to acknowledge and value the contribution of women in reconstruction. For instance, exiled Afghan women’s programme in Peshawar as teachers is important. Afghani girls who missed out on schooling because of Taliban prohibitions against female education (Zuckerman & Greenberg 2004) have been provided background them to get education and become teachers. Many post-conflict countries have taken steps for enhancing women’s rights in terms of efficiency approach programmes: women’s political rights and participation, property rights, women’s right to employment without discrimination, the right to freedom from violence and right to accessing credit, etc. And the same time, Rwanda, South Africa and Cambodia have introduced new property rights laws under PCR projects. It is true that the Cambodian project does focus on land titling for the poor, but does not consider gender needs. However, the Sri Lankan project provides a good example. Sri Lanka has given preference to female-headed households when reconstructing houses and regularizing titles (Zuckerman & Greenberg 2006).

Women’s political participation in both national and local government institutions is also very significant in the post-conflict reconstruction as a tool of efficiency for development. These are important because they make decisions on issues related to different groups of people in the community which need specific concerns. In Somalia, some officials strongly opposed women representing their clan in the Traditional Council although the country earlier had female ministers. Women are excluded from the clan-based councils which is more important organ for political discussion in the present situation though Somali women are the most able peacemakers and developers of their country (Sørenson 1998). In Algeria, women were also directly prevented from being elected in the free election of 1990. Cambodia, only 5% of the candidates for the Constituent Assembly elections was women while Supreme National Council did not have any female representatives. Sri Lanka has also presented only 5% of the seats of National Parliament for women and less than 2% at the all level of local authorities including Provincial Councils though Sri Lanka boasts of having granted women’s right to vote in 1931 prior to most of European countries granted the world’s first woman Prime Minister. This condition now prevalent in Sri Lanka is similar both in pre and post-war periods. In Nepal, women traditionally had little opportunity to
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participate actively in political life with few or no women represented in the legislative, judiciary and executive bodies. Although Nepal ratified CEDAW without any reservations, women voices have long been silenced. After signing of the Comprehensive Peace Accord (CPA), the parties formed a National Monitoring Committee in which 2 out of a total of 31 members were women, and a committee set up to develop a new Interim Constitution. As women politicians and women’s organizations have applied more pressure to change content of the six member all-male committee in drafting interim constitution, later it was expanded to include four women and one representative from the Dalit community (Falch 2010). Their voices were finally heard. Another example from Eritrea and Eritrean People’s Liberation Front (EPLF) is political movement which struggled for democratic society with greater gender equity (Sørenson 1998). In the Eritrean struggle for independence women played a major role at all levels within the movement. The liberation movement considered the improvement of women’s situation an indispensable part of the democratic goal.

The dominant parties in South Africa (ANC), Mozambique (Frelimo) and Namibia (Swapo) have also established women’s quotas on candidate lists. Controversy erupted in Kosovo in early 2004 regarding quotas, despite a campaign by the Kosova women’s lobby and Kosova women’s Network demanding ‘open lists’ to ensure representatives’ accountability to constituencies. Some have questioned women’s quotas on the grounds of women’s qualifications for political work. However, a criticism was not encountered against unqualified elected men. When the National council in Timor Leste rejected quotas in 2002, its Women’s Network searched for UN funding to train 200 women to compete effectively in elections. In Afghanistan, despite the religious fundamentalism and negative traditional attitudes towards women that still encompass the culture of the country, its lower parliament consists of at least 25% of women. In Rwanda, women won 49% of parliamentary seats in the election of late 2003 whereas Rwanda constitutes more than 60% of post-genocide population. However, women’s representation in some post-conflict parliaments is very low. For instance, Sri Lanka has 5% and lower house in Guatemala is 8% (Zuckerman & Greenberg 2004) only.

The right to freedom from violence is another strategy for efficiency. Demobilized soldiers are accustomed to life in a military sub-culture, they prone to be violent and involve extreme forms of abuse of women including rape, forced marriages, and sexual slavery. The post-conflict reconstruction processes often need protection of these rights of women and girls. Widespread sexual violence as a consequence of insecurity and impunity may continue or even increase in the aftermath of conflict. Discrimination and inequitable laws prevent women from accessing humanitarian aid and their basic social, political, and economic rights. This dreadful and horrible situation for women prevails in Pakistan. In Pakistan, women are not only subjected to financial discrimination, but they are also victims of inhuman customs and laws such as Karo kari, Hadood ordinance. They are highly vulnerable to violation of their rights to life (Huma 2012). In confirming efficiency approach, the governments need to provide the structural mechanism in the community and the institutions to assure violence free society to women.

Empowerment Approach

While empowerment is the most recent approach it was pronounced by the Third World women. The purpose is to empower women through greater self-reliance. It recognises women’s triple role and women’s subordination seen not only as the problem of men but also of colonial and neo-colonial oppression (Moser 1993). Empowerment is generally based on
the promotion of gender equality in education, economic status, employment, welfare and political rights of women. Empowerment of both women and men in the field of livelihoods is another key policy area. For example; the demining programme known as Mine Action National Strategy Programme in Sri Lanka. In this programme, Sri Lankan government has decided to recruit at least 40% of women as de-miners because most of the families are women-headed; therefore to provide them an income the government has taken this decision (Ministry of Economic Development reports and statistics 2013). A World Bank project in Sri Lanka is another exceptional example. It is an information and communications technology (ICT) programme which targets women in training and enhance skills in order to broaden employment opportunities (Greenberg &Zuckerman 2006). However, this targets women with ICT training.

Empowerment approach has launched projects in order to expand space available for women in the cash economy by creating some opportunities in rope making, brick making, ship inventorying, motorcycle repair, farming and fishing (Pennells 2008). Setting up of steps to ensure livelihood opportunities for women by Serbia, Montenegro, and South Africa are good examples of an empowerment approach (Greenburg and Zuckerman 2009). Kosovo has also taken some measures to improve women’s livelihoods through promoting their small businesses (bee keeping , wine making, poultry farming, knitting and crocheting, etc.) and giving them training in computer skills and sewing (Kalungu-Banda 2010).

In most of these post-conflict countries, education is considered as an empowerment tool and a policy practice. Increasing new strategies in the education system have been found to increase women’s participation in the labour force. These countries have stressed the importance of women’s education as a major way of improving their status. South African higher education policy introduced through the Higher Education Act provides equal opportunities to women. In addition to free education policies, these countries have also expanded government policies to improve opportunities for women to be a part of the labour force and have facilitated the provision of free services for child care, health and transportation (Martin 2009; Babiker et al. 2011). Measures have been taken to protect the status of women workers through employment policies. However, very often women and girls have less opportunity for schooling than men and boys in general.

Employment without discrimination and creating employment opportunities are also important strategies for empowerment. This situation is so significant in post-conflict to stabilize sustainable economies. Most of the post-conflict training programmes for formal-sector employment mainly target male ex-combatants. In most post-conflict situation, women lose their jobs in the formal sector and return to the household or to the informal sector (Zuckerman & Greenberg 2004), because they were replaced by fighting men who were returned back home. However, this was different in the case of Sri Lanka. In post-conflict Sri Lanka the armed forces were not returned back home after war and they were remained in the armies and they started to establish infrastructure in war-affected areas and relocate communities and establish social relations under rapid development programmes. But this was different in Kosovo, Serbia and Montenegro. In Kosovo, women were pushed out from the workforce and back into their homes.

Post-conflict reconstruction is involved with all macro-economic and micro-economic development activities. Economic policies affect both men and women differently because of their different economic roles in the society. Due to lack of attention to this fact and any project does not address gender issues it may obstruct process that impose negative impacts on women and damage socio-economic objectives. In such background, the other important policy practice in the field of women’s empowerment is microfinance programmes and
activities (Kim & et al. 2007). Through the use of loans and microfinance activities, women are able to increase their own production for sale, such as vegetable gardening and dairy schemes. South Africa has given more loans to enhance women’s microfinance activities and training programmes on business activities and leadership in order to enable women to play a key role in community mobilisation (Kim & et al. 2007). The National Commission for Women, the National Credit Fund for Women, or the Rashtriya Mahila Kosh (RMK), The Balika Samirdhi Yojana, National Policy for Empowerment of Women are significant progressive programmes implemented by post-conflict counties in the field of microfinance and economic empowerment (Sen & Mukherjee 2006). Sahana Aruna Naya Yojana Kramaya (‘Sahana Aruna’ loan scheme) in Sri Lanka is another significant microfinance loan scheme for poor (both men and women) who are unable to keep property as security or produce sureties. Under these microfinance schemes, while some women in post-conflict have gained benefits others have not succeeded. Under KWI project in Kosovo, Albanian women were given training in sewing and computer skills; classes were conducted for improving literacy and English-language knowledge; awareness was raised on health issues, democracy and women’s rights. On the other hand, Serbian women were provided with support focused on income generation through activities such as bee keeping for the sale of honey, wine making, poultry farming, knitting and crocheting for selling and distributing among vulnerable people in the community.

Post-conflict processes create opportunities to macro-economic reforms as a part of the reconstruction programmes to include reallocations of budgets, privatization of state-owned enterprises, liberalization of price and trade liberalization, streamlining of civil services and decentralization of governance. Therefore, many structural adjustments programmes (SAPs) created burden on women. The typical example for this SAPs that of Serbia and Montenegro. They required state-owned enterprises to be closed, restructured, public expenditure to be made cuts including in the civil services, and liberalization and commercialization of financial sector. Cutbacks in spending on health services leads women to spend more time caring for sick household members, which reduces time available to them for paid work. Cutbacks in civil service and other formal-sector jobs result in women, especially, who are more likely to have junior level posts. The number of female-headed households was increased and changing patterns of economic development are also leading to job losses among unskilled or low-skilled men, meaning that many male-headed households become depend on women’s earnings. Credit is another popular tool. While both men and women need to access to credit, women who live in poverty face certain barriers to obtain through conventional channels. Commercial banks often fixed conditions on their lending that make women are unable to obtain loans. For instance, they require that their clients are literate, or demand conditions like surety and security in which women lack rights to own land or property. Therefore, both borrowers and lenders (bank officers) are almost all men.

However, many post-conflict reconstructions do not target women at all. World Bank Sierra Leone Economic Rehabilitation and Recovery Credit Project (III) can be quoted as an example. It does not even acknowledge women’s important role in the economy. Post-conflict reconstruction activities frequently assume, strangely, that farmers to be men but majority of them were functioning as combatants during the civil war, in actual terms women maintained their farms during the period of war. In Rwanda and Angola women did the main role in agriculture during the civil war. Most of the demilitarization, demobilization and reintegration (DDR) programmes as well as finance for typical development activities like credit and training almost were male-centered. As these activities were mainly target at male ex-combatants, women who engaged in carrying arms were excluded.
Developing human capacity and life skills is also very important in empowerment. In contexts of structural adjustment cutbacks in public expenditure many young girls were expropriated of opportunities to attend schools. For instance in Angola, many younger women had less education than older women who educated before the conflict (Zuckerman & Greenberg 2004). In case of Angola, the reasons for prevention of women to get educated are: the need for girls to attend to family members when they succumb to war injuries and AIDS, the dislocation of communities, the destruction of schools, dangers encountered by girls when travel to schools, etc. In the case of Sri Lanka, these practices were similar only in war-affected areas during the civil war. However, in post-conflict reconstruction, government has taken more positive steps to provide education for both girls and boys equally within the rapid post-conflict development process. As soon as the war is over the government started the rapid development programmes for both war-affected provinces as well as the other areas of the country. In this process, main objective was to re-establish the infrastructure facilities. Main target was to renovate and re-establish schools and hospitals and other government institutions. Though there are some pitfalls in Sri Lankan post-conflict reconstruction process, in providing services like free education and health there is no gender inequality and discrimination. However, there are some other impediments for girls as a consequence of poverty and caring task (siblings & disabled) in most of the women-headed households functioning in war-affected areas.

South Africa has National Policy Framework for Women’s Empowerment and Gender Equality known as the Gender Policy Framework (GPF). It attempts to ensure the process of gender equality. It is at the heart of the transformation process in South Africa and it is embedded in all structures, institutions, policies, procedures, practices and programmes of the government. The government has committed itself to the implementation of CEDAW and Beijing Platform for Action. They have already been translated into priorities for national action. However, South Africa must also need to report on its progress with regard to women’s participation in political decision-making; women’s access to professional opportunities and women’s earning power and participation in the economy (Waal 2006). As a result of long-term measures of gender mainstreaming, although South African women have achieved equality to participate in all aspects of economic, social, political decision-making and equality of benefits and rewards still it has some pitfalls and need to achieve more opportunities for women to mainstream gender in post-conflict reconstruction. However, when compared to other post-conflict countries SA has achieved significant standards.

Conclusion

The study explores the fact that gender mainstreaming policies, programmes and projects which practiced by post-conflict countries have had similar approaches such as legal and constitutional reforms, education and employment, empowerment, economic and livelihood and ensuring political rights of women and etc. They very often applied quite similar approach like fivefold social development approach: welfare, equity, anti-poverty, efficiency and empowerment. This fivefold policy approach has been discussed by feminist development theorists, Caroline Moser (1989) and Buvinic (1983). This study reveals that these post-conflict countries have mainstreamed gender through the above-mentioned fivefold approach by using various policy strategies, programmes, projects and activities. They are often presented through tools such as constitutional and legal reforms and methods, policy implications, new laws, new norms and rules and various conventions.
For gender mainstreaming, many countries have taken different measures by using the above-mentioned particular tools. Institutional change is one such step. This is carried out with the influence of structural adjustment programmes. By changing the structures, cultures and procedures embodied in institutions, it is expected to achieve the goal of gender mainstreaming. The institution should have a clear understanding on the goals and the way to achieve these goals. However, such institutional changes have still not reached the level of political structure of societies, cultures and communities. These institutions are still patriarchal. Therefore, it is imperative to transform traditional cultural values and norms to a certain extent and the introduction of a variety of policy implications. However, none of the countries has taken steps to change existing social structure with the prevalent culture.

However, the national governments in these countries have not given much consideration to cultural barriers such as patriarchal values, male domination and social norms that often restrict gender mainstreaming approaches in the reconstruction process: especially on gender myths. None of the countries has not focused on to do attitudinal change and alleviate cultural myths and social constructed norms and values on women as well as psychological barriers. They also have not focused much on long-term projects and programmes that can bring about ideological changes in the communities changing the inequitable social system. Moreover, in this reconstruction process, women are not receiving necessary comfort and care for the wartime traumas they are subjected to, particularly when such trauma are sexual. Women often face sexual violence during war time; widows suffer greatly in the post-conflict environment; therefore, they need to be given first and foremost consideration, not the second priority. Reorientation programmes designed to deal with traumas experienced by male combatants need to be included prevention of domestic violence and also therapy for sexual violence that men suffer during the conflict so that they do not revisited on women and children (Handrahan 2004).

In the reconstruction process governments as well as NGOs and international organisations needed to take more practical steps to mainstream gender. In the post conflict peace building process, government departments, ministries, organisations working with conflict affected populations need to ensure greater participation of women in designing, implementing, evaluating of policies and practices (Moser and Clark 2010). Inequitable social systems and institutions around the world need to be changed. Institutional change as a requirement to address root causes of gender inequality should be included changing the rules of the game. These rules should be stated and implied the determination of who gets what, who does what and who decides (Roa & Kelleher 2005).

Further, the involvement of women in post-conflict reconstruction process is, of course, an enormous topic that ranges from the demilitarisation process to the institution of a new government. Integrating gender into post-conflict reconstruction process should include the followings: recognizing that sustainable development requires gender equity, recognising women’s right to participate in all aspects of the transition, developing laws that respect and foster gender equity, implementing a justice component which ends impunity and ensures accountability for crimes committed during the conflict against women and girls (Cahn 2006). Moreover, in exercising women-focused activities in PCR programmes, there are good amount of challenges faced by countries such as funding, institutional, attitudinal and cultural barriers. Many developments projects operationalized by government and other donors allocate insufficient funding for rights-focused women activities is a common problem.
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Violation Of Women’s Right To Life: Honour Crimes In Turkey / AYSE KULAHLI

Abstract

According to the United Nations Population Fund (UNPF 2000), there are 5,000 women and girls who are murdered in the name of ‘honour’ by their family members each year throughout the world. Turkey is one of many countries that have failed to adequately prevent honour crimes despite taking some measures to address the phenomenon. Although Turkey has ratified the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and other human rights agreements, the country has yet to amend the criminal code on crimes of honour, diligently implement new laws on honour killings, or evaluate the influence of new regulations in this regard. As such, the country has been unable to fully protect women’s right to life, since women are still under threat of honour killings. This paper will aim to identify and examine the factors that have contributed to this gap between Turkey’s intention to protect women from honour killings established in legal measures and the failure to implement this protection in practice.

This paper will first examine honour crimes within the international human rights framework and the relevant commitments and legal measures established by Turkey. Then, Turkey’s current situation regarding honour killings will be analysed, with particular emphasis on the deficiencies of implementation. The paper will highlight the emergence of honour suicides as an alternative form of honour killings, which has further complicated efforts to address this crime, before presenting some brief conclusions.

Keywords: honor, killing, Turkey

The Context of International Human Rights and National Frame: Honour Crimes

Although there is no specific Article on women’s rights in the 1948 Universal Declaration of Human Rights (UDHR), pursuant to Article 2, it emphasises that “everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political…”. Furthermore, interpreted with Articles 2, 3 and 5, if there is a threat to a woman’s right to life, liberty and security or any kind of violence, torture or inhuman act, it is accepted that there is a violation of the UDHR (Özer 2012, p. 88). In addition, there are other crucial agreements: the 1966 Convention of Civil and Political Rights that is to protect and prohibit violence against women, interpreted with Articles 6, 7, 9 and 2, and the 1966 Convention of Economic, Social and Cultural Rights which is to ensure that women and men benefit from these rights equally (Article 3). Representing an important step for women’s rights, the UN Convention on the Elimination of Discrimination against Women (CEDAW) was ratified in 1979. With regard to honour crimes and killings, the CEDAW General Recommendation 19 declares the measures to stop family violence, which should include “legislation to remove the defence of honour in regard to the assault or murder of a female family member” (Article 24 (r) (ii)).

When did honour killings enter into the UN process? According to Pervizat (2006, p. 309), in 1998, when she worked for the United Nations Commission on Human Rights calling for lobbying on honour crimes, the matter was started due to a rising awareness of women’s rights. While there were important developments, which started to be taken seriously globally in the human rights framework, during the Beijing+5 meeting, Turkey brought into question

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the subjects of ‘honour crimes’ and ‘forced marriage’ (Pervizat 2006, p. 310). The first internationally accepted text on the crimes of honour was ‘Working Towards the Elimination of Crimes Committed in the Name of Honour’ during the Beijing+5, which is called the Outcome Document of the 23rd Special Session of the United Nations General Assembly in 2000. This document emphasises that honour crimes are one of the violations of women’s human rights and lists among the actions to be taken at the national level:

“…That governments develop, adopt and fully implement laws and other measures as appropriate, such as policies and educational programmes, to eradicate harmful customary or traditional practices including female genital mutilation, early and forced marriage, and so-called honour crimes…” and “to increase cooperation, policy responses, effective implementation of national legislation and other protective and preventive measures aimed at the elimination of […] crimes committed in the name of honour.” (UN CHR 2000, Paragraphs 69/e, 96/a).

As is known, the political organisations of the UN had to take crucial steps after Samia Sarwar’s killing in the name of ‘honour’ (Amnesty International 1999). Thus, there was a resolution into ‘Working Towards the Elimination of Crimes Committed in the Name of Honour’ in the Netherlands in 2000 (Pervizat 2006, p. 313). After these developments, a serious and effective lobbying occurred in 2004 between Turkey and the United Kingdom for a resolution on honour crimes. Pervizat (2006, p. 314) evaluated that the first attempt to undertake such work on women’s rights issues was by Turkey at the UN.

In 2002, there was an election, which saw the beginning of the Justice and Development Party’s long authority in Turkey. The Justice and Development Party’s programme has taken shape within the process of integration into the European Union (EU). In the light of these developments, Turkey has drastically and radically reformed policies such as the new penal code and formed a parliamentary investigation committee to prevent honour killings. Rubin (2010, p. 10) asserts that between the years 2002 and 2004, reforms for the penal code in Turkey were related to pressure from the EU and human rights NGOs and “gave activists hope that stricter legal sentences would result in an immediate decrease in honour killings”. When Turkey tried to integrate with the EU in the 1990s, for the researchers, academicians and women activists, there was still a problem of not ending honour crimes despite taking measures

Bilgili and Vural (2011, p. 69) state in their article called The Heaviest Way of Violence Against Women: Honor Killings, that between the years 2000 and 2005, Turkey witnessed 1091 custom and honour killings in all 81 cities according to the Turkish National Police study. As a consequence, the new Turkish criminal law was legislated in 2004 and came into force in 2005. Rubin (2010, p. 1) points out that even though the authorities of the Turkish government legislated against honour crimes, these attempts to eradicate it have been inadequate. So, what is contributing to the gaps between codes and implementations in preventing honour crimes?

The Problems of Implementing Measures on Honour Crimes

A. A Vagueness of the Definitions: Honour Crimes and Custom (Tore) Crimes

As a type of violence against women, an honour crime is defined as the murder of a woman “suspected of having transgressed the limits of sexual behaviour as imposed by traditions; for example engaging in a premarital relationship with someone of the opposite sex or having extra marital affairs” (WWHR Report 2005, p. 62). In addition, Pervizat (2011, p.
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144) states that the girl or woman is not seen as a victim, but that the man has to follow a rule, which involves killing the woman to reinstate the family honour.

Even though the new penal code regulations were brought in to meet the requirements of the CEDAW through numerous crucial steps, it is criticised for not including in the name of honour in its statement. According to Article 82 (k), “if the act of homicide is committed with the motive of customary tradition, the perpetrator shall be sentenced to aggravated life imprisonment”. Thus, the UN Committee on the Elimination of Discrimination Against Women reported for Turkey that “the use of the term custom killings instead of honour killing in the Penal Code may result in less rigorous prosecution of and less severe sentences for, the perpetrators of such crimes against women” (Human Rights Watch 2008, p. 48). In that case, a reason emerged to clarify the terms ‘custom’ or ‘honour’ after the new penal code. Pervizat (2006, p. 299) points out that despite the Turkish Penal Code and contributions from the Women’s Platform, these activists unfortunately were unsuccessful in that honour killings and custom killings were not seen as identical.

There is a distinction between “killings in the name of custom” and “honour killings”. In custom killings a family assembly gathers and makes a decision about whether a woman who has acted contrary to the general norms of chastity will live or die. However, in terms of honour killings that are not custom killings, the killer who can be a husband, a brother or a family member undertakes to make a decision to kill based on the societal norms of honour. Therefore, the killer is characterised as a ‘victim’ of such norms and is granted a sentence reduction.

In a similar way, the Shadow NGO Report on Turkey’s Sixth Periodic Report to the Committee on the Elimination of Discrimination Against Women (2010, p. 7) states that:

“Despite all our efforts and strong public support during the construction of the new Turkish Penal Code, it proved impossible to pass a clause deterrent enough to prevent honour killings, a direct violation of women’s right to life. The term used in the Turkish Penal Code for honour killings is ‘killing in the name of custom’. Custom killings provide a legal loophole that limits the scope of the article to only a certain type of honour killing, such as family assembly verdicts....”

As a consequence, despite the new penal code, there are loopholes to interpret the killings in the wrong way. Therefore, there are still deficiencies to prevent such killings despite forming new codes.

B. Tradition and Culture

Rubin (2010, p. 1) asserts that Turkey plays an important role that has increased in the integration process with the European Union and the issue of honour killings has drawn the attention of women’s rights defenders. Human rights activists have searched for the reasons for crimes whether relating to tradition, culture or religion.

Regarding religious beliefs, Sev’er and Yurdakul (2001, p. 966) state that the killers, who are generally family members, “invoke a cultural understanding of honour rather than a religious one” and conclude that there is no clear and direct connection between Islam and honour killings. In addition, the Qur’an does not include references to honour crimes and Muslims believe that “no one has the right to take a life given by God” (Kardam 2005, p. 51). Pervizat (2006, p. 307) stressed that killing a woman in the name of honour is not mentioned in the Qur’an and the role of religion is known in ending violence against women.
Crimes committed in the name of honour are common in some countries in the world, such as Pakistan, India, Lebanon, Egypt, and Turkey. A question has emerged regarding whether these types of crimes are committed more in Muslim countries and if they are related to religion or not. However, in the last two decades, honour killings have started to be seen in Europe, but it is emphasised that the killers are generally immigrants. Sev’er (2005, p. 138) states that the reason for an increasing number of honour crimes in countries such as Germany, Britain, Norway, Sweden and the Netherlands is that they are accepting immigrants and refugees from Eastern countries.

There is another aspect that is ‘traditional’ concerning why honour crimes are still committed in Turkey. To what extent is honour a type of gender-based power relationship in modern families that aims to discipline women? In conformity with traditional principles, honour is related to female sexuality and the only solution to save family honour when it is damaged by “a woman’s sexual misconduct” is by murdering the woman (Rubin 2010, p. 3). Kogacıoğlu (2004, p. 120) states that the main reason why the violations are still widespread in Turkey is ‘tradition effect’.

Although honour killings are exposed as being part of ‘tradition’, it should be said that they are an abuse of human rights. Moreover, honour killings cause a number of violations of human rights, such as “the right to life and security of the person, freedom from torture and cruel, inhuman and degrading treatment, the right to equality before the law and to equal protection of the law.” (Boon 2007, p. 817).

In addition, it is alleged that the majority of honour killings are widespread among Kurdish people in the Southeast region. Pervizat (2011, p. 145) states that whether honour crimes are a practice of Kurdish culture or not can be “explained away by looking into the gender and women based statics in the country”. However, there are no inclusive statistics provided by government about women’s issues. Over the last five years, the highest numbers of honour crimes have happened in Istanbul (Ince 2009, p. 539).

C. Sentence Reductions

The implementation of codes is still a problem in Turkey, as it fails to prevent honour crimes. The old penal code legally gave the adjudicators options to provide sentence reductions to murderers who committed honour crimes and many judges did not choose certain Articles over others to avoid sentence reductions and implement increased sentences (Kogacıoğlu 2004, p. 131). For instance, Article 449 (1), concerning the act of manslaughter, pointed out “(1) If committed against wife, husband, sibling, foster father, foster mother, foster child, step mother, step father, step child, father-in-law, mother-in-law, bridgroom and brides”, the murderers would get higher sentences. Moreover, Article 462 was activated once killers were accepted as protecting family honour, in cases of rape, impregnation and adultery. The initiation to abolish Article 462 made by Judge Ali Güzel of the Second Criminal Court of Bakırköy District, Istanbul pointed out the reasons:

“The right to life, and to preserve and develop one’s material and mental existence are basic rights which are not touchable, resolvable, or renounceable. This article arising from the claim of an individual to possession and domination over another individual who is leading her life based on her own free will and own choices, especially if she has reached the age of discretion and can distinguish between right and wrong, his egoism of not allowing her to love someone else, and the idea of cleansing the honour, have nothing in conformity with the general principles of law” (Pervizat 2009, p. 7).
Even though Article 462 was abolished after pressure from the EU in 2002, the implementation of sentence reductions has remained incapable of protecting women victims (Sev’er 2005, p. 133).

One of the victims is Gönül Aslan who suffered an attempted murder in the name of honour in 1998. She was forced to marry her cousin and then ran away with her lover. However, her family council decided she must die and attempted to kill but she succeeded in escaping alive. Her perpetrators were sentenced to four years and five years.144 In Pervizat’s words: “A detailed look into the specifics of this case demonstrates how the state did not, with due diligence, prosecute it, and how there is a gender-based persecution of women who disobey the social norms in which they live” (2011, pp. 145-146). Another example of honour killings was Hatice, stabbed by her husband owing to her going to a movie theatre with her friends. The murderer was sentenced to 24 years, reduced by half due to his age (Sev’er 2005, cited in Farac, p. 135). In substance, these cases demonstrate that the judges play important roles in decision-making since the sentence reductions are based on their interpretations of the laws.

As said before, the New Criminal Code came into force in 2005, the result of the Working Women group’s campaigns and the EU’s pressure and cancelled sentence reductions against honour killers. Furthermore, there was a declaration entitled ‘Preventive Measures for Violence Against Children and Women and for Custom and Honour Killings’ by the Prime Minister’s Office in 2007 (Pervizat 2011, p. 151). In that case a question emerged of whether the new penal code and new document are implemented to prevent honour crimes without due diligence or not.

The Court of Cassation ruled that sentences for honour crimes are given only if the killer committed a crime as a result of a decision by the family assembly, as follows:

“...Moreover, in a ruling issued in 2008, the Supreme Court of Appeals sought the existence of a — family assembly verdict, a rather abstract notion which is almost impossible to prove, in order to sentence the accused with aggravated homicide. This ruling nullifies Article 82/J of the Penal Code, which foresees — aggravated punishment for the perpetrators of killings in the name of custom. Furthermore, women’s organizations’ demands to be granted intervener status in such cases are constantly rejected, leaving the chair of the intervener — who is supposed to protect the rights of the victim against the defendant — unattended.” (The Shadow NGO Report 2010, p. 7).

In addition, pursuant to Article 29 of the Penal Code that establishes sentence reductions for unjust provocation: “A person committing an offense with effect of anger or asperity caused by the unjust act is sentenced to imprisonment from eighteen years to twenty-four years instead of heavy life imprisonment, and to imprisonment from twelve years to eighteen years instead of life imprisonment. In other cases, the punishment is abated from one-fourth up to three thirds”. For instance, Hatice Demir who was cheating on her husband with her ex-husband was killed in 2008 and her husband, Ahmet Demir was sentenced to 15 years due to unjust provocation.145 When Ahmet, who is blind, suspected his wife was deceiving him, he claimed she told him, “I am enough for both of you”. Therefore, the judge decided there was extraordinary provocation and reduced punishment to 15 years from life imprisonment. This case demonstrates that there is still narrow understanding of the new code and that sentence reductions are made on the conditions of alleged cheating since there is no strong proof. However, there are cases where judges do not give sentence reductions to

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144 http://arsiv.sabah.com.tr/1999/07/05/g08.html
murderers who committed honour killings. For instance, Güldünya’s killer was sentenced to twenty-three years; that then will be discussed.

D. From Honour Killings to Honour Suicides

Although the Turkish government has taken measures to reduce killings in the name of honour via new laws punishing crimes, implementing legal forms is obviously inadequate. It is clear that judges rarely impose harsher sentences against honour killers and police officers do not examine homicides, suspicious deaths, disappearances of women or extraordinary ‘accidents’, which cause young women’s deaths (Rubin 2010, p. 11). Rubin (2010, p. 2) states that as an alternative method of preserving traditional principles, the increase of ‘honour suicides’ is the result of new law implementations such as harsher punishments. In the South-eastern area of Turkey, Batman and Urfa have drawn attention to women’s suicides which were forced by their families in the name of ‘honour’ from the beginning of 2000 (Bilgili and Vural 2011, p. 68). As the Special Rapporteur of the United Nations Commission on Human Rights on violence against women, Yakin Erturk (2007) points out in her report:

“…There have been many misleading statements about suicides of women in Southeast Turkey and Batman specifically. Between 2000 and 2005, there were 105 suicides in Batman: 61 victims were women, 44 were men. In 2006, there have been so far 7 suicides: 5 women and 2 men and 53 suicide attempts of which 36 are women and 17 men… in which there were reasonable grounds to believe that the suicide was instigated or that a so-called honour killing was disguised as a suicide or an accident. Some of these cases have been referred to the courts for prosecution…”

For instance, there was the case of Derya, which started a trend for ‘honour suicide’ in Turkey (Bilefsky 2006). Derya, who was seventeen, attempted suicide by jumping into the River Tigris due to having a relationship with a boy. When her relatives learned of this matter, they forced her into suicide by sending threatening messages to her: “You have blackened our name.... Kill yourself and clean our shame or we will kill you first” (Bilefsky 2006). However, she escaped and sought refuge in a women’s shelter in the region to save her life.

In response to the legal developments, implementation has been deficient. Families force female family members to kill themselves to save their young male family members from being sent to jail. Families generally close a girl in a room for a long period without giving her any food, but give her a gun, a rope or poison, saying ‘clean our shame’ (Boon 2006, p. 842). As Derya said, the reason for honour crimes is discrimination of gender and added: “In my village and in my father's tribe, boys are in the sky while girls are treated as if they are under the earth” (Bilefsky 2006). At this juncture, it can be asked why there is still gender inequality in Turkey and has the legal base been deficient in guaranteeing gender equality according to CEDAW, Article 1. In the current Turkish Civil Code Enactment Law, which came into force in 2010, there is a lack of a definition for ‘discrimination against women’ despite the requirement of CEDAW Article 1 (Shadow NGO Report, p. 6). Furthermore, according to the European Commission Staff Working Document on Turkey 2012 Progress Report (2012, pp. 26-67), there are still deficiencies in combatting honour killings and domestic violence against women and these remain major challenges for Turkey.
E. Police Negligence

The failure of local police to protect victims of honour crimes is another significant problem in Turkey. For instance, the case of Güldünya Tören symbolises the fight against honour crimes even though there is negligence by the Turkish authorities (Pope 2012, pp. 189-194). Güldünya was raped by her cousin resulting in a pregnancy and unfortunately her family decided to send her to her uncle who lived in Istanbul. However, her two brothers went to Istanbul to hunt her down. Sev’er (2005, p. 134) states that Güldünya gave her son up for adoption sensing the approaching threat. Her brother, Irfan, who was 17 years old, shot her on the street. She survived surprisingly and asked for police protection, saying, “I know they won’t want me to live. I’m scared” (Pope 2012, p. 191). Unfortunately, while she was at hospital for treatment, she was shot in the head by Irfan. The negligence of police officers caused Güldünya’s death.

Conclusion

Turkey is a member of all major international human rights organisations. Its domestic legislation enables for the equality and human rights of women. However, in practice, authorities are too often unwilling to implement these regulations and defend women from violence. Honour crimes are among the most widespread human rights violations in Turkey. It is stated that all the different factors that have contributed to inadequate implementation: vague definitions, tradition and culture, sentence reductions, persistent gender inequality and the trend of ‘honour suicides’, and police negligence. Fatma Kurtalan who is a member of the Parliament reported that 953 women were murdered in the first six months of 2009 with the majority of killings suspected to be the result of honour crimes and honour related violence (Pervizat 2011, p.145)

In line with the international developments, Turkish Penal Code was reformed, regarding the treatment of honour killings in 2005. To comply with the EU acquis, the reformed code comprised clauses aiming at achieving gender equality. However, there are still legal loopholes to prevent crimes of honour. In addition, as discussed, there is a serious lack of due diligence in prosecuting and punishing crimes in the name of honour and reducing sentences to the perpetrators who violate women’s right to life.

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You Can’t get a House on Campus, You are not Married: Gendered Codes, Institutional and Customary Laws in Pakistan / SHIRIN ZUBAIR

Abstract

This paper addresses issues related to the gendered divisions, institutional laws and regulatory discourses in Pakistani universities. Struck by the ubiquitous silence and invisibility of women in higher academic and administrative positions, my self-reflexive narrative captures the ambivalent positioning of being a proclaimed feminist within the patriarchal academic milieu. I particularly draw on Moroccan feminist Mernissi’s (1993) views on purdah (veil) as a symbolic division of Muslim space on the basis of gender, which restricts women’s freedom of movement and access to education. She argues that this exclusion and seclusion of women by veil has to do with the power struggle between fundamentalist men and unveiled women in contemporary Muslim societies. By invoking discourses on religion, morality and law, control is exercised not only over the syllabi, teaching pedagogies, but also covertly over linguistic codes and meaning-making processes through regulating women’s bodies, dress-codes and sexuality. The customary laws embedded in sexist language, discriminatory regulations and practices, along with anecdotal data from my teaching, administrative and everyday lived experiences, illustrate the way these hegemonic structures of patriarchy are naturalized through discursive linguistic codes and institutional practices. From a feminist standpoint, I reflect on my experiences and everyday struggles as an academic to argue that patriarchal and sexist discourses on religion and morality are used not merely to regulate women’s bodies and dress codes, but also to curtail their autonomy as citizens. Through citing anecdotal data, I bring out the complex linkages between the linguistic codes such as chador and char deewari (veil and four walls), customary laws and institutional practices. I particularly relate the teaching of Burqavaganza—(a satirical play on veiling) for which I was held accountable by the University administration for transgression—to the hegemonic discourses popularized during the 80s to relegate women to the private domains.

Keywords: gendered codes, customary laws, discrimination

Introduction

Writing on critical feminist pedagogy and the awkward positioning of the feminist within the conventional academic frameworks in Pakistan, I draw on and link my work (Zubair 2001, 2003, 2005) to the work of feminists and social activists in other teaching contexts (Taylor 2013, Tilley and Taylor 2013, hooks 1994). Taylor (2013) in a self-reflexive paper considers the processes of being or becoming on the academic map and emotional landscapes within academia: she recounts how she was made to feel an emotional, angry feminist academic with her ‘critical pedagogy’ deemed a failure by the neutral, objective and rational counterparts in a UK context. Similarly, hooks (1994) describing her feelings as a black student in USA says that while white students seen as ‘exceptional’ were allowed to

147 Senior Fellow, Kate Hamburger Kolleg/Centre for Global Co-operation Research, Universitat Duisburg-Essen, Germany; Professor & Former Chair Department of English, Bahauddin Zakariya University, Pakistan
chart their intellectual journeys the blacks were expected to conform, as if they were there in the predominantly white academy not to learn but only to prove that they were the equal of whites. Later, bored by the conventional teaching which relied on memorization of textbook information, she was inspired by Freire’s theory of emancipatory education (2000). The emotions of alienation, pain and hurt that she experienced led her to teach differently: she brought forth pleasure, fun and excitement in her pedagogy by engaging the students in critical thinking. She argues that this excitement can co-exist with and even stimulate serious intellectual and academic engagement.

Jamal (2010) observes that Pakistani state controls female sexuality through the institution of family, by assigning women the primary familial roles of mothers, daughters, wives and mothers within patriarchal family thus reducing their equal rights to Pakistani citizenship. In this context, teaching English Literature and feminist theory becomes problematic as one of the major tenets of Western feminism was sexual revolution for women: women fought for equal sexual, bodily and reproductive rights during the feminist Movement in the West. It is pertinent to mention here that the founder of Pakistan Jinnah, during the Independence Movement had deplored the fact that Muslim women were confined to the four walls of their houses like prisoners. He had expressed a desire for Muslim women to work as comrades along with their men in all spheres of life. As a symbolic gesture he always took his sister Fatima Jinnah with him wherever he went. She was trained as a dentist and remained a single, independent lady all her life taking active part in pre and post-partition politics.

However, since the early eighties, the media (and other state institutions like education) have been strictly controlled under the pretext of Islamization, to the extent that at one point in time the female announcers and news-readers could not appear on state television without a head cover. Hoobhoy (2013) observes that the 1980s’ Islamization of education meant that every subject—languages, geography, history, social studies, chemistry, physics, mathematics, etc.—could only be viewed through a narrow prism. All else was to be shunned and filtered out. The academic freedoms and intellectual debates at Pakistani universities were curtailed and received a huge setback. Shaheed (1994) observes that steps taken towards Islamization were no more than symbolic gestures. By revitalizing the Council of Islamic Ideology (CII) General Zia gave them the mandate to review the existing laws and bring them in line with Islam. The CII was packed with conservative ulamas (clerics) who singled out women by giving reactionary suggestions regarding them. Further, Zia’s symbolic moves included orders to offer afternoon prayers in the government offices; for women to wear chaddar (drapes to cover body) at work; to begin all office correspondence with Koranic words: *bismillah-hir-raham-nir-raheen* (I start this work in the name of Allah); and investing all official ceremonies with similar symbolic acts.

Notwithstanding these limitations, I as a senior faculty and chair, mustered up the courage to teach texts which were iconoclast and revolutionary, talking about women’s narratives on tabooed subjects such as rape, divorce, homoeroticism, exploring women’s sexualities, their choices and their genres. Inspired by the writings of black feminists like hooks (1994) who advocates transgression in teaching; Angelou (1989) who was raped at the age of eight and yet had the courage and perseverance to become an icon for women worldwide; Durrani’s autobiography *My Feudal Lord* which created a furore in Pakistani society when it was first published; translated texts of Chughtai’s short stories now considered classics in Urdu literature but were banned in the undivided India of the forties. Nafisi’s *Reading Lolita in Tehran* who was—like myself, a professor of English Literature at Tehran university during Khomeini’s Iranian revolution—ousted from Tehran university for teaching un-Islamic and immoral, decadent Western literature. I strongly identified with Nafisi
who had formed a reading group of six female students after being banned from the university, who would meet up twice a month to discuss these books and found vicarious pleasure through identification with the fictitious characters; Afzal-Khan’s auto/biographical narrative Lahore With Love which captures the tension she experienced while articulating hitherto silenced voices of her friends—all of who except herself were either killed, silenced or morphed into docile, conforming dutiful Pakistani wives ( she escaped a similar fate because she lives in the US!). Not only was I teaching these memoirs and auto/biographies as feminist documents, I also encouraged research on gender and feminism in the department of English on topics which related these textbooks to women’s lives in general and to their social worlds in particular.

In the remainder of the paper, I present a few vignettes from my work experience at a state university in Pakistan to illustrate the discursive and coercive gendered codes and practices which position women as objects in institutional discourses and customary laws.

Vignette 1: Burqavaganza: Curriculum as lived Experience

Initially I designed a module for my MPhil class with women’s longer narratives—novels and memoirs—for classroom reading sessions. The students on this course were university and college teachers of English, both male and female, experienced and new with a total of 16 students, six men and ten women. On student’s initiative, I changed the course textbooks and included the genre of drama, poetry and short story along with novel and memoir.

Teaching the translation of Shahid Nadeem’s contentious drama Burqavaganza in my MPhil class on Postmodern literary theory is an instantiation of the awareness-raising campaign through critically engaging with socio-political issues. The play was banned in Pakistan because it exposes the hypocritical practices and double standards rampant within the institutions of Pakistani society (also see Tilley and Taylor 2013). I suggested that everyone would come to the class clad in a burqa with veil to get the full impact of the sardonic undertones and nuances and each one of us (including myself) would play a character reading and acting out the play. Aware that there were young men in the class who would not like to wear a burqa even in play-acting, as some did stay away from that class, I myself wore one to bring home the point of the play.

The wearing of masks or burqas as a form of purdah signified a whole range of discursive practices which were brought into focus with regard to women’s subjugation and their segregation from the public domains through this central and powerful motif of burqa. Feminist scholars like Ali and Mernissi (1993) have analyzed this phenomenon of purdah as a symbolic division of Muslim space on the basis of gender, restricting women’s freedom of movement and access to education; this exclusion and seclusion of women by veil (or purdah) has to do with the power struggle between fundamentalist men and unveiled women in the contemporary Pakistani (and other Muslim) society. Burqa as a motif is similar to silence in its ambivalent nature: burqa-clad, veiled women are physically visible and yet invisible to the public eye on the streets; their invisibility in the public domains and leadership positions is conspicuous and ubiquitous; their silences are very vocal and marked in that women are visible and mute(d) human beings within the institutional constraints. Burqa hints at their embodied identities and restricts their movement, however, they are still visible bodies on streets and in public places. Thus the play acting became a powerful visual instantiation of the way women are relegated to oblivion and obscurity and denied equal citizenship rights.
During a class on poststructuralist feminist theories, when one of my students posed the question:

what position should we as women take regarding our dress code? On the one hand popular Western feminism is all about flaunting your bodies in semi-nude advertisements and on the other the rising trend of veil among Muslim women is seen as an assertion of a religious identity?

I answer: women have to decide for themselves. It’s not my prerogative to tell you how to dress, you have to take a position yourselves!

This apparently innocuous response would be interpreted in a negative light in that a woman should not be autonomous in her decision to choose her dress. She must follow the dress codes prescribed by the religious clerics or dress as told by her parents or wali (guardian). As Twigg observes that: “clothes are expressions of identity, one of the perennial means whereby we signal to the social world who and what we are…; a means whereby ideas of identity are grounded in the visual” (2007: 291). She argues that dress is an arena for the expression of identity and exercise of agency, and that people may use clothing to resist or redefine the dominant cultural meanings.

The discourses of chaddar and char-diwari (veil and four walls) promoted during the Zia regime meant that women’s bodies and their physical movement had to be strictly regulated by the dress codes specified by male religious clerics; their primary domain was the private domain. This discourse was popularized in the print and electronic media to confine women within the four walls (char diwari) of their homes. However, if they were to come out in the public arenas they were to remain invisible in a chaddar. In a similar but more strenuous legislation, the imposition of Hadood Ordinance and Zina (illicit sex including adultery and fornication) Ordinance during the regime is viewed by Muslim feminists (Khan 2010; Zia 2009) as a way of exercising coercive power and control over women. Khan (2010) illustrates--through interviews with men who favour these laws and seem indifferent to women’s suffering in prisons on false accusations of adultery—how the civil society in today’s Pakistan is divided on this crucial legislation. Further, she observes that by focusing on the fundamentals of Islam, according to Zia’s Zina Ordinance, illicit sex became a crime against the state for the first time in Pakistan’s history. Her research in Pakistani prisons shows how women’s incarceration for zina is linked to issues of gender, class and control of women’s bodies.
Photo: A group photo of my class after a reading session of BurqaVaganza; even in burqa women are still physically visible in public domains.

Vignette 2: Sexsim in Institutions: You can’t get a house on campus; you are not married

I was told by our Dean (herself a woman) who showed me the university statutes which read: married will be preferred over the unmarried. In spite of my seniority or length of service within the institution—I had put in twenty eight years of service— I was singled out because I had ticked the option unmarried instead of married. There were only two options on the application for house allotment forms married/unmarried. Since I was divorced I ticked the option unmarried. The categorization into binarism of married/unmarried left no space for the divorced, widowed or separated employees particularly if they are divorced or single women. Such legal frameworks and linguistic structures are blatantly discriminatory and exclusionary regarding the positioning of women in the public discourses: the signifying practices exclude divorced and single university employees from participating in the mainstream public discourses on the bases of their marital status and gender. For a single male employee this would not be an issue, as several whose length of service was far less than mine had been allocated on-campus accommodation. The discourse excludes women particularly divorced and single women as they can pose a threat (i.e. fitna) or chaos to the smooth functioning of the social fabric of Muslim society by asserting their autonomy and freedom, although the practices exist, as the numbers of divorced and single women are rising among urban, educated populations.

Vignette 3: Embodied identities: She’s almost naked!

Jamal (2010) observes that women in contemporary Pakistani state are primarily cast in the social roles of daughters, mothers, sisters and wives and their citizenship rights are also curtailed by these patriarchal social and institutional structures. Therefore the female
professors are no exception to this general norm. They are also cast in the roles of mother-like figures who must not transgress either in dress code, or in social behaviours from the prescribed gendered codes. Saeed (2002) has observed that patriarchal division of women into ‘good’ and ‘bad’ in Pakistani society associates certain forms of behaviors with each category. Women who are mobile, assertive, bold, interact with men, and feel they have a right to be in control of their lives and bodies are categorized as bad women, and this categorization is a mechanism of controlling women’s behavior.

The control of women’s sexuality through regulation of their bodies is central in the following quotes and the discourses and discursivities that surround them:

**You look like a Kashmiri girl!**
**You’ve become a symbol of resistance!**
**She’s very bold and independent!**
**What kinda clothes does she wear? She’s almost naked!**
**She wears tightly-fitted clothes, a teacher should be decently dressed!**
**Her personal life is in a shambles!**

I was astounded, shocked at the audacity of one of my male scholars commenting on my looks and calling me a girl at 56: a full professor, head of a university department; even after initiating and continuing discourses on feminism and sexism in my classes for over a year I was reductively being called a girl. Initially shocked, I later wondered whether this was meant as a compliment, an innocuous remark or an insult. It undermined my status and capacity as an academic and focused on my girlhood, my looks suggesting that in spite of all my academic credentials, I was still a little girl. Or was it because I taught feminist theories? And not only did I teach feminisms, I taught with a passion for gender equity and equilibrium rarely witnessed and least accepted in our context (See Zubair 2003).

Hence, my embodied identity is not only fluid but also ambivalent: like any other Pakistani woman at this point in time, I am caught up in a complexity of myriad roles and competing identities (Zubair 2006). While I am born a Kashmiri girl, I have also become a symbol of resistance, being a Kashmiri girl collides with my assumed persona (becoming) of a die-hard feminist resisting the official discourses on how to be a proper Muslim Pakistani woman within these institutional structures and strictures (for identity as being and becoming see Hall 1993). As an academic, I am expected to rise above the gendered societal limitations and restrictions, yet having entered the public domain in a designated male space in the Muslim social order, I have already violated the sanctity of chaddar aur char diwari.; I have transgressed and trespassed the boundaries of the designated female domain i.e. four walls of the house by entering a public domain and by working and interacting with (na-mehram) strangers. Having travelled abroad, lived and worked in the Western societies, I am considered a very independent and bold woman (academic) on the one hand, and on the other, far too westernized to be a good influence on my younger female colleagues and students. I am divorced and divorce is still a huge social stigma. As discussed, there is no slot for the category of divorcees on the house allotment forms. The signifying practices and discourses thus render (single and divorced) women invisible in public spaces by relegating their roles to the private domains only.
Within the academy I am the defamed feminist: I react emotionally and angrily to sexism within the institution; I do not laugh at the sexist jokes cracked at the expense of my women colleagues and students by male deans and professors in high-level meetings; I protest against discriminatory treatment of female students when they complain of harassment by male teachers and students; I teach and publish research on tabooed subjects and themes like gender, sexism in language and literary representations, rape and sexual harassment (see Zubair 2005 & 2010). In another study (Zubair & Zubair in progress) I discuss how younger female colleagues are inspired by feminist literary theory and readings. Some of them would call themselves free women inspired by these readings which leads me to a vague realization that my female students and younger colleagues do aspire to my status and power as the head of a university department, a professor who lives an independent life, travels abroad very frequently to present her work at international conferences. However this ambition or goal may seem as an unattainable ideal as unmarried women (generally referred to as girls in Pakistani society!) do not have the freedom to decide for themselves. Their fathers or families make crucial decisions regarding travel, education, marriage, employment. Aged twenty six or thirty in university employment, they still have to seek permission to travel within the country to even present their research at conferences.

**Concluding Comments**

My feminist teaching gradually emerged as a huge threat to the fundamentalist’s hegemony and control over the Department: As more and more women in my classes began to find it interesting and relevant to their lives; I was suspended as professor for teaching pornography, sexuality and nudity in July 2013. Although they are unable to exert control in all departments of their lives, women felt empowered by reading feminist literature and engaging in critical pedagogy. Feminist criticism made them to rethink and redefine their social and familial positioning within patriarchy...it gives them new frameworks and theoretical paradigms to channel their thoughts, although at this point in time it is neither a platform for action nor activism; however research (Zubair in progress) shows that it makes them reflect on issues of identity formation and raises their consciousness of these issues that are vital to their existence. The discourses of freedom, critical pedagogy, emancipatory education and equal rights had become a part and parcel of my everyday existence. Unobtrusively at a subconscious level, I was promoting values of equality, of human rights, social justice and citizenship rights which if upheld by every woman would tend to disrupt the smooth functioning of the patriarchal institutions of family and academy within the Pakistani state.

I conclude with my uncensored subtext:

_We live in the land of the pure, Pakistan. We are the holy women, the Western feminists are sexual monsters, diabolic creatures yet we are neither more nor less pure or impure, holy or unholy...we are the repository of a clan’s izzat (honour). Our bodies symbolize shame...if we are raped collectively, our family and our community lose face, not we, we do not even have a face...we are faceless, nameless, invisible, burqa-clad creatures. we who suffer such agony and humiliation are unholy and presumably unaffected by such atrocities._ (see notes)
GENDER AND “THE LAW”

Notes

1. For a discussion of discourses on honour see Mai and Cuny 2006; Rehman 2002; N. S. Khan 1991; for a discussion of the future of secular Feminism in Pakistan see A. S. Zia 2009; for a fuller discussion of Islamization of curricula see R. Saigol 2000.

2. It refers to the act of marrying a woman with Koran in some communities in Pakistan. See Imtiaz and Zubair (2011) for a fuller account.

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The Issue of Gender-Sensitive Penal Law in Appearance and Practise: A Case of Honour (Namus) Killings in Turkey / DERYA TEKİN

Abstract

Penal laws are aspired to be explicit and precise to not only enlighten citizens about the acts acknowledged as ‘crime’ by the state, but also to prevent arbitrary implementations through restricting the discretion of judges. Punishment of honour killing in Turkey provides a considerable example regarding this duty of penal law. The conceptualisation and actualisation of honour in Turkey significantly differs from its western understanding. It corresponds to the notion “namus” that is somehow pertinent to women sexualities, bodies, lives and individualities. Although women are labelled with or without namus, men bear the responsibility to keep it clean when it stained. According to cultural mores, men cannot have namus per se, because their namus is always contingent upon the namus of their mothers, wives, daughters, and sisters. At this juncture, honour killings correspond to namus killings which are a gender-based crime that are predominantly committed by men against women and girls who break the established societal norms. The Penal Code in Turkey does not provide an explicit prohibition regarding honour (namus) killings while killings in the name of custom (tore) are listed among the aggravating circumstances of a crime, and constitute aggravated homicide that requires life imprisonment (Article 82/f). This legal loophole leaves a room for interpretation of implementers. Moreover, the justification of the article 82 provides the grounds for sentence reduction based on “unjust provocation”. Due to the fact that honour is not specifically included as one of the aggravating circumstances, unjust provocation can be easily referred to lessen the sentences of the perpetrators of honour killings. As honour is accepted as a vital element of Turkish culture, these sentence reductions are rarely challenged. This paper, thus, questions the role of law in terms of its discourse and historical interaction with social patriarchal values. It also emphasises the necessity of gender-sensitive approach of implementers on the face of legal loopholes.

Keywords: Penal law, gender based crime, discourse, implementation, Turkey, honour killings

"our mothers, our lovers wives
who die without ever having lived,
who get fed at our tables after our oxen..."

Nazim Hikmet

Introduction

Penal laws are aspired to be explicit and precise to not only enlighten citizens about the acts acknowledged as ‘crime’ by the state, but also to prevent arbitrary implementations through restricting the discretion of judges. Honour killings, as a homicide type, in the former Turkish Penal Code have demonstrated the consequences of the failure of this policy in a very tragic way. The former penal code used to provide numerous provisions allowing for sentence reductions at the honour killing cases. Such reductions used to be integrated with age reductions in that often the youngest member of the family committed the murder in order to benefit from all legal possibilities lessening the sentence. Accordingly, the former legal norms served to contribute in more than one way to rendering the punishment of an honour killing more bearable (Kocacioglu, 2004: 123).
With the new Penal Code, Turkey has totally changed his attitude against honour killings. The discriminative norms are sorted out; in particular the murder in the sake of honour ("custom" in the Code) has been regulated as matter in aggravation. The efforts of the women rights activists and changing role of Turkey in the region have been significant motives on the change in question. However, considering possible implementation issues, the new provisions are unlikely satisfying albeit the radical changes. The law is not explicit about honour killings so it is possible to face the problems of the former penal code at the point of using the discretion given to judges. At this juncture, one can claim that the efficiency of the laws in question is left to the judicial decision makers.

This paper, thus, questions the role of law in terms of its discourse and its historical interaction with social patriarchal values regarding honour killings in Turkey. It also emphasises the necessity of gender-sensitive approach of implementers in the face of legal loopholes. Accordingly, as a first task, some terms related to the honour will be explained in order to depict what sense ‘honour’ makes in this geography. Having presented the legal framework on the issue, the legal steps achieved will be discussed in conjunction with the international instruments ratified by Turkey such as the Convention on the Elimination of Discrimination against Women (hereinafter ‘the CEDAW’) and the UN resolutions on the issue. Finally, the significance of the implementation when it comes to honour killings will be articulated with some suggestions, and a conclusion will be reached.

**Ambiguity of the Terms: Honour, Custom (Töre), Namus and Seref as Turkish Indigenous Concepts**

Leyla Pervizat (2006: 306) mentions that how she was protested when she first started lobbying on the honour killings at the United Nations in 1998. Since honour in the west is considered as something good, valuable and positive, she used to be warned that she should ‘rename this violation or better choose her words carefully’. The conceptual distinction between the western and eastern traditions is likely the underlying reason of this reaction. ‘In the West, honour is often defined as moral integrity, the esteem accorded to virtue or talent. Both the depth and the breadth of an eastern understanding of honour is very different’ (Sev’er and Yurdakul, 2001: 971 cited in Abu-Lughod, 1986). Various words used in Turkish language are such as to attest to this assertion. Besides the western meaning, we have two, particularly vital, words germane to honour: *seref* and *namus*.

*Seref* can be defined as social esteem or prestige of individual or family (Bilgili and Vural, 2011: 66), and thus represents an honour stemmed from an achieved status (Sev’er and Yurdakul, 2001: 972). ‘Namus, on the other hand, refers to the concept of the women sexualities, bodies, lives and individualities. [...] Although women are labelled with or without namus, actually the responsibility to keep it clean when it stained is with men. Men’s actions to fulfil these responsibilities define whether he has *namus* or not’ (Pervizat, 2006: 297). According to cultural mores, men cannot have *namus* per se, because their *namus* is always contingent upon the *namus* of their mothers, wives, daughters, and sisters (Sev’er and Yurdakul, 2001: 975).

In substance, in this traditional system, women are considered the property of the family rather than being individuals, and represent its *seref* or *namus*. By the same token, they are expected, for instance, to be virgins or in other words ‘clean’ when they marry. This cleanliness is so delicate that can be destroyed by the merest acts such as strolling alone in the town, flirting with a boy, or even asking for a love song on the radio. In such a situation, the
cost of freedom and love that woman pay might be the murder in the name of honour (Arin, 2001: 822-823).

The Concept of Honour Killings in the Former and New Turkish Penal Codes

In the light of the terms explained above, in Turkey, the concept ‘honour killings’ literally corresponds to ‘namus killings’. However, neither the old Penal Code nor the new one does handle the notion namus (hereinafter ‘honour’). When looking at the entire code, ‘custom (tore) killings’ is distinguished as a single term which could be related with honour killings. Pervizat (2006: 298-299) articulates the distinction between two crimes, and reveals the significance of distinguishing them:

Firstly, she emphasizes the gender-based nature of honour killings. In the context of Turkey, honour killings are predominantly committed against women and girls who break the established societal norms. On the other hand, custom killings are the crimes arising from living in the feudal system.

Although women and girls can be the victims in these custom killings, they are not the main targets. In other words, their lives, their sexualities, their bodies, and individualities are not the main issue here. What is important in the custom killings is the sustenance and continuance of the tribal system. In a very rough way of looking at things, in custom killings men kill other men (Pervizat, 2006: 298).

Accordingly, if the society progresses from the feudal system of living into more modernized form, custom killings might disappear but we could unlikely attain same consequence for honour killings. Men’s desire to control women is a phenomenon that could be encountered in every social, political, and economic system (ibid.).

As for the significance of the honour versus custom debate in Turkey’s context, Pervizat rightly states that while this misunderstanding sometimes derives from just sheer ignorance, it has often a racist perspective (ibid.). Some people, thereby, can perceive the issue of honour killings as violence against women occurring only in Kurdish communities, where the feudal system is still dominating lives, in Turkey (ibid.). As an honour killing advisor, Bingul Durbas (“The Interview” 2011) points out that ‘linking honour crimes to Kurdish culture leads to the stigmatization of entire Kurdish communities and “ethicises” honour crimes’. She identifies honour killings as a particular manifestation of universal patriarchal violence against women and a means of controlling women’s lives and thereby maintaining male control over women.

Throughout the former Turkish Penal Code, the law did not mention ‘honour killings’ explicitly. However, particular articles attested to some value judgments favouring the offenders of such killings. According to the former Penal Code (Article 453/1), the woman who killed her new-born child out of wedlock for inducement of rescuing her ‘seref’ was sentenced to from 8 to 12 year imprisonment by extenuating the punishment.

Another provision implicitly referring honour killings was the Article 462, which set forth the reduction of the punishment at the cases that murder was committed in due course of catching victims committing adultery or illicit intercourse.

This article was only abolished 2003 after great pressure from the EU, within the framework of the sixth harmonization package aimed at bringing Turkish legislation in line with EU legislation. The JDP government presented the cancellation of article 462 as a symbol of their determination to prevent honour crimes (Ilkkaracan, 2007: 9).
Through this article, such an understanding that people captured in due course of adultery deserve the murder was expressed, as well as the discrimination between offenders was displayed in contravention of the Article 2 of the CEDAW which obliges state parties to repeal all national penal provisions constituting discrimination against women. Namely, if and only if the murderer was brother, his sentence would be reduced; no reduction would be applied if the murderer was sister (Centel, 2005: 11).

The new Turkish Penal Code that entered into force in 2005, after a successful campaign by women’s movements, has brought positive changes respecting the recognition of women’s sexual and bodily rights (Human Rights Watch, 2008: 46).

The reform of the Penal Code has transformed the philosophy of the old Penal Code by acknowledging women’s right to have autonomy over their bodies and sexuality. [...] All references to vague patriarchal constructs such as chastity, morality, shame, public customs, or decency have been eliminated and definitions of such crimes against women brought in line with global human rights norms (Anil et al., 2005: 14).

Accordingly, the provisions exemplified above (Art. 453 and 462) are not included into the new code. Likewise the former code, the new code does not refer to honour killings expressly: however, killings in the name of custom (töre) are listed among the aggravating circumstances of a crime, and constitute aggravated homicide that requires life imprisonment (Article 82/k).

New Government, New Penal Code: Steps in the Period of Change

Turkey has ratified a range of international instruments in order to enhance women’s situation, particularly the CEDAW which is the only binding international legal instrument on the elimination of all forms of gender-based discrimination and the protection of women’s human rights. However, when it comes to women’s human rights, it is essential to remember that the success of the policy is substantially up to the sincerity of the governments. As Shadow Report on the Implementation of the Istanbul Plan of Action (2009: 15) underlines, ‘although a few positive steps have been taken by the southern and eastern Mediterranean countries such as Turkey, and there have been amendments to penal and national laws and other legislation, some of these efforts were most likely motivated by political considerations and not by a commitment to fighting discrimination against women or achieving gender equality per se’. Considering the efforts of Turkey for accession to the European Union for a very long time, the policy on the prevention of honour killings is also an exam for Turkey in terms of demonstrating his genuine intention.

While determining the policy of the JDP on honour killings, the international regulations on the issue at the UN should firstly be depicted. As a milestone international instrument, the Outcome Document of the 23rd Special Session of the United Nations General Assembly (Beijing+5) obliges all state parties to ‘develop, adopt and fully implement laws and other measures, as appropriate, such as policies and educational programmes, to eradicate harmful customary or traditional practices, including [...] so-called honour crimes’ (Paragraph 66/e), and ‘to increase cooperation, policy responses, effective implementation of national legislation and other protective and preventive measures aimed at the elimination of [...] crimes committed in the name of honour’ (Paragraph 96/a). The document emphasizes that honour killings is one of the violations of the human rights of women and girls, and an obstacle to the full enjoyment by women of their human rights and fundamental freedoms (Paragraph 66/e).
The resolution ‘Working towards the Elimination of Crimes Committed in the Name of Honour’ is another notable document which was introduced by the Netherlands on November 1st, 2000 and adopted with 120 in favour including Turkey and 25 abstaining. In 2004, Turkey, with its intensive and effective lobbying, and the UK put the resolution to tender again, and succeeded in the adoption of it by all states. That this effort is Turkey’s first ever attempt at the UN on women issues, being main sponsor of the resolution with the UK, and the appointment of Professor Yakin Erturk as the UN Special Rapporteur on violence against women are explicit indications of Turkey’s changing face in the world (Pervizat, 2000: 313-315).

In the light of these developments, Women for Women’s Rights (WWHR) – New Ways (an NGO in Turkey) initiated the Campaign for the Reform of the Turkish Penal Code from a Gender Perspective immediately after the Civil Code reform, in 2002 (Anil et al., 2005: 9-17). The initiation and coordination of a national Working Group with the participation of representatives of NGOs and bar associations, as well as academicians from various regions of Turkey was enabled by WWHR – New Ways at the beginning of 2002. Having analysed both the Turkish Penal Code in effect and the 2000 Penal Code Draft Law, the group asserted that both of the regulations comprises ‘the same discriminatory, patriarchal perspective and contains a myriad of provisions legitimising women’s human rights violations’. The Working Group handled the draft law from a perspective aiming to transform the underlying philosophy of the Penal code, benefited penal codes from other countries, and prepared its recommendations including more than 30 amendments in the form of new articles. The recommendations and proposed articles in question were published as a report and sent to all members of the parliament (MPs), NGOs and media representatives in 2000. In due course of these legal studies, the General Assembly took a decision for early elections as an unexpected development after a political crisis in 2002. After the early elections and the victory of the religious right JDP, the booklet was sent to all MPs of the new parliament immediately, and an appointment with the new Justice Minister was asked, which he refused. JDP acted reluctant to cooperate with the Working Group, and ignored the recommendations concerning women in the process of the new draft. This attitude of the government led to launch of a massive public campaign during 2003-2004 through numerous conferences, meetings, press conferences in various cities of Turkey. The Group managed to voice their demands, and affected the Justice Commission after intensive advocacy efforts. Finally, the draft law was approved in the General Assembly on September 26th, 2004. However, despite the overall success of the Campaign, including the definition of honour crimes (not only so-called customary crimes) as aggravated homicide was one of the four demands of the group which were not accepted.

The new Penal Code came into force in 2005. Since that time, The JDP government has not stepped on course to change the Penal Code on the issue honour killings albeit continual demands. Shadow NGO Report on Turkey’s 6th Periodic Report to the Committee on the Elimination of Discrimination against Women (2010) uttered the issue one more time:

Article 82 of the Turkish Penal Code regulates Aggravated Homicide, and states that ‘killings in the name of custom’ instead of “honour killings” meets the conditions for aggravated homicide. The justification of the article provides the grounds for sentence reductions based on “unjust provocation”. This hinders effective punishment of the perpetrators of “honour killings”. Honour killings should be classified as aggravated homicide in Article 82, and all references to “unjust provocation” should be removed from its justification.

During the consideration of the 6th periodic country report of Turkey at the 46th session, Selma Aliye Kavaf, the State Minister of the Republic of Turkey in charge of women and family affairs, emphasised the regulations brought by the new Turkish Penal Code in
order to meet the requirements of the CEDAW. She also mentioned that the new code has been criticised for not covering ‘in the name of honour’ statement albeit numerous significant steps. However, she insisted that the concept of crimes in the name of custom comprise honour killings as well. The validity of this perception then should be tested in conjunction with the legal practice.

**Implementation Issues**

Uygur and Sancar (2005: 35) rightly points out the interaction between honour killings, legal norms and implementation:

The origin of these crimes lies down not only in the religion and custom; legal norms (like Article 434 of the [former] Criminal Code) also encourage them. On the other hand, judges and other officials are influenced by custom, religion and morality. Thus, it may be expected that they reflect these in their decisions, in particular, when they use their discretion.

At the time of the former Penal Code, in practice, when it was not possible to apply Art. 462 for the killings in the sake of honour, the sentence reductions would be implied by applying the general provision of undue provocation. The World Organisation against Torture (OMCT, 2003: 354) also condemns this implementation in its report on violence against women in Turkey: ‘Because of the general social acceptance of honour as an extremely important element of Turkish culture, sentence reductions for the perpetrators of crimes committed in the name of honour are rarely challenged’. In a sample case that is given by Sev’er and Yurdakul (2001: 982), Sevda Gok, aged 17, had publicly been executed in the market area by her adolescent cousin who cut her throat with a bread knife on the purpose of cleaning ‘the family honour’. Although this murder was premeditated and the cousin displayed no remorse, he was sentenced to only 7 year. Similarly, Hacer Felhan was killed by his 13 year old brother using shot gun in that she escaped from home. Owing to his age and so-called provocation, his sentence was reduced to 10 years, but in fact he was released after serving 2 years (Sev’er and Yurdakul, 2001: 984 cited in Farac, 1998). The more tragic one for the Turkish Law was the decision of the court on his early release: ‘Although the accused killed his sister intentionally, due to her running away from the family he had been put under great social pressure, and committed the crime under mitigating circumstances’ (Arin, 2001: 821). As for the genuine criminals behind the cases, namely the family members who decided the murder, they simply went unpunished.

With the new Penal Code, now it is harder for perpetrators of honour killings to utilize sentence reductions. However, according to women’s rights organizations, the reforms have fallen short.

[...] there is no mention of killings justified in the name of namus (honour)—which may be exempted from the higher sentences for tore (custom) killings. Concern over this large loophole was expressed by the UN Committee on the Elimination of Discrimination Against Women: reviewing Turkey in 2005, it found that ‘the use of the term “custom killing” instead of “honour killing” in the Penal Code may result in less vigorous prosecution of, and less severe sentences for, the perpetrators of such crimes against women’. Yakin Erturk, the UN Special Rapporteur on Violence against Women, agrees: ‘With the law worded as tore, there is still room for interpretation’ (Human Rights Watch, 2008: 46-47).

According to Article 29 of the Penal Code that establishes sentence reductions for unjust provocation: ‘A person committing an offense with effect of anger or asperity caused by the unjust act is sentenced to imprisonment from eighteen years to twenty-four years instead of heavy life imprisonment, and to imprisonment from twelve years to eighteen years instead of life imprisonment. In other cases, the punishment is abated from one-fourth up to
three thirds’. Due to the fact that honour is not specifically included as one of the aggravating circumstances, other provisions within the Code such as Art. 29 can still be used to lessen the sentences of the perpetrators of honour killings. Women’s rights groups in Turkey claim that this article implicitly ‘offers license to perpetrators of honour killings and legitimizes this violent tradition under the pretext of penal law’ (Human Rights Watch, 2008: 47).

Conclusion

All these points make the gender-sensitive legal practice indispensable part of the protection of women against all forms of honour killings. As Yakin Erturk stated in her report (2007: 17), ‘if the courts do not grasp the spirit of the reform and fail to punish all murders aimed at controlling women’s sexuality or curbing their personal autonomy with the highest sentences, the legislative branch may have to revisit article 82 and amend it once again’.

The Parliamentary Commission on Inquiry on Honour and Custom Killings called for the rate of honour and custom killings in the entire killings committed in 81 provinces from the Security General Directorate. According to the research, 1091 murder cases occurred between 2000 – 2005 by reason of honour and custom (Bilgili and Vural, 2011: 69). As a more up-to-date statement on the issue, the former Minister of Internal affairs Muammer Guler has declared that 1411 women were murdered between 2009 and 2012. These statistics illustrates that honour killings are still an on-going social problem in Turkey despite the progress of the criminal law. The lack of gender-sensitive approach of judicial actors makes the situation worse. At this juncture, providing the NGOs with more active role regarding the law of procedure could be an effective step so as to enable a fair proceeding without perverting the course of justice. Finally, gender-sensitivity trainings for prosecutors, judges, and lawyers could be another solution to compensate for deficiencies in the law itself.

References


PART V: POWER AND HEGEMONY


Reports and Documents

Abrogated Turkish Penal Code of the Republic of Turkey Law No: 765

Convention on the Elimination of Discrimination of Women (CEDAW)


Shadow NGO Report on Turkey’s 6th Periodic Report to the Committee on the Elimination of Discrimination against Women for submission to the 46th Session of CEDAW, prepared by: The Executive Committee for NGO Forum on CEDAW – Turkey Women’s Platform on the Turkish Penal Code (July, 2010).


Turkish Penal Code of the Republic of Turkey Law No: 5237


Websites

Abstract

This paper deals with the availability of assisted fertilization technologies (AI, IVF etc.) in Slovenia. It focuses on the rule of law, which allows these technologies only to women in heterosexual pair, which means that it discriminates against all other women who do not have rights under the law (single heterosexual women, disabled and homosexual women). It discusses the emergence of single women as a gender with specific properties, which would »justify« the lack of access to artificial insemination by law. The gender of single women is a construct of political and public discourse in the media constructed during the time when the law on infertility treatment and bio-medically assisted procreation procedures, the amendments to this law and the referendum had taken place. Paper moreover, analyses gender roles, talking about women - mothers, patriarchal political authorities and society, the right of choice, and the body as a field of political discourse. Finally, it presents a critical analysis of political and public discourse.

Keywords: reproductive technologies in Slovenia, the law, gender, single women, politics

INTRODUCTION

New reproductive technologies\(^ {149}\) that help to cure infertility are changing the image of the human reproduction and redefine relations towards sexuality, gender, parenting, families and children. To women is given a greater autonomy, since in order to become pregnant they do not need sexual contacts with men. We live in a time where sex without reproduction is tolerated and where reproduction without sexual contact is possible and allowed. Human reproduction is a very broad concept, which encompasses social practices, experiences and structures that have an impact on individuals, the community and social reproduction. Social reproduction is associated with kinship systems and it does not represent only biological reproduction but also reproduction of social statuses, institutions and relations. Everywhere in the world different cultures have different attitudes towards the new reproductive technologies.

In our society, the nuclear family is the most common form of the family. Usually it is composed of both (heterosexual) parents and the child or children. The parents are both biologically and socially. This type of family is socially the most accepted and stands for the essence of a stable social order (Skušek 1996 p. 135). Such deep-rooted social rules were shaken in the 1980s by the advanced medical technology. Louise Brown, born in 25 July 1978, is the first human to have been born after conception by in vitro fertilisation (IVF). Her birth has been described as the beginning of a new era in the treatment of infertility. Fertilization outside the body (i.e.,

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\(^ {149}\) NRTs include various methods and medications that can help men and women to prevent pregnancy, for example oral contraceptives, diaphragms, condoms, vaccinations, etc., as well as the techniques that help women to conceive (assisted reproduction). Assisted reproductive technologies (ARTs) or bio-medically assisted procreation procedures (BMAPPs) that are allowed in Slovenia are presented in the Law on infertility treatment and bio-medically assisted procreation procedures. This paper is dealing particularly with the BMAPPs.
IVF) and embryo transfer (ET) give women the possibility to conceive and to give birth, which would otherwise be advised only with adoption of a child (Virant – Klun 2002 p. 99). The development of NRTs has had an important impact on the relations between the sexes, definitions of parenthood, motherhood, progeny, heredity, relations to the body, etc. The state apparatus of the so-called modern era however had to redefine concepts of paternity, maternity, succession and inheritance. The questions about the bio-genetic and social parenthood were emerging as well as discussions on dichotomy between nature and culture. The decision about whether to have children or not, is no longer dependent on the actual biological ability to have children, but from an individual’s will and technical science.

The phenomenon of ARTs raises different opinions among humans that reflect their perceptions of tradition, modernity, natural, artificial, body and motherhood. 13 years ago, Slovenia has proved that it is not yet ready for the rapid development of the NRTs. Among other things, has demonstrated its intolerance to different families, and that before the law, all women do not have equal rights. Zalka Drglin (2002 p. 96–97) writes that:

‘In the problematisation of the law we can find the rights of concrete women being curtailed besides the wider deliberation about “woman – mother”. Similarly, a few years ago the possibility of the right to abortion become more stringently restricted, did not just mean a threat to once already obtained rights for individuals – it was possible to understand it as an important indicator of the fragility of women’s rights and the problem of different conceptions of “women” in general. The essential point that is common to the right to abortion and the right to assistance in the biomedical insemination is the right to decide on their own body (thus also about the way of life, their own no-procreation, to their own pleasure, taking responsibility for the decisions, etc.).’

This paper explores the impact of NRTs on the shaping of the meaning of gender and sexuality. It reviews the law on infertility treatment and bio-medically assisted procreation procedures, an attempt to change the law and the referendum. The main question this paper addresses is why certain healthy and fertile women have the right to assisted fertilization procedures and others do not.150 To help answer this question an analysis of the 5th and the 7th session of the national assembly has been done. It presents the arguments of members of parliament (MPs) who were against the amendment of the law, how they rejected the principle of equality before the law as to defy one of the fundamental constitutional rights. The paper presents arguments why this law is discriminatory and restrictive, and describes the social construction of single women gender.

**LAW ON INFERTILITY TREATMENT AND BIO-MEDICALLY ASSISTED PROCREATION PROCEDURES**

Law on infertility treatment and bio-medically assisted procreation procedures151 was adopted in 2000 and is still valid, 'regulates health measures that help woman and man with procreation and therefore assures the freedom of choice to decide on their children’s birth’ (Article 1). The infertility treatment and bio-medically assisted procreation procedures (BMAPPs) are separated. Treatment is ‘the determination of the causes of infertility or

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150 This paper specifically focuses on the single women
151 Law on Infertility Treatment and Bio-Medically Assisted Procreation Procedures, Official Gazette of the Republic of Slovenia, n. 70/00
reduced fertility and eliminating these causes in a professional counselling, medication or surgical intervention’ (Article 3), BMAPPs are ‘processes to inseminate a woman with the help of bio-medical science, which means to get fertilised in a way other than intercourse’ (Article 4). BMAPPs can take place inside the woman’s body (transfer of sperm or sperm and eggs) and outside the woman’s body (IVF, ET) (Article 4).

Treatment of infertility is entitled to everyone. BMAPPs are entitled only to heterosexual pair, that means only to a man and a woman who live in a marital or extramarital union\textsuperscript{152} (Article 5). Surrogate motherhood is prohibited (Article 7), as well as the donation of male and female gametes simultaneously (Article 8), so the donation of embryos is not allowed (Article 13).

Maternity and paternity of the children being conceived by BMAPPs are governed by the Article 41 and Article 42. The mother of the child is always the woman who gave birth, although it was conceived by the donor egg. The father is always the mother’s husband or partner, although the child was conceived by the donor sperm. In both cases the biological maternity and paternity is not allowed to identify. In exceptional health conditions, the child will be allowed to know the important health data of the donor (Zupančič et al. 2000 p. 496).

The woman can receive only one donor cell, which means that at least one of the parents must be a biological parent. This mode allows maintaining the biological connection between parents and children (Zaviršek 2008 p. 107). The law therefore continues the genetic inheritance and similarity between relatives.

RESTRICTIVE PROVISIONS OF THE LAW

The existing law is discriminatory because it does not treat all women the same. It prohibits the BMAP procedures to women who do not live in a marital or extramarital union, this are single women and women in a homosexual relationship.

The Constitution of the Republic of Slovenia in Article 55 specifies that everyone is free to decide whether to bear children. The state has to guarantee the opportunities for exercising this freedom and create such conditions to enable parents to decide to bear children. Basic human right to decide freely and responsibly on the birth of one’s own children means that a person is free to decide whether to have children, when and how many. The following rights that stem from this freedom are the right to discover and treat reduced fertility or infertility, the right to prevent conception and the right to artificial abortion for women. The Constitution also specifies in the Article 14 that in Slovenia everyone is guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance. All are equal before the law.\textsuperscript{153}

\textsuperscript{152} The conditions for extramarital union are given in the definition: longer period, a man and a woman, no reasons suggesting the invalidity of a marriage. Therefore, under marriage regulations, extramarital union is equal to marriage as concerns the rights and obligations of partners

The law is restrictive; certain provisions even prevent its implementations. Among other things it stipulates that fertilization with simultaneous use of donated male and female gametes is not allowed. This provision prevents access to BMAPPs to such couples where both partners are infertile. In this case, male and female gametes are selected from gamete bank and are used either for fertilization outside the woman’s body (IVF) or inside the body (intrauterine insemination - IUI). The Slovenian legislator wants to ensure that the procedure of assisted reproduction guarantees that the child is a genetic offspring of at least one of the individuals of the couple that is being treated (Mickovik and Kochkovska 2013 p. 11).

The law also introduces a mandatory permission of the State Commission for BMAP for each individual donor process. Such an arrangement means that the Commission should meet for each individual donor case and approve it (or not). Another restrictive provision stipulates that the medical doctor shall verify whether the donor is still alive before transferring donor gametes or embryo in the woman’s body. In the case of donor gametes from abroad it is almost impossible to verify if the donor is alive in that moment. With this provision the import of donor gametes is practically blocked.

AN ATTEMPT TO CHANGE THE LAW

In the fall of 2000 a group of MPs and members of the political party LDS filed the amendments to the law on infertility treatment and bio-medically assisted procreation procedures which was discussed in the national assembly in the spring of 2001. So women’s rights have again become the subject of debates among party members as well as the public. Although the changes touched a smattering of citizens discussions have been tumultuous. Proposed amendments to the law were considered at 5th session of the national assembly, 18 and 19 April. Supporters of the amendments have insisted on the right to equal treatment of all women. MP of political party ZLSD explained that it’s peculiar fake ignorance denying single fertile women the right to assisted fertilization since married fertile woman who only solves the infertility of her partner is hundred percent guaranteed. ‘Where is here the respected autonomy and equality of women? If the woman is single, she does not have these rights. As soon as the man steps in the picture, she has these rights guaranteed.’ (www.dz-rs.si, 5th session, 18.04.2001)

At the time of the adoption of the Law on infertility treatment and bio-medically assisted procreation procedures and his attempt to change which ended with the referendum, two political currents were formed. Each tried to assert its position with more or less ideological and cogent arguments. According to the points of view and arguments two models were formed:

• The (neo)conservative model which covers some of the Roman Catholic Church views

This model defends the concept of a traditional nuclear family. NRTs are allowed only in treating the opposite-sex couple and if they don’t break biological family ties. It stands for

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154 As in natural way conception by a dead person is not possible, (conscious) posthumous use of gametes is not allowed (Zupančič et al. 2000 p. 496). It is forbidden to conduct BMAP procedures with gametes or with early embryos in the woman's body when the donor is no longer alive. Before inserting the gametes of the donor or the early embryo that was created with the help of donated gametes, the doctor must determine whether the donor is still alive. See: Article 28 of Law on Infertility Treatment and Bio-Medically Assisted Procreation Procedures, Official Gazette of the Republic of Slovenia, n. 70/00
health and benefits of the future child, who is in the centre. It relies on tradition and natural order of family ties.

- Conditionally liberal model

This model supports the plurality of family forms, equality before the law and does not interfere in the intimate and private sphere of life. It requires strict control over the NRTs and defends human rights. It stands in favour of the ‘liberated’ modern woman.

Political parties of the opposition presented the arguments of (neo)conservative model. These parties were SDS (Slovenian Democratic Party), NSi (New Slovenia – Cristian People’s Party), SNS (Slovenian National Party), and SMS (Youth Party). Political party SLS-SKD (Slovenian People’s Party-Slovenian Christian Democrats) was a member of the coalition in power but has also opposed the amendments of the law. The coalition in power that presented the arguments of conditionally liberal model was composed of parties LDS (Liberal Democracy of Slovenia), ZLSD (United List of Social Democrats), and DeSUS (Democratic Party of Pensioners of Slovenia).

It turned out that both political factions used the same stereotypes and similar ideological restrictions in the parliamentary debate as well as in public debate. On the question of whether by the new amending act also homosexual women could get assisted fertilization, MP of party LDS responded in an interview that the State Commission for BMAP will also check this. He added that the mechanisms of control will probably deny BMAP procedures to homosexual women (Newspaper Večer, 9.5.2001, p. 5). Another example is the statement of the Minister of health, who responded to the idea that the amending act will destroy the healthy family in our society. He explained that the family will continue because heterosexual relationships continue, and love and so on. ‘Amendments do not speak about family; they speak about the minority who did not create a family’ (Party LDS, 7th session, 3.5.2001). With these words the minister defined family as a union with heterosexual relations.

ARGUMENTS AGAINST CHANGING THE LAW

Arguments of the opponents of the amendments have many times crossed the limits of tolerance. Single women and women without a male partner are to be inadequate to be mothers, stupid because they do not know how to find a man, and exploitative since assisted fertilization of even healthy women would cost the State budget. Other statements of certain MPs were discriminatory against people who do not fit in the frame of traditional social norms. They include arguments regarding different types of families and lifestyles. The concept of ‘complete, healthy family’ was being repeated together with the fear that adopted amendments could have in the future in changing other laws concerning childcare and family. In some ways, with its ideological arguments they were trying to retain the legitimised discrimination by gender, sexuality and lifestyle.

155 Adoption of children by same-sex couples
‘I believe that each individual has to carry at least as much responsibility with a selection of lifestyle to accept all consequences that the chosen way of life brings. Life with a same-sex partner or a single life doesn’t bring offspring.’ (MP, Party SMS, 5th session, 18. 4. 2001)

‘This amending law is the first step towards the recognition of adoption rights to homosexual partners. This is not the European norm. The European norm is a healthy family. In the Slovenian National Party we believe in a child conceived by a woman and a man. /…/ And what is more, a child is not a psychiatrist, therefore the frustrated specimens should not take a ‘child a la carte’ as their therapy.’ (MP, Party SNS, 5th session, 18.4.2001)

Opponents of amendments defined family as a heterosexual couple with children. This model of family, marital- or extramarital union, should represent the ideal form to raise a child and consequently the whole society. In other cases a child would only represent an object. The ‘imperfect’ family was defined as single parent family.

‘I think that for the healthy development of our society we cannot continue with the abandonment of the family as the basic cell of society, we learned at school in the old days. It is important for our nation and country to support the family, whether the partners are married or not.’ (MP, Party NSi, 5th session, 18. 4. 2001)

‘It is a fact that we have a growing number of single parent families. However, I ask myself the question, why should a country with its own laws contribute to the growth of incomplete, imperfect single parent families. /…/ a child becomes an instrument to achieve a particular goal. It becomes an object, either used for the treatment of personal trauma or any kind of aversions.’ (MP, Party NSi, 5th session, 18. 4. 2001)

The concept of the nuclear, heterosexual and patriarchal family reflects such an order of gender and sexual roles that allows new centres of power, which promote the ideology of national identity and the nation State, to coincide clearly and without disturbance (Velikonja 1999 p. 149).

MPs against the amendments defended the rights of a child. Their statement included the child’s right to both parents and the legal equality of all children. They mentioned the United Nations Convention of the Rights of the Child.156 They went so far to put the rights of an unborn or even unconceived (imagination of a child) child before the rights of an adult women regarding the right of one’s own body. In Slovenia the right to one’s own body is before the right of a foetus, since abortion is legal. Nevertheless, we must know that the discourse was about the rights of children that do not exist, and they did not want them to exist. But single women do exist and demand the same rights as women in opposite-sex relationships. In a democratic society all women should have the same rights.

Another argument of the opponents was that single women and consequently single parents have lower economical standard than men.

156 Convention of the Rights of the Child, 2.9.1990
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‘If we’re speaking about complete and perfect family with a mother and a father, then it’s clear that the economic position is twice better. If the father is missing is 50% worse’ (MP, Party NSi, 5th session, 19. 4. 2001).

The importation of gametes was considered as controversial mainly due to the racial connotations. Many, whether MP or a medical doctor did not avoid such and similar comments:

‘It was said that the donors will be mostly from abroad. Here it can come to some exotics; we will have Asians and Blacks. What about the condemnation of the environment where this child will be born, and the frustration when it will find out how it was conceived?’ (MP, Party SLS-SKD, 5th session, 19. 4. 2001)

Although the opposition was strongly against the amendments to the law, the amending act on infertility treatment and bio-medically assisted procreation procedures has been fully adopted in the 5th session on April 19, 2001.

REFERENDUM

Against the amending act were members of Faculty of theology in Ljubljana and a student launched a campaign for the referendum. All the opposite political parties (SDS, Nsi, SNS, SMS in SLS-SKD) joined him and filed a request for referendum. The day of its realization was June 17, 2001. Only a small amount of voters participated that day (35, 66%) and 72, 36% of them were against the amending act.157

The amending act was thus rejected. Since then the legalised discrimination from the law on infertility treatment and bio-medically assisted procreation procedures is no longer a political question. Such discriminatory legislative provision is slowly but efficiently becoming self-evident and legitimate (Mencin Čeplak 2005 p. 121). At first glance it may seem that the referendum question was just about single women, but the impression is wrong. It was about Article 55 of the Constitution, it was about the right of choice.

THE CONSTRUCTION OF SINGLE WOMAN GENDER

At the time of the adoption of the amending act on infertility treatment and bio-medically assisted procreation procedures a single woman gender has been constructed. Every culture has different ways of doing gender, different norms of masculinity and femininity. Gender roles that are associated with the traditional family do not collide only with public ideals of equal rights and resources, but also with the liberal understanding of the conditions and the values of the private life (Kymlicka 2005 p. 559). In the background of political and public scene there was always heteronormativity; like in the example of how to measure infertility. Speaking about how to define whether the woman is fertile or not, medical science proposed the method of sexual intercourse. Sexual intercourse is a form of social relationship and it is still believed that sexual needs are fulfilled in a heterosexual relation. By the Law on infertility treatment and BMAPPs every woman

157 The official reports on the outcome of referendum on the amending act on infertility treatment and bio-medically assisted procreation procedures (www.uradni-list.si)
has a right to infertility treatment but how can we define infertility among single women? It is assumed that a single woman does not have sexual intercourses; therefore her infertility is not possible to determine (Keržan 2004 p. 51). Of course single woman can have regular sexual intercourses, hetero- or homosexual, but, and here is the heart of the matter, it comes to sexual relations which do not fall into the category of acceptable sexuality (ibidem, p. 52).

The single woman in our discourse is struggling with respectability. One of the highlights of the creation of identity markers presents the development of European nationalisms from the 18th century on (Velikonja 1999 p. 137). The essential role there were taken by the social rules of decency\(^\text{158}\), which nowadays are considered as self-evidence, moral norms, criteria of decency and conventional standards of behaviour. The ideal of femininity was constructed reinforced with symbols of nation (ibidem). We can interpret that the woman is responsible for the survival of her nation. But only the decent, respected one corresponding to the social norms because she is also responsible for the preservation of the national social decency. The fact, that only women in a relationship with men are entitled to BMAP procedures is a national norm, is the interest of the nation State.

Discourse analysis of single women has shown that being single as a social status is stigmatized. The arguments of MPs presented single women as sick because they successfully run their own life; and they should be needed psychiatric help because they choose to have a child instead of a man. Single status of women is seen as a result that they have not found someone yet to integrate them in the relation to build a family on.

Modern “partially” emancipated woman in Slovenian society can today only be disciplined through the reproductive technologies. This could be one reason why debates about the rights of single women to BMAPPs were so tumultuous. As women are getting freer they take up new roles and also men roles change. Today a male who aspires to be a man does not need to protect, procreate and provide.\(^\text{159}\) Male social roles are no longer exclusively male and nor are female social roles. It means we are getting more and more equal also in practice.

DISCUSSION

So what is about single women? Why they cannot have the same rights as women in a relationship in Slovenia? This is a political question. The heated debate was about the rights of single women, the rights of a child, the decay of traditional family, medical technologies, and ethics and so on. Politicians with their symbolic and real power define the conditions of our existence and functioning in society. They write the laws and thus indirectly determine how we live. Political parties were with their own views on reproductive technologies and who has the right to benefit from them shaping the referendum decisions of voters.

Politics is a field where social reality is being created. Citizens are pushed into imaginary framework of acceptability and tolerability. Single Slovenian women are not allowed to BMAPPs in Slovenia but they can find this help abroad. Such limitation is a product of traditional ideology that makes woman clear where she belongs. Discourse about single woman in political and public space was actually about discussing the femininity. What

\(^{158}\) See also George L. Mosse, Nationalism and sexuality

\(^{159}\) Three common imperatives of a man by anthropologist David D. Gilmore
kind of limits should be drawn by femininity in the contemporary Slovenian space? I think that human reproduction is one of such areas through which women can be controlled, dominated and disciplined. The Law that takes away women’s rights to assisted fertilization procedures is patriarchal because it maintains women’s dependence. It is an ideological construct.

References


GENDER AND “THE LAW”


PART VI: AFFECT AND LAW

PART VI
AFFECT AND LAW

Gender Equality and the Freedom to Practise Religion: Sharia Law in Australia, Canada and the United Kingdom / AMIRA AFTAB

Abstract
The Sharia Law debate provides an exemplar of contemporary manifestations of the multiculturalism-feminism debate, and related questions surrounding the role of law and possibility of legal pluralism in providing for religious freedom and gender equality. The potential scope of Sharia Law in Western liberal democracies is illustrated by the Canadian example, when, in 2003 Canadian Islamic groups requested the establishment of Islamic tribunals under the provisions of Ontario’s 1991 Arbitration Act. Key arguments raised by women’s groups in the debate concerned the use of the law by religious groups to establish and operate tribunals that essentially reinforce patriarchal models of family and control. Although no such tribunals have operated in Australia, the fundamental associated questions about the role of the state in providing for religious freedoms are relevant to the Australian multicultural society. Particularly, in understanding the affect that accommodating religious groups under the law would have in terms of allowing dominant members of such groups to exercise power and hegemony over vulnerable members, such as women. Compared to both Canada and the United Kingdom (UK), the Sharia Law debate in Australia is undeveloped. In this paper I outline the multiculturalism-feminism debate and related question surrounding the possibility of legal pluralism. I will then present the Sharia Law debate in the Australian context, specifically in relation to the area of family law; contrasting it to the experience in Canada and the UK, in order to explore and illustrate the multiculturalism-feminism debate that underlies the conflict between religious freedoms and gender equality.

Keywords: Gender, Sharia Law, Family Law, Multiculturalism, Feminism

Multiculturalism-Feminism Debate
The multiculturalism-feminism debate is complex and often employed in the study of identity politics, as well as studies of nation-states and other institutions of political science and legal pluralism. It can inform understandings of whether the practise of religion should be regulated by states in order to ensure gender equality, and what instruments (if any) would be appropriate in any such regulation.

Multiculturalists, such as Will Kymlicka, have significantly shaped the multiculturalism-feminism debate. Kymlicka argues that individual rights are not adequate in protecting minority cultures, and that states should grant special group rights to members of these cultures in order to better protect their individual rights (Kymlicka 1995 p.10). Like Kymlicka, Charles Taylor offers a view of multiculturalism in terms of potential marginalisation of minority groups, but in the context of the politics of recognition. For Taylor, the modern notion of identity is grounded heavily on the ideal of recognition; which
as a result has given rise to a politics of difference – whereby everyone should be recognised for his or her unique identity (Taylor 1994 p.38). Taylor asserts that there needs to be a move away from the politics of equal dignity and its “difference-blind approach” as it ultimately reflects one hegemonic culture, forcing minority cultural groups to adopt an “alien form” (Taylor 1994 p.43). Ultimately, multiculturalists, such as Kymlicka and Taylor, believe that it is necessary to recognise the equal value of different cultures, and to provide them with sufficient protection in order to allow them to survive and recognise their inherent social value.

Such theories are strongly opposed by feminists, such as Susan Okin, and this opposition provides the contours of the multiculturalism-feminism debate. The feminist argument, as presented by Okin, essentially states that accommodation of minority groups’ cultural rights under multicultural policies leads to oppression of vulnerable individuals (particularly women) within minority cultures, because the practices and traditions of many minority cultures tend to marginalise women (Okin 1999 p.10). For Okin, multiculturalism is difficult to define, but the specific element of concern for feminists should be the claim by Kymlicka that minority cultures and their ways of life are not sufficiently protected within liberal democratic regimes (Okin 1999 p.11). Multiculturalists, like Kymlicka, acknowledge that there are cultural groups that may be deeply illiberal, oppressing members of the group through depriving them of their individual rights (Kymlicka 1995 p.73). As such the proposition offered by Kymlicka in justifying the multiculturalist position is that special group rights only be granted to groups that are internally liberal. This is where dominant members of a group do not place any internal restrictions (which may violate basic liberties) on other members under the pretext of “preserving culture” (Kymlicka 1995 p. 73). Despite this justification in support of multiculturalism, the feminist position, maintains that feminism and multiculturalism cannot be easily reconciled. For Okin, most cultures hold largely illiberal attitudes towards gender and power, as they are riddled with practices and ideas that unfairly prejudice women and perpetuate gender inequalities (Okin 1999 p.12).

One of the primary arguments put forth by feminists in opposing multiculturalism is articulated in Okin’s observation that male members of most minority cultural and religious groups are typically in positions of power to determine the beliefs and practises of the group (Okin 1999 p.12). Essentially, there is a strong belief that culture ultimately facilitates and reinforces the control of women by men. This is founded in the claim that many of the world’s traditions and cultures are distinctly patriarchal in nature, but that particularly in cultures outside of the West there are practices that are more oppressive – making it impossible for women to live independently and freely (Okin 1999 p.14). As such, accommodating minority groups by granting special rights gives rise to the possibility of the leaders within these groups taking advantage of State laws, that may provide such accommodation, and using it for the purposes of reinforcing their power and gender discrimination.

There are, however, some feminist scholars who disagree with Okin's claims - particularly in relation to whether multiculturalism and feminism can co-exist. Martha Nussbaum, for example, believes that Okin's arguments are too simplistic. Nussbaum, in focusing on religion, favours an approach which provides religious traditions with special deference (as she views minority religions as being particularly vulnerable). Whilst Nussbaum does agree with Okin's support for gender equality, she instead proposes that a solution be found which balances the interests of religious and non-religious citizens, and by doing so believes the State through providing greater religious freedom and accommodation could better protect women (Nussbaum 1999 p.114). The foundation of this argument is Nussbaum's belief, which is supported by other scholars like Azizah Al-Hibri, that religion and culture are
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central to the identity of women, and thus you cannot simply take it away (Nussbaum 1999 p.114; Al-Hibri 1999 p.44). Essentially the retraction of religious freedoms affects both the men that dominate the religion, as well as the women who prescribe to its teachings.

Based on the arguments raised by the multiculturalism-feminism debate it becomes clear that the area of private law and family law (namely marriage, divorce, child custody and inheritance) are of particular importance to women. Okin notes that the defence of "cultural practices" is likely to have a much greater impact on the lives of women and girls than of men and boys. This is based on the belief that far more of women's time and energy traditionally goes into preserving and maintaining the personal, familial and reproductive side of life (Okin 1999 p.13). It is for this reason, that family law is important and not only disputed by feminists and multiculturalists, but also a focus of great dispute between feminists and conservatives in the broader context of contemporary law and politics. Ultimately, there is a fear that by accommodating cultural and religious groups under family law, would lead to dominant members of minority cultural and religious groups (who are typically men) taking advantage of such laws in order to exercise their power and control over women and other vulnerable group members.

Legal Pluralism – Can Sharia Law be accommodated?

The request for recognition of cultural and religious laws alongside an existing secular legal system also raises the issue of legal pluralism. The multiculturalism-feminism debate addresses whether the State should accommodate minority groups, including religious laws. However, in the context of legal pluralism, the other question that arises - particularly in relation to the discussion of Sharia Law in Australia, Canada or the UK - is whether the State can actually accommodate other "laws", and provide for greater religious freedom.

Both Canada and the UK provide examples of legal pluralism, with religious laws being accommodated through religious arbitration, under the respective Arbitration Acts in each jurisdiction. In Ontario Canada, up until 2005, religious groups were able to carry out religious arbitration under the guidelines of the State’s Arbitration Act 1991. The Act essentially allowed people to authorise a third party to resolve civil disputes within a legal framework of their own choosing (Arbitration Act S.O. 1991 c.17). For decades, Christian and Jewish religious groups had been practicing religious arbitration under these provisions, even establishing religious arbitration tribunals for such purposes (Bakht 2004 p.1).

Similarly, in the UK, informal Sharia councils have been in operation for many years. In fact, in 2009, it was estimated that there were at least 85 unofficial Sharia courts operating around the UK (MacEoin & Green 2009 p.69). Most notably, in 2007 there was the establishment of the Muslim Arbitration Tribunal (MAT), which claims jurisdiction as a mechanism for alternative dispute resolution, provided for by the UK’s Arbitration Act 1996. As such, the UK provides a greater example of legal pluralism and the accommodation of Sharia Law through the establishment of and maintenance of religious arbitration tribunals.

The prospect of legal pluralism in Australian family law is in theory, possible. This stems from the fact that Australian family law is relatively accommodating, and allows a great amount of flexibility in the arrangements that people may make under it (Parashar 2012 p.565). For instance, Muslims are able to conduct marriage in a way that allows compliance with both Sharia and Australian laws (Black & Sadiq 2011 p.398). Essentially, marriages conducted by marriage celebrants who are ministers of religions that are acknowledged by the
State, will be legally recognised (*Marriage Act 1961* (Cth) s.45). As such, Australian Muslims may go to an Islamic religious leader to be married, and there will be no further requirement to separately register the marriage with the State.

However, actual plurality is denied. Over the years the Australian government has rejected formal legal pluralism, and as a result limits the possibility of adopting personal laws for religious groups. Nonetheless, scholars Malcolm Voyce and Adam Possamai propose that legal pluralism may exist in another sense – one where there are no formal mechanisms per se, but rather alternate legal systems operating through non-formal dispute mechanisms (Voyce & Possamai 2011 p.341). Based on this idea, informal arbitration tribunals, like Sharia councils, could be deemed as “legal” arrangements. Ultimately, legal pluralism is an ideological debate, and the prospect of its introduction into a secular legal system, like Australia, raises questions about whose responsibility it would be to ensure legal arrangements are fair and non-discriminatory for all members of society (and how this could be accomplished) (Parashar 2012 pp. 565 and 569). This leads to questions of how to prevent dominant members of minority groups from adapting any such accommodating State laws, for potential use in their own agendas of reinforcing patriarchal models of family and control.

**The Sharia Law Debate in Australia, Canada and the UK**

The Sharia Law debate in Australia is relatively new compared to the UK, arising predominantly post-9/11. According to Bronwyn Winter, this is due to Australia’s lack of colonial and postcolonial relationships with the Muslim world, as well as the absence of large Muslim minorities (Winter 2009 p.195). By contrast, the debate has been discussed in great depth in both Canada and the UK, particularly in relation to the ideological dispute between feminism and multiculturalism. As such, unlike Canada and the UK, Australia has not had to deal with formal demands for recognition. However, the fundamental questions raised in the Canadian and British Sharia Law debates, are relevant in understanding Australia’s position regarding the role of law, the possibility of legal pluralism and accommodation of Sharia Law, and whether or not the government and legal system should accommodate religious laws.

In Australia, the Sharia Law debate predominantly surrounds the informal requests for recognition of Islamic family law by the State’s legal system. This discussion has been raised on several occasions, mainly by the media and politicians who comment on the viability of such accommodation (Krayem 2014 p.109). Unlike the Muslim communities in the UK and Ontario who put forward formal proposals for the recognition of Islamic family law, the Australian Muslim community has not done so. Instead, Australian Islamic leaders attempt to gain accommodation through existing dispute resolution processes (Krayem 2014 p.110). One possible explanation for the differences between Australia and international jurisdictions is the fact that the family law dispute resolution framework in Australia has a greater focus on mediation as opposed to the arbitration focus in Canada and the UK (Krayem 2014 p.110). Nonetheless, the gender concerns that have been raised in the international contexts are still relevant to Australia, regardless of the mediation focus.

The implications surrounding the accommodation of Sharia law in the legal systems of Canada and the UK rely heavily on multiculturalist and feminist theories. The Sharia Law debate in Canada highlights the gender concerns that usually accompany requests for
recognition of religious laws, particularly Sharia. In 2003, the Islamic Institute of Civil Justice (IICJ) announced their intent to establish an arbitration tribunal that would employ Sharia Law. The provision of Ontario’s Arbitration Act 1991 allowed parties to authorise a third party to resolve civil disputes outside the traditional court system, within a legal framework of their own choosing (such as one based on religion). This decision would be legally binding as long as it did not conflict with Canadian law, and parties could appeal the decision to the courts on these grounds (Korteweg 2006 p.50). Many Jewish and Christian groups had long-established arbitration boards settling disputes based on their respective religious laws (Korteweg 2006 p.50; Bakht 2004 p.2). However, the proposal by IICJ sparked a public debate surrounding Sharia Law, which culminated in the introduction of amendments to the Arbitration Act in February 2006 (Family Statute Law Amendment Act S.O 2006 c.1).

Many groups, including devout and secular Muslim women, successfully lobbied the government to prevent the establishment and accommodation of Sharia tribunals under the arbitration legislation. The predominant concern was the potential impact an arbitration regime employing Sharia Law may have on Muslim women. As many of the civil disputes would concern marriage, divorce and inheritance, there was a concern that “regressive interpretations” of Sharia may be used, which would ultimately affect and limit the individual rights of the women involved in such arbitration cases (Bakht 2004 p.18). There was a concern that with no real mechanism for overseeing and managing the arbitration procedures of such tribunals, there would be no way to ensure that it was being conducted in a way that was in line with Canadian Law (Korteweg 2006 p.50). Essentially there was a fear that the Islamic religious leaders, who are typically men, would “bully” the women involved in arbitration, resulting in unfair outcomes that merely reinforce patriarchal models of community and family.

The Sharia Law discussion in Britain is very similar to Canada, however unlike Ontario - which amended its arbitration legislation - there are now Sharia Tribunals operating under the UK’s Arbitration Act of 1996. This Act allows “alternative dispute resolution” and it is under this provision that the MAT established in 2007 claims to have legal jurisdiction (Arbitration Act (UK) 1996 c 23). The MAT provides an alternative for individuals in the Muslim community to resolve disputes under Islamic Law (Muslim Arbitration Tribunal 2008). The Tribunal operates within the legal framework of England and Wales, which means that decisions reached by MAT are legally recognised and can be enforced via the court system if need be (Muslim Arbitration Tribunal). Such religious arbitration tribunals deal with civil personal law matters, such as divorce (in the religious sense) and inheritance. More recently, the Sharia Law debate has erupted again in the UK, with The Law Society of England and Wales releasing a practice note for its members to guide them in drawing up Sharia compliant wills. The wills, which would be in accordance with British Law, would essentially accommodate Sharia inheritance principles (The Law Society 2012). The particular concern is that inheritance under Sharia Law refuses women equal shares, and excludes non-Muslims from receiving any inheritance altogether (Mohammedi 2012-2013 pp.265 and 268).

There are many arguments made in favour of such religious tribunals, like the MAT, and the benefit of introducing something similar in the Australian context. One such argument is that it provides a means of ensuring the enforceability of religious marriage contracts (which are similar to secular pre-nuptial agreements), as, in Australia at least, they are
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currently informal and not enforceable by law (Krayem 2014 p.154). Similarly, it has been argued that religious arbitration can provide greater personal autonomy for Muslim women. This is the idea that religious arbitration could provide a mechanism through which religious individuals can organise their lives in accordance with their religious principles and beliefs (Ahmed & Luk 2012 p.433). As Anne Korteweg argues, a woman can potentially find and exercise agency through being able to actively follow religious principles (Korteweg 2008 pp.447-448). Australian scholar Ghena Krayem puts forth a similar argument, noting that it may provide opportunities for better protection of Muslim women’s rights, through allowing them to turn to both the Australian legal framework and Islamic principles in seeking the enforcement of their rights (Krayem 2014 p.161). Based on this idea, accommodating religious laws under Australian legislation could be seen as a means to help women overcome patriarchal dominance within their communities and families; and be used in an empowering way, to exercise their individual rights and freedoms.

Another common argument made in favour of accommodating religious laws and allowing religious arbitration tribunals, is that Islam is wrongly stereotyped as being oppressive towards women and denying them basic human rights (Krayem 2010 p.4). What is not taken into account is that ethnic and cultural backgrounds influence the practices of various Muslim groups, and as a result it is actually culture that perpetuates gender inequalities not Islam (Ali 2011 pp. 362 and 368). However, even if religion is not the driving force behind the oppressive group practices, the fact that culture can and does influence Sharia Law practices and interpretations, provides a dangerous possibility that dominant members of the group may take advantage of religious accommodations by the State, in order to exert their hegemony over women and reinforce these culturally based patriarchal structures.

Similarly, whilst it could be argued that accommodating Sharia Law (or any religious law for that matter) may provide women and other vulnerable minority group members with greater personal autonomy, the alternative is that it may actually prove to be a limitation. For instance, group pressures within religious communities may lead to women feeling a pressure to conform. Where there is an idea within the religious community or group on how a woman is expected to behave, there is a chance that women are actually not making autonomous decisions (Ahmed 2010 p.227). There may be pressure from family members and religious leaders, in addition to a lack of access to resources and information. Shakira Hussein has explored this idea of autonomy within the Australian context. She presents a detailed discussion of whether Muslim women following Sharia Law actually exercise “choice”. The “choice” versus “force” binary appears when women are negotiating issues, whether it is a matter of family law (i.e. divorce) or religious dress codes. Muslim women get caught in a negotiation of sorts, often on unequal terms with the men who dominate the religion (Hussein 2007 p.7). Ayelet Shachar presents a similar argument in the Canadian context, proposing that the “choice” given to women in choosing religious arbitration over secular remedies is not free choice, as there are questions of loyalty arising out of their membership in religious groups and communities (Shachar 2005 p.64). It is in this way that dominant members within the religious community would be able to employ legal norms to control women through “forcing” them to conform to certain ideas and expectations, under the guise of “free choice” and personal autonomy.
The actual experiences of Muslim women in dealing with the Sharia council and tribunals in the UK provides examples of the gender inequalities being perpetuated. Religious arbitration in the UK encourages women to first reconcile with her husband and try to make the marriage work, before a Muslim divorce may be further considered and granted (Bano 2008 p.301). This raises a host of issues, namely placing women in a vulnerable position, particularly where their husbands may be physically or emotionally abusive (Bano 2008 p.301; Ali 2013 p.172). Sharia councils were established to provide women a safe space to seek help, so that they would not have to address “strange” men in the secular legal system regarding personal matters; however, the irony is that Sharia councils and tribunals are more often than not male dominated, consisting of men who are “strangers” to the appealing women (Ali 2013 p.173). These religious arbitrations are typically instilled with conservative views of women in Islam - specifically traditional expectations regarding their roles as mothers, wives and daughters (Bano 2008 p.302). Women during the reconciliatory process are typically encouraged to be more understanding of their husbands, as they are supposed to be the “nurturers” within the Islamic family model, and thus should be more flexible in compromising (Bano 2008 p.302).

By participating in religious arbitration processes, particularly going along with a reconciliatory focus, it is argued that women are allowing the reproduction of unofficial legal norms and values within this “privatised space of religious arbitration” (Bano 2008 p.300). Ultimately, allowing the men dominating such private spaces to reinforce patriarchal ideals and exert their power over the group, but especially over vulnerable women. Such concerns have led to the establishment of various groups in the UK, much like those involved in the Canadian Sharia debate, who monitor and lobby against the implementation of Sharia. Most recently, avid supporters of protecting Muslim women’s individual rights launched Sharia Watch UK. Sharia Watch UK reiterates the concern that Sharia Councils treat Muslim women unfairly in divorce arbitrations as well as the settlement of inheritance disputes (Sharia Watch UK 2014). By states accommodating religious laws, in ways that the UK has with MAT, the overarching concern is that it may allow men within these communities to use legal norms in order to establish their own system of family law dispute resolution; ultimately perpetuating gender inequalities and oppressive practices. A concern that is currently echoed by Australian politicians and media commentators whenever the question of Sharia Law accommodation is raised.

Conclusion

In conclusion, Australia can learn much from the British and Canadian experiences with Sharia Law. Ultimately, the Sharia Law debate in Canada and the UK provides examples of legal pluralism. Specifically, that it is possible, but raises questions about the role of law and whether providing greater religious freedom is bad for women, and thus whether the law should promote gender equality instead. There are various benefits to accommodating religious laws, such as empowering religious women with an alternative family law dispute resolution system that allows them to better adhere to their religious obligations. However, there is the underlying possibility that the dominant members of these religious groups (typically men) may employ state laws, which provide accommodation of religious freedoms, for their own purposes. Namely, exercising power over vulnerable group members
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(specifically women), in order to reinforce patriarchal models of control and dominance. These arguments echo the fundamental concerns that were raised in the multiculturalism-feminism debate.

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New Perspectives on Gender in Shari‘a-based Family Law Studies: Moving Beyond Women’s Rights / ZAINAB ALWANI

Abstract

With so much focus on Muslim women’s rights and gender studies in the academy over the last few decades, a greater awareness of Shari‘a-based family laws has developed especially in the West. The study aims to foster critical and collaborative conversations by drawing on intellectual debates on these subjects over the past two decades.

The first part will review the principle of equality between the sexes from a Qur’anic perspective. Teachings based on Islamic sources (Qur’an and Sunna) will also highlight specific gender roles in Shari‘a-based family law. Since there is no class or ethnic discrimination in Islam, a Qur’anic model will be outlined to show how the Qur’an acknowledges zawjiyya (pairing) as the widely used Qur’anic expression to describe the male-female relationship. To define how men and women have an equivalent impact on social and family relations, the Qur’anic model will also examine the concept of gender equality. The paper will outline the foundation of gender relations as wilayah (protectors of each other), and define the relationship between men and women as partners (awliya’) in establishing a healthy family and society.

The second part of this study will focus on the distinction between Islamic sources and Muslim cultures (urf) which have developed over the centuries. Culture and religion may interact in many ways, leading to a wide range of responses in Muslim families and societies. Islamic legislation is based on interpretations of the sources in different contexts with specific local traditions (urf) constraining the moral norms of society by having an influence on the legislation. Today local moral customs (urf) differ both from those of ancient Arab society and from one society to another, and this creates tension between what is legal and what is moral. Although some of the traditions and institutions were not consistent with the divine Qur’anic value system, they persisted over the centuries until they became so enmeshed with Islamic history that many people, even Muslims, believed they were part of the Qur’an and Sunna. This section will address whether these cultural systems infiltrated Islamic law. The paper will conclude by discussing promising and failed cultural strategies, and exploring the role of sharia on gender justice, family stability and societal development.

Keywords: Women’s Rights, Gender Justice, Family Law, The Qur’an and Sunna, ‘Urf

Introduction:

Over the last century and specifically in the last three decades, stories of forced marriages, domestic violence justified under the guise of shari‘a law and female genital mutilation perpetuated by purported religious figures continue to make the headlines and challenge Muslims over the globe. This triggered discussions on the concept of “gender culture,” raised questions about whether class, ethnicity and sexuality had a role in legal matters in shari‘a based family law. Does Islam place one gender above another? What is the male-female relation in Islam? Does the Qur’ân really condone domestic violence? Are pious women to be equated with submissive wives? And beyond issues strictly associated with Islamic texts, what do Islamic teachings have to offer women in terms of her role in society at large? In this context, this paper calls attention to the value of bringing forth insights from contemporary scholarship on Islamic epistemology to bear on shari‘a-based family law studies. More specifically, I argue that both religious and academic scholars in the field of
gender and family law need to discuss ways of integrating ethical principles derived from religious epistemology into practical mechanisms for law and social organization.

The main issues of concern to women scholars pertain to the normative authority of religious law, debating the appropriate methodology with which to approach the original sources of Islamic knowledge as they may be found in the Qurʾān and the traditions of the Prophet and the formative community as well as in the more general intellectual and juridical sources of the Islamic legacy in order to recapture a lost momentum and induce recovery and renewal. Muslim women scholars have mobilized rhetorical force around gender justice, sexual ethics, legal reform, and the critique of Western publics seeking to reduce Islam to a penal definition of Shariʿa law.i Here I ask: What resources are contemporary Muslim scholars and theologians generating concerning classical Islamic thought and jurisprudence? How are contemporary Muslim women intellectuals navigating arguable misogynistic tendencies of their heritages in order to affirm social opportunity for women and other socially marginalized? In this chapter, I demonstrate that women scholars can find a methodological precedent for reading the hadith, the secondary source of Islamic law, in a way that challenges misogynistic interpretations and affirms the higher objectives of the Quran’s message. This methodological precedent exists in the istidrakat commentaries of ‘Āʾisha, the daughter of Abū Bakr Abdullah bin Abī Quḥāfah (d.678/57).

While Islamic law has been historically characterized by pluralism, flexibility and change, today, we see a rather static application of Islamic family law in many countries where it is still applied. I argue that over three decades, Muslim scholars and legal experts residing in America and elsewhere have been engaged in a concerted effort to employ frameworks and principles to formulate religious rulings appropriate to the American sociopolitical and cultural milieu. These religious minorities, engaged in developing jurisprudence for minorities (fiqh al-aqalliyyāt) have generated a rich intellectual discourse on how religious laws can both reinforce civic belonging and adapt to meet the practical needs of Muslim-minority populations. Muslim scholars and legal jurists must begin to measure existing laws against both al-maqāṣid al-Qurʾāniyya and the maqāṣid al-sharīʿa (objectives of the law) in order to more fully realize the intent of the law.ii

The theory of al-Maqāṣid al-Qurʾāniyya, the objectives of the Quran, was developed by Taha Jabir al-Alwani (b. 1935) to indicate that it is based on applying the following three higher Qur’anic-rooted values: tawḥīd (believing in and affirming God’s oneness), tazkiya (purification of humanity and society from evil), and ’umrān (building a value-based civilization).iii Al-Maqāṣid al-Qurʾāniyya are further defined through an examination of the conceptual reading of the Qurʾān and the “combined two readings,” namely, the “Book of Allah,” in which the world of the unseen is unfolded and religious issues are clarified, and the “Book of Creation” (the natural universe) in which the laws of nature are established.iv Al-Alwani’s methodology is not a rejection of the traditional Maqāṣid al-Sharīʿa developed by classical fuqahā’, but rather a complimentary and comprehensive methodology intended to recharge their traditional objectives (e.g., Islam’s universality, the Shariʿa’s sovereign nature, and the finality of the Islamic message) with new meanings that are inclusive regardless of an individual’s particular religion or ideology.v

I demonstrate below how the historical integration of ‘urf and maʿrūf into the development of the law allows for “the common good” and cultural norms to play a role in deriving legal rulings, especially where these norms are consistent with the higher objectives of shariʿa. Scholars must revive this methodological principle of integrating the common good, as well as employing insights from other academic fields, into the development of laws that can more fully realize justice for all, which is one of the objectives of shariʿa. At the same
time, where ‘urf is allowed to reign without limit, it can significantly stifle women’s rights, as has been the case in inheritance laws in many parts of the Muslim world, as I demonstrate below. There is a need to study the sunna of Prophet Muhammad as a methodology in applying the Quranic teachings in changing the attitudes towards, and treatment of, women at his time. He was able to transform the status of women in a very short time from being oppressed to being equal partners to men. This is well demonstrated in the story of Khawla bint Thalabah, al-mujadilah “the woman who disputes.” She complained to the Prophet regarding the pagan ‘urf of Dhihar. God confirmed Khawla’s conviction that what had been done to her was unjust and was henceforth to be prohibited by law and soon was abolished.

Epistemological Foundations of Islamic Ethics

There is a strong conviction among religiously committed Muslims that the Qur’ān reveals universal moral law (sharī’a), which when upheld secures individual and communal well-being. Sharī’a is linguistically derived from the Arabic root word meaning “road or pathway,” or “the road leading to God.” shari’a is “Divine Law,” and, in a sense, it is the concrete embodiment of “Divine Will” according to which human beings should live in both their private and public lives. Chapra argues that the maqāsid objectives of the sharī’a is to enable human falāḥ (well-being) and hayāt tayyiba (the good life for all). This set of beliefs maintains balance and stability in all aspects of life because in Islam there is no division between the sacred and the profane. It is important to differentiate between Sharī’a and fiqh.

Fiqh is human understanding and the interpretation of Sharī’a, through a rational body of opinion calling on systematic and methodological applications of the intellectual faculties down the generations [ijtihādix]. This provides the material for legality and the site for legitimate change in changing times. Ritual practices, family relations, gender relations, commercial exchange, international relations, and essentially all other categories of human action are potentially situated on a moral-ethical rubric according to the merit of the said action. The intent of the law, therefore, not its substance, provides the ethical basis of the law. Jurists, who are continually engaged in a process of interpreting divine intent, must continually measure the substance of the law against its ultimate objective. When strict adherence to a specific law no longer fulfills its divine objective, then it becomes the responsibility of jurists to engage in ijtihād and legal renewal to ensure the fulfillment of divine intent. In order to achieve this, jurists must not only derive legal rulings from religious texts, but must also be informed by a comprehensive understanding of existential realities by deriving their knowledge from the findings of other related disciplines.

Sharī’a became part of a social contract or covenant between humans and their Creator. The Qur’ānic meaning of Haqq (truth and rights) is a comprehensive concept and it is one of God’s attribute. However, ḥaqq in the fiqhi juristic context means truth and right. It is interesting that the jurists classified it in two categories as God’s right (refer to the people/public) and the individual’s right (private). It emphasizes that every right (ḥaqq) thus has a reciprocal obligation. According to this perception, women, no less than men, bear their burden of responsibility in as much as they share in the human agency which qualifies them for this charge. There is need to filter both normative practices and laws according to the Quran’s ethical paradigm on women as equal partners to men. As the Qur’ān establishes, that men and women are considered Awliya’, partners of each other, in chapter 9, verse 71. In this verse, God makes it clear that men and women both have a mutual societal obligation to enjoin what is right and forbid what is evil.
The Moral Order and Human Agency: Woman's Role

Throughout history down to our own times, the "Woman Question" in general and that of women in Islam in particular continue to be raised and these are among the answers that retain relevance in the Qurʾān. The fact that not only is woman's human status clearly settled there, but that her role as an active autonomous and accountable agent in the human common well-being is maintained. In attempting to reconnect to the Qurʾān on critical gender questions, Muslim women realize that the issue is not to seek available answers, but to establish a viable methodology to respond to the complexities at stake.

The challenge is not to formulate the rules, but to cultivate a knowledge ethos, reconstruct identities that can foster the ability for creative and critical thinking as well as for ethical problem-solving abilities. The methodology for approaching the Qurʾān calls for a matrix of thinking, cognitive map that takes its bearing from the Qurʾānic worldview and provides answers to the challenges facing Muslim societies locally and globally.

I would argue that the works contributed by emerging Muslim female scholars and researchers have challenged and held the double task of standing up to both the old conventions and the new and have called for critical and collaborative conversations. Hence, Muslim women scholar’s strategies include developing different readings of the Qurʾān and authentic sunna, redefining public space, highlighting the areas of misogynistic biases within inherited traditions, distinguishing cultural customs from ethical laws, and forwarding arguments that privilege God’s transcendent natural law (sharīʿah) over the rules of mediaeval jurisprudence. This requires a renegotiation of notions of legality in Muslim society and identifying benchmarks of piecemeal reformist initiatives like personal law and family legislation, the last remaining strongholds of formal Muslim legalism in many modern countries.

1) Conceptualizing Gender through the Qurʾān: Essence and Relevance

Notably, in the early 1990s and specifically within the American academia, Amina Wadud helped to advance a line of analysis which conceptualizes the Quran’s gender paradigm with the first edition of her book Qurʾān and Woman. Azizah al-Hibri, Asma Barlas, and others have also focused on developing hermeneutic strategies for contemporary exegesis. The work of these scholars continues to influence newer generations of women who are building upon this foundation.

There is another voice, not as well known to the American academy, whose insights and unique orientation have enriched the scholarship in this field. Mona Abul-Fadl (d. 2007), a philosopher and political scientist, was among the early pioneers of Muslim female scholars who engaged the tradition and drew our attention to the role of preconceived beliefs and presumptions in our reading of the Qurʾān. She argues that “the readers must let the Qurʾān speak for itself, unmediated through its interpreters, taking the Qurʾānic discursive field, syntax and semantics for its own parameters, momentarily suspending the reader’s prejudices and judgments, attentively open its flow, without any arbitrary attempt to isolate, predetermine, or refine.”

In applying the above methodology, Abul-Fadl’s team of researchers explored the critical question: What is the Qurʾānic worldview on gender? Unexpectedly, the search brought in several surprises. First, it demonstrates that gender, far from being marginal, constitutes a central undercurrent that informs not only civil, legal and social spaces, but that it lies at the very heart of the existential discourse in the Qurʾān. Second, differentiated from
both Islamic jurisprudential (fiqhi) and feminist theories, through the Qurʾān, it is possible to perceive gender as a regenerative harmony in life itself. The Qurʾān suggests a new concept that is more consistent with reality and edifying for humanity.

Interestingly, there was another case given with a fresh reading of the nature-culture divide that is included in the women question. This could be transcendent into a Qurʾānic hermeneutic that “transvalued” nature by giving it a new and independent cultural content, it is the question of sexuality. How does the Qurʾān define sexuality? According to the Qurʾān, male-female relations are clearly defined, only in much purer and more respectful fashion than the word "sexuality". It is described as a connection through life. God is the source of life at its origin, which is transferred through the ruḥ’ (spirit). In the creation of Adam -in line with the Qurʾānic terms- in the creation of the first couple out of the first living entity, the nafs wahida (4:1), the miracle of life was mediated through the ruḥ, the divine Breath. Hence the sexual union between man and wife in intercourse, serves both as though it were the original unitary should and the breath of the Spirit. In essence, a marriage has its own spirit once it's sanctified under the rules of God.

The Qurʾān emphasizes the importance of the community and describes the relationship between the Self and Other where the Other is seen as an extension of the Self and not a severed separate entity. While the Qurʾān does acknowledge the concept of the 'self' in the term nafs, it is closely linked to the term zawj which means 'pair.' Humanity is viewed in the Qurʾān as one family or existing in a state of kinship. In this case, men and women are equal and in their duties and purpose of their creation.

The Qurʾānic concept of zawjiyya (pairing) is the original and widely used expression in the Qurʾān to describe the male-female relationship. Amani Salih explains the concept of zawjiyyah in her article as “Pairing and Impairing: Re-Conceptualizing Gender through the Qurʾān,” and suggests that the meaning is a universal concept:

“Grounding in a universal cosmogony, zawjiya is poised to compass and encompass a dynamic axiology. It declares the meaning of a deep rooted unity and similarity, human equality, interdependence, functional integrity, a fair and balanced system of reciprocities, a right-duty distribution, and a basic social equity between both sexes where merit and due recompense are required and not accredited. With this in view, the Qurʾān unequivocally denies the inevitability of a confrontation between the sexes and dislodges traditional male-bounded authoritarian theories on the gender question.”

The Creator constituted humanity into males and females, established mutual affection between them, and prepared them to find love in each other. The foundation of an Islamic marriage is described in the following verse from the Qurʾān: “And among His signs is this: that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your (hearts). Verily in that are signs for those who reflect” (Qurʾān 30:21). This verse further specifies the purpose of marriage and characterizes the union in which each spouse is responsible for bringing tranquility into the marriage. God describes husband-wife relationship as follows: "They are your libas (garments) and you are their libas (garments)” (Qurʾān 2:187). Linguistically, the term libas means dress, garments, being on intimate terms, apparel, and robes. Within the context of its usage in this verse, the term libas takes on a delicate intimate shade.

Alternately, as “gender” had been introduced into the disciplines in an attempt to extricate sexuality from its exclusive biological determinants and open the field to viewing its social implications, contingent and historical, the Qurʾān point us to meanings and categories
that enrich gender studies and pave the way to charting the field away from its compulsive gene-centricities.

2) Reading the Prophetic Tradition in the Light of the Qurʾān

Religious scholarship in Islam is based on the primary sources, the Qurʾān and the collected sunna of the Prophet Muhammad (peace be upon him). The Qurʾān regards the Prophet as a role model for humanity (e.g. Qurʾān 33:21), and hence, from the perspective of Islamic jurisprudence, the authentic prophetic sunna explains, clarifies, and demonstrates how to implement the teachings of the Qurʾān. As we strive to redefine our academy in the critical consciousness of an age that is past, I suggest that a strong methodology based on the Qurʾān and sunna is one tool in reasserting women’s scholarship and reshaping religious discourse.

I argue that Āʾisha, the daughter of Abū Bakr Ṣaddiq Abū Quḥāfah (d. 678/577)’s methodological contribution is a potential model for how to read ḥadīth in the light of the Qurʾānic message and objectives. Analyses of the critical methodology of Āʾisha are not without precedent, and at least three classical Sunni scholars have previously sought to develop this field of study: Abū Manṣūr Ḥabīb al-Muḥammad bin Ṭūlūn (d. 794/1390), a prominent scholar of hadith and Qurʾānic sciences, composed a commentary on al-Baghḍādī’s examples;xxiv and finally, Jalāl al-Dīn al-Suyūṭī, (d. 910/1505), composed another commentary on this material which had come to be known as istidrākāt Āʾisha, (Āʾisha’s revisions).xxv While few in number, these works confirm what is pointed out by contemporary Muslim feminist authors,xxvi namely that Āʾisha had a clear conception of how to derive understandings from linking the Qurʾān and sunna of the Prophet. Her strategies for laying claim to religious authority and firmly refuting misogyny serve as examples of how women can and should bring their critical perspectives to the constitution of religious knowledge. Āʾisha made the Prophet’s sayings and the Qurʾānic teachings the solid basis from which she launched her dissenting opinions. For instance, Ahmad ibn Ḥanbal (d. 855/241/241) narrated the following in his Musnad:

Two men entered Āʾisha’s house and said: “We heard Abū Hurayra saying that the Prophet used to say, ‘affliction resides in women, donkeys and homes.’” Āʾisha was markedly disturbed by that and said: “I swear by He who revealed the Qurʾān upon Abū-Al-Qāsim [Mohamed] that he did not speak like this. Rather the Prophet of God said, ‘The people used to say during the Jāhiliya [pre-Islamic era] women, animals used for transportation, and homes bring bad omen.’”xxvii She then recited the verse: ‘No calamity befalls on earth or in yourselves but it is inscribed in the Book of Decrees before we bring it into existence. Verily, that is easy for Allah. In order that you may not grieve at the things that you fail to get nor rejoice over that which has been given to you. And Allah likes not prideful boaster’ (Q. 57: 22-23).

In this example, it was clear for Āʾisha that the Qurʾānic worldview denounced superstition (e.g. Q. 27:45-47, 36:18, and 7:131), and therefore, an accurate ḥadīth could not contradict the Qurʾānic worldview. In commenting on this exchange, al-Zarkashī highlights the subsequent wide acceptance of Āʾisha’s reasoning by scholars. As I have argued in particular, Āʾisha’s legacy and strategies for engagement provide inspiration for women

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scholars as they seek to contend with problematic aspects of their religious heritage. The question is what is the next step in developing a methodology of reading the sunna and traditions of the Prophet (PBUH) in the light of the Qurʾān and within its context?

3) Islamic Law: A dynamic model -- Moral, legal and social structure

While Muslims generally agree on the principle of a divinely ordained, ethical-moral code of sharia, centuries of intellectual productivity demonstrate the localized, historically dynamic, and flexible nature of ethical-moral norms.

I argue that a careful analysis of the connection between the Qurʾānic concept of maʾruf “Enjoining what is right, and forbidding what is wrongxxviii” and the immense significance of ‘urf, custom (which in Arabic derived from the same root ‘A R F means to know) shows the active interaction between the metaphysical and legal, socio-cultural understanding of the Divine will. Instead of relying on technical and material dictations of relationships, Islam promotes a social moral conscience that begins and ends with maʾruf.

In this context, maʾruf, a Qurʾānic concept, is an open space for promoting and practicing kindness and goodness in every human relation. This makes rights and responsibilities within the community a space or arena for competing for the betterment of humanity. Therefore, in the context of usul-ul-fiqh, jurisprudential practice, the fuqaha (jurists) considered maʾruf as ‘good’ customs; hence it opens space for the adoption of new norms that the community practices and which have been recognized as innately good.xxix As the renowned scholar Ali Mazrui describes, the strategy of Islamic law was such that it integrated the best practices of diverse human cultures. He writes, “Cultural pluralism has roots in an Islamic tradition of ethnic diversity that historically fostered a tendency toward cultural broadness and flexibility. This heritage has allowed autonomous non-Muslim cultures to flourish within Islam to this dayxxx.” This was accomplished through identifying those aspects of existing cultural norms that coincided with the Quranic moral system and integrating them into the law.xxxi

Today, there is a credible need for jurists to apply the law in light of changing realities, which must be informed by the vast findings of other relevant fields. In the area of gender and family law in specific, Muslim jurists must collaborate with social scientists and specialists in related disciplines in order to yield a comprehensive and holistic view of the state of women and the law.

Although, the diversity of urf (culture and customs) in the Muslim world has a significant impact on shaping human thinking and behavior to a great extent,xxxii not all manifestations of ‘urf have had a positive impact on women’s rights. ‘Urf could be considered as an unspoken social contract that the community agrees upon, but this did not prevent its manipulation, misinterpretation, and misappropriation. With this in mind, it is possible to see how a tradition might, in time, come to be challenged in the very name of the teachings to which it claims allegiancexxxiii. For example, women’s status, civic roles, and political engagements vary greatly from one place to another, even within the same time period.

As Amr Abdalla articulated in his article, “Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature”,

“Several of the traditions and institutions were not necessarily consistent with the basic divine value system; yet they persisted over the years until they became so enmeshed with Islamic history that many people, even Muslims, believed that they were part of their
system sanctioned by the Qurʾān and Sunna. The practice of rituals associated with marriage, and institutionalized violence against women are examples of traditions and institutions that not only were foreign to Islam, but also contradictory to Islamic divine values. Yet in some nations, majorities of Muslims believe that these values are rooted in Islam. xxxiv

I argue that the main challenge for both male and female Muslim scholars is how to examine each tradition or custom in the light of the Qurʾān and authentic sunna and develop methodologies that enable us to filter that which is right from what is wrong, unjust and oppressive. The Quran’s treatment of customs, by abolishing some customs that were unjust and maintaining others that were good, serves as a model and framework that should be implemented today by scholars to distinguish some customary practices from religious teachings. For example, female infanticide, which was one of the most grotesque abuses against females at that time, was an act that was encouraged culturally to men who were ashamed of their daughters.xxxv The Qurʾān abolished this horrific act of violence by addressing it at various points in the Qurʾān. In addition, the Qurʾān prohibited the custom that considered women as the property of men.xxxvi. In pre-Islamic Arab societies, if a man died, for example, his brother or adult son could “inherit” the wife and take her for himself without her consent.xxxvii

The incorporation of ‘urf into inheritance laws has been to the detriment of women, while its incorporation in other legal matters may help the lot of women. Although a Muslim woman can possess wealth, property and land according to the Qurʾān, there are many cultural factors that impact a woman’s right to inherit or to access her shares. Conservative interpretations of Islamic law and customary/traditional structures/practices often combine to diminish or altogether extinguish women’s rights to property. A prime example is the recourse to or the customary practice of renunciation (tanazul) of even the reduced female inheritance share in favour of a male member of the family, such as a brother or son. Today, many human rights advocates reported that in many countries, women’s property rights are limited by social norms, customs and at times even legislation, hampering their economic status and opportunities to overcome poverty.xxxviii

Although Islamic law within Muslim societies has been codified, in practice, informal justice systems, tribal law and other factors determine inheritance. xxxix

Based on a 2009 study by the rural Development Institute for the World Justice Project, tribal customs supersede Islamic law in South Asia (e.g., Afghanistan, Bangladesh, Pakistan, India, Nepal and Sri Lanka) when it comes to Muslim women’s inheritance and land acquisition. Despite what might be categorized as legal pluralism, customary practices are often more important to women’s property and land rights than personal laws. xl There is a need therefore, to distinguish between Islamic legal rulings on inheritance and customary practices, which often deprive women of God-given rights.

Conclusion

Islamic law need not be seen as inimical to the interests of women. Guiding principles for familial ethics are firmly vested in the promotion of families as cohesive social units that engender successful progeny and social stability. There is a need for policy makers, human rights advocates, community leaders, and religious authorities to work together to prepare policies and enact procedures that improve formal and informal justice systems by removing unjust customs. The role of scholars is to provide the methodological, theoretical and legal basis for credible religious reform. These would include:
(1) Defining the core Islamic values in order to understand the dynamics of Qurʾānic law vs. man-made laws based on process of ijtihad.

(2) Providing community support programs that define the roles, rights, and expectations of family members within an Islamic framework.

(3) Explaining the Qurʾānic verses and the prophetic tradition in a holistic way, concerning inheritance, Mahr and other financial resources available to women;

(4) Defining existing customs and civil legislation concerning inheritance, Mahr and other financial resources available to women;

Even though local social institutions are imperfect, they do allow for the discussion of issues affecting people’s lives. It is at this level that the language and values of Islam are most significant and authentic, and where the gap between the formal justice system of state and the informal networks and realities of everyday life is most evident. Therefore, effective reform will need to credibly engage religious discourse and include the involvement of a wide number of actors, including religious scholars and experts in fields related to gender and law. Policy makers, human rights advocates, community leaders, and religious authorities should work together to propose policies and procedures that improve formal and informal justice systems and remove unjust customs. There is specifically a need for reform in the areas of Marriage and Divorce Laws and for a more fair application of Islamic inheritance laws. More specifically, there is a need for systems of family dispute arbitration that are relevant to the needs of local Muslim communities that allow for integration between religious and civil requirements that advance women and family financial and economic security.

Inspired by the teachings of the Qurʾān, and with determination to understand and preserve the guidance of the Prophet, the Maqasid al-Quraniyya can be a methodology for contemporary Muslim women scholars that provides a more holistic and accurate rendition of Islamic knowledge which has as its foundations in the Qurʾān, in the authentic sunna, and in the unity of man and woman (e.g. Q. 4:1 and 49:13). As epitomized by this article, in particular as women scholars seek to contend with problematic aspects of their religious heritage, a foundational understanding of the Maqasid al-Qurantiyya and ʿĀʾisha’s methodology is vital to a reinvigoration and reformation of tradition.

References
GENDER AND “THE LAW”


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vi Qurʾān 3:156 – “It is part of the mercy of God that you deal gently with them, wert you severe or harsh-hearted; they would have broken away from about thee. So pass over their faults and ask for God's forgiveness for them, and consult them in affairs (of moment), then when you hast taken decision, put your trust in God. For God loves those who put their trust in Him.”


ix Taha Alwani,

xSee Wael B. Hallaq, A History of Islamic Legal Theories (Cambridge: Cambridge University Press, 1997).


xiii “The Believers, men and women, are protectors one of another (awliya’): they enjoin what is just and forbid what is evil: they observe regular prayers, practice regular charity, and obey Allah and His Messenger. On them will Allah pour His mercy: for Allah is Exalted in power, Wise.”

xiv Mona abu-Fadl, Women and Civilization, p12.

xv Ibid 12.

PART VI: AFFECT AND LAW


xviii See in this context Aysha Hidayatullah’s Feminist Edges of the Qur’an,

xix She is the founder of the Journal women & Civilization: Forum For Muslim Women Studies (issue 3, Fall 2002) on Women and the Qur’ān.


xxiii She was characterized by a sharp intelligence and was the source of more than twelve-hundred ḥadīth reports. For an account of her life and role in the tradition see Dennis Spellberg, Politics, Gender, and the Islamic Past: The Legacy of A’isha Bint Abi Bakr (New York: Columbia University Press, 1994).


xxvi On ‘Ā’ishah’s skill in refuting misogynistic ḥadīth see Shaikh, 105-6 and Naguib, 42.

xxvii Aḥmad ibn Ḥanbal, Musnad, in Ḥadīth EncyclopediaCD-ROM, ḥadīth # 24894.

xxviii Qur’ān: 3:110


xxxii As An-Naim described it “…Culture is a primary force in the socialization of individuals and a major determinant of the consciousness and experience of the community. The impact of culture on human behavior is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness.

xxxiii Mona Abu Fadl, Muslim Women Scholars on Women in Islam, Chicago Theological Seminary, November, 7th 1990. www.muslimwomenstudies.com


xxxv Qurʾān, 16:58 and 81:8-9.

xxxvi Qurʾān, 4: 19.

xxxvii Recite Qurʾān: 4:19.
PART VI: AFFECT AND LAW

The debt of motherhood, the crisis of values, and the bankruptcy of human rights - Neo-Nazi discourse on women in Greece / MARIANTHI ANASTASIADOU / ATHANASIOS MARVAKIS / JASMINE SAMARA

Abstract

The recent rise of neo-Nazi groups in Greece has brought into focus new dynamics and discourses regarding gender and law. While commentators of various political affiliations question whether ‘rule of law’ exists in contemporary Greece, neo-Nazi groups articulate new rights and duties, identify distinctive ‘problems’ and offer (both legal and extra-legal) ‘solutions’, and emphasize idealized gender roles grounded in notions of natural law. By analyzing discourse on women and gender in the public writings of neo-Nazi groups, our research examines how ‘natural’/‘social’ rights and ‘unwritten’/‘official’ law are understood and invoked in relation to women.

In particular, we ask: How is law perceived as helpful (or not) in dealing with the problems and solutions neo-Nazism identifies as being especially pressing for women? Which ‘law’? We examine how the social category of ‘women’ is constructed and what rights are articulated for women in Greek neo-Nazi discourse. We examine recruitment materials to understand how legal and extra-legal ‘solutions’ are marketed to women, as well as the symbolic uses of ‘women’ in the formulation of neo-Nazi ideologies.

Since insufficient research has been conducted on women in neo-Nazi activism in contemporary Greece, this research explores the naturalization of motherhood and suggested ‘gender complementarity’, the racialization and hierarchization of ‘women’ within neo-Nazi discourse in Greece as well as the implications they pose to ‘equality rights’-based frameworks (which have a tenuous hold in Greece in any case). Examining the alternative notions of ‘citizenship’ such ideologies offer, we ask: how are these similar and different from existent legislation and dominant discourses/practices on citizenship in Greece? We hypothesize that emphasis on women’s ‘special’ and ‘racial’ roles may gain appeal under neoliberal austerity conditions. At the same time, we identify areas of overlap between neo-Nazi groups and existing practices and positions of non-neo-Nazi right, center and left groups regarding women, as well as with state policies. Thus, an examination of neo-Nazi proposals sheds light on the limitations of existing feminist/social activist projects in Greece, revealing disparities and violence that may be masked by the rhetoric of ‘equality rights’.

Keywords: gender, women, race, natural law rights, neo-Nazism, far-right, Golden Dawn, neoliberalism, Greece

Introduction

The last few years have witnessed a significant rise of the far right and neo-Nazism across Europe (e.g. Bathke & Hoffstadt 2013; Langenbacher & Schellenberg 2011; Melzer & Serafin 2013). Gender emerges as a central element in the political agenda of the far right, in

160 Paper presented in the International Conference on Gender and ‘The Law’: Limits, Contestations and Beyond, organized by Law Faculty, Gediz University, Izmir-Turkey/ Dokuz Eylul University, Izmir-Turkey/ Department of Anthropology, Indiana University, USA/ London Centre for Social Studies, UK, 4-6 June 2014, Dokuz Eylul University and Gediz University, Izmir, Turkey
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ways that overtly challenge political projects of gender equality, as well as other notions of equal rights within and between perceived social groups. The ways in which far right groups specifically address women, and women’s participation in their ranks, are key to understanding broader gendered dimensions of far right political action; attention to gender allows ‘new interrogations across right-wing forms and across scale: the body, the city, streets, nation, region’, as well as ‘recruitment strategies, the modes of adherence and participation they include, [and] how they reproduce themselves across generations’ (Bacchetta & Power 2002 p. 2). Nonetheless, insufficient attention has been given to the political and social implications of contemporary far right speech towards and about women.

The lack of systematic study and analysis of neo-Nazi discourse in Greece is noteworthy at a moment when neo-Nazism, represented most visibly by the political party Golden Dawn (Χρυσή Αυγή), is gaining significant ground in political and social life (e.g. Papaioannou 2013; Psarras 2012). This absence contributes to the mythologizing of neo-Nazism in Greece, while discouraging a more concrete understanding of the neo-Nazi political project – including areas of overlap between neo-Nazi discourse and dominant discourses and practices in Greek society - and the challenges this entails for democracy and social justice. Similarly, neo-Nazi rhetoric on women has not received adequate attention, even as it has been systematically cultivated and disseminated. A basic means for the circulation of neo-Nazi speech in Greece is printed media and the internet, which hosts a number of websites run by neo-Nazi groups. Even a cursory examination reveals that neo-Nazi discourse is intensely gendered, bringing to the forefront of the conversation discussion of women’s capabilities and limitations, social roles and obligations, as well as the most critical problems (and solutions) identified as facing women today. This underscores the need for a more systematic exploration of neo-Nazi ‘women’s’ discourse in Greece, including its content, arguments, and ideological assumptions. Such analysis can shed light on neo-Nazi debates about women’s position in today’s - as well as in an ‘ideal’ - society, in order to answer a fundamental political question: What types of rules, normative systems, rights and obligations does Greek neo-Nazi discourse construct and propose for women? What behaviour is required and how are women called upon to (want to) conduct themselves in accordance? How are these rules justified and made persuasive? These are the questions we examine in our project.

Methodology

To examine the above questions, we focused on writings on the internet addressed systematically and primarily to a female audience. Golden Dawn in particular has developed a specific strategy towards women, establishing women’s ‘cells’ where ‘women’s’ issues are discussed (raising the question of what topics are understood to constitute ‘women’s’ issues). Women also have their own internet spaces - a women’s blog (Women’s Front - ‘Metopo Gynaikon’)164 was developed in addition to the primary Golden Dawn website,165 accompanied by an ‘Ideological Library’166 with a rich body of material. Our research focused primarily on publications on the Metopo website.

164 http://whitewomenfront.blogspot.gr - This blog regularly published posts during the years 2007-2013. Among the authors of the blog are executive members of Golden Dawn and its Women’s Front, while other posts are signed with pseudonyms.
165 http://www.xryshaygh.com/
166 ideology-studies.blogspot.gr - Public access to this blog has recently become restricted only to members.
These websites disseminate neo-Nazi ideology to their members as well as the wider public, offering commentary on current affairs as well as segments with positive references to historical Nazi ideology. Metopo blog posts cover a range of topics, such as: motherhood, abortion, ‘inter-racial relationships’, security, rights, education, ethics, values and the ‘survival of the race’; these topics are not discrete and separate but rather inter-related via a system of values and key arguments. While a review of these texts cannot reveal how readers respond to such arguments, nor the complex reasons that lead individuals to join far right groups (Blee 2007), it can shed light on attempts to articulate positions on issues perceived to be important to women as well as how political materials are marketed to women. The texts also demonstrate how individual and collective identities are invoked as part of ‘a means of exerting claims based on these identities’ (Blee 2007 p. 120).

The basic questions guiding our research concern the relationships between law and gender in Golden Dawn discourse. What rights, roles and obligations are articulated, what rules are proposed and what is their basis? How is the notion of ‘woman’ constructed in relation to these rules? We drew on critical discourse analysis to focus on the ways in which language is used to construct, support, and convince readers of arguments, exploring how power relations are constructed and presented in texts and how the content and structure of language support this (e.g Wodak 1997; Lazar 2005; Jäger & Jäger 2007). Thus, as a first step, we examined Metopo website texts, cataloguing statements and arguments around a series of social issues that emerged as central. We explore two of these – motherhood and the crisis of values/failure of ‘human rights’ and ‘equality’ – in more detail below.

The ‘motherization’ of women - motherhood as a racial debt

The concept of ‘woman’ is constructed in direct relation to the key concept of motherhood; women are referred to fundamentally and nearly exclusively as actual or potential mothers. The texts emphasize that Golden Dawn ‘places the woman as mother at the pinnacle of society, it gives her the place that befits her’ and ‘for us, a woman who is a mother represents by herself the highest value’ [1]. Giving value to motherhood is presented as a distinctive, unique characteristic of Golden Dawn’s political ideology; emphasizing that ‘we’ are the only ones who support motherhood distinguishes the neo-Nazis from other political parties, who it is inferred undermine or disparage motherhood.

Motherhood is not portrayed as a choice women might opt to exercise (or not). It is exactly in the potential for and realization of motherhood (childbirth as well as child-rearing) that the social value of women is found, creating an ideal type of ‘the woman as mother’. The notion of motherhood is here linked closely with nature, emphasizing the biological process of conception, birth and the genetic mother-child relationship. This supposedly direct, unmediated biological relationship allows child-rearing to be presented as a primarily female activity, a responsibility women bear by virtue of their nature - independently of the need for a father to complete the portrayed ‘traditional’ family. Motherhood is also described in terms of (naturalized) complementary gender roles: the man ‘owes respect to woman, because she is his natural and only complement. She is the one who will make him Father and continuer of the Race. She is the one who will teach his children the highest of Ideals.’ [25]

Crucially, motherhood also represents the repayment of a debt: ‘the Greek woman carries the debt/obligation [χρέος] and honor to continue her race’ [1]. According to this logic, humans by nature – and Greeks in particular - are born into debt that they must repay. This notion of debt contains both biological and cultural elements - the two sexes ‘have been called by Nature to complete each other, each having to satisfy their own special Debt toward
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For Greeks, ‘[a] heavy inheritance and a debt as well weighs on us [...] to stand worthy of our grand ancestors’ [1]. It is the role of motherhood in the supposed biological continuity of the community that constitutes an ‘honor’, as well as a ‘debt’ women bear: for the ‘Greek woman’ in particular, this is a debt owed to a legendary community, a special race ‘that gave birth to philosophers and heroes’ [1]. Thus, ‘she should feel proud to contribute to the continuation of a people who were the cradle of civilization all over the world’ [1] – here the popular nationalist but also Eurocentric narrative on Greece is reproduced as well. Thus, motherhood constitutes the ultimate means for paying a debt not only to nature, but first and foremost to the Greek as well as the white race.

The ‘Greek woman’s’ obligation is made more urgent by the constant reminder that the race is threatened literally with disappearance: ‘it is truly unheard of to let the Greek race be lost as the Sumerians and other tribes were lost in the depths of time’ [1]. This is described against a backdrop of group struggles for demographic dominance: it is only neo-Nazis who ‘recognize the enormous demographic problem, the fact that in a few years the Greek nation will be a minority’ [1] as, for example, ‘Muslim women bear on average six children, while the Greek woman today, barely one’ [1].

Demographic statistics are thus used to remind women of the unique and precious value of a ‘white’ female body – thereby including Greek women in the ‘white race’: the blog warns that ‘only 2% of the world’s population are white women of reproductive age!’ [6], a stark reminder to women who may have been previously unaware of this valuable asset they possess.

Embracing this obligation is also said to provide women ‘self-fulfilment’. Again, in this portrayal, bearing children is not merely a (potential) biological capacity. Rather, it is a woman’s natural destination and primary possibility for self-fulfilment, for fulfilment of her essentialized female nature: the ‘greatest joy’ the female body can experience [5]. Thus the distinction between motherhood and ‘personal life’ prompts an indignant response: lamenting ‘the idea that motherhood is the ultimate sacrifice to one’s ‘personal life’’, the blog urges, ‘let’s not go completely crazy!’ [1]

What happens when a woman declines to fulfil her natural racial destiny? Abortion is described in stark tones, as the blog notes that ‘in 2008 2,863,649 unborn children were thrown in the trash [in Europe]’ [12]. Equating the refusal of motherhood with a ‘crime against the race’, the blog expresses shock that ‘many people do not consider abortion murder!’ [6]. Women are warned of the ‘excruciating consequences to psychological and physical health of the mother’ that ‘will torture her for the rest of her life’ [12]. Again, the woman’s body is inextricably linked with reproduction, and every potential disruption to this woman-mother relationship is presented as bringing pain and anguish to the woman as well as danger to the community, as reflected in statements that ‘Europe is committing suicide’ [12] due to abortions as well as immigration that threatens the ‘European’ race with ‘racial vitiation’ [12]. Despite the blog writers’ suspicion of U.S. hegemony, the evident borrowing of rhetoric and materials from U.S. anti-abortion activists [169] raises questions about transnational linkages and exchanges.

167 Across the Metopo website, Greek women are addressed as members of the ‘Greek’, the ‘European’ as well as the ‘white’ race. As is explained in the blog, ‘the Greek nation … belongs to a broader race family, the White Aryan nation’ [11], whereas in another post the blog refers to ‘the common blood relations that relate the European peoples to each other as children of the same family’ [12].
168 Despite a significant population of Muslims with Greek citizenship, ‘Muslim’ and ‘Greek’ are evidently considered mutually exclusive groups for Golden Dawn, and ‘Muslim’ appears as a racialized category.
169 E.g. the movie ‘The Silent Scream’, cited as a link in ‘Abortion: a crime against the race’ [6].
Equally dramatic are the consequences of violating racial rules with regard to the choice of romantic and sexual partners – women are warned to ‘beware of inter-racial relationships!’ [7] Women who violate racial rules and engage in ‘mixed-race’ relationships are portrayed as risking serious dangers that threaten their life and integrity. The cautionary tale of a young British woman, Katie Piper, with graphic details of the acid attack she suffered, is cited to set an example for other women regarding the consequences of ‘inter-racial relationships’. Thus inter-racial relationships are presented as a powerful threat to racial homogeneity at a moment when racial reproduction and purity are put forth as central neo-Nazi projects: a ‘priority’ for Golden Dawn is ‘avoiding the racial vitiation of the population’ [11]. ‘Racial mixing’ is said to represent a ‘shameful sin against the Creator, the biggest Hubris’ [11], suggesting a violation of natural law of apparently divine provenance. In the examples of both abortion and inter-racial relationships, the harm or violence occurs at two levels - personal and community-, and respecting the rules protects both the safety of the individual woman and the existence of the community.

Golden Dawn is presented as the only political body that supports motherhood, and Golden Dawn women have a special role, identifying themselves as defenders of motherhood but also as examples of the only ‘healthy’ female role model based on ‘real values’; actively engaged (guided by their ‘healthy’ values and ideals of the ‘glorious’ Greek race [1], including those drawn from portrayals of women of Ancient Sparta), in the struggle for their race and country. Golden Dawn women - ‘forceful’, ‘strong and conscious of the nature of the female sex’ [1] – are thus presented as a model for other women: these determined women use their power to ensure women fulfil their destiny of motherhood in service of the racial community. This model is presented in stark contrast to the dominant ideals of the modern world, as explored below.

But even in this era of debt, not all motherhood is of equal service: the value of reproduction is determined not only by competition between racial groups, but the varying reproductive value of different women within the racial group. In addition to the unwanted motherhood of ‘uneducated Muslim immigrant women’ [10], the value of motherhood of ‘alcoholic, unemployed and women who live on welfare’ [10] is questioned as well. In accordance with this, it is only ‘the proven clever and creative’ women, i.e. ‘the successful working women’ that should ‘be reproduced’ - ‘otherwise we are degenerating as a species’ [10]. Metopo authors make conflicting arguments relating to the political economy of motherhood, in particular the question of whether the state should provide financial support to mothers of many children. While one post argues that these women are heroic mothers of the race, who should receive ‘both moral and material’ support from the state [1], another expresses concern that the mothers who are most likely to be swayed by the existence of benefits are ‘the women of the lower social classes’ [10] - exactly the ones the race doesn’t need to reproduce. In this view, talented, capable, successful Greek women – the ones the race needs most urgently to reproduce – are unlikely to find their decision impacted by a paltry government allowance. This post presents a clear vision of different segments of Greek women as unequally suited for exercising reproductive rights. In this portrayal, class inequalities between women as well as social problems, like alcoholism, are reduced to natural inequalities, but also depicted as needing management by the state. As we explore below, the notion of equality in general is targeted by Metopo writers as a failed ideology.
The current ‘Crisis of Values’

It is important to emphasize that the neo-Nazi ideal of motherhood is portrayed as resistance to the dominant ideals and value systems of contemporary society. This modern world is described darkly as founded on ‘superficial values’ or ‘pseudo-values’ [1] that denigrate motherhood and promote the ‘prostitution’ [1] of women, as well as consumerism, the stark individualism of ‘personal life’ [1] and the passivity of women who are ‘carried away’ by ‘the current of the era’ [1] from their natural destination.

A central theme when Metopo writers explicitly address women is a harsh critique of the currently dominant value systems, or the standards by which particular acts or goals are judged as good or bad. This ‘crisis of values’ [26] or ‘decay of values’ [2] is identified as the root of many problems in contemporary Greece: the absence of positive ideal models of behavior has helped erode social institutions, such as family and school, and norms, such as respect to teachers and parents, that previously guided and protected people. According to their critique, the currently prevailing system of ‘superficial values’ [1] is problematic in several ways:

First, people are oriented primarily by the desire for financial motivation, concealing the unpleasant truth about their actions so they can continue to profit – for example, doctors conducting abortions, who ‘conceal the criminality of the activity for their own financial gain’ [6]. Other political groups (including both Marxists and neoliberals) are said to be guided by materialism, rejecting other value systems due to their ‘allergy’ to anything non-material, such as homeland, religion and family’ [2]. In this world of ‘progressives’ [2], even ‘solidarity is salaried’ [2], part of an industry managed by paid professional activists and NGOs. The state is not immune from this: financial considerations lead to bad decision-making with regard to what the government decides to legalize, and even the Greek police, ‘mostly young kids’ who just wanted ‘a little position with a permanent salary’ [22], are portrayed as caring more passionately about protecting their salaries than about protecting the citizens.

Moreover, women have become caught up in the pursuit of a fashionable, consumption-oriented ‘lifestyle’ - media and marketers have created an environment in which women are judged and valued primarily on their physical appearance, and disoriented from their supposedly natural debt. The resulting insecurity is a key theme for Metopo writers: judging women ‘only for their abilities on the fashion catwalks’ creates ‘a climate of insecurity for the woman who occupies herself with the care of her family and her children’ [1].

Feminists are said to be complicit in creating this environment, because they justify self-focused behavior, encouraging a woman to follow her desires, no matter how frivolous or self-destructive, in the name of ‘self-fulfilment’. Metopo writers lament the rise of ‘individualism: a new disease’ [21]. This leads to the question: if every woman pursues her self-interest, ‘who will be left to look out for the larger good’? (Klatch 1988 p. 683). As an answer, Metopo writers envision the institution of the family as a site of ‘undivided respect, companionship and security’ [1]. However, they fear this institution is being destroyed: ‘this first-class institution for the transmission of values, ideals and traditions to the youth is in deep crisis, to the delight, of course, of those who would dismantle Greek society’ [2]. Thus, the family as a source of values – an idea portrayed as alarming to Marxists and neoliberals - risks fading away.

Media and marketing have also altered what are described as natural developmental stages, as they encourage girls to become sexualized at ever-younger ages, to the delight of
corporations who are eager for them to become consumers of ‘cosmetics, make-up, clothes and lingerie, expensive shoes, bags and perfumes’ [5] and other perceived necessities of womanhood. Lamenting this profit-driven disruption to natural life stages, one post explains that ‘Our Movement’ proposes ‘another way of life’ and ‘natural behavior at every age. We’re talking about life and its natural rules.’ [5] In response to the described insecurity caused by social pressure to pursue a trendy and fashionable lifestyle, which undermines women’s ability to be confident in seeing motherhood as a valuable role in life, the blog authors call for a specific kind of women’s empowerment; empowering women not to worry about the ‘wrong’ ideas of ‘normal’ that currently dominate, but to replace those with alternative norms and ideals to which to aspire - those suggested by Golden Dawn.

The bankruptcy of human rights and equality: endangering Greek women

‘What are the equal rights that our accusers have managed to establish? [The right] for a woman not to be able to travel freely on the streets? Where is equality when you are forced to ask a man to help escort you home, when they rob or even rape you in your own house? Where is my right to take walks with my child in the park and public squares? But in which squares? In those full of third-worlders, full of women who sell themselves, or those where the drug trade rages?’[1]

In line with the ‘individualistic’ systems discussed above, the notions of ‘human rights’ and ‘equality’ are similarly a central part of the crisis of values. Not only have they failed to improve conditions for women, but they have left women more vulnerable to insecurity and more dependent on (Greek) men. How so? The argument is framed around what Metopo writers describe as an increasing danger of criminal assault and physical violence for women that has supposedly changed the social landscape of Greek cities. Metopo writers attribute this violence almost exclusively to the presence of immigrants with ‘other mentalities and customs’ [3], who are innately predisposed to violence. Nonetheless, and perversely, Metopo writers complain, human rights advocates worry exclusively about protecting the ‘human rights’ of persecuted immigrants, not punishing them for violence. They insist that talk about ‘equality’ fails to mean anything for Greek women who, fearing physical violence cannot engage safely in even the most basic ‘mothering’ activities such as taking their child to the playground - a discourse that highlights the victimization of Greek women-mothers.

According to this logic, Greek women have - both literally and metaphorically - lost ground in the era of human rights and equality, now finding themselves dependent on strong Greek men to protect them from dangerous Other men. Greek men, as portrayed in the blog, do not experience fear, nor are they a source of fear, danger or violence for Greek women. The exception here are the ‘internal Other’ Greek men, who are dangerous through their ideological manipulation or ‘dictatorship’ [8] they perpetuate (in the case of ‘progressives’ [8] and human rights advocates defending the rights of ‘criminal immigrants’ [8] and justifying their presence in Greece), or those who are ‘anarchists’ [8] engaged in violence.

Themes of fear and access to space emerge clearly in the blog, which creates fear of violent Other men even as it discusses how to take action against it, including by encouraging women to attend special Metopo-organized self-defence classes offered ‘exclusively for Greek women’, since ‘attacks against women by hordes of illegal immigrants have become a daily phenomenon’ [23]. These themes have erupted in battles over real playgrounds, such as Agios
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Panteleimonas in Athens, but also are used for symbolic resonance: the alleged loss of control over space that threatens everyday mothering activities is used to emphasize how wide is the chasm between the priorities of ‘human rights’ organizations and the blog audience’s daily lived experiences.

Discussion

Greek neo-Nazis highlight and frame topics in ways designed to aid their efforts to change the dominant political agenda and obtain a more prominent position in public discourse. This effort involves not only changing perceptions of what the most urgent issues at stake for society are, but also proposing a different interpretation of issues already on the table, as well as a different political approach to solving these problems.

The above analysis has explored how Greek neo-Nazi discourses construct a ‘motherized’ narrative of womanhood and a naturalized and racialized narrative of motherhood. At the same time, contemporary ideological projects of equality and human rights are rejected - if not demonised - as failing women, while a model of gender complementarity as well as social segregation framed around race and class inequalities is proposed instead. ‘Women’ are used to market these ideas and make them persuasive, as they are portrayed as victims of a ‘decayed’ system of norms as well as national and international policies based on these norms. They are also called upon to engage in resistance by embracing and promoting a distinctive, alternative system of values and taking action with Greek neo-Nazi groups. This raises questions about the implications neo-Nazi discourses pose for the ideological bases and functioning of democracy in Greece as well as gender equality achievements. Furthermore, our analysis also raises questions around ‘choice’ and ‘desire’: who is proposed as responsible (educators, family, the state?) for creating conditions ripe for women to make the ‘right’ choices and have the correct desire to fulfill particular roles? How do distinctions between ‘choice’ and ‘learning to be conscious of one’s obligation’ play out?

However, these discourses also reflect ideological assumptions characteristic of ‘mainstream’ Greek society, e.g. the idea that a woman’s natural purpose is to become a mother and the idea that immigrants are responsible for urban degradation. How do neo-Nazi discourses overlap and intersect with dominant discourses and practices in contemporary Greece? Further comparative study could shed light on ways in which elements of neo-Nazi discourses are masked (or find space openly) in hegemonic discourses, as well as their potential appeal to members of the public. As neo-Nazis in Greece today and particularly the Golden Dawn Party ostensibly reject Nazi identity or a connection with historical German Nazi ideology, the evident similarities and continuities between neo-Nazi and historical Nazi gender ideologies are also worthy of further attention.

Prior to conducting this research, we had hypothesized that emphasis on women’s ‘special’ and ‘racial’ roles may gain appeal under the neoliberal austerity conditions facing contemporary Greece. In this sense, Metopo’s language related to ‘crisis’ (primarily of values and particularly the ways in which relations of money have corrupted more ‘authentic’ social relations), ‘debt’ (of mothers, to nature and the race), and ‘value’ (of white womanhood and the ability to reproduce it) is particularly striking and calls for further analysis (see also Lazzarato 2012; Berezin 2013). Further analysis of gendered neo-Nazi discourses could shed light on the ways in which broader understandings and models of social and legal obligation are being re-negotiated at this critical moment.
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[2] - ‘Η οικογένεια σήμερα, χθες και αύριο’ [The family today, yesterday and tomorrow], 15.12.2011, 
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[11] - ‘Φυλετικό ζήτημα’ [The racial issue], 28.11.2010, 
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[25] - ‘Η ηθική μας’ [Our Ethics], 17.02.2010, 
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References


PART VI: AFFECT AND LAW


Abstract

Mixed or binational marriages have existed for centuries, but they became a growing phenomenon only a few decades ago, in the context of globalization and transformations occurred in the field of sentimental love. Global search for a spouse traces routes linking the rich countries of Western Europe, North America and Asia/Pacific with the Caribbean, Latin America, Eastern Europe and South-East Asia.

Between 1996 and 2012, in Spain binational marriages went from 4% of all marriages at the beginning of the period, to 17% at its highest point. Considering all mixed couples for the stated period, almost 60% were marriages between Spanish men and foreign women.

Spain is the EU country with the greatest sustained increase in immigration from the '90 to the final years of the XXI century’s first decade. This migratory growth was essential to promote a dramatic increase in intermarriages. An inevitable association ensued: with the immigration conceptualized as a social problem, mixed couples are perceived as suspicious of trying to, under the appearance of marriage, circumvent immigration laws in order to access the benefits of Spanish nationality.

From 1995 onwards, in Spain (and later in the EU) rules applying exclusively to binational couples wanting to marry or register their marriage celebrated in a third country have been approved. Their aim is to determine the ‘purpose of the marriage’, in order to avoid the so-called ‘marriages of convenience’. One of the legal instruments created for this purpose is the individual interview practiced with each spouse by public servants. Judicial reasoning used for allowing or denying marriages are detailed in the Department of Registers and Notaries’ resolutions, final administrative authority evaluating the appealed cases. These resolutions -hardly exploited by social sciences, so far- are one of the main sources of this communication. Its analysis, along with the analysis of European and Spanish legislative framework, is the aim of this study. Our contribution, held from a gender perspective, highlights discrimination in the application of the law towards couples who do not meet ‘normative’ standards, or spouses with some specific characteristics. The whole process conveys an idea of what is/should be a ‘love-story’ to be considered as such when it has consequences on immigrants’ legal status.

Keywords: Binational marriages, Immigration laws, Spain, Stereotypes

1. Introduction

In this research we call ‘mixed or binational marriages’ to the legal unions between heterosexual persons of different national origin. Even if they have existed for centuries, these marriages only popularised a few decades ago, in the context of globalization and transformations occurred in the field of sentimental love, especially in countries with large
immigrant populations, like Spain.\textsuperscript{174} The migratory growth experienced by Spain in the last decades was central to the subsequent dramatic increase of binational marriages.

![Figure 1: Evolution of mixed marriages in Spain](image)

Source: compiled by the authors, based on INE\textsuperscript{175} data

With the immigration conceptualized as a social problem in the host countries, an inevitable association ensued: mixed couples are perceived as suspicious of trying to, under the appearance of marriage, circumvent immigration laws in order to access the benefits of Spanish citizenship.

From 1996 to 2012, a total of 320,222 weddings between a Spanish spouse and a non-Spanish one were celebrated (INE, 2013). Most couples were formed by a Spanish man and a foreign woman (58%), even though there are more foreign men than women in Spain (Setién & Vicente, 2007:139). Countries of Central and South America are the main origins of foreign spouses (Fig. 2). Besides this coincidence, foreign wives’ and husbands’ main regions of origin do not match: Spanish women marry Western Europeans and North Africans more often than Spanish men; and these are more frequently paired with Latin American and Slavic people than Spanish women.

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & Spanish man/ Foreign woman & Spanish woman/ Foreign man & Total MM \\
\hline
1996 & 5000 & 5000 & 5000 \\
1998 & 10000 & 10000 & 10000 \\
2000 & 15000 & 15000 & 15000 \\
2002 & 20000 & 20000 & 20000 \\
2004 & 25000 & 25000 & 25000 \\
2006 & 30000 & 30000 & 30000 \\
2008 & 35000 & 35000 & 35000 \\
2010 & 40000 & 40000 & 40000 \\
2012 & 45000 & 45000 & 45000 \\
\hline
\end{tabular}
\caption{Evolution of mixed marriages in Spain}
\end{table}

\textsuperscript{174} In 1996 there were 542,314 non-Spanish people in Spain (1.36% of the total population); the peak was reached in 2010 with 5,747,734 people (12.2% of the total population); in January 2013 there were 5,520,133 foreigners, representing 11.7% of the total population (INE, 2013).

\textsuperscript{175} Spanish National Institute of Statistics (INE, for its Spanish acronym).
Analysing the absolute values of the foreign spouses’ main national origins we also noticed some differences (Table 1).

<table>
<thead>
<tr>
<th>SPANISH MAN/FOREIGN WOMAN</th>
<th>SPANISH WOMAN/FOREIGN MAN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colombia</td>
<td>Morocco</td>
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<tr>
<td>Brazil</td>
<td>Argentina</td>
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<tr>
<td>Morocco</td>
<td>Colombia</td>
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<td>Ecuador</td>
<td>Italy</td>
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<td>Argentina</td>
<td>England</td>
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<td>Dominican Republic</td>
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<td>Russia</td>
<td>Germany</td>
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<tr>
<td>Venezuela</td>
<td>Cuba</td>
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<tr>
<td>Cuba</td>
<td>Dominican Republic</td>
</tr>
</tbody>
</table>
PART VI: AFFECT AND LAW

Table 1: Main total origins for foreign spouses (1996-2012)
Source: compiled by the authors, based on INE data

While the main origins of women married to Spanish men only include Latin Americans, Moroccans and Russians, among the foreign husbands married to Spanish women we also find Italian, English, French and German men, but not Russians.

2. Love under suspicion

In many Western European countries, couples formed by a European spouse and a non-EU one are suspected of undertaking illegal manoeuvres in order to access the benefits of residency or citizenship in the host country, in a clear shift from romantic relationships to the crossing of borders (Conradsen & Kronborg, 2007:228). The so-called ‘marriages of convenience’ have been subject to regulation since the mid ‘90s in various EU countries, following the growing interest in restricting migration for family reasons (Kraler, 2010:40). Although in those years family migration was not perceived as a problem in Spain, some measures were undertaken: (1) modification of the Nationality Act (1990) - expanding the requirements to foreign spouses for citizenship acquisition - and (2) the first regulation on marriages of convenience (1995), aiming to maximise verifications on binational marriages when one spouse comes from abroad. All those who wish to marry a person from a ‘third country’ are affected, as these couples are submitted to rigorous scrutiny to verify its authenticity. This context highlights a contradiction between the discourse of a State protector of the family, and the immigration restrictions promoted by the EU.

Three legal norms regulate this issue in Spain:

- EU Council Resolution 97/C 382/01 of 4th December 1997 on measures to be adopted on the combating of marriages of convenience;

- Instruction of 9th January 1995, on the file prior to marriage when one spouse is living abroad, a non-legislative act adopted by the General Department for Registries and Notaries (DGRN);

- DGRN Instruction of 31st January 2006, on marriages of convenience (BOE 41, 17/02/2006:6330-6338).

The European Resolution defines ‘marriage of convenience’ as the one concluded between an EU national or an alien resident and a third-country national ‘with the sole aim of

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176 In the Spanish law they are defined as the social phenomenon whereby a Spanish citizen or an alien resident marries a foreigner ‘with the sole purpose of benefit from the legal consequences of the marital status in the field of immigration and nationality’ (BOE, 2006:6331).

177 Family related migration has been the dominant legal mode of entry in Europe for the past few decades, but it has become increasingly contested in recent years. Current political debates focus on three issues justifying restrictions of family migration: (1) marriages of convenience; (2) forced marriages, and (3) integration.

178 Instruction from the General Department for Registries and Notaries (DGRN, for its Spanish acronym) of 9th January 1995, BOE 21, 25/01/1995:2316-2317.

179 The European Council adopted a regulation containing two lists of countries: 'positive' and 'negative'. The negative one includes 133 'third-countries' considered unreliable, mostly from Africa, Asia and Middle East (Jeandesboz, 2010:153).

180 The Spanish Constitution provides for the family’s social, economic and legal protection, as one of the guiding principles of social and economic policy of the Estate (art. 39.1).

181 Official State Gazette (BOE, for its Spanish acronym)
circumventing the rules on entry and residence (...) and obtaining a residence permit or authority to reside in a Member State’. The Spanish Instruction 2006 describes ‘marriages of convenience’ as:

‘Weddings usually celebrated in exchange for a price: a person -often, but not always, a foreigner- pays to another person -usually, but not always, a Spaniard- to convince the latter to marry him/her, with the agreement that there will never be ‘authentic marital cohabitation’ or ‘real will to establish and raise a family’, and that ‘after an agreed period’, legal separation or divorce will follow (BOE, 2006:6330).

The sole purpose of this ‘business’ would be ‘to benefit from the legal consequences of the marital status in the field of immigration and nationality’ (BOE, 2006:6331).

Besides, terminology used in these legal norms presumes all mixed couples as potentially fraudulent. Instruction 1995 focuses, in principle, on all binational marriages (unlike the other two norms, which concern only illegal binational marriages); however, it mentions fraud and simulation as its constituent elements:

‘Cases of Spaniards living in Spain wishing to marry foreigners residing abroad are increasingly frequent. There are many reasons to suspect that these unions only intend to facilitate the entry and residence of foreigners in Spanish territory’ (BOE, 1995:2316).

This vocabulary emerges in the registrars’ discourse when assessing binational couples. They face their task assuming they are all illegal, which is a violation of the presumption of innocence, part of the fundamental right to due process (Spanish Constitution -CE- art. 24.2). An example of the important part played by suspicion in the scrutiny exerted over these couples is the routine formulation used to authorize a marriage: ‘The established facts are not sufficiently clear to assume, without a doubt, the existence of fraud’. The registrar authorises the marriage because he fails to demonstrate that it is fraudulent, and not because he/she is convinced of its legitimacy. Furthermore, the formulation suggests that it is up to the applicants to prove the relationship’s existence, and not to the Civil Registry Office its absence.

Legal norms are justified by the need to ‘prevent fraudulent manipulation of marriage’ (BOE, 2006: 6332), demanding the identification not only of the alleged fraud but also of marriage’s ‘true’ characteristics. To achieve this, the concept of ‘marital consent’ is used, which generally implies the ‘true will of the parties to create a community of life (...) to fulfil the proper and specific purposes of marriage, this is (...) to raise a family’ and assume the marital duties well-defined in the Civil Code (BOE, 2006:6331-6332), among which ‘living together’ (art. 68). The intentions become indicators of a ‘true’ marriage, although proving it becomes impossible in a preventive system, as stated in the same norm (BOE, 2006:6338). Such difficulty challenges the existence of a special mechanism for assessing mixed couples ‘marital consent’ since the Civil Code includes a ‘nullity of marriage’ process by which the lack of such consent is evaluated a posteriori and with all the guarantees of due process. Moreover, these ‘instructions’ violate the legal reservation principle (CE, art. 32.2) to regulate

182 Marrying a Spanish citizen reduces from 10 to 1 year the necessary period to acquire the Spanish nationality by residence, and from 2 to 1 year for Latin Americans (first origin among Spanish citizens’ foreign spouses) Filipinos and Equatoguineans (art. 22.1 Spanish Civil Code).
the right to marriage. In any case, legal reasoning cornerstone is not the lack of consent in the so-called marriages of convenience, but the fraudulence of the consent, since its purposes are others than ‘raising a family’. However, the fact that some of these unions may pursue different goals than the ones specified for marriage (e.g. benefits of residency/citizenship and/or monetary gain) does not imply their unwillingness to assume normative marriage purposes as well. In fact, to deny marriage merely because it would help one partner in obtaining a residency permit is incompatible with the right to marriage (EU Agency for Fundamental Rights, 2011:102). Moreover, in each marriage at least one person profits by, for instance, taxes, or taking over the spouse property, or perceiving allowances in case of divorce or widowhood. The main difference for the legislator seems to be that, when treating with Spaniards those benefits are unforeseen and unintended consequences, while in the mixed couples they constitute the reason and cause for the marriage. Therefore, the reasons for a marriage otherwise considered private become subject to state scrutiny (Messinger, 2008:386).

Spanish or mixed couples wishing to marry follow the same minimal procedure, which entails the opening of a file instructed by a Civil Registry Office’s agent. When dealing with mixed couples, this file -normally applied to check if the couple meets the capacity requirements specified in the Civil Code- is used ‘to ensure the registrar of the true purpose of both partners as well as the existence of real marital consent’ (BOE, 1995:2316). Therefore, binational couples are submitted to a supplementary and compulsory procedure, known as the ‘private hearing’ [audiencia reservada]. These audiences -where each applicant is heard separately, questioned on similar topics and not allowed to share information- are considered ‘essential procedures which should not be disregarded or summarily performed’ (Instruction 1995). Procedures marked by an unequal power relationship (Eggebo, 2013:779) between the interviewer -State representative- and the interviewee -applicant-, where the most vulnerable ones are from countries of the Schengen visa ‘negative’ list, those whose social resources, both economic and symbolic, are weaker (Jeandezboz, 2010:164).

The EU Resolution and the Instruction 2006 specify what factors civil servants are to ponder when assessing a marriage as fraudulent or not. The stricter European Resolution states that fraud might be suspected by the fact that cohabitation is not maintained; the spouses have never met before their marriage; they are inconsistent about their respective personal details or the circumstances of their first meeting; they do not share a language; money has been handed over in order for the marriage to be contracted; there is evidence of previous ‘sham marriages’ in their personal history, etc..

On the other hand, Instruction 2006 stipulates two criteria: partial or total ignorance of their spouse’s ‘basic personal and/or family data’, and the lack of previous personal encounters. In order to assess the intention of fraud, a guide of 118 questions exist to be used during the hearings (Annex to Instruction DGRN 2006). There are three sets of questions: the first, which includes enquiries about the partner’s personal, friends and family data, intends to determine the degree of mutual knowledge. The second contains questions concerning the development of the relationship, from their first meeting until their marriage or the moment they decided to do so. The third group refers to the couple’s everyday life: hobbies, if they smoke, their common language, their health, if the foreign spouse knows about the marital benefits of residency or citizenship, if he/she has family in Spain, etc.

Conducting these procedures, the registrars contribute to the production of state credibility by applying the Constitution, which guarantees the right to marry (art. 32), a right also guaranteed by the European Convention on Human Rights, signed by Spain in 1979. They have to perform this task without arbitrariness, and in accordance with the principle of
equality and non-discrimination (CE, art. 14). As civil servants, they share responsibility regarding the implementation of measures aimed at protecting national territory and its borders. This is, struggling against ‘abuses’, an issue closely linked in Spain to the figure of the ‘foreigner’. Civil servants do not live on the margins of society, but -like us all- have a number of embedded social constructs (stereotypes, preconceptions, prejudices) and, consciously or unconsciously, make use of them in their daily life, even when acting as registrars (Valli et al, 2002; Eggebø, 2012, 2013; Lavanchy, 2013). Which criteria -implicit or explicit- do registrars apply during the described procedures? How do they assess the (in)existence of ‘real marital consent’? What part does their categorization by age, class, gender, race, etc. play? Are national stereotypes involved? What other variables influence their decision-making?

When asking them to perform such judgements, registrars are granted the capacity of (un)authorising the marriage celebration/registration in Spain. They are also being given a certain amount of discretion in interpreting legal norms and assessing representations of what constitutes a ‘real’ marriage or a ‘genuine’ relationship, and the social criteria both partners are expected to fit to certify the legitimacy of their intentions (Lavanchy, 2012:2).

After both hearings, spouses’ answers are cross-checked by the registrar, who then issues a resolution in which, after evaluation of the prosecution, authorizes or denies the wedding celebration/registration. If denied, the parties have the option to appeal to DGRN, which evaluates the case and decides definitively and without appeal. Both the arguments of the parties to support their appeal and the registrar’s reasoning to decide are included in the DGRN Resolutions. Legal database Westlaw (http://www.westlaw.es/) collects them both. To exploit this source, not often used by social scientists yet, we searched the database, selecting all Resolutions containing the keywords ‘marriages of convenience’ [‘matrimonios por complacencia’] between 1996 and 2011183. We found 1836 resolutions concerning heterosexual couples of different national origin. In order to conduct a comprehensive discourse analysis we randomly selected a sample of 184 resolutions.

Between 1996 and 2012, a total of 296,459 mixed marriages were celebrated in Spain among which 58% were between a Spanish man and a foreign woman, and 42% between a Spanish woman and a foreign man. Among the 1836 resolutions recorded for that period, 73% are appeals submitted by Spanish men and non-European women after their application to register/celebrate a marriage had been rejected. Couples of Spanish women and non-European men had submitted 27% of the appeals. Hence, the number of appeals filed by Spanish men and their foreign spouses is much higher than it should have been proportionally, and conversely, the ones submitted by Spanish women and their foreign spouses are fewer than expected. Therefore, it seems that Spanish women find lesser difficulties than their male co-nationalss when handling their marriages procedures. Or we could also think that Spanish men’s ‘more proactive attitude’ during the search for a foreign partner (Roca, 2010:75) also applies for this step of the process.

Those presenting appeals to the DGRN after having had their application rejected are mostly couples formed by Spaniards and Cubans, Colombians, Dominicans or Moroccans. Bearing in mind the most common nationalities of origin among foreign spouses and comparing them with those present on the DGRN Resolutions list, Cubans overrepresentation becomes clear, despite their low position among the total frequencies for foreign spouses’ origins (Table 2). The same applies to Dominicans, to a lesser extent.

183 The INE proposes mixed marriages data from 1996 onwards. As the search on Westlaw was lead in 2012, the last complete available year was 2011.
Table 2: Foreign spouses’ origins (1996-2012)

<table>
<thead>
<tr>
<th>TOTAL MM</th>
<th>DGRN RESOLUTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spanish man/Foreign woman</td>
<td>Spanish woman/Foreign man</td>
</tr>
<tr>
<td>Colombia</td>
<td>Morocco</td>
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<tr>
<td>Brazil</td>
<td>Argentina</td>
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<td>Cuba</td>
<td>Dominican Republic</td>
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</tbody>
</table>

Source: compiled by the authors, based on INE and Westlaw data

No sub-Saharan country is listed at the top of the mixed marriages total population, yet Nigerians of both sexes and Senegalese men are very often involved in the Resolutions. The same happens to people from Peru, Chinese women, and men from Algeria, Pakistan\(^{184}\) and India. The opposite is true with other nationalities\(^{185}\), such as Argentineans, or women from Russia and Venezuela, suggesting the existence of a scale of more or less desirable and/or suspicious spouses.

Among the most common origins we find groups with ‘racialized’ physical characteristics. As Kirton (2000:68) says, ‘racialized physical features and the associated expectations may have an impact on any encounter or relationship’. In addition to stereotypes of race, class, gender, etc., certain aspects of the historical and geopolitical relations between the involved countries also contribute, establishing a ranking of more or less ‘convenient’ or ‘dangerous’ origins for the host society (Vázquez, 1999:57; Colectivo Ioé, 1999:183-187; Fueyo, 2002:69). The classification of ‘positive’/‘negative’ countries adopted by the Council of Europe in 1999 reflects it (Jeandesboz, 2010:153).

The inconsistency about their (future) spouse’s personal or family details is the most common reason to reject the appeal. Many questions asked during the hearings can be easily answered if a relationship exists, but sometimes they are insignificant details, hard to remember (clothes sizes, flight number on the last visit, etc.). Sometimes a contradiction is

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\(^{184}\) Some studies mention that Pakistani, Turkish and Morocco men, for example, prefer to marry women from their home country, who ‘more readily accept male supremacy and authority’ (Beck-Gernsheim, 2007:282).

\(^{185}\) All Western European disappear of the DGRN Resolutions list of foreign spouses’ origins because, as stated above, this part of the process only applies to marriages between Spaniards and non-EU citizens.
pointed out because one applicant said they met on the street, while the other speaks of a bar; or if a spouse said her boyfriend is divorced when he lived with a partner he never married…

Another reason often used by registrars is the fact of never having physically met before their marriage, or having encountered shortly before it. This motive, mentioned in 89/145 cases was introduced by the EU Resolution 1997, but nuanced in DGRN Instruction 2006. Consequently, increased legitimacy was predictable for epistolary, phone or online relationships from there on. We could also expect that having met shortly before the wedding would cease to be a fraud sign. But it is still used to refuse marriage celebration/registration, removing all legitimacy to the increasingly common long-distance relationships (Rosenfeld & Thomas, 2012; Beck & Beck-Gernsheim, 2012), as well as to with the ‘arranged marriages’, frequent and standardized in some Asian and African countries. In addition, and as contradictory as it may sound, if the non-European partner requests for an EU visa, he/she is perceived as ‘suspicious’. Therefore only the Spaniard can travel to his/her (future) foreign spouse’s home country without arousing the suspicions of the system, restricting then the possibilities of personal encounters.

Furthermore, there are no clear criteria about the length of the minimum acceptable courtship before marriage, the suitable number of visits, or the reasonable time of cohabitation. Despite expressions as ‘they married a few days after knowing each other’ or ‘with very little prior personal knowledge’, standards are never established and the suitable periods can range from zero days to several months. With no rules stating how long ‘should’ a relationship last before the wedding, the arbitrariness in judicial resolutions is evident.

During the hearing and among the questions related to their project as a couple, the applicants should specify the country they plan to live in. If they manifest their intention of living in Spain, the non-European spouse should also answer whether he/she has relatives in Spain, if he/she has ever applied for an EU visa, and if he/she is aware of the marital status legal consequences in the field of immigration and nationality. Lastly, they are asked if they want to get married in order to take advantage of these benefits. In this situation it is very difficult to answer ‘correctly’, regardless the truth. If the non-EU person denies wanting to live in Spain with his/her partner, the registrar may assume the lack of ‘common project’ and, therefore, of ‘true marital consent’. But if the foreign applicant says he/she is planning on living in Spain with his/her partner, the administration might suspect them of trying to celebrate/register a ‘sham marriage’ and deny the authorisation.

Indeed, using the argument of the marriage ‘immigration purpose’ to support the denial is very common, while we only found one Resolution mentioning economic gains. Notwithstanding, the money that Spaniards often send to their non-EU partners is used as proof of legitimate relationship, especially when remittances are sent regularly. Interestingly, marriages between Spanish men and non-EU autonomous women are more often denied than those with ‘dependent’ foreign women. This group matches the profile of ‘traditional’ wives some Spanish men seem to seek (Roca & Urmeneta, 2013). Some of them manifest having married their husbands to be able to ‘take care’ or ‘serve’ them and/or their in-laws.

We already highlighted the over-representation of certain national origins among the DGRN Resolutions (Table 2). Additionally, Cubans, Dominicans and Colombians, three frequent origins among non-EU people married to Spaniards, are clearly discriminated. For instance, from 2004 onwards, all negative Resolutions involving Cubans includes the same formula:
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‘Additionally the Consulate affirms that marriage between Cuban citizens and foreigners is often used, consciously or unconsciously, for immigration purposes, which in this case seems to concur, given the applicant’s willingness to reside permanently in Spain’ (R.35, 2004).

Some years later, same treatment started to apply for Colombians and Dominicans as well. These are three Caribbean countries, with very diverse populations resulting from the mixture of many groups that have historically coexisted on the continent. Fueyo (2002:78) studied advertisements showing repeated images of Caribbean women portrayed as sex objects, and emphasizing the idea of Cuba and Dominican Republic as appropriate places for the consumption of the advertised products and the use of the attached ‘objects’ [women]. As to Colombians, it is impossible to ignore the frequent association popularized by the mass media between Colombia, cartels and violence.

As well, Setién and Vicente (2007:143) found that a large majority of Spaniards would accept a family member marrying a foreigner, although 67.5% would prefer people of their same ‘race’ or ‘ethnic group’. Among the Spaniards who would forbid their daughter to have a relationship with a foreigner, disapproval would be stronger if the partner were to be African than if it was from Eastern Europe or Latin America (Setién & Vicente, 2007:152).

The above might explain, at least partially, why some national origins are overrepresented among the DGRN Resolutions, while others are almost absent. Surprisingly, Eastern Europe citizens are often described as ‘close to us’, while other communities (Moroccans or sub-Saharan) would embody the ‘other’ (Anzil, 2013:207). Phenotypic traits still operate to signal (di)similarity and (not)belonging to Europe, while it is religion, namely Islam, that sanctions the ‘other’ par excellence (Capussotti, 2007:203).

3. Conclusions

The system grants great power and discretion to registrars to determine if a marriage is ‘real’ or ‘fraudulent’. Describing the process, Eggebø (2013:779) says: ‘the authorities set the standards and define the criteria for what a real marriage is’.

Many couples described the application interview as an uncomfortable situation where they felt nervous and stressed. It is uncomfortable because it is clearly unequal to the detriment of mixed couples. Since it is an administrative process, there is no lawyer ready to plead for the applicants’ interests while they are scrutinized and tested according to unknown and unpredictable criteria. On the other hand, during the hearings a conflict arises between two aspects of the registrars’ professional mission. Exceeded in their competences, they simultaneously become civil servants and specialists of the intersection between legality and legitimacy (Lavanchy, 2013:680). In practice, all this often results in arbitrary decisions, due to the absence of clear and common criteria to assert the (i)legitimacy of a relationship (accepted courtship duration, valid evidence of contacts, degree of knowledge of personal and family data, etc.). In addition, similar situations are sometimes solved differently, and a clear discrimination exists against certain national or racial groups.

The surveillance of intimacy by state representatives affects couples designated by their mixedness as ‘deviant’. This, along with the figure of the ‘foreign suspect’/foreign
threat’ popularized by the mass media in Spain\textsuperscript{186}, allows this regulation to achieve its ultimate goal, which is none other than exerting control over immigration.

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\textsuperscript{186} In a paper in preparation we analysed articles published in Spanish newspapers, in order to reconstruct the ‘imaginary’ on mixed couples the press helps to shape and [re]create.
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GENDER AND “THE LAW”


Gender and Legal Technicality: Rethinking the Discourse of Divorce Mediation / SHU-CHIN GRACE KUO

Abstract

In my paper, I do not focus on comparing the advantages and disadvantages of mediation and the adversarial system or on which one is more suitable for divorce disputes. Instead, using the theory of legal technicality, I discuss three divorce-related disputes and how legal techniques affect the strategies of disputants, especially female disputants. I argue that Taiwanese women should no longer necessarily be seen as a gender disadvantaged group because of the legal system’s gender neutrality. However, societal and cultural gender norms influence divorce disputes in more subtle ways, particularly when intertwined with legal techniques in the dispute settlement process.

Indeed, bringing divorce disputes into the adversarial system has been profoundly criticized for two reasons. One, the patriarchal legal system lacks a sense of gender (Fineman 1995; 1998) and gives more critical time to disadvantaged groups, such as women and minorities (Grillo 1992). Second, the paradigm of divorce disputes has shifted from the courtroom to the conference room. Due to the psycho-social elements that weigh heavily in divorce disputes, the courtroom is no longer perceived as the suitable field for settling divorce disputes. Social workers and other relevant professionals tend to be more involved in conference room settlements, and therefore, mediation is seen as more suitable for divorce disputes than the adversarial system (Shaffer 1988; Signer 2009).

Legal technicality is a form of reasoning and argumentation, which includes various types of formatted conventional documents, such as letters of intent; protocol; analogies of legal interpretations; and precedent citations (Riles 2011:64-65). Legal techniques are usually considered trivial, value- and gender-neutral, and theoretically unimportant. However, as at least one legal scholar has emphasized, law without legal technique is not law at all (Riles 2011:67).

My paper is organized into three major sections. The first part briefly reviews the discourse of divorce mediation, including the paradigms prevalent in the United States and Taiwan. The second part explains my rationale for applying legal technicality theory to divorce mediation, particularly through the lens of gender. The third part analyzes three divorce mediation cases in Taiwan. I hope to contribute to a greater understanding of how gender affects the law, particularly, the techniques of law.

Keywords: Divorce Dispute, Divorce Mediation, Legal Technicality, Family Law, Civil Procedural Law, Gender, Taiwan

I. Gender, Legal Technicality, and the Debates of Mandatory Divorce Mediation

Is the adversarial system the best solution for divorce or family disputes? Would an alternative dispute resolution such as divorce/family mediation be better for disadvantaged groups such as victims of abuse or minorities? Feminist jurisprudence scholars have been highly critical of bringing divorce disputes into the adversarial system because, they argue, the patriarchal legal system lacks a sense of gender, and it gives women and minorities more

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187 SJD, Northwestern University School of Law, USA Associate Professor of Law, National Cheng Kung University, TAIWAN
critical time during the dispute procedure, such as in the courtroom (Mertz 2007; Merry 1990). As a result, the paradigm of divorce disputes has shifted from the courtroom to the conference room (Singer 2009, p365-366). Considering the psychosocial elements that weigh heavily in divorce disputes, the courtroom is no longer perceived to be the most suitable arena for settling divorce disputes. Social workers and other relevant professionals tend to be more involved in conference room settlements, and therefore, mediation is seen as more suitable than the adversarial system for divorce disputes (Shaffer 1988). However, scholars remain concerned that the alternative dispute resolution model could fall into another trap, which would lead to more disadvantages for women or minorities (Grillo 1991).

My paper is not a comparison of mediation and the adversarial system or an attempt to suggest one is more suitable than the other is for divorce disputes. Instead, using the theory of legal technicality, I provide a story based on my ethnographic legal research that aims to discuss how legal techniques affect the strategies of disputants, especially female disputants. I argue that Taiwanese women should not necessarily be seen as a gender-disadvantaged group because of the legal system’s gender neutrality. However, societal and cultural gender norms influence divorce disputes in more subtle ways, particularly when intertwined with legal techniques in the dispute settlement process.

Legal technicality is ‘a form of reasoning and argumentation,’ which includes various types of formatted conventional documents, such as letters of intent; protocol; analogies of legal interpretations; and precedent citations (Riles 2011, p.64-65). Legal techniques are usually considered trivial, value- and gender-neutral, and theoretically unimportant. However, as Annelise Riles asserts, ‘law without legal technique is not law at all’ (Riles 2011, p.67).

Following on from the theory of legal technicality, my paper is organized into three major sections. The first part briefly reviews the discourse of divorce mediation, including the paradigms prevalent in the United States and Taiwan. The second part attempts to respond to critics of socio-legal studies by using the idea of legal technicality. The third part illustrates a story of divorce mediation and the fourth part follows my analysis from both doctrinal issues and a socio-legal perspective. Ultimately, I hope that this paper will contribute to a greater understanding of how doctrinal law affects gender practice in the dispute settlement process. Particularly, I hope to trigger discussion among socio-legal scholars on the multiple layers of the techniques of law and gender practice.

II. Using Legal Technicality to Respond to the Critique of Socio-Legal Studies

In my paper, I refer to socio-legal scholarship that primarily encompasses the law and society community in the U.S. In this section, I firstly explain how the law and society approach has been criticized and then, I explain how I use the theory of legal technicality to respond to such criticism.

In the book Invitation to Law and Society: An Introduction to the Study of Real Law, Kitty Calavita concisely explained that the subject of concern in studies of law and society (socio-legal studies) is the role that law plays in society, or real law. For example, what are the mechanisms underlying actual applications of laws? How do law and daily life affect each other? What can be learned from the difference between abstract legal provisions and concrete realities? Socio-legal studies also extend to investigating how laws are interpreted and practiced in the juridical mechanism (e.g., a judge and a jury) and how legal education is taught and reproduced (Calavita 2010, p.3-5). In the essay ‘Complexity, Contingency, and Change in Law’s Knowledge Practices: An Introduction,’ Sarat et al. indicated that when the
law encounters real social problems, law executors make clear judgments and corresponding actions by collecting information and thoroughly understanding relevant requests. This reflects citizens’ expectations and perceptions of the law, although it may be a misunderstanding of ‘law’s way of knowing’ (Sarat et al. 2007, p1-2). Sarat et al. argued that although law’s way of knowing varies between agencies of differing nature, legal terminology and its ritualized execution remain unchanged. To people outside of the legal circle, this terminology and its related operations are professionally mysterious; however, the practices become unsurprising once the professional terminology is deciphered (Sarat et al. 2007, p1-2).

Therefore, socio-legal scholars should focus on using the research methods and theories of non-law social sciences to comment on the dominating powers (specifically class, race, and gender) in the execution and effects of law while interpreting the operations of power politics and state hegemony (patriarchy) during this process (Merry 1990, p.96-109).

Recent problems with the basic methodology and epistemology of U.S. law and society academia include the following: Are the differences in the research methods, epistemologies, and academic concerns of scholars studying law and society, who are primarily socio-legal scholars investigating interdisciplinary studies in law and doctrinal law scholars, so significant that they prevent these two groups of scholars from communicating with each other? Is there validity in the notion that only doctrinal law scholars are genuine lawyers? Are doctrinal law scholars actually less involved with jurisprudential retrospection? Do socio-legal scholars excessively discuss society and seldom discuss law, using too many theories and conducting minimal practice (Valverde 2007, p.77-78)? Can scholars critical of legal studies propose methods that can actually resolve complex social problems? What remains after the critique of law and the deconstruction of legal hegemony (Brown and Halley 2002, p.2-5; p.25-32)? In her article ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’, Mariana Valverde explained this self-critique and indicated that conducting interdisciplinary studies in law while upholding the socio-legal research banner may cause scholars to overlook the knowledge technicality and doctrinal issues of the positive law. Additionally, research has focused excessively on the practical effects that law has on society, with few studies investigating the ‘law itself’ (Valverde 2007, 77-78). This research trend may cause scholars investigating the technicalities of law and those conducting socio-legal research to terminate their dialogue and eliminate possibilities for cooperating and exerting a joint influence.

These questions lead to the objective of my paper, which is to use the technicality of legal knowledge as a representation of doctrinal issues and the phenomena of legal knowledge. In my opinion, focusing on the technical character of law while also emphasizing how social factors such as gender have intertwined with the technicality of law may prevent the problematic situation identified by Valverde, where socio-legal studies are increasingly marginalized or not recognized as legal studies. Therefore, I borrow the concept ‘technical legal knowledge’ (Riles 2011, p.13) as the entry point for investigating interdisciplinary studies in law. This is a term that lawyers should be familiar with but it is often mistaken as a neutral and nonjudgmental characteristic of legal knowledge. My aim is to provide an interpretation method that differs from those of doctrinal laws and to strengthen the position of socio-legal studies, which Valverde indicated was weak, in order to give feedback on the legal interpretation of doctrinal laws.

Annelise Riles demonstrated the importance of research regarding the ethnography of law by providing an example of an ethnographic study on international financial markets: the executive director of a computer company replaced numerous quantitative data analysts hired to analyze market trends with qualitative data analysts with ethnographic experience. This director stated, ‘I realized that what I needed was not data, but insight’ (Riles 2011, p.13).
More specifically, in the first chapter of her book *Documents: Artifacts of Modern Knowledge*, Riles recommended employing the ethnography of law as the epistemology for interdisciplinary studies of law. To my understanding, conducting ethnographic legal research in keeping with Riles’ strategy does not only aim to obtain a greater number of updated ethnographic findings (Riles 2006), nor is it limited to an investigation of and retrospection on the informant relationships between ethnographic researchers and subjects (Riles 2006, p.4). Instead, the link between ethnography and modern knowledge is highlighted by examining the production process of ethnographic knowledge; scholars investigate how categories are recognized and conceptualized and in what form the categorized contents respond to particular categories (Riles 2006, p.1).

In *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Riles 2011), Riles used U.S. and Japanese banks and futures trading financial markets as the ethnographic field. In this field with abundant professional terminology, jargon, numbers, and documents, Riles investigated how banks, bankers in the market, traders, decision makers, experts, and scholars produce documents and use terminology and jargon to form “inside knowledge.” Riles indicated that this control field is interwoven by laws that are represented by the government; furthermore, the private economic principles of financial markets and the trading habits and methods are widely recognized by the industry. Therefore, legal technicality is regarded as merely an incidental and secondary means, unlike the ends that play a crucial role, such as policy decisions or economic sanctions. However, based on long-term field observations and theoretical analysis, Riles found that the ends originally defined by mechanisms or legal regulations tended to disappear or dissipate during substantial legal knowledge practice and day-to-day practice. In contrast, the means that have been defined and perceived to possess neutral and objective value, subtly yet effectively influenced the overall control (Riles 2011, p228-230). Therefore, Riles proposed the concept of ‘legal technicality’ to provide a more detailed understanding of the practical aspects of law and control. The connotations of legal technicality are as follows: (a) they include the concepts of legal instrumentalism and managerialism; (b) they involve specific types of legal experts, particularly the lawyers who regard law as a regulatory tool and equate experts’ self-identification with ‘legal engineers’ (or ‘legal technicians’), that is, the types of actors who are expert scholars, government officials (regulators), and practitioners; (c) legal technicality significantly emphasizes a problem-solving paradigm and tends to use legal terminology to clearly and practically define problems, subsequently proceeding toward a solution; and (d) legal technicality is “a form of reasoning and argumentation,” which includes various types of formatted conventional documents, such as letters of intent, protocol, and memorandum, analogies of legal interpretations, classification techniques for various types of financial tools (e.g., futures and stocks), applicable legal practices, and precedent citations (Riles 2011, p64-65)). Riles identified two possible reasons for underestimating the forms involved in legal technicality, such as document production and practical operational procedures. One reason is that these procedures are considered trivial, theoretically unimportant, and not key practical procedures capable of affecting legislative or judicial policies; therefore, these technicalities do not attract significant academic attention. The other possible reason is that compared to political issues that are more commonly examined in socio-legal studies, these technical details seem ordinary and unlikely to be the focus of policy-related or theoretical debates (Riles 2011, p65-66).

Based on the socio-legal scholars’ introspections regarding the research positioning of their academic communities, as explored in Section II, I contend the following: socio-legal research must re-focus on the practice of legal rules rather than political critiques regarding legal norms. I base this contention on Riles’ first proposal that legal knowledge should
include actors, their action strategies, and perceived legal knowledge phenomena. By examining field data, Riles further indicated that among the various procedures and documents considered subtle and trivial processes and thus taken for granted, the technicalities of legal knowledge are what make the law the law. The scope of my study, family dispute and mediation, is substantially smaller than the international financial market investigated by Riles, and the data and public/private control methods adopted for my study differ significantly from those Riles employed. Nonetheless, the two studies are similar in that both examine the legal technicalities involved in the procedural law jurisprudence of doctrinal law, both assess the document production techniques in judicial practices, and explore how actors of various professional (or occupational) backgrounds learn and apply legal terminology for dispute resolution. I employed the knowledge base of the ‘technicality of legal knowledge’ proposed by Riles and used an incident observed at the mandatory divorce mediation as my ethnographic field to discover how technical legal knowledge should be applied.

III. A Counterclaim Story: “I object to everything he wrote in there!”

The situation I will examine in this section arose in the mandatory divorce mediation. I voluntarily serve as a district family court mediator so that I am involved in the ethnographic legal study of divorce mediation. The fields where I participate and witness are mostly mandatory mediation, particularly divorce related disputes.

Mr. and Mrs. A were both public elementary school teachers who had been married for six years and had no children. Mr. A claimed that they experienced difficulty getting along because of their incompatible personalities. In addition, Mr. A complained Mrs. A was always disrespectful to Mr. A’s parents. Following a job transfer two years earlier, Mr. A moved out of their shared apartment in the western part of the city to live alone in the eastern part of the city (approximately a three-hour drive away). Over the next two years, Mr. and Mrs. A met only occasionally and gradually drifted apart. Consequently, Mr. A believed that their marriage existed only nominally and petitioned for a divorce. Additionally, because Mr. A had debts and zero current assets, whereas Mrs. A owned real estate properties and cash amounting to approximately NT$2 million. Mr. A claimed that Mrs. A should pay him NT$1 million, citing his right to claim for the distribution of property.

Mrs. A stated that she ‘had an emotional breakdown and cried daily’ after receiving Mr. A’s indictment, which contained numerous accusations including ‘having a stubborn personality and insulting her husband and parents-in-law when things were against her wishes.’ She was shocked to learn that the love and marriage she had cherished was so ugly and disappointing to Mr. A.

One day before the mediation meeting, Mrs. A submitted a five-page hand-written plea to the court in order to ‘express herself to the court, Mr. A, and Mr. A’s attorney.’ In the plea, she refuted Mr. A’s accusations that she had insulted her parents-in-law, claiming instead that she had been misunderstood. Mrs. A listed several detailed stories of her interactions with her

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188 According to Taiwan Family Proceedings Act, Article 23, divorce disputants should participate in the mandatory mediation, which is conducted by court.

189 Taiwan Civil Code, Article1030-1: ‘I. The following constitutes the separate property: (1) Articles which are exclusively intended for the personal use of the husband or the wife; (2) Articles which are essential to the occupation of the husband or the wife; (3) Gifts acquired by the husband or the wife which the donor has designated in writing to be the separate property. II. The separate property provided in the preceding paragraph is governed by the provisions concerning the separation of property regime.’
parents-in-law, such as family gatherings on holidays to demonstrate that she had been wrongly accused. In both the plea and her oral statement, Mrs. A insisted on her love for Mr. A and her strong desire to have a child with him. According to Mrs. A, she had been receiving treatment and preparing for pregnancy since she had been diagnosed with infertility. Therefore, it was unacceptable to her that Mr. A was demanding a divorce and NT$1 million by citing his right to claim for the distribution of remaining property. Consequently, she filed a counterclaim\textsuperscript{190} objecting to all of Mr. A’s statements, especially because she had lost her job, health, love, and marriage.

Mr. A hired a female attorney, Ms. D, who drafted the indictment and accompanied Mr. A to the mediation. By contrast, Mrs. A attended the mediation by herself. Based on Mrs. A’s plea and oral statement, it was difficult for me, as a mediator, to determine whether her requests could be mediated. In particular, it was unclear whether Mrs. A completely understood the meaning of ‘counterclaim’, a legal term she had used in her plea. Based on the lengthy descriptions of her grievances in the plea, and her repeated statement that ‘I will wait for him. I will wait for him forever in our home, and my door will always be open to him,’ it seemed that Mrs. A objected to a divorce. However, ‘objection to a divorce’ and ‘counterclaim’ are two completely different concepts in the legal system. According to the Taiwanese Code of Civil Procedure, a counterclaim refers to a defendant making a claim against the plaintiff regarding facts that are relevant to the same lawsuit. In other words, the plaintiff becomes the defendant and the defendant becomes the plaintiff in another lawsuit; therefore, the initial claim is reversed, or countered.\textsuperscript{191} Thus, in this situation, a counterclaim would entail Mrs. A also filing for a divorce from Mr. A, possibly for other reasons than those he had cited.

Therefore, my primary task was to clarify Mrs. A’s demands: did she agree to divorce but for other reasons? Alternatively, was she against Mr. A’s request to divorce? Perhaps she was not yet ready to make a decision. Mrs. A did not give me a clear message and to some extent, she acted like ‘the bad woman’ as described by Trina Grillo (Grillo 1991, p1556); instead of negotiating rationally, her anger and tears prolonged the mediation session.

After Mr. A and his attorney clearly and calmly summarized the demands in the indictment, I asked Mrs. A for her response to Mr. A’s statement. Mrs. A stated, ‘I do not want to divorce,’ before bursting into tears. She wept while saying, ‘How can you do this to me? Divorcing me and asking me to pay? ... I am only a weak woman. How can I have one million (New Taiwan Dollars, NT$)? … Is he destroying me because I cannot bear his child?’ Bound by the mediation manual, I was obliged to mediate between the two parties by assuming an unbiased and objective position. Considering Mrs. A’s highly emotional state, the mediation could not proceed. Therefore, Mrs. A was invited to calm herself in the waiting room while I spoke to Mr. A in private in order to understand his intentions. Mr. A explicitly stated, ‘I am determined to get a divorce.’ I indicated that based on Mrs. A’s plea and her extremely emotional reaction, it was likely that Mrs. A was unwilling to abandon the marriage. Subsequently, I asked Mr. A whether it was impossible for them to continue sharing a life together, to which Mr. A replied, ‘Impossible for me.’ Attorney D added, ‘She (Mrs. A) has been acting like this for a long time... We can’t tolerate anymore. Now that she’s filing a counterclaim for divorce, it means we both agree to a divorce, right? As for the distribution of

\textsuperscript{190} Taiwan Code of Civil Procedure Article 260:”I. No counterclaim may be raised if it is subject to the exclusive jurisdiction of another court or if it is neither related to the plaintiff's claim nor related to the defendant's means of defense. II. No counterclaim may be raised if it cannot be adjudicated in the same proceeding with the plaintiff's claim. III. The court may dismiss a counterclaim without prejudice where it is raised by a party for purposes of delaying litigation.”

\textsuperscript{191} Id.
property, we want Judge to make decision. We don’t want to negotiate with her.’ Mr. A nodded and agreed, ‘Right, let us do this.’

Subsequently, I asked Mr. A and Attorney D to wait outside and had a private talk with Mrs. A, who still appeared emotional. In an attempt to understand Mrs. A’s thoughts, I asked, ‘Mrs. A, according to your plea, you filed a counterclaim for divorce, which means that you also want to divorce. However, based on what you said, are you withdrawing this counterclaim?’ I explained the meaning of a ‘counterclaim for divorce’ in detail. After more than three explanations, Mrs. A finally seemed to understand. Therefore, I asked again, ‘Do you or do you not want a divorce?’ Still in tears, Mrs. A replied, ‘I don’t know. I don’t know anything now… What I meant was, I object to everything he said in the indictment!’ It was almost an hour into the mediation, and Mrs. A still seemed undecided.

Finally, both parties were invited to the mediation room, where the current procedure and both parties’ intentions were explained. I confirmed Mr. A’s intentions and he responded by stating that there was nothing more to say. Attorney D added that the division of the remaining property worth NT$ one million was negotiable. Upon hearing the financial issues, Mrs. A once again burst into tears, weeping while saying that she and her family had provided substantial financial support to her husband when he needed money to establish a home tutoring company. Additionally, she had bought a gold necklace for her mother-in-law as a birthday gift, financed her sister-in-law’s apartment renovation when the sister-in-law married, and she expected Mr. A to return the money. After Mrs. A’s statement, Attorney D simply responded that the division of the remaining property was negotiable.

Considering the three people’s uncompromising attitudes and that Mrs. A seemed unable to promptly calm herself, I determined that this case could not be resolved within the session, which should have already closed. Meanwhile, the parties of the next case had already been waiting outside for over thirty minutes, so I made a final confirmation with both parties regarding their positions. Mr. A insisted on a divorce and Mrs. A stated she would ‘leave everything to the judge to decide for her’ and that she ‘did not know about anything anymore.’ Attorney D concluded that there was no need to schedule a second mediation and said, ‘We should petition for a judge to grant a divorce. Since the two parties have no children together, this is only a property division issue left. We can see what the judge’s ruling will be.’

IV. Gender in the technical context of law

In this section, I firstly outline the relevant doctrinal issues and then turn to the socio-legal approach to explain how the scene in the mediation room can be interpreted as ‘law in action.’

1. No-fault Divorce

In Taiwanese family law, ‘any gross event other than that set forth in the preceding paragraph’ and defined in Paragraph 2, Article 1052, of the Civil Code, is known as the ‘irretrievable breakdown of marriage.’ I want to assess if this applies to the lawsuit in question. In fact, Paragraph 2, Article 1052 shows that ‘no-fault divorce’ has not yet been adopted in Taiwanese family law. Maintaining an unhappy marriage for the sake of the children seems more welcome to the patriarchal culture in Taiwanese law and society than divorce is. Therefore, adopting the idea of a no-fault marriage is perceived to ‘encourage’
people to divorce. In other words, filing for divorce should only be a last resort and the court must determine which party caused the marriage to fail under the criteria outlined in Paragraph 2, Article 1052. Therefore, Mr. A and his attorney need to strike Mrs. A with great force in order to prove Mr. A is faultless and Mrs. is incapable of maintaining a successful marriage. Accordingly, the terminology utilized in the plea was full of gender stereotypes. Mr. and Mrs. A both modeled themselves according to the stereotypes of a good husband or good wife.

2. Marriage Property

The distribution of remaining property during the marriage period, as defined under Paragraph 1, Article 1030 of the Civil Code, is also debatable. For example, Mrs. A believed that she had contributed immensely to the marriage because she and her family had financed her husband’s business venture. It is necessary to assess what a reasonable calculation of Mrs. A’s and Mr. A’s matrimonial property is. The right to claim for the distribution of remaining property serves regulatory purposes, recognizes the husband’s and the wife’s sincere contribution to a marriage, and promotes the increase of matrimonial property for both parties rather than working outside the home. However, the actual situation may be that the couple has experienced marital discord for a long time and are already separately managing their own property before either party submits an indictment for a divorce by decree at court. In other words, although the law is gender neutral and considers the value of housework, the law cannot prevent couples from disposing of their property by various means in order to avoid its later partition with the other party following a marital breakdown.

3. Mandatory Mediation and Counterclaim

Regarding procedural law, whether the disputant is in favor of mandatory mediation is also debatable. For Mr. A and his attorney Ms. D, attending mediation was merely a waste of their time. Although Mrs. A appreciated having the opportunity to voice her concerns in a ‘formal occasion’, i.e., mandatory mediation, it remained unclear whether she meant to continue or abandon the marriage. In my opinion, civil procedural law, which is based on self-interest, rationale, and reasonableness, obviously cannot solve problems for disputants like Mrs. A. Parties in the dispute settlement process, whether going to court or turning to Alternative Dispute Resolution (ADR), are required to ensure their claims are clear, straightforward, and in line with certain legal categories. However, Mrs. A failed to do so in this session. As argued above, the keyword in this situation is ‘counterclaim’ (Fan Su). It is a technical term that means the defendant is making a claim against the plaintiff regarding facts that are relevant to the same lawsuit. As outlined above, Mrs. A filing a counterclaim for divorce would mean her filing for a divorce from Mr. A, possibly for other reasons than those he had cited. However, fan in mandarin Chinese means to be against or to object. Therefore, Mrs. A insisted that she was against everything Mr. A had accused her of. It could be possible

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192 As mandatory mediation, see sub-paragraph 1, Paragraph 1, Article 406, Taiwan Code of Civil Procedure
193 Taiwan Code of Civil Procedure Article 260: “I. No counterclaim may be raised if it is subject to the exclusive jurisdiction of another court or if it is neither related to the plaintiff's claim nor related to the defendant's means of defense. II. No counterclaim may be raised if it cannot be adjudicated in the same proceeding with the plaintiff's claim. III. The court may dismiss a counterclaim without prejudice where it is raised by a party for purposes of delaying litigation.”

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that Mrs. A refused to comprehend this technical concept simply because she had not made up her mind about terminating her marriage.

V. Conclusion

Riles stated that anthropologists conducting comparative studies do not have to undertake extensive traveling such as Malinowski, the British legal anthropologist who proposed the concept of ‘legal anthropology’, adopted. Instead, the subject of comparison can be found in the society in which we live. Additionally, the end and starting points of our knowledge and understanding regarding the comparative studies of legal anthropology and doctrinal law should be learning cultures in other regions as well as deepening the understanding of one’s own knowledge tradition (Riles 1994, p.598). By examining gender in the technical context of the law and by positioning myself on the border of doctrinal law and gender-socio-analysis, I use the technicality of legal knowledge as a position of representation between interdisciplinary studies in law and doctrinal law. I have used Mr. and Mrs. A’s story to demonstrate the legal technicalities involved in specific legal regulations, and to highlight how legal terminology is referenced, manipulated, and reproduced by actors of various law mechanisms. The technical character of legal doctrines may be the center of a legal study. Yet, the theory and research strategy of legal technicality may de-center legal hegemony from legal centrism (Riles 2011, p13-19). Gender certainly influences the substance and procedure of law. The impact of gender on legal systems may no longer be simply defined as the masculinity of law; nonetheless, it continues to affect the technical context of law in subtle ways.

References


GENDER AND “THE LAW”


Abstract

The family has been at the heart of feminist theorizing and activism for a long time. Three lines of debate stand out in this camp. In the first place, the "family" appears as the institutional arrangement for the expropriation of women's labor and the production of their dependence to men that occupy the roles of husbands and fathers (Engels, 1966) (Orloff, 1993) (Shamir, 2010). Secondly, the "family" is conceived as the enabler and result of the "traffic in women" (Rubin, 1975). Finally, the "family" is presented as the site for affective protection and fulfillment, as the ideal for "community" (Stone, 1979; Olsen, 1983). In this case, family is positively valued and women are considered as important because of the attention they give to family and not in spite of it.

The role of law in the production of the family as a site for the expropriation of women's labor and for the traffic in women, as well as the scenario for affective protection and fulfillment, has not been as controversial. An important part of the process of law's modernization in the last century, in many jurisdictions over the last two centuries, was the entrenchment in law and legal thinking of the idea that the "family" exists before law as a product of nature or culture or both. Consequently, the role of law in relation to the family has been reduced to "reflecting" or "interpreting" the "family" with fidelity in order to protect it (Olsen, 1983).

In this paper we start from the premise that the "family" does not exist outside the law but rather (Jaramillo, 2010) is produced by and produces law (Gordon, 1984). From there we ask how exactly does law produce the family and, in particular, how does it produce the family as a site of oppression for women. Specifically, we wish to find answers for the question of how should we read the fragmentation and incoherence of the legal system's definitions of family. For this, we show that family law produces not one but several views of the family and the role of women and men in families. Then we show how social policy also embodies different views on the family with different consequences for women and men. We end by asking how to make sense of this fragmentation and the contradictions they produce at the same time that we acknowledge the contribution of the family to the oppression of women.

Keywords: Gender, Family, Law and distribution, Social Law, Family Law
The families of family law

Family law has been the scene of many feminist interventions. Feminists have challenged rules pertaining to coverture, marriage, marital property, alimony, divorce, and child custody (Bartlett, 1999). Not all feminists, however, use the “family” as an argument for or against a certain rule choice, nor have they reflected much on the relevance of having legal definitions of the family produced via statutes or cases. We would like to undertake such an exercise here using the Colombian case. We will start by explaining the role of the “family” as a concept that not only shapes and justifies the field, but also “solves” the gaps and contradictions of the rules understood to be included in it. Next, we show the diverse scenarios in which the concept has been used, and the stakes involved in emphasizing “family” as a solution in each.

Getting to the family

It is not a “natural” or “necessary” characteristic of legal systems to be organized to include a field of law pertaining to the “family” (family law). This turn in most jurisdictions happened during the dominance of the “social” as framework for understanding law and legal thinking (Kennedy, 2006). It was founded on the idea that law should be organized to “reflect” social reality and the idea that the family was an observable social reality (Jaramillo, 2010). The conclusion was to think about rules on marriage, divorce, marital property and parental relations as rules that define the “creation and evolution of families” (Jaramillo, 2010).

One of the most important consequences of this turn to family law is that moral and/or scientific notions about the family become relevant arguments for filling the gaps or solving the contradictions among the rules included in the field (Jaramillo, 2010).

The second consequence that is relevant for our discussion is that family becomes intertwined with notions of marriage and the “best interest of children”, as legal scholars insist that family law is the law of marriage while at the same time they emphasize that family law is the law of marriage and parental relations (Jaramillo, 2010; Halley & Rittich, 2010).

Conceptual fragmentation

In spite of the importance of family for modern thinking of law, in particular of family law, legal scholars, and specially those in the field of family law, acknowledge that there is no univocal concept of the family. In their introductory chapters to family law treatises they explain that the family is a contested concept in sociology and anthropology, even if they go no further than late nineteenth century and early twentieth century views on the family, and proceed to assert that the family can be defined as an economic unit, an affective unit or a biological unit (Jaramillo, 2013; Jaramillo, 2010). These different concepts are legally important because they determine who is included as a member of a family and how an individual ceases to be part of a family. Thus treatise writers explain that the family as an economic unit is a group of individuals who provide for each other and live under the same roof (a definition very close to the definition of the household), as an affective unit is a group of individuals bound by filial and romantic love (this definition is close to the definition of a couple) and as a biological unit is a group bound by kinship (this definition overlooks that

198 Some already argue that legal feminism has been “too” interested in family law. (Quinn, 2002)
kinship is cultural and not biological but wishes to emphasize reproduction and therefore children as the core of families).

For our purposes it is crucial to note the paradoxical embrace of family as a concept that is useful to “fill in the blanks of the law”, so to speak, at the same time that it is recognized as indeterminate and full of contradictions. We see this fragmentation playing out in two ways: first, as allowing the reconciliation of incompatible agendas; second, as keeping the family as relevant for deciding about sex and reproduction. We believe that the conceptual fragmentation depoliticizes the family in so far as it presents different definitions as scientifically plausible options with the same technical value. The depoliticization of the family makes it harder to imagine arguments outside or beyond the family. Also, it turns the family into a pure benefit while not being a family becomes a pure cost.

The stakes of “family”

In family law, the stakes of family have become most relevant in two specific doctrinal debates: common law marriages and same sex marriages. In these cases conceptual fragmentation has manifested itself in the power of the cultural and social reality of affection and solidarity to expand the notion of the family beyond legal formalities in the case of common law marriages, and the inefficacy of these very same arguments in the context of same sex couples. In this context, the arguments become purely biological: same sex couples are not the same as couples formed by people with different sexes because they cannot engage in reproduction. Same sex couples have yet to win the battle over adoption and marriage because they cannot claim to be families.

Interestingly, the expansion of the concept of family to include “informal” or “natural” families (as Colombian law names them) has involved legal triumphs for individual women and has been explicitly argued as a feminist development in Colombian law. In these cases “wining” means that a judge has declared that the plaintiff has the same rights that a spouse would have in her situation: access to health, social security, inheritance, community of property, nationality, among others. Most plaintiffs in cases about same sex couples, on the other hand, have been men. The claims have been to a large extent about similar resources: access to health, social security, inheritance, community of property, nationality, among others.

For us, these developments pose several questions as to the role of law in producing the family as the site for the oppression of women. We find that the expansion of marriage privileges to common law couples seems in line with the feminist demand for community of property as a recognition of housework and, therefore, as a promising path for emancipating women from the malaise of the sexual division of labor. In this sense, it would seem that more “family” could have positive distributive results for women as the “family” gets to be redefined as an economic unit and we move away from marriage and the powers and privileges it is accused of embodying (Colker, 1991). Then again, it is rather suspicious that

199 For the case of common law marriages see, in particular, Constitutional Court Sentencia T-098/2010 (explaining how progressively “concubines” or “partners” have acquired property rights through judicial decisions). For the case of same sex marriages see Constitutional Court Sentencia C-577/11 (establishing that the exclusion of same sex couples from marriage is not discrimination but determining that the Colombian Congress should legislate to protect the rights of same sex couples).

200 See Constitutional Court Sentencia C-098/1996 (explaining that the exclusion of same sex couples common law marriage legislation is not unconstitutional because legislators are allowed to tackle one social ill at a time; in the case of common law marriages that ill was women’s poverty).
these changes have come about alongside an insistence on biology as the only possible route to exclude same sex couples from recognition as families. If more “family” is also more “biology”, rather than some form of emancipation we could be facing a new mode of oppression through the family: getting more resources from men through sex on condition of being open to reproduce and bearing the costs of reproduction.

Social policy and the family

Alongside family law, but mostly in isolation from debates and reforms taking place in family law, social policy has produced its own “families” through statutes, cases, regulations and macro policy frameworks. In this field we find less internal critique and ambiguity about the family in different periods, but fragmentation is manifested in two ways: first, through radical discontinuities from one period to the next; and second, through isolation of social policy debates from debates in private law and, in particular, in family law. As is the case with family law, the type of conceptual fragmentation we are talking about leads to depolitization of the family and invisibilization of the stakes of “families”, in particular for women.

In this section we present two moments of social policy thinking in Colombia and reflect on the way in which “families” were conceived in each moment. As in the previous section, we pay close attention to the work that conceptual fragmentation is doing and we suggest some of the stakes involved in the definition of families in this field.

The evolution of social policy during the 1970s: modernization, state intervention to reach full employment and the family as a black box

According to traditional accounts, during the early 20th century and up until the early 1970s, economic and social policy was intertwined with the overarching objective of modernization. The idea of modernization was understood in a wide range of ways which included migration from rural areas to the cities, industrialization and the mechanization of agricultural production, the elimination of semi feudal or feudal forms of production, the formalization of labor relations and the titling of land. The family was seen as a unit which would follow the transformation of its male head. Once society as a whole reached the promise of modernization, every member would benefit from its blessings.

However, instead of consolidating liberal ideas, the modernizing process strengthened “an extremely conservative, authoritarian and unpopular vision of social, political and cultural order” (Melo, 1991, p. 237). Dominant economic groups, church and other social sectors promoted under the idea of modernization “a paternalistic view of labor relations and social order” (Melo, 1991, p. 237) which consolidated the family as the natural and uncontroversial unit of society.

Since the late 1940s, welfare style provisions were intimately linked to the promotion of formal employment. At this time, the idea of modernization was limited more to Import Substitution Industrialization and as a consequence, the design of social policy remained linked to the development agenda.

Beginning the 1970s, academics and government officials started speaking of the ‘crisis of the modernization model’. This crisis meant that the promises of modernization had
not reached the majority of the Colombian population. President Alfonso López Michelsen (liberal 1974-1978) explained this frustration in the following terms:

Since the 1930s our country has had the same development plan which consisted of a strong and decisive support for the modern sector of the economy. The development plan which we are now presenting to Congress has as its main objective to close the gap that this traditional development model has generated. (Departamento Nacional de Planeación, 1975, p. v)

One of the most salient gaps was the effect that this unequal distribution of the modernization impulse had over families. A document prepared by Cepal accounting for a decade of social policy in Colombia (since the mid-1970s through the mid-1980s) (Parra, 1987) describes this circumstance in the following terms:

Two situations had an enormous impact upon the Colombian family between 1950 and 1970: the expansion of the education model and the fact that women entered school the labor force. This meant that social expectations varied in all groups and there were transformations in attitudes towards childbearing and marriage. (Parra, 1987, p. 22)

The basic policy geared toward aiding families was the establishment of publicly funded nursery centers ‘Centros de Atención Integral Preescolar’ (CAIP). This program received scant government support. For progressive liberal policy makers, this was problematic because it ignored that women were entering into the labor force and needed childcare support (Parra, 1987, p. 27). For conservative ones this fact was problematic because children were left unattended. President Julio César Turbay (liberal, 1978-1982) explained this concern in the following terms:

The increase in labor force participation rates of women, the change of the extended family to the nuclear family and the slow growth of the infrastructure to serve preschool, have led to the child now suffers an increasing vulnerability during their early years.

The process of socialization and child care traditionally performed by women in the family have been affected by the increasing female labor participation, by the change from extended to nuclear family and new patterns of urban family life (Departamento Nacional de Planeación, 1980, p. 95).

To Turbay, ‘Centros de Atención Integral Preescolar’ (CAIP) replaced, somehow, maternal care and have a real function of family instruction:

The accelerated urbanization of the country and the demographic transition experienced in the last decade have created new problems that are affecting the stability of the social structure and family organization, such as the irresponsible procreation and neglect of children, malnutrition, among others.

Consideration of these issues led the national government to design the new social policy -in which was highlighted as a priority the care of children- which will allow face those situations (Turbay, 1982, p. 201).

Social Policy in the 1990s: free market, focalized welfare provisions and the family as an indispensable recipient

By the late 1980s, the industrialization model was gradually abandoned in favour of free trade and the strengthening of market institutions (Alviar Garcia, 2008). The abandonment of full employment had a significant impact on social policy because formal employment benefits were reduced. The economic development model was aimed at strengthening the market as the best distributor of resources and as a consequence, social policy was geared towards aiding those outside of the market to enter. The discussion on welfare style provisions was therefore focused on the concept of human capital.

As a matter of fact, strategies against poverty changed their perspective of macroeconomic planning and shifted to microeconomic solutions that sought to address
specific issues of particular groups of individuals. These strategies responded to a change in the definition of poverty: from being identified as a structural problem that should be addressed through policies directed to groups of citizens, to a localized one linked to individual/household fortunes that should be directed to individuals mainly through conditional cash transfers (Alviar García, 2013). In other words, poverty alleviation was focused on eliminating structural barriers to full participation in the market.

Conceptual fragmentation and the stakes of “family”

In the case of social policy conceptual fragmentation materializes in visible shifts from one period to another, as well as in the isolation of debates about the family from debates taking place inside family law. When gender is foregrounded, then again, conceptual fragmentation reveals yet another mirage: the more the family is a black box, the less talk about the family, and viceversa. Indeed, during the 1970’s and 1980’s, the consequence of understanding the family as a black box was that male heads of household were the main characters in social policy programs and the main recipients of resources. The “family”, then, were those individuals upon whom each male casted his shadow. To the contrary, starting in the 1990’s, focus on individuals has led to channelling most resources through female heads of household. In this case, “family” is formed by unmarried or separated women and their underage children; decidedly a turn from the economic family to the biological family.

As in the case of family law, then, we find women as the main beneficiaries of the conceptual turn in the family, since they are the ones getting the only cash transfers offered by the state, and their visibilization as a goal explicitly argued for as a feminist goal, in this case because it ends their economic dependence towards men. Here, however, the trick seems to be that while men were protected as employees, women’s employment in the new policies (prominently in Families in Action) is to get the transfer: they have to show that each and every one of their underage children have been vaccinated, attend school regularly and are properly fed. All this bureaucratic work has to be done for a meagre fee of 50 dollars per child. There is no prevision of savings or training for future employment. There are no policies to foster women’s participation in the labor market.

Preliminary conclusions

As pointed out before, we start from the premise that law produces the family as much as it is produced by families. In the frame delineated by this premise, the relevant question is how law produces the family and not whether or not it does a good job at protecting it. Thinking about the role of law, we propose, means taking into consideration statutes, cases, regulations, and theoretical frameworks. Also, it requires accounting for conceptual fragmentation and its distributional impact. In the case of the family in Colombia, we have suggested a three stage analysis of conceptual fragmentation: first we study how rules on marriage, divorce and parental relations become an exceptional field organized around the concept of the family; then we show how fragmentation operates within family law as ambivalence and ambiguity regarding the definition but also as an answer to the gaps and contradictions that arise in the application of rules; finally we evidence how social policy works isolated from debates in private law, understands itself as radically discontinuous with regards to the role of families, and tends to invoke the family most often as pertaining to women. Relating to distribution, we point out that both in the case of family law and in the case of social policy, changes in the concept of the family have come along with the
materialization of feminist agendas and channelling of resources toward women. At the same
time, however, the emphasis on the biological family as a limit for the expansion of family as
a concept has meant exclusions for same sex couples, particularly same sex men, and the
intensification of the feminization of reproduction.

Thinking about the family in family law and social policy simultaneously, then again,
reveals yet another poison in the gift of resource allocation to women through common law
marriage and cash conditioned transfers to female heads of households: just as women can
“get” some recognition for their housework, social policy creates an incentive for women to
declare being single or separated. In fact recent statistics in Colombia show that since the
1990’s there is a significant growth in the number of female heads of household and teenage
pregnancy. Some have attributed these changes, and it does not seem farfetched at all, to the
fact that women may get more from being alone than from being in a stable relationship. The
fallacy here is that women actually can get much more in terms of property from being in a
relationship than from the state. Of course, relationships come with the high cost of relentless
violence.

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For and Against Emotional Law – an English Case Study / ADRIAN HOWE

Abstract

As feminist scholars have observed for some time now, the operation of partial defences to murder, especially the provocation defence, provides wonderful opportunities to explore affect and the law. The law of provocation is, after all, western societies' most emotional law. Privileging 'infidelity'-inspired rage, provocation defences have for centuries allowed men to get away with murdering wives. The foundational 1706 case of Mawgridge explains why this is so:

...when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property.

Despite decades of reform efforts in anglophone jurisdictions, male possessory right expressed as jealous homicidal fury still mitigates murder in so-called 'intimate homicides' today.

This paper takes as a case study the affect-laden early 21st-century reform movement to abolish provocation in England and Wales. In the face of strident opposition from sections of the judiciary and the House of Lords, the reformers finally succeeded in abolishing provocation, replacing it with a new defence of loss of control in the Coroners and Justice Act 2009. Most controversially, 'sexual infidelity' was expressly excluded as a trigger for loss of control. Interestingly though, the reformers did not think to alter the differential standard embodied in the objective test for loss of control. This is extraordinary to an Australian observer, our High Court having abolished the differential standard according to 'sex' two decades ago. The ground for doing so was equality: in a modern democracy, men and women should be held to the same standard of self-control in the event that they succumb to homicidal fury. That notion somehow passed the English reformers by. So, usually, does the profoundly sexed operation of excuses for murder, scarcely any commentator noticing that two sets of intimate femicide cases, five of them committed in a jealous rage, neatly bookended a decade of reform activity and opposition.

The question animating the paper is this: how is affect playing out in intimate homicide cases in the post-reform era?

Keywords: homicide, provocation, case study

As feminist legal scholars have observed for some time now, the operation of partial defences to murder, especially the provocation defence, provides golden opportunities to explore the intersection of affect and law. The law of provocation is, after all, western societies' most emotional law, pandering to men's homicidal rage in intimate partner homicide cases. Across all Aglophone jurisdictions, that law has for centuries enabled jealous, possessive men who kill 'unfaithful' wives to avoid a conviction for murder, successful provocation pleas resulting in convictions for the lesser crime of manslaughter. Moreover, despite decades of reform efforts, male possessory right unleashed as homicidal fury against 'their' women can still mitigate murder in intimate femicide cases today. Contesting that right is hard work inasmuch as critics of emotional excuses for murder run into strenuous opposition from defenders of the right to passion that historically has found a congenial home in the provocation defence (Howe 2002; 2004, 2010, 2012).

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A classic case in point is what happened when in the early 21st-century British law reformers set about winding back partial defences to murder. I have written elsewhere about that reform movement and its extraordinary achievement, abolishing the provocation defence in the face of strident and highly emotional opposition (Howe 2012 and 2013a). Most controversial from the perspective of defenders of the status quo was the replacement of the provocation defence with a new loss of control defence that expressly excluded sexual infidelity as a trigger for loss of control. A wide-cross section of the legal profession and upper echelons of the judiciary were outraged by a reform that effectively deprived Englishmen of a time-honoured defence for killing their wives. It pays to return to these reforms because they highlight just how affect-laden the whole process of reforming emotion and emotional laws can be. Just as critically, they serve as a reminder that when English criminal law has addressed the question of emotion it has done so almost exclusively in provocation by infidelity cases or, more exactly, provocation by (her) infidelity cases.

Over the centuries, English courts have waxed and waned over the question of emotional killing. Should killers who succumb to overwhelming passion be partially excused, convicted of manslaughter rather than murder? Should extreme distress over some provocative act that led to homicide mitigate sentence? In the 1655 Buckner case, Judge Ask expressed his displeasure, in a dissenting judgment, of what he saw as a new-fangled idea of distinguishing between murder and manslaughter, and ‘between hot blood and cold blood, as we now distinguish’. It was, his said, contrary to the common law and ‘the law of God’. His was a rare protest and, crucially, Buckner was not an infidelity case. When it came to crime passionel—almost invariably finding one’s wife in delicto flagrante and killing either her or her lover—that was a different matter entirely. That, in the view of the courts, was hot-blooded killing for which a concession to ‘human frailty’ had to be made. Blood, traditionally, could not cool if the killer was to escape a murder conviction. If it did then, as it was put in a 1666 case, ‘that which was passion first, is malice last; and that which should have been manslaughter then is murder now’. The hotter the spurned love of the homicidal cuckold, the more he succumbed to the heat of passion, the better his chance of escaping the noose. The 1707 foundational provocation case of Mawgridge explained why:

…when a man is taken in adultery with another man’s wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery the highest invasion of property. 204

If the case law is anything to go by, they were indeed thinking of men. The endlessly rediscovered fact that it is overwhelmingly controlling and possessive men who are the perpetrators of intimate homicide while the rare woman who kills a male partner does so usually in self-defence after a long history of violence has been reported too many times to record here. Suffice it to say that researchers today continue to discover what feminist research has found over the last three decades—that the early English cases that defined voluntary manslaughter were cases in which men had killed allegedly adulterous wives and that for centuries only husbands could invoke the provocation defence when they killed after witnessing adultery.

202 Buckner’s Case (1655) Style 467 at 469.
203 Lord Morley (1666) 6 St Tr 770 at 780.
204 R v Mawgridge (1706) Kel 119 at 135.
Englishmen did have to have proof of their wives’ adultery. As Lord Raymond stated in a 1727 case, they had to ‘fall into a passion…which passion carries the person killing beyond his reason’. He continued:

…though the law of England is so far peculiarly favourable (I use the word peculiarly, because I know no other law that makes such a distinction between murder and manslaughter) as to permit the excess of anger and passion (which a man ought to keep under and govern) in some instances to extenuate the greatest of private injuries, as the taking away a man’s life is; yet in those cases it must be such a passion, as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office; if it appears he reflects, deliberates, and considers before he gives the fatal stroke, which cannot be as long as the fury of passion continues, the law will no longer under that pretext of passion exempt him from the punishment, which from the greatness of the injury and heinousness of the crime he justly deserves, so as to lessen it from murder to manslaughter.205

In Lord Raymond’s view then, English law was exceptional in being ‘peculiarly favourable’ to hot-blooded killers suffering from an ‘excess of anger and passion’. Nevertheless, the ‘fury of passion’ had to fall short of vengeance and ‘pretext of passion’ examined closely.

For example, mere suspicion of a wife’s adultery would not suffice to reduce murder to manslaughter. A wife-killer had to have ‘facts’ to ‘warrant the inference that he was justified in any such feeling’. As the judge said in an 1832 case, ‘if a man kills his wife, or the adulterer, in the act of adultery, it is manslaughter, provided the husband has ocular inspection of the act, and only then’.206 Or as Coleridge famously put it in the 1837 case of Kirkham, that it was ‘well known that there are certain things which so stir up man’s blood that he can no longer be his own master’, and that in such cases, the law ‘makes allowance for them’:

If, therefore, a person being stung and excited inflicts a fatal blow or wound, provided the provocation be sufficient, and acting upon him at the time, and recent, he will only be guilty of manslaughter…what he did was done in a moment of overpowering passion…though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.207

The view that men were expected to control their emotions was confirmed in mid-nineteenth century provocation by infidelity cases. As the judge said in an 1848 case, if a man finds his wife in adultery that would be manslaughter because he would be supposed to be acting under an impulse so violent that he could not resist it’.

But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would most unquestionably be murder…We must not shut our eyes to the truth.208

205 R v Oneby (1727) 2 Lord Raymond 1485 at 1486.
206 Pearson’s Case (1832) 2 Lewin 216.
207 R v Kirkham (1837) 173 ER 422.
208 R v Matthias Kelly (1848) 175 ER 342 (my emphasis).
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Or consider the 1863 case of a man who cut his fiancée’s throat when she broke her engagement to him, believing her to be his property—he killed her, he said, ‘to recover and repossess himself of property which had been stolen from him’. The judge directed the jury that if he defendant’s ‘real motive’ was ‘jealousy or a desire for revenge upon her....that would be murder’ for those were ‘the very passions which the law required men to control’. Furthermore

…what would be the consequences to society if men were to say to every woman who treated them in that way should die, and were to carry out such view by cutting her throat? The prisoner claimed to exercise the same power over a wife as he could lawfully exercise over a chattel, but that was ….the conclusion of a man who had arrived at results different from those generally arrived at and contrary to the laws of God and man...²⁰⁹

After all, as was laid down in an 1869 case:

When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it, the law does not say that an act of homicide intentionally committed under the influence of passion is excused.²¹⁰

Men then were expected to control their emotions, to use reason to control it. English law might consider ‘human frailty’, but it refused to ‘indulge human ferocity’.

This view that passion’s mitigating force needed to be contained continued into the 20th century. In the 1921 wife-killing case of Ellor, the Lord Chief Justice responded to allegations that the wife had made comments to the effect that she was going to be unfaithful, was adamant that the ‘law of England has always been’ that words were not sufficient to reduce the charge from murder to manslaughter. But if a man ‘discovers her in adultery…the law regards this as manslaughter because it regards the act of adultery as equivalent to a blow struck at the husband, that is to say, in its effect on his self-control’.²¹¹ By the mid-twentieth century, provocation was said to have ‘a very precise meaning in law’ and once again ‘if a husband observes an act of adultery on the part of his wife’ was given as an example of sufficient provocation.²¹² Adultery on her part, not his, and so it continued through to the 1946 case of Holmes, high point of judicial resistance to expanding provocation for the benefit of wife-killers, where Viscount Simon famously held that: ‘Even if Iago’s insinuations against Desdemona had been true, Othello’s crime was murder and nothing else. He said more:

The rule, whatever it is, must apply to either spouse alike, for we have left behind us the age when the wife’s subjection to her husband was regarded by the law as the basis of the marital relation…and when the remedies of the Divorce Court did not exist. Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he hold against her, and neither, on

²⁰⁹ R v Townley (1863) 176 ER 384.
²¹⁰ R v Welsh (1869) Cox CC 336.
²¹¹ R v Ellor (James) (1921) 15 CR App R 41.
hearing an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter.\(^{213}\)

And ‘as society advances, it ought to call for a higher measure of self-control in all cases.’

But the Homicide Act 1957 changed all that, opening the floodgates to men’s emotional provocation pleas in wife-killing cases by leaving it to juries to determine whether a ‘reasonable man’ would do as the defendant did in a murder case, such killers had a viable defence. Juries could take into account ‘everything done and said’, thereby opening the floodgates to passion provocation pleas. Now ‘passion’—the passion of men aroused by taunting, departing women in scenarios far removed from discovering her _flagrante delicto_—could become embedded in what is colloquially referred to today as ‘the nagging and shagging defence’. Henceforth mere suspicion of a wife’s ‘infidelity’—say, her departure from an unhappy and often violent relationship—would not bar a successful provocation plea or appeal. All her killer need allege was that her taunting of his sexual inadequacy or her preference for another drove him into a ‘red mist’ rage. To take just one amongst dozens of examples, a man released in 1985 after serving a prison sentence for a dishonesty offence strangled his wife, claiming she had disparaged his sexual ability and boasted about her encounters with other men. His five-year sentence for manslaughter by reason of provocation was reduced to four, the court taking the view that her alleged provocation was ‘the grossest’—‘to taunt a man about his lack of sexual inclination or prowess does involve striking at his character and personality at its most vulnerable’.\(^{214}\)

No comparable husband-killings committed by women taunted by their lack of sexual prowess can be found in the case law. Infidelity-killing was and continues to be all one-way traffic in terms of who kills whom. In the early twenty-first century, Englishmen continued to get emotional, fall into a fury of passion when wives left them, kill them and then receive risibly short sentences for manslaughter. But by then there was considerable disquiet over lenient sentences given to ‘provoked’ wife killers. In December 2002, the Attorney General appealed against sentences considered unduly lenient in 3 femicide cases.\(^{215}\) The sentences, all for manslaughter, ranged between three and half and seven years. In one of the cases, a man killed a woman who had left him, the court noting he had found this difficult to accept. He said he ‘just boiled over’ in a ‘red haze’ and choked her to death, saying ‘Do me a favour and die’. She had, he said, provoked him by saying she had the children, he only had their photos. The jury acquitted him of murder. In the other case, that of an ‘overworked’ solicitor, a plea of guilty to manslaughter on the basis of provocation was entered on condition that this plea was accepted by the prosecution. He knifed his wife to death in front of their 4 children, the eldest a 12-year old covered in blood as she rang 999. He testified that he was ‘in a red mist’ at the time and had ‘lost it totally’—‘It’s like they say, you can see a red mist, I was bellowing like a bull’. His wife was not only going to leave him for another man for whom she had ‘big style’ feelings, she insisted on telling Humes so. He received a 7-year sentence (cited in Howe 2013a p 415). When the Court of Appeal declined to interfere with the sentences, the stage was set for a protest movement.

\(^{213}\) _R v Holmes_ [1946] AC 588 at 598-601.

\(^{214}\) _R v Melletin_ (1985) 7 Cr App R (S) 9 at 10.

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It was led by the then Solicitor-General and later Minister for Equalities Harriet Harman, the first minister to address long-standing concerns raised by women’s rights groups about the operation of partial defences to murder in femicide cases. She explained that for centuries

…the law has allowed men to escape a murder charge in domestic homicide cases by blaming the victim. Ending the provocation defence in cases of ‘infidelity’ is an important law change and will end the culture of excuses. (quoted in Versaik 2008)

Ending the culture of excuses caused a great deal of consternation, several eminent lawmen expressing their continuing support for this culturally and legally-inscribed excuse for homicidal violence against women. In November 2008, the media reported the response of Lord Phillips, then the Lord Chief Justice to Harman’s call for abolishing provocation defences in infidelity cases. He felt ‘uneasy’ about a reform that he felt ‘so diminishes the significance of sexual infidelity as expressly to exclude it from even the possibility of amounting to provocation’. No ministerial statement had persuaded him it was necessary for reforms to ‘go that far’. Indeed, no change was needed because the current law did not let men ‘off lightly’—it required provocation to be conduct that would cause a reasonable man to act as the defendant acted (quoted in Versaik 2008). Harman persisted:

This defence is our own version of honour killings and we are going to outlaw it. We have had the discussion, we have had the debate and we have decided and are not going to bow to judicial protests…I am determined that women should understand that we won’t brook any excuses for domestic violence…It is a terrible thing to lose a sister or a daughter, but to then have her killer blame her and say he is the victim of her infidelity is totally unacceptable. The relatives say ‘he got away with murder’ and they’re right. (quoted in Hinsliff 2008)

It is with Harman’s powerful critique of ‘our own version of honour killing’ that I will conclude this brief commentary on English criminal law’s intersection with affect. Taking up Lord Raymond’s refrain about the peculiarly and specifically indulgent English law of murder, Harman highlights the need to challenge what she so aptly calls ‘the culture of excuses’ for killing women. Here she draws on substantial feminist scholarship produced across all Anglophone jurisdictions offering sustained criticism of culturally-inscribed excuses for murdering women. They have shown how “provocation” provides men with a deeply ingrained cultural excuse for murdering women, operating effectively as a cultural defence for all men, racially privileged white Englishmen in part, particularly (eg Bandali 1995; Volpp 2001; Rozelle 2005; Howe 2009 and 2012). It is culture or, more precisely, what Canadian law scholar Caroline Dick calls the male-centered values of the ‘dominant cultural community’ underscoring criminal courts’ continuing concessions to wife-killers that need to be continually questioned (Dick 2011 p 529; Howe 2013b and 2014a and 2014b). The voracious objections to the Harmen-led reforms to partial defences to murder in England and Wales are a measure of the difficulty of the task of undermining cultural excuses for violence against women. Shriest objections to the sexual infidelity exemption in the new loss of control defence were raised in the House of Lords where emotions ran very high over the idea of depriving men of the ancient right to plead provocation after killing a unfaithful wife. According to Lord Neill of Bladen, excluding infidelity as excuse for murder was ‘ridiculous and out of line with the way in which people think about human passions. It is one
great terrible event that can happen in a married life’ and disregard it was ‘nonsense’. Lord Lloyd of Berwick agreed: ‘Why should we exclude infidelity from a jury’s consideration? Is Parliament really to say that sexual infidelity can never give rise to a justifiable sense of being seriously wronged? Surely not’. The government could reiterate its position that ‘in this day and age’ it was no longer ‘adequate to treat violence as a justified response to anger’; that the provocation defence was ‘too generous to those who kill in anger’ and that it was no longer unacceptable for a defendant who has killed an unfaithful partner ‘to seek to blame the victim for what occurred’. The reformers’ opponents were unconvinced. Looking ‘back in history’, one law lord recalled that adultery was always considered to be one of the categories of adequate provocation. He did not ‘want to go back to those days’; he did not want to ‘go back to provocation’. But if the law was to be based on loss of self-control, ‘how can we exclude the deepest feeling and passions, the breach of trust and breach of faithfulness, from our considerations?’ (quoted in Howe 2013a pp 411-412).

In the post-reform era, the English court of appeal was adamant such feelings could not be excluded. The 2012 case of Clinton, conjoined appeals of three men convicted of murdering wives who wanted to leave them, gave the court its first opportunity to rule on the impact of the reformed law’s sexual infidelity exception. In a unanimous verdict delivered by the Chief Justice Lord Judge, the court determined that ‘infidelity’—including a wife’s departure from a marriage—may properly be taken into consideration not only in sentencing but for the purposes of the partial defence of loss of control when such behaviour was ‘integral to the facts as a whole’. 216 According to Lord Judge, relationship breakdown is ‘always fraught with tension and difficulty, with the possibility of misunderstanding and the potential for apparently irrational fury. Experience ‘over many generations’ had shown that sexual infidelity has the potential to produce ‘a completely unpredictable and sometimes violent response’, one that may have nothing to do with any notional “rights” that the one may believe that he or she has over the other, and often stems from a sense of betrayal and heartbreak, and crushed dreams’. 217

Still to be adequately grasped by non-feminist legal commentators, lawyers, jurists and judges keen to defend emotion as excuse for murder is this key point: the deepest feelings and passions’ indulged by the English courts over the centuries have been, specifically and overwhelmingly male passions. The extremely rare case of a woman killing a man over lost love is the exception proving the rule. Emotional law is profoundly gendered and equally profoundly sexed. The most superficial glance at the case law, recent case law included, reveals that jealousy remains ‘the rage of a man’ and—in the view of far too many of wife-killers and their legal advocates—such rage is warranted because adultery is still ‘the highest invasion of property’.

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PART VI: AFFECT AND LAW

November 7

1181-1218
Women’s Access to Justice: The Connection Between Violence Against Women and Prohibition of Discrimination in the Jurisprudence of the European Court of Human Rights\textsuperscript{218} / NISAN KUYUCU\textsuperscript{219}

Abstract

Violence against women is being described as a type of gender discrimination in international law. Till September 2013 only in 12 of cases before ECHR on violence against women, the applicants adduced prohibition of discrimination. This shows the connection made by international law between violence against women and gender discrimination has not had any effect on the ECHR case-law. Besides, only a few violence against women cases has brought before the Court. In this article, it will be examined whether there is a connection between fewness of violence against women cases, and especially considering the fact that most of the claims of Article 14 is made by men, and the position of the ECHR regarding the prohibition of discrimination in violence against women cases.

Keywords: Prohibition of discrimination, violence against women, discrimination against women, ECHR.

Introduction

Violence against women is being described as a type of gender discrimination in international law. This is important mainly because once violence against women is described as gender discrimination, it is no more understood as an individual act, but as a “manifestation of social inequality among individuals”. Doing so, violence against women can be taken not as an individual but a systematic and political problem and its solution needs to be political and systematic (Goldfarb 2003 pp. 254-255). To end violence against women, remedies that are “whole, systemic, and addressed to the affirmation of women’s rights as a group” are needed (Stellings 1993 p. 188).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and The Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), which is accepted in 2011; are international documents which state clearly that violence against women is a type of gender discrimination. Apart from them, The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Agreement) and The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women (The Protocol to the African Charter) also contain clauses showing the connection between violence against women and gender discrimination.

\textsuperscript{218} I thank Ezgi Sarıtaş and Mark Bridgeman for their kind help with the proofreading of this article.

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Istanbul Convention, which was accepted in 2011, is the first binding international legal instrument which describes sanctions for violence against women and domestic violence (Moroğlu 2012 p. 366). Before the Istanbul Convention, there was no binding legal instrument against violence against women except the ECtHR decisions in cases about violence against women (Mcquigg 2012 p. 957). Below, when I deal with the violence against women cases which have been dealt by the ECtHR, it will be seen why these decisions are inadequate for combating violence against women. The inadequateness shows that the ECtHR, which is the most effective and important mechanism with regard to protecting human rights, hasn’t done what it ought to have done, when it comes to violence against women.

ECtHR hasn’t established in its decisions any direct connection between “violence against women” and “discrimination against women” which has been established by the international law. The Court's approach to Art. 14 claims are different from international law and, since 2011, regulations of the Council of Europe’s (CoE). This might have many reasons. In this paper, I will analyze whether there’s a connection between the Court's attitude and women’s low application rates to the ECtHR and Art. 14.

In this paper, firstly how the ECtHR applies prohibition of discrimination in violence against women cases and whether this application gives us any clues on ECtHR’s approach to violence against women, will be shown. After that, I will analyze whether Court’s case law on violence against women with regards to Art. 14 has an effect on the rareness of violence against women cases that are brought before the Court and especially on the fact that Art. 14 is generally used by men rather than women.

Violence Against Women and Article 14: ECtHR Decisions

When we consider how widespread violence against women in CoE Member States, it is clear that the number of cases that are being brought before the Court is very low. CoE’s data shows that in Europe one in every 4 women experience domestic violence during their lives. Again, in Europe, the number of women who have experienced violence in a given year is between 6% and 10% (Committee of Ministers 2002). These are just the numbers in statistics.

Since there are no thematical statistics, we don’t know how many violence against women applications have been brought before the Court. But it can be said beyond any doubt and without any help of statistical data, that the number of applications is too low when compared to the real numbers. It is striking enough that as of April 2014 only in 14 cases among the few violence against women cases, breach of Art. 14 has been adduced. Applicants have not established any connection between violence against women and discrimination against women in their justice demands from the Court. What is more interesting is how the Court examined Art. 14 applications in these 14 cases.

ECtHR’s Case Law on Art. 14

14 violence against women cases, in which breach of Art. 14 was claimed, are cases of forced gynecological examination during custody, rape, domestic violence and economic violence.
The Violence Against Women Cases in Which the Court Hasn’t Examined the Prohibition of Discrimination Claims or Hasn't Found a Breach of Prohibition of Discrimination

In some of the cases which haven’t been examined with regards to Art. 14, the Court has not found it necessary to examine Art. 14 claims separately when it found breach of another article of the European Convention on Human Rights (ECHR). In these cases, accessory nature of Art. 14 is at stake. For example, in the case of D.J., the Applicant relied on Art. 3 and 8 and complained that “the investigation into her allegations of rape had not been thorough, effective and independent and that she had no effective remedy in that respect”. The Court found breach of these articles but didn’t find it necessary to examine Art. 14 complaints separately.220

In the cases of Junkhe and Salmanoğlu and Polattas, the Applicants alleged that they had been subjected to forced gynaecological examination. The Court has found breach of Art. 8 in the first case and Art. 3 in the latter.221 The Court didn’t find it necessary to examine Applicants' allegations of the breach of Art. 14 seperately.222

The second group of cases consists of the cases which have been examined with regards to Art. 14 by the ECtHR, where no breach of the article has been found. In the both economic violence cases against United Kingdom, Applicants alleged that determining different pensionable ages for women and men by the State was discriminatory on the grounds of gender and was in breach of Art. 14 in the conjunction with Art. 1 of the Protocol No. 1. In the decision of Stec and Others, ECtHR declared that the Member States enjoys wide margin of appreciation in the cases regarding economic and social rights and therefore, there isn't any breach of Art. 14.223 The Court repeated this argument in the case of Barrow.224

One of the economic violence cases, that ECtHR examined with regards to Art. 14 but didn't find any breach, is Şerife Yiğit case.225 Unlike the Chamber, the Grand Chamber investigated the claim of the Applicant, who could not benefit from the social security rights of her deceased spouse because they were religiously married, firstly under Article 14 instead of Article 8. However the Grand Chamber concluded that there was no violation on the grounds that there had been a reasonable proportionality between the impugned difference in treatment and the legitimate aim pursued. The Grand Chamber maintained its examination under Art. 8 and hasn't found any breach in accordance with the Chamber's previous decision.226

ECtHR frankly characterises the fact of the case as violence against women in Bevacqua and S. however, it hasn't given any decision about the Art. 14 claims.227 For this reason this case also falls into the group of cases where the Court hasn't required

221 Juhnke/Turkey, Application No. 52515/99, 13.05.2008, para. 82; Salmanoğlu and Polattas/Turkey, Application No. 15828/03, 17.03.2009, para. 98 ve 103.
222 Juhnke/Turkey, par. 99; Salmanoğlu and Polattas/Turkey, para. 105.
223 Stec and Others/Birleşik Krallık, Application No. 65731/01; 65900/01, 12.04.2006, par. 66.
224 Barrow/United Kingdom, Application No. 42735/02, 22.08.2006, para. 38-39.
225 Şerife Yiğit/Turkey, Application No. 3976/05, 02.11.2010.
226 Şerife Yiğit/Turkey, para. 51-53; para. 88 ve 103.
227 Bevacqua ve S./Bulgaria, Application No. 71127/01, 12.06.2008.
examination under Art. 14. ECtHR examined the case only under the Art. 8 and hasn't found any breach.\textsuperscript{228}

These cases show us that ECtHR didn’t take into consideration the connection that the international law has made between violence against women and discrimination against women. Therefore in violence against women cases when prohibition of discrimination was adduced, the Court examined the case as if the case is not about a systematic human rights violation with specific difficulties but rather as an ordinary discrimination claim. In none of these cases, the Court has clarified the meaning of the violence against women and what the Court understands from that. It means, the Court hasn't considered forced gynaecological examination, women’s loss of their social security rights as discrimination and violence against women.

Another case whose facts were clearly characterised by the Court as violence against women is the case of \textit{A}. In this case the Court has examined Art. 14 claims but rejected the case in accordance with Art. 35 of ECHR.\textsuperscript{229} ECtHR analyzed the case under Art. 8 and found a breach on the grounds of Member State’s failure of giving effective sanctions against the husband and enforcing the sanctions that were given as the state has not fulfilled its positive obligations. Applicant’s Art. 14 claims have been analyzed in comparison to the \textit{Opuz} case. During this case examination, the Court hasn't refereed to the international sources, that it has referred to previously in \textit{Opuz} case which state violence against women is a type of discrimination against women. Accordingly, in \textit{A.} case, the Court rejected Applicant’s Art. 14 request on the grounds that she hadn't provided any supportive reports, statistics and other data or documents which may convince the Court of discriminatory treatment.\textsuperscript{230}

In Art. 14 cases listed below, we see that ECtHR distances itself from the frame of the international law and doctrine regarding violence against women. Moreover, it’s not possible to understand the methodology that ECtHR adopted or might adopt in violence against women cases regarding Art. 14. The group of cases analyzed below are the cases in which the Court found a breach in connection with Art. 14.

\textbf{Violence Against Women Cases in Which a Breach of Prohibition of Discrimination Was Found}

Violence against women cases in which the Court has found a breach of the Art. 14 should be analyzed in two groups. One of these groups consist of the cases related to economic violence. In the case of \textit{Schuler Zgraggen}, Applicant’s invalidity pension had been suspended because of the assumption that women would give up their jobs after having their first child. The Applicant claimed the breach of Art. 14 on the grounds of sex.\textsuperscript{231} ECtHR said that “the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.” In the case at stake, the Court has found the breach of

\begin{itemize}
\item \textsuperscript{228} Bevacqua ve S./Bulgaria, para. 84.
\item \textsuperscript{229} A/Croatia, Application No. 55164/08, 14.10.2010, para. 104.
\item \textsuperscript{230} A/Croatia, para. 94-104.
\item \textsuperscript{231} Schuler-Zgraggen/Switzerland, Application No. 14518/89, 24.06.1993.
\end{itemize}
Art. 14 taken together with Art. 6 para. 1.a on the grounds that no such reasons had been put forward.\textsuperscript{232}

In the case of \textit{Wessels-Bergervoet}, although there wasn’t any such regulation for married men, Applicant’s pension was reduced because married women could only be insured when their husbands were insured according to the regulation. The Applicant took her case before the Court and adduced the breach of Art. 14. Member State’s argument that during the relevant period men were the main breadwinners in the society wasn’t found acceptable and the Court found the violation of Art. 14.\textsuperscript{233}

The other group of violence against women cases in which violation of Art. 14 was found consist of domestic violence cases. Firstly the \textit{Opuz} case should be mentioned. It is the first case in which the Court accepted that domestic violence can amount to torture, inhuman or degrading treatment and violence against women is a form of discrimination against women as to international law documents. In this case, Applicant and her mother were subjected to the Applicant’s husband’s and his father’s violent attacks for more than 10 years. As a result of local authorities’ passivity, Applicant’s mother was murdered by Applicant’s husband. The violent attacks of the husband continued after the sentence of imprisonment imposed for murder ended.\textsuperscript{234}

Applicant alleged that men with violent behaviours enjoy impunity taking advantage of the tolerant attitude of judicial and administrative authorities and her rights protected under the ECHR were violated based on sex discrimination which caused the breach of Art. 14.\textsuperscript{235} When dealing with Art. 14 claim, the Court expressed the connection between violence against women and discrimination against women in the international law documents. The ECtHR referred to the decisions of the CEDAW Committee, CoE’s recommendations on violence against women and Belém do Pará Convention.\textsuperscript{236}

In the decision, based on statistics and reports provided by the Applicant and the CEDAW Committee’s findings regarding violence against women in Turkey, the Court reached the conclusion that mostly women were affected by domestic violence in Turkey and the discriminative judicial practices create an atmosphere that promotes domestic violence. Accordingly, the Court found a violation of Art. 14.\textsuperscript{237}

\textit{Opuz} case of 2009 is an important contribution that the ECtHR made to the struggle against violence against women. More importantly for the first time the ECtHR interpreted domestic violence, which women suffer at their homes, as an issue related to Art. 3.\textsuperscript{238}

For this study, the most important part of the \textit{Opuz} case is that domestic violence was seen as an equality and prohibition of discrimination issue. ECtHR also stated, that Member States’ failure of effective protection in violence against women cases would mean failure of gender equal protection. Moreover, from this point of view, it can be

\textsuperscript{232} Schuler-Zgraggen/Switzerland, para. 61-67.
\textsuperscript{233} Wessels-Bergervoet/Netherlands, Application No. 34462/97, 04.06.2002, para. 44-45.
\textsuperscript{234} Opuz/Turkey, para. 7-69.
\textsuperscript{235} Opuz/Turkey, para. 178-179.
\textsuperscript{236} Opuz/Turkey, para. 185-191.
\textsuperscript{237} Opuz/Turkey, para. 192-202.
\textsuperscript{238} Opuz/Turkey, para. 161.
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understood that, the State’s failure to protect women from violence even when this failure is unintentional, is against equality.239

However we can see that ECtHR has not maintained this perspective in Bevacqua and S. case of 2008 and in A. case of 2010. ECtHR has not mentioned the international law documents to which it had referred in Opuz case. The reason behind this might be the statistics and reports which demonstrate the prevalence of violence against women where and when the facts of the case had taken place and the passivity of local authorities' passive attitude towards violence. Still it is not clear how such a radical difference of attitude has occurred which caused a failure of recognition of the international law.

ECtHR has found a breach of prohibition of discrimination in three violence against women cases, that it has concluded since 2013. All three cases are against Moldova. What makes these cases significant is that they carried the Opuz case one step further.

*Eremia* case is about the violent attacks of police officer A. against his wife and children who are the Applicants.240 Concerning the Art. 14 claims, although Eremia didn’t provide any statistics, reports or other data, the Court decided only by taking all the facts of the case into consideration. As to the Court, the failure of the state to protect the Applicant from violence arises not just from a simple mistake or negligence but it constitutes discrimination on the grounds of sex because of the local authorities’ efforts to convince the Applicant to take her complaint back or to give up the divorce case and because of their failure to take all necessary measures and to ensure A.’s punishment was taken into consideration. The Court also took into the consideration the findings of the United Nations Special Rapporteur on violence against women, its causes and consequences in Moldova. She stated that Moldovan authorities “do not fully appreciate the seriousness and the extent of the problem of domestic violence in Moldova and its discriminatory effect on women”.241

Whereas violence has increased after the divorce request in *Eremia* case, the *Mudric* case is about the violence a 72-year-old-woman suffered 22 years after the divorce. The complaints that *Mudric* lodged were ineffective and her former husband A.M. was absolved of criminal responsibility on the grounds of paranoid schizophrenia during criminal proceedings.242 In this case too, the violation of Art. 3 has been found on the grounds that the Member State didn’t comply with its positive obligations. ECtHR considered the claims with respect to the Art. 14 taken in conjunction with Art. 3. by taking into consideration the facts of the case and the Report of the UN’s Special Rapporteur and found violation, in the same way it did in the *Eremia* case.243

*T.M. and C.M.* case is also about violence after divorce.244 In this case too, ECtHR found violation of Art. 3 on the grounds that the Member State did not comply with its positive obligations. Violation Art. 14 has been found through following the same line of argumentation, as in the *Eremia* and *Mudric* cases.245

239 Opuz/Turkey, para. 184-191.
240 Eremia/The Republic of Moldova, para. 7-28.
241 Eremia/The Republic of Moldova, para. 80-90.
242 Mudric/The Republic of Moldova, para. 7-17.
243 Mudric/The Republic of Moldova, para. 55 and 63-64.
244 T.M. and C.M./The Republic of Moldova, para. 6-24.
245 T.M. and C.M./The Republic of Moldova, para. 53-63.
As it can be seen above, while in the A. case Art. 14 claims have been rejected on the grounds that the Applicant couldn’t support her Application with the relevant statistics and reports as Opuz did, in Eremia, Mudric and T.M. and C.M. cases only facts of the case were enough to find a violation of Art. 14 and report of the UN’s Special Rapporteur on Moldova had only a supportive role. In all of the three cases against Moldova, there was no comparison with the Opuz case. These three cases are the most important cases after Opuz to be brought before the Court concerning violence against women on the grounds of equality and prohibition of discrimination. In the A. case, although the claim of breach of prohibition of discrimination was rejected, as it was not rejected from the beginning because it was seen unnecessary shows that, after the Opuz case, a different and more egalitarian approach has been adopted by the ECtHR with regard to prohibition of discrimination in domestic violence cases.

Why Are There So Few Women Applicants Before the Court?

The answer of the question in the subheading is obvious when the cases analyzed above are taken into consideration. In this chapter, I will try to clarify it further. Between November 1998 and March 2006, 16% of the admissible cases those are decided by the Chamber or the Grand Chamber were issued by women applicants. Prohibition of discrimination breaches before the Court were mostly alleged by men (Tulkens 2007 pp. 14-15).

As “gender inequality” is a problem experienced by women rather than men, what does it mean that men allege breach of prohibition of discrimination, namely the equality norm, more than women in the ECHR system? Certainly one can find a number reasons arising from the inequality between men and women which cause lower application rates of women when compared to men. It is a fact that women’s access to justice is more limited than men when we consider their social, cultural and economic statutes. But besides these obvious reasons, are there any other reasons specific to ECtHR that cause women to allege prohibition of discrimination less than men?

Women alleged prohibition of discrimination only in 14 cases within all violence against women cases. Among these 14 cases, only in six cases violation of Art. 14 had been concluded. ECtHR examined de facto Art. 14 only in the Şerife Yiğit case, but not on the grounds of sex but property. In other words ECtHR hasn’t characterized any violence against women case as an issue of gender equality and hasn’t examined Art. 14 by itself. This finding gives an idea about the situation and importance of Art. 14 in the ECHR system. The article has not been applied effectively even in the situations in which the international law has reached a consensus that these are cases of discrimination. It means that women cannot see the Court as an authority from where they can ask for equality and the ECtHR doesn’t maintain its statute as a human rights authority in Europe when it comes to women. Regarding violence against women, the most important article of the ECHR is Art. 14 which expresses that violence is women's problem as a group and that’s why it cannot be eliminated by the help of individual measures.

Establishing the violation of Art. 14 in violence against women cases would encourage Member States to make legislation on violence against women or to change

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246 There’s just a few applications before the Court regarding Art. 14 and this article seems functionless. Statistics regarding this fact, see www.echr.coe.int
present regulations and administrative or judicial practices arising from existing gender roles. Without these changes, the decisions which establish violations of right to life, prohibition of torture or right to respect for private and family life will only have individual effects. These individual effects will not be able to prevent further offences, neither they will help to combat violence against women.

ECtHR should take into consideration every specificity pertaining to each case. Universality claim of human rights shouldn’t mean indifference to specific human rights issues. Human rights protection mechanisms shouldn’t forget that they have the duty “to respect, to protect, to fulfil” also regarding specific human rights issues and if these obligations cannot be fulfilled through regular means, they have to develop other means to fight against these specific issues.

ECtHR will not be fulfilling its aim of protecting human rights in European countries regarding women and other ignored vulnerable groups as long as it continues giving decisions on violence against women cases without taking their systematic and structural content into account. Jurisprudence on Art. 14 should be updated by taking into consideration the systematic and structural nature of violence and the basic principles of the jurisprudence should be established again.

It’s obvious that reasons arising from the Court’s own practice results in the low number of women alleging prohibition of discrimination in violence against women cases. This being the case, focusing on the reasons which are not arising from the Court’s practice but are general issues, would mean ignoring ECtHR’s responsibility. First ECtHR should fulfil its responsibility. Only after that, if still less women than men claim equality before the Court, it would be meaningful to talk about other reasons causing this situation.

Conclusion

Violence against women is a phenomenon arising from unequal power relations between men and women. International law accepts violence against women as a form of discrimination against women. Within the UN system, General Recommendations number 12 and 19 of CEDAW Committee247, within the CoE system Istanbul Convention of 2011, within the Inter-American system Belém do Pará Convention and in Africa The Protocol to the African Charter take violence against women and discrimination against women together. The importance of this approach is that it takes violence against women as a systematic problem which necessitates systematic solutions rather than an individual problem. As women are discriminated more risk of being subjected to violence increase and as they are subjected to violence more risk of being discriminated also increase. That’s why relating the violations that women face with discrimination, plays an important role in combating violence against women.

Since the ECHR doesn’t entail any article on equality, the article promoting prohibition of discrimination, which is in fact the negative expression of equality, puts forward the equality principle. Among violence against women cases brought before the ECtHR, where women apply less than men, only in 14 cases prohibition of discrimination has been alleged by April 2014. The ECtHR hasn’t established the

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connection between violence against women and prohibition of discrimination on its own initiative and hasn’t examined Art. 14 automatically. Besides, only in six cases it has found violation of Art. 14. ECtHR couldn’t develop just, original and consistent jurisprudence about this specific and widespread human rights issue.

This fact that there are more male applicants with respect to Article 14 demonstrates more than the commonsense situation in which men apply more than women under an article to the court where men apply more than women in general. Only in 179 cases violation of Art. 14 has been found in the ECtHR case-law between 1959 and 2011.\textsuperscript{248} Art. 14, which sets forth one of the basic principles of law, namely prohibition of discrimination, is being applied only in few cases and it contradicts the Court’s aim of guaranteeing fundamental rights and freedoms. Considering the low application rates of women applicants to ECtHR, which should welcome disadvantaged people’s applications mostly, it can be concluded that it has not achieved this aim at least regarding women. Even if only the violence against women cases are taken into consideration, more applications regarding Art. 14 can be expected.

Accordingly, women’s low application to the Court and especially with respect to Art. 14 results from their social, cultural and economic statutes which deprive them of access to justice. But the Court is also responsible of not providing effective protection to women. If ECtHR does not succeed in distributing justice to women and other vulnerable groups, it cannot achieve its aim to guarantee fundamental freedoms in Europe.

References

_Articles_


\textsuperscript{248} In order to make a comparison some numbers are provided below: During the same period, it is found that right to property which is protected under article 1 of protocol 1 had been violated 2569 times, right to a private and family life which is protected under article 8 had been violated 853 times, right to an effective remedy that is protected under article 13, which is a accessory article like article 14, had been violated 1559 times. Numbers are taken from www.echr.coe.int.

**ECtHR Decisions**
A/Croatia, Application No. 55164/08, 14.10.2010.
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**Conventions, Recommendations, Resolutions**
The European Convention on Human Rights
The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women
The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
The Convention on the Elimination of All Forms of Discrimination against Women
The Convention on Preventing and Combating Violence against Women and Domestic Violence.
Abstract

Society finds its ways to norm (words in italics are used to show the common language used to describe the intersexed; since the authors oppose from those words, the alienation is illustrated by making them aslant) bodies, to make them recognizable. These norms are powerful, sometimes to an extent, that they become law or “law-like” by including and excluding certain people.

In a strict binary system of the sexes are those who do not fit into the biological matrix of male and female excluded. This exclusion goes so far that, when it comes to the intersexed, it turns into a mere denial of the other. It is thus the ongoing practice to surgically direct an intersexed child straight after its birth to either the male or the female sex. The intersexed have no chance to develop an identity of their own. Intersex constantly challenges the system of two opposing sexes by crossing the seemingly fix boarders between male and female and by that, making it obsolete. Oppressing the development of an intersex identity is a way of maintaining the binary sex system - and consequently the gender system - itself. As to surgical directions, physical and psychological results on the operated child are tremendous (Fausto-Sterling 2000: 93). There are no legal norms enforcing these practices, but equally no legal norms prohibiting them. This creates a private, yet lawless sphere, in which parents feel the pressure to give their consent to surgeries in order to ensure their children a normal life.

Likewise, there are no legal means for an operated intersexed person to claim state compensation for this treatment (Schmidt am Busch 2013: 253).

This raises the question of what the state’s role is within this complex interplay of societal expectations of gender roles, medical advice and parents’ fears. What is the so-called best interest of the intersexed child and who defines it? Is it the state’s responsibility to regulate the ongoing practices? Consequently, what does it mean for a state that it is not reacting to gender related injustice?

This paper focuses on intersexuality and its legal aspects in Germany. After a first introduction to the intersexed and our personal approach, it continues with an outline of the legal situation and the ongoing medical practices in Germany. This leads to the question who the offenders are and what the state’s responsibility is. This paper concludes by discussing what the state’s role is within societal gender expectations.

Keywords: intersexuality, violence, GPSI

Who can I become in such a world where the meanings and limits of the subject are set out in advance for me? By what norms am I constrained as I begin to ask what I may become? And what happens when I begin to become that for which there is no place within the given regime of truth?

(Judith Butler, Undoing Gender 2004)
GENDER AND “THE LAW”

A. Introduction

I. Our Approach

Intersexuality is always described as a phenomenon -- an exception to the rule. It will always remain abstract, if one just talks about it. We have had the chance to get to know Frances Kreutzer when we first heard about intersex.

Frances Kreutzer was born as Margarethe Frances Kreutzer in Stuttgart, Germany in 1957 and raised as a girl. It was in 1972 – Frances was then 16 years old – that his body first exposed male characteristics. The consulting doctors ordered an immediate surgery, claiming that a high risk of cancer was the reason. Apparently, Frances Kreutzer had inner testes and they got surgically removed. But neither Frances nor his parents were properly informed about the operation, its reasons or the lifelong hormone substitution medication resulting from the removal of the hormone-producing gonads. One of the doctors argued after the operation in a letter: ‘We could not wait any longer, or the patient would have lost her patience.’ (unpublished letters from Frances Kreutzer’s doctor’s). Frances Kreutzer never knew what actually happened during the surgery.

In the following years Frances Kreutzer suffered from massive adverse effects caused by the hormone substitution medication, such as migraines, diabetes and tumours. Yet he was urged by his doctors not to stop the medication so that he could ‘be a real woman’ (unpublished letters from Frances Kreutzer’s doctor’s).

Just by coincidence he read an article about intersexuality and learned about the German self-help group ‘Verein Intersexuelle Menschen e.V.’ (Association of Intersexual People) that motivated him stop the medication and to live under his second name Frances. After more than thirty years of hormone medication, Frances Kreutzer is today severely handicapped and has not received any legal compensation for his damage.

When we met Frances Kreutzer, we asked him if he felt better now living as a man. He laughed and answered, that he is over defining himself with categories and that he wants to live peacefully being maybe 70 % a woman and 30 % a man.

II. The Intersexed: Reception and Stigmatisation

The gender spectrum marks female at one end and male at the other. The exclusivity of these two recognized sexes results in the abnormality of everyone outside of these categories. This impression is manifested by the established term intersexuality. It suggests that anything outside of the rule of two exclusive sexes is somewhere inter – in between of the two sexes. Following a different approach, this paper refers to the term “intersexed” to show how this is not a term intersexed people have chosen themselves, but a passive stigmatisation which is put upon them (Plümecke 2005: 8).

The intersexed always existed – whether they were called hermaphrodite, hybrid or intersexual – as a subject of sociological and medical interest (Calvi 2012: 79). Still they challenge the strict border between man and woman not only in a biological way, but even more in a gender political way. The reception of intersexed persons is closely linked to the general concept of gender stereotypes: If women are by nature weak and sentimental and man tough and aggressive, what about those who have percentages of both? The existence of the
intersexed challenges the conviction of binary sexes – and accordingly binary gender identities.

Almost every article on the topic of intersex starts with a medical explanation of intersex as an exception to nature’s rules. Biology, as a seemingly incontrovertible non-political reference, is used to make the specific problems of the intersexed understandable. Every attempt to point out how many intersexed are affected by the dysfunction and what the biological conditions of this disorder may be, strengthens the impression that intersex is just a phenomenon. Intersex rather is really just a variation of the sexual development.

But underlining the abnormal, the phenomenon of intersexuality proves how deep the conviction of the binary matrix goes: We recognize a person by recognizing a body and its sex. If we cannot recognize a certain sex, we have to find explanations.

**B. The Situation in Germany**

Legal norms both reflect and create the framework of societal habits and beliefs. This chapter aims to give a close look at how the German state does or does not regulate gender norms and in specific, surgical interventions on intersexed children. It is the necessary basis to understand how private practices can be established and what the German state’s responsibility is.

**I. Legal Construction of Gender Identity**

Gender is not legally defined in German law and therefore neither is intersex. Yet there are certain gender norms creating the expectation that gender is meant to be bipolar. For example, the German Law on Civil Status (Personenstandsgesetz) was recently amended to say: ‘If a new born child cannot be directed to either the male or female sex, there shall be no registration of the sex.’ (Free translation of § 22 Personenstandsgesetz). This law demonstrates that “male” and “female” are established categories and that there is no need to create a newly distinguished category. Everything that differs from the bias falls into the pool of a “third category” for which there is no legal name (Remus 2013).

The need for legal gender categories is manifested in the German constitution to mark the still relevant distinction between heterosexual marriage and same sex marriage. But ever since the amendment of the German Law on Civil Status in November 2013, it is possible not to register the intersexed child’s sex, which raises the question of who people with no registered sex are supposed to marry. When male and female exclusively make a heterosexual couple, people from the “non category” can only marry same sex – which would mean they could only marry other people who are not registered. The consequent application of the law can lead to discrimination of those people (Remus 2013).

This also occurs in the field of family law: The legal mother can only be “the woman who gave birth to her child” (Free translation of § 1591 Bürgerliches Gesetzbuch) and the legal father is “the man who is married to the legal mother” (Free translation of § 1592 Bürgerliches Gesetzbuch). Here again, the possibility of a third category – or a non-categorization – is left out. At least for this example a gender neutral language – e.g. simply replacing the word ‘mother’ with ‘the person who gave birth to her child’ would be an efficient step towards less discrimination.
II. Medical Surgeries as Private “Best Practices”

When a child is born in Germany, its sex must be registered within a week. Intersexuality, being invisible within the German society, is treated as a diagnosed dysfunction or disability. The guidelines of the German medical association, which serve as important advice for medical staff and doctor’s, call the birth of an intersexed child “a physical and psychological emergency” and consult to operate the intersexed within 18 months after birth (Leitlinien: Störungen der Geschlechtsentwicklung 2012: 5). It is not surprising that the official medical term for intersex – as established by the Chicago Consensus Conference in 2005 – is “Disorder of Sex Development”.

The practice of surgically directing intersexed children to one sex dates back to US-American sexual therapists, which established in the 1950 the “optimal gender policy”. The premise of this policy is that to develop a stable psychological identity a child needs a manifest sexual identity.

The question of which sex is being assigned is mostly one of surgical feasibility: As a result, in 85-90 % of cases the intersexed are assigned to the female sex (Brinkmann 2007: 241). The medical intervention usually consists of a surgical removal of the hormone-producing gonads and as a result from that, hormone substitution medications. Often, also cosmetically genital directing operations are performed on the intersexed to create external inconspicuousness. The operations are highly invasive. They often result in substantial pain, cicatrisations and incalculable side effects from the hormone substitution medications. Also, the genital circumcision can lead to the permanent loss of sexual lust (Plett 2014: 10). On top of that, intersexed people report grave psychosocial effects: The stigmatisation of one’s own body, its permanent medical inspections and expositions as abnormal can lead to a inflicted estrangement from one’s own body (Stern 2010: 89).

The surgeries are usually based on the advice that children with a recognized sex have a smaller chance of facing social exclusion. But if there is no sex diversity, everything that fails to fit the standard of either male or female is a reason for discrimination. Often, doctors claim that intersexed gonads correspond with a high risk of cancer, but this is hardly the case. (Remus 2012: 30). Additionally, a child’s need of sexual stability is hardly provable. To the contrary, there are now several studies constraining that early genital interventions rather lead to psychological harm than a better social inclusion (Fausto-Sterling 2000: 94). Or as Butler claims: “Gender is a different sort of identity and its relation to anatomy is complex.’ (Butler 2004: 63). The idea of a surgical correction leads to the misunderstanding that gender identity can only be borne out in a normed anatomic way. There are now demands within the medical discourse directed towards a full consent policy in which operations depend on a child’s fully reasonable own consent (Klöppel 2010: 309).

There are no legal directions for surgical sex assignments. The execution of the sex-directing surgeries depends solemnly on the parents’ consent to the operations. The situation of decision taking and consenting to these operations is in many cases a very difficult one for the parent’s. Due to the social invisibility of intersex, it is in most cases the first time that the parents hear about intersexuality. From the medical point of view, intersex is declared a disability or a defect of the normal sexual development. Sex-directing surgeries are presented as a key to a normal life for the child. Parent’s consent with the best intent for their child and often, suggested time pressure does the rest. The decision to surgically direct the child to a sex is taken in a private sphere, where the state seemingly does not interfere.

C. Gender-specific Violence and the Question of Responsibility
There exists no such thing as objective or neutral law – especially when it comes to gender. Gender based inequality is reflected most prominently in the structure of the labour market, in the access to high positions, private or public careers, and jobs with high responsibility and power. The politics beneath the legislation and over all, those who make law have to be examined carefully. Existing laws in Germany were mostly made by men. Men are those who are in politics, who lead the public discussions and speak in the name of justice. One example of men-made law, which fosters gender stereotypes and was only abducted when the norm addressees themselves raised their voice, was the German legislation and jurisdiction concerning rape and sexual abuse.

Originally, the crime of rape was primarily considered a crime against morality (Kratzer 2010: 83). The intent of the criminal provision was to defend the honour of the innocent girl against a strange male aggressor. These ideas were not tailored for rape or sexual abuse committed within a marriage, between two married adults, or even between a love couple. The norm of rape simply was not applicable for cases in which a husband raped his wife- the wife was declared ‘unrapeable’ (Kratzer 2010: 85). It was argued, that in order to protect the intimacy and privacy of family and marriage, the State would not intervene and at maximum prosecute the sexual violence as a form of coercion. Apparently, this sphere was too private for the state to intervene.

In such private spheres, violence against women could and can be enacted because there is no state regulation. In the case of intersexed children parents consent to medical operations and the state does not regulate or intervene in any way with this practices.

I. Searching for Offenders in the Case of the Intersexed

The situation of the intersexed is dodgy: The state leaves the decision about consenting and operating to private actors. It is the doctors who consult and parents who consent who stand behind sex assigning surgeries. Doctors follow medical guidelines convinced that a surgical correction was the best treatment for the so received disorder of sex development. And parents’ consent because they are informed that consenting was in the best interest of their child. So neither side has any violent intent. Both sides moreover believe that anatomy is the precondition for a stable gender identity and that it could be corrected by surgical means.

Societal practices that clearly violate the bodies of intersexed children can thus be enacted because the state has created no means to prevent them.

II. The State’s Legal Responsibility

The constitution is the primary instrument to define the citizens and state´s rights and duties, the system of values and ethics. The German constitution (Grundgesetz - Basic Law for the Federal Republic of Germany) from 1949 contains at its very beginning a recognition of individual fundamental human rights.

Article 1, clause 1 of the Grundgesetz does not guarantee a right, but furthermore states that ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority’. The decision to devote the first paragraph of the first article of the new constitution to the importance of human dignity, and naming the State itself for the first time
in the context of its duty towards protecting human dignity, was a decision to define the State from the individual, to create its legitimization from its duty to protect its citizens.

Article 2, clause 1 in conjunction with Article 1, clause 1 Grundgesetz guarantees the right, to freely develop and live one’s own identity and personality (e.g.: BVerfG 1973: 2 BvR 454/71; BVerfG 1973: 1 BvR 536/72). Only in 2011, the German constitutional court stated in a judgement concerning the rights of transsexual people, that the Grundgesetz guarantees the individual freedom to develop a gender identity independently from the biological sex (BVerfG 2011: 1 BvR 3295/07). There has not been any decision concerning the intersexed yet – but this valuation should be applied to the intersexed as well. The surgical interventions on intersexual children, however, deprive them from this freedom: They are forced into a biological sex and a matching gender identity.

The idea of fundamental and human rights is the idea of freedom from the state. But those righty also guarantee freedom within the state.

The division of a public and a private sphere discloses that there exists no such thing like neutral or objective law, especially when it comes to gender-related problems. By consciously not regulating private spheres in which violence is enacted, the German state breaks its promises from the constitution. The current laws do not suffice to guarantee a free identity- and sexual development. In order to fulfill its duty and protect human dignity, the state has to become active in its legislation.

**III. The Need for Legal Changes**

1. **On Parents’ Consent**

   The majority of sex-directing operations are performed on intersexed minors because parents have the freedom to consent to the operations. Consenting to medical treatments is part of the parental care, which has to be measured with the best interest of the child. Parental care and education should lead to a self-dependent life with the possibility of an open future. It is the state’s duty to guard the way parents execute their rights when in certain cases children’s freedom has to be ensured from their parents’ decisions. This is the case in highly personal and invasive intrusions with children’s rights.

   There are certain cases of violations of children’s rights in which the German state understood its responsibility to act, which show the cultural embossment and influence which lays beneath legislation. The German state for example declared female genital mutilation a crime (§ 226 of German penal law). A sentence in Cologne in 2012, which punished circumcision as a criminal assault, initiated a debate about male circumcision which led to a legislative amendment now declaring that male circumcision is explicitly allowed by law. Even though genital mutilation is often part of the surgical interventions on intersexed children, the legal prohibition of girl’s mutilation is not applicable in cases where a child is assigned a sex, nor is the specifications about male circumcision used.

   Moreover, there are general rules to protect children from rapid and irreversible decisions their parents make. It is legally prohibited, that parents’ consent to their child’s sterilization. But again, when it comes to the intersexed, even though the removal of the hormone-producing gonads is a constitutive part of the sex-directing surgeries, those norms are explicitly not applicable (Statement of the German Government 2012: 11). This clear
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contradiction shows that the only reason for the state not regulating the case of the intersexed is gender related: According to this logic parents shall have the freedom to direct their children’s’ sex – no matter how invasive the results might be (Richarz/ Brachthäuser 2014: 290).

2. On Compensation/ Work Assignment

Germany is a member of various human rights conventions such as to the United Nations (UN) Convention on the Rights of the Child, to the UN Women’s Right Convention, to the UN Anti-Torture Convention, just to name a few.

In 2011, the German government was called to give an account of the status of the Anti-Torture Conventions rights. Like all non-governmental organisations, the Association of Intersexual People was also called upon to hand in a so called “shadow report”. Students from Humboldt Law Clinic Human Rights worked together with the Association of Intersexual People to prepare this shadow report and described the ongoing medical practice to direct an intersexed child surgically to one sex, the aftermaths of those operations and the legal status of intersexed people (CAT-Shadow Report 2011). The UN-Anti-Torture commission then expressed in their concluding observations their deep concern about those practices:

‘However, the Committee remains concerned at cases where gonads have been removed and cosmetic surgeries of reproductive organs have been performed, implying lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians, where neither investigation, nor measures of redress have been introduced. The Committee remains further concerned at the lack of legal provisions providing redress and compensation in such cases (arts. 2, 10, 12, 14 and 16).’

Germany was called both to prohibit the sex-directing surgeries as well as to provide compensation and redress to those who have been harmed.

This was not an isolated decision, but part of a general development in the valuation of international Human Rights towards a stronger focus on children’s and patients’ rights and a higher awareness of the importance of the right to freely develop and express identity and sexuality.

The Special Rapporteur on Torture, Juan E. Mendez, also called in his report for the Human Rights Council upon all member states to respect the rights of trans-and intersexual people and to refrain from any form of body norming operations (Mendez 2013: 88).

The international legal bonds, to which Germany agreed, cannot be exceeded from the assignation of compensation for the intersexed. It is thus not only Germany’s duty to prevent surgical interventions on the intersexed, but also to guarantee legal compensation for those who have suffered from the German legal wrong.

D. Conclusion

The harm of the intersexed and their legal status is strictly linked to the matrix of two opposing sexes. The intersexed identity is denied. Socially, this denial goes so far, that
children born intersexed are even denied to develop their own identity, but are – immediately and with tremendous consequences – directed to either the male or the female sex.

Carole Pateman imagined the metaphor of a *Sexual Contract* in the 1980s with which she meant a state contract excluding women. The metaphor of such a state contract can be applied to the intersexed, too. The compromise of this contract is that everything contradicting bipolar gender expectations is excluded. As seen, there are yet no legal norms regulating private spheres in which the intersexed are violated.

The need – and legal responsibility – for a legal inclusion of the intersexed in Germany is urgent. Also, this would immensely support and acknowledge their fight for recognition.

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